A TREATISE

ON THE

ANGLO-AMERICAN SYSTEM OF

EVIDENCE

IN

TRIALS AT COMMON LAW

INCLUDING

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

BY

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IN FIVE VOLUMES

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LIST OF LATEST SOURCES EXAMINED

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

TABLE I

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

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

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

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

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

LIST OF LATEST SOURCES EXAMINED

TABLE I. JUDICIAL AND LEGISLATIVE SOURCES USED

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

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

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

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

LIST OF LATEST SOURCES EXAMINED

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

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

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

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

LIST OF LATEST SOURCES EXAMINED

TABLE II

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

TABLE II. LATEST NATIONAL REPORTERS EXAMINED

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

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

LIST OF CHANGED SECTION NUMBERS IN THIS EDITION

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

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EVIDENCE

IN

TRIALS AT COMMON LAW

BOOK I: ADMISSIBILITY (*continued*)

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§ 1864. **General Nature of these Rules; Confusion of Issues, and Undue Prejudice, as Grounds for Exclusion.** The peculiar mark of the ensuing group of rules is that in their operation they set aside or exclude, either conditionally or absolutely, certain kinds of evidence (otherwise admissible so far as Relevancy is concerned) which are found to have an improper effect by obstructing or confusing rather than aiding or facilitating the process of ascertaining the truth. They may be termed *Simplificative* rules, with reference to their mode of operation, in contrast to the other rules of Auxiliary Probative Policy (included under this Part II of the evidential rules of Admissibility), in the sense that they work merely by way of elimination (temporary or permanent) of the objectionable evidence.[1]

The distinction between this and the preceding groups of rules (Preferential, Analytic, and Prophylactic) has already been examined (*ante*, § 1172). These Simplificative rules treat the danger or inconvenience of the evidence as ineradicable by such methods as those of the foregoing rules, and therefore resort to the extreme measure of eliminating entirely the evidence supposed to be tainted with the objectionable disadvantage. It is clear that such a measure could not properly be resorted to unless either the evidential material was necessarily and thoroughly objectionable or else was of minor utility and could be easily sacrificed; nor should the exclusion be an absolute one, unless a conditional or temporary exclusion would not suffice for the purpose. These considerations do in fact appear to have prevailed, their strength in a given instance depending of course upon supposed experience with that class of evidence.

As to the qualities or elements that constitute the objectionable features and furnish the grounds for exclusion, it will be seen that they cannot concern the relevancy, or legitimate probative value, of the evidence itself; it is assumed, as to circumstantial evidence, that it is amply relevant (*ante*, § 38), and as to testimonial evidence, that the witness is duly qualified (*ante*, § 475). The qualities, therefore, which give rise to the present rules lie in some indirect and disadvantageous probative effects found in experience to be produced by the use of certain kinds of evidence. No doubt, in framing a code, one might 'a priori' specify various sorts of such evil effects,

§ 1864. [1] The term *Segregative* would possibly be a better one; compare, in the Century Dictionary, s. v. Segregate, the quotation from Dixon's Church History: "According to one account, he [Sir T. More] likened his predecessor [Wolsey] to a rotten sheep, and the King to the good shepherd who had judiciously segregated it."

of more or less importance, requiring rules of the present sort; but we are here concerned only with the standards and the experience of the judges and of the legislators, as embodied in the rules actually laid down by them and found in operation in trial by jury at common law and under statutes.

These disadvantageous effects, then, forming the motives for the ensuing heads, may be broadly summarized under two heads, namely, (a) Confusion of Issues, (b) Undue Prejudice. (a) If the use of certain evidential material tends to produce undue confusion in the minds of the tribunal — *i. e.* the jurors — by diverting their attention from the real issue and fixing it upon a trivial or minor matter, or by making the controversy so intricate that the disentanglement of it becomes difficult, the evidence tends to the suppression of the truth and not to its discovery; and there is good ground for excluding such evidence, unless it is so intimately connected with the main issue that its consideration is inevitable. (b) So also, if certain evidential material, having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent, or by virtue of the personality of the witness tends to receive an excessive weight in the minds of the tribunal, there is good ground for excluding such evidence, unless it is indispensable for its legitimate purpose.

The foregoing motives, as might be expected, do not always operate distinctly and precisely in the shape of rules deduced directly and solely from one or the other motive. These broad considerations of policy may be plainly enough seen in the utterances of the judges, and an appreciation of them is indispensable to an understanding of the rules. Yet the resultant concrete rules may be due in part to the one and in part to the other motive, or one of these motives may, though dominant, be attended by subordinate motives of some other kind. Hence we are bound, here as elsewhere in considering these Auxiliary Rules, to deal with them from the point of view of the specific rule itself, as it appears in actual operation, and to refer to the motives of policy merely for the purpose of understanding the object and the true limitations of the rule. The final question always in the law of Evidence is, What do the judges do? and not, What do they say that they do? nor even, Why do they say that they do it?

The rules, then, for which the above-mentioned considerations of sound policy have been either the sole or the dominant motive fall conveniently under three general heads:

I. Rules excluding Evidence in general (testimonial or circumstantial) not Presented in the Proper Order of Time;

II. Rules excluding Specific Kinds of Circumstantial Evidence or of Witnesses because of Confusion of Issues or Undue Prejudice;

III. The Rule excluding Opinion Testimony.

These may now be taken up in order, after first noticing one supposed but fallacious foundation for some of these rules.

§ 1865. **Length of Time is in itself no Ground for Exclusion.** It is sometimes said in passing, by judges explaining their reasons for enforcing some of the ensuing rules, that the length of time taken up by the presentation of some kinds of evidential material is a reason for excluding it. "The trial," once said the great Chief Justice Doe, for example, "to which parties are entitled is not an endless one, nor one unreasonably protracted and exhausting";[1] and similar expressions, mentioning this consideration along with others as operating reasons, are occasionally found:

1847, ROLFE, B., in *Attorney-General* v. *Hitchcock*, 1 Exch. 91, 105: "The laws of evidence on this subject as to what ought and what ought not to be received must be considered as founded on a sort of comparative consideration of the time to be occupied in examinations of this nature and the time which it is practicable to bestow upon them. If we lived for a thousand years, instead of about sixty or seventy, and every case were of sufficient importance, it might be possible and perhaps proper to throw a light on matters in which every possible question might be suggested, for the purpose of seeing by such means whether the whole was unfounded or what portion of it was not, and to raise every possible inquiry as to the truth of the statements made. But I do not see how that could be; in fact, mankind find it to be impossible. Therefore some line must be drawn."[2]

These expressions are not incorrect, in the sense meant by their judicial authors; but they are apt to mislead. They signify that a trial's length of time, regarded as permitting a multiplicity of witnesses and a cumulation of minor circumstances, may lead to an utter confusion of the issues and thus bring about the suppression and not the discovery of the truth, and that this confusion of the issues is thus a sound reason for exclusion. They do not signify that the length of time taken up in presenting relevant evidence is in itself a sufficient reason for excluding any sources of information. Time becomes important only as affording an opportunity for that confusion of issues which may justly furnish a real and intrinsic cause of the failure of justice.

No doubt, there was an age when this was not so. Up to the end of the 1700s the spirit of the administration of trials (in criminal cases at least) sanctioned the most summary procedure. Quick despatch was expected, even at the cost of truth; or, perhaps, more truly, it was not supposed that the truth needed anything but a summary investigation. The arrest, the trial, and the execution, succeeded one another with a celerity which left little time for raising and settling doubts.[3] The proceedings in a criminal trial were expected to reach a close before the tribunal separated for the day; to that end an important trial was occasionally carried on into candle-light,[4] but the jury were allowed no food or drink until their verdict was returned. "The rule," says Sir James Stephen,[5] "which prevailed then [in 1699, at

§ 1865. [1] 1879, Amoskeag Mfg. Co. *v.* Head, 59 N. H. 332.

[2] Various similar expressions are found in the citations *ante*, §§ 27, 443, 1002, *post*, § 1907.

[3] The trial of Colonel Turner, in 1664, is an example; for a robbery committed on the night of Jan. 7, he was arraigned on the 15th, tried and convicted on the 16th, sentenced on the 19th, and executed on the 21st.

[4] Colledge's trial, in 1681 (8 How. St. Tr. 332, 549, 603), lasted a dozen hours.

[5] History of the Criminal Law, I, 422, 403.

Spencer Cowper's trial] and long afterwards, of finishing all criminal trials in one day must often have produced cruel injustice. Many of the cases I have referred to were tried in a superficial, perfunctory way. . . . The right of the Court to adjourn in cases of treason or felony was not fully established till the treason trials of 1794." The first trial for treason that lasted over one calendar day, by adjournment to another, is said to have been that of Hardy, in 1794.[6]

Gradually the spirit of the proceedings changed. Ample time to investigate every material topic came to be allowed. To-day we are going too far towards the other extreme; by showing an almost total disregard for the value of time, we invite and overlook the abuse of this liberty by unnecessary and obstructive protraction of testimony on the part of unskilful prosecutors and unscrupulous defenders. It is clear enough, however, to any one who observes the conduct of our trials, that nowhere is there an appearance in practice of a doctrine that length of time consumed is in itself an objection to the reception of relevant evidence. The harsh and rough-shod methods of earlier times have wholly disappeared. Time, as essential to the discovery of truth, is judicially regarded as a commodity of unlimited supply. If this is apparent enough in the practice at trials, it has also not lacked plain enunciation in authoritative places. Modern judges have more than once taken the opportunity to repudiate the fallacy that any party in a court of justice should be denied the liberty of demonstrating the truth of his cause, because forsooth the Court has not time enough to investigate it. Indeed, for a most eloquent and the earliest utterance, we may hark back to a period when this principle was as yet (in criminal cases at least) a mere ideal unrepresented in the practice of the day:

1670, VAUGHAN, C. J., in *Bushel's Case*, 6 How. St. Tr. 999, 1003, Vaughan 135, 3 Keb. 322, 1 Mod. 119 (replying to the argument against new trials that to report all the evidence for the Judges "would be too long"): "A strange reason! For if the law allows me remedy for wrong imprisonment (and that must be by judging whether the cause of it were good or not) to say the cause is too long to be made known is to say the law gives a remedy which it will not let me have, or I must be wrongly imprisoned still because it is too long to know that I ought to be free. What is necessary to an end the law allows, is never too long. 'Non sunt longa quibus nihil est quod demere possis' is as true as any axiom in Euclid."

1870, BLACKBURN, J., in *Godard* v. *Gray*, L. R. 6 Q. B. 139, 152: "In no case that we know of is it ever said that a defense shall be admitted if it is easily proved and rejected if it would give the Court great trouble to investigate it."

1863, DAVIES, J., in *People* v. *Pease*, 27 N. Y. 45, 61 (repudiating the argument that to investigate the correctness of an election-return would consume too much time): "It is the first time I have ever heard it urged that a party who had a conceded right should not have a remedy to enforce it, because a large consumption of time would take place before his right could be established. If a party has a legal title to an office, it surely can be no

[6] Campbell's Lives of the Chancellors, 5th ed., VIII, 307. Compare the instances cited *ante*, § 1364, note 65. Elizabeth Canning's celebrated trial for perjury, in 1753 (19 How. St. Tr. 252), lasted seven days; and this served to break ground for future cases.

legal reason for denying him the opportunity to establish it, that such process will require the examination of a large number of witnesses and consume much time in the proceeding. Rights of parties cannot be determined on such a basis."

Sub-title I: ORDER OF EVIDENCE

§ 1866. **General Subdivision of Topics.** There are conceivably three general types of arrangement that a system of procedure might adopt, in prescribing the order of presentation of the evidence. The first may be termed the *paternal* method; the second, the *topical*, or logical, method; the third, the *antiphonal*, or partisan, method.

The *paternal*, or primitive method, is indeed the absence of method. Presumably it marks all primitive stages of any system.[1] The parties present their evidence as they please, or as the judge pleases, without discrimination as to witnesses or sides, and without any general rule from case to case.

The *topical* method requires the evidence on each topic to be presented at the same time. Logically this would be the clearest. Practically it is impossible. But it may be supposed that the Continental procedure assumes this as a theoretical ideal:[2] for it is most suited to a system where the judge, and not (as with us) the parties (*post*, § 2483), has the duty and control of presentation.

The *antiphonal* method is most suitable, and alone practicable, in a system of procedure which relies upon the parties' own initiative for the production of the evidence; and this is of course (*post*, § 2483) the vital tradition of Anglo-American procedure. This method is marked by the allotment of the mass of the evidence, and of the individual witness, to each party in turn, —'suum cuique.' The result is an antiphonal drama, in which the first grand lines of division are drawn for the entire mass of evidence, and then, within these, secondary lines of division are drawn for the examination of each individual witness.[3]

This traditional Anglo-American method has been embodied, more or less imperfectly, by express provision in many Codes.[4]

§ 1866. [1] Illustrations will be found in the customs of modern African tribes quoted in Kocourek & Wigmore's Sources of Ancient and Primitive Law, pp. 303, 314 (Evolution of Law Series, vol. I, 1915).

[2] Illustrations will be found in Albert Bataille's Causes Criminelles et Mondaines, 1896 (and prior years); Stephen's History of the Criminal Law, vol. III, Appendix.

[3] It would seem that the rules for the order of evidence began first to be formulated about the second half of the 1700s: Burke's Report on Warren Hastings' Trial (1794), 31 Parl. Hist. 343–353. In this speech of Burke's, protesting against the rulings of the House of Lords excluding certain evidence in Warren Hastings' trial, will be found an interesting contrast of the practice, as to order of evidence, in jury trials and in chancery.

[4] *Alaska:* Comp. L. 1913, § 1019 (like Cal. C. C. P. § 607); § 1491 (like Cal. C. C. P. § 2042); § 2246 (like Cal. P. C. § 1093) *Arizona:* Rev. St. 1913, Civ. C. §§ 512–514; P. C. 1033; *Arkansas:* Dig. 1919, § 1292 (similar to Cal. C. C. P. § 607); §§ 3173–3175 (similar; criminal cases); § 4182 ("The party who begins the case must ordinarily exhaust his evidence before the other begins; but the order of proof shall be regulated by the Court, so as to expedite the trial and enable the tribunal to obtain a clear view of the whole evidence"); *California:* C. C. P. 1872, § 607, P. C. 1093 ("When the jury has been sworn, the trial must proceed in the following

In the Anglo-American trial, the first general line of division in the presentation of evidence will have reference to the *whole mass of evidence* as shared *between the opposing parties*. Each must have his turn. It is immaterial under what system of pleading the trial is conducted; it is assumed that the

order, unless the judge, for special reasons, otherwise directs: 1. The plaintiff, after stating the issue and his case, must produce the evidence on his part; 2. The defendant may then open his defense, and offer his evidence in support thereof; 3. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case; 4. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument; 5. If several defendants, having separate defenses, appear by different counsel, the Court must determine their relative order in the evidence and argument; 6. The Court may then charge the jury"); § 2042 ("The order of proof must be regulated by the sound discretion of the Court. Ordinarily, the party beginning the case must exhaust his evidence before the other party begins"); § 2045 ("The direct examination must be completed before the cross-examination begins, unless the Court otherwise direct"); § 2050 ("A witness once examined cannot be re-examined as to the same matter without leave of the Court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the Court. Leave is granted or withheld, in the exercise of a sound discretion"); *Colorado:* Comp. L. 1921, C. C. P. § 205 (civil cases; like Cal. C. C. P. § 607); *Georgia:* Rev. C. 1910, § 6318 ("The regular mode of conducting the examination of a witness shall be as follows: First, the witness shall be examined by the party introducing him, and then cross-examined by the other party; after which the original party may further interrogate the witness to explain the direct or rebut the cross-examination; and if any new matter be thus elicited, the opposite party may further examine the witness as to such new matter. In all cases in which more than one attorney is retained on either side, the examination and cross-examination shall be conducted by one of the counsel only; and at the opening of the case both parties shall state to the court to which attorney the examination and cross-examination of witnesses is confined"); *Hawaii:* Rev. L. 1915, § 2403 (substantially like Cal. C. C. P. § 607); *Idaho:* Comp. St. 1919, § 6847 (similar to Cal. C. C. P. § 607); § 8941 (criminal cases; like Cal. P. C. § 1093); § 9168 (trial of insanity plea; like Cal. P. C. § 1369); *Indiana:* Burns' Ann. St. 1914, § 558 (similar to Cal. C. C. P. § 607); § 2136 (similar to Cal. P. C. § 1073); *Iowa:* Code 1919, § 7495 (civil cases), § 9434 (criminal cases); *Kansas:* Gen. St. 1915, § 7185 (substantially like Cal. C. C. P. § 607); § 8148 (criminal cases); *Kentucky:* C. C. P. §§ 317, 592, 594, 600 C. Cr. P. §§ 220–224 (substantially like Cal. C. C. P. § 607, P. C. § 1093); *Louisiana:* C. Pract. § 477 ("When the plaintiff has closed his evidence, the defendant shall bring his witnesses, and produce the proof in support of his defence; the plaintiff may then bring additional witnesses, or his former witnesses, to rebut the testimony adduced by the defendant, or to lessen the weight of such testimony"); § 484 ("After all incidental questions shall have been decided, and both parties have produced their respective evidence, the argument commences; no witness then can be heard, nor proof introduced except with the consent of all the parties"); *Minnesota:* Gen. St. 1913, § 7799 (similar to Cal. C. C. P. 607); *Missouri:* Rev. St. 1919, § 4025; *Montana:* Rev. C. 1921, § 9349 (like Cal. C. C. P. § 607); §§ 10659, 10662 (like Cal. C. C. P. §§ 2042, 2045); § 10667 (like Cal. C. C. P. § 2050); § 11969 (like Cal. P. C. § 1093); *Nebraska:* Rev. St. 1922, § 10144 (criminal trials; like Cal. P. C. § 1093); *Nevada:* Rev. L. 1912, § 5210 (civil cases); § 7159 (criminal cases); *North Dakota:* Comp. L. 1913, § 7619 (like Cal. C. C. P. § 607); § 10821 (substantially like Cal. P. C. § 1093); § 11065 (trial of plea of insanity; like Cal. P. C. § 1369); *Ohio:* Gen. Code Ann. 1921, § 11447 (substantially like Cal. C. C. P. 607); § 13675 (substantially like Cal. P. C. § 1093); *Oklahoma:* Comp. St. 1921, §§ 541, 2687, 2869; *Oregon:* Laws 1920, § 132 (like Cal. C. C. P. § 607, in substance); §§ 853, 857 (like Cal. C. C. P. §§ 2042, 2045); *P. I.* C. C. P. 1901, § 132 (like Cal. C. C. P. § 607); *Philippine Islands:* P. C. 1911, Gen. Order 58 of 1900, § 31 (criminal trials; like Cal. P. C. § 1093); *Porto Rico:* Rev. St. & C. 1911, § 6265 (like Cal. P. C. § 1093); §§ 1517–1529 (civil cases); *South Dakota:* Rev. C. 1919, § 2505 (like Cal. C. C. P. § 607); *Texas:* Rev. Civ. St. 1911, §§ 1951, 1952, Rev. C. Cr. Pr. 1911, §§ 717, 718; *Utah:* Comp. L. 1917, § 6802 (like Cal. C. C. P. § 607); § 8975 (substantially like Cal. P. C. § 1093); § 9330 (insanity plea; substantially like Cal. P. C. § 1369); *Washington:* R. & B. Code, 1909, § 339 (similar to Cal. C. C. P. § 607, for civil cases); *Wyoming:* Comp. St. 1920, § 5769 (civil cases; similar to Cal. C. C. P. § 607); § 7532 (criminal cases).

law of Pleading has prescribed whether one or more than one plea may be at issue, and that the law of Procedure has prescribed whether one or more than one issue may be investigated at the same trial. In any case, the party sustaining the burden of affirmation (here termed the proponent) will first come forward with his evidence in support, the party sustaining the opposite (here termed the opponent) will then come forward in denial, and each in turn may need to present further evidence. The apportionment of the whole evidential material between the parties is thus the first problem.

Next arises a further line of division in the *examination for each witness;* since almost all evidential material, of whatever sort, comes before the tribunal through the assertions of witnesses (*ante*, §§ 22-25), since every witness is subject to examination by the opposing as well as by the calling party, in order to extract the whole of his knowledge and ascertain its detailed significance (*ante*, §§ 1368–1369). He may need to be examined first by the calling party, then by the opposite party, and so again by each in turn. The apportionment of the order and topics of examination for each witness, as between the parties, thus presents the second problem.

Since the party calling a witness may be the opponent in the case at large, it is evident that this second line of division is a distinct one from the preceding, and exists along with and independently of it. On the other hand, the two groupings will sometimes coincide and involve the same problem; as, for example, where the opponent seeks to put in by cross-examination the evidential material supporting his own case, or where a witness is desired to be recalled after both parties have closed their cases. In general, therefore, the two lines of division can be followed separately in considering the appropriate rules; but in particular situations it becomes sufficient to treat the problem as a single one, under one or the other head according as it is more natural. The due apportionment and separation of these various topics is not an easy task, but it is an inevitable one; nevertheless, the lack of an accepted scientific nomenclature makes succinct and clear exposition almost impossible in this department of rules.

The arrangement of topics will therefore be made as follows, taking each division as representing a stage in which evidence is desired to be offered:

A. STAGES OF PRESENTATION, FOR THE WHOLE CASE

1. *Putting in the Case at Large.*
   - *a.* Proponent's Case in Chief.
   - *b.* Opponent's Case in Reply.
   - *c.* Case in Rebuttal.
   - *d.* Case in Rejoinder.
2. *Case Closed.*
   - *a.* By Proponent.
   - *b.* By Opponent.
3. *Argument begun.*
4. *Charge given.*
5. *Jury retired.*

B. Stages of Examination, for the Individual Witness

1. *Original Call.*
   a. Direct examination. *b.* Cross-examination.
   c. Re-direct examination. *d.* Re-cross-examination; and so forth.
2. *Recall.*
   a. For direct examination. *b.* For cross-examination.
3. *Re-recall;* and later calls.

§ 1867. **Trial Court's Discretion as the Ultimate Standard for each Case.** It is obvious that, while a usual order for introducing topics of evidence and witnesses is a desirable thing, a variation from that order, which is often equally desirable, will not necessarily cause direct harm; it can do so only where it tends to confuse the jury, or where it misleads the opponent or finds him unprepared to meet it. Moreover, the necessity for such a variation and the likelihood that it will confuse or mislead must depend almost entirely upon the particular circumstances of each case.

Accordingly, it is a cardinal doctrine, applicable generally to all of the ensuing rules, that they are not invariable, that they are directory rather than mandatory, and that an *alteration of the prescribed customary order* is always allowable in the *discretion of the trial Court;* [1]

1840, Story, J., in *Philadelphia & T. R. Co.* v. *Stimpson*, 14 Pet. 448, 463: "The question, then, is whether it was at that time [after the close of the offeror's case] admissible on the part of the defendants as a matter of right, or whether its admission was a matter resting in the sound discretion of the Court; if the latter, then it is manifest that the rejection of it cannot be assigned as error. The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to the practice of the circuit Courts, with which this Court ought not to interfere; unless it shall choose to prescribe some fixed general rules on the subject, under the authority of the act of Congress. Probably the practice in no two States of the Union is exactly the

§ 1867. [1] The following cases and statutes declare this general principle, but almost every case cited for a specific rule in the following sections contains also such utterances: *Ala.* 1887, Drum *v.* Harrison, 83 Ala. 384, 386, 3 So. 715; *Alaska:* Comp. L. 1913, § 1491 (like Or. Laws 1920, § 853); *Ark.* Dig. 1919, § 4182 ("The order of proof shall be regulated by the Court so as to expedite the trial and enable the tribunal to obtain a clear view of the whole evidence"); *Cal.* 1857, Gordon *v.* Searing, 8 Cal. 49; Cal. C. C. P. 1872, § 2042 ("The order of proof must be regulated by the sound discretion of the Court"); *Haw.* 1901, Mist *v.* Kawelo, 13 Haw. 302, 303; *Ill.* 1898, Board *v.* Harlev, 174 Ill. 412, 51 N. E. 754; *Ind.* 1836, Throgmorton *v.* Davis, 4 Blackf. 174, 175; *Iowa:* 1860, Rutledge *v.* Evans, 11 Ia. 288; 1896, Kassing *v.* Walter, — Ia. —, 65 N. W. 832; *Kan.* 1881. Blake *v.* Powell, 26 Kan. 320, 327; *Md.* 1912, Baltimore C. & A. R. Co. *v.* Moon, 118 Md. 380, 84 Atl. 536; *Mass.* 1856, Robinson *v.* R. Co., 7 Gray 92, 96; *Mich.* 1898, Smith *v.* Bye, 116 Mich. 84, 74 N. W. 302; 1906, People *v.* Tollefson, 145 Mich. 449, 108 N. W. 751 (forgery); *Mo.* 1877, State *v.* Jones, 64 Mo. 391, 397; 1907, State *v.* Taylor, 202 Mo. 1, 100 S. W. 41; *Nebr.* 1892, McCleneghan *v.* Reid, 34 Nebr. 472, 478, 51 N. W. 1037; 1892, Consaul *v.* Sheldon, 35 Nebr. 247, 251, 52 N. W. 1104; 1895, Basye *v.* State, 45 Nebr. 261, 63 N. W. 811; *N. D.* 1907, State *v.* Werner, 16 N. D. 83, 112 N. W. 60. *Oh.* 1891, Shahan *v.* Swan, 48 Oh. 25, 26 N. E. 222; *Or.* Laws 1920, § 853 (like Cal. C. C. P. § 2042); Or. 1909, Crosby *v.* Portland R. Co., 53 Or. 496, 101 Pac. 204; *Pa.* 1895, Com. *v.* Weber, 167 Pa. 153, 31 Atl. 481; 1896, Dosch *v.* Diem, 176 Pa. 603, 35 Atl. 207; *P. R.* Rev. St. & C. 1911, § 1517 (like Cal. C. C. P. § 2042).

same; and therefore, in each State, the circuit Courts must necessarily be vested with a large discretion in the regulation of their practice. If every party had a right to introduce evidence at any time at his own election, without reference to the stage of the trial in which it is offered, it is obvious that the proceedings of the Court would often be greatly embarrassed, the purposes of justice be obstructed, and the parties themselves be surprised by evidence destructive of their rights which they could not have foreseen or in any manner guarded against. It seems to us, therefore, that all Courts ought to be, as indeed they generally are, invested with a large discretion on this subject, to prevent the most mischievous consequences in the administration of justice to suitors; and we think that the circuit Courts possess this discretion in as ample a manner as other judicial tribunals. We do not feel at liberty, therefore, to interfere with the exercise of this discretion."

1841, SCOTT, J., in *Rucker* v. *Eddings*, 7 Mo. 115, 118: "The law has entrusted Courts with a discretion in allowing the parties to a cause to obviate the effects of inadvertence by the introduction of testimony out of its order. This discretion is to be exercised in furtherance of justice, and in a manner so as not to encourage the tampering with witnesses to induce them to prop up a cause whose weakness has been exposed. Where mere formal proof has been omitted, Courts have allowed witnesses to be called or documents to be produced at any time before the jury retire, in order to supply it. So, material testimony ought not to be rejected because offered after the evidence is closed on both sides, unless it has been kept back by trick and the opposite party would be deceived or injuriously affected by it. So, after a witness has been examined and cross-examined the Court may at its discretion permit either party to examine him again, even as to new matter, at any time during the trial. So, where by an accidental omission plaintiff's attorney does not call and examine a witness who was present in Court, and a non-suit is moved for after he has rested his case, the Court will permit the witness to be examined in furtherance of justice. This Court is sensible of the disadvantages under which it labors in revising the discretion of the circuit Courts in matters of this kind, and a strong case must be presented for its interference before it can be induced to disturb the judgment of inferior Courts by revising the exercise of the discretion with which they are entrusted in regard to the relaxation of the rules of evidence. It must be manifest to any one conversant with the trial of causes that the Court before which a trial is had, from having an opportunity of seeing the conduct of parties, of witnessing the difference in the experience of the opposite counsel, and many incidents which cannot be set out in a bill of exceptions and which influence the exercise of its discretion (and properly too), has superior means for a wise and judicious exercise of this power than is possessed by this Court, which is confined entirely to the facts spread upon the record."

1849, POLAND, J., in *Goss* v. *Turner*, 21 Vt. 437, 439: "Although there are certain established rules which have obtained in the process of trying causes before a jury and in the order of introducing the evidence of witnesses, yet these rules for the most part are but rules of practice, and are considered as under the control of the Court and subject to be varied in the exercise of a sound judicial discretion; so that a departure from the ordinary rules in the course of a trial, or a refusal to grant such an indulgence to a party on request, cannot properly be made a ground of error. Of this class are the rules as to the order of introducing the evidence, and also as to the mode of examining witnesses. Indeed, the constantly varying circumstances under which cases arise, and the haste and confusion which must frequently be expected in jury trials, without permitting the exercise of the discretion of the Court would often lead to most unjust results and disastrous consequences."

1873, MCCAY, J., in *Eberhart* v. *State*, 47 Ga. 598, 607 (referring to the admission of evidence after argument begun): "It seems to us that, in the breaking down of the old unbending forms of the common law by our Code, the necessity for a specific order of proceedings goes with it; that one shall be held to his announcement is the main right. But to make such a rule rigid as to separate it from the other rules as to order, and say

that, whilst the judge may modify them as justice and the public convenience may require, he must be held to this with an iron grip, seems to us absurd. If injustice has come from a deviation from the rule, we would interfere; but there is no pretence here of that. . . . The order of business ought as a general rule to be pursued by both parties; and the Court ought to have the power, when a proper case presents itself, to modify the rule where no injustice will occur and the public interests be subserved."

1921, BRICKEN, P. J., in *Sansom* v. *Corington Co. Bank*, 17 Ala. App. 556, 87 So. 406: "Rules of practice looking to the orderly introduction of evidence by the respective parties are essential in order to prevent injurious surprises, and annoying delays in the trial of cases and the administration of justice. The trial has its regular stage of process, and the evidence should be introduced with reference thereto; and the general rule is that the plaintiff having the burden of proof must in the first instance produce all the evidence he has in support of his case, then the defendant must offer all his evidence in defense, plaintiff then replies, and should confine his evidence to a direct answer to defendant's case. And ordinarily the rebutting evidence offered by him upon whom the burden of proof rests concludes the introduction of evidence; but not always, for it is within the discretion of the Court, for good reasons and in the furtherance of justice, to permit the other party to introduce evidence in response to that called forth by the rebuttal testimony, but the rule is that nothing further in chief can be offered, except by permission of the Court. These may be stated as the general rules of practice, and are under the control of the Court, subject to be varied in the exercise of a sound judicial discretion. And almost without exception it is held that it is discretionary with the Court whether it shall admit or reject evidence which is not offered in accordance with the rules prescribing the stage of the trial at which it must be offered, and that the exercise of this discretion in permitting or refusing to allow evidence to be introduced out of the order prescribed by the rules is not assignable as error, except in a clear case of abuse of such discretion. The action of the Court, as in the case at bar, in refusing to permit a party to introduce evidence in support of his case during the examination of his adversary or his adversary's witnesses, is not error, as it was a matter that rested entirely within the discretion of the Court."

It follows that an error in the allowance of such a variation should rarely be treated as sufficient ground for a new trial.[2] There may occur instances where an opponent has been unfairly deprived of showing the truth by reason of such a variation of the customary order of evidence; but the trial Court can better be trusted to understand the situation. The doctrine of new trials is not within the present purview; but no opportunity should be lost to rebuke the abuse by which these rules of customary order are sought to be turned into inflexible dictates of absolute justice, and new trials are asked merely because an unusual sequence of evidence was adopted (*ante*, § 21). Courts often lend ear to such appeals, and thereby partake in the abuse of such a practice. To purport to preside over the investigation of truth, and then, at an inordinate expense of time, labor, and money, to insist on reopening the entire investigation because a minor witness has been asked a minor question some half-hour before he should have been asked, is to furnish a

[2] 1843, Scott, J., in Brown v. Burrus, 8 Mo. 26, 30 ("Even did we interfere and reverse the judgment for this cause, how would the party complaining be benefited by a new trial? Would not the evidence, of the introduction of which he complains, come out in an unexceptionable manner on another trial?"); 1871, Day, C. J., in Crane v. Ellis, 31 Ia. 510, 512 ("No good end is to be accomplished by reversing this case and sending it back for a new trial and for the admission of the same evidence at a different stage of the trial").

spectacle fit to make Olympus merry over the serious follies of mortals. And yet such decisions are not uncommonly rendered by the professed ministers of truth and justice. Therein they do violence to the spirit of the rules which are now to be examined.

A. STAGES OF PRESENTATION FOR THE WHOLE CASE

1. Putting in the Case at Large

§ 1869. **Case in Chief; Order of Topics and Witnesses in general; Party testifying First.** (1) For the order of *topics* within the proponent's case in chief, the general principle leaves the arrangement to the trial Court to determine. No specific rules exist as to the customary order (except those noted in the next two sections); nor, in the nature of things, can a regular order be prescribed for that which must depend so much on the varying complications and exigencies of each case. The matter therefore remains practically in the unhampered control of counsel, who employs, subject to the judge's prohibition, such an order as the dictates of intelligent tactics require.[1] He may even, in certain circumstances, advance *rebuttal evidence* by anticipation, during the case in chief.[2]

Whether the *opponent's case* may be put in *during cross-examination* of the proponent's witnesses is more conveniently dealt with later (*post*, § 1885).

(2) For the order of *witnesses* also, there are no specific rules as to the customary sequence.

The sole exception is that, at common law, where a *party* claims the right not to go out when his witnesses are sequestrated, he may be required, as a condition of remaining, to take the stand first of his own witnesses;[3] and that, by statute in a few jurisdictions, for analogous reasons, the party, if he is to be a witness for himself, must always take the stand before his other witnesses.[4] The reason for this rule is the occasional readiness of the interested

§ 1869. [1] 1836, Chitty, General Practice, 2d ed., III, 896; 1892, McDaneld *v.* Logi, 143 Ill. 487, 32 N. E. 423.

[2] 1899, Mayer *v.* Brensinger, 180 Ill. 110, 54 N. E. 159; 1908, Decatur *v.* Vaughan, 233 Ill. 50, 84 N. E. 50; 1912, Knight *v.* State, 64 Tex. Cr. 541, 144 S. W. 967 (the woman's chastity, in seduction); and cases cited *post*, § 1873.

[3] *Ante*, § 1841.

[4] CANADA: *Alta.* Rules of Court 1914, No. 190 (like Ont. Rule 254); *Ont.* Rules of Court 1914, § 254 (quoted *ante*, § 1837); UNITED STATES: *Ky.* C. C. P. 1900, § 606 (3) (civil cases); Stats. 1915, § 1646 (accused); *Tenn.* Code 1916, § 5601 (accused); see these statutes quoted in full *ante*, § 488, and referred to *ante*, § 579.

The Kentucky and Tennessee rules had their origin in the statutes making civil or criminal parties competent, which stipulated originally as a condition that the party should testify first of the witnesses on his side; they have been applied as follows: *Kentucky:* 1896, Barkley *v.* Bradford, 100 Ky. 304, 38 S. W. 432 (held to be merely a "rule of practice, not of right"); 1903, Savage *v.* Bulger, — Ky. —, 77 S. W. 717 (party admitted in rebuttal); 1906, Burkhardt *v.* Loughridge, 124 Ky. 48, 98 S. W. 291 (rule applied to depositions); 1910, Continental Ins. Co. *v.* Ford, 140 Ky. 406, 131 S. W. 189 (rule held not to prohibit the party's testimony where already his counsel had on cross-examination entered upon new matter); 1915, Cowan *v.* Dillon, 163 Ky. 496, 173 S. W. 1160 (devisee testifying to execution of a will); 1920, Neely *v.* Strong, 186 Ky. 540, 217 S. W. 898 (Code § 606, subd. 3, applied to an infant plaintiff); 1920, Davis *v.* Kimberlain, 188 Ky. 147, 221 S. W. 226 ("a rule of practice, not of right"); *Tennessee:* 1892, Clemons *v.* State, 92 Tenn. 284, 286, 21 S. W. 525.

In *England*, the same rule is now applied,

person to adapt his testimony, when offered later, to victory rather than to veracity, so as to meet the necessities as laid open by prior witnesses, — a tendency illustrated in the following anecdote:

1904, *Sir Henry Hawkins*, Baron BRAMPTON, Reminiscences, I, 134: "I was retained at Hertford Assizes with Peter Ryland, a practising barrister on that circuit, as my leader, to prosecute a man for perjury, which was alleged to have been committed in an action in which a cantankerous man, who had once filled the office of High Sheriff for the county, was the prosecutor. Wealthy and disagreeable, he was nevertheless a hen-pecked tyrant. Mrs. Brown, his wife, was a witness for the prosecution in the alleged perjury, which was unfortunate for her husband, because she had the greatest knowledge of the circumstances surrounding the case; while Mr. Brown had the best knowledge of the probable quality of his wife's evidence. When we were in consultation and considering the nature of this evidence, and arranging the best mode of presenting our case to the jury, Brown interposed, and begged that Mr. Ryland should call Mrs. Brown as the last witness. He said it was all-important she should come last. 'It is Mrs. Brown's wish,' he pleaded. 'But,' says Ryland, 'Mrs. Brown ought to be called *first*. It is all-important in my view that she should be called in that order, which you must see is the natural order — Mrs. Brown first, the rest anywhere' (or, perhaps better nowhere, thought Brown, if Mrs. Brown is to be believed). 'You'll find the other way best,' says Brown. But Ryland positively refused to proceed in any other than the proper course, which was to call the lady first instead of last. As I left Ryland, Brown came up to me, thinking me, probably, more amenable to reason, and in the most beseeching manner begged me to press upon Ryland the course he, Brown, had suggested. I assured him that Mr. Ryland would do what was best and most prudent; at the same time saying that, if he could give me any good reason for calling Mrs. Brown last, I was sure he would do so if he agreed with it. Whereupon said Brown: 'Well, Mr. Hawkins, Mr. Ryland did not seem to think very well of my case on the evidence, so I have come to the conclusion that Mrs. Brown ought to be the last witness, because, *if anything goes wrong during the trial or anything is wanting, Mrs. Brown will be quite ready to mop it all up*.' This in a prosecution for *perjury* was one of the boldest propositions I had ever heard. I need not say good Mrs. Brown was called, as she ought to have been, first. The lady's mop was not in requisition at that stage of the trial, and the jury decided against her."

§ 1870. **Same: Treason; Corpus Delicti; Conspiracy; Document's Loss and Execution; Reading Documents.** The special rules in regard to the quantity of evidence sufficient for proof of acts of *treason*, and of the *corpus delicti* of any crime, give rise to questions about the order of this required evidence; these are better considered under the respective rules (*post*, § 2038, and § 2073).

So, too, in using a *conspirator's admissions*, the proof of the conspiracy may be required to be made before the one party's admissions can be usable against the other (*ante*, § 1079).

Whether a *document* may be *proved lost* before evidence of execution is offered, so as to allow the use of a copy, has been already considered in

under St. 1898 (quoted *ante*, § 488) to the *accused:* 1911, Morrison's Case, 6 Cr. App. 159, 165 (L. C. J. Alverstone: "In all cases I consider it most important for the prisoner to be called before any of his witnesses").

There may be other jurisdictions having such a rule of court: 1917, Garrabrandt *v.* Boston Molasses Co., 10 P. R. Fed. 71 (Rule of Court 51; Hamilton, J.: "I do not know the date of this rule, but it was here in 1913").

dealing with the subject of lost documents (*ante*, § 1189). Whether a *document produced* may be read before any evidence of execution raises the general question treated in the next section. Whether a *document proved* by a witness must be *read before his cross-examination* is a question of the order of examination of witnesses (*post*, § 1883).

§ 1871. **Same: Conditional Relevancy; Facts offered before their Relevancy appears; Stating the Purpose of a Question.** (1) It constantly happens that an evidential fact is relevant, not with direct reference to an allegation in the pleadings, but only through its connection with other subordinate facts (*ante*, § 2). Without them, it is irrelevant, or immaterial, and therefore inadmissible. So far, then, as concerns the time of its introduction in evidence, one might expect a rule requiring such a fact *not to be given in evidence until the connecting facts*, by reason of which it becomes relevant, have first been put in evidence.

No such rule, however, would be practicable; for those same connecting facts would themselves often be irrelevant apart from the fact in question; in other words, the relevancy appears only when all are considered together. Now it is obviously impossible to present all the facts at precisely the same moment or in the testimony of a single witness. Hence, some of the connected facts must be allowed to be presented before the others, even though the former, standing alone, are irrelevant.

Thus the fundamental rule, universally accepted, is that, with reference to facts whose relevancy depends upon others, the *order of presentation is left to the discretion of the party himself*, subject of course to the general discretion of the trial Court (*ante*, § 1867) in controlling the order of evidence. In other words, if an evidential fact offered *has an apparent connection* with the case *on the assumption that other facts shall also be proved*, it may be admitted. No objection, therefore, can be made merely on the ground that the other facts have not yet been evidenced.[1] The possibility that the other facts may not be made good is a necessary risk to be taken; and in case of a failure to make them good, the subsequent striking out of the evidence now offered is regarded as an adequate remedy:

1849, CATON, J., in *Rogers* v. *Brent*, 10 Ill. 573, 587 (holding improper the exclusion of a certain land-certificate, assignment, and judgment and execution-deed): "Most cases have to be proved by a succession of distinct facts, neither of which standing alone would amount to anything, while all taken together form a connected chain and establish the issue; and from necessity a party must be allowed to present his case in such detached parts as the nature of his evidence requires. It would be no less absurd than inconvenient, when proof is offered in its proper order, of one necessary fact, to require the party to go on

§ 1871. [1] *Accord:* 1833, Davis *v.* Calvert, 5 G. & J. 269; 1921, Sloat-Darragh Co. *v.* General Coal Co., 6th C. C. A., 276 Fed. 502 (correspondence introduced at separate times); 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127; 1880, Hoffman *v.* Harrington, 44 Mich. 183, 184, 6 N. W. 225; 1824, Stewart *v.* Bank, 11 S. & R. Pa. 267; 1880, Zell *v.* Com., 94 Pa. 258, 274; 1878, Marshall *v.* State, 5 Tex. App. 273, 291.

For the specific rule in using a *copy of a lost document*, as between the loss of the original and its execution, see *ante*, § 1189.

and offer to prove at the same time all the other necessary facts to make out the case. Such a practice would embarrass the administration of justice and prove detrimental to the rights of parties. It may be that Rogers was bound to connect himself with Southwick's title before he could insist that the patent was void because obtained in fraud of such title; but he must first prove such title to exist before he could connect himself with it; and this he was not allowed to do. If he was bound to connect himself with Bowman's creditors, to avail himself of the fraud practiced upon them, he must first show that there were such creditors; and the judgment which proved this was ruled out by the Court. It is the right of the party, when he offers evidence in its proper order which proves or tends to prove any necessary fact in the case, to have it go to the jury; for the reasonable presumption is that it will be followed by such other proof as is necessary for its proper connection, and if it is not, it then becomes irrelevant, and as such, if desired, may be withdrawn from the jury. If there is anything to induce the suspicion that the time of the Court is being trifled with, it may be proper to call upon counsel to state the connection which they expect to give the proposed evidence; but this should ordinarily be avoided, as it is often embarrassing for counsel to anticipate their case in the presence of the opposite party. It may sometimes happen that evidence is offered so out of its proper place as to authorize the Court to exclude it for want of a proper foundation; as, in this case, had the sheriff's deed been offered without the previous proceedings, it might have been properly excluded till the proper foundation for it was shown. No such objection, however, existed in this case. The party commenced at the foundation of his case, and offered to establish the first necessary fact; and, when that was ruled out, he still persisted in offering to prove subsequent parts of his case dependent upon those previously offered and rejected, till his repeated offers had almost the appearance of wrestling with the opinion of the Court. He proceeded as far as duty or propriety required."

1860, Baldwin, J., in *Palmer* v. *McCafferty*, 15 Cal. 334, 335: "The counsel offering the deposition and the agreement [excluded by the trial Court] explained that it was the intention of the plaintiff to show in connection with it that the defendant claimed the premises under one Wooster who was a party to the agreement. It seems that Wooster executed a mortgage of these premises to the defendant, and that the latter foreclosed the mortgage and went into possession under the decree of foreclosure. The object of the plaintiff was to show that he had succeeded to the estate of Scoggs and Co. who made this executory agreement, and that Wooster and his assigns having failed to comply with the contract on their part forfeited all their rights under the same, and that by force of this Scoggs and Co. became reunited to their original title, of which plaintiff was the assignee. . . . 'Prima facie' the plaintiff's proof thus offered was relevant to the issue, and that was enough to entitle him to introduce it. The plaintiff was entitled to introduce his proofs in his own order. He was not bound to make his whole case complete by any one item of proof. A case consists frequently of various facts, neither one of which makes it out; and to hold that a party is not entitled to introduce any part until he establishes the whole is to require an impossibility. All that the Court can ask is that the particular evidence offered conduces to establish any one proposition involved in the issue. It is time enough to pass upon the sufficiency of the proofs after they are all in the cause. There must be a starting-place somewhere; and the Court should never reject evidence merely because unaided by other testimony it is insufficient, if it tend legally to prove any part of the case."

1900, Loring, J., in *O'Brien* v. *Keefe*, 175 Mass. 274, 56 N. E. 588: "The possibility of testimony admitted 'de bene' not being subsequently made competent is one of the considerations to be passed upon by the presiding magistrate in determining whether to admit such evidence at the time it is offered or not, and it is necessary, in the conduct of trials, that such discretion should be exercised. If evidence admitted 'de bene' is not subsequently made good, the only remedy that can be given is, on the proper application being subsequently made, to rule out the testimony. Whether, in such a case, the party who produces

the witness whose testimony has been confused, or the party who has undertaken to assert that the witness is not to be believed because he is a criminal, and it turns out that that assertion is unfounded, is the greater sufferer, is open to question. If he has suffered an injury, it is one inherent in the trial of causes; and it is well settled, when such evidence is admitted in a jury trial, that the objecting party cannot be heard to complain, if the evidence is ruled out and the jury are instructed to disregard it."

(2) But if the evidential fact thus put forward has on its face *no apparent connection with the case, an accompanying statement of the connecting facts must be made* by counsel, and a *promise to introduce them* at a later time if they have not already been introduced.[2] This much is indispensable as a safeguard against the indiscriminate use of irrelevant evidence and as a measure to enable the adversary to discover any objection that might be appropriate. How specific the counsel's statement must be will depend on the circumstances:

1836, COLERIDGE, J., in *Haigh* v. *Belcher*, 7 C. & P. 389, 390: "I think I must receive evidence of it, and trust to the statement of the counsel in the cause that by some further evidence it will be shown to be relevant; . . . and the discernment of the jury must be trusted so far, in case it should turn out to be immaterial."

1888, *Parnell Commission's Proceedings*, 33d day, Times' Rep. pt. 9, p. 104; the Irish Land League and its leaders being charged with complicity in crime, the doings and admissions of various known criminals were offered, with the purpose of connecting with them the League leaders. Sir *Richard Webster*, Attorney-General, having asked a witness what one Carey said about Egan, one of the leaders, Sir Charles Russell objected. Sir *R. Webster:* "I think, if your lordships trust me for a moment, you will see that it is in the interests of justice that this man should make his statement. I will undertake to connect it with Egan." Sir *C. Russell:* "I do not think that is a reason." President HANNEN: "Well, if the Attorney-General does not fulfil his pledge, I shall strike out what is said." Sir *C. Russell:* "We have had so many of these pledges which have been broken." Sir *R. Webster:* "I beg your pardon; no pledges that I have given have been broken." Sir *C. Russell:* "Well, — left unfulfilled." Sir *R. Webster:* "Or left unfulfilled!" President HANNEN: "Counsel can only say what they anticipate will be the case; if this is not made evidence, I will strike it out."

[2] *Accord: Eng.* 1888, Parnell Commission's Proceedings, 54th day, Times' Rep. pt. 14, p. 149; *Can.* 1869, Key *v.* Thomson, 1 Han. N. Br. 295, 302; *U. S.* 1842, Mardis *v.* Shackelford, 4 Ala. 493, 501; 1846, Sorrelle *v.* Craig, 9 Ala. 538; 1846, Abney *v.* Kingsland, 10 Ala. 360; 1897, Bischof *v.* Mikels, 147 Ind. 115, 46 N. E. 348; 1854, Warner *v.* Hardy, 6 Md. 525, 538 ("the testimony, as proposed, must appear to be pertinent to the matter in controversy, or be accompanied by an offer to show its relevancy in the progress of the cause"); 1897, Lane *v.* Agric. Soc., 67 Minn. 65, 69 N. W. 463; 1875, Tilton *v.* Beecher, N. Y., Abbott's Rep. II, 35; 1869, State *v.* Cherry, 63 N. C. 493, 494; 1877, State *v.* Hopkins, 50 Vt. 316, 330.

Examples of an offer properly so made are the following: 1874, McCoy *v.* Watson, 51 Ala. 466, 467 (deeds; evidence of the grantor's title at time of execution was not yet offered; deeds admitted, subject to later proof of the title); 1875, Cramer *v.* Burlington, 42 Ia. 315, 319; 1876, Ober *v.* Carson, 62 Mo. 209, 213; 1851, Garrigues *v.* Harris, 16 Pa. St. 344, 350 (a deed may be read before proof of execution).

Compare the rule for counsel *making offers* which they know will not be sustained, and *stating in argument* matters of which no evidence has been introduced (*ante*, § 1810).

Even where the evidence is properly rejected for irrelevancy at the time it is offered, it may be admitted *if afterwards offered when its relevancy appears:* 1844, Lyford *v.* Thurston 16 N. H. 399, 405 (even where it becomes relevant through the introduction of evidence by the opponent).

For the order of proof, for a *copy of a lost document*, as between the loss of the original and its execution, see *ante*, § 1189.

1824, GIBSON, J., in *Weidler* v. *Farmer's Bank*, 11 S. & R. 134, 139: "The plaintiff contends that this may have been only a part of the chain of his evidence, and that what was deficient might afterwards have been supplied. If this were admitted, no Court could without error ever reject for irrelevancy, as there is no fact so entirely irrelevant as to be incapable of being connected with the question, however remotely, by a chain of possible circumstances. But the question is, How did the matter stand as it was proposed to the Court? If it was altogether irrelevant, the Court might reject it (although it might not perhaps be error to admit it). If it would be relevant when taken in connection with other facts, it ought to be proposed in connection with those facts, on 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 showing of the party can produce no results. . . . The proposal of 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."

1842, COLLIER, C. J. in *Mardis* v. *Shackelford*, 4 Ala. 493, 501: "If evidence be irrelevant at the time it is offered, it is not error to reject it because other evidence may afterwards be given in connection with which it would become competent. If it would be relevant in conjunction with other facts, it should be proposed in connection with those facts and an offer to follow the evidence proposed with proof of those facts at a proper time."

Yet it is often difficult to apply this principle. The statement of intention to prove the other facts, or of reference to the preceding facts, will usually be expressly made, when objection is raised; but the circumstances may have been such that a statement of the necessary kind may be sufficiently implied, without formal words. Much depends on the issues in controversy, the stage of the trial, the terms of the offer, and the point of the objection. The *trial Court's discretion* ought to have free play.[3] It is clear that a *Court of appeal* will sometimes treat the evidence as properly admitted where it finds by implication some understanding in fact as to the later proof of the connecting circumstances;[4] and it is also clear that it will sometimes treat it as properly excluded because it refuses to see such an understanding or promise at the time of the offer.[5]

[3] Cases cited *ante*, § 1867, and the following: *Can.* 1876, Davidson *v.* King, 16 N. Br. 396; *U. S.* 1908, Putnal *v.* State, 56 Fla. 86, 47 So. 864; 1909, Atlantic Coast Line R. Co. *v.* Partridge, 58 Fla. 153, 50 So. 634; 1903, Ellis *v.* Thayer, 183 Mass. 309, 67 N. E. 325 (good opinion, by Knowlton, C. J.); 1880, Hoffman *v.* Harrington, 44 Mich. 183, 184; 1903, Bradley *v.* Dinneen, 88 Minn. 334, 93 N. W. 116; 1905, Campbell *v.* Railway Transfer Co., 95 Minn. 375, 104 N. W. 547; 1907, State *v.* Arnold, 206 Mo. 589, 105 S. W. 641; 1904, Earnhardt *v.* Clement, 137 N. C. 91, 49 S. E. 49.

It was the strict enforcement of the rule that evoked one of Burke's chief complaints in his criticisms of the management of Warren Hastings' Trial (Report of the Commons Committee, 1794, 31 Parl. Hist. 344–347); his contention was that, according to the prior practice, the judges had been content to rely upon a subsequent direction to the jury for curing the effect of admitted evidence which had not been afterwards properly connected with the case. It was about this same rule, in 1794, at Tooke's Trial (24 How. St. Tr. 367) that John Horne Tooke had his well-known passage with C. B. Eyre about the "links of a chain."

[4] Examples: 1836, Reed *v.* Brashers, 3 Port. Ala. 375; 1842, Lynch *v.* Benton, 3 Rob. La. 105; 1906, State *v.* Green, 115 La. 1041, 40 So. 451 (identifying a pistol); 1844, State *v.* McAllister, 24 Me. 139, 143.

[5] Examples: *Ala.* 1830, Jinkins *v.* Noel, 3 Stew. 60, 82, 84; 1833, Clendenning *v.* Ross, 3 Stew. & P. 267; 1837, Wiswall *v.* Ross, 4 Port. 321, 330; 1838, Innerarity *v.* Byrne, 8 Port. 176, 179; *Ind.* 1876, Cones *v.* Binford, 54 Ind. 516, 517; 1907, Ross *v.* State, 169 Ind. 388, 82 N. E. 781; *Md.* 1838, Caton *v.* Carter, 9 G. & J. 476; 1854, Stewart *v.* Spedden, 5 Md. 433, 444.

The principle that governs is, however, clear enough; and the following may serve as an illustration of one variety of such cases:[6]

1843, ORMOND, J., in *Branch Bank* v. *Kinsey*, 5 Ala. 9, 12: "It is certainly the privilege of a party to present his testimony in the mode his judgment or fancy may dictate; and, if relevant, it cannot be objected to, although it may be of no avail without further proof. So, in this case, the defendant could have proved the execution of his conveyance, and read it to the jury and afterwards have proved its consideration; and indeed this would seem to be the natural order in which to present it. But we do not understand this to be the point raised on the bill of exceptions. The statement is that . . . '[the Court] admitted the same to be read to the jury as 'prima facie' evidence of the consideration therein specified, without further proof thereof.' It would be doing great violence to the language here employed and to the ordinary rules of interpretation to understand the objection here raised to be to the time merely when the instrument was offered to be read as evidence. . . . [The Court in fact ruled that] it was read to the jury for that purpose [of presuming a consideration] without further proof."

(3) Nevertheless, a *cross-examination* is generally conceded to be exempt from the foregoing rule. In other words, the *cross-examiner need not state beforehand the connection of a question* which appears to be irrelevant, unless exceptionally, under the trial Court's determination.[7] The chief reason is that the advantages of brevity and relevancy, which might otherwise be insisted on, are in experience found to be far overbalanced by the danger of

[6] For the doctrine that the *construction of the terms of the offer* is for this purpose to be made most strongly against the offeror, see the following opposed opinions: 1877, Graves, J., in Reynolds *v.* Ins. Co., 36 Mich. 131, 144; 1842, Collier, C. J., in Mardis *v.* Shackelford, 4 Ala. 493, 501.

Compare also the doctrine of *multiple admissibility*, *ante*, § 13, and the general rules as to mode of *offering* and *objecting* to evidence (*ante*, §§ 17, 18).

It has been held that on the subsequent failure of the promised evidence, the opponent must take advantage by a *motion to strike out:* 1920, Holmes *v.* U. S., 5th C. C. A., 269 Fed. 97; 1903, Stone *v.* State, 118 Ga. 705, 45 S. E. 630; 1906, Hix *v.* Gulley, 124 Ga. 547, 52 S. E. 890; 1907, Sasser *v.* State, 129 Ga. 541, 59 S. E. 255; 1906, Tinkle *v.* Wallace, 167 Ind. 382, 79 N. E. 355 (bribery); 1908, Dorn & McGinty *v.* Cooper, 139 Ia. 742, 117 N. W. 1; 1906, Putnam *v.* Harris, 193 Mass. 58, 78 N. E. 747 ("It is more correct to say that the exception will not be sustained unless the fact that the evidence admitted 'de bene' had not been properly connected afterwards was brought to the attention of the Court and a further ruling on that ground asked for"); 1908, Com. *v.* Johnson, 199 Mass. 55, 85 N. E. 188 (narrative of conversations held proper on the facts; 1921, State *v.* Douthitt, 26 N. M. 532, 194 Pac. 879 (unlawful shooting); 1903, Jones *v.* Peterson, 44 Or. 161, 74 Pac. 661.

Contra: 1906, Root *v.* Kansas C. S. R. Co., 195 Mo. 348, 92 S. W. 621.

Not clear: 1906, Pittman *v.* State, 51 Fla. 94, 41 So. 385 (opinion reading both ways).

Examples of the striking out of evidence where the promise to connect has not been fulfilled: 1912, People *v.* Smith, 254 Ill. 167, 98 N. E. 281 (purchase of a pistol not connected with the one in issue).

The Court's direction to the jury to disregard evidence as to which the condition has not been fulfilled is of course sufficient to cure the temporary effect of admitting it; this assumption underlies the whole principle; 1917, Fuller *v.* Maine Central R. Co., 78 N. H. 366, 100 Atl. 546; and cases cited *ante*, § 19.

[7] *Accord:* 1876, City Bank *v.* Kent, 57 Ga. 283, 285, 299 ("even when a party is under cross-examination, the Court may exercise a sound discretion in requiring counsel to make the relevancy of his questions apparent") 1877, Harness *v.* State, 57 Ind. 1, 7 (good opinion by Worden, J.); 1883, Wood *v.* State, 92 Ind. 269, 273; 1884, Hyland *v.* Miller, 99 Ind. 308, 310; 1872, O'Donnell *v.* Segar, 25 Mich. 367, 371 (good opinion by Christiancy, J.); 1906, Brown *v.* State, 88 Miss. 166, 40 So. 737; 1872, Burt *v.* State, 23 Oh. St. 394, 402 ("I know of no case where the rule requiring such a disclosure has been applied to a cross-examination; whether such a case might arise need not now be decided"); 1877, Martin *v.* Elden, 32 Oh. St. 282, 289; 1900, Knapp *v.* Wing, 72 Vt. 334, 47 Atl. 1075.

destroying the effectiveness of the great weapon of cross-examination; for it would often be made useless by requiring in advance a betrayal of its purpose to the wary witness whose falsities are desired to be exposed: [8]

1806, Mr. *W. D. Evans*, Notes to Pothier, II, 230: "The benefits of cross-examination are sometimes defeated by the interposition of the Court to require an explanation of the motive and object of the questions proposed, or to pronounce a judgment upon their immateriality; whereas experience frequently shows that it is only by an indirect and apparently irrelevant inquiry that a witness can be brought to divulge the truth which he prepared himself to conceal. The explanation of the motives and tendency of the question furnishes the witness with a caution that may wholly defeat the object of it, which might have been successfully attained if the gradual progress from immateriality to materiality was withheld from his observation."

1861, CHRISTIANCY, J., in *Campau* v. *Dewey*, 9 Mich. 381, 422: "On the direct examination, it is true, if the relevancy of a proposed inquiry does not appear, the Court have a right to call on the counsel to state the object of the proposed testimony and the manner in which it is to be made relevant; and the Court may in the exercise of its discretion require a particular statement of the substance of the evidence in connection with which the proposed inquiry is to be rendered pertinent, and, if refused, may reject the evidence. . . But on a cross-examination the rule as to relevancy is not so strict; and it would be a very unsafe rule which should allow the Court to reject evidence which may in any manner be rendered material, because the party proposing it has not volunteered to precede it with a statement of its precise object and of the other facts in connection with which it is to be rendered material. The Court may doubtless, in its discretion, when a question is asked on cross-examination which he thinks cannot be rendered pertinent, require an intimation of its object, and reject the evidence if not given. But this is a discretion which should be very sparingly exercised, and nothing further than a bare intimation should generally be required; for, in many cases, to state the precise object of a cross-examination would be to defeat it." [8]

§ 1872. **Opponent's Case in Reply; Order of Topics and Witnesses in general.** The opponent's presentation of his case in reply is no more subject to detailed rules than was the proponent's in chief. The special practices as to conditional relevancy, lost documents, and party witnesses, as noted in the preceding sections, apply equally to the opponent's case where those topics present themselves.[1]

The questions peculiar to the opponent's case alone are few. Whether he may, on *cross-examination* of the proponent's witnesses, introduce his *own case in advance* is here the great problem, but it also involves a consideration of the function of cross-examination and can be examined under that head (*post*, § 1885).[2] The opponent may, however, in the trial Court's discretion,

[8] "An experienced equity judge once said to me in relation to a question I had asked, 'Really, this is a long way from the point.' 'I am aware of that, my lord,' was my answer; 'if I were to begin any nearer, the witness would discover my object'" (Serjeant Ballantine's Experiences of a Barrister's Life, 127).

§ 1872. [1] For the order of evidence as between *co-defendants* see the following: 1824, R. *v.* Cooke, 1 C. & P. 322; 1893, Grundy *v.* Janesville, 84 Wis. 574, 54 N. W. 1085.

[2] When the admissibility of the proponent's evidence depends on a question of fact, to be *decided by the judge* (*post*, § 2550), the opponent is entitled to put in his counter-evidence then and there: 1843, Bartlett *v.* Smith, 11 M. & W. 483 (whether a bill was inadmissible for lack of stamp; leading case); 1855, Boyle *v.* Wiseman 24 L. J. Exch. 284 (whether a letter offered was the original; repudiating Jones *v.* Fort, Moo. & M. 196); 1859, Cooper *v.* Dawson, 1 F. & F. 550 (whether a contradicting letter was genuine).

For this rule as applied to *confessions and dying declarations*, see *ante*, §§ 861, 1451.

put in his case in advance, by *calling a witness during the proponent's case in chief*, if the exigency requires it.[3] So too, being entitled under the principle of Completeness (*post*, § 2115) to read the *whole of a deposition* of which the proponent reads a part only, the opponent may do this, if allowed by the trial Court, during the proponent's case in chief.[4] Whether he may at that time read a *document proved by cross-examination* of the proponent's witness involves the rule for cross-examination (*post*, § 1884).

On the other hand, the *proponent* himself, in connection with his *cross-examination* of a witness of the *opponent*, and before the latter has rested his case in reply, may be allowed in advance to put in a part of his case in rebuttal.[5] Conversely, he may be *compelled*, in the trial Court's discretion, to open his *evidence in reply*, before the close of the proponent's case in chief, when (for example) the latter is obliged to await the arrival of a tardy witness.[6]

§ 1873. **Proponent's Case in Rebuttal; Limited to Evidence made Necessary by Opponent's Reply.** It is perfectly clear that the orderly presentation of each party's case would leave the proponent nothing to do, in his case in rebuttal, except to meet the new facts put in by the opponent in his case in reply. Everything relevant as a part of the case in chief would naturally have been already put in; and a rebuttal is necessary only because, on a plea in denial, new subordinate evidential facts have been offered, or because, on an affirmative plea, its substantive facts have been put forward, or because, on any issue whatever, facts discrediting the proponent's witnesses have been offered. To discriminate between the first of these classes and the opponent's testimony merely denying the same facts that the proponent's witness had originally affirmed, is no doubt often difficult, and it is then not easy to say whether the proponent's testimony in rebuttal might or might not as well have been put in originally; yet the principle involved is clear. Moreover, practical disadvantages that would result from abandoning the natural order of evidence are, first, the possible unfairness to an opponent who has justly supposed that the case in chief was the entire case which he had to meet, and, secondly, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning.

Accordingly, it is well settled that, while the occasional difficulty of discrimination, and the frequency of inadvertent omissions and unexpected contests, add emphasis to the general principle of the trial Court's discretion (*ante*, § 1867), yet the usual rule will exclude all evidence which has not been made necessary by the opponent's case in reply:[1]

[3] 1877, Huston *v.* Plato, 3 Colo. 402, 407; 1904, Conant *v.* Jones, 120 Ga. 568, 48 S. E. 234.

[4] 1882, Herring *v.* Skaggs, 73 Ala. 446, 453.

[5] 1895, Ranney *v.* R. Co., 67 Vt. 594, 32 Atl. 810.

[6] 1888, Townsend's Succession, 40 La. An. 67, 73, 3 So. 488.

§ 1873. [1] *Accord* (compare with these citations the cases under Re-direct examination, *post*, § 1896, and Recall, *post*, § 1898):

ENGLAND: 1794, Warren Hastings' Trial,

1848, SHAW, C. J., in *Cushing* v. *Billings*, 2 Cush. 158, 159: "We take it to be well settled that the order in which witnesses shall be called is a matter of discretion with the Court. . . . The orderly course of proceeding requires that the party whose business it is to go forward should bring out the strength of his proof in the first instance; but it is competent for

Debrett's History of the Trial, Pt. V, pp. 85–88, 97; 1826, R. *v.* Stimpson, 2 C. & P. 415; 1828, Rowe *v.* Brenton, 3 M. & Ryl. 133, 139, 304; 1831, Knapp *v.* Haskall, 4 C. & P. 590; 1831, Whittingham *v.* Bloxham, 4 C. & P. 597; 1832, R. *v.* Hilditch, 5 C. & P. 299; 1834, R. *v.* Nicholson, 2 Lew. Cr. C. 151; 1911, R. *v.* Crippen, 1 K. B. 149 (careful statement; but unfortunately not discriminating between this situation and that of § 1877, *post*).

CANADA: 1904, R. *v.* Wong On, 10 Br. C. 555 (alibi); 1885, Harvey *v.* R. Co., 3 Man. 266 (negligence); 1858, Adams *v.* Ferguson, 4 All. N. Br. 102; 1863, Heavy *v.* Odell, 5 All. N. Br. 524; 1902, R. *v.* Higgins, 35 N. Br. 18, 30; 1850, Devlin *v.* Crocker, 7 U. C. Q. B. 398.

UNITED STATES: *Federal:* 1813, Gilpins *v.* Consequa, 1 Pet. C. C. 85, 89; 1861, Johnston *v.* Jones, 1 Black 209, 226; 1895, Goldsby *v.* U. S., 160 U. S. 70, 74, 16 Sup. 216; 1901, Throckmorton *v.* Holt, 180 U. S. 552, 21 Sup. 474; 1903, Atchison T. & S. F. R. Co. *v.* Phipps, 60 C. C. A. 314, 125 Fed. 478; 1904, Wilmoth *v.* Hamilton, 127 Fed. 48, 61 C. C. A. 584; *Alabama:* 1907, Nicholson *v.* State, 149 Ala. 61, 42 So. 1015; *Alaska:* Comp. L. 1913, §§ 2246; 1019; *Arizona:* Rev. St. 1913, § 1033; Civ. C. § 512; *Arkansas:* Dig. 1919, §§ 1292, 3175, 4182; 1901, Blair *v.* State, 69 Ark. 558, 64 S. W. 948; 1921, Wells *v.* State, — Ark. —, 235 S. W. 798 (murder); *California:* C. C. P. 1872, § 607, P. C. 1872, § 1093; 1854, Mowry *v.* Starbuck, 4 Cal. 274; 1865, Priest *v.* Union Canal Co., 6 Cal. 170; 1860, Lisman *v.* Early, 15 Cal. 199; 1863, Brooks *v.* Crosby, 22 Cal. 42, 46, 50; 1864, Union Water Co. *v.* Crary, 25 Cal. 504, 509; 1864, Kohler *v.* Wells Fargo & Co., 26 Cal. 606, 613; 1889, Cousins *v.* Partridge, 79 Cal. 224, 228, 21 Pac. 745; 1892, Young *v.* Brady, 94 Cal. 128, 130, 29 Pac. 489; 1897, People *v.* Hill, 116 Cal. 562, 48 Pac. 711 (expert evidence as to a defendant's insanity, not allowed in rebuttal for the defendant); *Colorado:* Comp. St 1921, C. C. P. § 205; 1873, Browne *v.* Steck, 2 Colo. 70; 1874, Kansas P. R. Co. *v.* Miller, 2 Colo. 442, 469; 1877, Smith *v.* Mayer, 3 Colo. 207, 210; 1882, Nutter *v.* O'Donnell, 6 Colo. 253, 259; 1887, Buckingham *v.* Harris, 10 Colo. 455, 463, 15 Pac. 817; 1893, DeRemer *v.* Parker, 19 Colo. 242, 245, 34 Pac. 980; *Columbia (Dist.):* 1894, Olmstead *v.* Webb, 5 D. C. App. 38, 57, *semble;* 1898, Throckmorton *v.* Holt, 12 D. C. App. 552, 582, 584; *Connecticut:* 1904, Vincent *v.* Mutual R. F. L. Ass'n, 77 Conn. 281, 58 Atl. 963 (age, in an insurance policy); 1904, McAllin *v.* McAllin, 77 Conn. 398, 59 Atl. 413; 1916, State *v.* Williams, 90 Conn. 126, 96 A. R. 370 (murder); *Delaware:* 1921, Ajax Rubber Co. *v.* Rothacker, Inc., — Del. —, 114 Atl. 610 (promissory notes); *Florida:* 1891, Jacksonville T. & K. W. R. Co. *v.* Peninsular L. T. & M. Co., 27 Fla. 1, 157, 9 So. 661; 1909, Jenkins *v.* State, 58 Fla. 62, 50 So. 582; 1911, Johnson *v.* Rhodes, 62 Fla. 220, 56 So. 439; *Georgia:* 1856, Bryan *v.* Walton, 20 Ga. 480, 498, 510; 1860, Choice *v.* State, 31 Ga. 424, 465; 1897, White *v.* State, 100 Ga. 659, 28 S. E. 423; 1899, Milam *v.* State, 108 Ga. 29, 33 S. E. 818; 1903, Green *v.* State, 119 Ga. 120, 45 S. E. 990; *Hawaii:* Rev. L. 1915, § 2403; 1904, Lo Toon *v.* Terr., 16 Haw. 351, 357 (alibi); *Idaho:* Comp. St. 1919, §§ 6847, 8941; 1905, State *v.* Waln, 14 Ida. 1, 80 Pac. 221; 1919, State *v.* Mushrow, 32 Ida. 562, 185 Pac. 1075 (illegal sale of liquor); *Illinois:* 1879, Mueller *v.* Rebhan, 94 Ill. 142, 150 (quoted *supra*); 1896, Chytraus *v.* Chicago, 160 Ill. 18, 43 N. E. 335 (liberal range in rebuttal is a policy specially sanctioned in assessment cases, where the municipality cannot clearly know beforehand what parts of its case will be disputed); 1898, Washington Ice Co. *v.* Bradley, 171 Ill. 255, 49 N. E. 519; 1903, Hartrich *v.* Hawes, 202 Ill. 334, 67 N. E. 13; 1908, Floto *v.* Floto, 233 Ill. 605, 84 N. E. 712; 1910, Albrecht *v.* Hittle, 248 Ill. 72, 93 N. E. 351 (the proponent of a will must offer his expert witnesses on the case in chief, but in rebuttal he may offer expert opinion on the contestant's evidence); 1921, People *v.* Cunningham, 300 Ill. 376, 133 N. E. 270 (robbery); 1922, People *v.* Byrnes, 302 Ill. 407, 134 N. E. 730 (robbery); *Indiana:* Burns' Ann. St. 1914, § 2136 (criminal cases); 1870, State *v.* Parker, 33 Ind. 285; 1878, Holmes *v.* Hinkle, 63 Ind. 518, 523; 1881, Pittsburg C. & St. L. R. Co. *v.* Noel, 77 Ind. 110, 122; 1883, Perrill *v.* Nichols, 89 Ind. 444, 447; 1888, Kahlenbeck *v.* State, 119 Ind. 118, 122, 21 N. E. 460; 1889, Brown *v.* Marshall, 120 Ind. 323, 325, 22 N. E. 312; 1896, Ransbottom *v.* State, 144 Ind. 250, 43 N. E. 218; 1899, Ellison *v.* Branstrator, 153 Ind. 146, 54 N. E. 433; 1906, Tinkle *v.* Wallace, 167 Ind. 382, 79 N. E. 355; *Iowa:* Code 1897, §§ 3700, 5372, Comp. Code 1919, §§ 7495, 9434; 1862, Samuels *v.* Griffith, 13 Ia. 103; 1865, Donaldson *v.* R. Co., 18 Ia. 280, 290; 1871, Hubbell *v.* Ream, 31 Ia. 289, 295; Crane *v.* Ellis, 31 Ia. 510; 1872, Bouls *v.* Shields, 35 Ia. 231; 1876, McNichols *v.* Wilson, 42 Ia. 385, 392; 1882, Hess *v.* Wilcox, 58 Ia. 380, 383, 10 N. W. 847; 1905, State *v.* Seligman, 127 Ia. 415, 103 N. W. 357; 1906, State *v.* Thomas, 135 Ia. 177, 109 N. W. 900; *Kansas:* Gen. St. 1915, § 7185; 1875, Rheinhart *v.* State, 14 Kan. 318, 323; 1919, Eames *v.* Clark, 104 Kan. 65, 177 Pac. 540 (speed of an automobile); *Kentucky:* C. C. P. 1895, §§ 317,

the judge, according to the nature of the case, to allow a party who has closed his case to introduce further evidence. This depends upon the circumstances of each particular case, and falls within the absolute discretion of the judge, to be exercised or not, as he may think proper."

592, C. Cr. P. § 224; 1900, Oldham *v.* Com., — Ky. —, 58 S. W. 418; 1900, Wilson *v.* Hays' Ex'r, 109 Ky. 321, 58 S. W. 773; 1890, Williams *v.* Com., 90 Ky. 596, 14 S. W. 595 (here the Court disparages too easily the trial Court's ruling, on the theory that no discretion was actually exercised); 1904, Fletcher *v.* Com., — Ky. —, 83 S. W. 588 (Williams *v.* Com. approved); 1905, Tetterton *v.* Com., — Ky. —, 89 S. W. 8; 1912, Bennett *v.* Com., 150 Ky. 604, 150 S. W. 806; 1913, Smith *v.* Com., 154 Ky. 613, 157 S. W. 1089; *Louisiana:* 1897, State *v.* Pruett, 49 La. An. 283, 21 So. 843; 1903, Southern R. Co. *v.* Wilson, 111 La. —, 35 So. 561; 1905, State *v.* Boice, 114 La. 856, 38 So. 584; 1906, State *v.* Johnson, 116 La. 30, 40 So. 521; 1906, State *v.* Douglas, 116 La. 524, 40 So. 860; 1907, State *v.* Heidelberg, 120 La. 300, 45 So. 256; 1913, State *v.* Bellard, 132 La. 491, 61 So. 537; 1919, Snowden *v.* State, 133 Md. 624, 106 Atl. 5 (murder); *Massachusetts:* 1848, Cushing *v.* Billings, 2 Cush. 158; 1855, Com. *v.* Moulton, 4 Gray 39 (alibi); 1871, Com. *v.* Dam, 107 Mass. 210; 1878, Com. *v.* Blair, 126 Mass. 40; 1890, Com. *v.* Meaney, 151 Mass. 55, 23 N. E. 730; 1897, Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770; 1899, Lansky *v.* R. Co., 173 Mass. 20, 53 N. E. 128; 1904, Burnside *v.* Everett, 186 Mass. 4, 71 N. E. 82; 1920, Bilodeau *v.* Fitchburg & L. R. Co., 236 Mass. 526, 128 N. E. 872; 1921, Vallen *v.* Cullin, — Mass. —, 130 N. E. 204 (personal injuries); *Michigan:* 1872, Danielson *v.* Dyckman, 26 Mich. 169, 170; 1877, Somerville *v.* Richards, 37 Mich. 299, 303; 1882, Brown *v.* Marshall, 47 Mich. 576, 578, 11 N. W. 392; 1885, People *v.* Wilson, 55 Mich. 506, 515, 21 N. W. 905; 1895, Maier *v.* Benefit Ass'n, 107 Mich. 687, 65 N. W. 552; 1906, People *v.* Harper, 145 Mich. 402, 108 N. W. 688 ('corpus delicti' and eye witnesses; here, in a technical and ill-advised opinion, citing no authority, the Supreme Court interferes with the trial Court's discretion); 1921, People *v.* Utter, — Mich. —, 185 N. W. 830 (murder); *Minnesota:* Gen. St. 1913, § 7799; *Mississippi:* 1896, Winterton *v.* R. Co., 73 Miss. 831, 20 So. 157; 1897, King *v.* State, 74 Miss. 576, 21 So. 235; 1904, Flowers *v.* State, 85 Miss. 591, 37 So. 814; *Missouri:* Rev. St. 1919, § 4025; 1870, Babcock *v.* Babcock, 46 Mo. 243, 246; 1873, State *v.* Linney, 52 Mo. 40; 1898, Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053; 1900, State *v.* Weber, 156 Mo. 249, 56 S. W. 729; 1903, Beyer *v.* Hermann, 173 Mo. 295, 73 S. W. 164; 1906, State *v.* Miles, 199 Mo. 530, 98 S. W. 25; 1910, Seibel-Suessdorf C. & I. M. Co. *v.* Manufacturers' R. Co., 230 Mo. 59, 130 S. W. 288; *Montana:* Rev. C. 1921, §§ 9349, 10667, 11969; 1904, Maloney *v.* King, 30 Mont. 158, 76 Pac. 4; *Nebraska:* Rev. St. 1922, § 10144; 1897, Davis *v.* State, 51 Nebr. 301, 70 N. W. 984; 1897, Ream *v.* State, 52 Nebr. 727, 73 N. W. 227; 1900, Baer *v.* State, 59 Nebr. 655, 81 N. W. 856; 1917, O'Connor's Estate, 101 Nebr. 617, 164 N. W. 570 (handwriting witnesses, on an issue of forgery of a will); *Nevada:* Rev. L. 1912, § 7159 (criminal causes); § 5210 (civil cases); 1882, McLeod *v.* Lee, 17 Nev. 103, 118, 28 Pac. 124; Lamance *v.* Byrnes, 17 Nev. 197, 202, 30 Pac. 700; *New Mexico:* Annot. St. 1915, § 4464; 1920, State *v.* Hunt, 26 N. M. 160, 189 Pac. 1111 (murder); *New Jersey:* 1905, Willett *v.* Morse, — N. J. L. —, 60 Atl. 362; 1919, State *v.* Unger, 93 N. J. L. 50, 107 Atl. 270; *New York:* C. Cr. P. 1881, § 388; 1838, Hastings *v.* Palmer, 20 Wend. 225; 1859, Stephens *v.* People, 19 N. Y. 549, 573; 1882, Leighton *v.* People, 88 N. Y. 117, 119; 1897, People *v.* Strait, 154 N. Y. 165, 47 N. E. 1090 (sanity); 1897, People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730; *North Carolina:* 1874, State *v.* Haynes, 71 N. C. 79, 83; 1881, State *v.* King, 84 N. C. 737, 741; *North Dakota:* Comp. L. 1913, §§ 7619, 10821; 1905, Petersburg School Dist. *v.* Peterson, 14 N. D. 344, 103 N. W. 756; *Ohio:* Gen. Code Ann. 1921, §§11477, 13675; 1876, Webb *v.* State, 29 Oh. St. 351, 356; *Oklahoma:* Comp. St. 1921, §§ 541, 2687, 2869; 1904, Cochran *v.* U. S., 14 Okl. 108, 76 Pac. 672; 1919, Tingley *v.* State, 16 Okl. Cr. App. 639, 184 Pac. 599 (manslaughter; trial Court's discretion sanctioned); 1921, Beason *v.* State, — Okl. Cr. —, 195 Pac. 792 (murder); 1921, Waller *v.* State, — Okl. Cr. —, 199 Pac. 224; *Oregon:* Laws 1920, § 132; 1888, State *v.* Hunsaker, 16 Or. 497, 499, 19 Pac. 605; *Pennsylvania:* 1865, Gaines *v.* Com., 50 Pa. 319, 329; 1897, Campbell *v.* Brown, 183 Pa. 112, 38 Atl. 516; 1902, Acklin *v.* McCalmont Oil Co., 201 Pa. 257, 50 Atl. 955; 1920, Com. *v.* Morrison, 266 Pa. 223, 109 Atl. 878 (sanity); *Philippine Islands:* P. C. 1911, Gen. Order 58 of 1900, § 31; *Porto Rico:* Rev. St. & C. 1911, § 6265; *Rhode Island:* 1898, State *v.* Ballou, 20 R. I. 607, 40 Atl. 861; *South Carolina:* 1881, State *v.* Clyburn, 16 S. C. 378; 1887, State *v.* Jacobs, 28 S. C. 30, 37; 1896, Ludden & Bates S. M. H. *v.* Sumter, 47 S. C. 335, 25 S. E. 150; *South Dakota:* Rev. C. 1919, § 2505; § 4868 (substantially like Cal. P. C. § 1093, omitting the clause about previous convictions in par. 1); *Tennessee:* 1843, Smith *v.* Britton, 4 Humph. 201; 1848, Story *v.* Saunders, 8 Humph. 667; 1900, Jones *v.* Galbraith, — Tenn. —, 59 S. W. 350; 1905, Union R. Co. *v.* Hunton, 114 Tenn. 609, 88 S. W. 182; *Texas:* Rev. Civ. St. 1911,

1850, FROST, J., in *Clinton* v. *McKenzie*, 5 Strobh. 36, 42: "The rule is most salutary in its fitness to prevent trickery, and is necessary in many cases to prevent surprise and injustice. Witnesses can with difficulty be kept in attendance on the Court after they have given their testimony, and the defendant might be taken at great disadvantage if the plaintiff were permitted to return to his evidence in chief and renew the attack after the defendant had closed his case and his witnesses had left the court. This rule, like many others for the conduct of a trial, cannot however be rigorously and uniformly enforced; much must of necessity be left to the discretion of the judge. Whenever evidence has been inadvertently omitted, the uniform practice of our Courts is to permit the party to supply the omission, unless it is apparent that it will operate injustice to his adversary."

1850, WAITE, J., in *Hathaway* v. *Hemingway*, 20 Conn. 191, 195: "The rule upon this subject is a familiar one. When, by the pleadings, the burden of proof of any matter in issue is thrown upon the plaintiff, he must in the first instance introduce all the evidence upon which he relies to establish his case. He cannot, as said by Lord Ellenborough, go into half his case and reserve the remainder. The same rule applies to the defence. After the plaintiff has closed his testimony, the defendant must then bring forward all the evidence upon which he relies to meet the claim on the part of the plaintiff. He cannot introduce a part and reserve the residue for some future occasion. After he has rested, neither party can as a matter of right introduce any farther testimony which may properly be considered testimony in chief. . . . But this rule is not in all cases an inflexible one. There is and of necessity must be a discretionary power, vested in the Court before which a trial is had, to relax the operation of the rule, when great injustice will be done by a strict adherence to it. If a party, by a mere mistake or inadvertence, omit to introduce a piece of testimony constituting an essential link in his chain of evidence, and does not discover the mistake until after he has closed his testimony, the Court in its discretion will, rather than that his cause should be sacrificed, permit him to supply the omission; taking care, however, to see that the adverse party is not prejudiced by the relaxation of the rule. This discretionary power, however, is to be exercised with great caution. While the rule may be departed from for the sake of preventing great and manifest injustice, it ought not to be so frequently disregarded as to render it a rule in name and not in reality."

1859, DUNLOP, C. J., in *Spear* v. *Abbott*, C. C. D. C., Fed. Cas. 13,222: "The rule of practice in the courts of England and this country in the trial of common law causes before a

§ 1951; Rev. C. Cr. P. 1911, § 717; 1897, Burt *v.* State, 38 Tex. Cr. 397, 420, 40 S. W. 1000, 43 S. W. 344; *Utah:* Comp. L. 1917, §§ 6802, 8975; 1899, State *v.* Webb, 18 Utah 441, 56 Pac. 159 (unless the opponent clearly appears to have been put at a disadvantage); 1915, State *v.* Benson, 46 Utah 74, 148 Pac. 445 (admissions of a defendant are proper for the first time in rebuttal); *Vermont:* 1826, Pingry *v.* Washburn, 1 Aik. 264, 267; 1838, Clayes *v.* Ferris, 10 Vt. 112; 1849, Goss *v.* Turner, 21 Vt. 437, 439; 1860, Kent *v.* Lincoln, 32 Vt. 591, 598; 1883, Stevens *v.* Dudley, 56 Vt. 158, 164 (in this State the original practice, subject always to the trial Court's discretion, was to allow the plaintiff "to rest on making a 'prima facie' case, and afterwards to adduce additional as well as rebutting testimony"; but under later rules this practice was abandoned, though the principle as to discretion remains the same; see Clayes *v.* Ferris, Kent *v.* Lincoln, Stevens *v.* Dudley); 1877, State *v.* Magoon, 50 Vt. 333, 338 (applicable equally to the prosecution in a criminal case); 1883, Stevens *v.* Dudley, 56 Vt. 158, 164; 1896, Watkins *v.* Rist, 68 Vt. 486, 35 Atl. 431; 1898, State *v.* Lawrence, 70 Vt. 524, 41 Atl. 1027 (even in a criminal case, provided the defendant has had a fair opportunity to meet the evidence); *Virginia:* 1854, Brooks *v.* Wilcox, 11 Gratt. 411, 413, 417 (even after express notice by the opponent during the case in chief); 1900, Reed *v.* Com., 98 Va. 817, 36 S. E. 399; 1918, Rust *v.* Reid, 124 Va. 1, 97 S. E. 324 (testamentary capacity); *Washington:* R. & B. Code 1909, § 339; *West Virginia:* 1897, McManus *v.* Mason, 43 W.Va. 196, 27 S. E. 293; 1901, State *v.* Williams, 49 W. Va. 220, 38 S. E. 495; *Wisconsin:* 1895, McGowan *v.* R. Co., 91 Wis. 147, 64 N. W. 891; 1897, Stanhilber *v.* Graves, 97 Wis. 515, 73 N. W. 48; 1904, Schiesler *v.* State, 122 Wis. 365, 99 N. W. 593 (sanity); 1905, Steward *v.* State, 124 Wis. 623, 102 N. W. 1079 (sanity); *Wyoming:* Comp. St. 1920, §§ 5769, 7532; 1911, Russell *v.* State, 19 Wyo. 272, 116 Pac. 451.

jury requires a party to examine all his witnesses in chief before he closes his opening examination, and forbids afterwards the introduction of any other than rebutting proof. This rule in jury trials produces order and method and expedition in the transaction of business, and promotes fairness and prevents fraud in the conduct of common-law causes. It makes a party show his hand to his adversary, prevents his splitting up his proof and retaining part for reply, and defeats the fraudulent purpose, if such exists, to make evidence to overcome and fit the defense."

1879, DICKEY, J., in *Mueller* v. *Rebhan*, 94 Ill. 142, 150 (testamentary sanity; the proponent of the will had been refused a further opportunity for evidence of sanity): "As a matter or practice, the rulings of Courts are not uniform upon this question. In some Courts it is held that neither party is called upon to produce all his testimony in support of any allegation in issue until it has been developed on the trial that an issue in the evidence is made upon that question. . . . That rule has not prevailed in the Courts of this State; but the more usual rule is, that the party upon whom the burden of proof rests must, in the first instance, produce all the proof he proposes to offer in support of his allegation; and after his adversary has closed his proof, he may only be heard in adducing proof directly rebutting the proofs given by his adversary. This question of practice must, to a greater or less degree, be left to the discretion of the Court trying the case. This discretion should be exercised in such a manner that neither party shall be taken by surprise and deprived, without notice, of an opportunity of producing any material proof."

In applying this customary rule of order, however, certain distinctions must be noted:

(1) In the first place, it is not always easy to determine, in a given instance, whether the situation before the Court was one of the present sort, or involved evidence offered after the whole case is closed (*post*, § 1876), or evidence offered on a re-direct examination but during the case in chief (*post*, § 1896), or evidence offered on a recall, but still during the case in chief (*post*, § 1898); the lack of a uniform and clear nomenclature leading to frequent ambiguity in judicial language. But, as the principle of the trial Court's discretion applies in all these situations, the obscurity does no serious practical harm.

(2) In the next place, the evidence offered thus tardily may consist in *new facts* which ought to have been put in before, or in a repetition (either by a new witness or by the same former witness [2]) of *former facts already once evidenced*. The customary rule will equally forbid both. But, on the other hand, the principle of the trial Court's discretion will equally sanction either; though the reasons in a given instance for thus permitting a departure would differ in the two cases, since for the former an inadvertent omission might be a sufficient excuse, while for the latter a just cause would be found in the need of clearing up an obscurity or emphasizing a disputed point upon which substantial contest had not been anticipated; moreover, the danger of unfair surprise might be present in the former case, but could hardly exist in the latter case.

(3) The *nature of the issues* in each case will usually vary so that no more detailed rules can be laid down for determining whether a particular fact

[2] The latter situation may coincide with those of § 1896 (re-direct examination) and § 1898 (recall), *post*.

belongs in the case in chief or in the case in rebuttal. But the distribution of the *burden of proof* and the bearing of the rule as to a 'prima facie' case (*post*, § 2494) will often specially aid in determining. For example, where, in contesting a will, the proponent of the will is by those rules not required to introduce evidence of sanity, and the contestant has the duty of producing evidence of insanity, it is clear that the proponent's evidence of sanity is no part of his case in chief, and that it is therefore properly reserved until it becomes necessary in his case in rebuttal. But in a jurisdiction where the proponent is required to raise the presumption of sanity by producing some evidence of it in his case in chief, then it may conceivably (though not wisely, it would seem) be held that he must introduce it all at that time, and that he may not properly reserve it for his case in rebuttal.[3]

(4) For matters *properly not evidential until the rebuttal*, the proponent has a *right* to put them in at that time, and they are therefore not subject to the discretionary exclusion of the trial Court.[4] Matters that should have been put in at first may by that discretion be refused later, because this is but the denial of a second opportunity. But matters of true rebuttal could not have been put in before, and to exclude them now would be to deny them their sole opportunity for admission. Hence, while the trial Court's determination of what is properly rebutting evidence should be respected, yet, if its nature as such is clear, the proponent does not need the trial Court's express consent to admit it as involving a departure from the customary rule.[5]

This will always be the case for evidence offered to *impeach the opponent's witnesses* by way of moral character, bias, self-contradiction, or the like.[6] This doctrine is justly applied also where the proponent has found it necessary or desirable, by reason of the *opponent's cross-examination*, partly to *anticipate his case in rebuttal* by going into it during his case in chief, — for example, on a re-direct examination; here he may take up the same subject again during the rebuttal.[7] It has also sometimes, by discretion, been extended even to the case where this partial anticipation of the rebuttal during the case in chief has been voluntary and irregular on the proponent's part, *i. e.* where he has not had the excuse of necessity.[8] In general, such

[3] See examples in note 1, *supra*, and *post*, § 2500.

[4] Whether an error in this respect should be adequate ground for a new trial is a different question, and of course a rational liberality would seldom find here such a ground: *ante*, § 1867, note 3.

[5] 1871, Wade *v.* Thayer, 40 Cal. 578, 584; 1872, Farmers & M. Bank *v.* Young, 36 Ia. 45, 46, *semble;* 1917, State ex rel. Betts *v.* Stout, 101 Kan. 600, 168 Pac. 853; 1902, Glenn *v.* Stewart, 167 Mo. 584, 67 S. W. 237; 1902, Anaconda C. M. Co. *v.* Heinze, 27 Mont. 161, 69 Pac. 909.

[6] For example, a self-contradiction: 1911, Roberts *v.* State, 25 Del. Boyce 385, 79 Atl. 396; 1886, Winchell *v.* Winchell, 100 N. Y. 163, 2 N. E. 897; 1889, Ankersmit *v.* Tuch, 114 N. Y. 54, 20 N. E. 819.

For the general principles as to evidence in *supporting an impeached witness*, see *ante*, §§ 1104–1144.

For the doctrine that one irrelevant fact may justify *another irrelevancy in rebuttal*, see *ante*, § 15.

For the doctrine as to *impeaching an impeaching witness*, see *ante*, § 894.

[7] 1838, Briggs *v.* Ainsworth, 2 Mo. & Rob. 168.

[8] 1854, York *v.* Pease, 2 Gray Mass. 282 (here the plaintiff had anticipated a defence of privileged communication); 1820, Harrison *v.* Rowan, 3 Wash. C. C. 582 (questions as to testator's sanity, improperly asked in chief by

discretionary variations should be liberally dealt with; for nothing can be more irrational or more unjust than to apply the judicial lash of a new trial to errors of trivial importance.

§ 1874. **Opponent's Case in Rejoinder.** For the opponent's case in rejoinder there remain properly only two sorts of evidence, namely, evidence explaining away the effect of new facts brought forward by the proponent in rebuttal, and evidence impeaching the witnesses testifying in rebuttal. All other evidence could and should have been put in during the case in reply. Accordingly, evidence of the latter sort is ordinarily not to be received in the case in rejoinder; though, here as elsewhere, the trial Court in discretion may allow it to be brought forward at this time;[1] and it is here immaterial, subject to limits above noted (*ante*, § 1873, par. 2), whether the evidence consists in new facts or in a repetition of facts already once put in.

On the other hand, for evidence legitimately receivable in rejoinder — in particular, evidence impeaching rebuttal witnesses — there has been no prior opportunity to adduce it, and hence it is here entitled to be received, without depending on the Court's discretion to relax the usual order;[2] for this class of evidence, what has been said in the foregoing section (§ 1873, par. 4) is equally applicable.

§ 1875. **Stages after Rejoinder.** It is not conceivable that, after a rejoinder, there can be any evidence for which there has not already been an opportunity of admission, except evidence impeaching witnesses in the preceding stage; and even for this excepted class it can hardly be worth while to confuse the issues by new evidence of such relatively minor importance.

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the propounder of the will, allowed again in re-examination).

It would seem that rebutting facts which could have been obtained from the opponent's witness on cross-examination, but are postponed and are sought by *calling the same witness* in rebuttal, do come within the present allowance; there was a fair opportunity to bring them out and it was not availed of; hence, any later power of inquiry should be within the trial Court's discretion. *Contra:* 1901, Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884.

§ 1874. [1] In the following cases it is sometimes impossible to learn whether the Court is dealing with the present case, or with the situation involved in §§ 1897, 1899, *post* (re-cross-examination), or with that of the next note: 1895, Wilkinson *v.* State, 106 Ala. 23, 17 So. 457; 1887, Barkly *v.* Copeland, 74 Cal. 1, 8, 15 Pac. 307; 1889, First National Bank *v.* Wolff, 79 Cal. 69, 73, 21 Pac. 551, 748; 1850, Hathaway *v.* Hemingway, 20 Conn. 191, 195; 1891, Belden *v.* Allen, 61 Conn. 173, 23 Atl. 963; 1853, Walker *v.* Walker, 14 Ga. 242, 250; 1895, Willard *v.* Pettitt, 153 Ill. 663, 39 N. E. 991; 1865, Donaldson *v.* R. Co., 18 Ia. 280, 290; 1872, Cannon *v.* Iowa City, 34 Ia. 203; 1879, State *v.* Woods, 31 La. An. 267; 1886, State *v.* Gonsoulin, 38 La. An. 459, 462; 1892, State *v.* Lyons, 44 La. An. 106, 10 So. 409; 1893, State *v.* Spencer, 45 La. An. 1, 9, 12 So. 135; 1895, Devonshire *v.* Peters, 104 Mich. 501, 63 N. W. 973; 1905, State *v.* Forsha, 190 Mo. 296, 88 S. W. 746 (the rule applies equally to a defendant who did not testify in chief for the defence but offers himself in rejoinder); 1898, Argabright *v.* State, 56 Nebr. 363, 76 N. W. 876; 1859, Stephens *v.* People, 19 N. Y. 573; 1887, State *v.* Dilley, 15 Or. 75, 13 Pac. 648; 1868, Koenig *v.* Bauer, 57 Pa. 168, 172; 1850, Clinton *v.* McKenzie, 5 Strobh. S. C. 36, 41; 1874, Bittick *v.* State, 40 Tex. 117, 120; 1868, Pratt *v.* Rawson, 40 Vt. 183, 188.

For the doctrine as to *impeaching an impeaching witness*, see *ante*, § 894.

[2] 1882, Nutter *v.* O'Donnell, 6 Colo. 253, 259, *semble*; 1859, Thomas *v.* State, 27 Ga. 287, 298, *semble*; 1899, State *v.* Summer, 55 S. C. 32, 32 S. E. 771 (after new witnesses called in rebuttal, the rejoinder is entitled to impeach their character; three judges dissenting); 1860, Kent *v.* Lincoln, 32 Vt. 591, 599; 1899, State *v.* Staley, 45 W. Va. 792, 32 S. E. 198 (the rejoinder is entitled to impeach character of witness first called on rebuttal). *Contra:* 1903, Keffer *v.* State, 12 Wyo. 49, 73 Pac. 556.

Accordingly, it would seem that the trial Court's discretion should determine whether there may be any case at all in re-rebuttal or re-rejoinder. There is, however, little authority upon these rare stages of the cause.[1]

2. After Case Closed

§ 1876. **Case Closed**: (1) **Offeror's Case alone Closed.** After a party has declared his presentation of evidence to be completed, there is thenceforth no proper occasion for the introduction of evidence by him. Nevertheless, inadvertences of counsel and inevitable delay of witnesses occur constantly in trials, and it would be unnecessary and unjust to hold that from the moment of the announcement of the closing there is to be an invariable rule of exclusion. Courts are therefore agreed that, in the trial Court's discretion, evidence may none the less be subsequently admitted:[1]

§ 1875. [1] 1862, State *v.* Alford, 31 Conn. 40, 46 (re-rebuttal allowable in discretion).

Compare the rule as to *impeaching an impeaching witness*, *ante*, § 894.

§ 1876. [1] In the following rulings, it is often impossible to learn whether the Court is dealing with the situation here involved, or with that of the next section (both cases closed), or with that of § 1873, *ante* (case in chief ended); but the same general principle of the trial Court's discretion applies to all. Furthermore, the rulings and statutes under the next four sections (§§ 1877–1880), admitting evidence in discretion, would of course apply the same rule for the present situation.

ENGLAND: 1823, Brown *v.* Giles, 1 C. & P. 118 (Park, J., allowed it; but intimated a stricter rule for criminal cases); 1826, Giles *v.* Powell, 2 C. & P. 259, 261 (quoted *supra*); 1841, Johnson *v.* Clinton, A. M. & O. 123, 124 (Brady, C. B.: "It is very objectionable to be recalling witnesses to patch up a case, and if I thought there were the slightest danger of perjury I should not think of it"); 1841, Murray *v.* Dublin, A. M. & O. 130, 132 ("There may be cases where such a course would be expedient"); Kelly *v.* Smith, A. M. & O. 150; 1842, Bell *v.* Stewart, A. M. & O. 401; 1849, Middleton *v.* Barned, 4 Exch. 241, 243; 1911, Foster's Case, 6 Cr. App. 196.

UNITED STATES: *Federal:* 1840, Philadelphia & T. R. Co. *v.* Stimpson, 14 Pet. 448, 463; 1892, Omaha Bridge Cases, 10 U. S. App. 98, 191, 2 C. C. A. 174, 51 Fed. 309; *Arkansas:* Dig. 1919, § 4190; 1915, Nutt *v.* Fry, 119 Ark. 450, 177 S. W. 1137 (money due); *California:* 1859, Fairchild *v.* Stage Co., 13 Cal. 599, 605; 1872, Barry *v.* Bennett, 45 Cal. 80, 85 (refused); 1874, Abbey H. Ass'n *v.* Willard, 48 Cal. 614, 618; *Columbia (Dist.):* 1908, Central National Bank *v.* National Metropolitan Bank, 31 D. C. App. 391; *Georgia:* 1905, Brooke *v.* Lowe, 122 Ga. 358, 50 S. E. 146; 1908, Ellenberg *v.* Southern R. Co., 5 Ga. App. 389, 63 S. E. 240; 1911, Wickham *v.* Torley, 136 Ga. 594, 71 S. E. 881; *Illinois:* 1904, Hauser *v.* People, 210 Ill. 253, 71 N. E. 416; *Indiana:* 1872, Williams *v.* Allen, 40 Ind. 295, 297; *Iowa:* 1868, Huey *v.* Huey, 26 Ia. 525; 1885, Meadows *v.* Ins. Co., 67 Ia. 57, 59; 1889, Randolf *v.* Bloomfield, 77 Ia. 50, 53; 1901, Cathcart *v.* Rogers, 115 Ia. 30, 87 N. W. 738 (after motion for a verdict); 1904, Hill *v.* Glenwood, 124 Ia. 479, 100 N. W. 522; *Kansas:* 1893, Hill *v.* Miller, 50 Kan. 659, 662; *Louisiana:* 1826, Richardson *v.* Debuys, 4 Mart. N. S. 127; 1833, Stone *v.* Carter, 5 La. 448, 450; 1855, Labarre *v.* Hopkins, 10 La. An. 466; 1875, State *v.* Coleman, 27 La. An. 691, 694; 1881, State *v.* Rose, 33 La. An. 932; 1901, State *v.* Sims, 106 La. 453, 31 So. 71; 1906, State *v.* Rodriguez, 115 La. 1004, 40 So. 438; 1906, State *v.* Goodson, 116 La. 388, 40 So. 771; *Massachusetts:* 1848, Com. *v.* Eastman, 1 Cush. 189, 197, 217; 1901, Cushing *v.* Cushing, 180 Mass. 150, 61 N. E. 814; *Missouri:* 1837, Mary *v.* State, 5 Mo. 71, 80 (here on the facts, involving an agreement of counsel, the allowance was held improper); *Minnesota:* 1920, State *v.* Jouppis, 147 Minn. 87, 179 N. W. 678; *Montana:* 1904, Schilling *v.* Curran, 30 Mont. 370, 76 Pac. 998; *Nevada:* 1874, State *v.* Murphy, 9 Nev. 394, 397; *New Hampshire:* 1902, Stone *v.* Boscawen Mills, 71 N. H. 288, 52 Atl. 119 (after argument for a motion for a non-suit); *New York:* 1842, Shepard *v.* Potter, 4 Hill 202 ("No case gives a discretion to cut off further testimony, if it be pertinent, unless the party be left to the evidence as it stood when he declared his case closed"; here the Court, by calling again one of the plaintiff's witnesses, had virtually changed for the opponent the situation); *North Carolina:* 1886, Olive *v.* Olive, 95 N. C. 485, 486; *Oregon:* 1898, State *v.* Isenhart, 32 Or. 569, 52 Pac. 170; *Pennsylvania:* 1901, Com. *v.* Biddle, 200 Pa. 640, 50 Atl. 262; *Porto Rico:* 1912, People *v.* Julián, 18 P. R. 905; *Rhode Island:* 1860, Hopkinton *v.* Waite, 6 R. I. 374, 380; *South Carolina:* 1895, State *v.* Derrick,

1826, ABBOTT, C. J., in *Giles* v. *Powell*, 2 C. & P. 259, 261, said: "that he would never allow a witness to be called back to get rid of any difficulty on the merits or on anything that went to the justice of the case, but that he always allowed it to be done to get rid of objections which were beside the justice of the case and little more than matter of form."

1831, O'NEAL, J., in *Browning* v. *Huff*, 2 Bail. 174, 179: "It has been a long and well settled practice to allow a plaintiff, when evidence essential to support the issue had been omitted accidentally or from supposing that before the Court sufficient, to adduce it even after the evidence had been closed, a motion for nonsuit made and argued, and even the opinion of the presiding judge pronounced in favor of the motion. The application of this rule of practice must always be left to the discretion of the presiding judge; though it ought never to be allowed to surprise or work any delay or loss to the defendant. I am, however, unable to see that the discretion allowed to the presiding judge was improperly exercised here. For if the plaintiff could, without delaying the Court or the party, make out a fact on which the proceedings themselves informed the defendant the plaintiff did rely, and which she had omitted to prove from supposing that in point of law it could not be questioned, surely she ought to have been permitted to do so. The attainment of speedy justice is one great object of a suit at law; and it would be a bad way of attaining this end to say to a party situated as the plaintiff was in the court below, 'Your case must fail, and you must begin 'de novo,' because you did not offer evidence before you closed which you can now obtain in a few moments.'"

§ 1877. **Same: (2) Case of Both Parties Closed.** Where both parties have finally closed their cases, the possibility of unfair disadvantage to the opponent by the admission of further evidence is no doubt greater; yet the same exigency, for honest purposes and with no unfair consequences, may equally exist; and therefore all Courts agree that the trial Court may in discretion sanction its admission:[1]

44 S. C. 344, 22 S. E. 338; 1904, Davis *v.* Collins, 69 S. C. 460, 48 S. E. 469; *Vermont:* 1883, State *v.* Hopkins, 56 Vt. 250, 262; *Virginia:* 1906, Pocahontas C. Co. *v.* Williams, 105 Va. 708, 54 S. E. 868; *Wisconsin:* 1891, Humphrey *v.* State, 78 Wis. 570, 572, 74 N. W. 836.

Distinguish the rule (*post*, § 2496) that after a motion for a verdict the party, if overruled, loses the benefit of the motion by putting in evidence.

§ 1877. [1] The remarks preceding note 1, § 1876, *ante*, apply equally to the following rulings:

ENGLAND: 1725, L. C. Macclesfield's Trial, 16 How. St. Tr. 767, 1261; 1828, George *v.* Radford, 3 C. & P. 464, 466; 1859, Wilkes *v.* Heaton, 17 U. C. Q. B. 95.

UNITED STATES: *Federal:* 1898, Hart *v.* U. S., 28 C. C. A. 612, 84 Fed. 799; *Alabama:* 1841, Towns *v.* Riddle, 2 Ala. 694; 1848, Gayle *v.* Bishop, 14 Ala. 552; *Alaska:* Comp. L. 1913, § 1500 (like Or. Laws 1920, § 862); *California:* C. C. P. 1872, § 2050, *semble* (quoted *post*, § 1896); 1871, Foote *v.* Richmond, 42 Cal. 439, 442; *Colorado:* 1875, Sellar *v.* Cleveland, 2 Colo. 532, 551; 1896, Plummer *v.* Mercantile Co., 23 Colo. 190, 47 Pac. 294; 1897, Brooke *v.* People, 23 Colo. 375, 48 Pac. 502; *Connecticut:* 1904, Alling *v.* Weissman, 77 Conn. 394, 59 Atl. 419; *Florida:* 1902, Anthony *v.* State, 44 Fla. 1, 32 So. 818; 1903, Ferrell *v.* State, 45 Fla. 26, 34 So. 220; *Georgia:* 1898, Huff *v.* State, 104 Ga. 521, 30 S. E. 808; 1898, Hunley *v.* State, 104 Ga. 755, 30 S. E. 958; 1900, Ward *v.* State, 112 Ga. 75, 37 S. E. 111; 1906, Bridger *v.* Exchange Bank, 126 Ga. 821, 56 S. E. 97 (during argument on a motion to direct a verdict); *Hawaii:* 1883, R. *v.* Heleliilii, 5 Haw. 16, 19; *Idaho:* Comp. St. 1919, § 8037 (like Cal. C. C. P. § 2050); *Illinois:* 1842, Young *v.* Bennett, 5 Ill. 47; 1903, Chicago City R. Co. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087; 1887, Tucker *v.* People, 122 Ill. 583, 593, 13 N. E. 809; 1906, People *v.* Wiemers, 225 Ill. 17, 80 N. E. 45 (trial without a jury); *Indiana:* 1888, McNutt *v.* McNutt, 116 Ind. 545, 565, 19 N. E. 115; *Iowa:* 1869, Tisdale *v.* Ins. Co., 28 Ia. 12, 17; 1887, Cowan *v.* Musgrave, 73 Ia. 384, 387, 35 N. W. 496; 1889, Gorman *v.* R. Co., 78 Ia. 509, 513, 43 N. W. 303; 1892, Kimball *v.* Saguin, 86 Ia. 186, 192, 53 N. W. 116; 1893, Des Moines S. Bank *v.* Colfax H. Co., 88 Ia. 4, 55 N. W. 67; 1894, Hartley S. Bank *v.* McCorkell, 91 Ia. 660, 665, 60 N. W. 197; *Kansas:* 1875, Rheinhart *v.* State, 14 Kan. 318, 323; *Kentucky:* C. C. P. 1895, § 600; 1893, Mutual L. Ins. Co. *v.* Thomson, 94 Ky. 253, 22 S. W. 87; 1897, Froman *v.* Com., —

1801, KENT, J., in *Alexander* v. *Byron*, 2 John. Cas. 318, 319: "It can never be claimed by either party at trial as a matter of strict right, to open the cause to proof after full opportunity has been given to each side to be heard, and the testimony has been regularly and by mutual consent closed. It was therefore properly admitted, upon the argument of this motion, that the subsequent admission of testimony must rest upon the discretion of the Court, duly exercised according to the circumstances of the case. The parties must come to trial prepared, at their peril; and if either party has any good excuse for not being prepared, he is entitled of right to a postponement of the trial. . . . [Here the witness desired arrived during the argument of the defendant, who then offered him.] After the counsel for the defendant had declared that they had done with the examination of witnesses, and the plaintiff and his witnesses had in consequence of it left the court, it would then have been unreasonable to have received the witness, unless the plaintiff with his witnesses had been recalled. I do not think that witnesses are bound to stay, after the parties have declared they have done with the proofs; for this is equivalent to a discharge of the parties. If the witness had been received and had testified what he was offered to prove, it might have made a decisive change in the weight of the proofs; it would in fact have been a fresh trial of the cause; and unless the plaintiff had full opportunity to have been present with his witnesses, to have repelled the testimony if in his power, he would have had just cause to complain on the ground of surprise. . . . I cannot therefore say that in the present case the judge has not exercised a due discretion."

1811, TILGHMAN, C. J., in *Richardson* v. *Stewart*, 4 Binn. 198, 200: "I should be very tender in rejecting material testimony because offered at the last hour, unless it had been kept back by trick and the adverse party had been deceived and injured by it."

1818, CHEVES, J., in *Price* v. *Jenkins*, 1 Nott & McC. 153: "[To allow such tardy introduction of evidence] would frequently be a surprise on the opposite party which would be highly unjust. He probably would regulate his testimony by that of his opponent. He would dismiss his witnesses, when the testimony was closed in the usual manner; and, if allowed to reply, would be unable by reason of their absence. If allowed to reply and

Ky. —, 42 S. W. 728; *Louisiana:* 1841, Buel *v.* New York Steamer, 17 La. 541, 544; 1847, Le Blanc *v.* Nolan, 2 La. An. 223; 1877, State *v.* Colbert, 29 La. An. 715; 1897, State *v.* Gaubert, 49 La. An. 1692, 22 So. 930; 1898, State *v.* Jones, 51 La. An. 103, 24 So. 594; 1903, State *v.* Robertson, 111 La. 35, 35 So. 375; 1917, State *v.* Johnson, 141 La. 775, 75 So. 678 (confession); *Michigan:* 1921, People *v.* Bauer, 216 Mich. 659, 185 N. W. 694 (attempt at larceny; after "conclusion of the proofs," the case was allowed to be reopened to give evidence of venue); *Missouri:* 1841, Rucker *v.* Eddings, 7 Mo. 115, 117 (here, the trial Court's refusal to allow the other party also to put in new evidence, after one had been so allowed, was held improper on the facts); 1873, St. Louis *v.* Foster, 52 Mo. 513, 517; 1873, German Sav. Bank *v.* Kerlin, 53 Mo. 382, 384; 1883, State *v.* Smith, 80 Mo. 516, 520; 1888, Taylor *v.* Cayce, 97 Mo. 242, 251, 10 S. W. 832; 1894, State *v.* Pennington, 124 Mo. 388, 391, 27 S. W. 1106; 1896, State *v.* Eisenhour, 132 Mo. 140, 33 S. W. 785; 1897, State *v.* Laycock, 141 Mo. 274, 42 S. W. 723; 1903, Joplin Waterworks Co. *v.* Joplin, 177 Mo. 496, 76 S. W. 960; 1916 Buck *v.* St. Louis Union Trust Co., 267 Mo. 644, 185 S. W. 208 (undue testamentary influence); *Montana:* Rev. C. 1921, § 10667 (like Cal. C. C. P. § 2050); *Nevada:* 1897, Sweeney *v.* Hjul, 23 Nev. 409, 48 Pac. 1036; *New York:* 1801, Alexander *v.* Byron, 2 Johns. Cas. 318 (quoted *supra*); 1810, Mercer *v.* Sayre, 7 Johns. 306; 1825, Jackson *v.* Tallmadge, 4 Cow. 450; 1859, Williams *v.* Hayes, 20 N. Y. 58, 60; 1890, Carradine *v.* Hotchkiss, 120 N. Y. 608, 613, 24 N. E. 1020; *North Carolina:* 1892, Gregg *v.* Mallett, 111 N. C. 74, 79, 15 S. E. 936; 1896, Sutton *v.* Walters, 118 N. C. 495, 24 S. E. 357; *Oklahoma:* 1920, Felice *v.* State, — Okl. Cr. —, 190 Pac. 898 (shooting with intent to kill); 1920, Winfield *v.* State, — Okl. Cr. —, 191 Pac. 609; *Oregon:* Laws 1920, § 862 (like Cal. C. C. P. § 2050); *Pennsylvania:* 1811, Richardson *v.* Stewart, 4 Binn. 198, 200 (quoted *supra*); *Philippine Islands:* 1915, Castillo *v.* Sebullina, 31 P. I. 518, 522 (after a two years' continuance); *Porto Rico:* Rev. St. & C. 1911, § 1525 (like Cal. C. C. P. § 2050); 1908, Arruza *v.* Langier, 14 P. R. 24, 28 (breach of contract); *Virginia:* 1895, Bertha Zinc Co. *v.* Martin's Adm'r, 93 Va. 791, 22 S. E. 869; *Washington:* 1905, State *v.* Sexton, 37 Wash. 110, 79 Pac. 634; *West Virginia:* 1895, Perdue *v.* C. C. C. Co., 40 W. Va. 372, 21 S. E. 870; 1921, Jones *v.* Hebdo, 88 W. Va. 386, 106 S. E. 898 (assault); *Wisconsin:* 1890, Blewett *v.* Gaynor, 77 Wis. 378, 393, 46 N. W. 547.

he should be prepared, it would open the cause again fully as to him, to adduce any testimony in his power. The irregularity and confusion in the trial, and danger of frequent perjury, under such a practice, would be intolerable."

The practice in Chancery, as to *enlarging publication* by taking testimony after publication had passed (publication being supposed to mark the closing of the testimony on both sides) recognized also the same broad principle of discretion as controlling; but its examination is without the present purview.[2]

§ 1878. **After Argument Begun.** The presentation of evidence has naturally no place after argument on either side has begun. Moreover, a special danger of abuse for such a situation lies in the opportunity which it would afford for the deliberate coloring or manufacture of testimony to suit some specific need which may be apparent only after the opposing counsel's argument has revealed where the emphasis of his claim is placed and what conclusions he founds upon the evidence as already presented.

Nevertheless, situations may easily arise in which an honest purpose may justly be served, without unfair disadvantage, by admitting evidence at this stage; and it has always been conceded that the trial Court's discretion should not be hampered by an inflexible rule: [1]

[2] See a full and clear exposition of principle and authorities by Chancellor Kent, in Hamersly *v.* Lambert (1817), 2 John. Ch. 432.

In Edmund Burke's speech, protesting against those rulings of the House of Lords which excluded certain evidence in the trial of Warren Hastings, will be found a powerful plea for flexibility of rule in admitting evidence tardily (1794; Cobbett's Parliamentary Hist., XXXI, 347–358).

§ 1878. [1] To the following cases, add those of the next two sections, which would of course recognize the same principle of discretion for the present situation:

England: 1826, Walls *v.* Atcheson, 2 C. & P. 268, 269 ("It is better not to lay down any particular rule, but to leave it to the discretion of the judge who tries a cause, under the particular circumstances").

Canada: 1849, Scribner *v.* McLaughlin, 1 All. 379, 384; 1856, Doe *v.* Connoly, 3 All. 337.

UNITED STATES: *Federal:* 1906, Cincinnati N. O. & T. R. Co. *v.* Cox, 143 Fed. 110, C. C. A.; *Alabama:* 1883, Hobbs *v.* State, 75 Ala. 1, 6; 1889, Dyer *v.* State, 88 Ala. 225, 229, 7 So. 267 (here, after charge given); *Arizona:* Rev. St. Civ. C. § 513 ("at any time before the conclusion of the argument," the trial Court may, "where it appears to be necessary to the due administration of justice," allow omissions to be supplied, and prescribe terms); *Connecticut:* 1916, State *v.* Ricker, 90 Conn. 147, 96 Atl. 941 (reopening to correct testimony); *Florida:* 1905, Robinson *v.* State, 50 Fla. 115, 39 So. 465; 1909, Charles *v.* State, 58 Fla. 17, 50 So. 419; *Georgia:* 1860, Bigelow *v.* Young, 30 Ga. 121, 125; 1873, Eberhart *v.* State, 47 Ga. 598, 604, 607; 1888, Blackman *v.* State, 80 Ga. 785, 791, 7 S. E. 626; 1902, Duggan *v.* State, 116 Ga. 846, 43 S. E. 253; 1903, Jackson *v.* State, 118 Ga. 780, 45 S. E. 604; 1905, Roberts *v.* State, 123 Ga. 146, 51 S. E. 374; 1906, Bundrick *v.* State, 125 Ga. 753, 54 S. E. 683; *Hawaii:* 1892, Herblay *v.* Norris, 8 Haw. 335, 336; *Illinois:* 1887, Tucker *v.* People, 122 Ill. 583, 593, 13 N. E. 809; 1900, Bolen *v.* People, 184 Ill. 338, 56 N. E. 408; *Indiana:* 1857, Trees *v.* Eakin, 9 Ind. 554, 557; 1858, Coats *v.* Gregory, 10 Ind. 345, 346; 1889, Stipp *v.* Claman, 123 Ind. 532, 538, 24 N. E. 131; 1900, Roush *v.* Roush, 154 Ind. 562, 55 N. E. 1017; *Iowa:* 1856, McManus *v.* Finan, 4 Ia. 283, 287; 1862, Wheeler *v.* Smith, 13 Ia. 564; 1867, McCormick *v.* Holbrook, 22 Ia. 487, 491; 1871, State *v.* Shean, 32 Ia. 88, 93; 1880, Kemerer *v.* Bournes, 53 Ia. 172, 175, 4 N. W. 921; 1881, Darland *v.* Rosencrans, 56 Ia. 122, 124, 8 N. W. 776; 1882, Smith *v.* Ins. Co., 58 Ia. 487, 12 N. W. 542; 1884, McDonald *v.* Moore, 65 Ia. 171, 175, 21 N. W. 504; 1891, McComb *v.* Ins. Co., 83 Ia. 247, 48 N. W. 1038; 1892, Kimball *v.* Saguin, 86 Ia. 186, 53 N. W. 116; 1893, Hamilton Buggy Co. *v.* Iowa B. Co., 88 Ia. 364, 373, 55 N. W. 496; 1893, State *v.* Burke, 88 Ia. 661, 665, 56 N. W. 180; 1900, State *v.* Wright, 112 Ia. 436, 84 N. W. 541; *Kentucky:* 1837, Vicaro *v.* Com., 5 Dana 504, 509; 1849, Hendron *v.* Robinson, 9 B. Monr. 503, 505 (if it is granted to one party, the other party should be allowed to impeach); *Louisiana:*

1811, LOCKE, J., in *Parish* v. *Fite*, 2 N. C. Law Repos. 238: "It must be admitted that the regular and proper practice would be never to suffer witnesses to be introduced after the first examination, but especially after the arguments of counsel are closed; yet we are of opinion that the discretion of the judge must govern this rule of practice. The reason of the rule is grounded on the temptation it holds out for committing the crime of perjury; that when the cause has been argued and the party discovers the points on which it is to rest, the Court will not permit a party to support the weak parts of his case by a re-examination of the case. And we think it is right in every case to adhere to such a practice, unless the Court discovered the necessity of a re-examination and that it will not be productive of the evil on which the rule is founded."

1818, TILGHMAN, C. J., in *Duncan* v. *McCullough*, 4 S. & R. 480, 482: "To make a general practice of introducing new evidence when, from the argument of the adversary, it is found where the shoe pinches, might lead to perjury, and at all events it would be productive of confusion in trials."

§ 1879. **After Judge's Charge Given.** It is equally true, on the one hand, that the production of evidence after the judge has given his instructions, either in part or in whole, is untimely and should in general be refused; and on the other hand, that the trial Court may in its discretion properly allow an exception to be made; and this is the conceded principle: [1]

C. Pr. 1900, § 484 (after argument begun, no evidence admissible except by consent); 1834, Psyche *v.* Paradol, 6 La. 366, 378 (discretion intimated to exist); 1845, Thomas *v.* Kean, 10 Rob. 80, 85 (Code rule enforced); 1852, Hill *v.* Miller, 7 La. An. 621 (allowed on the facts); 1855, New Orleans *v.* Locke, 10 La. An. 730 (same); *Maine:* 1836, McDonald *v.* Smith, 2 Shepl. 99; 1880, Ruggles *v.* Coffin, 70 Me. 468, 472; 1896, State *v.* Martin, 89 Me. 117; *Michigan:* 1909, People *v.* Blake, 157 Mich. 533, 122 N. W. 113; *Missouri:* 1844, Freleigh *v.* State, 8 Mo. 606, 612 (here allowing it to the prosecution); 1921, State *v.* Stokes, 288 Mo. 539, 232 S. W. 107 (seduction); *Nebraska:* 1879, Tomer *v.* Densmore, 8 Nebr. 384, 388; 1904, Blair *v.* State, 72 Nebr. 501, 101 N. W. 17; 1820, Tucker's Trial, N. Y., 3 Amer. St. Tr. 520, 522 (larceny; ownership evidenced after argument begun); *North Carolina:* 1816, Kelly *v.* Goodbread, 2 Taylor 28; 1824, Williams *v.* Averitt, 3 Hawks 308 (disapproving Kelly *v.* Goodbread, because there the Supreme Court interfered with the trial Court's discretion); 1851, State *v.* Rash, 12 Ired. 382, 385; *Oklahoma:* 1901, Harvey *v.* Terr., 11 Okl. 156, 65 Pac. 837; *Pennsylvania:* 1818, Duncan *v.* McCullough, 4 S. & R. 480 (quoted *supra*); *South Carolina:* 1845, Colclough *v.* Rhodus, 2 Rich. 76, 78; *Texas:* Rev. Civ. St. 1911, § 1952, Rev. C. Cr. P. § 718 ("allowable, where it appears to be necessary to the due administration of justice"); 1872, Cotton *v.* Jones, 37 Tex. 34; 1906, Jones *v.* State, 50 Tex. Cr. 194, 95 S. W. 1044; 1920, Mandosa *v.* State, 88 Tex. Cr. 84, 225 S. W. 169. *Vermont:* 1897, Buchanan *v.* Cook, 70 Vt. 168, 40 Atl. 102.

§ 1879. [1] Add the rulings in the following section, whose principle would apply equally to the present situations: *Alabama:* 1889, Dyer *v.* State, 88 Ala. 229, 7 So. 267; *California:* 1872, Keys *v.* Warner, 42 Cal. 60, 62 (cause submitted on stipulations); *Indiana:* 1906, Todd *v.* Crail, 167 Ind. 48, 77 N. E. 402 (judge sitting without a jury); *Iowa:* Code 1897, § 3719, Comp. C. § 7515 ("At any time before the cause is finally submitted to the Court or jury, either party may be permitted by the Court to give further testimony to correct an evident oversight or mistake," but terms may be imposed); 1862, Samuels *v.* Griffith, 13 Ia. 103, 104 (here, after bill of exceptions prepared); 1882, Eggspieller *v.* Nockles, 58 Ia. 649, 652, 12 N. W. 708 (here, after cause decided by the Court on depositions); 1887, Baker *v.* Jamison, 73 Ia. 698, 702, 36 N. W. 647 (after chancery cause submitted); 1889, Seekel *v.* Norman, 78 Ia. 254, 262, 43 N. W. 190; 1890, Sickles *v.* Dallas C. Bank, 81 Ia. 408, 411, 46 N. W. 1089 (after chancery cause submitted and taken under advisement; under the Code, after actual final submission, no evidence can be received, but the trial Court determines what is a final submission, and where its action is equivalent to setting aside the submission, this will be sanctioned); 1891, Dunn *v.* Wolf, 81 Ia. 688, 691, 47 N. W. 887 (rule of preceding case applied); 1893, Thatcher *v.* Stickney, 88 Ia. 454, 457, 55 N. W. 488 (same); *Kentucky:* 1824, Braydon *v.* Goulman, 1 T. B. Monr. 115; *Louisiana:* 1905, Parker *v.* Ricks, 114 La. 942, 38 So. 687 (after cause submitted to judge); *New York:* 1830, Law *v.* Merrills, 6 Wend. 268, 276 (quoted *supra;* but per Walworth, C., a recall to allow a witness to re-state his alleged testimony in terms denied by the bill of exceptions is

1824, MILLS, J., in *Braydon* v. *Goulman*, 1 T. B. Monr. 115, 118: "Neither side ought to be permitted to give evidence by piecemeal, then to apply for instructions, and again to mend and add to his proof until by repeated experiments he shall make it come up to the opinion of the Court. An adherence to these rules, generally, will be found necessary in all Courts of original jurisdiction; and without them confusion, loss of time, and captious and irritable conduct will follow. We say *generally;* for it will often be found necessary and proper for the presiding Court for good reasons to depart from them to attain complete justice; and where they ought or ought not to be varied must in a great measure be left to the sound discretion and prudence of the inferior Court, and this Court for such departure ought never to interfere, except injustice is done by that departure."

1830, BEARDSLEY, Sen., in *Law* v. *Merrills*, 6 Wend. 268, 281 (dealing with a trial Court's refusal to recall a witness to re-state or to amend his testimony): "It seems to be conceded by the Supreme Court, and the law undoubtedly is so, that it is matter of discretion with the Court whether to admit a re-examination or not; and as a general rule it will be conceded that such re-examinations should be discouraged. If such discretion exists, it can most properly be exercised by the Court trying the cause. The judges decided that they considered it improper to call him. They might have discovered a readiness on the part of the witness to testify for one side only, and very properly might have refused a re-examination on that ground; they might have refused it from the manner of testifying on the part of the witness; they might also have refused it on the ground that they were satisfied that the witness did not testify as he pretended he did. Now what tribunal is so competent to decide on these questions as the Court trying the cause? It appears to me that the propriety of a re-examination must depend in a great measure upon facts and appearances discoverable only to the tribunal before whom the witness is examined, and that no other is so competent to exercise this discretion. . . . It cannot be tolerated as a legal right that parties, after they have examined and cross-examined a witness and discharged him, shall be allowed as a matter of right to call him again after the cause is submitted and he has discovered from the charge of the Court what new testimony is required, or what part must be qualified to serve the interest of the party he wishes to favor. I can readily imagine cases where it would be proper to call a new witness or adduce new testimony, after the cause had been summed up, and yet that it would be very improper to allow a witness to be re-examined for the purpose of re-stating what he had previously said. . . . If it is matter of right, it destroys all discretion; and if it may be claimed as a legal right in one case, it may be in all cases similarly situated. . . . This cannot be tolerated as matter of right."

§ 1880. **After Jury Retired.** It is clear that the reception of evidence after the jury has retired to consider a verdict reaches the extreme of irregularity. The normal time for finally closing all evidence is the time when the tribunal proceeds to deliberate upon its effect:

1642, *Lord Strafford's Trial*, Lords' Journals, April 10: "The Lords . . . propounded this question to the Judges. 'Whether it be according to the course of practice and common justice, before the Judges in their several Courts, for the prosecutors in behalf of the King, during the time of trial to produce witnesses to discover the truth, and whether the prisoner may not do likewise?' The Lord Chief Justice delivered this as the unani-

improper, the bill being conclusive); *Philippine Islands:* 1907, U. S. *v.* Cinco, 8 P. I. 389 (judge without a jury); 1907, U. S. *v.* Base, 9 P. I. 48 (same); *West Virginia:* 1889, Lewis *v.* Alkire, 32 W. Va. 504, 9 S. E. 890 (after cause taken for decision by Court sitting without jury).

Where a cause is submitted to a *Court sitting without a jury* (either under Chancery practice or in a special case at common law), it is not easy to say whether the situation is to be regarded as of the present sort or of that dealt with in the next section; but the principle would probably not differ in the two cases; the authorities are placed above.

mous opinion of himself and all the rest of the Judges: 'That according to the course of practice and common justice, before them in their several Courts, upon trial by jury, as long as the prisoner is at the bar and the jury not sent away, either side may give their evidence and examine witnesses to discover truth.'"

1794, Mr. *Edmund Burke*, Report of Committee of House of Commons, Debrett's History of Hastings' Trial, 1796, Part VII, Suppl. xxxvii: "Your Committee observes that if the rules which respect the substance of the evidence are (as the great lawyers on whose authority we stand assert they are) no more than rules of convenience, much more are those subordinate rules which regulate the order, the manner, and the time of the arrangement. These are purely arbitrary, without the least reference to any fixed principle in the nature of things or to any settled maxim of jurisprudence; and consequently are variable at every instant, as the conveniences of the cause may require. We admit that, in the order of mere arrangement, there is a difference between examination of witnesses in chief and cross-examination; and that in general these several parts are properly cast according to the situation of the parties in the cause. But there neither is nor can be any precise rule to discriminate the exact bounds between examination and cross-examination. So as to time, there is necessarily some limit, but a limit hard to fix; the only one which can be fixed with any tolerable degree of precision is when the judge, after fully hearing all parties, is to consider of his verdict or his sentence."

Nevertheless, here too it may occur that evidence excusably omitted at an earlier stage may be honestly offered and justly received without unfair disadvantage to the opponent. In respect to the danger of such an exception, there is no radical difference between the preceding situation and the present one; for the chief danger lies only in the opponent's dismissal of his witnesses and in the unfair use of hints derived from the argument of counsel and the judge's charge. If an exception may be allowed after those stages have been reached, it requires no stretch of principle or of policy to allow it in the present stage. Accordingly, it is generally agreed that the trial Court, in its discretion determining the exigency, may exceptionally admit evidence at this stage.[1]

§ 1881. **After Verdict Rendered.** It has never been supposed that after the rendering of a jury's verdict at common law the admission of further evidence would be justified by any exigency.[1] In Chancery, however, where

§ **1880.** [1] 1680, Hale, Pl. Cr., II, 307 (at the jury's request); 1767, Buller, Trials at Nisi Prius, 308 (same); 1910, Garner *v.* State, 97 Ark. 63, 132 S. W. 1010; 1906, Watson *v.* Barnes, 125 Ga. 733, 54 S. E. 723; 1917, People ex rel. Boos *v.* St. Louis I. M. & S. R. Co., 278 Ill. 25, 115 N. E. 854 (tried before a judge only); 1885, Meadows *v.* Ins. Co., 67 Ia. 57, 59, 24 N. W. 951 ("at any time before verdict"); 1891, McComb *v.* Ins. Co., 83 Ia. 247, 48 N. W. 1038, *semble;* 1912, People *v.* Ferrone, 204 N. Y. 551, 98 N. E. 8; 1811, Parish *v.* Fite, 2 N. C. Law Repos. 238; 1865, Van Huss *v.* Rainbolt, 2 Coldw. Tenn. 139, 141 (re-stating his testimony); 1915, Galan *v.* State, 76 Tex. Cr. 619, 177 S. W. 124 (murder; sheriff's testimony admitted, to answer a question propounded by the jury after retirement; Davidson, J., diss.); 1889, Meserve *v.* Folsom, 62 Vt. 504, 505, 511, 20 Atl. 926; 1851, Livingston *v.* Com., 7 Gratt. Va. 658; 1916, State *v.* Littleton, 77 W. Va. 804, 88 S. E. 458; *Contra:* Conn. Gen. St. 1918, § 5785 ("After the cause is committed to the jury," no evidence shall be received).

Compare the cases cited in the preceding section, of evidence offered after submission to a Court sitting without a jury.

§ **1881.** [1] A radical and perhaps useful expedient, helping to flexibility, has been inserted into some *Canadian* codes: *Alta.* Rules of Court 1914, No. 192 (like Ont. Rule 257, for trials without a jury); *B. C.* Rules of Court 1912, No. 457A (like Ont. Rule 257); *Man.* Rev. St. 1913, c. 46, Rule 585 (like Ont. Rule 257); *Ont.* Rules of Court 1914, R. 257 (rule for allowing a verdict to be rendered conditionally on subsequent proof of a fact

the jury are merely an advisory body whose report on questions of fact does not form a part of the judgment nor bind the Chancellor in his action, the cause may of course in his discretion be further investigated by him, either by rejecting the verdict entirely or by supplementing it, and the admission of other evidence after receiving the jury's verdict is therefore allowable if he considers it necessary.[2]

B. STAGES OF EXAMINATION FOR THE INDIVIDUAL WITNESS

§ 1882. **Order of Examination in General.** Where there are opposing parties, it is obvious that both cannot examine a witness at the same moment. There are therefore three conceivable ways of arranging the order of questions as between the parties. (a) The calling party and the opposing party might put questions, one after the other, *on each topic* as it came up, with no regularity or restriction, until each had asked as many questions as he chose; this plan would secure the minimum of restriction and would tend to the maximum of confusion. (b) Or, going to the other extreme, it might be required that the *calling party examine all his witnesses* before the other party asks any questions of any of them, the other party then examining all the original witnesses, together with his own additional ones, without interruption; this plan would avoid all confusion due to the opposing party's interruption of the order of questions, but it would increase the confusion which arises from the separation of topics naturally connected in each witness' testimony. (c) Or, taking a medium course, the calling party might be required to examine each witness originally without interruption, and then the other party, at the close of each single examination, be required and allowed to put such questions as he desired, so as to dispose entirely of each witness, by a *double examination*, before another witness was called; this plan avoids the extreme of confusion due to either of the above causes.

It is this third plan that the common law fixed upon long ago, as embodying practically the greatest advantages and the fewest disadvantages:[1]

1726, C. B. GILBERT, Evidence, 146: "The witness produced must first be examined on the part of the producer, and then the other side may examine him; and this is a regulation that naturally follows the true order of things; for it is proper first to enquire what a witness can prove, before you are to examine what hath not fallen under his knowledge."

1746, L. C. HARDWICKE, in *Lord Lovat's Trial*, 18 How. St. Tr. 658: "My lords, the rule for the examination of witnesses in this Court, in either House of Parliament, and everywhere else, is that . . . all questions that are asked, whether touching the matter of fact to be tried or the credibility of the witness, are to be asked at the proper time.

omitted); *Yukon:* Consol. Ord. 1914, c. 48, Rule 268.

But the jury may be *recalled*, before separation, to *reconsider* a verdict founded on a palpable but inadvertent failure to observe instructions (*post*, § 2350).

[2] 1891, Clavey *v.* Lord, 87 Cal. 413, 416, 419, 25 Pac. 493.

§ 1882. [1] Many codes explicitly confirm this common-law rule; the provisions are quoted *ante*, § 1866.

The party who produces a witness has a right to go through the examination first, and then the other side cross-examines him; and after that is over, the judge asks him such questions as he thinks proper; unless, as I said before, there be any objections to the questions, or any doubtful matter arises that wants immediately to be cleared up. The same method is to be observed here; and the reason of it, my lords, is that unless your lordships observe this method, you will be in perpetual confusion."

The peculiar effects of the common-law arrangement, as contrasted with the other two modes, is on the one hand, that it secures to each party the untrammelled pursuance of his own line of proof in the handling of each witness; and, on the other hand, that it provides for the exhaustion of the entire knowledge of each witness at a single occasion by the successive examination of both parties before he leaves the stand, and thus secures the concentrated attention of the tribunal to the significance of his testimony as a whole and the bearing of his general credit on his specific statements. This general purpose and spirit of the common-law method will be of importance in assisting to solve the much-mooted problem of the scope of cross-examination.

Thus the questions that arise for consideration involve mainly the propriety of exceptionally allowing a second examination by either party while the witness is still on the stand, and of allowing his recall after he has left the stand when the parties have once declared their examinations ended, as well as of determining the allotment of topics to these various stages of examination. The stages may therefore be grouped under the following heads: 1. Original Call: *a.* Direct examination; *b.* Cross-examination; *c.* Re-direct examination; *d.* Re-cross-examination; *e.* Subsequent examinations; 2. Recall: *a.* for Direct examination; *b.* for Cross-examination; 3. Re-recall, for either party.

1. Original Call

§ 1883. **Direct Examination, in general; Putting in Documents.** There are in general no detailed rules limiting the topics appropriate for the direct examination. The party at that time puts in the evidence constituting his own case; but the rules that affect him therein have reference to the stage of the case at large, and not to the stage of examination of the individual witness; accordingly, all the rules already dealt with (*ante*, §§ 1869–1872), though they find usual application during a direct examination, have no essential connection with it.

Furthermore, it is of course expected that the first or direct examination will be utilized for obtaining all that the witness knows in the party's favor, so that no further examination will be needed for the same party; and this assumption is the foundation of the rules that apply when a re-direct examination (*post*, § 1896) or a recall (*post*, § 1898) is desired. And finally, the direct examiner is entitled to complete his examination on all the desired topics before the opponent's cross-examination begins,— a fundamental rule

of the Anglo-American system, protecting the examiner from distracting interruptions.[1]

There seems to be but one rule distinctively affecting the direct examination as such, namely, that in *proving a document's execution*, the document must be formally put in evidence and read to the jury *before the close of the direct examination* of the proving witness; otherwise, a party might unfairly postpone putting in the document until the witness had left the stand, and the opponent would thus be deprived of the opportunity of cross-examining the witness as to its contents.[2] This rule is in spirit akin to that already noted (*ante*, § 1838) requiring the document's exhibition to the opponent; and it may profitably be compared with the rule for documents proved on cross-examination (*post*, § 1884), the rule in The Queen's Case for documents used in contradiction of a witness (*ante*, § 1259), and the rule for documents lost and the like (*ante*, §§ 1870–1872).

§ 1884. **Cross-Examination, in General; Postponement and Waiver; Putting in Documents.** The cross-examination, or examination by the party not calling the witness, *follows immediately* the direct examination, in customary order prescribed by the common law (*ante*, § 1882).

Since the purpose of this immediate sequence is to furnish the tribunal with the means of fixing the net significance of the witness' testimony while the tenor of his direct testimony is fresh in their minds, it seems proper enough to hold that the *opponent is entitled* to this *immediate sequence*, in order to expose without delay the weak points of the testimony against him.[1] Yet it can hardly be doubted that, upon the general principle of the trial Court's discretion (*ante*, § 1867), a postponement may be granted where fairness seems to require it.[2] Conversely, the *calling party is entitled* ordinarily to insist that the cross-examination be had immediately; though here also the trial Court's discretion may postpone it, in part or in whole, at the opponent's request;[3] especially since the full significance of the cross-

§ 1883. [1] *Cal.* C. C. P. § 2045 ("The direct examination must be completed before the cross-examination begins, unless the Court otherwise direct"); repeated in the other Codes founded on the California Code.

[2] This rule has been laid down in only a few jurisdictions, but it deserves wider acceptance: *Ark.* Dig. 1919, § 4194 (if a writing is "proved by the witness and allowed by the Court, it must be read to the jury before his testimony is closed; otherwise, it cannot be read unless the witness is recalled"); *Ida.* Comp. St. 1919, § 8041 (writing proved by a witness "must be read to the jury before his testimony is closed, or it cannot be read except on recalling the witness"); *Or.* Laws 1920, § 866 (like Ida. Comp. St. 1919, § 8041).

§ 1884. [1] 1856, Fralick *v.* Presley, 29 Ala. 457, 461; 1905, Miller *v.* Carnes, 95 Minn. 179, 103 N. W. 877; 1879, State *v.* McNinch, 12 S. C. 89, 95 (the Court allowed the prosecution to withdraw a witness at the close of his direct testimony, because of his intoxication, intimating that he could be later recalled for cross-examination; held improper).

But where the *party opponent* is called, under the statutes (*ante*, § 916) permitting him to be treated as if on cross-examination, this is perhaps to be regarded as a stage in itself, so that the opponent cannot thereupon as of right testify further for himself, as if on redirect examination; the trial Court may therefore require him to wait till his own case is put in: 1900, Jones *v.* Bradford, 79 Minn. 396, 82 N. W. 651; 1904, Olson *v.* Aubolee, 92 Minn. 312, 99 N. W. 1128.

The statutes quoted *ante*, § 1866, lay down the orthodox rule for the sequence of cross-examination; but their provisions should not be deemed to prevent the above flexibility.

[2] 1888, Parnell Commission's Proceedings, 7th day, Times' Rep. pt. 2, pp. 46, 66.

[3] 1820, Queen Caroline's Trial, Linn's ed., I, 207; s. c., 2 B. & B. 287; 1874, Rush *v.*

examination can often not be brought out until other witnesses of the calling party have testified. But where the opponent has once entirely waived cross-examination, he may not later claim the privilege without the Court's consent given in discretion.[4]

When there are *two or more opponents*, the order of their respective cross-examinations must rest with the trial Court to determine.[5]

Where the cross-examiner *proves a document* by the witness, under the orthodox rule allowing him to put in his own case on cross-examination (*post*, § 1885), it would seem that he ought to be obliged to put it in formally as evidence *before closing his cross-examination*, so as to enable the calling party to reëxamine the witness as to the document,[6] for reasons much the same as in the case (*ante*, § 1883) of a document proved on direct examination; the only conceivable (but hardly sufficient) ground for distinction is that in the present case the witness is under the calling party's control and may therefore be kept in court for a prospective reëxamination when the cross-examiner shall have later put in the document. Where the document is one containing a *self-contradictory statement used to impeach the witness*, it seems that this result is indeed reached by the rule in The Queen's Case (*ante*, §§ 1259).[7]

§ 1885. **Putting in One's Own Case on Cross-Examination**: (1) **Orthodox Rule**; (2) **Federal Rule**. The great question that arises as to the scope of the cross-examination is whether the opponent may upon the cross-examination elicit the witness' knowledge as to *facts that constitute part of the opponent's own case*, or whether he is confined to the matters already dealt with in the direct examination or at least to the topics connected therewith.

French, 1 Ariz. 99, 140, 25 Pac. 816 ("The party entitled to cross-examine may waive his rights to do so at the time, and recall the witness and cross-examine him after he opens the case").

[4] 1895, Chapman *v.* James, 96 Ia. 233, 64 N. W. 795.

For the *consequences* of a loss of the opportunity to cross-examine, through *postponement* or through the *witness' illness* or *death*, with reference to the inadmissibility of the direct testimony, see *ante*, §§ 1391, 1392.

[5] 1892, State *v.* Howard, 35 S. C. 197, 14 S. E. 481.

For the rule against using *more than one counsel to cross-examine for the same party*, see *ante*, § 783.

For the restriction of the *length of time* of a cross-examination, see *ante*, § 783.

[6] *Accord:* the statutes cited *ante*, § 1883. *Contra:* 1835, Holland *v.* Reeves, 7 C. & P. 36, 39; 1905, Armour Packing Co. *v.* V. Y. Produce Co., — Ala —, 39 So. 680, *semble* (the document cannot be put in until the cross-examiner's own case is opened).

Conversely, the cross-examiner is *entitled* to put it in then: 1833, Stephens *v.* Foster, 6 C. & P. 289 (paper referred to in cross-examination of a deponent; cross-examiner is entitled to read it as a part of the cross-examination). *Contra:* 1816, Graham *v.* Dyster, 2 Stark 21, 23 (the plaintiff having failed to produce letters on notice from the defendant, the latter was not allowed to cross-examine the plaintiff's witnesses to the contents; such proof being properly reserved till the time when the originals would have been produced); 1817, Sideways *v.* Dyson, 2 Stark. 49 (the plaintiff having refused to produce his books during cross-examination of his own witnesses, the defendant was not allowed to give evidence of their contents at that stage, although the rule was conceded to be "rigorous"); both of these rulings were by L. C. J. Ellenborough.

Otherwise, naturally, in Courts which do not accept the orthodox rule (*post*, § 1890) for cross-examination: 1903, Kroetch *v.* Empire M. Co., 9 Ida. 277, 74 Pac. 868 ("The practice of allowing a party to identify and introduce exhibits on cross-examination of his adversary's witness . . . should seldom be permitted").

[7] Compare also the other rules as to documents (*ante*, §§ 1878, 1883), and the rule for *showing the document to the opponent* (*ante*, § 1861).

(1) In England, and in the United States down through the first quarter of the 1800s, there was apparently but one view upon this subject. There seems, indeed, to have been no question at all; so that in English judicial opinions an express statement of the rule is scarcely to be found.[1] That rule — which may be termed the orthodox one — adopted the former of the above alternatives:

1829, SUTHERLAND, J., in *Fulton Bank* v. *Stafford*, 2 Wend. 483, 485: "When a witness has been sworn in chief, the opposite party may not only cross-examine him in relation to the point which he was called to prove, but he may examine him as to any matter embraced in the issue. He may establish his defence by him without calling any other witnesses. If he is a competent witness to the jury for any purpose, he is so for all purposes."

(2) But in the year 1827, Chief Justice Gibson, of Pennsylvania, in dealing with a related point, chanced to remark (without citing an authority), that, as the ordinary rule, the cross-examining party should not "prove his case by evidence extracted on cross-examination," and also that a witness may not be cross-examined to facts which are "wholly foreign to what he has already testified":

1827, GIBSON, C. J., in *Ellmaker* v. *Buckley*, 16 S. & R. 72, 77: "A witness may not be cross-examined to facts which are wholly foreign to the points in issue (and I would add, to what he has already testified) for the purpose of contradicting him by other evidence. . . . In ordinary cases, the witness may be cross-examined by the party adverse to him whose witness he is at the time, and even then only to discredit him or to bring out something supposed to be withheld; . . . [but this is subject to enlargement in the Court's discretion in special cases], and for myself, I would not without further consideration pronounce the exercise of the discretion, depending as it does on circumstances which cannot be fully made to appear in a court of error, to be a legitimate subject of a bill of exceptions. If, then, a party may not prove his case by evidence extracted on a cross-examination after he has proposed his case to the jury, 'a fortiori' he may not do so before."

The remarks put forth in this opinion (which were by no means consistent with themselves, and contained the germs of a practice that would have been repudiated by the great Chief Justice) seem to have received no further attention at the time in other Courts. But in 1840, Mr. Justice Story (also speaking obiter, and also without citing a single authority) was found to lay down in the Federal Supreme Court a rule of similar purport, though of slightly different phraseology — a difference, nevertheless, which has served more than anything else to introduce the extreme rule (equally unanticipated by the learned Federal judge) which now prevails in many jurisdictions.

This rule — which may be termed the Federal rule, because through Mr. Justice Story's sponsorship it lost its local character and obtained wide currency — was as follows:

1840, STORY, J., in *Philadelphia & T. R. Co.* v. *Stimpson*, 14 Pet. 448, 461: "[The answers in controversy were inadmissible] upon the broader principle (now well established, although sometimes lost sight of in our loose practice at trials) that a party has no right

§ 1885. [1] See the English cases applying it, *post*, §§ 1891–1893.

to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progesss of the cause."

Where the great Federal judge — the most versatile and encyclopedic mind among American jurists — obtained the "established" rule thus first introduced into circulation, it is difficult to say.[2] He did not find it in the orthodox and accepted common-law practice either of England or of the United States; for there appear to have been up to that time (except in Pennsylvania) no other rulings to that effect. It is clear that the earlier practice, as ascertainable from prior rulings in half a dozen jurisdictions,[3] had been in harmony with the orthodox English practice. It is possible that Mr. Justice Story was merely expounding the Pennsylvania rule, as he was bound to do (*ante*, § 6) for a Federal trial Court sitting in Pennsylvania.[4] It is also possible, and even probable, that he had in mind a passage, uttered just a hundred years before, in which Lord Hardwicke's recollection, when sitting as Chancellor, of the practice at the common-law bar, is made to serve as authority:

1740, L. C. HARDWICKE, in *Dean of Ely* v. *Stewart*, 2 Atk. 44, "laid down the following rules in this cause: . . . Where at law a witness is produced to a single point by the plaintiff or defendant, the adverse party may cross-examine as to the same individual point, but not to any new matter; so in equity, if a great variety of facts and points arise, and a plaintiff examines only as to one, the defendant may cross-examine to the same point, but cannot make use of such witness to prove a different fact." [5]

The practice at common law at the time when the Chancellor spoke does not bear him out in his assertion;[6] nor can his authority to speak of the common-law rule be regarded as weighty, for his experience at that bar had been comparatively scanty.[7] So far as the practice in chancery may have seemed to Justice Story to have a bearing, it was hardly fitted to come into competition with the common-law rule as a claimant for favor. The rule

[2] 1874, Dunne, C. J., in Rush *v.* French, 1 Ariz. 99, 133, 25 Pac. 816: "We cannot know what the Court meant by saying that the principle involved in the second declaration was 'well settled.' They could not have meant well settled in England, for such had never been the rule there; nor in Massachusetts, Vermont, New York, Ohio, Wisconsin, or Missouri. The case they had in hand was from Pennsylvania, and the rule in that State was, it is true, settled, as the Supreme Court says; but whether they meant that, or that it was settled in the United States circuit court for Pennsylvania, or what they meant, we cannot tell."

[3] See the rulings cited *post*, § 1890, in Maryland, Louisiana, Massachusetts, Missouri, New Jersey, New York, North Carolina, South Carolina, and the Federal Court.

[4] Compare the remark of C. J. Dunne, in note 2, *supra*.

[5] The same judge is elsewhere reported as follows: 1743, L. C. Hardwicke, in Vaillant *v.* Dodemead, 2 Atk. 524 (said that "wherever at law the party calls upon his own attorney for a witness, the other side may cross-examine him, but that must be only relative to the same matter, and not as to other points of the cause"; but this is explained easily enough as stating the limited effect of the waiver of the privilege, *post*, § 2324).

[6] Of the later practice there can be no doubt whatever; see §§ 1891–1893, *post*.

[7] He was only three years at the common-law bar, then fifteen years at the chancery bar, then Chief Justice of the King's Bench (mainly in criminal cases) for three years; and had been four years Lord Chancellor in 1740.

in chancery was indeed apparently what Lord Hardwicke declared it to be (though, oddly enough, there appears to have been no other ruling than his own during the course of a century).[8] But the system of cross-examination in chancery had long been notoriously a failure, and was already practically abandoned as a weapon of defence.[9] It was therefore singular that Justice Story (if indeed he was thinking of the chancery rule) not merely should have deviated without precedent into a practice having in this respect conditions peculiar to itself and differing radically from the common law, but should have gone for guidance to a system of cross-examination which had for a generation or more been stunted and devitalized.

In any event, the rule thus presented by him to the country at large must be regarded as a sudden innovation upon the hitherto general and accepted practice of the common law, both in England and in the United States. Whatever its later currency, it came before the profession at that time as an interloper, with all the weight of experience against it. It was bound to justify itself, in reason and in policy. Whether it has done so may now be considered.

§ 1886. **Same: Original Form of the Federal Rule; Trial Court's Discretion; Cross-Examiner's own Affirmative Case excluded.** Before considering the respective policies of these opposing rules, it is necessary to keep in mind that in their original form they were never put forward by their eminent sponsors as anything but rules of customary and normal practice, subject always to the general principle (*ante*, § 1867) that the *trial Court may in its discretion allow exceptions*. Chief Justice Gibson, the very progenitor of the Federal rule, declared radically that he "would not without further consideration pronounce the exercise of the discretion, depending as it does upon circumstances which cannot be fully made to appear in a court of error, to be a legitimate subject of a bill of exceptions." In the Pennsylvania and the Federal Supreme Courts — the two most notably associated with this rule — this controlling principle of discretion has from time to time been expressly emphasized (*post*, § 1890). In this pure form of these rules, then, the supposed disadvantages, which have been by the champions of either put forward as marking the enforcement of the other rule in extreme cases, are reduced to a minimum, and may often be practically inconsiderable. The

[8] Gresley, Evidence in Equity, 50, and Daniell, Chancery Pleading and Practice, I, 922, cite only this case of Ely *v.* Stewart.

[9] 1837, Gresley, Evidence in Equity, 50, note ("Cross-examination, except on this point [to credit], has fallen very much into disuse"); Plumer, V. C., quoted in Gresley, *ubi supra*, 75 ("The glaring defect in the system of taking evidence in chancery, and that which renders it insufficient for the elucidation of truth, is the total exclusion of anything like an effective cross-examination. Each party is ignorant, not only of what the witnesses on the other side have said, but of what they have been asked. In such total darkness, a cross-examination is seldom attempted; the most experienced practitioners, I believe, recommend it only in cases where the witness is one whom it would be necessary or prudent to have examined in chief; . . . [this] leaves the examination in Chancery a mere 'ex parte' proceeding, and little better than evidence by affidavit"). Compare the authorities cited *ante*, § 1367.

trial Court's discretion is intended to give a flexibility that will obviate these occasional disadvantages.

Thus the only question of controversy that would properly have remained would be whether the one or the other is better suited to be the foundation for the usual (not the necessary or invariable) order of evidence. But unfortunately this same qualification, always assumed by the inventors of the rule as an inseparable part of it, has usually been lost sight of by their followers — at least among the adherents of the Federal rule. While seldom expressly denying the principle of discretion, they have come practically to ignore it. By ignoring it, they have reduced the rule itself to a fixed and deadened formula; and they have thus emphasized and made actual and frequent the possibilities of practical harm which were otherwise only latent in it. In considering, therefore, the policy of the Federal rule as actually administered by most of the Courts adhering to it, account must be taken of the drawbacks which attend its actual workings in this extreme form, even though they were not inherent in the rule as originally advanced and correctly applied.

Furthermore, the rule has suffered degeneration in another respect, in the hands of most of its modern adherents. For it would seem that both of the eminent judges, Gibson and Story, who promulgated it, understood it to exclude only the putting in of the opponent's *own case*, *i. e.* the new facts constituting his affirmative defence (whether strictly appropriate to an affirmative plea or not); yet their language made it possible for their followers to forbid an examination to anything but the *precise matters testified by the witness on the direct examination*, even to matters which properly concerned the calling party's own case under the allegations of his pleading. This extreme interpretation of the rule has also led to the emphasizing of special disadvantages, which must be reckoned with in weighing the respective policies of the two rules as actually administered. The arguments against the Federal rule (set forth *post*, § 1888) are both entitled and obliged to deal with it in the degenerate form in which to-day it is practised in most of its jurisdictions.

§ 1887. **Same: Policy of the Federal Rule.** The Federal rule has labored under one notable disadvantage, namely, it has never found, among judges of accepted eminence, a single defender other than its progenitor, Chief Justice Gibson. In searching for the reasons upon which the rule is supposed to be founded, attention is attracted by the circumstance that the greatest names are found as expositors of the reasons against the rule. The best that can be said on behalf of the rule seems to be contained in the following passages:

1843, GIBSON, C. J., in *Floyd* v. *Boward*, 6 W. & S. 75, 76: "The difficulty is to find a reason for those English decisions which hold the party to a different course, and allow the witness to be cross-examined to every transaction within his knowledge in the hands of the party who is first compelled to call him. This would seem to be foreign to the end of a cross-examination, which is not to give the party an advantage in the manner of introducing the facts of his case, but to test the credibility of the witness as to what he has

testified; . . . and I may add that to reward a party with the privilege of putting leading questions for bringing forward a branch of his case out of order would reward him for throwing the cause into confusion. Where the testimony of a witness is required to establish a fact which is part of the defence, it is a dictate of justice that no advantage be given to either party in the manner of eliciting it. But an advantage is in truth given, and for no adequate reason, when a party is allowed to bring out his part of the case by cross-examination, merely because the opposite party had been compelled to call the witness in the first instance. . . . It would be better to say that each party should call the witness to serve his turn, and make him his own for the time being, than to entangle the justice of the case in those distinctions with which the English judges have surrounded it. A plaintiff may be compelled to call the defendant's principal witness to some matter of formal proof, and it is easy to see that the justice of the case would not be promoted by allowing the defendant for that reason to break in on the plaintiff's order of proof by introducing his defence and eliciting the testimony in support of it by leading questions."

1856, BACON, J., in *People* v. *Horton*, 4 Mich. 67, 82: "It is certainly desirable not to mingle up and thus confuse the testimony of the opposing parties. If the plaintiff first presents all his testimony which he considers necessary to support his case, without allowing the defendant at the same time to offer a part or all of the testimony upon which he relies, and then the defendant presents the evidence which properly pertains to his defence, the line of separation is well kept up. No confusion is likely to follow; and the jury, if there be one, will be less likely to fall into mistakes or to overlook material facts. Nor do we see any objection whatever to this rule. It certainly tends to promote method and order, — two cardinal points in presenting evidence to a judge. The rule merely regulates the manner of the examination. The party loses no rights; he only postpones the time of introducing his witnesses."

1856, HANDY, J., in *Mask* v. *State*, 32 Miss. 405, 430: "I consider this latter [or Federal] rule as founded on the sounder reason and as establishing the better practice. Cross-examination, 'ex vi termini,' must relate to what has been stated by the witness on his examination in chief, and it could not properly be denominated cross-examination when it extended to new matter, about which the witness had given no testimony. Suppose the first witness introduced by the plaintiff testifies only to an isolated fact, as, for example, the execution of a document relied on by the plaintiff as evidence; would it be competent for the defendant to anticipate the merits of the case to be developed by the plaintiff, and, by way of cross-examination, to examine the witness as to matters which he supposed to be involved in establishing the plaintiff's case, and go into the merits of the whole case? Such a course would scarcely be sanctioned or tolerated by any court. And why? Because it would tend to subvert the regular order of presenting the case, and lead to confusion. . . . The same principle which governs the pleadings between the parties should regulate the exhibition of the proof upon the trial; and as each pleading should be strictly in answer to that to which it applies, so the cross-examination of each witness should be confined to the matter testified to in his examination in chief, in order to produce certainty and distinctness in ascertaining the facts to be proved. This course, while it is sanctioned by the rules of logical proceeding, can be productive of no prejudice to a party desiring to prove by the witness other matters than such as are embraced in the examination in chief; for it is well settled that he may, afterwards, introduce him as his own witness, to prove any matters pertinent to the merits of the cause, and that the adverse party having called him, is thereby precluded from objecting to his competency, or from impeaching his credibility. It is no just objection to this view of the subject, that the party against whom the witness is originally called should not be compelled to introduce him as his own witness to the new matter, and thereby preclude himself from impeaching his credit. For if he would rely upon the new matter proved by the witness, it would be against his interest to impeach him; and it is to be presumed that if he wished to impeach him, he would not introduce him to prove material facts in his case."

1864, WALKER, C. J., in *Stafford* v. *Fargo*, 35 Ill. 481, 486: "[The opponent] has only the right to cross-examine upon the facts to which he [the witness] testified in chief. If he can give evidence beneficial to the other party, he should call him at the proper time and make him his own witness and examine him in chief, thereby giving the other party the benefit of a cross-examination on such evidence in chief. Otherwise the party calling the witness would be deprived of a cross-examination as to evidence called out by the other side, and the party against whom the witness was first called would obtain the advantage of getting evidence under the latitude allowed in cross-examination."

These reasons suggest the following comments:

(*a*) A reason advanced by Chief Justice Gibson is that it is "*foreign to the end of cross-examination* . . . to allow the witness to be cross-examined to every transaction within his knowledge." This, however, is a mere begging of the very question at issue. Furthermore, the general nature of the common-law arrangement of examinations (*ante*, § 1882) suggests precisely the contrary, namely, that the function of cross-examination is to exhaust the witness' knowledge on all points on which he has any that is relevant to the trial. A much more natural assumption is the one made by the judges later quoted (*post*, § 1887),[1] namely, that the "primary obligation of the oath is to elicit the whole truth."

(*b*) Another reason put forward is that this rule "tends to *promote order and method*." If by this be meant that the rule is in theory more orderly, in that it aims to keep the facts of the opponent's case from confusing the jury and complicating the proceedings until the proponent has fully set forth his own case, this much may be conceded for the rule in its pure form,[2] although in its usual form there is not even the semblance of such a scientific demarcation, since the rule turns on whatever line of facts the proponent may have chosen to take up in the direct examination. But if it be meant that simplicity is actually attained and that confusion is in fact avoided, the precise contrary has been shown by experience.

(*c*) Another suggested reason is that the *calling party otherwise loses the benefit of cross-examination* on the facts forming part of the opponent's case. But why should he *not* lose the benefit of cross-examination? He has called the witness, and the sole purpose of cross-examination (*ante*, § 1368) is to enable the non-calling party to bring out facts ignored or suppressed by the calling party's examination. By direct examination and by re-direct examination the calling party may bring out any fact whatever that assists his case. The notion that he has any need for a cross-examination is unfounded. The re-direct examination is for him a cross-examination to all intents and purposes.

§ 1887. [1] For example, Mr. J. McIver and Mr. J. Campbell.

[2] Even this reason would substantially disappear if sanction were given (by law) to the sensible proposal of an experienced judge of the New York Supreme Court, Mr. Justice Leventritt (The Brief, vol. II, p. 330, June, 1900), namely, that the defendant be allowed a concise opening statement of his case in opposition, immediately after the plaintiff's opening. Moreover, this reason hardly applies at all to a plaintiff's cross-examination of a defendant's witness.

(*d*) A fourth reason, and the one most frequently reiterated, is the apprehension that "if a defendant could make out his case on cross-examination, he might employ *leading questions* for the purpose." This is indeed a lamentable bugbear; for it is purely the creature of imagination. The adoption of the Federal rule will not of itself muzzle the opponent and stifle his obnoxious leading questions; for it is clear (*ante*, § 773) that he may ask them in any event. The prohibition of leading questions is designed to prevent a willing witness from accepting the suggestions put into his mouth by counsel; it applies, therefore, 'prima facie,' to the counsel of the calling party, and it does not apply, 'prima facie,' to the cross-examining party (*ante*, § 769). The rule as to asking about one's own case on cross-examination is purely a matter of the order of presenting facts. But the rule as to leading questions concerns the partisan disposition of the individual witness, and depends on the supposed willingness of a partisan witness to assist his party. Thus the rule exceptionally may be relaxed if the witness appears hostile to the calling party, and exceptionally may be enforced if he appears eager to befriend the cross-examining party (*ante*, §§ 773, 774). Its criterion is solely the individual witness' state of mind, — not the kind of fact that is to be asked, nor the stage of asking. The very same fact may be asked of witness Doe on cross-examination by a question leading in form, but may not be asked of witness Roe in that form. It is therefore a complete misconception of the principle of leading questions to suppose that the use of leading questions on cross-examination furnishes any objection to the opponent's asking at that stage about the facts of his own case, or that it supplies any reason for favoring the calling party by forcing the cross-examiner to call the witness again so that the former may ask leading questions. If the witness is hostile to the opponent, he should be and would be allowed to put his questions in leading form whether he asked them on cross-examination or whether he called the witness anew at a later stage; and conversely, if the witness is hostile to the original calling party, the opponent should not and could not ask leading questions any the more on this cross-examination than on a direct examination at a later stage. This objection, then, may be dismissed as founded on a fallacy.[3]

(*e*) Another objection, analogous to the preceding one, but less often mentioned, is that, but for this Federal rule, the cross-examining party could, on cross-examination or otherwise, *impeach the witness* through whom the facts of his own case are thus proved, though he could not do so if he had been compelled to call him for the purpose at a later stage. But, again, the question occurs, Why should he not? The cross-examiner has not called the witness, nor, by calling, represented him as worthy of credit (*ante*, § 896). Why should he not expose his lack of credit, while at the same time utilizing the testimony in his favor for what it may be worth? Furthermore, the opponent, even after calling the witness himself, may still show his specific falsities

[3] See its appearance in a practical form, *ante*, § 915 (impeaching one's own witness).

(*ante*, § 907) and probably his self-contradictions (*ante*, § 905); and thus but little of real service has been accomplished. The appearance in this connection of the unreasoning and ill-deserving rule against impeaching one's own witness is merely another illustration (*ante*, § 899) of its power to make disturbance and confusion without profit to any one.

§ 1888. **Same; Policy of the Orthodox Rule.** The Federal rule was introduced by two great judges into a system of practice which had apparently up to that time known it not. On the names of those judges, however, it speedily was carried into favor in many Courts.[1] Its original attraction to its propounders lay probably in its apparently logical allotment of 'suum cuique' in the presentation of the respective cases. But it remained to be tested by experience and to be compared in operation with the original and orthodox rule. Within a generation it had ample opportunity for this test; and its practical weaknesses soon became apparent enough.

In the following passages will be found the expositions of these defects as noted in experience by some of the most eminent names in the law of Evidence, as well as some 'a priori' suggestions, shrewd in their prophetic tenor, by judges who wrote before the Federal rule had been promulgated or had obtained any footing. The names of Shaw, Bigelow, Martin, Campbell, Christiancy, and Cooley form a brilliant list; and the weight of their opinions counts heavily against an unfortunate rule which has threatened to dominate our entire system of practice:

1806. *Per* CURIAM, in *Sawrey* v. *Murrell*, 2 Hayw. 397: "It would be a very dangerous consequence if when produced by the plaintiff the defendant could not interrogate the witness except as to the facts which she had deposed for the plaintiff; for then all distinct facts within her knowledge, however much they would operate for the benefit of the defendant if brought out, must remain undrawn from the witness, for fear of the defendant's being precluded from the advantage of proving her want of credit."

1811, MARTIN, J., in *Durnford* v. *Clark*, 1 Mart. La. 202 (on Lord Hardwicke's opinion, *supra*, being cited): "I have never known this practice to prevail, and I cannot on this dictum set the verdict of the jury aside. It must be understood as a rule of discipline, introduced for the purpose of preserving regularity in the admission of testimony. Every witness must be sworn to tell the whole truth; and if the defendant is not allowed to examine the plaintiff's witness at first to any point material to the defence, he has certainly a right to call back the witness and examine him while introducing his own testimony. If therefore the defendant's counsel in the present case might at any [*i. e.* some] stage of the trial have compelled the witness to disclose the fact which has been drawn during the cross-examination, no injury has been done to the plaintiff by obtaining this part of the evidence a little earlier than in the regular way."

1835, SHAW, C. J., in *Moody* v. *Rowell*, 17 Pick. 490, 499: "Where a witness is called to a particular fact, he is a witness to all purposes, and may be fully cross-examined to

§ 1888. [1] Professor Greenleaf's treatise appeared in 1842, two years after Mr. J. Story's opinion was rendered; and no doubt the former's treatise served as an efficient medium for propagating the latter's rule. "The rule is now considered by the Supreme Court of the United States to be well established," is its language (§ 445); and yet the author was unable to cite a single other authority than the rulings of Floyd *v.* Bovard and Phila. & T. R. Co. *v.* Stimpson. Thus the great judge's name and the author's reverence for his opinion (the treatise was dedicated to him) combined to manufacture the rule almost out of whole cloth.

the whole case. . . . It is most desirable that rules of general practice, of so much importance and of such frequent recurrence, should be as few, simple, and practical as possible, and that distinctions should not be multiplied without good cause. It would be often difficult, in a long and complicated examination, to decide whether a question applies wholly to new matter or to matter already examined to in chief."

1854, BIGELOW, J., in *Beal* v. *Nichols*, 2 Gray, 262, 264: "A party calling a witness, even for formal proof of a written instrument or other preliminary matter, thereby makes him his witness. . . . It follows that the adverse party has the right to cross-examine upon all matters material to the issue. Experience has shown that this rule is convenient and easy of application in practice, and works no disadvantage to the party who produces a witness. On the other hand, a different rule, by making it necessary for the Court during the examination of a witness constantly to determine what is or is not new matter upon which the opposite party has the right to put leading questions, leads to confusion and delay in the progress of trials."

1861, Messrs. *Douglass*, *Fenton*, *Sutherland*, and *Avery*, arguing in *Campau* v. *Dewey*, 9 Mich. 381: "In our judgment it [the English rule] is the only rule which leaves the course of cross-examination sufficiently free and unobstructed to make it effective for the attainment of truth in respect to the matters in controversy. The rule laid down in People *v.* Horton [quoted *supra*, § 1887], however plausible in theory, is exceedingly mischievous in practice. It is altogether too nice and refined for practical application. Under it, in most litigated cases, questions of relevancy, often of the most difficult and perplexing nature, are perpetually springing up during the progress of the trial, occupying the time of the Court, and distracting the jury with their discussion; and each of these questions must be decided by the presiding judge upon the spot, at the peril of a reversal of the judgment, to the great injury of the party if, from misrecollection of the witness' testimony in chief, misapprehension of the nature of the issue, or any other cause, he commits an error, although the error, if in the way of overruling an objection, in most instances works no practical injustice. But this is not all. The worst effect of the rule is that it greatly impairs the efficiency of cross-examination. If there are any evils in the practical working of the English rule of sufficient magnitude to call for its modification or abandonment, they are all avoided, as well as the evils of the rule laid down in People r. Horton, by adopting the rule that whether a party shall be allowed to cross-examine his adversary's witness as to the whole case, or by leading questions, rests in the sound discretion of the Court."

1861, CHRISTIANCY, J., in *Campau* v. *Dewey*, 9 Mich. 381, 417: "[1] When a witness is called and examined by a party, the law and the oath impose the obligation to state the whole truth, — all the facts within the knowledge of the witness bearing upon the question in controversy upon which his testimony is sought. The witness may be cognizant of some facts which, considered without reference to others equally within his knowledge, would tend strongly to prove the issue in favor of the party calling him; while at the same time there may be other facts equally within his knowledge, which, considered without reference to the former, would have an opposite tendency, or which, considered in connection with them, would explain away or modify the former and give a very different effect to the whole. Should a witness in such a case disclose only that class of facts which operated in favor of the party calling him, his testimony, though true in the detail, would be false in the aggregate, and have all the effect of intentional falsehood; and, if aware of the nature of the controversy in which he is called to testify, he would be guilty of perjury as much as if he had wilfully falsified the facts stated by him; and this whether he were cross-examined or not. It is the disclosure of the facts known to the witness (bearing on the issue) *as a whole* which the law seeks; and a direct examination which should be perfectly fair would in such a case disclose both classes of facts and present the witness' knowledge as a whole. But the party calling the witness may so adroitly direct the examination in chief as to disclose only that class of facts which tend to establish the issue in his favor and to conceal those which would destroy or modify their effect. And as Courts, from their ignor-

ance of the extent of the witness' knowledge and of the plan arranged by the party calling him, have no means of enforcing the perfect fairness of a direct examination, the law has given to the opposite party the right to cross-examine the witness, for the purpose, among others, of bringing out the facts thus concealed, which tend to explain away or modify the effect of those stated on the direct examination or to rebut the inference which would otherwise result from them. . . . Such I think are the purely logical principles of cross-examination. . . . But there are many objections to the rule as applied in People *v.* Horton. [2] It impairs the efficiency of cross-examination as a means of detecting error and exposing falsehood, and renders it comparatively easy for a corrupt party, by the aid of corrupt witnesses, to fabricate fictitious cases without the risk of impeachment, compelling the opposite party to make the witness his own as to facts which might tend to modify the effect of his evidence; thus precluding the power of impeachment. [3] It tends to break up into detached and widely separated fragments the state of facts within the knowledge of the witness bearing upon the same main point, and which would be much better understood if stated as one connected whole. The testimony of other (and perhaps many other) witnesses intervening between the parts of the witness' testimony, the jury are more likely to confound the testimony of one witness with that of another. The bearing of the different parts of the witness' testimony upon each other, and any discrepancies which may exist, are not so easily discovered, and consequently the credit of the witness is not so correctly estimated. [4] But there is a practical difficulty in the application of this rule (as understood in People *v.* Horton), inherent in the rule itself, and which can only be avoided by getting rid of the rule as there applied. It adopts, as the test of the relevancy of a cross-examination, the bearing of the particular facts sought to be elicited by it upon the particular facts brought out on the direct examination; instead of the main fact or facts which these particular facts tend to prove; and as these particular facts are often very numerous, and their number and character incapable of restriction, and the question of relevancy may arise upon any two of them, and as the degrees of relation between them may be as numerous and varied as the facts themselves, it is easy to see that questions of this kind must be constantly arising, till the case bristles with points of relevancy. The rule therefore leads to almost infinite embarrassment; and it must and often does require more time to dispose of these questions of relevancy (under this rule thus understood) than would otherwise be required for the trial of the cause."

1862, CAMPBELL, J., in *Chandler* v. *Allison*, 10 Mich. 477: "The only object of this process is to elicit the whole truth concerning transactions which may be supposed to have been only partially explained, and where the whole truth would represent them in a different light. Whenever an entire transaction is in issue, evidence which conceals a part of it is defective, and does not comply with the primary obligation of the oath, which is designed to elicit the whole truth. If the witness were (as he always may be) requested to state what he knows about it, he would not do his duty by designedly stopping short of it. Any question which fills up his omissions, whether designed or accidental, is legitimate and proper on cross-examination. . . . A party cannot glean out certain parts, which alone would make out a false account, and save his own witness from the sifting process by which only those omissions can be detected. There could be no such thing as cross-examination if such a course were allowed. . . . No one can be compelled to make his adversary's witness his own to explain or fill up a transaction he has partially explained already."

1878, COOLEY, J., in *New York Iron Mine* v. *Negaunee Bank*, 39 Mich. 644, 659 (after quoting Mr. J. Campbell's words *supra*): "One might suppose, after reading this language, that it was written in anticipation of the proceedings in this very case. . . . Here the matter in issue was confined to the single point of Wetmore's authority to make and indorse the paper sued upon.[2] . . . But although he was the first witness called, and the case involved nothing but paper made or indorsed by himself, he was not asked respecting his

[2] The next two sentences are for clearness' sake transferred here from the preceding page of the opinion.

signatures, and the notes were not offered in evidence while he was upon the stand. The reason for this was apparent as soon as the cross-examination commenced; for when the witness was asked any questions concerning the notes, the purpose of which was to show that he had signed or indorsed them without authority and in fraud of defendant, and that he had admitted that such was the fact, objection was at once interposed on behalf of the plaintiff; and the circuit judge, remarking that the witness had given no testimony in reference to the notes nor had any testimony been introduced by any other party in reference to them nor had the notes been put in evidence, sustained the objection. The questions on behalf of the plaintiff had been carefully restricted to that part of the facts which it was supposed would tend in its favor, and in respect to which a cross-examination could not be damaging, and were intended, instead of eliciting the whole truth, to conceal whatever would favor the defense. The witness, instead of being required, according to the obligation of his oath, to tell the whole truth, had been carefully limited to something less than the whole; and when questions were asked calculated to supply his omissions, they were ruled out because they did not relate to the precise circumstances which the plaintiff had thought it for his interest to call out. It would be difficult to present a more striking illustration of the error in the rule in People *v.* Horton than is afforded by this case. For here was the principal actor in the transaction under investigation brought forward as a witness to support his own acts, but carefully examined in such a manner as to avoid having him utter a single word regarding the main fact — though it was peculiarly within his own knowledge, — and even his handwriting was left to be proved by another. In that manner he was made to conceal not merely a part of the transaction but a principal part, and made to tell, not the whole truth according to the obligation of his oath, but a small fraction only, — a fraction, too, that was important only as it bore upon the main fact which was so carefully kept out of sight while this witness was giving his evidence. It is true, the defense was at liberty to call the witness subsequently; but this is no answer; the defense was not compellable to give credit to the plaintiff's witness as its own for the purpose of an explanation of facts constituting the plaintiff's case and a part of which the plaintiff had put before the jury when examining him. One of the mischiefs of the rule in People *v.* Horton was that it encouraged a practice not favorable to justice, whereby a party was compelled to make an unfriendly witness his own, after the party calling him had managed to present a one-sided and essentially false account of the facts, by artfully aiding the witness to give such glimpses of the truth only as would favor his own side of the issue. What has been said on this point has in substance been said many times before. The necessity of repeating it is a singular illustration of the difficulty with which a mischievous but plausible precedent is sometimes got rid of." [3]

The chief objections to the Federal rule may be summarized as three in number; and although these apply in aggravated degree to its degenerate form only, and not to its original and pure form, nevertheless, as already suggested (*ante*, § 1886), the rule must be reckoned with as it usually is applied and not as it might be:

(1) The necessity of determining, for each question on cross-examination, whether the fact inquired for is properly a part of the case of one or the other party produces delay, propagates confusion, and increases the opportunities for securing a re-trial on trifling errors of ruling which do not affect the merits of the cause or the truth of the facts. Even under a strict system of pleading, this possibility is great; but under the prevailing loose system of pleading

[3] In Detroit & M. R. Co. *v.* van Steinburg, 17 Mich. 99, 109, the same judge had forcibly expounded the evils of the rule here repudiated.

they are legion. Moreover, under the degenerate form of the rule (*ante*, § 1886), not even the rules of pleading can furnish a guide; the line of distinction changes with every witness, it is both variable and uncertain; and it requires either an impossible feat of memory or a constant perusal of a stenographic report to ascertain the standard of decision. Thus are caused additional labor in preparation for trial, delay and confusion in its progress, and an increased contingency that the work must be done over again at a new trial. (2) The opportunities for successful unfair tactics are increased, by enabling the calling party to suppress part of the facts, so as to oblige the cross-examiner to call the witness later as his own.[4] The latter's right to do this is for him usually no just equivalent; first, because the proper time to extract the desired facts effectively is the time immediately after the direct examination; and, secondly, because with a hostile witness it is often dangerous, if not impossible, to attempt to obtain the facts fully at the later stage. The result is (as the calling party hopes) often to prevent the cross-examiner from obtaining the desired facts at all, because he does not feel justified in risking the exercise of his right to call the witness subsequently. This evil is the more emphasized where the witness is himself the party opposed to the cross-examiner; especially in a criminal case, where the prosecution could not call the accused as its own witness, except under the restrictions of the privilege against self-crimination (*post*, § 2276). (3) It hampers the cross-examiner subjectively in exercising the fundamental right of cross-examination; because, in many jurisdictions following this rule, the erratic corollary is enforced that, by asking about his own case on cross-examination, the opposing party makes the witness his own and therefore becomes unable to discredit him (*ante*, § 914); the consequence being that the cross-examiner feels himself in a constant danger of overstepping the line and losing his right to expose a false witness, and thus is obliged to leave a large margin for safety. That this produces an unnecessary labor and responsibility, and has inevitably a dulling effect upon what should be the sharp weapon of cross-examination, must be apparent. In this respect the rule has a vicious indirect effect in helping to disarm the opponent of his greatest protection against fraud and perjury. A perusal of some of the modern rulings enforcing this pedantic application discloses better than anything else the degenerate and pettifogging influence of the rule in question.

These objections, together with other minor ones noted by the various judges, ought to be enough to stem the progress of this rule. In its two generations of existence it has gone into many Courts; but in most of these it is not too late to turn — if not to repudiate the rule, at least to revise and restore it to its original and pure form. It was accepted in almost every instance merely upon authority, and under the belief that it was, in the eminent

[4] Particularly in the case of an accused offering himself as a witness; see the citations *post*, § 1890.

jurist's language, "well established." Since the test of experience has passed, few have been found to defend it; nor can it be successfully defended. It has sometimes been called the American rule. It is not yet entitled to that name, and it must never be.

§ 1889. **Same: (3) Michigan Rule; Cross-Examination to Facts Modifying the Direct Examination.** It has already been noted (*ante*, § 1886) that, so far as the Federal rule has any claim to scientific orderliness, it rests on the assumption that to each party is apportioned a stage of the trial for the presentation of the facts supporting his own case, and that it is proper for him to present the evidence of those facts in that stage only. Hence, the extent of the prohibition, as it affects the cross-examiner, is limited to those facts which would have formed a *part of his own affirmative case* at a later stage. In this, the pure and only plausible form of the rule, the cross-examiner may still inquire as to all facts which *modify* or *explain away the effect of the facts of the proponent's case as brought out on the direct examination;* and the prohibition applies only to his *own affirmative case*, since the former class of facts would not in themselves be a part of the cross-examiner's own case. This form of the rule is still open to the first and perhaps other objections already noted (*ante*, § 1880). But unfortunately the originating words of Justice Storey and of Chief Justice Gibson (quoted *ante*, § 1885), prohibiting all except "facts *connected with the matters stated in his direct examination*," gave to the rule a much broader and a wholly unscientific form. In the result (contrary, perhaps, to their real expectations) the latter form, based upon their literal expressions, came to be accepted in most of the Courts following their rule, producing in its application the most serious of the disadvantages latent in it. Against this degenerate form and its practical results, a number of Courts have earnestly protested. These have striven, while accepting the rule, to enforce it in its pure and only defensible form, and to diminish its rigor by a generous interpretation. There is a difficulty in defining the line of distinction, especially under a loose system of pleading; but the general purpose and theory is plain enough.

This form of the rule may be termed the Michigan rule, since the Court of Michigan has not only most fully expounded it but has by its sound exposition done particular service in arresting the progress of the inferior form:

1861, CHRISTIANCY, J., in *Campau* v. *Dewey*, 9 Mich. 381, 419: "It is further essential to the development of the true logical idea of cross-examination to observe that it is the tendency of the direct examination which determines the subject of it of a test of cross-examination. For example, it is that essential or ultimate fact in the plaintiff's case which determines the logical limits of the cross-examination, and not merely the particular minor facts and circumstances tending to the proof of that fact. As the plaintiff is at liberty to adduce any number of these particular or secondary facts, however disconnected with each other, so that they tend to the proof of the essential resultant fact which he is bound to establish; so must the defendant be equally entitled on cross-examination to elicit any number of such particular facts as may tend to disprove that resultant fact or to weaken

the tendency in its favor of the particular facts stated on the direct examination.[1] . . . But these remarks must be confined to such facts on cross-examination as go to controvert so much of the plaintiff's case as the direct testimony tended to prove. The party against whom the witness is called has no right (and, I think, should not have, under any rule) on cross-examination to go into an independent or affirmative case on his own part, which does not controvert the 'prima facie' case which the direct testimony tended to prove, but seeks to meet it by matter substantially in the nature of confession and avoidance; as to the facts constituting such a defense, the onus of proof is on the defendants. And where two or more main facts are essential to the plaintiff's 'prima facie' case, such as the title of the plaintiff and conversion by the defendant in trover, and the direct examination has been confined to matters tending only to the proof of one of these main facts, the defendant should not be allowed to cross-examine as to the other;[2] as this would have no relation to the evidence in chief, and could not therefore in any logical sense be denominated a cross-examination. Such, I think, are the purely logical principles of a cross-examination. To apply these principles to the case before us. The main question in controversy was the identity of the person under whom the plaintiffs claimed with the person described in the treaty by the name of Taucumegoqua. The burden of proving this identity rested with the plaintiffs throughout the case. This fact was necessary to constitute a 'prima facie' case for the plaintiffs, and without it the defendants needed no defense. It was a fact, then, which belonged to the plaintiffs', not the defendants' case. . . . From the peculiar nature of the question, anything which tended to show that some other person was the reservee intended by the treaty would also tend to show that the person under whom the plaintiffs claimed was not. It is therefore a mistake to suppose that this could only be shown for the purpose of proving title in the defendants; it would defeat the title of the plaintiffs, and this was all that the defendants were required to do; [and questions as to the presence at the treaty-making of another person of the same name were proper on cross-examination]."

1862, CAMPBELL, J., in *Chandler* v. *Allison*, 10 Mich. 460, 477: "The principal point in controversy was whether Allison had an unqualified present interest as a tenant of Chandler. That he was a tenant was conceded, and the only point in issue on that subject was whether, under the terms of his holding, Chandler had a right to require him to leave, in order to rebuild upon the premises. The questions put to the witness [Allison, the plaintiff, testifying for himself in an action of trespass against Chandler for expelling him,] were aimed at ascertaining the precise terms of the letting. . . . It is difficult to perceive any principle upon which such questions can be held improper on cross-examination. The only object of this process is to elicit the whole truth concerning transactions which may be supposed to have been only partially explained, and where the whole truth would present them in a different light. Whenever an entire transaction is in issue, evidence which conceals a part of it is defective, and does not comply with the primary obligation of the oath, which is designed to elicit the whole transaction. . . . When the answers are given, the nature and extent of the transaction becomes known from a comparison of the whole, and each fact material to a comprehension of the rest is equally important and pertinent."

1874, *Rush* v. *French*, 1 Ariz. 99, 134, 138, 139, 25 Pac. 816. The following rule was laid down by the majority, per GARBER, J.: "1. When an adverse witness has testified to any point material to the party calling him, he may then and there be fully cross-examined and led by the adverse party upon all matters pertinent to the case of the party calling him, except exclusively new matter; and nothing shall be deemed new matter except it

§ 1889. [1] The next two sentences are here inserted from the preceding page of the opinion.

[2] Notice that this sentence represents a qualification or sub-variety of the foregoing proposition; and is lacking in some statements of the rule, *e. g.* in Rush *v.* French, *post.* It embodies the really vicious feature of the inferior practice, namely, making the rule depend not on the nature of the *issues under the pleadings*, but on the *topics* which the *direct examiner has pleased to mention in his questions.*

be such as could not be given under a general denial; 2. The fact that evidence called forth by a legitimate cross-examination happens also to sustain a cross-action or counter-claim affords no reason why it should be excluded." Upon this the following comments were made by DUNNE, C. J.: "[The rule as stated by Justice Story] is very broad; it covers an inquiry into 'all the facts and circumstances *connected* with the *matter* stated in the direct examination.' But while it is broad, it is also uncertain, and uncertainty is almost the greatest defect a rule can have. Whatever may be urged against the English rule, it cannot be charged with uncertainty. It possesses certainty even to my lord Coke's celebrated third degree. There is little danger of trenching upon its limitations; for it is practically without any. We do not wonder that it is popular with judges; for it relieves them of all anxiety upon one of the most intricate and delicate branches of their duty. But it seems very hard that a party may be allowed to set up new matter in defense and draw the proof to support it out of the plaintiff's witnesses by cross-examination; doubtless it is the apprehended hardship of this part of the rule which has te[illegible]ourts to depart from it. But whenever they have done so, and have failed to [illegible]e other definite rule, great trouble and difficulty have followed. . . . We have [illegible]bjection to the [Federal] rule as stated by Judge Garber [being in substance the r[illegible]oted *supra*], and that is the difficulty of applying it with certainty in the hurry of nisi prius trials. The test as to whether matter is or is not new matter of defense is, Can it be given in evidence under a general denial? and very often it is not easy to say at a moment's notice whether the matter is new or not in this sense. The rule would hardly forward business on the trial; there would be the same objection by counsel as to admissibility, the same consumption of time in argument, and the same hesitation on the part of the Court to decide. But there is this advantage [over the looser form of the Federal rule]: after the trial is over, all parties know just what is necessary to determine whether an appeal will lie or not; they know where the line is drawn; they can look for it, and when they find it they know that they have struck 'wall rock,' and that it is useless to go further; this is a great deal better than trusting to some other man's idea of the general equities of the case. Still, it is a very poor substitute for the plain, simple, English rule, which avoids all possibility of dispute, saves all contention at the trial, dispatches the business at once, and yet, according to the testimony of our oldest and busiest State, hurts nobody."

1881, BREWER, J., in *Blake* v. *Powell*, 26 Kan. 320, 326: "A cross-examination is not limited to the very day and exact fact named in the direct examination. It may extend to other matters which limit, qualify, or explain the facts stated on the direct examination, or modify the inferences deducible therefrom, providing only that such matters are directly connected with the facts testified to in chief."

§ 1890. **Same: State of the Law in the Various Jurisdictions.** 1. With reference to the *discretionary power of the trial Court* to allow variations from the customary order, it is clear (*ante*, §§ 1867, 1885, 1886) that this is an inherent assumption in each rule as properly understood. The Courts following the orthodox rule seldom forget this; and the Courts in which the Federal rule originated (Pennsylvania and the Federal Court) are still found recognizing it fully, and declining ordinarily to consider as an error any variation sanctioned by the trial Court. But in many of the Courts following the latter rule the qualification as to discretion is usually ignored, and the rule is enforced in its most bigoted form.

2. With reference to the customary *scope of the facts* that may be sought on cross-examination, the inferior form of the Federal rule is found now applied in the majority of jurisdictions. In a large minority the orthodox

rule prevails. In a small minority (notably Michigan and California) the better form of the Federal rule (termed above the Michigan rule) is carefully enforced. As between the two forms of the Federal rule it is sometimes difficult to ascertain which has been adopted, and there are sub-varieties of it.

3. As applied to the *party-opponent* testifying in a civil case, the extreme rule is apt to be modified.[1] As applied to an *accused* taking the stand in his own favor, the rule is often attempted to be juggled with,[2] and is also subject to confusion with other principles, to be later discriminated (*post*, § 1895).[3]

§ 1890. [1] Compare the cases cited *ante*, § 916.

[2] Compare the rulings in California and Missouri, intended to prevent this. As applied to an accused the rule is particularly absurd, because the prosecution cannot call him as its own witness.

[3] The rulings in the various jurisdictions are as follows; but for an accused or a civil opponent as witness the rulings are sometimes affected by the statutes quoted *ante*, § 488 (making parties competent), and by the statutes quoted *ante*, § 916 (impeaching one's own witness); and the rulings as to an accused's waiver of privilege against self-crimination (*post*, § 2276) are sometimes not to be distinguished from those under the present rule:

England (the cases are cited *post*, §§ 1891–1893).

Canada: *British Columbia:* St. 1902, c. 22, § 6 ("in cross-examination questions may be asked with regard to any matter referred to in the evidence of the witness while under examination in chief"); St. 1903–1904, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 4 (repeals St. 1902, c. 22, § 6); this part of the repeal is an unfortunate step backwards, and should be reconsidered;
Manitoba: St. 1906, 5 & 6 Edw. VII, c. 17, § 2, Rev. St. 1913, c. 46, Rule 474 (a party, etc., to a civil action "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");
New Brunswick: 1859, Atkinson *v.* Smith, 4 All. 309 (defendant not allowed to cross-examine to an affirmative defence; good opinion by Parker, J.); 1870, Fredericton Boom Co. *v.* McPherson, 2 Han. 9 (defendant allowed to prove payment on cross-examination, but not a set-off; 1870, Gilbert *v.* Campbell, 13 N. Br. 55, 58 (English rule followed); 1892, Schofield *v.* Anderson, 31 N. Br. 518;
Ontario: 1859, Lamb *v.* Ward, 18 U. C. Q. B. 304, 313 (per Burns, J.: "That rule [of England] has always prevailed in this country until questions have been made at Nisi Prius within the last year"; but limiting the examination of an opponent as a witness, under statutory implication); 1861, Dickson *v.* Pinch, 11 U. C. C. P. 148 (treating the party like other witnesses; good opinions by Draper, C. J., Richards and Hagarty, JJ.; per Richards, J.; "The rule which prevails in England and Ireland, and which I have always understood to be in force here," permits a witness to be called on "to state all he knew about the matters in dispute").

United States: *Federal:* 1820, Harrison *v.* Rowan, 3 Wash. C. C. 580 ("Upon the cross-examination of a witness, he may be asked leading questions, to draw from him a further disclosure than was made upon the principal examination and in reference to the matter testified about. But if the cross-examination respects new matter, leading questions cannot be asked"; the ruling thus shows no indication of a practice at this time to forbid questions as to new matter, but rather the contrary: the rule as to leading questions was an independent one, *ante*, § 915; note here, too, that the Court was trying a will issue directed by itself in Chancery, yet does not refer to a Chancery rule); 1840, Philadelphia & T. R. Co. *v.* Stimpson, 14 Pet. 448, 461 (Federal rule laid down; quoted *ante*, § 1885); 1861, Johnston *v.* Jones, 1 Black 209, 226 (rule of the preceding case "adhered to"); 1863, Houghton *v.* Jones, 1 Wall. 702, 706 ("the rule has been long settled"); 1873, Rea *v.* Missouri, 17 Wall. 532, 542 (cross-examination is "usually confined within the scope of the direct examination"; but "a greater latitude is undoubtedly allowable" for a party-opponent as witness; when the range is thus enlarged, the trial Court's discretion controls); 1879, Wills *v.* Russell, 100 U. S. 621, 625 ("A party has no right" to examine on new matter "without leave of the Court," but no precedent has declared that judgment will be reversed for a relaxation of the rule; "it clearly would not be a ground of error, unless it appeared that it worked serious injury to the opposite party"); 1883, Gilmer *v.* Higley, 110 U. S. 47, 49, 3 Sup. 471 (cross-examination held improperly restricted); 1899, Mont-

gomery *v.* Ins. Co., 3 C. C. A. 553, 97 Fed. 913 (rule applied); 1899, Merchants' Life Ass'n *v.* Yoakum, 39 C. C. A. 56, 98 Fed. 251 (rule applied); 1900, McBride *v.* U. S., 42 C. C. A. 38, 101 Fed. 821 ("It was within the discretion of the trial judge to confine the cross-examination to matters concerning which the witness had testified on his direct examination"); 1901, Mine & Smelter S. Co. *v.* Parke & L. Co., 47 C. C. A. 34, 107 Fed. 881, 885 (held properly limited in discretion); 1902, McCrea *v.* Parsons, 50 C. C. A. 612, 112 Fed. 917 (cross-examination held properly restricted); 1902, Sauntry *v.* U. S., 55 C. C. A. 148, 117 Fed. 132 (confused statement, mingling both rules); 1903, Fourth Nat'l Bank *v.* Albaugh, 183 U. S. 734, 23 Sup. 450 (trial Court's discretion); 1903, M'Knight *v.* U. S., 122 Fed. 926 (Federal rule applied); 1899, Davis *v.* Coblens, 174 U. S. 719, 726, 19 Sup. 832 (rule of discretion applied); 1904, Resurrection G. M. Co. *v.* Fortune G. M. Co., 129 Fed. 668, 674, 681, 685, 64 C. C. A. 180 ("In the Courts of the United States, the party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error," per Sanborn, J.; to speak here of "reversible error" is to bow to the most bigoted fetish-like form of the rule; in view of Wills *v.* Russell, 100 U. S., *supra*, such a doctrine in the Federal Circuit Court of Appeals is an anachronism, as well as a reproach to the name of Justice; it is justly dissented from by Hook, J., who declares for the pristine rule leaving this subject "generally a matter within the sound discretion of the trial Court"; and by Thayer, J., who expressed the view that it was "overtechnical, unnecessary, and unwise" to invoke the rule of "reversible error"; it is to be hoped that the opinion of these two judges will prevail in the practice of the Circuit Courts of Appeals); 1904, Balliet *v.* U. S., 129 Fed. 689, 695, 64 C. C. A. 201 (rule applied to an accused taking the stand); 1904, Garlich *v.* Northern P. R. Co., 131 Fed. 837, 67 C. C. A. 237 (cross-examination held proper on the facts); 1909, Harrold *v.* Terr., 8th C. C. A., 169 Fed. 47 ("a violation of the right restricting cross-examination is reversible error," per Sanborn, J.; this utterly reprehensible rule is justly protested against by Adams, J., who points out that it was expressly repudiated by a majority of the judges in this circuit in Resurrection Gold M. Co. *v.* Fortune Gold M. Co., and in Balliet *v.* U. S., *supra*; the persistent attempt to fix this bigoted rule on the circuit should be discountenanced); 1909, St. Louis & S. F. R. Co. *v.* Cundieff, 8th C. C. A., 170 Fed. 319 (rule applied to a witness to a railroad-crossing accident); 1910, Æolian Co. *v.* Standard M. R. Co., C. C. N. J., 176 Fed. 811 (rule applied); 1910, Ferry-Hallock Co. *v.* Orange H. B. Co., C. C. N. J., 185 Fed. 816 (rule applied to patent-infringement cases; its absurdity is here illustrated); 1916, Hendrey *v.* U. S., 6th C. C. A., 233 Fed. 5, 15 (an example of the absurdity of the Federal rule; on a charge of participating in a fraudulent banking scheme, the receiver of the bank was called, and a question on cross-examination whether the bank was insolvent was held improper because not germane to the direct examination; incidentally, the opinion reveals rank technicality in construing the indictment; that criminal procedure has aspects of degeneracy is plainly illustrated in this case); 1916, DeWitt *v.* Skinner, 8th C. C. A., 232 Fed. 443 ("The right of cross-examination is not confined to the specific details of the direct examination, but extends to the subject-matter inquired about"); 1917, Coco-Cola Co. *v.* Moore, 8th C. C. A., 246 Fed. 942 (legal services); 1919, Heard *v.* U. S., 8th C. C. A., 255 Fed. 829 (robbery).

Alabama: 1854, Kelly *v.* Brooks, 25 Ala. 523, 527 (may examine as to "all facts material in the case"); 1856, Fralick *v.* Presley, 29 Ala. 457, 461 (same); 1869, Toole *v.* Nichol, 43 Ala. 406, 419 (*contra;* Federal rule 'obiter' approved, without citing the above precedents); 1892, Johnson *v.* Armstrong, 97 Ala. 731, 735, 12 So. 72 (orthodox rule applied); 1892, Huntsville R. Co. *v.* Corpening, 97 Ala. 681, 687, 12 So. 295 (in the trial Court's discretion, opponent may cross-examine to his own case); 1915, Carter *v.* State, 191 Ala. 3, 67 So. 981 (Fralick *v.* Presley affirmed; the 'obiter' approved of the Federal rule in Toole *v.* Nichol, repudiated; but "the exercise of the right to cross-examine is subject to the trial Court's sound discretion").

Alaska: Comp. L. 1913, § 2258 (quoted *ante*, § 488); § 1498 (like Or. Laws 1920, § 860).

Arizona: 1874, Rush *v.* French, 1 Ariz. 99, 134, 139, 25 Pac. 816 (quoted *ante*, § 1889).

Arkansas: 1854, Austin *v.* State, 14 Ark. 555, 563 (confining cross-examination to "those facts and circumstances only connected with the matters actually stated in the direct examination of a witness"); 1909, St. Louis I. M. & S. R. Co. *v.* Raines, 90 Ark. 398, 119 S. W. 665 (Austin *v.* State cited; but the trial Court's discretion is conceded).

California: C. C. P. 1872, § 2048 (this dates after the case in 36 Cal., *infra;* "The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions; but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination"); for *witnesses in general,* the rulings are as follows: 1855, Landsberger *v.* Gorham, 5 Cal. 450, 452 (Mr. J. Story's rule adopted, by two to one); 1857, Thornburgh *v.* Hand, 7 Cal. 554, 561 ("A witness cannot be cross-examined, except in reference to matters concerning which he has been examined in chief"); 1859, Jackson *v.* Feather River W. Co., 14

Cal. 18, 23 ("Courts are apt to take too narrow a view of the rights of the examiner in such cases"; the rule goes only to this, that "if the defendant sets up a defense not necessarily involved in the denial of the plaintiff's case, but consisting of new matter, then the defendant must wait until after his opening before he offers proof of this new matter"); 1864, Aitken *v.* Mendenhall, 25 Cal. 212 (cross-examination held properly limited); 1867, Wetherbee *v.* Dunn, 32 Cal. 106, 108 (same); 1867, Harper *v.* Lamping, 33 Cal. 641, 647 (Jackson case followed); 1868, Thornton *v.* Hook, 36 Cal. 223, 228 ("It frequently happens that both sides of a case stand in part upon common territory, or are founded in part upon the same or cognate facts; . . . where such are the conditions, the course to be pursued must inevitably be left to the discretion of the Court below"); 1879, Steinburg *v.* Meany, 53 Cal. 425 (cross-examination held improperly restricted); 1882, McFadden *v.* Mitchell, 61 Cal. 148; 1882, Gridley *v.* Boggs, 62 Cal. 190, 200 (here held properly restricted); 1888, Braly *v.* Henry, 77 Cal. 324, 19 Pac. 529 (same); 1890, Graham *v.* Larimer, 83 Cal. 173, 180, 23 Pac. 286 (here held improperly restricted); 1891, McFadden *v.* R. Co., 87 Cal. 464, 470 (same); Wixom *v.* Goodcell, 90 Cal. 622, 626, 27 Pac. 419 (same); 1892, Westerfield's Estate, 96 Cal. 113, 116, 30 Pac. 1104 (here held properly limited); 1893, Townsend *v.* Briggs, — Cal. —, 32 Pac. 307 (same); 1897, Taggart *v.* Bosch, — Cal. —, 48 Pac. 1092 (liberal rule applied); 1901, Clarke *v.* Clarke, 133 Cal. 667, 66 Pac. 10 (same); 1901, People *v.* Altmeyer, 135 Cal. 80, 66 Pac. 974 (cross-examination held not to relate to the same subject as the direct examination); 1902, People *v.* Keith, 136 Cal. 19, 68 Pac. 816 (rule applied illiberally).

In the following cases the rule was applied to an *accused* taking the stand (compare §§ 2276, 2277, *post*): 1870, People *v.* Dennis, 39 Cal. 625, 634; 1871, People *v.* McGungill, 41 Cal. 429; 1873, People *v.* Russell, 46 Cal. 121; 1887, People *v.* Sutton, 73 Cal. 243, 15 Pac. 86; 1888, People *v.* Meyer, 75 Cal. 383, 386, 17 Pac. 431; 1888, People *v.* Rozelle, 78 Cal. 84, 92, 20 Pac. 36; 1890, People *v.* Mullings, 83 Cal. 138, 139, 23 Pac. 229 (an accused who merely testifies, "I am not guilty," may be cross-examined on all the facts); 1892, People *v.* O'Brien, 96 Cal. 171, 180, 31 Pac. 45; 1901, People *v.* Rodriguez, 134 Cal. 140, 66 Pac. 174; 1901, People *v.* Bishop, 134 Cal. 682, 66 Pac. 976; 1904, People *v.* Teshara, 141 Cal. 633, 75 Pac. 338 (like People *v.* McMullings, with qualifications); 1904, People *v.* Podilla, 143 Cal. 158, 76 Pac. 889 (rule applied in a bigoted fashion to prevent the impeachment of witnesses of the defendant); 1904, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169; 1906, People *v.* Soeder, 150 Cal. 12, 87 Pac. 1016 (similar to People *v.* Mullings); 1908, People *v.* Schmitz, 7 Cal. App. 330, 94 Pac. 407 (an example of the senselessness of the Federal rule, and the litigious gambling which it encourages); 1919, People *v.* Tyren, 179 Cal. 575, 178 Pac. 132 (murder; cross-examination of defendant).

Columbia (*Dist.*): 1875, Cramer *v.* Cullinane, 2 MacArth. 197, 201 (Federal rule adopted); 1886, Woodbury *v.* District, 16 D. C. 127, 137 (same; "an impregnable rule of practice"); 1915, Washington R. & E. Co. *v.* Dittman, 44 D. C. App. 89 (death by wrongful act; Federal rule of discretion applied).

Connecticut: 1868, State *v.* Gaylord, 35 Conn. 203, 208 ("in practice, such inquiries are often made on cross-examination without objection, and allowed by the Court as a matter of convenience"); 1881, State *v.* Smith, 49 Conn. 376, 380 (Philadelphia & T. R. Co. *v.* Stimpson followed); 1901, Murphy *v.* Murphy, 74 Conn. 198, 50 Atl. 394 (trial Court's discretion conceded); 1905, Nichols *v.* Wentz, 78 Com. 429, 62 Atl. 610 (rule applied to testimony to the execution of a will); 1916, Levine *v.* Marcus, 90 Conn. 682, 98 Atl. 348 (action against indorser of a note).

Florida: 1882, Savage *v.* State, 18 Fla. 909, 957 (cross-examination is limited to matters dealt with in the direct examination, including the whole of the details of such matters); 1891, Adams *v.* State, 28 Fla. 511, 531, 10 So. 106 (cross-examination held properly limited); 1892, Tischler *v.* Apple, 30 Fla. 132, 138, 11 So. 273 (here held improperly limited, under the rule); 1893, Williams *v.* State, 32 Fla. 315, 317, 13 So. 834 (the rule allows inquiry into "all the facts and circumstances connected with the matters of the direct examination"); 1896, Thalheim *v.* State, 38 Fla. 169, 20 So. 938 (same); 1903, Peaden *v.* State, 46 Fla. 124, 35 So. 204 (rule applied); 1903, Fields *v.* State, 46 Fla. 84, 35 So. 185 (rule applied); 1905, Hampton *v.* State, 50 Fla. 55, 39 So. 421 (rule applied); 1912, Padgett *v.* State, 64 Fla. 389, 59 So. 947 (discretion of trial Court emphasized).

Georgia: Rev. C. 1910, § 5871, P. C. § 1044 ("The right of cross-examination, thorough and sifting, belongs to every party as to the witnesses called against him"); 1855, Dawson *v.* Callaway, 18 Ga. 573, 585 (orthodox rule followed); 1902, Ficken *v.* Atlanta, 114 Ga. 970, 41 S. E. 58 (same).

Hawaii: 1897, Piipiilani *v.* Houghtailing, 11 Haw. 100 (cross-examination must "relate to matters brought out on the direct examination"); 1898, Kalaukoa *v.* Henry, 11 Haw. 430, 431 (similar); Booth *v.* Beckley, 11 Haw. 518, 521 (the trial Court has discretion); 1904, Ahmi *v.* Waller, 15 Haw. 497, 501 (Booth *v.* Buckley, approved); 1904, Flint *v.* Flint, ib. 313 (similar).

Idaho: Comp. St. 1919, § 8034 (like Cal. C. C. P. § 2048); § 8035 (quoted *ante*, § 916, n. 2); 1897, State *v.* Larkins, 5 Ida. 200, 47

Pac. 945 (defendant in a criminal case taking the stand; statute applied).

Illinois: 1864, Stafford *v.* Fargo, 35 Ill. 481, 486 (cross-examination is confined to "the facts to which he testified in chief"; yet "it may be that unless the Court could see that such an examination had resulted in injury to the opposite party, the judgment would not be reversed for that reason alone; but being calculated to work injury, such a practice should be discouraged"; quoted *ante*, § 1887); 1864, Chicago & R. I. R. Co. *v.* Northern Ill. C. & I. Co., 36 Ill. 60 (cross-examination is limited to the subject of the testimony in chief, "except by the exercise of the discretionary power of the Court"); 1872, Bell *v.* Prewitt, 62 Ill. 361, 367 (cross-examination on new matter, held improperly allowed); 1875, Drohn *v.* Brewer, 77 Ill. 280, 282 (cross-examination held properly limited); 1887, Bonnet *v.* Slattfeldt, 120 Ill. 166, 172, 11 N. E. 250 (same); 1887, Erie & Pac. Despatch *v.* Stanley, 123 Ill. 158, 14 N. E. 212 (same); 1889, Anheuser Busch B. Ass'n *v.* Hutmacher, 127 Ill. 652, 656, 21 N. E. 626 (same); Hanks *v.* Rhoads, 128 Ill. 404, 407, 21 N. E. 774 (same); 1892, Hansen *v.* Miller, 145 Ill. 538, 32 N. E. 548 (rule applies equally to a party-witness); 1898, Wheeler & W. M. Co. *v.* Barrett, 172 Ill. 610, 50 N. E. 325; 1903, Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515 (but the trial Court has a "large discretion"); 1904, Dick *v.* Zimmermann, 207 Ill. 636, 69 N. E. 754; 1904, Chicago City R. Co. *v.* Creech, 207 Ill. 37, 69 N. E. 919 (the cross-examiner may "elicit suppressed facts which weaken or qualify the case of the party introducing the witness or supporting the case of the party cross-examining"; no precedents cited); 1909, Schmidt *v.* Chicago City R. Co., 239 Ill. 494, 88 N. E. 275 (after direct examination to a custom of intersecting street-railroads to give the right of way to the car which first arrived within 200 feet, a cross-examination as to the length of time required to run 200 feet, etc., would be improper; this illustrates the quibbling unpracticalness of the rule); 1918, People *v.* Robertson, 284 Ill. 620, 120 N. E. 539 (conspiracy; a peculiar ruling).

Indiana: 1855, Wright *v.* Gaff, 6 Ind. 416, 420 (Federal rule adopted in this and the following cases); 1859, Patton *v.* Hamilton, 12 Ind. 256; Dearmond *v.* Dearmond, 12 Ind. 455, 457; 1863, Aurora *v.* Cobb, 21 Ind. 492, 511; 1874, Stinehouse *v.* State, 47 Ind. 17; 1881, Johnson *v.* Wiley, 74 Ind. 233, 237 ("A cross-examination must be confined to the subject-matter of the original examination"); 1886, Hunsinger *v.* Hofer, 110 Ind. 390, 394, 11 N. E. 463 (cross-examination held properly limited); 1887, Cincinnati C. I. & St. L. R. Co. *v.* Lutes, 112 Ind. 276, 284, 11 N. E. 784, 14 N. E. 706; 1888, Britton *v.* State, 115 Ind. 55, 61, 17 N. E. 254 (same); 1892, Chandler *v.* Beal, 132 Ind. 596, 598, 32 N. E. 597; 1905, Osburn *v.* State, 164 Ind. 262, 73 N. E. 601 ("When the direct examination opens on a general subject, the cross-examination may go into any phase of that subject"; said of the accused's conversations); 1905, Westfall *v.* Wait, 165 Ind. 353, 73 N. E. 1089 (same rule, applied to testimony to a testator's sanity) 1907, Eacock *v.* State, 169 Ind. 488, 82 N. E. 1039 (the trial Court's discretion controls); 1912, Crawfordsville Trust Co. *v.* Ramsay, 178 Ind. 258, 98 N. E. 177 (probate of a will; the testator's physician being examined by the plaintiffs on matters not involving sanity, the opponents on cross-examination asked the physician's opinion as to the testator's sanity; the trial Court's discretion in excluding this was held correctly exercised; it was right to leave the matter to the trial Court's discretion; but the ruling of the trial Court shows the absurdity of the present rule in practice).

Indian Terr.: 1905, Miller *v.* Springfield W. Co., 6 Ind. T. 115, 89 S. W. 1011 (under Annot. St. 1899, § 2012, the trial Court may allow cross-examination on matters not touched on in the direct examination).

Iowa: 1862, Wilhelmi *v.* Leonard, 13 Ia. 330, 335, *semble* (Federal rule applied); 1862, Davis *v.* Simma, 14 Ia. 154 (the "sound discretion" of the trial Court held to control; no cases cited); 1876, Artz *v.* R. Co., 44 Ia. 284, 286 (Federal rule applied in this and in ensuing cases); 1883, Glenn *v.* Gleason, 61 Ia. 28, 32, 15 N. W. 659 (but "much must be left to the discretion of the trial Court"); 1885, Citizens' Bank *v.* Rhutasel, 67 Ia. 316, 320, 25 N. W. 261; 1887, Krager *v.* Pierce, 73 Ia. 359, 363, 35 N. W. 477; 1888, Riordan *v.* Guggerty, 74 Ia. 690, 39 N. W. 107 (rule liberally construed where fraud is to be got at); 1888, Bulliss *v.* R. Co., 76 Ia. 680, 681, 39 N. W. 245; 1894, State *v.* Farrington, 90 Ia. 673, 57 N. W. 606; 1920, Graves *v.* Interstate Power Co., 189 Ia. 227, 178 N. W. 376 (death by electric wire; plaintiff's witnesses not allowed to be cross-examined as to notifying deceased of danger; unsound); 1921, State *v.* Walker 192 Ia. 823, 185 N. W. 619 (burglary; rule applied to defendant's wife, called to prove an alibi; the ruling is pedantically over-strict, of the species that needlessly assists the escape of criminals).

Kansas: 1872, Sumner *v.* Blair, 9 Kan. 521, 526 (cross-examination held too broad, but apparently on the ground of irrelevancy); 1873, Da Lee *v.* Blackburn, 11 Kan. 190, 202 (Federal rule applied); 1878, Callison *v.* Smith, 20 Kan. 28, 37 (same); 1881, Blake *v.* Powell, 26 Kan. 320, 326 (see quotation *supra*, § 1889); 1887, Lawder *v.* Henderson, 36 Kan. 754, 757, 14 Pac. 164 (must be confined "to the facts and circumstances given by the defendant in his evidence in chief").

Kentucky: C. C. P. 1895, § 594 ("the witness' examination, upon the same matter, by the adverse party is the cross-examination"); § 595 (leading questions not allowable on "new matters").

Louisiana: 1811, Durnford *v.* Clark, 1 Mart. 202 (English rule maintained; quoted *supra*, § 1888); 1859, Nicholson *v.* Desobry, 14 La. An. 81, 84 (same); 1878, State *v.* Swayze, 30 La. An. 1323, 1327, *semble* (Federal rule applied, but not applicable to the defendant in a criminal case); 1881, King *v.* Atkins, 33 La. An. 1057, 1064 (orthodox rule applied); 1912, State *v.* Oden, 130 La. 598, 58 So. 351 (illegal liquor-selling; here the startling result was reached that unless the accused does on direct examination say something about having a Federal revenue liquor license — and would he mention it, unless he went gae daft on the stand? — he cannot be asked about it on cross-examination; this ruling effectually removes from the defendant's mind a really disagreeable dilemma — perjury or discovery — in taking the witness stand); 1913, State *v.* Bellard, 132 La. 491, 61 So. 537 (opinion not entirely clear).

Maryland: 1815, Shields *v.* Millet, 4 H. & J. 1, 6, *semble* (orthodox rule applied); 1878, Griffith *v.* Diffenderfer, 50 Md. 466, 478 (Phila. & T. R. Co. *v.* Stimpson followed); 1881, Herrick *v.* Swomley, 56 Md. 439, 455; 1903, Black *v.* Bank, 96 Md. 399, 54 Atl. 88 (subject to the trial Court's discretion); 1916, Flaccus Glass Co. *v.* Gavin, 39 Md. 431, 98 Atl. 213 (contract for bottles).

Massachusetts: 1809, Webster *v.* Lee, 5 Mass. 334 (the opponent "might very properly cross-examine him as to all matters pertinent to the issue on trial"); 1831, Merrill *v.* Berkshire, 11 Pick. 269, 273 ("He was sworn generally in the suit, and cannot be restricted in his testimony to facts relating to such individual or such parts of the case as the party calling him may choose to select"); 1835, Moody *v.* Rowell, 17 Pick. 490, 499 ("Where a witness is called to a particular fact, he is a witness to all purposes"; quoted *ante*, § 1888); 1848, Com. *v.* Eastman, 1 Cush. 189, 197, 217 (here, by allowing the prosecution to cross-examine the defendant's witnesses); 1851, Burke *v.* Miller, 7 Cush. 547, 549 (declares that there has been "some diversity of practice" in the local courts, but intimates that "the strict rule does not permit a party who has not opened his own case to introduce it to the jury by cross-examining the witnesses of the adverse party"; leaving it, however, to the trial Court's discretion; no precedents cited); 1854, Beal *v.* Nichols, 2 Gray 262 ("The adverse party has the right to cross-examine the witness upon all matters material to the issue"; here applied to an attesting witness; quoted *ante*, § 1888); 1858, Com. *v.* Hudson, 11 Gray 64 ("A witness, when called by one party, is liable to be examined and bound to answer as to all facts material to the case, whether examined upon that subject by the party calling him or not"); 1871, Com. *v.* Morgan, 107 Mass. 199, 205 (cross-examination is "not confined to the matters inquired of in chief"); 1878, Blackington *v.* Johnson, 126 Mass. 21, 23 (similar; but said to be "within the discretion of the presiding judge"); 1903, O'Connell *v.* Dow, 182 Mass. 541, 66 N. E. 788 (rule applied even to an attesting witness required to be called); 1916, Conklin *v.* John Howard Industrial Home, 224 Mass. 222, 112 N. E. 606 (action against a corporation; the plaintiff having called its superintendent to prove incorporation, the defendant was allowed to cross-examine to show that the corporation was a charitable one and therefore not liable).

Michigan: Comp. L. 1915, § 12554 (quoted *ante*, § 916); 1856, People *v.* Horton, 4 Mich. 67, 80 (Mr. Justice Story's rule adopted; quoted *supra*, § 1887); 1861, Campau *v.* Dewey, 9 Mich. 381, 414, 439 (same, by Martin, C. J., and Manning, J., against Christiancy, J.; quoted *ante*, § 1888); 1862, White *v.* Bailey, 10 Mich. 155, 159 (rule applied); 1862, Chandler *v.* Allison, 10 Mich. 460, 477 (scope of the rule examined as to "facts connected with the matters stated in chief"; quoted *ante*, § 1889); 1865, Dann *v.* Cudney, 13 Mich. 239, 243 (cross-examination held improperly restricted under the rule); 1866, Thompson *v.* Richards, 14 Mich. 172, 183 (same); 1868, Detroit & M. R. Co. *v.* van Steinburg, 17 Mich. 99, 109 (negligent injury; plaintiff's witnesses allowed to be cross-examined as to his contributory negligence; "the case of People *v.* Horton, we think, is overruled, so far as it has any bearing upon the present question, by the cases of Chandler *v.* Allison" and the ensuing ones; quoted *ante*, § 1888); 1869, Turner *v.* Grand Rapids, 20 Mich. 390, 394 (testimony concerning matters in chief, held improperly excluded; "see Campau *v.* Dewey, where the rule of cross-examination, as applied in People *v.* Horton, was first brought in question in this State, and which has since been overruled by all the other cases above cited"); 1872, O'Donnell *v.* Segar, 25 Mich. 367, 371 ("The only safe general rule upon cross-examination is to allow the party cross-examining to go over the whole subject or subjects to which the direct examination related"; scope of cross-examination further phrased in terms similar to the next case); 1873, Wilson *v.* Wagar, 26 Mich. 452, 457 ("The defendant had the right on cross-examination, not only to call out any fact which would contradict or qualify any particular facts stated on the examination in chief, but anything which would tend to rebut or modify any conclusion or inference resulting from the facts so stated"); 1874, Hamilton *v.* People, 29 Mich. 173, 181 (cross-examination held improperly limited); 1876, Haynes *v.* Ledyard, 33 Mich. 319 (rule of Chandler *v.* Allison applied to allow a cross-examination); 1876, Jacobsen *v.* Metzger, 35 Mich. 103 (cross-examination held properly allowed; "much must be left to the discretion of the trial judge"); 1878, New York Iron Mine *v.* Negaunee Bank, 39 Mich. 644, 658

(Cooley, J.: "Those cases [of People *v.* Horton and Campau *v.* Dewey] have been repeatedly overruled; . . . the necessity of repeating it is a singular illustration of the difficulty with which a mischievous but plausible precedent is sometimes got rid of"; quoted *ante*, § 1888); 1880, Lichtenberg *v.* Mair, 43 Mich. 387, 5 N. W. 455 (cross-examination held improperly limited); 1883, Stearns *v.* Vincent, 50 Mich. 209, 221, 15 N. W. 86 (rule of Chandler *v.* Allison applied); 1886, People *v.* Barker, 60 Mich. 277, 302, 27 N. W. 539 (cross-examination broadly allowed: orthodox rule apparently approved); 1890, Ireland *v.* R. Co. 79 Mich. 163, 164, 44 N. W. 426 ("The rule is well established that a witness may be cross-examined upon all points material to the issue, whether the party has called them out upon direct examination or not"); 1893, Hemminger *v.* Assur. Co., 95 Mich. 355, 54 N. W. 949 (preceding case approved).

Minnesota: Gen. St. 1913, § 8377 (party called by adversary; quoted *ante*, § 488); 1920, Wrabek *v.* Suchomel, 145 Minn. 468, 177 N. W. 764 (battery; "the rule . . . is not absolute; the latitude to be allowed is largely within the discretion of the trial Court").

Mississippi: 1856, Mask *v.* State, 32 Miss. 405, 426, 429 (orthodox rule followed in a good opinion by Fisher, J.; Handy, J., diss., quoted *ante*, § 1887); 1905, Walton *v.* State, 87 Miss. 296, 39 So. 689 (rule applied).

Missouri: The *ordinary rule* was applied as follows: 1840, Page *v.* Kankey, 6 Mo. 433 (witness called to prove a signature; allowed to be cross-examined generally); 1843, Brown *v.* Burrus, 8 Mo. 26, 30 (witness "introduced to prove a single insulated fact," allowed to be cross-examined "to all matters involved in the issue"); 1874, St. Louis & I. M. R. Co. *v.* Silver, 56 Mo. 264 ("This Court at an early day adopted the English doctrine"); 1875, State *v.* Sayers, 58 Mo. 585, 586 (same); 1875, State *v.* Brady, 87 Mo. 142, 145 (same); 1898, State *v.* Soper, 148 Mo. 217, 235, 49 S. W. 1007 (same); 1905, Ayers *v.* Wabash R. Co., 190 Mo. 228, 88 S. W. 608 ("What is called the 'orthodox rule' has always been the rule in this State"); in 1905, the following statute intervened, inserting a new § 4655*a* into Rev. St. 1899, being § 5414 of R. S. 1919: "A party to a cause, civil or criminal, against whom a witness has been called and given some evidence, shall be entitled to cross-examine said witness (except where a defendant in a criminal case is testifying in his own behalf) on the entire case; but this shall not be construed to entitle a defendant who has pleaded a counterclaim or set-off in a civil case to cross-examine a plaintiff's witness in respect thereto, but as to said counterclaim or set-off such witness (if examined by defendant in relation thereto) shall be deemed defendant's witness and be so examined in the course of the trial"; of this statute, only the second part has anything that could be construed as a change in the law; and such petty tinkering is impolitic, especially when it is based on the erroneous theory noted *ante*, § 1887, par. *d*). For an *accused*, the following statute (quoted in full, *ante*, § 488) modified the general rule as before applied: Rev. St. 1881, § 1918, Rev. St. 1899, § 2637, R. S. 1919, § 4036 (the accused taking the stand "shall be liable to cross-examination as to any matter referred to in his examination in chief"); applied in the following cases: 1881, State *v.* McGraw, 74 Mo. 573; 1881, State *v.* Porter, 75 Mo. 171, 178; 1882, State *v.* McLaughlin, 76 Mo. 320; 1882, State *v.* Turner, 76 Mo. 350; 1883, State *v.* Douglass, 81 Mo. 231, 235; 1885, State *v.* Patterson, 88 Mo. 88, 91; 1885, State *v.* Mills, 88 Mo. 417; 1886, State *v.* Chamberlain, 89 Mo. 129, 133, 1 S. W. 145; 1886, State *v.* Bulla, 89 Mo. 595, 598, 1 S. W. 764; 1886, State *v.* Berning, 91 Mo. 82, 3 S. W. 588; 1887, State *v.* Beaucleigh, 92 Mo. 490, 495, 4 S. W. 666; 1888, State *v.* Brannum, 95 Mo. 19, 22, 8 S. W. 218; 1888, State *v.* West, 95 Mo. 139, 143, 8 S. W. 354; 1888, State *v.* Graves, 95 Mo. 516, 8 S. W. 739; 1890, State *v.* McKinzie, 102 Mo. 620, 632, 15 S. W. 149; 1892, State *v.* Turner, 110 Mo. 196, 201, 19 S. W. 645; 1892, State *v.* Avery, 113 Mo. 475, 500, 21 S. W. 193 (a single question as to guilt or innocence permits "a wide range of cross-examination"); 1899, State *v.* Hudspeth, 150 Mo. 31, 51 S. W. 483; 1900, State *v.* Miller, 156 Mo. 76, 85, 56 S. W. 907 (similar); 1901, State *v.* Hathorn, 166 Mo. 229, 65 S. W. 756 (repudiating the contrary ruling in State *v.* Brooks, 92 Mo. 542, 581, 612, 5 S. W. 257); 1905, State *v.* Wertz, 191 Mo. 569, 90 S. W. 838 (State *v.* Avery approved); 1906, State *v.* Feeley, 194 Mo. 300, 92 S. W. 663 (rule applied); 1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235 (rule applied); 1911, State *v.* McDonough, 232 Mo. 219, 134 S. W. 545 (wife of defendant; choking off cross-examination to character by means of the present rule); 1913, State *v.* Foley, 247 Mo. 607, 153 S. W. 1010 (accused); 1915, State *v.* Sherman, 264 Mo. 374, 175 S. W. 73 (murder, during burglary; cross-examination of the accused as to the reason for his being in the neighborhood at the time, allowed under the above statute, now Rev. St. 1909, § 5242; surely no serious consideration should be given to an objection to such evidence on that ground); 1916, State *v.* Pfeifer, 267 Mo. 23, 183 S. W. 337; 1920, State *v.* Belknap, — Mo. —, 221 S. W. 39 (statutory rape; cross-examination of the accused); 1920, State *v.* Gallagher, — Mo. —, 222 S. W. 465 (co-indictee separately tried and convicted); 1920, State *v.* Wicker, — Mo. —, 222 S. W. 1014 (assault with intent to kill; cross-examination of defendant as to having said that the prosecuting witness' testimony on preliminary hearing was true, held improper, under Rev. St. § 5242); 1921, State *v.* Stokes, — Mo. —, 232 S. W. 107 (seduction; Rev. St. 1919, § 4036, applied to cross-

examination of accused); 1922, State v. Meyer, — Mo. —, 238 S. W. 457 (not limited "to a mere categorical review of subjects covered in direct examination"); 1922, State v. Culpeper, — Mo. —, 238 S. W. 800 (robbery). Compare here the cases cited *post*, §§ 2376, 2377.

Montana: Rev. C. 1921, § 10665 (like Cal. C. C. P. § 2048); 1887, Terr. v. Rehberg, 6 Mont. 467, 472, 13 Pac. 132 (not clear); 1897, Harrington v. Mining Co., 19 Mont. 411, 48 Pac. 758 (may cross-examine on one's own case in the trial Court's discretion); 1901, Kipp v. Silverman, 25 Mont. 296, 64 Pac. 884 (liberal rule, like that of Michigan); 1902, Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805 ("Doubt respecting the limits to which cross-examination may go ought usually if not always to be resolved against the objection"); 1904, State v. Howard, 30 Mont. 518, 77 Pac. 50; 1906, Borden v. Lynch, 34 Mont. 503, 87 Pac. 609 (consideration of a note; the rule applies equally to a party-opponent); 1912, State v. Biggs, 45 Mont. 400, 123 Pac. 410 (liberal rule, leaving much to the trial Court's discretion); 1920, State v. Smith, 57 Mont. 349, 188 Pac. 644 (sedition; cross-examination of defendant to other seditious utterances not evidenced in the case for the prosecution, held improper).

Nebraska: 1878, Davis v. Neligh, 7 Nebr. 84, 87 ("must be restricted to the facts and circumstances drawn out on his direct examination"); so in the following: Clough v. State, 7 Nebr. 320, 341; 1879, Schlencker v. State, 9 Nebr. 241, 250, 1 N. W. 857; 1882, Boggs v. Thompson, 13 Nebr. 403, 14 N. W. 393; 1883, Cool v. Roche, 15 Nebr. 24, 26, 17 N. W. 119; 1888, Grimes v. Cannell, 23 Nebr. 191, 36 N. W. 479; 1897, Atwood v. Marshall, 52 Nebr. 173, 71 N. W. 1064 (rule liberally applied in cases of fraud); 1900, Missouri P. R. Co. v. Fox, 60 Nebr. 531, 83 N. W. 744; 1920, Larson v. Hafer, 105 Nebr. 257, 179 N. W. 1013 (assault and battery; cross-examination liberally allowed).

Nevada: 1872, Ferguson v. Rutherford, 7 Nev. 385, 390 (not decided); 1877, Buckley v. Buckley, 12 Nev. 423, 441; 14 Nev. 262 ("Cross-examination ought to be allowed a free range within the subject-matter of the evidence in chief, but if it ranges outside of that, there is error").

New Jersey: 1824, State v. Zellers, 7 N. J. L. 220, 229 ("Even upon a cross-examination, if you examine into a substantive independent matter, you must open it," meaning apparently that a statement by counsel as to his purpose must be made; and upon the counsel making such a statement, the examination proceeded as desired); 1857, Donnelly v. State, 26 N. J. L. 463, 494, *semble* (cross-examination to new matter, held properly refused); 1887, Disque v. State, 49 N. J. L. 249, 8 Atl. 281 (same rule for an accused); 1907, Crosby v. Wells, 73 N. J. L. 790, 67 Atl. 295 (cross-examination not restricted to matters of the direct examination, in case of a deposition taken out of the State under P. L. 1900, p. 375, formerly § 38 of St. 1874, Mar. 27, on Evidence); 1908, Axel v. Kraemer, 75 N. J. L. 688, 70 Atl. 367 (Crosby v. Wells followed); 1909, Prout v. Bernards L. & S. Co., 77 N. J. L. 719, 73 Atl. 486 ("As to matters directly in issue or directly relevant to the issue, there is no discretionary power"; this goes too far; the preceding cases are not cited, and the distinction between other rules and the present rule is apparently not perceived); 1920, State v. Fisher, 94 N. J. L. 12, 110 Atl. 124 (officer accepting bribes; discretion of the trial Court controls).

New Mexico: 1920, Morrill v. Jones, 26 N. M. 32, 188 Pac. 1108 (cross-examination of a bona fide purchaser of a note); 1921, State v. Taylor, 26 N. M. 429, 194 Pac. 368 (murder; rule applied to a witness for the State).

New York: 1804, Jackson v. Son, 2 Caines 178 (opponent not allowed to cross-examine to a will without notice to produce; by cross-examining "he made the witness as much his own as if he had himself called him"; a correct enough ruling on the facts); 1827, Jackson v. Varick, 7 Cow. 238, 242 ("P. [after examination by the defendant] was properly admitted to his cross-examination as a competent witness for the plaintiff"); affirmed in 2 Wend. 166, 171, 205; 1829, Fulton Bank v. Stafford, 2 Wend. 483, 485 (orthodox rule applied; quoted *ante*, § 1885); 1834, Bogert v. Bogert, 2 Edw. Ch. 399, 403 (a witness "sworn generally" "may be cross-examined at large in support of the rights of the opposite party"); 1860, Mattice v. Allen, 33 Barb. 543, 546 (the English rule "is the rule in this State"; yet the Court goes on, perplexingly, to approve Mr. J. Story's language, and declares that "a party has no right, before he has opened his case to the jury, to introduce it and prove it on cross-examination of his adversary's witness"); 1868, Blake v. People, 73 N. Y. 586 (to introduce matter of defence on cross-examination is in the trial Court's discretion, being "simply a question as to the order of proof"; no precedents cited); 1882, Neil v. Thorn, 88 N. Y. 270, 275 (refers to "the general rule that a party cannot introduce his case to the jury by cross-examining the witness of his adversary," but leaves the trial Court's discretion to control; ignoring the above leading cases, and citing only two irrelevant cases).

North Carolina: 1807, Sawrey v. Murrell, 2 Hayw. 397 (quoted *ante*, § 1888); 1899, State v. Allen, 107 N. C. 805, 11 S. E. 1016 ("The rule that the cross-examination is limited to the matters brought on the direct examination has never prevailed in this country").

North Dakota: 1896, State v. Kent, 5 N. D. 516, 67 N. W. 1052 (Federal rule applied; but, in an accused's examination, motive having

been touched upon, the subject may be gone into; *semble*, also, that after a mere general denial of the crime, the same may follow); 1899, Kaeppler *v.* Red R. V. N. Bank, 8 N. D. 406, 410, 79 N. W. 869 (strict rule applied, though "much discretion should be given"); 1904, Hogen *v.* Klabo, 13 N. D. 319, 100 N. W. 847 (rule applied to an issue of payment on notes in a suit for a balance due; foregoing case not cited); 1905, Schwoebel *v.* Fugina, 14 N. D. 375, 104 N. W. 848 (trial Court's discretion controls; moreover, "any fact in issue within the knowledge of the adverse party may be proved by cross-examination of him"); 1909, Leistikow *v.* Zuelsdorf, 18 N. D. 511, 122 N. W. 340 (the original unamended pleading of the opponent, not admitted on cross-examination as an admission); 1911, Luick *v.* Arends, 21 N. D. 614, 132 N. W. 353 (on plaintiff's calling an opponent for cross-examination, his own counsel should ordinarily reserve his re-direct examination until his own case is put in).

Ohio: 1853, Legg *v.* Drake, 1 Oh. St. 286, 290 (orthodox rule said to be adopted, that cross-examination may extend "generally to the merits of the cause or to any matter embraced in the cause," with the qualification that it cannot include "distinct matter of his defence by way of avoidance"; similar to the Michigan rule).

Oklahoma: 1904, Woods *v.* Faurot, 14 Okl. 171, 77 Pac. 346 (Federal rule illiberally applied); 1919, Smith *v.* Missouri K. & T. R. Co., 76 Okl. 303, 185 Pac. 70 (medical testimony to personal injuries; rule applied overstrictly); 1919, Dix *v.* State, 15 Okl. Cr. 559, 179 Pac. 624 (co-defendant called by the prosecution); 1920, McNeill *v.* State, — Okl. Cr. —, 192 Pac. 256 (murder; plea, insanity; the defendant taking the stand, held that to evidence his insanity he could not "testify 'ad libitum' to anything which came to his mind," free from the ordinary rules of evidence); 1921, Kennedy *v.* Supnick, 82 Okl. 208, 200 Pac. 151 (contributory negligence).

Oregon: Laws 1920, § 860 (like Cal. C. C. P. § 2048); 1893, Ah Doon *v.* Smith, 25 Or. 89, 33 Pac. 1093 (citing the Michigan cases); 1894, Sayres *v.* Allen, Or. 215, 35 Pac. 254 (similar); 1895, Maxwell *v.* Bolles, 28 Or. 1, 41 Pac. 662 (it "may extend to any other matters connected therewith which tend to limit, explain, qualify, or rebut any inference resulting from the direct examination"); for an *accused*, the rule is strictly applied: 1885, State *v.* Lurch, 12 Or. 99, 102, 6 Pac. 408; 1886, State *v.* Saunders, 14 Or. 300, 309, 313, 12 Pac. 441; 1890, State *v.* Gallo, 18 Or. 423, 23 Pac. 264; 1902, State *v.* Deal, 41 Or. 437, 70 Pac. 534; 1904, Goltra *v.* Pentland, 45 Or. 254, 77 Pac. 129 (a good example of how the rule helps to suppress truth and reduce a trial to a game); 1917, Benson *v.* Johnson, 85 Or. 677, 165 Pac. 1001 (title to personalty; Lord's Or. L. § 860, applied).

Pennsylvania: 1827, Ellmaker *v.* Buckley, 16 S. & R. 72, 77 (Federal rule first put forward; quoted *ante*, § 1885); 1841, Castor *v.* Bavington, 2 W. & S. 505 (in Ellmaker *v.* Buckley "it was ruled that a party shall not introduce his case to the jury through a cross-examination of his adversary's witnesses"); 1843, Floyd *v.* Bovard, 16 W. & S. 75, 76 (similar; quoted *ante*, § 1887); 1838, Perit *v.* Cohen, 4 Whart. 81 (rule applied); 1844, Markley *v.* Swartzlander, 8 W. & S. 172, 177 (cross-examination to new matter, allowed for an attesting witness, on the facts); 1846, Schnable *v.* Doughty, 3 Pa. St. 392, 395 (the rule being departed from below, "it was so much a matter of discretion in the court below that we cannot reverse on that ground"); 1848, Bank *v.* Ferdyce, 9 Pa. 275, 276 (cross-examination to new matter, allowed on the facts); 1851, Mitchell *v.* Welch, 17 Pa. 339, 342 (cross-examination held properly restricted); 1855, Turner *v.* Reynolds, 23 Pa. 199, 206 (same); 1866, Helser *v.* McGrath, 52 Pa. 531 ("Cross-examination, as a general thing, is only regular when it is confined to the testimony given by the witness in chief"; but "much must still be left to the discretion of the judge," and in this case "an excess of latitude," not injuring the opponent, was held not ground for reversal); 1869, Jackson *v.* Litch, 62 Pa. 451, 455 (Sharswood, J.: "I have not been able to find a single case in which this Court has reversed on that ground; it has generally been considered as a matter within the sound discretion of the Court below"); 1875, Hopkinson *v.* Leeds, 78 Pa. 396, 400 (rule enforced); 1875, Malone *v.* Dougherty, 79 Pa. 46, 51 (cross-examination held properly restricted); 1879, Fulton *v.* Central Bank, 92 Pa. 112, 115 (like Mitchell *v.* Welch); 1880, Monongahela Water Co. *v.* Stewartson, 96 Pa. 436, 438 (same); 1883, Hughes *v.* Coal Co., 104 Pa. 207, 213 ("Cross-examination must be confined to matters which have been stated in the examination in chief"; yet "the purpose might often be defeated by a rigid enforcement of these rules in all cases," and "much must be left to the discretion of the Court below"); 1886, Thomas *v.* Loose, 114 Pa. 35, 47, 6 Atl. 326 (Jackson *v.* Litch approved; but here the discretion of the Court below was overruled, though unnecessarily; this case markedly illustrates the irrationality and injustice of the extreme form of this rule, the Court here ordering a new trial for a mere irregularity in the order of evidence); 1890, McNeal *v.* R. Co., 131 Pa. 184, 189, 18 Atl. 1026 (cross-examination held properly allowed) 1893, Bohan *v.* Avoca, 154 Pa. 404, 26 Atl. 604 (trial Court's discretion must control); 1902, Sutch's Estate, 201 Pa. 305, 50 Atl. 943 (rule treated as absolute); 1902, Smith *v.* Philadelphia Traction Co., 202 Pa. 54, 51 Atl. 345 (cross-examination tending to elicit facts which ought to have been brought out as a part of the opponent's case, held proper);

1903, Glenn *v.* Philadelphia & W. C. T. Co., 206 Pa. 135, 55 Atl. 860 ("while this is the rule, yet the range of a cross-examination must to a very great extent be left to the sound discretion of the trial judge"); 1905, Quigley *v.* Thompson, 211 Pa. 107, 60 Atl. 506 (negligence; rule applied); 1919, Reibstein *v.* Abbott's Alderney Dairies, 264 Pa. 447, 107 Atl. 776 (cross-examination to circumstances of a collision, here allowed).

Philippine Islands: C. C. P. 1901, § 381 ("each witness may be orally cross-examined by the adverse party or his counsel with sufficient fullness and freedom to test his accuracy and truthfulness and freedom from interest or bias, or the reverse, and to elicit all important facts bearing upon the issue. The courts shall be liberal in allowing cross-examinations, but shall have the power to restrict them so as to confine them to the purposes last above specified and to prevent irrelevant or insulting interrogatories"); § 339 (like Cal. C. C. P. § 2048).

Porto Rico: Rev. St. & C. 1911, § 1523 (like Cal. C. C. P. § 2047, first sentence); 1901, People *v.* Fernandez, 14 P. R. 611, 617 (Evid. Act, § 155, limiting to the direct examination, etc., held applicable to criminal cases).

South Carolina: 1831, Browning *v.* Huff, 2 Bail. 174, 178 (orthodox rule applied; distinguishing Price *v.* Jenkins, 1818, 1 N. & McC. 153, as properly decided on its facts); 1833, Poole *v.* Mitchell, 1 Hill 404; 1870, Mathews *v.* Heyward, 2 S. C. 239, 247; 1880, Kairson *v.* Puckhaber, 14 S. C. 626; 1850, Clinton *v.* McKenzie, 5 Strobh. 36, 41, *semble* (the opponent may "lay the foundation of his defence in any new matter in the knowledge of the witness"); 1881, Kibler *v.* McIlwain, 16 S. C. 550, 556 (see quotation *supra*, § 1888); 1886, Dillard *v.* Samuels, 25 S. C. 318, 322; 1888, Owens *v.* Gentry, 30 S. C. 490, 497, 9 S. E. 525; 1890, Willoughby *v.* R. Co., 32 S. C. 427, 11 S. E. 339; 1892, State *v.* Howard, 35 S. C. 197, 14 S. E. 481; 1895, Sims *v.* Jones, 43 S. C. 91, 20 S. E. 905; 1899, State *v.* McGee, 55 S. C. 247, 33 S. E. 353; 1918, Carmichael *v.* Carmichael, 110 S. C. 357, 96 S. E. 526 (general rule stated).

South Dakota: 1893, Wendt *v.* R. Co., 4 S. D. 476, 483, 57 N. W. 226 (Federal rule applied); so in the following: 1894, Noyes *v.* Belding, 5 S. D. 603, 59 N. W. 1069; 1895, First Nat'l Bank *v.* Smith, 8 S. D. 101, 65 N. W. 439; 1896, Novotny *v.* Danforth, 9 S. D. 301, 68 N. W. 749; 1898, Fisher *v.* Porter, 11 S. D. 311, 77 N. W. 112; 1900, Connor *v.* Corson, 13 S. D. 550, 83 N. W. 588 (cross-examination may in discretion be limited to the matter of the direct examination); 1900, Boucher *v.* Clark Publ. Co., 14 S. D. 72, 84 N. W. 237; 1902, Bedtkey *v.* Bedtkey, 15 S. D. 310, 89 N. W. 479 (subject to the trial Court's discretion); 1895, State *v.* Bunker, 7 S. D. 639, 642, 65 N. W. 33 (trial Court's discretion controls; here the complaining witness in bastardy).

Tennessee: 1901, Sands *v.* R. Co., 108 Tenn. 1, 64 S. W. 478 (orthodox English rule definitely adopted; "We believe this rule the sounder, in that it presents less technical difficulty, is easier of application, and tends in a larger measure to elicit the truth, the chief end of all judicial investigation").

Texas: 1853, Wentworth *v.* Crawford, 11 Tex. 127, 132 ("It is regular to ask a witness on a cross-examination any question that may be pertinent to the questions to be decided by the jury"); 1873, Bassham *v.* State, 38 Tex. 622, 625 (not clear); 1884, Evansich *v.* R. Co., 61 Tex. 24, 27 (Wentworth *v.* Crawford approved); 1922, Rodgers *v.* State, — Tex. Cr. —, 236 S. W. 748 (murder; cross-examination of wife to self-contradictions, allowed); 1916, McDougal *v.* State, 79 Tex. Cr. 254, 185 S. W. 15 (homicide; defendant's wife as witness).

Utah: 1902, Whipple *v.* Preece, 24 Utah 364, 67 Pac. 1072 (as against one charged with fraud, a wide range is permissible on cross-examination); 1915, State *v.* Benson, 46 Utah 74, 148 Pac. 445 (party); 1921, Central Bank *v.* Stephens, — Utah —, 199 Pac. 1019 (note signed conditionally).

Vermont: 1853, Linsley *v.* Lovely, 26 Vt. 123, 135 (orthodox rule applied); 1877, State *v.* Hopkins, 50 Vt. 316, 331, *semble* (same); 1917, Goodwin *v.* Barre S. B. & T. Co., 91 Vt. 228, 100 Atl. 34 (bank collections); 1919, Clogston's Estate, 93 Vt. 46, 106 Atl. 594 (probate of a will; rule not applicable to an adverse party); 1919, State *v.* Kelsie, 93 Vt. 450, 108 Atl. 391 (sanity of an accused; liberal rule applied to cross-examination of a medical witness for the accused).

Virginia: 1896, Miller *v.* Miller's Adm'r, 92 Va. 570, 23 S. E. 891 (Federal rule applied).

Washington: 1897, Bishop *v.* Averill, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024 (Federal rule applied); 1901, Coey *v.* Darknell, 25 Wash. 518, 65 Pac. 760 (cross-examination may cover "all matters directly stated or suggested his testimony"); 1909, Kinnane *v.* Conroy, 52 Wash. 651, 101 Pac. 223 (trial Court's discretion).

West Virginia: 1900, State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626 (trial Court's discretion approved in allowing cross-examination to one's own case); 1919, Ingles *v.* Stealey, 85 W. Va. 155, 101 S. E. 167 (party-opponent may be cross-examined to matters not covered by direct examination); 1921, State *v.* Weissengoff, 89 W. Va. 279, 109 S. E. 707 (trial Court's discretion controls).

Wisconsin: 1863, Congar *v.* R. Co., 17 Wis. 477, 483 (cross-examination to "new matter," excluded); 1869, Knapp *v.* Schneider, 24 Wis. 70, 71 ("The rule is that cross-examination is to be confined to the matters about which the witness was examined in chief"; but an exception probably exists for

§ 1891. **Same: Qualifications of Each Rule.** (1) Under the *orthodox rule*, it is of course assumed that there can be no inquiry on cross-examination as to facts not properly then in issue under the pleadings.[1] But where there are joint opponents, the facts in issue are presumably available on cross-examination by any one of them.[2] Where the witness is himself the party on whose behalf the counsel is cross-examining, and has been called by the first party, there seems to be no reason why the same scope of questioning should not be allowed;[3] although (*ante*, §§ 773, 774) the questions should not be leading in form.[4] Where the witness is the *party-opponent* to the cross-examiner, no difference is called for.[4]

(2) Under the *Federal rule*, it is clear that nothing prohibits cross-examination to one's own case where the calling party has been allowed (*ante*, § 1883) in his direct examination to bring out facts in rebuttal of a prospective defence,[5] nor where with the trial Court's consent the opponent has postponed the cross-examination until after he has begun his own case in reply.[6] Furthermore, it is certain that the discrediting of the witness by any allowable mode whatever (*ante*, §§ 920–1046) is not a part of the opponent's own case, within the meaning of the rule, and may therefore be pursued without restraint on cross-examination.[7] Nevertheless, such is the latent power of confusion inherent in the rule, that even this elementary postulate is sometimes lost sight of; so that a Court is found to refuse to let the opponent on cross-

a party under cross-examination); 1883, Norris *v.* Cargill, 57 Wis. 251, 255, 15 N. W. 148 (same exception "probably" recognized, subject to trial Court's discretion); 1885, Youmans *v.* Carney, 62 Wis. 580, 581, 23 N. W. 20 (cross-examination held properly restricted); 1891, Weadock *v.* Kennedy, 80 Wis. 449, 453, 50 N. W. 393 ("It has always been the practice to allow a party as a witness to be cross-examined fully on the whole case"); 1894, Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101 (cross-examination of a plaintiff, held not improperly restricted in the trial Court's discretion); 1900, Sullivan *v.* Collins, 107 Wis. 291, 83 N. W. 310 (the exception as to a party, suggested in Weadock *v.* Kennedy, apparently disapproved); 1900, Cuddy *v.* Foreman, 107 Wis. 519, 83 N. W. 1103 (contrary to the foregoing case); 1901, Stubbings *v.* Curtis, 109 Wis. 307, 85 N. W. 325 (general rule applied); 1901, Lauterbach *v.* Netzo, 111 Wis. 322, 87 N. W. 230 (approving Sullivan *v.* Collins); 1905, Winn *v.* Itzel, 125 Wis. 19, 103 N. W. 220 ("In case the witness is also a party to the action, a somewhat broader range is allowed"); 1912, Case *v.* Power M. & M. Co., 151 Wis. 400, 138 N. W. 195 (when an opponent is called for cross-examination as an adverse witness, under Stats. 1898, § 4068, his counsel may then immediately re-examine him, but not as to new matter forming his own case; explaining O'Day *v.* Meyers, 147 Wis. 549, 133 N. W. 605).

§ 1891. [1] *Eng.* 1859, Bracegirdle *v.* Bailey, 1 F. & F. 536 (matter not pleaded at all); *U. S.* 1830, Hartness *v.* Boyd, 5 Wend. Mass. 563 (through lack of an affidavit of merits, the cause was conducted on the plaintiff's pleading as an "inquest" only); 1841, Kerker *v.* Carter, 1 Hill S. C. 101 (similar).

[2] 1842, Fletcher *v.* Crosbie, 2 Moo. & Rob. 417 (counsel for a defendant who had suffered judgment and was interested only as to the amount of damages was allowed to cross-examine to the whole case with a view to establishing the liability of other defendants, since he would be liable for costs on his plea in abatement if they were not guilty).

[3] *Contra:* 1863, Bell *v.* Chambers, 38 Ala. 660, 664 (he does not become "a general witness in the cause," and therefore cannot be examined "on any matter of defense not called out by the plaintiff in his examination"). But the cases cited in the preceding section do not make this exception.

[4] Whether such a party-witness *may be impeached* by the cross-examiner is of course a different question (*ante*, § 916).

[5] 1896, Kenny *v.* Walker, 29 Or. 41, 44 Pac. 501.

[6] See the cases cited *ante*, § 1884.

[7] 1907, Isaac *v.* U. S., 7 Ind. Terr. 196, 104 S. W. 588; 1881, State *v.* Willingham, 33 La. An. 537; 1914, State *v.* Garner, 135 La. 746, 66 So. 181. Few counsel have been hardy enough to raise the doubt.

examination ask about a prior self-contradiction (*ante*, § 1019); the result being that, when the opponent recalls him for the purpose, he is met by the rule against impeaching one's own witness (*ante*, § 902) and the Court is obliged to evade an unendurable ruling by the novel suggestion that if in discretion the question is excluded on the cross-examination, it must then be allowed at the later stage.[8] Under the Federal rule, finally, is sometimes found an exception for a *party-opponent* as a witness.[9]

§ 1892. **Same: What constitutes Calling a Witness, so as to allow the Opponent to Cross-Examine to his Own Case, under the Orthodox Rule in General.** Under the orthodox rule (*ante*, § 1885), the opponent in the stage of cross-examination may inquire about any facts material to the case. But cross-examination is by hypothesis a counter-examination, — the stage subsequent to a direct examination. Hence it is not proper, if there has been no prior stage of examination at all. If the person has not become a witness for the one party, he can testify only by being called by the opponent as his own, which cannot occur until his own general stage of the whole case (*i. e.* in defence or in rebuttal) has been reached. The question thus is: *What constitutes*, for the first party, *calling a witness*, so as to entitle the opponent to cross-examine, instead of later calling the witness under a direct examination?

It is obvious that the question can practically arise *under the orthodox rule only*. Under that rule, the opponent may ask as to any facts material to his own case, and he thus has a motive for desiring on any pretext to treat the person as already a witness under the first party's call. Under the Federal rule, on the other hand, if the person has been (for example) sworn but not questioned by the first party, the opponent cannot ask as to facts relating to his own case; he can ask only as to facts forming part of the first party's case (which of course he will hardly wish to do, except for facts modifying a former witness' testimony), or, under the inferior form of that rule, for matters about which he has already testified (that is, none at all), or for facts impeaching the witness' character or otherwise discrediting his testimony (that is, again, none at all, because he has made no testimonial assertions). Thus there remains, in effect, no field for cross-examination under the Federal rule, in the class of cases about which a question may arise under the orthodox rule. The law has therefore been developed chiefly in England; though the precedents in the American jurisdictions following the orthodox rule are singularly few.

The question, as usually phrased, is whether the opponent, in certain circumstances, has acquired the right to cross-examine, *i. e.* to certain topics of testimony. But it may be noted that the same definitions serve equally for determining another problem under an independent rule, namely, the rule against *impeaching one's own witness* (either on cross-examination or

[8] An example of this is the following case: 1900, Clary *v.* Hardeeville Brick Co., 100 Fed. 915.

[9] See the cases cited *passim*, *ante*, § 1890, and compare those cited *ante*, § 916 (impeaching one's own witness).

otherwise). Who is one's own witness, depends in part upon which party has first called and made use of the witness; and thus the same tests serve for that purpose. This has already been noted in dealing with that subject (*ante*, § 909). By some Courts the two principles are improperly associated, in a peculiar doctrine that an *unpermitted cross-examination to one's own case* (under the Federal rule) *makes the witness one's own* and thus prohibits his impeachment (*ante*, § 914).

§ 1893. **Same: (*a*) on Ordinary Subpœna, or by Deposition.** The object then is to define the point of time at which it may properly be said that the person has become the witness of the party for the purpose of forming the first stage of the examination. It would seem that the proper test is to be found in the question *whether he has given admissible testimony*. Until then, he may be potentially a witness (as are all persons having relevant knowledge), but is not actually a witness. Until he has made a contribution, by way of testimonial assertion, to the general mass of evidence, and this contribution has been accepted by the party and sanctioned by the Court as a part of the evidence, the person is only prospectively and not 'de facto' a witness. Certain consequences follow from this:

(1) A person who has been *sworn by mistake*, as sometimes happens under the practice of swearing in a group (*ante*, § 1819), and has not yet been put on the stand, is not yet the witness of the party for whom he was sworn.[1]

(2) A person sworn but *not yet asked any question* is not the witness of the party swearing him;[2] moreover, he cannot be cross-examined even to *discredit* him, for there is as yet no testimonial assertion to be discredited.[3]

(3) A person sworn and asked questions, where he gives *no answer* or where the facts in his answer are *irrelevant* to the case, has not yet become the party's witness.[4]

§ 1893. [1] 1827, Clifford *v.* Hunter, cited in note 4, *infra:* 1840, Wood *v.* Mackinson, 2 Moo. & Rob. 273 (Coleridge, J.: "If there really be a mistake, whether on the part of counsel or officer, and that mistake be discovered before the examination in chief has begun, the adverse party ought not to have the right to take advantage of this mistake by examining the witness"; here, the fact that the counsel had been misinstructed as to the witness' knowledge was held to form such a mistake; otherwise, if he had discovered that the witness "knew other matters inconvenient to be disclosed").

[2] 1898, Milton *v.* State, 40 Fla. 251, 24 So. 60 (summoned only); 1919, Booth *v.* State, 24 Ga. App. 275, 100 S. E. 723; 1906, Harris *v.* Quincy O. & K. C. R. Co., 115 Mo. App. 527, 91 S. W. 1010; 1899, State *v.* Lucas, 124 N. C. 825, 32 S. E. 962. *Contra:* 1900, Mason *v.* R. Co., 58 S. C. 70, 36 S. E. 440.

[3] *Eng.* 1859, Bracegirdle *v.* Bailey, 1 F. & F. 536 (at the close of the plaintiff's case, the plaintiff himself was tendered for cross-examination, but was not examined in chief; defendant proceeded to ask several questions "as to the past conduct and life of the witness"; Byles, J.: "Inasmuch as he has proved nothing, you cannot cross-examine him to discredit him"); *U. S.* 1869, Toole *v.* Nichol, 43 Ala. 406, 419 (witness sworn but not asked; the opponent had also had the witnesses separated; "the purpose of a cross-examination is to sift the testimony of a witness and to try his integrity; when he has not been examined in chief, there can be no necessity for this"); 1827, Ellmaker *v.* Buckley, 16 S. & R. Pa. 72, 77 (witness sworn, but asked no questions; cross-examination's purpose being to try credibility, "it would be palpably absurd when applied to a person who had given no evidence at all").

Yet a person sworn and asked no questions but *tendered voluntarily* to the opponent for cross-examination (as in Bracegirdle *v.* Bailey, *supra*) may of course be cross-examined upon the latter's own case.

[4] *Eng.* 1827, Clifford *v.* Hunter, 3 C. & P. 16, Tenterden, L. C. J. (here the person turned out to be another of the same name); 1835,

(4) A person who is questioned and answers merely to *prove a document* does become a witness of the party thus using him.[5]

(5) If a *deposition* is offered, but the answers to the direct interrogatories are for some reason held *inadmissible* for the offering party, the answers to the cross-interrogatories are equally inadmissible, because otherwise a cross-examination would be allowed with no direct examination preceding.[6] So, too, if the taking party has wholly *failed to offer* the deposition;[7] and the same principle is assumed in those cases which hold that the non-taking party who uses the entirety of a deposition not used by the taker cannot impeach the deponent,[8] and that the taker may impeach him.[9]

§ 1894. **Same: (*b*) on Subpœna duces tecum.** (1) A person summoned by *subpœna duces tecum* does not by merely attending and *producing the document* become the summoner's witness.[1] He has himself furnished no

Creevy *v.* Carr, 7 C. & P. 64 (here an immaterial question and answer); *U. S.* 1794, Bebee *v.* Tinker, 2 Root Conn. 160 (sworn and asked, but questions excluded as irrelevant); 1859, Brown *v.* State, 28 Ga. 199, 212; 1876, Artz *v.* R. Co., 44 Ia. 284, 286; 1899, State *v.* Carter, 51 La. An. 385, 25 So. 442 (a witness called, declared she knew nothing of the case, and was withdrawn); 1899, Fall Brook C. Co. *v.* Hewson, 158 N. Y. 150, 52 N. E. 1095 (asked on immaterial points only); 1897, Watkins *v.* U. S., 5 Okl. 729, 50 Pac. 88 (after preliminary questions, no knowledge of the subject appeared). *Contra:* 1795, Phillips *v.* Eamer, 1 Esp. 355.

Any relevant answer of course permits cross-examination. So, too, at a deposition, after the taking party has once begun his questions, he cannot withdraw the proceeding; the opponent is entitled to cross-examine: 1885, Re Rindskopf, 24 Fed. 542.

[5] *Eng.* 1818, Morgan *v.* Brydges, 2 Stark. 314 (compare note 3, § 1894); *U. S.* 1886, People *v.* Barker, 60 Mich. 277, 301, 27 N. W. 539 (witness called to testify merely to showing the defendant a section of the statutes, allowed to be cross-examined to another conversation); 1840, Page *v.* Kankey, 6 Mo. 433; 1874, St. Louis & I. M. R. Co. *v.* Silver, 56 Mo. 264; 1920, Duncan *v.* Carson, 127 Va. 306, 103 S. E. 665, 105 S. E. 62 (on subpœna d. t. to a party, the swearing of the party to identify the books produced does not make the party the opponent's witness so as to permit cross-examination by the party's own counsel). Compare the remarks of Christiancy, J., in Campau *v.* Dewey (1861), 9 Mich. 381, 418.

[6] 1878, Callison *v.* Smith, 20 Kan. 28, 37 (but pointing out that the rule might be different for a party-witness, whose answers in any event would be admissions, independent of the direct examination; on this point, compare §§ 1075 and 1416, *ante*); 1891, Achilles *v.* Achilles, 137 Ill. 589, 594, 28 N. E. 45 (party examined and cross-examined, and the deposition excluded because of interest; the cross-examination was then also held inadmissible for the party); 1904, Bentley *v.* Bentley's Estate, 72 Nebr. 803, 101 N. W. 976.

[7] *Eng.* 1832, Smith *v.* Biggs, 5 Sim. 391; *U. S.* 1915, Jonas *v.* South Covington & C. St. R. Co., 162 Ky. 171, 172 S. W. 131 (point not noticed); 1905, McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668, *semble;* 1904, Gussner *v.* Hawks, 13 N. D. 453, 101 N. W. 898, *semble.*

Contra, semble (allowing cross-examination of a deponent present in court); 1903, Sherrod *v.* Hughes, — Tenn. —, 75 S. W. 717. That the *direct* examiner, after using the direct answers, may put in the cross-answers, if the cross-examiner does not, is noticed *post*, § 2103, and depends on another principle.

[8] *Ante*, § 912, note 2.

[9] *Ante*, § 913, note 3.

But distinguish the right of the opponent to put in the *entire deposition taken but not read* by the first party (*ante*, § 1389); it is then not a question of cross-examination only.

For the right to put in the *remainder of a deposition* when the opponent has put in one part only, see *post*, § 2103.

Where a deponent has been summoned by the opponent and *is present*, but his deposition is nevertheless allowed to be read by the taking party (*ante*, §§ 1411, 1415), he becomes the latter's witness, and the opponent may cross-examine orally in addition: 1850, Ford *v.* Ford, 11 Humph. Tenn. 89, 92, *semble;* 1871, Sweat *v.* Rogers, 11 Heisk. Tenn. 117, 122.

§ 1894. [1] *Eng.* 1829, R. *v.* Murlis, cited M. & M. 515, Gaselee and Littledale, JJ.; 1830, Davis *v.* Dale, 4 C. & P. 335, M. & M. 514, Tindal, C. J.; 1831 (?), Newland *v.* Reeves, cited 2 Cr. & M. 481, Parke, J.; 1834, Summers *v.* Moseley, 2 Cr. & M. 477, 2 Dowl. Pr. 364, Exch. (on consultation with the

testimony; the document is not receivable in evidence unless proved by some one; it is the person proving it, and not the person bringing it, who furnishes testimony. (2) A person producing a document and being sworn but *not being asked any question*, does not become the witness of the party swearing him.[2] (3) A person producing a document and *answering questions tending to prove it* does become the questioner's witness.[3]

§ 1895. **Same: Other Principles of Evidence discriminated (Right of Cross-Examination, Character on Cross-Examination, Accused on Cross-Examination, Form of Questions, Impeaching One's Own Witness).** The rule under consideration is concerned solely with the *order of presenting evidential material;* the assumption is that the fact may be proved on direct examination at a later stage, and the only question is whether it may be elicited during the earlier stage.[1] The rule is therefore to be discriminated from certain other independent rules which have a bearing on cross-examination:

(1) A fundamental rule — the Hearsay rule — is that all testimonial evidence, to be admissible, must be subjected to cross-examination. Hence arise problems as to the satisfaction of the test by adequate *opportunity for cross-examination* in depositions and former testimony (*ante*, §§ 1373–1389)

other judges); 1834, Rush *v.* Smith, 1 C. M. & R. 94, Exch.; 1834, Perry *v.* Gibson, 1 A. & E. 48, 3 Nev. & M. 462, K. B. (Park, J.: "I always thought that a subpœna duces tecum had two distinct objects, and that one might be enforced without the other"; Lord Denman, C. J., declared it "fully considered and decided"); *U. S.* 1919, Cowart *v.* Strickland, 149 Ga. 397, 100 S. E. 447.

The following argument served to clarify the question: Mr. Serjt. Ludlow, arguing, in Summers *v.* Moseley, *supra:* "Any other regulation would be productive of the greatest mischief, as it would continually impose on the party the necessity of calling an adverse witness; and a document may even be given by one party (as happened in this case) to a most hostile individual for the very purpose of compelling the opposite party to call him as their witness. . . . A person who has possession of a document may know nothing about the cause; and it is absurd to compel the party wanting only the document to examine the party producing it about a matter as to which he may be perfectly ignorant. The writ comprises two things, — it orders the attendance of the witness to testify the truth as to the matters he knows, and to bring with him a document; it does not follow that, because he is called on to do the latter, he is supposed to be called on to give evidence under the compulsion of the former branch of the writ."

[2] 1815, Reed *v.* James, 1 Stark. R. 132, Ellenborough, L. C. J.; 1822, Simpson *v.* Smith, 1 Stark. Evid., 3d ed., 187, per Holroyd, J.; 1834, Rush *v.* Smith, 1 C. M. & R. 95 (here a question was put, but no answer made). *Contra:* 1819, R. *v.* Brooke, 2 Stark. 472, Abbott, C. J.; but this case, which long served to becloud the whole subject, cannot be regarded as law.

Whether such a witness can be *compelled to take the stand*, under the form of his subpœna, is a different question (*post*, § 2200).

[3] *Eng.* 1818, Morgan *v.* Brydges, 2 Stark. 314; and other cases cited *supra*, § 1893, note 5.

From this the following cases are to be distinguished: 1814, R. *v.* Netherthong, 2 M. & S. 337, Kenyon, L. C. J. (an interested witness summoned merely as custodian of documents; an opponent objecting to the witness as interested may "inquire as to the custody," *i. e.* merely to satisfy any doubts and to bring out the facts); 1815, Reed *v.* James, 1 Stark. 132, Ellenborough, L. C. J. (an interested creditor producing a bill of exchange as the debt-instrument, allowed to speak to it only because the opponent had objected to his interest, *i. e.* only as for the opponent; therefore he did not become the summoner's witness, and could not be cross-examined); *Can.* 1917, Lyone *v.* Long, 36 D. L. R. 76, Sask. (malicious prosecution, magistrate called by plaintiff to prove certain documents, held liable to cross-examination, because examined on other matters).

For the *practice in Chancery*, see Gresley, Evidence in Equity, 126.

§ 1895. [1] 1905, Ayers *v.* Wabash R. Co., 190 Mo. 228, 88 S. W. 608 (Valliant, J., quoting this sentence, adds, "That is really the only essential difference in effect between the two rules").

and in the trial in hand (*ante*, §§ 1391–1393), and the existence of *exceptions* to the requirement (*ante*, § 1420).[2]

(2) The kinds of facts that may be employed to *discredit a witness* depend upon a special group of rules. Some of these rules forbid the facts to be proved by other testimony than that of the witness himself, and thus these rules come to be phrased with specific reference to *cross-examination* (*ante*, §§ 878, 944, 977), as the *exclusive means of discrediting*. They deal, however, with the question whether the facts may be proved at all, and not with the question of order of proof, *i. e.* whether they may be proved on cross-examination rather than at a later stage.[3]

(3) When an *accused takes the stand* in his own behalf, the question arises whether he may be *discredited* like any other witness (*ante*, § 889), and whether he has *waived his privilege* against self-crimination so that he may be compelled to answer questions involving criminal misconduct (*post*, § 2276). Here, again, the question is not as to the order of evidence, but the compellability of certain answers; yet the rulings do not always indicate which principle is involved. The same question arises where a *husband* or *wife* takes the stand and is claimed by the opponent to have waived thereby the privilege of not testifying against wife or husband (*post*, § 2242). In cases of that sort the liability to confusion with the present rule is the greater because one view of the proper limitation applicable to the privilege-question is that the waiver extends only to the topics testified to on the direct examination and not to all the issues material to the case.

(4) The *form and manner of questions* (whether leading, misleading, abusive, cumulative, lengthy, or the like) is governed by certain rules for Testimonial Interrogation, designed to secure the most trustworthy utterances (*ante*, §§ 766–788). Some of these are specially designed or modified with reference to a cross-examiner's questions; but they concern the mode of interrogation, not the order of topics inquired about.

§ 1896. **Re-Direct Examination.** The party calling the witness has upon the direct examination had an opportunity to obtain from the witness all his knowledge on all the facts relevant to the party's own case. There is therefore no need of a re-direct examination except to meet what has been brought out in the meantime upon the cross-examination, namely, facts made relevant to overthrow the opponent's facts adduced in support of his own case, under the orthodox rule for cross-examination (*ante*, § 1885), and facts explaining away discrediting facts or other weakening facts affecting the proponent's own case and brought out on cross-examination.

Nevertheless, the discrimination between these classes must here often be

[2] The difference is that there the question is merely whether there need be any adverse examination at all by the opponent; here that question is assumed to be settled in the affirmative, and the inquiry is at what stage of the case certain topics of that adverse examination shall be placed.

[3] The rule against *impeaching one's own witness* is invoked frequently as if the question were whether one may cross-examine the witness; the distinctions noticed *ante*, §§ 916, 1892, will exhibit the real nature of the inquiry.

a matter of nicety. Honest misjudgments and inadvertent omissions often occur during the direct examination, and the repetition of particular parts sometimes becomes desirable; while, on the other hand, the only danger to be guarded against is the unfair misleading of the opponent by the reservation of important testimony until the re-direct examination at a time when he may have dismissed the needed witnesses in opposition. Accordingly, the general principle of the *trial Court's discretion* (*ante*, § 1867) is here fully recognized as sanctioning the exceptional allowance, in case of need, of new testimony which could have been put in before, or of a repetition of matters already testified to:[1]

§ 1896. [1] *Accord:* (compare also the cases under § 1898, *post*); ENGLAND: 1835, Blewett *v.* Tregonning, 3 A. & E. 554, 565, 581, 583, 584.

CANADA: 1903, R. *v.* Noel, 6 Ont. L. R. 385 (Blewett *v.* Tregonning, followed).

UNITED STATES: *Alaska:* Comp. L. 1913, § 1500 (like Or. Laws 1920, § 862); *Arkansas:* Dig. 1919, § 4190 (for re-examination "to the same matter," leave of Court is necessary; but re-examination "as to any new matter upon which he has been examined by the adverse party" is allowable); § 4184 ("The direct examination must be completed before the cross-examination begins, unless the court otherwise directs"); *California:* C. C. P. 1872, § 2050 ("A witness once examined cannot be re-examined as to the same matter without leave of Court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the Court. Leave is granted or withheld in the exercise of a sound discretion"); 1892, People *v.* McNamara, 94 Cal. 509, 512, 29 Pac. 953; *Colorado:* 1876, Sloan S. M. & L. Co. *v.* Gutthsall, 3 Colo. 8, 13 (here held properly rejected, without mentioning discretion); 1876, Schaefer *v.* Gildea, 3 Colo. 15, 20 (allowable in discretion); *Connecticut:* 1898, Morehouse *v.* Morehouse, 70 Conn. 420, 39 Atl. 516; 1899, Hoadley *v.* Seward & S. Co., 71 Conn. 640, 42 Atl. 997; *Georgia:* 1856, Jesse *v.* State, 20 Ga. 156, 164 (to have the report of testimony taken down); 1857, Thomasson *v.* State, 22 Ga. 499, 504; 1890, Augusta & S. R. Co. *v.* Randall, 85 Ga. 314, 11 S. E. 706; 1897, Kidd *v.* State, 101 Ga. 528, 28 S. E. 990; where the *defendant* in a criminal case merely makes a "statement" not under oath, he may by consent be cross-examined (*post*, § 2276, n. 5), but he may not then be *re-examined* by his own counsel, unless the trial Court in discretion so rules: 1877, Brown *v.* State, 58 Ga. 212; 1902, Walker *v.* State, 116 Ga. 539, 42 S. E. 787; 1912, Lindsay *v.* State, 138 Ga. 818, 76 S. E. 369; *Idaho:* Comp. St. 1919, § 8037; *Illinois:* 1875, Wickenkamp *v.* Wickenkamp, 77 Ill. 92, 95; 1891, Springfield *v.* Dalby, 139 Ill. 38, 29 N. E. 860; *Indiana:* 1896, Pigg *v.* State, 145 Ind. 560, 43 N. E. 309; *Iowa:* 1859, State *v.* Ruhl, 8 Ia. 450; *Kentucky:* C. C. P. 1900, § 600 (substantially like Ark. Dig. 1919, § 4190); *Louisiana:* 1844, State *v.* Duncan, 8 Rob. 562 (trial Court's discretion controls; no distinction between civil and criminal cases; quoted *supra*); 1867, State *v.* Denis, 19 La. An. 119 (but repudiating the discretionary liberty for criminal cases; the Court nevertheless conceding that this was an instance "wherein a relaxation of the rule might serve to advance the course of justice"; such a ruling is in notable contrast to the spirit of the rulings in the palmy days of Chief Justice Martin); 1878, State *v.* Swayze, 30 La. An. 1323, 1327 (preceding case approved, in an opinion of singular obscurity of language and confusion of thought); *Maine:* 1904, Caven *v.* Bodwell G. Co., 99 Me. 278, 59 Atl. 285; *Massachusetts:* 1875, Wallace *v.* R. Co., 119 Mass. 93; 1886, Dole *v.* Wooldredge, 142 Mass. 184, 7 N. E. 832 (the test should be, whether the questions cover "matters not new in themselves or unconnected with the statements elicited on cross-examination, or remote and distinct from that which was the subject of inquiry and investigation on the part of the defendant in cross-examination, but have a natural and close connection with it"); *Michigan:* 1875, Hemmens *v.* Bentley, 32 Mich. 89, 91; 1897, Minkley *v.* Springwells, 113 Mich. 347, 71 N. W. 649; *Minnesota:* 1899, Backus *v.* Barber, 75 Minn. 262, 77 N. W. 959; *Mississippi:* 1880, Dillard *v.* State, 58 Miss. 389; *Missouri:* 1843, Brown *v.* Burrus, 8 Mo. 26, 29; 1889, State *v.* Pratt, 98 Mo. 482, 492; 1895, State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113; *Montana:* Rev. C. 1921, § 10667 (like Cal. C. C. P. § 2050); *Nebraska:* 1879, Schlencker *v.* State, 9 Nebr. 241, 249; 1894, Murphey *v.* State, 43 Nebr. 34, 61 N. W. 491; 1895, Collins *v.* State, 46 Nebr. 37, 64 N. W. 432; 1901, George *v.* State, 61 Nebr. 669, 85 N. W. 840; *New Jersey:* 1911, Brown *v.* Harriot, 81 N. J. L. 484, 80 Atl. 479; *New York:* 1827, Winchell *v.* Latham, 6 Cow. 682 (here the cross-examiner's question did not

1844, KING, J., in *State* v. *Duncan*, 8 Rob. La. 562, 563: "It is understood to be now the universal practice of the Courts of this State, in both civil and criminal proceedings, to permit a witness, after having been examined in chief, consigned and cross-examined, to be again examined by the party introducing him, upon points touching which he had not before testified, and subsequently to be recalled and interrogated in regard to facts material to the issue, which had not been previously elicited or referred to, either from inadvertance or ignorance that they were within the knowledge of the witness. In civil cases it has been held that it is discretionary with the Court to permit witnesses to be introduced, even after both parties had announced that the evidence had been closed; the exercise of such a discretion may frequently be as important to the safety of the accused as to the interest of the State."

However, for matters designed to meet the effect of the cross-examination, the first opportunity occurs during re-examination; hence, as for the case at large *in rebuttal*, after the case in reply (*ante*, § 1873), to put them in at that stage is not to vary the usual order and needs no express consent of the trial Court. It is therefore sometimes said that the proponent is entitled as of right to a re-examination for this purpose;[2] but this ought not to mean any more narrow a policy in granting new trials for errors in this respect (*ante*, § 21).

§ 1897. **Re-Cross-Examination, and Later Stages.** (1) No doubt cases may arise in which a re-direct examination may make relevant certain new evidence for which there was no prior need or opportunity, and for this purpose a re-cross-examination becomes proper; in such cases it is sometimes said to be a matter of right.[1] But for other matters there is ordinarily no such need, and the allowance of a re-cross-examination depends in such cases on the consent of the trial Court.[2]

necessarily involve evidence of an admission, and hence a re-examination to negative the admission was unnecessary); 1886, Simmons *v.* Havens, 101 N. Y. 433, 5 N. E. 73; 1895, People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846; *Oregon:* Laws 1920, § 862 (like Cal. C. C. P. § 2050); *Pennsylvania:* 1813, Curren *v.* Connery, 5 Binn. 488; *Porto Rico:* Rev. St. & C. 1911, § 1525 (like Cal. C. C. P. § 2050); *South Carolina:* 1899, Sloan *v.* Courtenay, 54 S. C. 314, 32 S. E. 431; *South Dakota:* 1895, Baird *v.* Gleckler, 7 S. D. 384, 64 N. W. 118; *Texas:* 1895, Cunningham *v.* R. Co., 88 Tex. 534, 31 S. W. 629; *Virginia:* 1848, Howel *v.* Com., 5 Gratt. 664, 669; *Wisconsin:* 1874, Schaser *v.* State, 36 Wis. 429, 431; 1891, Humphrey *v.* State, 78 Wis. 571, 47 N. W. 386.

[2] Compare also with the following citations the cases under § 952, § 1044, *ante* (re-examination to explain bias or self-contradiction); 1881, Osborne *v.* O'Reilly, 34 N. J. Eq. 60, 66; 1901, Gray *v.* R. Co., 165 N. Y. 457, 59 N. E. 262; 1903, Martin's Adm'r *v.* Richmond F. & P. R. Co., 101 Va. 406, 44 S. E. 695 ("The process of explaining away discrediting evidence belongs naturally in the re-examination"); and the statutes cited *supra*, note 1. *Contra:* 1899, McCooe *v.* R. Co., 173 Mass. 117, 53 N. E. 133 (explanations on re-direct examination are allowable in discretion).

Distinguish in general the rules for *admissibility* of various *facts to support* a witness' credit (*ante*, §§ 1100–1144).

For the *repetition of questions* on the same topic, see *ante*, § 782; certain aspects of that problem merge into the present one.

For the allowance of irrelevant facts in explanation of *irrelevancies brought out on cross-examination*, see *ante*, § 15. For the admission of the *remainder of a conversation* on re-examination, see *post*, § 2115.

§ 1897. [1] 1855, Wood *v.* McGuire, 17 Ga. 303, 318, *semble;* 1872, State *v.* Scott, 24 La. An. 161, *semble* (for the accused); 1909, Lapointe *v.* Berlin Mills Co., 75 N. H. 294, 73 Atl. 406 (here applied to plaintiff's offer to exhibit his injured hand).

Compare what is said *supra*, § 1896.

[2] 1845, State *v.* Hoppiss, 5 Ired. N. C. 405 ("were it otherwise, and counsel had the arbitrary power of resuming cross-examinations as often as they chose, it is obvious it would lead to great abuses in harassing witnesses and pro-

(2) Situations are conceivable in which still another direct or cross-examination may be needed for new matters; but it seems generally conceded that the protraction of the examination to this length is always in the hands of the trial Court.[3]

2. Recall

§ 1898. **Recall for Re-Direct Examination.** It can rarely occur that during the putting in of a party's case at large the recall of a witness once dismissed by him becomes necessary in order to obtain facts which could not have been put in during the witness' examinations on the original call. Nevertheless, the cross-examination of an intervening witness may develop such a situation. Moreover, inadvertent omissions constantly and unavoidably occur; and repetitions become desirable sometimes for clearness' sake. The chief danger to be guarded against is the unfair misleading of the opponent, who may have dismissed his own witnesses. Accordingly, while it does not seem to be maintained that there are cases in which a recall may be demanded as of right, it is conceded that the allowance of a recall, upon the general principle (*ante*, § 1867), rests entirely with the trial Court's discretion:[1]

tracting trials"); 1866, Thornton *v.* Thornton, 39 Vt. 122, 160; 1897, Atlantic & D. R. Co. *v.* Rieger, 95 Va. 418, 28 S. E. 590.

Compare § 1874, *ante* (rejoinder), where the rulings are sometimes difficult to distinguish from those on the present point; the governing principle is the same. For re-cross-examination in rejoinder, see also *post*, § 1899.

[3] 1901, Berger *v.* Booth, 13 Haw. 291, 296 (re-re-direct); 1890, Brown *v.* State, 72 Md. 468, 475, 20 Atl. 186 (re-re-direct).

There was a re-re-cross-examination of the plaintiff in Tilton *v.* Beecher, N. Y., 1875, Abbott's Rep., II, 684.

§ 1898. [1] In the following rulings it is not always possible to learn whether the witness was recalled before the close of the case in chief or in reply, but practically the rule would be the same as for a recall after that stage; compare also the cases under § 1896, *ante* (re-direct examination on the original call), where some of the rulings may be intended to deal with the present situation; compare also the cases under § 1044, *ante* (recall to explain a self-contradiction).

ENGLAND: 1839, R. *v.* Frost, 4 State Tr. N. S. 85, 384 (allowed on a point where they could not have foreseen that the opponent's witness would assert certain facts); 1841, White *v.* Smith, A. M. & O. 171; 1834, Adams *v.* Bankart, cited in Chitty's Gen. Pract., III, 901.

CANADA: 1857, St. Denis *v.* Grenier, 2 Low. Can. Jur. 93; 1860, Joseph *v.* Morrow, 4 Low. Can. Jur. 238; 1864, Jackson *v.* Filteau, 15 Low. Can. 60; 1914, R. *v.* Prentice, 20 D. L. R. 791, Alta. (recall of a witness as to details affecting bias; judge's refusal held improperly exercised).

UNITED STATES: *Fed.* 1896, Faust *v.* U. S., 163 U. S. 452, 16 Sup. 1112; *Ala.* 1884, Phœnix Ins. Co. *v.* Moog, 78 Ala. 284, 309; 1889, Riley *v.* State, 88 Ala. 193, 196, 7 So. 149; 1896, Crawford *v.* State, 112 Ala. 1, 21 So. 214; *Alaska:* Comp. L. 1913, § 1500 (quoted *ante*, § 1896); *Cal.* C. C. P. 1872, § 2050 (quoted *ante*, § 1896); *Colo.* 1894, Layton *v.* Kirkendall, 20 Colo. 236, 283, 38 Pac. 55; *Fla.* 1878, Coker *v.* Hayes, 16 Fla. 368, 376; *Ga.* 1853, Walker *v.* Walker, 14 Ga. 242, 251 (to make a correction); 1860, Bigelow *v.* Young, 30 Ga. 121, 125 (to re-state his testimony; but "this is a dangerous practice" not allowable with a witness "whose fairness lies under any ground of suspicion"); 1902, Central of G. R. Co. *v.* Duffey, 116 Ga. 346, 42 S. E. 510 (allowed for a correction, even after the witness has conferred with counsel); *Ill.* 1887, Bonnet *v.* Glattfeldt, 120 Ill. 166, 174, 11 N. E. 250; 1898, Anderson T. Co. *v.* Fuller, 174 Ill. 221, 51 N. E. 251; *Ky.* 1896, Louisville Ins. Co. *v.* Monarch, 99 Ky. 578, 36 S. W. 563; *La.* 1868, Dunn *v.* Pipes, 20 La. An. 276 (to re-state his testimony for correcting the report of it); 1879, State *v.* Woods, 31 La. An. 267; 1898, State *v.* Walker, 50 La. An. 420, 23 So. 967 (allowable for a correction, where counsel dispute as to the terms of his answer); *Md.* 1869, Schwartze *v.* Yearly, 31 Md. 270, 276; 1871, Green *v.* Ford, 35 Md. 82, 88 (to re-state testimony); 1898, Legore *v.* State, 87 Md. 735, 41 Atl. 60; *Mass.* 1895, Robbins *v.* R. Co., 165 Mass. 30, 42 N. E. 334; 1902, McLean *v.* Paine, 181 Mass. 287, 63 N. E. 883; *Mich.* 1892, Erickson *v.* R. Co., 93 Mich. 414, 418, 53 N. W. 393 (allowed for a correction in the report of testimony); *Mo.* 1898, State *v.* Soper, 148 Mo. 217, 235, 49 S. W. 1007; 1915,

1813, TILGHMAN, C. J., in *Curren* v. *Connery*, 5 Binn. 488: "The examination of witnesses is to be conducted in such manner as to discover the truth without taking any unfair advantage. The party who calls the witness examines him first; he is then cross-examined by the adverse party; after which, if necessary, the party who produced him may examine him again. The mouth of the witness is not to be closed, because the counsel omitted to ask a material question at first. It may be necessary, in order to come at the truth of the case, to examine him as to new matter, and after that there may be a second cross-examination. The Court at their discretion may permit a witness to be examined by either party over and over again at any time during the trial. But they will take care to exercise this discretion, so as not to suffer any advantage to be gained by trick or artifice. If the plaintiff should declare that he had finished his testimony, in consequence of which the defendant should dismiss some of his witnesses, and then the plaintiff should offer to produce new testimony, which might perhaps have been contradicted by the witnesses who have been dismissed, the Court would not suffer him to avail himself of such disingenuous conduct."

1830, MARCY, J., in *People* v. *Mather*, 4 Wend. 229, 249: "When the examination is closed and the witness dismissed from the stand, it is a matter resting in the discretion of the Court which receives the testimony to allow of a further examination. I do not doubt that this discretion is often too indulgently exercised; but it is scarcely possible for this Court to regulate it. Courts which try issues of fact must experience the inconveniences arising from too great indulgences in this respect, and on them devolves the duty of applying the corrective. At all events it is a matter too purely discretionary to warrant the interference of this Court, unless it should be in a very flagrant and oppressive instance."

It will be noticed that when the recall is asked, not (as here assumed) during the original case, but after the close of the proponent's case in chief or the proponent's case in reply, it merges in the larger question of the propriety of putting in evidence at the tardy stage of rebuttal (*ante*, § 1873) or surrebuttal (*ante*, § 1874); and when the recall is asked after the close of the case at large, the same question is practically presented as for all evidence offered in that stage (*ante*, §§ 1876–1881). The decision in such cases depends on the principles already considered under those heads; but the general principle of the trial Court's discretion, as set forth in the passages above quoted, applies in the present as well as in the other classes of cases.

In Chancery the same principle was applied in allowing the submission of new interrogatories to a deponent.[2]

State *v.* Jones, — Mo. —, 177 S. W. 366 (gambling); *N. H.* 1851, Severance *v.* Hilton, 24 N. H. 147; *N. Y.* 1829, People *v.* Mather, 2 Wend. 229, 249; *N. C.* 1879, State *v.* Lee, 80 N. C. 483, 485; *Oregon:* Laws 1920, § 862, C. C. P. 1891, § 839 (quoted *ante*, § 1896); *P. I.* C. C. P. 1901, § 341; *P. R.* Rev. St. & C. 1911, § 1525 (like Cal. C. C. P. § 2050); *Tex.* 1874, Goins *v.* State, 41 Tex. 334, 335 (to make explanations); *Va.* 1848, Howel's Case, 5 Gratt. 664, 668; 1895, Burke *v.* Shaver, 92 Va. 345, 23 S. E. 749.

Nor is there any exception to this principle in the doctrine that, after an order for the sequestration of witnesses, a witness who after dismissal has disobeyed the order may be refused to be admitted on recall; for here also it is conceded by all that the trial Court in its discretion may decline to enforce the penalty (*ante*, § 1842).

[2] 1837, Gresley, Evidence in Equity, 54, 134; *Eng.* 1859, Bevan *v.* M'Mahon, 2 Sw. & Tr. 55 (in a court of common law, "whenever I have suspected that he was being again brought forward to meet the stress of the case, I have invariably refused to accede to it"); *U. S.* 1826, Phettiplace *v.* Sayles, 4 Mas. Fed. 312, 320; 1884, Meyer *v.* Mitchell, 77 Ala. 312, 314; McDonald *v.* Jacobs, 77 Ala. 524, 527; 1888, Hall *v.* Pegram, 85 Ala. 522, 534, 5 So. 209, 6 So. 612; 1882, Swartz *v.* Chickering, 58 Md. 290, 297; 1815, Kingston *v.* Tappen, 1 Johns. Ch. N. Y. 368 (there being here "no suggestion of any tam-

§ 1899. **Recall for Re-Cross-Examination.** A recall for re-cross-examination will ordinarily be unnecessary, except in the rare cases where the direct examination of an intervening witness has brought out new facts upon which the prior witness may throw light, and for this purpose the matter can always be left in the hands of the trial Court. The general principle, therefore, of the trial Court's discretion as controlling the grant of a recall for this purpose (*ante*, § 1898) is conceded to apply here also.[1] The only exception, possibly, is that of a recall to put the warning question essential to lay a foundation for impeaching by proof of a prior self-contradictory assertion; here it is sometimes held that the recall is a matter of right.[2]

But the ordinary case of a recall by the opponent for re-cross-examination is to be distinguished from that of a re-cross-examination of a witness *recalled for re-direct examination by the party originally using the witness* (*ante*, § 1898); for there the re-direct examination usually is intended to bring out new matter, and a cross-examination to probe into this or to discredit the witness in respect of it will of course not need the express consent of the Court (on the principle of § 1897), since there has been no prior opportunity for that purpose.[3]

§ 1900. **Re-Recall.** The general principle of the trial Court's discretion (*ante*, § 1898) would apparently be held to control all requests for a second recall for any purpose whatever.[1]

pering with the witness"); Denton *v.* Jackson, 1 Johns. Ch. 526; 1820, Hallock *v.* Smith, 4 Johns. Ch. 649; 1829, Beach *v.* Fulton Bank, 3 Johns. Ch. 573, 580, 587; 1867, Fant *v.* Miller, 17 Gratt. Va. 187, 219.

For the recall of an *accused* to make a second "*statement*," in the jurisdiction which still refuses him the right to testify, see *ante*, § 579.

For a recall to explain an irrelevant fact by *other irrelevant evidence*, see *ante*, § 15.

§ 1899. [1] Add to the following cases the rulings collected *ante*, § 1874 (rejoinder) and § 1899 (re-cross-examination), in which it is sometimes impossible to learn the precise situation to which the ruling was applied, and the statutes cited *ante*, § 1896; *Ala.* 1891, Louisville & N. R. Co. *v.* Barker, 96 Ala. 435, 438, 11 So. 453; 1893, Thompson *v.* State, 100 Ala. 70, 72, 14 So. 621; 1893, Thomas *v.* State, 100 Ala. 53; *Cal.* 1875, People *v.* Parton, 49 Cal. 632, 636, *semble;* People *v.* Keith, 50 Cal. 137, 139; *Colo.* 1921, Moeller *v.* People, 70 Colo. 223, 199 Pac. 414; *Fla.* 1899, McCoggle *v.* State, 41 Fla. 525, 26 So. 734; *Ida.* 1899, Anthony *v.* State, — Ida. —, 55 Pac. 884; *Ind.* 1887, Nixon *v.* Beard, 111 Ind. 142, 12 N. E. 131; *Ia.* 1851, Ross *v.* Hayne, 3 Ia. 211, 213; 1859, State *v.* Ruhl, 8 Ia. 447, 450 (to re-state the testimony); 1888, Fowler *v.* Strawberry Hill, 74 Ia. 648, 38 N. W. 521; *Ky.* 1904, Howard *v.* Com., 118 Ky. 1, 80 S. W. 211, 81 S. W. 704; *Mich.* 1904, People *v.* Hossler, 135 Mich. 384, 97 N. W. 754; *Mo.* 1899, State *v.* Soper, 148 Mo. 217, 49 S. W. 1007; *N. C.* 1913, State *v.* Fogleman, 164 N. C. 458, 79 S. E. 879; *Or.* 1897, State *v.* Robinson, 32 Or. 43, 48 Pac. 357; *Pa.* 1853, Com. *v.* Hart, 21 Pa. 495, 502; *Utah:* 1895, People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

[2] The cases are considered *ante*, § 1036.

[3] *Eng.* 1834, R. *v.* Palmer, 6 C. & P. 653; *U. S.* 1849, Hendron *v.* Robinson, 9 B. Mon. Ky. 505 (where the witness after argument begun had been allowed to repeat his testimony, and could be shown to have contradicted in so doing); 1896, Titus *v.* Gage, 70 Vt. 13, 39 Atl. 246 (testing as expert, by cross-examination after rebuttal, of one called first for his knowledge but on rebuttal as an expert, held improperly forbidden).

But this does not entitle the opponent, without permission, to go beyond the scope of the re-direct examination: 1889, Moellering *v.* Evans, 121 Ind. 196, 22 N. E. 989.

§ 1900. [1] *Accord:* 1915, Loud *v.* Solomon, 188 Mich. 7, 154 N. W. 73.

SUB-TITLE II: RULES TO AVOID CONFUSION OF ISSUES OR UNDUE PREJUDICE

CHAPTER LXIV.

Next for consideration comes the second group of rules, *i. e.* Simplificative Rules, whose general purpose and operation has been already set forth (*ante*, § 1864), viz. Rules excluding Specific Kinds of Evidence because of Confusion of Issues or Undue Prejudice.

A. CIRCUMSTANTIAL EVIDENCE

§ 1904. **General Principle.** Circumstantial evidence, concededly relevant, may nevertheless be excluded by reason of the general principle (*ante*, § 1863) that the probative usefulness of the evidence is more than counterbalanced by its disadvantageous effects in confusing the issues before the jury, or in creating an undue prejudice in excess of its legitimate probative weight. In either case, its net effect is to divert the jury from a clear study of the exact purport and effect of the evidence, and thus to obscure and suppress the truth rather than to reveal it. But the operation of this principle cannot practically be expounded apart from the examination of the rules of Relevancy which affect the same kinds of evidence; because sometimes the operation of the present principle may be obviated by a change in the situation and its ban may thus be removed, and the evidence will then be receivable if relevant. For example, the bad moral character of an accused person, though relevant, is nevertheless excluded by the principle of unfair prejudice, when offered against the accused; yet the accused's good moral character, though no more relevant than before, is admitted in his favor, because the present principle ceases then to operate. Moreover, the exclusion usually results only when other principles combine with the present one.

For these reasons, it becomes necessary to treat the operation of the present principle in connection with the operation of the principles of Relevancy, though those principles themselves form in theory distinct domains in the

law of Evidence. In this place, therefore, it is enough to note the bearing of the principle upon various sorts of circumstantial evidence already considered in dealing with the rules of relevancy.

1. *Confusion of Issues.* This consideration operates potentially throughout the whole realm of circumstantial evidence. It is given positive effect chiefly where the evidence consists of particular facts of human conduct or external events which are of themselves only minor and additional and are not the sole mode of proof for the matter in issue. Moreover, even in these cases, effect is given to it usually only when the other principles of Undue Prejudice (*infra*) and of Unfair Surprise (*ante*, §§ 1845, 1849) combine at the same time to accumulate an overweight of disadvantage in using the evidence.

The influence of the present principle may be seen in the rules affecting the use of *particular acts of misconduct* to prove the *character of a party* (*ante*, § 194), of *other crimes* as evidence of *plan or intent* (*ante*, § 300), of other instances proving the *defective* or *dangerous* nature of *highways*, *machines*, and the like (*ante*, § 443), of *particular acts of misconduct* to discredit *the character of a witness* (*ante*, § 978), and of *error on collateral facts* to diminish credibility (*ante*, § 1000).

2. *Undue Prejudice.* This consideration, like the preceding one, is found operating potentially throughout the realm of circumstantial evidence; and, like the preceding one, it is found mainly in its positive effects where the other principles of Confusion of Issues (*supra*) and of Unfair Surprise (*ante*, §§ 1845, 1849) combine also to oppose the use of the evidence. Nevertheless, it has effect also in some marked instances where neither of the others has any bearing.

Its operation may be seen in the rules affecting the use of a *party's general character* (*ante*, § 55), of a party's capacity or habit (*ante*, §§ 83, 92), of *particular acts of misconduct* to evidence *the character of a party* (*ante*, § 194), of other crimes to prove a plan or intent (*ante*, § 300), and of a *witness' character* (*ante*, §§ 921, 978). It is found also affecting the use of *real evidence* (or *autoptic proference*) in one or two aspects (*ante*, §§ 1157, 1158).

The influence, then, of the present considerations upon the law of Circumstantial Evidence as a whole is large and widespread, although it is not practicable to state it in the form of rules standing distinctly apart from the other rules.

B. TESTIMONIAL EVIDENCE

§ 1906. **General Principle.** When a witness has once been declared to be qualified, *i.e.* to have the fundamental qualities essential to render his assertions trustworthy (*ante*, §§ 483–867), the considerations that can overweigh this and exclude his testimony because on the whole it unduly confuses the issue or prejudices the fair determination of the facts must supposably be rare; and so the rules of exclusion resting on such considerations are but few.

There are indeed no absolute and positive prohibitions having a general recognition.[1] What we find is, first, a rule permitting the exclusion of additional witnesses upon a single topic where their testimony is merely superfluous and only cumbers the issues, — this rule resting on the principle (*ante*, § 1863) of Confusion of Issues; and, secondly, three suggested (but not established) rules requiring the exclusion of certain kinds of witnesses whose personality might be supposed to carry undue weight with the jury and thus to divert them from an impartial consideration of the evidence; these rules rest upon the principle (*ante*, § 1863) of Undue Prejudice, although other reasons are sometimes suggested as also serving for a foundation.

§ 1907. **Witnesses merely Cumulative, or Excessive in Number; General Principle.** Where the array of witnesses called to testify on a given side mounts up in numbers, it is obvious that each additional witness increases, in almost geometrical ratio, the possibilities of confusing the issues and of thus diverting the jury from a clear and concentrated consideration of the precise issue in dispute. Each witness adds new items of detail in his examination and cross-examination; each witness may be impeached by the calling of additional witnesses on the other side; each of these new ones adds his quota of details; and each may in turn lead to the calling of new impeaching witnesses on the first side; and with each of these last the same round of possibilities begins again; until amid the interminable entanglements of scores of witnesses and their statements it might become practically impossible for the jurymen to follow the thread of the substantial issue in controversy and to detect the true effect of the evidence. The result would be the stifling of the truth, not its revelation, and the decision would probably turn upon the chance effect of fragments of evidence making casual impressions, rather than upon an orderly consideration of all the salient facts.

Nevertheless, the possibility of confusion through the exposition of a mass of details is not in itself a sufficient reason for refusing to hear those details, where the complication is inherent in the issue. If the truth is complicated, the complication must none the less be struggled with, at whatever risk of baffled endeavor. It is where the complication and confusion are substantially unnecessary, or the small value of the evidence is overwhelmed by its disadvantages, that a rule of Evidence may properly intervene in prohibition.

This much in general has been conceded on all hands; the effort has been to draw the line fairly between necessary and unnecessary complication. It has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited

§ 1904. [1] Distinguish the rules of Privilege and the like in Part III, *post* (§ 2175); there the exclusion rests on extrinsic policy having nothing to do with the probative defects or efficiency of the testimony; here, as noted already (*ante*, § 1171), in surveying the nature of the rules in Part II, we are concerned with those rules which are based on the desire to secure the highest probative efficiency for the evidence and to eliminate disturbing evidential facts.

only by his own judgment or whim. But the difficulty is to define the situations in which the testimony may be properly regarded as practically superfluous or relatively unprofitable:

1827, Mr. *Jeremy Bentham*, in his *Rationale of Judicial Evidence*, b. IX, pt. VI, c. II, § 1 (Bowring's ed., vol. VII, p. 531): "What number of witnesses shall a party be allowed to produce? Put a limitation anywhere upon the number, you lay the party under the necessity of leaving the mass of evidence on his side incomplete; you pave the way to deception and consequent misdecision. Put no limitation anywhere upon the number, you put it in the power of a 'mala fide' suitor (if superior to a certain degree in respect of opulence) to overwhelm his adversary with an indefinite load of testimony and the expense, vexation, and delay attached to it. . . . The greater the mass of evidence in the cause, the heavier the burthen imposed by it on the mental faculties of the judge [*i. e.* the jury]; the heavier the burthen on the judge's mind, the greater the probability that his force of mind will not be adequate to the sustaining of it, to the acting under it in such a manner as to extract the truth from the mass of matter through which it is diffused, to frame to himself a right judgment respecting the principal facts in dispute and to decide in consequence. . . . [The chances ordinarily in favor of a right decision being assumed as 100 to 1,] suppose the faculties of the judge in a state of complete confusion, and the force of his mind altogether unequal to the task of framing a right decision under the pressure of the burthen thrown upon it by the aggregate mass of evidence; this chance of 100 to 1 will be reduced to an even chance, or chance of 1 to 1; at which point, the party who is in the right will have no greater chance of prevailing than the adversary who is in the wrong. At this point, the advantage possessed by him who is in the right is equal to 0; and to this point every additional quantity, added to the load of evidentiary matter, tends in proportion to its pressure to reduce the cause. . . . The evils, therefore, which arise from excess of evidence are very great; and that they form a proper subject for the legislator's consideration is out of the reach of dispute. But the propriety of allowing them to be productive of actual exclusion, of giving them in practice the effect of a conclusive reason, depends upon *proportion*, viz., upon the preponderance of the collateral inconvenience in the shape of vexation, expense, and delay, as compared with the probability of direct mischief resulting from deception and consequent misdecision resulting for want of the evidence proposed to be excluded." [1]

In attempting to determine when this overbalance of disadvantages exists, rendering the admission of the testimony relatively unprofitable, it may be assumed in advance that the facts testified to are relevant; more than this the party of course cannot claim, and less than this can certainly not be forbidden him. The question thus reduces itself in effect to that of the number of witnesses allowable upon facts concededly relevant. May any limitation be imposed at all? It is clear that no rule of limitation, if any be made,

§ 1907. [1] Mr. Bentham's proposal of reform (too lengthy to be set out here) consisted chiefly in subdividing the "burthen" by eliminating before the actual trial all testimony that is practically not needed on the main controversy; this is to be accomplished by the parties' submission beforehand of a brief or sketch of all the proposed evidence, so that the few precise points over which alone there is any real controversy will remain for testimony on the trial, and will then cause little or no complication. His exposition of this proposal deserves perusal.

Bentham's vision seems to have come true in modern English practice under the Rules of Court of 1883; see the exposition by Mr. Samuel Rosenbaum (of the Philadelphia Bar) in his monograph The Rule-Making Authority in the English Supreme Court, and the comments of Chief Justice Taft and of former Justice Loring in the American Bar Association Journal (1922, October, vol. VIII, No. 10).

should in its terms be mandatory and invariable, and that the rule should merely declare the trial Court empowered to enforce a limit when in its discretion the situation justifies this; and such is in fact the form which the rule (so far as accepted) does take.

What are these situations in which the trial Court is empowered in its discretion to limit the number of witnesses? To this question the answer is, in some respects, clear and accepted on all hands; in others, it is as yet the subject of rulings somewhat conflicting and diversified in their details.

§ 1908. **Same**: (1) **Expert Witnesses**; (2) **Character Witnesses**; (3) **Witnesses in General.** (1) The frequent uncertainties and hopeless contrariety which are well known to beset the use of *expert testimony* and have led to much speculation over methods of improvement (*ante*, § 563), tend to reduce its serviceableness as a decisive testimonial element, and hence make it easier to dispense with it when an over-accumulation threatens to complicate and confuse the controversy. A limitation may therefore properly be set upon the number of expert witnesses: [1]

§ 1908. [1] Add to the following citations some of the rulings in note 3, *infra*, which deal with expert witnesses but do not limit the rule to that class:

CANADA: *Dominion:* Can. St. 1902, c. 9, Rev. St. 1906, c. 145, Evid. Act, § 7 (of "professional or other experts entitled according to the law of practice to give opinion evidence," not more than five on one side are to be called without leave of Court before examination of any experts); 1906, Dodge *v.* The King, 38 Can. Sup. 149, 152 (statute noted; but the strange doubt is expressed whether if more are improperly called the Court above may consider their testimony); 1916, Canadian Northern Western R. Co. *v.* Moore, 31 D. L. R. 456 (Evid. Act, § 10, held applicable to value testimony before arbitrators under the Railway Act); *Alberta:* 1915, Canadian Northern Western R. Co. *v.* Moore, 23 D. L. R. 646 (taking of land; Can. Evid. Act, § 10, held to limit the value witnesses to three, in arbitration proceedings under the Railway Act); *British Columbia:* Rules of Court 1912, No. 467A (the judge may limit; no number named); *Manitoba:* St. 1908, 7–8 Edw. VII, c. 18, § 1, Rev. St. 1913, c. 65, § 7 (not more than three expert witnesses to be called on either side without leave of the judge; such leave to be applied for before examination of any experts); *Ontario:* St. 1902, c. 15, Rev. St. 1914, c. 73, § 10 (like Dom. Evid. Act, § 7, making three the limit, instead of five); 1912, Rice *v.* Sockett, 8 D. L. R. 84 (contract to build a silo; certain persons held experts, under the above statute, though not having a special technical education); 1915, Burrows *v.* Grand Trunk R. Co., 23 D. L. R. 173 (personal injury; statute applied to medical witnesses); *Saskatchewan:* Rev. St. 1920, Evidence Act, c. 44, § 42 (like Dom. Evid. Act, § 7).

UNITED STATES: *Federal:* 1858, Winans *v.* R. Co., 21 How. 100 (quoted *supra*); *Illinois:* 1915, Geohegan *v.* Union Elev. R. Co., 266 Ill. 482, 107 N. E. 786 (eminent domain; the trial Court having limited the opinion evidence to five witnesses on a side, and the defendant having called five witnesses, qualified by knowledge of the vicinity, to testify to the effect of the railroad in damaging the property, three further witnesses for the defendant on that subject were excluded by the trial Court; held, that the trial Court had discretion to limit the number of expert witnesses and the number of witnesses to a collateral fact, and that the rule at any rate included witnesses to property value, even though in one sense these witnesses might not be classed as experts); *Massachusetts:* 1904, White *v.* Boston, 186 Mass. 65, 71 N. E. 75 (the limited number having been used, a lay witness of the opponent cannot be used as an expert on cross-examination); *Michigan:* 1879, Fraser *v.* Jennison, 42 Mich. 206, 223, 3 N. W. 882 (testator's sanity; refusal to admit a sixth expert witness for the contestants, held proper; quoted *supra*); St. 1905, No. 175, Comp. L. 1915, § 12558 (limits the number to three on each side; quoted in full *ante*, § 563); 1910, People *v.* Dickerson, 164 Mich. 148, 129 N. W. 199 (St. 1905, No. 175, held unconstitutional, but not as to the present point; see the case more fully cited *post*, § 2484, n. 1); *Missouri* 1906, St. Louis M. & S. E. R. Co. *v.* Aubuchon, 199 Mo. 352, 97 S. W. 867 (land damages; a ruling restricting the witnesses to four on each side, held unreasonable on the facts; but the opinion, though citing nine cases from other jurisdictions and two cases from an inferior

1858, GRIER, J., in *Winans* v. *R. Co.*, 21 How. 100: "A judge may obtain information from experts, if he desire it, on matters which he does not clearly comprehend, but cannot be compelled to receive their opinions as matter of evidence. Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount, and it often occurs that not only many days, but even weeks, are consumed in cross-examinations to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both Court and jury, and perplexing instead of elucidating the questions involved in the issue."

1879, COOLEY, J., in *Fraser* v. *Jennison*, 42 Mich. 206, 224, 3 N. W. 882 (approving a limitation to five expert witnesses to insanity): "If testamentary cases are ever to be brought to a conclusion, there must be some limit to the reception of expert evidence; and that which was fixed in this case was quite liberal enough. To obtain such evidence is expensive, since desirable witnesses are not to be found in every community; but an army may be had if the Court will consent to their examination; and if legal controversies are to be determined by the preponderance of voices, wealth in all litigation in which expert evidence is important may prevail almost of course. But one familiar with such litigation cannot but know that, for the purposes of justice, the examination of two conscientious and intelligent experts on a side is better than to call more; and certainly, when five on each side have been examined, the limit of reasonable liberality has in most cases been reached. The jury cannot be aided by going farther. Little discrepancies that must be found in the testimony, of those even who in the main agree, begin to attract attention and occupy the mind, until at last jurors, with their minds on unimportant variances, come to think that expert evidence, from its very uncertainty, is worthless. This is not a desirable state of things; and it can only be avoided by confining the use of expert evidence within reasonable bounds."

This result may be said to be universally accepted; the trial Court in its discretion may limit the number of expert witnesses.

(2) The value of *character-evidence*, impeaching or sustaining a party or a witness, is commonly much exaggerated (*ante*, §§ 920, 1611); its comparative futility in the ordinary case, and its tendency to degenerate into a mere exhibition of petty local jealousies and animosities, of no real probative service, have induced the Courts to concede unanimously that the number of character-witnesses may without disadvantage be limited, as the trial Court may prescribe: [2]

court of Missouri, wholly ignores the four rulings in its own court, cited *infra*, notes 2 and 3; the Court's remark that "we are cited to no case by respondent that sustains such rule" will not properly account for such inattention to its own rulings, even on the part of a Minos so recently enthroned and so brilliant and sensible as the one who writes the opinion); *New York:* 1847, Sizer *v.* Burt, 4 Denio 428; *New Hampshire:* 1879, Hilliard *v.* Beattie, 59 N. H. 462, 464 (personal injury; number of experts may be limited, but a modification of the order must not be unfair); *Ohio:* 1895, Wabash R. Co. *v.* Defiance, 52 Oh. 262, 40 N. E. 89; *Tennessee:* 1890, Powers *v.* McKenzie, 90 Tenn. 182, 16 S. W. 559; *Washington:* 1904, Swope *v.* Seattle, 36 Wash. 113, 78 Pac. 607 (limitation to three witnesses to real estate value, held proper in discretion).

[2] *Accord: Federal:* 1921, Hauge *v.* U. S., 9th C. C. A., 276 Fed. 115 (perjury; defendant's character-witnesses limited to 6); *Arkansas:* 1919, Kindrix *v.* State, 138 Ark. 594, 212 S. W. 84 (impeaching witnesses, in discretion, here limited to five); *California:* 1912, People *v.* Burke, 18 Cal. App. 72, 122 Pac. 468; *Connecticut:* 1854, Bunnell *v.* Butler, 23 Conn. 65, 69 (quoted *supra*); *Illinois:* 1911, People *v.* Arnold, 248 Ill. 169, 93 N. E. 786 (number limited to twenty-five on each side); *Indiana:* 1887, State *v.* Thomas, 111 Ind. 575, 578, 13 N. E. 35 ("It may be that in some cases a limit may be put"); *Iowa:* 1879, Bays *v.* Herring, 51 Ia. 286, 291, 1 N. W. 558 (in trial Court's discretion); 1882, Bays *v.* Hunt, 60 Ia. 251, 254, 14 N. W. 785 (same); 1889, Minthon *v.* Lewis, 78 Ia. 620, 622, 43 N. W. 465 (same); 1896, State *v.* Beabout, 100 Ia. 155, 69 N. W. 428 (limitation to five on each side, held proper

1840, NELSON, C. J., in *Bissell* v. *Cornell*, 24 Wend. 354, 357: "We have heretofore held that the judge at the circuit may exercise a sound discretion as to the number to be sworn of impeaching and supporting witnesses [to character]. There must be some limit. Any one familiar with trials must be aware that, after some dozen of witnesses on a side have been examined, equally supporting and impeaching a party or witness, very little additional benefit is derived by enlarging the number. The relative strength of the testimony will be the same, however extended the examination. A balanced public opinion will appear."

1854, WAITE, J., in *Bunnell* v. *Butler*, 23 Conn. 65, 69: "It would be absurd to hold that upon an enquiry of this sort, depending in a great measure upon the opinion of witnesses, a party has the right to examine as many as he pleases, and that the Court and jury are bound to sit and hear them without any power to interfere. There must necessarily be a limit to such inquiries, and it is for the Court to prescribe it. . . . Much, however, will depend upon the circumstances of the case and the importance of the testimony of the principal witness."

(3) For witnesses upon *any point whatever* a similar rule of limitation may be enforced. It may not be possible to define any other specific classes of witnesses or of facts for which a rule can be laid down; but it is possible to sanction a general rule as applicable, in the circumstances of the case, to any kind of fact or witness whatsoever. The reason of the rule — namely, that the disadvantage of confusion preponderates over the testimonial value, little or none — of the additional witnesses — may come to be applicable at any time:

1878, SHERWOOD, C. J., in *State* v. *Whiton*, 68 Mo. 91, 92 (dealing with a limitation on the issue of change of venue): "We regard such ruling clearly within the domain of judicial discretion, with which, unless arbitrarily and abusively exercised, we should refrain from interfering. It would be productive of very serious and hitherto unheard of consequences, should the law be so declared by this Court as to cut off and preclude inferior tribunals from the exercise of one of the most ordinary functions pertaining to the daily administration of justice. . . . Any other theory of the law would permit, nay prompt, a crafty criminal to block the wheels of both punitive and remedial justice, by using the latest census returns of the county as a fecund source of limitless supply for countless subpœnas, thus securing a continuance under the pretence of securing a change of venue."

1894, JENNER, J., in *Hupp* v. *Boring*, 8 Oh. C. C. 259, 260: "Has the trial Court the

in discretion); *Louisiana:* 1906, State *v.* Rodriguez, 115 La. 1004, 40 So. 438 (under St. 1894, No. 67, a limitation of defendant's character-witnesses to six, with liberty to have process for more at his own cost, held proper); *Michigan:* 1885, Hollywood *v.* Reed, 57 Mich. 234, 237, 23 N. W. 792 (number of sustaining and impeaching witnesses "is in the discretion of the Court, and is generally limited to an equal number on each side"); 1922, People *v.* Nemer, — Mich. —, 187 N. W. 315 (arson; limitation of character-witnesses to six, held proper); *Missouri:* 1899, State *v.* Rutherford, 152 Mo. 124, 53 S. W. 417 (more than six witnesses to defendant's character, excluded properly on the facts); *New Hampshire:* 1879, Plummer *v.* Ossipee, 59 N. H. 55, 58 (limitation to twenty on each side, held proper); *New York:* 1840, Bissell *v.* Cornell, 24 Wend. 354, 357 (character of plaintiff in slander to mitigate damages; refusal to hear more than sixteen witnesses on a side, held proper in discretion; quoted *supra*); *Ohio:* Gen. Code 1921, § 13662 (no more than ten witnesses on each side allowable "upon the subject of character or reputation" in any criminal case except murder, manslaughter, rape, rape-assault, or selling liquor to habitual drunkard, unless full fees are deposited or paid beforehand); 1905, People *v.* Dones, 9 P. R. 423, 432 (limitation to five for impeaching veracity, held proper); *South Dakota:* 1909, State *v.* Madison, 23 S. D. 584, 122 N. W. 647 (impeaching witnesses here limited to four on a side); *Tennessee:* 1897, Williams *v.* McKee, 98 Tenn. 139, 38 S. W. 730 (trial Court may limit in discretion; here disapproving of the fixing of the number before testimony was introduced); *Texas:* 1879, Johnson *v.* Brown, 51 Tex. 65, 76 (a reasonable limitation is proper).

power to limit the number of witnesses that may be called in proof of a material fact or of the issue? The question is one of importance in practice. Mere numbers do not necessarily determine the weight of the testimony; and numbers within a reasonable limit are often of great importance. It has long been held that, in eliciting the truth from a witness, the manner and extent of the examination is largely in the discretion of the trial judge. But when it comes to the number to be called to establish a fact or a given issue, must all discretion be denied? A trial sometimes becomes a contest as to which side can overwhelm the other with the larger number of witnesses. And we have repeated what recently occurred in a common pleas court in this circuit, the issue between two neighboring farmers being the identity of three sheep, not worth to exceed three dollars. A hundred witnesses were called, ten days consumed in the trial, the three sheep were soon followed by the loss of the entire flocks of the unfortunate farmers, and also a large part of their farms. In another part of this circuit the issue tried was the alleged warranty of a heifer at an auction sale of stock; all the men present at the sale were called by one or the other of the contending parties, with a result not less disastrous than the sheep case. A Court of justice that has no power to regulate such exhibitions of bad temper, is hardly worthy of the name. . . . We conclude that a reasonable limitation of the number of witnesses who may be called in proof of a fact, or of a single issue, is within the discretion of the trial Court, to be exercised. no doubt, with caution, considering the nature of the case, the character of the witnesses, and the state of the proof."

Some such general principle, as to the limitation of numbers, seems to be conceded on all hands.[3]

[3] *Federal:* 1905, Carrara P. A. Co. *v.* Carrara P. Co., 137 Fed. 319, C. C. (depositions of 250 witnesses were allowed, no special reason for limitation of number being shown); 1916, Samuels *v.* U. S., 8th C. C. A., 232 Fed. 536 (fraudulent use of the mail by sending a pretended cure for disease; after 35 witnesses for the defendant had testified that they were cured by his medicine, the Court announced that 6 more only would be permitted, and refused to admit 20 or 25 others offered by the defendant; held proper, in the trial Court's discretion); *Alaska:* Comp. L. 1913, § 1494 (like Or. Laws 1920, § 856); *Arkansas:* Dig. 1919, § 4183 (like Cal. C. C. P. § 2044); 1890, Jones *v.* Glidewell, 53 Ark. 161, 176, 13 S. W. 723 (election contest; limitation held to be for the trial Court's discretion); 1897, Hall *v.* State, 64 Ark. 121, 40 S. W. 578 (trial Court's discretion approved, excluding cumulative witnesses to errors in an accomplice's testimony); 1902, Hughes *v.* State, 70 Ark. 420, 68 S. W. 676 (Court's discretion, under Stats. § 2955, in limiting the further examination of a witness, held improperly exercised); 1922, Henson & S. C. Co. *v.* Strickland, — Ark. —, 238 S. W. 5 (mining trespass; a limitation to two witnesses on each side, held unreasonable; but the opinion is unsound in further declaring that an order of limitation should not be made until it "becomes obvious to the Court that the parties . . . are merely producing cumulative testimony"; for this tardy announcement might deprive the party of the option to select the most important of his witnesses); *California:* C. C. P. 1872, § 2044 (Court "may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt"); *Columbia (Dist.):* 1909, Trometer *v.* District, 24 D. C. App. 242, 247 (wife's testimony on a certain point, excluded as cumulative); *Delaware:* 1901, Pritchard *v.* Henderson, 3 Pen. 128, 50 Atl. 218 (rule of Court, limiting to six witnesses to one fact, applied); 1901, Giordano *v.* Brandywine Granite Co., 3 Pen. 423, 52 Atl. 332 (where the number has been limited beforehand, a witness who, being the person supposed by the counsel, nevertheless knows nothing on the subject, counts as one of the limited number; Spruance, J., diss., and properly); 1907, State *v.* Uzzo, 6 Pen. 212, 65 Atl. 775 (rule of Court limiting to six witnesses on the same fact, held applicable in capital cases); *Illinois:* 1864, Gray *v.* St. John, 35 Ill. 222, 238 (fraud in conveyance; deposition excluded on the principle that "when a fact is sufficiently established, and is not controverted, the Court may properly refuse to suffer its time to be occupied in hearing further evidence on that point"); 1869, White *v.* Hermann, 51 Ill. 243, 246 (refusal to permit more than four witnesses to value of land, held improper); 1879, Mueller *v.* Rebhan, 94 Ill. 142, 151 (proponent of a will introduced seventeen witnesses to prove that the testator's condition had not changed prior to the will's execution; opponent offered to admit that all other witnesses of proponent would testify to this and certain other facts; ruling that no more witnesses to these facts should be examined for proponent, held proper); 1891, Greene *v.* Ins. Co., 134 Ill.

There is, however, a lack of harmony and certainty in applying it. (*a*) In the first place, it is generally agreed that the existence of a need for the

310, 25 N. E. 583 (insanity of a grantor; limitation to nine witnesses on each side, held improper on the facts; partly because the order was not made at the opening of the trial, partly because the issue was the main one in dispute); 1900, Chicago Terminal T. R. Co. *v.* Bugbee, 184 Ill. 353, 56 N. E. 386 (limitation by parties' stipulation; additional witnesses excluded); 1909, West Skokie Drainage District *v.* Dawson, 243 Ill. 175, 90 N. E. 377 (obscure and rambling opinion; apparently the rule accepted is that the trial Court's ruling cannot be made before testimony begun and cannot be made to include rebuttal testimony; unsound on both points); 1915, Geohegan *v.* Union Elev. R. Co., 266 Ill. 482, 107 N. E. 786 (cited more fully *supra*, n. 1); *Indiana:* 1853, Gardner *v.* State, 4 Ind. 632, 634 (beating by a schoolmaster; limitation to two witnesses for the defence, as to the absence of blows with foot and fist, apparently held an abuse of discretion); 1869, Hubbell *v.* Osborn, 31 Ind. 249 (limitation to one witness on a material point, held improper); 1881, Union R. T. & S. T. Co. *v.* Moore, 80 Ind. 458 (land-value; limitation to eleven on each side, held proper in discretion); 1884, Butler *v.* State, 97 Ind. 378, 380, 388 (murder; limitation for depositions out of the State to forty-five for the defence, held proper in discretion); 1886, Mergentheim *v.* State, 107 Ind. 567, 572, 8 N. E. 568 (condition of a canal said to be a nuisance; limitation to seven on each side, held proper in discretion); *Iowa:* 1870, Kesse *v.* R. Co., 30 Ia. 78, 80 (whether a locomotive spark-net could be seen from the belt-frame; limitation held for trial Court's discretion); 1882, Everett *v.* R. Co., 59 Ia. 243, 244, 13 N. W. 109 (land-value; limitation to five on each side, held proper in discretion); 1890, McConnell *v.* Osage, 80 Ia. 293, 295, 45 N. W. 550 (condition of sidewalk; limitation to six on each side; objection not sufficiently taken); 1895, Preston *v.* Cedar Rapids, 95 Ia. 71, 63 N. W. 577 (land-value; limitation to seven on each side, held proper in discretion); *Kansas:* 1878, Fisher *v.* Conway, 21 Kan. 18, 24 (limitation to four witnesses, upon a matter of self-defence, held improper; though on "any collateral matter" the trial Court may in discretion limit the number); *Kentucky:* C. C. P. 1895, § 593 (like Cal. C. C. P. § 2044); *Louisiana:* St. 1894, No. 67, Wolff's Rev. L., p. 277 (in criminal cases "each side shall not be allowed to summon more than six witnesses," except after the attorney's written application setting forth under oath "what he expects to prove by the additional witness, that an additional number is required to meet the ends of justice and to make a proper prosecution or defence"); 1920, State *v.* Coll., 146 La. 597, 83 So. 844 (failure to comply with the statute deprives of right of postponement of trial for the absent witnesses, where more than six witnesses summoned are present; collecting the interim rulings on the statute); *Maryland:* 1861, Calvert *v.* Carter, 18 Md. 73, 109 (obscure; but *semble contra*); *Massachusetts:* 1835, Howe *v.* Thayer, 17 Pick. 91, 97 (additional witnesses on an undisputed point, excluded); 1848, Cushing *v.* Billings, 2 Cush. 158 (trial Court has discretion; using the illustrations mentioned in the next case); 1883, Com. *v.* Ryan, 134 Mass. 223, 224 ("It must be in the power of the Court to limit the amount of testimony where it may be extended indefinitely, as in the case of usage or character or genuineness of handwriting"); *Michigan:* 1888, Barhyte *v.* Summers, 68 Mich. 341, 36 N. W. 93 (unsoundness of a mare before sale; limitation to seven witnesses on a side, held improper; no authority cited); 1891, Detroit C. R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007 (electric railroad as decreasing travel in streets, lowering rents, etc.; limitation to "eight or ten" witnesses, held proper in discretion); *Missouri:* 1878, State *v.* Whiton, 68 Mo. 91, 92 (prejudice as ground for change of venue; limitation to six on each side, held proper in discretion; see quotation *supra*); 1897, State *v.* Lamb, 141 Mo. 298, 42 S. W. 827 (alibi; number limitable in discretion); 1901, State *v.* Smith, 164 Mo. 567, 65 S. W. 270 (exclusion of additional witnesses to deceased's threats, after eight had testified, held not improper); *Montana:* Rev. C. 1921, § 10661 (like Cal. C. C. P. § 2044); *New York:* 1893, Sixth Ave. R. Co. *v.* Metrop. El. R. Co., 138 N. Y. 548, 553, 34 N. E. 400 (number limited, in trial Court's discretion, for proving damages by taking of land); 1896, People *v.* Barberi, 149 N. Y. 256, 43 N. E. 635 (the trial Court held improperly to have refused to admit for the accused the corroborating testimony of others than the accused and yet allowed the jury to question her credibility); *Ohio:* 1894, Hupp *v.* Boring, 8 Oh. C. C. 259 (condition of boundary, in claim by adverse possession; limitation to four on each side, held proper in discretion; quoted *supra*); *Oregon:* Laws 1920, § 856 (like Cal. C. C. P. § 2044); *Porto Rico:* Rev. St. & C. 1911, § 1519 (like Cal. C. C. P. § 2044); *Rhode Island:* 1909, Campbell *v.* Campbell, 30 R. I. 63, 73 Atl. 354 (limitation of the number of witnesses to those specified by counsel as a condition of getting an adjournment, held unfair on the facts; Blodgett, J., diss.; elaborate opinions, criticizing the various precedents); *Texas:* 1891, Galveston H. & S. A. R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573 (exclusion of new depositions proving different facts tending

limitation should be left to the *trial Court's determination.*[4] (*b*) In the next place, it is also generally agreed that the rule may be applied only to exclude additional witnesses to the *same issue* or controverted fact; though a precise definition of the scope of such an issue is not furnished, nor, perhaps, can it be. Both of these conditions to the rule are fair and sound. (*c*) A Court occasionally declares the rule applicable only where the fact is *not actually controverted.*[5] But this limitation is unsound, because the value of merely cumulative witnesses may become trifling even where the point is controverted, and the policy of the rule rests on the proportion between the probative value of the additional witnesses and the disadvantages they bring. (*d*) Some of the statutory provisions declare the rule applicable whenever the evidence "is already so full as to *preclude reasonable doubt.*" Yet it seems undesirable to require the judge to pass upon this question, even provisionally; and it is unnecessary to do so, because the true reason for the slight value of the additional witnesses is that, if the jury did not believe the foregoing ten, they will hardly believe two more, and if they did believe the ten, then two more are not needed; in other words, the exclusion of the two more as valueless does not by any means rest on the assumption that the preceding ones have proved the fact indubitably (as the codifiers seem to have believed), but on the consideration that two more of the same sort cannot make a bad case better. The statutory phrasing should rather run: "if it is already so full that more witnesses to the same point could not be reasonably expected to be additionally persuasive." (*e*) Sometimes a Court declares the qualification that the limiting of numbers is proper only upon *collateral issues;* though there is little authority for this.[6] The term "collateral" is a much-abused one; it is difficult of definition, and should be avoided.[7] Moreover, there is no reason here for such a restriction of the rule; the exigency may equally arise upon any part of the issue, as the reasons above given indicate clearly. (*f*) It is sometimes required that the trial Court (with or without the parties' motion) *announce before any witnesses on the point are offered,* that a limitation of the witnesses upon the particular fact will be enforced, and a failure to do this is said to prevent the enforcement of any limitation; on the theory that, unless the party is thus advised of the intended limit, he may be obliged to omit

to prove the same ultimate issue, held improper); *Washington:* 1917, Mogelberg *v.* Calhoun, 94 Wash. 662, 163 Pac. 29 (personal injury; limitation to six eyewitnesses, not imposed until the sixth was called, held improper); *Wisconsin:* 1892, Meier *v.* Morgan, 82 Wis. 289, 294, 52 N. W. 174 (whether ice was properly packed; limitation to eight witnesses, held proper in discretion); 1896, Larson *v.* Eau Claire, 92 Wis. 86, 65 N. W. 731 (trial Court's discretion approved in excluding a tenth witness as to the condition of a highway).

In France, under the numerical system (*post,* § 2032), a limitation to ten witnesses to a single fact was introduced in the 1300s (Glasson, Histoire du droit et des institutions de la France, VI, 544; 1895).

[4] See the cases *passim* in the preceding note. For the argument as to a constitutional *right to process,* see *post,* § 2191.

[5] *E. g.* in Illinois and Massachusetts.

[6] Greene *v.* Ins. Co., Ill., *supra.* *Contra:* Preston *v.* Cedar Rapids, Ia.; Hupp *v.* Boring, Oh., and others by implication, *supra.*

[7] *Ante,* §§ 38, 1001.

his most valuable witnesses through not having known of the necessity of choosing the best of the lot at his disposal. This requirement has a plausible fairness in it, and is usually proper when feasible. But it is not always feasible, because the judge may not know of the party's intention as to number of witnesses; and it is not always proper for the judge to commit himself to such a fixed limit before hearing any of the witnesses.[8] The trial Court's discretion should be left to determine whether such a prior notice was feasible and desirable under the circumstances. (*g*) Finally, the rule should be applied with equal effect against *both parties*, so that neither be unfairly advantaged thereby.[9]

The rules as to limiting the *impeachment* of an *impeaching witness* (*ante*, § 894), as to the *length* of an *examination* of a single witness (*ante*, § 783), the *number of counsel* that may examine on each side (*ante*, § 783), and the *repetition of the same questions* (*ante*, § 782), which depend perhaps to some extent upon considerations of the present sort, have been already discussed in more appropriate places.

§ 1909. **Judge as Witness.** That a judge may give testimony as a witness in a trial before a Court of which he is a member seems in the classical English practice not to have been doubted, though the precedents are scanty.[1] It is not clear whether a judge so testifying was regarded as bound to retire from the Bench thereafter during the trial; but the propriety and legality of his taking the stand when needed seem to have been assumed.[2] This is

[8] Moreover, the intimation in Greene *v.* Ins. Co., Ill., that the notice must be given at the opening of the trial, is unjust and impracticable as a general rule.

If one of the prescribed number proves incompetent, he ought not to be reckoned as one of the allotment of that party, because his withdrawal diminshes by so much the time and the complications: *Contra:* 1895, Preston *v.* Cedar Rapids, 95 Ia. 71, 63 N. W. 577 ("It was defendant's business to know, before it called the witnesses, that they possessed the requisite knowledge to testify concerning that matter"); 1901, Giordano *v.* Brandywine Granite Co., Del. (cited *supra*).

[9] Compare Hilliard *v.* Beattie, N. H., *ante*, note 1.

§ 1909. [1] 1660, Regicides' Trials, Kel. 12 ("Secretary Morris and Mr. Annesley, President of the Council, were both in commission for the trial of the prisoners, and sate upon the bench; but there being occasion to make use of their testimony against Hacker, one of the prisoners, they both came off from the bench and were sworn and gave evidence, and did not go up to the bench again during that man's trial; and agreed by the Court that they were good witnesses, tho' in commission, and might be made use of"); 1680, Earl of Stafford's Trial, 7 How. St. Tr. 1293, 1413, 1442, 1487 (some of the lords judges testified); 1685, Oate's Trial, 10 How. St. Tr. 1079, 1142 (L. C. J. Jeffreys, asked to testify what he said at a former trial, replied: "No, there will be no need for that; I will acknowledge anything I said then"); 1716, Hawkins, Pleas of the Crown, b. 2, c. 46, § 80 ("It seems agreed that it is no exception against a person's giving evidence, either for or against a prisoner, that he is one of the judges or jurors who are to try him").

[2] In more modern times, doubts are found: 1872, Duke of Buccleuch *v.* Metropolitan Board, L. R. 5 E. & I. App. 429, 433 (Cleasby, B.: "With respect to those who fill the office of judge, it has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment (to which hardly any limit could be put) in relation to proceedings before them; and, as everything which they can properly prove can be proved by others, the Courts of law discountenance, and I think I may say prevent, them from being examined"; but this was not said especially of the judge 'coram quo'); 1890, R. *v.* Petrie, 20 Ont. 317, 323 (held improper, where the judge sits without a jury); 1914, Mitchell *v.* Justices, K. B. Div., 30 Times L. Rep. 526 (a licensing committee referred a liquor license to the compensation authority; one of the justices sitting in the former sat in the latter also; the latter authority, after first refusing the license, reopened the case and heard further evidence, including that of the

observable in the discussion which reappears, at various epochs,[3] over a celebrated problem once put by King Henry IV, concerning the proper conduct for a judge who has been the sole spectator of a murder and comes afterwards to preside on the trial of an innocent person charged with it. The controversy that arose over this problem concerned a different principle, namely, the judge's duty and power to use his private knowledge in his judicial capacity (as by ordering an acquittal); but it seems not to have been doubted by any of those who expressed their views that the judge might lawfully have given testimony; the only doubt was whether it was his moral duty to do so:

1696, Sir *John Hawles*, Solicitor-General, in *Fenwick's Trial*, 13 How. St. Tr. 537, 667: "If a judge knows anything whereby the prisoner might be convicted or acquitted (not generally known), then I do say he ought to be called from the place where he sate and go to the bar and give evidence of his knowledge; and so the judge in H. IV's time ought to have done, and not to have suffered the prisoner to have been convicted and then get a pardon for him; for a pardon will not always do the business"; and commenting on Cornish's Trial, 11 id. 459 (1685), as to the failure of the judge to testify to a witness' testimony at a former trial: "Every man knows that a judge in a civil matter tried before him, and a counsel even against his client, has been enforced to give evidence (provided it be not of a secret communicated to him by his client), for in that particular a judge ceases to be a judge, and is a witness; of whose evidence the jury are the judges, though he after re-assume his authority and is afterwards a judge of the jury's verdict. . . . If it be so in civil matters, let any man show me a reason why the law is not so in criminal matters."

In modern times, however, and in this country, the policy of uniting in one person the double capacity of judge and witness in the same trial has been much questioned. It must be premised that the objections are not based upon the general quality of judgeship, so as to oppose the admission of a judge as witness in any trial during his period of office as judge; there could be no conceivable reason for that.[4] Nor is it here a question of the judge's privilege against compulsory process (*post*, § 2372); or of the judge's privilege to withhold, in a trial not before himself, information received confidentially and officially, from an informer or a party confessing, not in open court (*post*, § 2376). Nor do the objections question the propriety of a judge's leaving the bench and in the same trial becoming a witness, where he has relevant knowledge; for, by reason of a principle already examined (*ante*, § 1805), this is the only way in which his personal knowledge can be contributed.

The objections are based rather upon the impolicy of combining at the same time the capacities of judge and witness, *i. e.* of becoming a witness

above justice; thereafter he took no part in the adjudication; the license was finally refused; held that the conduct of the justice was "most unfortunate"; that he should have refrained from sitting at all as judge in that case or should have refrained from giving evidence; but that his evidence was nevertheless "legal evidence").

[3] See the citations collected *post*, § 2569, under Judicial Notice.

[4] Thus, a judge may always testify, in a cause where he is not sitting, as to proceedings before him in another cause; see, for an illustration (1889), State *v.* Duffy, 57 Conn. 525, 528, 18 Atl. 791.

without ceasing to be a judge of the cause and of continuing to act as judge in the cause even after finishing his testimony as witness. The various considerations of policy that have been advanced at one time or another are represented in the following passages:

1824, MARTIN, J., in *Ross* v. *Buhler*, 2 Mart. N. S. 312: "There may be a different mode of practice which, by taking off the reason of the rule [of incompetency], perhaps destroys it in jury cases. If the judge, when he tries the facts, must weigh the evidence, he must do so impartially; this, perhaps, he cannot be easily supposed to do when he is to weigh his testimony against that of another. When, however, not he but a jury is to try an issue of facts, it would seem the reason in some degree fails. Yet cogent ones present themselves: in a Court composed of one judge only, who is to administer the oath? It cannot be done by any but a member of the Court, and he is the only one. . . . It seems to us some legislative provision is necessary in a case like this. Otherwise, the party cannot attain his right."

1851, PARKER, J., in *Morss* v. *Morss*, 11 Barb. 510, 511: "The objection to the competency of a judge rests on an entirely different ground [from that of a juror]. It goes to the power of the Court — the power to administer the oath, to decide on a question of competency, or the admissibility of parts of the evidence, to commit for refusing to answer, and to exercise over the witness all the other powers of the Court, which may be called into requisition for the protection of the rights of the party. . . . In examining this question upon principle, there seems to be the same difficulty, whether the Court consists of one judge or of three, all of them being necessary to constitute the Court. In the latter case, if one of the judges be called as a witness, there are but two judges left to administer the oath, to decide upon his competency if he be objected to, and to decide questions as to the relevancy of his testimony. If he refuses to answer, there are but two judges to commit him for contempt. Two-thirds of a court cannot form a legal tribunal. The party has a right to three judges, the number prescribed by statute. Can it be said that there are three judges when one is under examination as a witness — or in the prisoner's box, on a proceeding for contempt in not answering? When thus proceeded against he becomes a party, and may be heard in his defense either in person or by counsel. Can it be said, that under such circumstances, he still, by his presence, forms part of the Court, and gives validity and jurisdiction to its proceedings? And is it not absurd to say that he still forms part of the Court, when the two judges still on the bench commit him for contempt? The statute has declared the qualifications of judges, and will not allow one to sit in any cause to which he is a party, or in which he is interested (2 R. S. 373, 3d ed.). If one judge, holding a court alone, cannot be both judge and witness, it seems to me to be equally clear upon principle, that a judge cannot, who is one of three judges necessary to constitute a Court. The two characters are inconsistent with each other, and their being united in one person is incompatible with the fair and safe administration of justice. . . . The objection to a juror's being a witness rests mainly on a question of public policy, and the objection to a judge being sworn depends on an additional and different ground, viz., that of want of power to discharge the duties of a court while acting as a witness."

1894, RIDDICK, J., in *Rogers* v. *State*, 60 Ark. 76, 86, 29 S. W. 894: "If the judge of such a Court [having but one judge] takes the stand to testify against the defendant, there is no one to control his testimony or keep him within proper bounds. Even if he can control his own testimony, and discharge at the same time what have been called 'the incompatible duties of witness and judge,' yet, however careful and conscientious he may be, the chances are great that by thus testifying he will to some extent detract from the dignity that should surround the functions of his high office. Instead of the impartial judge administering the law with a firm and even hand, he takes on for the time the appearance of a partisan, endeavoring to uphold by his testimony one side against the other. More than

likely he provokes unseemly conflicts between himself and counsel, and arouses the distrust of the party against whom he testifies. In addition to this, the higher his character and standing as a judge, the more danger that he thus gives the party in whose favor he testifies an undue advantage over the opposing side."

1896, DUNBAR, J., in *Maitland* v. *Zanga*, 14 Wash. 92, 44 Pac. 117: "It seems to us that there are many reasons why the judge should not be allowed to testify that would not weigh in the case of a juror. If the defendant is entitled to the testimony of the judge, the plaintiff is equally entitled to his testimony, and it might eventuate, if this practice were to be tolerated, that the judge, upon a motion for a nonsuit, would be compelled to pass upon the weight of his own testimony; and, considering the inclination of the human mind to attach more importance to its own statements than to those of others, it is easy to see that the rights of the litigants might be prejudiced in such a case. Again, while upon the witness stand he would have a right to all the protection that any other witness has under the law. He could refuse to answer questions which, in his judgment, might tend to criminate him. He might decline to answer questions the admissibility of which it would be necessary for the court to determine, and which would bring him as a witness in conflict with himself as a court. Again, it would to a certain extent lead to the embarrassment of the jury, who are subordinate officers of the court, and under its directions, to have to weigh the testimony of the judge in the same scales with the testimony of other witnesses in the case whose testimony was opposed to that of the judge. And in many ways it seems to us that this practice would lead to embarrassment, and would have a tendency to lower the standard of courts, and bring them into contempt. There is no necessity for this practice, for, under the liberal provisions of our laws, if a party desires to avail himself of the testimony of the judge, another judge may be called in to preside at the trial of the cause."

Regarding the nature of the dilemma thus presented and the apparent ease of obviating these objections, it may be noted at the outset that their effect, if they are to be yielded to, is practically to exclude the judge of the cause from giving testimony at all. The simple expedient of discarding the judicial capacity and not returning to the Bench during the same trial is with us no real solution of the dilemma; because the modern and probably universal practice in this country constitutes the trial Court of a single judge only, or, in the rare instances where two are required (as sometimes in capital cases), renders both essential to the Court's constitution; nor, in the conditions everywhere prevailing, is another judge available on short notice for substitution. The practical result would usually be, then, either that the judge in the cause could not testify at all, or that the trial would be interrupted by postponement — the latter an inconvenient and highly objectionable alternative, because it might necessitate an entire re-trial.

Coming, then, to the reasons set forth in the above quotations, it will be seen that one of them at least — the inability of the judge to administer the witness' oath to himself — is a petty obstacle (if it is one) which should rather be obviated (as it is in many jurisdictions) by a statute empowering the clerk to administer rather than by the clumsy solution of disqualifying the judge. Furthermore, as to some of the other reasons — such as the impropriety of the judge passing upon his own claim of privilege and the unseemliness of the judge being impeached for unveracity by the opponent, — it

may be said that these are the merest possibilities, that they may be trusted to be avoided through the combined good sense and discretion of counsel and judge, and that to establish a universal rule for the sake of rare contingencies is unpractical and unnecessary.

The only real and remaining objections to the judge's assuming the place of a witness seem to be, in the first place, that he would be put thereby into a more or less partisan attitude before the jury and would thus as a judge lose something of the essential traits of authority and impartiality; secondly, that his continuing power as judge would embarrass and limit the opposing counsel in his cross-examination of the judge-witness, and would thus unfairly restrict the opponent's opportunity to expose the truth; and, thirdly (though this is itself inconsistent with the first reason), that the judge's official authority would impress his testimony upon the jury with special and therefore unfair weight.

In all these objections there is a modicum of truth. Yet is it necessary on that account to lay down a universal prohibition? The force of the objections would be most seen and would rise to an appreciable degree only when the judge became a principal witness, — as in the case put by King Henry IV, where the judge had been an eye-witness of a murder. In all such instances (which are rare enough), the usefulness of his testimony would be known beforehand, and his own discretion and the parties' could be trusted to send the cause before another judge for trial. But in the ordinary instance the judge's testimony is desired for merely formal or undisputed matters, such as the proof of execution of a certificate or of the administration of an oath or of a deceased witness' former testimony. To suppose here a danger that the inconveniences above noted would occur in any appreciable degree is to be unduly apprehensive. Military commanders do not train cannon on a garden-gate; and the law of Evidence need not employ the cumbrous weapon of an invariable rule of exclusion to destroy an entire class of useful and unobjectionable evidence in order to avoid embarrassments which can easily be dealt with when they arise. Since the trial judge has no interest to subject himself or counsel or jury to these supposed embarrassments, it may properly be left to his discretion to avoid them, when the danger in his opinion arises, by retiring from the Bench before trial begun or by interrupting and postponing the trial and securing another judge.

The precedents in this country are by no means harmonious; but some of them at least, as well as a statutory provision reproduced in several codes, seem to lay down the rule above indicated.[5]

[5] With the following, compare also the citations *ante*, § 1805 (judge's testimony as hearsay), and *post*, §§ 2372, 2376 (judge's privilege): *Federal:* 1798, U. S. *v.* Lyon, Wharton's State Trials, 333, 335, 6 Amer. St. Tr. 687 (the presiding judge was asked and answered questions by the defendant, who called no other witnesses); 1799, U. S. *v.* Fries, Wharton's St. Tr. 482, 532 (one of the bench was sworn and testified to matters connected with the sedition charged; he was also cross-examined); 1916, Lepper *v.* U. S., 4th C. C. A., 233 Fed. 227, 230, per Woods, J. (*obiter* stating that the trial judge is incompetent); *Alabama:* 1880, Dabney *v.* Mitchell, 66 Ala. 495, 503 (probate judge's own affidavit, held properly excluded by him-

§ 1910. **Juror as Witness.** Some of the objections to the giving of testimony by a judge, as well as other independent ones, have been advanced

self); 1897, Estes *v.* Bridgforth, 114 Ala. 221, 21 So. 512 (excluded, on the ground of giving improper weight to the testimony with the jury); 1902, Randall *v.* Wadsworth, 130 Ala. 633, 31 So. 555 (probate judge held incompetent to testify to the loss of official files); *Arkansas:* Dig. 1919, § 4193 (civil cases; quoted *post*, § 1910); 1894, Rogers *v.* State, 60 Ark. 76, 84, 29 S. W. 894 (in criminal cases, a sole judge cannot testify for the prosecution); *California:* C. C. P. 1872, § 1883 ("The judge himself, or any juror, may be called as a witness by either party; but in such case it is in the discretion of the Court or judge to order the trial to be postponed or suspended, and to take place before another judge or jury"); *Connecticut:* 1889, State *v.* Duffy, 57 Conn. 525, 18 Atl. 791 (justice of the peace, allowed to testify to the defendant's admissions in testifying below); *Georgia:* 1892, Baker *v.* Thompson, 89 Ga. 486, 15 S. E. 644 (trial justice, on appeal to the Court in which he presides; excluded, because he cannot swear himself); 1898, Shockley *v.* Morgan, 103 Ga. 156, 29 S. E. 694 (a sole judge held incompetent); *Idaho:* Comp. St. 1919, § 7938 (like Cal. C. C. P. § 1883); *Illinois:* Rev. St. 1874, c. 148, § 5 (where a county or probate judge is an attesting-witness to a will offered before him for probate, he is to make oath to the will before the circuit court, and then the other witnesses make oath to him as in other cases); *Iowa:* Code 1897, § 4610, Comp. Code § 7317 (a judge may testify, but may in discretion order the trial to be had before another judge); *Kentucky:* C. C. P. 1895, § 603 (a judge is competent, but the Court may transfer the trial to another judge); *Louisiana:* 1824, Ross *v.* Buhler, 2 Mart. N. S. 312 (district judge, held inadmissible in his own court; proceeding upon Spanish law); 1882, Bermudez, C. J., *obiter*, in State *v.* Barnes, 34 La. An. 395, 399 ("The law could not disqualify a judge, even if the judge were a material witness"); Rev. L. 1897, § 3192 (a judge is not to be incompetent as such by "being a material witness in the case in favor of either party"); R. S. 1870, § 3945 (where a judge is a material witness, provision is made for swearing him, etc.); *Montana:* Rev. C. 1921, § 10537 (like Cal. C. C. P. § 1883); *Nebraska:* Rev. St. 1922, § 8839 (like Cal. C. C. P. § 1883; a judge is competent as a witness, but, if testifying, he may in discretion order postponement and trial before another judge); *Nevada:* Rev. L. 1912, § 5429 (like Cal. C. C. P. § 1883); 1902, Reno M. & L. Co. *v.* Westerfield, 26 Nev. 332, 67 Pac. 961, 69 Pac. 899 (whether a judge may refuse to testify opinion obscure); *New Hampshire:* 1916, Hale *v.* Wyatt, 78 N. H. 214, 98 Atl. 379 (probate of a will; to show that the proponent had admitted the testator's insanity, the judge of probate was called to testify to the proponent's application for an inquisition on that ground for the testator; on objection by the opponent, held, that the judge's testimony was admissible, no question of his privilege being raised); *New Jersey:* 1903, State *v.* De Maio, 69 N. J. L. 590, 55 Atl. 644 (a judge sole cannot be called as a witness); *New York:* 1806, Perry *v.* Weyman, 1 John. 520 (justice of the peace held incompetent, when sworn by another justice, because the statute required by the oath to be administered by the justice trying the cause); 1848, Re Heyward, 1 Sandf. Sup. 701 (extradition; the police justice issuing the warrant was admitted to testify upon what papers it issued; "it is in no respect 'infra dignitatem' for the judge to appear as a witness in this mode"; citing two other instances); 1851, Morss *v.* Morss, 11 Barb. 510, 515 (quoted *supra*); 1854, People *v.* Miller, 2 Park Cr. 197, 200 (a judge essential to the Court cannot testify before himself); 1874, People *v.* Dohring, 59 N. Y. 374, 379 ("The inclination of the Courts has been to hold that when it is necessary for the conduct of the trial that one should act as judge, he may not be called from the bench to be examined as a witness; but when his action as a judge is not required because there is a sufficient court without him, he may become a witness; though it is then decent that he do not return to the bench"; but here the point was not necessary to a decision); *North Dakota:* Comp. L. 1913, § 7925 (like Cal. C. C. P. § 1883); *Ohio:* 1859, McMillen *v.* Andrews, 10 Oh. St. 112 (justice of the peace held incompetent in his own court, by implication of statutory procedure); *Oklahoma:* 1911, State ex rel. Nowakowski *v.* Lockridge, 6 Okl. Cr. 208, 118 Pac. 152 (that a judge conducted the preliminary examination does not disqualify him from presiding at the trial with the possibility of becoming a witness; the above text approved); *Oregon:* Laws 1920, § 867 (like Cal. C. C. P. § 1883, substituting "former case" for "such case"); 1904, State *v.* Houghton, 45 Or. 110, 75 Pac. 887 (judge allowed to testify on the question of a witness' self-contradiction on the former trial); 1909, State *v.* Finch, 54 Or. 482, 103 Pac. 505 (judge's testimony on a trivial matter at the defendant's instance, held not to require substitution of another judge); *Porto Rico:* Rev. St. & C. 1911, § 1410 (like Cal. C. C. P. § 1883); *South Dakota:* Rev. C. 1919, § 2732 (like Cal. C. C. P. § 1883); *Tennessee:* Shannon's Code 1916, § 5594 (the judge is a competent witness for either party "in any cause tried before him either of a civil or criminal nature"); *Texas:* Rev. C. Cr. P. 1911, § 798 (a trial judge "is a competent witness for either the State or the defendant"); § 800 (clerk may

against the use of a juror's testimony. They are sufficiently set forth in the following passages:

1851, PARKER, J., in *Morss* v. *Morss*, 11 Barb. 510, 511: "The competency of a judge rests upon different grounds from that of a juror. A juror is to decide only questions of facts, and is examined before the cause is submitted to him. The objection to his competency rests on public policy. In all cases he has to pass upon his own credibility; and this difficulty would be greatly increased in case of his impeachment. He may refuse to answer, in which case his commitment would delay the trial. The party against whom he is called is subjected to a great disadvantage, for the juror may be expected to maintain unyieldingly in the jury box the opinions he has expressed on the witness-stand. It may plausibly be objected, therefore, that respect for the feeling of the juror and regard for justice to the parties should exclude the juror as a witness and require the objection to be made on the calling of the jury, that the party need not suffer for the want of his testimony."

1865, WOODWARD, C. J., in *Howser* v. *Com.*, 51 Pa. 332, 337: "Let it be distinctly said that jurors are not incompetent witnesses in either criminal or civil issues. They have no interest that disqualifies, and there is no rule of public policy that excludes them. . . . The learned counsel argue that the practice violates the constitutional rights of the accused, who are entitled to a speedy and public trial by an *impartial* jury, and to be confronted with the witnesses. Our law takes the utmost care to secure to the accused, in capital cases, an impartial jury — it almost allows prisoners to select their own triers. They may examine jurors as to their knowledge of circumstances, their expressions, opinions or prejudices, and challenge as many as they can show cause for, and may challenge twenty without showing cause, and then if any juror happens to have knowledge of any pertinent fact, he is bound to disclose it in time for the accused to cross-examine him, and to explain or contradict his testimony. If this be not a fulfilling of the constitutional injunction in behalf of *impartial* juries, it would be difficult to invent a plan that would fulfil it and at the same time be consistent with the demands of public justice. But counsel imagine that the constitutional right to *confront* witnesses would be abridged in the instances of witnesses taken from the jury-box, because their truth and veracity could not be attacked without damage to the attacking party. As to material witnesses, those, we mean, upon whose testimony the event is essentially dependent, we think they ought not to be admitted into the jury-box, and we believe the general practice is to exclude them where the fact is discovered in time; but we do not think the constitutional provision alluded to, nor any rule of law, is violated by the examination of a juror as a witness. The 'a priori' presumption is that he is a man of truth and veracity or he would not have been summoned as a juror; and confronting witnesses does not mean impeaching their character, but means cross-examination in the presence of the accused. . . . He, like all other witnesses, must 'confront' the accused, that is, be examined in the presence of the accused, and be subject to cross-examination; but he is not disqualified to be a witness."

administer the oath to him); *Utah:* Comp. L. 1917, § 7125 (like Cal. C. C. P. § 1883); *Washington:* 1896, Maitland *v.* Zanga (quoted *supra*); 1905, State *v.* Bringgold, 40 Wash. 12, 82 Pac. 132 (justice of the peace, allowed to testify to the proceedings on arraignment of the now defendant); *Wisconsin:* Stats. 1919, § 4079 *n* (no judge of a court of record may testify "as to any matter of opinion" where an attorney of record is related to him in the first degree).

From this question whether the judge in the cause is disqualified as a witness, distinguish the following matters involving other principles affecting the use of judge's testimony: (1) whether a judge's *notes of former testimony* are receivable without calling the judge — a question of the Hearsay rule (*ante*, § 1666); (2) whether a judge, under the same rule, may use his *private knowledge* without taking the stand as a witness (*ante*, § 1805); (3) whether a judge is *privileged* from *personal attendance* to testify (*post*, § 2372); and (4) whether a judge is privileged not to *testify at all*, (*post*, § 2372), or not to reveal *official secrets* (*post*, § 2376).

These objections seem reducible in substance to two: first, that the opposing counsel will be embarrassed by a fear of offending the juror, so that an adequate cross-examination or impeachment would be prevented; and, secondly, that the juror, sitting afterwards as judge of the facts, would be disposed to give excessive weight to his own testimony and in general to treat too favorably the testimony of the side whose partisan he had been made. The first objection is in the hands of the opponent himself to obviate, for if the juror is to be a principal witness and his testimony will be of such consequence as to deserve impeachment on thorough cross-examination, the opponent may ascertain this upon the juror's 'voir dire,' and may then exclude him by challenge. The second objection is of slight consequence, because it may usually be obviated in the same way by challenge, and because the impartiality of the remaining jurymen can be trusted to counteract whatever slight bias may be by possibility created in the testifying juror, and because this bias can ordinarily affect only a minor fact in the whole mass of evidential matter.

Accordingly, it has always been regarded as proper that a juror having any relevant knowledge should be called as a witness, returning to the box after completing his testimony.[1]

Distinguish the principle of the Hearsay rule, which forbids a juror to make use of his *private knowledge* in any other way (*ante*, § 1800); the principle of Judicial Notice, which allows a juror to use *general information* common to all men, without taking the stand (*post*, § 2570); and the principle of Privilege, which forbids the juror to *disclose the secrets* of the jury-room (*post*, § 2346).

§ 1910. [1] To the following authorities add those cited *ante*, § 1800, which also imply the competency of a juror to testify; by statute certain restrictions are sometimes imposed:

ENGLAND: 1663, Fitzjames *v.* Moys, 1 Sid. 133 (a juryman testified for the defendant, and then "continued of the jury"); 1679, Reading's Trial, 7 How. St. Tr. 259, 267 (Defendant: "My lord, I am very glad to see Sir John Cutter here; for I did intend to have his evidence"; L. C. J. North: "That you may have, though he be sworn [on the jury]"); 1744, Heath's Trial, 18 How. St. Tr. 1, 123 (a juror was sworn and testified to impeach a witness); 1716, Hawkins, Pl. Cr., b. 2, c. 46, § 80 (quoted *ante*, § 1909, note 1).

UNITED STATES: *Ark.* Dig. 1919, § 4193 ("The judge or juror may be called as a witness by either party; but in such cases it is in the discretion of the judge to suspend the trial and order it to take place before another judge or jury"; and if party knows beforehand that juror is to be called by him, he must disclose it and the witness be excluded from jury); *Cal.* C. C. P. 1872, § 1883 (quoted *ante*, § 1909); *Ga.* 1897, Savannah F. & W. R. Co. *v.* Quo, 103 Ga. 125, 29 S. E. 607; *Ida.* Comp. St. 1919, § 7938 (like Cal. C. C. P. § 1883); *Ia.* 1896, State *v.* Cavanaugh, 98 Ia. 688, 691, 68 N. W. 452; *Ky.* C. C. P. 1895, § 603 (a juror is competent, but the Court may suspend the trial and select another jury; and the witness must be excluded from the jury if known beforehand to the party); *Mo.* Rev. St. 1919, § 4013 ("If any juror shall know anything relative to the matter in issue, he shall disclose the same in open Court"); *Mont.* Rev. C. 1921, § 10537 (like Cal. C. C. P. § 1883); *Nebr.* 1903, Chicago R. I. & P. R. Co. *v.* Collier, — Nebr. —, 95 N. W. 472; *Nev.* Rev. L. 1912, § 5429 (like Cal. C. C. P. § 1883); *N. Y.* 1874, People *v.* Dohring, 59 N. Y. 374, 378 ("It is settled that a juror may be a witness on a trial before himself and his fellows"; thus discrediting the *obiter dictum* in Morss *v.* Morss, 11 Barb. 510, 515, quoted *supra*); *N. D.* Comp. L. 1913, § 7925 (like Cal. C. C. P. § 1883); *Or.* Laws 1920, § 140 ("A juror may be examined by either party as a witness if he be otherwise competent"); § 867 (like Cal. C. C. P. § 1883; substituting "the former case" for "such case"); *Pa.* 1852, Plank-Road Co. *v.* Thomas, 20 Pa. 91, 95 (one who had been a viewer); 1865, Howser *v.* Com., 51 Pa. 332, 337; *P. R.* Rev. St. & C.

§ 1911. **Counsel or Attorney as Witness.** The competency of a counsel or attorney to testify on behalf of his client, as a problem in Evidence, has occupied a singular place in our law. Occurring in practice with much more frequency than that of a judge's or a juror's competency, it has presented constant opportunity for objection and discussion; the reasons of the most diverse sort, urged against it, are much more cogent than those urged against the testimony of judge or juror; the force of these reasons has been generally conceded; and yet in almost every court the final step has failed to be taken, and the judges have halted half-way between a prohibition and a license; while the legislators, who have eagerly busied themselves with a re-enactment of the common-law truism that a juror may be a witness, have ignored the troublesome problem of a counsel's testimony.

In the days of King Henry VIII and his abuse of the law's methods to tryannical private ends, an instance is recorded of a counsel's testifying against his client;[1] but this misunderstood instance, which has been spread into general knowledge by the anathema of an eminent legal biographer,[2] is in truth beside the point; for it not only concerned the case of a counsel testifying against his client (a matter upon which there has never been doubt), but involved apparently a breach of professional confidence, and was in that respect sufficiently illegal and indefensible. Certain it seems that until the 1800s[3] no doubt was raised as to the propriety of a counsel or attorney testifying for his client. Even then the doubt in England came by indirection only;[4] while in this country it was raised merely by invok-

1911, § 1410 (like Cal. C. C. P. § 1883); *S. D.* Rev. C. 1919, § 2732 (like Cal. C. C. P. § 1883); *Utah:* Comp. L. 1917 § 7125 (like Cal. C. C. P. § 1883); 1895, People *v.* Thiede, 11 Utah 241, 39 Pac. 837; *Vt.* 1802, Dunbar *v.* Parks, 5 Vt. 217; *Wash.* R. & B. Code 1909, § 348 (juror may be examined as witness).

Contra: 1890, R. *v.* Petric, 20 Ont. 317, 319 (apparently doubted).

A juror may therefore also be an *interpreter:* 1895, People *v.* Thiede, 11 Utah, 241 39 Pac. 837; 1895, Thiede *v.* Utah, 159 U. S. 510, 16 Sup. 62 (here with the accused's consent).

It was once suggested, but without any ground either in predecent or in policy, that the juryman might *refuse to testify* as witness: 1840, Manley *v.* Shaw, Car. & M. 361, per Tindal, C. J.

Distinguish the rule of *qualification as juror* that a prospective witness may be *challenged* as a juror; *e. g.:* 1877, Commander *v.* State, 60 Ala. 1, 6 (persons already summoned as witnesses for prosecution, held incompetent as jurors); Atkins *v.* State, 60 Ala. 45, 49 (same; as failure to examine them as witnesses is immaterial); Mo. Rev. St. 1899, § 2615 (no witness in criminal case is to be sworn as juror, if challenged before swearing).

Distinguish also the question whether a juror may at a *subsequent trial* disclose knowledge obtained by him at a *view of premises* on a former trial (*post*, § 2348).

§ **1911.** [1] 1535, Sir Thomas More's Trial, 1 How. St. Tr. 386, 387, 390 (treason; some twelve months before the trial, Mr. Rich, Solicitor-General, went to the accused in the Tower, to take away his books, and "pretending friendship with him," put a hypothetical case, and got an answer from the accused; on the trial, the proof languished, whereon "Mr. Rich was called to give evidence in open court upon oath, which he immediately did," of this conversation).

[2] 1856, Campbell, Lives of the Chancellors, 4th Ed., II, 61 ("Mr. Solicitor, to his eternal disgrace, and to the eternal disgrace of the Court who permitted such an outrage on decency, left the bar and presented himself as a witness for the Crown"; but these epithets may have been inspired by the fact that he testified to a confidential communication with the accused).

[3] 1654, Waldron *v.* Ward, Style 449 (a "counsel in the cause" allowed to be examined).

[4] *Circa* 1810, R. *v.* Milne, 2 B. & Ald. 606, note (the prosecutor was obliged to waive giving evidence before Lord Ellenborough, C. J., would allow him to address the jury); 1819, R. *v.* Brice, 2 B. & Ald. 606 (the prosecutor was not allowed to address the jury; per Curiam:

ing for individual cases the general principle of disqualification by interest in the event of the suit,[5] — a principle which of course did not apply to counsel merely as such. But in 1846, in England, a single judge sitting at Nisi Prius and citing no precedents, declared such testimony inadmissible, on broad though indefinite grounds,[6] and this ruling, though repudiated in the same jurisdiction within half a dozen years by a Court in banc,[7] served to bring the question into the arena of general discussion, and to give a larger scope to the problem of policy involved; and the echoes of the debate have not yet died away.

The arguments advanced against admitting counsel or attorney as witness for the client are of three distinct sorts.

(1) First the general principle of *disqualification by interest*, to be enforced not according to the narrow technical tests now obsolete (*ante*, § 576), but because of the general emotional relation of partisanship which exists in favor of the client, independently of any specific interest in the event of the cause:

1826, PORTER, J., in *Cox* v. *Williams*, 5 Mart. N. S. 139 (referring to an early prohibitory statute): "The motives which induced the Legislature to pass such a law were supposed to be that attorneys could not safely be intrusted to testify for their clients; that under the influence of professional zeal they became in feeling, if not in interest, completely identified with those who employed them."

"Besides, the prosecutor may be and generally is a witness, and it is very unfit that he should be permitted to state, not upon oath, the facts to the jury which he is afterwards to state to them on his oath").

[5] See the American cases before 1846, cited in note 10, *infra*, which all deal with it in this way.

[6] 1846, Stones *v.* Byron, 4 Dowl. & L. 393, 11 Jur. 242, 1 Bail Court Rep. 248 (the plaintiff's attorney acted as advocate, and also testified to contradict the defence; Patteson, J., held his testimony inadmissible, as not "consistent with the due administration of justice"); 1847, Deane *v.* Packwood, ib. 395, note, 1 Bail Court Rep. 312 (preceding case followed by Erle, J.).

[7] The English and Canadian cases are as follows:

ENGLAND: 1852, Cobbett *v.* Hudson, 1 E. & B. 11, 22 L. J. Q. B. 11 (the plaintiff, conducting his own cause 'in forma pauperis,' was held entitled as of right to address the jury as well as to testify; the foregoing cases were discredited; and the rule was put on the ground that a party's right to testify and his right to be his own advocate were separate and not inconsistent, though the practice was reproved as "contrary to good taste and good feeling" and "revolting to the minds of the jury"; the same rule was apparently held applicable to a counsel and witness not being also a party, but this was not expressly declared; "if the practice does gain ground to a decree seriously injurious" to justice, the judges were said to have power to make a rule against it).

CANADA: *New Brunswick:* 1847, Shields *v.* McGrath, 3 Kerr 398 (counsel not allowed to be a witness for his party); 1875, Bank of B. N. A. *v.* McElroy, 2 Pugs. 462 (counsel allowed to be witness, as a matter of right for the party; but "it is an indecent proceeding and should be discouraged"; repudiating the preceding case, on the authority of Cobbett *v.* Hudson); 1890, Halifax Banking Co. *v.* Smith, 29 N. Br. 462, 469, 480 (counsel who had assisted in a business transaction with notes, allowed to give his opinion of handwriting; two judges diss.); *Ontario:* 1847, Benedict *v.* Baulton, 4 U. C. Q. B. 96 (counsel not allowed to be witness for his party, following Stones *v.* Byron and Deane *v.* Packwood); 1847, Cameron *v.* Forsyth, 4 U. C. Q. B. 189 (preceding, case treated as representing the rule); 1876, Davis *v.* Ins. Co., 39 U. C. Q. B. 452, 477, 481 ("It is a misdirection for a judge to reject the testimony of counsel when offered as a witness on behalf of his client"; following Cobbett *v.* Hudson; though it is "desirable" not to keep the characters separate if possible; preceding two cases in effect repudiated); *Saskatchewan:* 1914, Robert Bell Engine *v.* Gagne, 20 D. L. R. 235 (kind of issue, not stated; trial judge held to have erroneously refused to permit counsel to testify; "there is no rule of law or practice" against it, but "such a practice should be discouraged"; citing the above text, par. (2), with approval).

This reason, it may be said once for all, has totally disappeared from the controversy. It was easy to appreciate its force in the epoch when pecuniary interest was a disqualification in general; but with the disappearance of that disqualification has passed away any inclination to see special danger in the even less tangible interest of a counsel. The rulings concerned with this argument [8] have therefore no present significance.

(2) The second reason, though indirectly connected with the preceding thought, is in effect wholly distinct, and is of the nature of those principles of Extrinsic Policy later dealt with (*post*, § 2175). It is concerned with the dangerous effects of the practice upon the public mind. In short, it does not fear that lawyers may as witnesses distort the truth in favor of the client, but it fears that the public will *think* that they may, and that the public's respect for the profession and confidence in it will be effectively diminished.[9] This is at once the most potent and most common reason judicially advanced:

1847, LEWIS, P., in *Mishler* v. *Baumgardner*, Pa. Com. Pl., 1 American Law Journal N. S. 304, 308: "In the course of twenty-five years' experience, I have seldom known an attorney received as a witness in chief for his client, touching a disputed fact, without some loss of reputation, and without to some extent bringing reproach upon the profession to which he belonged and upon the court of which he was an officer. . . . Existing prejudices and modes of thinking, whether just or not, point to the exclusion of such testimony as indispensable to the usefulness of all who are officially connected with the administration of justice. . . . Liability to suspicion of partiality and falsehood exists, . . . and its consequences to the public, when applied to those who are constantly charged with official trusts, are too alarming to escape observation."

1848, SANDFORD, J., in *Little* v. *Keon*, 1 Code Reporter (N. Y. Super.) 4: "When we test the objection to the attorney by any established principle in the law of evidence, we find no good ground for rejecting him. Thus, he is not interested in the event of the suit [unless he is employed on a contingent fee]. . . . There is no reason for excluding the attorney on the ground of privilege or of confidence as between him and the adverse party. . . . As to the effect of this practice upon the character of the bar itself, we think the evil will work its own cure. Attorneys as well as counsellors of standing and character will never, except in extreme cases, present themselves before a jury as witnesses in their own causes on litigated questions, and in such cases only because of some unforeseen necessity. Those gentlemen of the bar who habitually suffer themselves to be used as witnesses for their clients soon become marked, both by their associates and the Courts, and forfeit in their character more than will ever be compensated to them by success in such clients' controversies."

1848, *Anon.*, in 5 Western Law Journal 457: "The attorney's exclusion should rest on peculiar grounds. He should be rejected, not for the protection of the opposite party, but for his own; not because his integrity may be exposed to temptation, but because it will be exposed to suspicion. Let us consider for a moment the relation which he appears to sustain toward the party he represents. . . . He is paid for the knowledge, industry, talent, and zeal he may exert in the cause. Though his compensation depends on no con-

[8] *Infra* note 9, *passim*.

[9] This seems to be the basis of the specific rule that counsel shall not express *his own belief* as to the facts of the case: 1908, Canons of Ethics, No. 15, American Bar Association ("It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause"); Costigan's Cases and Other Authorities on Legal Ethics, (1917), p. 309.

tingency of success or failure, yet he feels entitled to charge, and his client feels disposed to pay a higher fee when the cause terminates successfully. His sympathy for a losing client induces him to abate the amount of his charge, and he feels that a fortunate litigant can compensate him more liberally. There are cases, too, in which, from the inability of his client, he must receive nothing, if the case is determined against him. . . . He is perhaps ardent to prevail for the sake of victory. Reputation is greatly enhanced by success. The vulgar generally applaud the winning lawyer, as the winning horse, and have no better criterion of ability than the event of a suit. The successful termination of a case, especially a doubtful one, often attracts other business. In whatever degree some minds may be influenced by such motives, there is no advocate wholly indifferent to the prestige which attends victory. The lawyer who approaches a jury to sustain a case by his testimony, and to advocate it by his eloquence, places himself in an indecent position. Paid for the ability he may exert in obtaining success, deceived by a partial knowledge of the facts, and ardent to win, his testimony must be viewed with distrust. His statement, though perfectly reliable under other circumstances, is received with suspicion by the jury, generally consisting of men whose limited education and position in life give them no enlarged views of things, and no elevated opinion of human nature. The incompetency of the attorney, therefore, need not be placed on the probability of the falsehood of his testimony. He should not be suffered by the Court to place himself in a position that may lessen his character, or diminish the confidence of men in the purity of the administration of justice."

1867, LAWRENCE, J., in *Ross* v. *Demoss*, 45 Ill. 447, 449: "An attorney occupying the attitude of both witness and attorney for his client subjects his testimony to criticism if not suspicion; but where the half of a valuable farm depends upon his evidence, he places himself in an unprofessional position, and must not be surprised if his evidence is impaired. While the profession is an honorable one, its members should not forget that even they may so act as to lose public confidence and general respect."

(3) The third reason is of the sort otherwise noticed in this Chapter, namely, the fear that the testimony of the counsel and his statements in argument might be so identified in the minds of the jury that they might be too ready to give to the argument a testimonial credit and effect, as if the oath of the counsel as witness were pledged to it, and thus be unduly impressed with its weight. This reason (which is somewhat inconsistent with the preceding one) has rarely been advanced, and derives its only importance from the fact that it was propounded by the successful counsel in the case which threatened for a time to establish the rule of absolute exclusion:

1846, Mr. *Udall*, arguing, in *Stones* v. *Byron*, 4 Dowl. & L. 393: "It would be a practice attended with the most mischievous consequences, if an attorney or any other person, acting as the advocate of a party, could afterwards present himself before the jury as a witness to support those statements he had been making in the course of his speech. The characters of an advocate and a witness should be sedulously kept apart. The one is a person zealously and warmly espousing the interests of his client; the other a person sworn fairly and impartially, without bias or favor to either party, to tell the truth of what he had witnessed or heard. The jury might have considerable difficulty in separating those statements which they had heard from a person as advocate from those which they had heard from the same person as witness."

The result of the controversy has been that, in the Courts dealing with this question since 1846, the force of these objections (mainly of the second)

has been fully realized; but that they have nevertheless declined, almost unanimously, to lay down a rule of prohibition.[10] The reasons are, probably,

[10] Compare also with the following authorities the quotations, *ante*, §§ 1806, 1807, which sometimes hint at the same result:

Federal: 1886, French *v.* Hall, 119 U. S. 152, 7 Sup. 170 ("There is nothing in the policy of the law, as there is no positive enactment, which hinders the attorney of the party . . . in a civil action from testifying at the call of his client; in some cases it may be unseemly"; here the exclusion was held improper);

Uniform Acts: Canons of Professional Ethics, American Bar Association, 1908, No. 19 ("Except when essential to the ends of justice a lawyer should avoid testifying in court in behalf of his client"); Statement of the General Council of the [English] Bar, 1917, quoted in Costigan's Cases on Legal Ethics, p. 448 ("A barrister should not accept a retainer in a case in which he has reason to believe he will be a witness; and if, being engaged in a case, it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear as counsel if he can retire without jeopardising his client's interests");

Alabama: 1848, McGehee *v.* Hansell, 13 Ala. 17, 21 (an attorney in the case is not as such disqualified by interest); 1848, Morrow *v.* Parkman, 14 Ala. 769, 775 (same); 1852, Quarles *v.* Waldron, 20 Ala. 217 (same, provided his fee is not contingent on the event of the suit);

Connecticut: 1846, Carrington *v.* Holabird, 17 Conn. 530, 539 (counsel in a former proceeding, not disqualified in proceedings to procure a new trial and an injunction against the judgment); 1896, Thresher *v.* Bank, 68 Conn. 201, 36 Atl. 38 (a party held entitled both to try his cause and to be a witness; but otherwise for a party who is an attorney-at-law, to whom applies "the wholesome rule of professional etiquette which holds the position of trial lawyer and material witness to be incompatible"; here a ruling allowing the attorney to try the cause and to testify, and refusing the opponent's request that the testimony be only in answer to questions put, was held not erroneous);

Columbia (Dist.): 1865, Mary Harris' Trial, Clephane's Rep. 61, 177 (murder of Adoniram J. Burroughs; defence of insanity; Mr. Joseph H. Bradley, chief counsel for the accused, testified at length, of his observation of her mental condition after becoming her counsel; here apparently a decided impropriety, which led later to a sneering comment by the prosecuting attorney);

Delaware: 1901, Pritchart *v.* Henderson, 3 Pen. Del. 128, 50 Atl. 218 (one in the office of the counsel, and taking some part in the case, excluded); 1910, Real Estate Trust Co. *v.* Wilmington & N. C. E. R. Co., 9 Del. Ch. 99, 77 Atl. 756 (counsel allowed to testify to service of notice on an opponent; Pritchard *v.* Henderson cited as if discredited; the opinion seems unaware of the radical distinction between the present question and that of § 2312, *post*);

Georgia: here statutes have hopelessly confused the present rule with that of privileged communications (*post*, § 2292): St. 1850, p. 46, Feb. 21 (no attorney shall give testimony "either for or against his client, the knowledge of which he may have acquired from his client or during the existence and by reason of the relationship of client and attorney"); 1853, Swift *v.* Perry, 13 Ga. 138 (St. 1850, disqualifying attorneys, held to apply "only in the case pending to which the client is a party"); 1853, Riley *v.* Johnston, 13 Ga. 260, 268 (statute applied); 1855, Chappell *v.* Smith, 17 Ga. 68 (statute applied); 1855, McDougald *v.* Lane, 18 Ga. 444, 452 (statute applied); 1858, Churchill *v.* Corker, 25 Ga. 479, 489 (like Swift *v.* Perry); 1859, Causey *v.* Wiley, 27 Ga. 444, 450 (statute applied); 1859, Osborn *v.* Herron, 28 Ga. 313, 316 (statute applied); 1860, Sharman *v.* Morton, 31 Ga. 34, 45 (statute applied); St. 1859, p. 18 (repealed the statute of 1850, but provided that no attorney should be "allowed" to testify to the client's admissions after employment in the case); St. 1866, p. 138 (declared all persons competent, with certain exceptions, and repealed all conflicting laws; one exception was: "Nor shall any attorney be compellable to give evidence for or against his client"); 1878, Willis *v.* West, 60 Ga. 613 (St. 1866 is held to signify that attorneys are "competent, though not compellable, to testify" for their clients); St. 1887, p. 30, Rev. C. 1910, § 5860 ("no attorney shall be competent or compellable to testify in any Court in this State for or against his client, to any matter or thing, knowledge of which he may have acquired from his client by virtue of his relations as attorney, or by reason of the anticipated employment of him as attorney"); 1887, Fire Ass'n *v.* Flemming, 78 Ga. 733, 3 S. E. 420 (attorney admitted for his client); 1888, Skellie *v.* James, 81 Ga. 419, 8 S. E. 607, *semble* (statute affects competency for his client); 1893, Lewis *v.* State, 91 Ga. 169, 16 S. E. 986 (statute makes an attorney incompetent for his client);

Idaho: 1888, Sebree *v.* Smith, 2 Ida. 327 (Hasb. 359), 16 Pac. 915 (attorneys should not be witnesses for their clients, except in case of extreme necessity; here, testimony to the opponent's negotiations was excluded); 1901, State *v.* Seymour, 7 Ida. 548, 63 Pac. 1036 (county attorney, held compellable to testify for the accused);

Illinois: 1861, Stratton *v.* Henderson, 26 Ill. 68, 73, 76 (counsel allowed to testify for his client as to interest-reckoning; "we are not

because the expected evil is one that would be caused only by an inveterate practice and not by casual instances, and because the strong recommenda-

altogether in favor" of it, but "we have no law or rule of practice" against it); 1865, Morgan v. Roberts, 38 Ill. 65, 85 (issue involving an attorney's claim for fees; attorney allowed to be witness; "all the Court can do is to discountenance the practice, and, when the evidence is indispensable, recommend to the counsel to withdraw from the cause"); 1867, Ross v. Demoss, 45 Ill. 447, 449 ("It is of doubtful professional propriety . . . without first entirely withdrawing" from the cause); 1900, Drach v. Kamberg, 187 Ill. 385, 58 N. E. 370 (attorney allowed to testify as subscribing witness to a will; but "Courts have always discountenanced the practice"); 1907, Wilkinson v. People, 226 Ill. 135, 80 N. E. 699 (prior rulings approved, and "the unenviable attitude of a willing witness and a zealous attorney" commented on); 1907, Bishop v. Hilliard, 227 Ill. 382, 81 N. E. 403; 1908, Onstott v. Edel, 232 Ill. 201, 83 N. E. 806; 1908, McConnell v. Brown, 232 Ill. 336, 83 N. E. 854; 1908, Glanz v. Zinbek, 233 Ill. 22, 84 N. E. 36 (attorney admitted, but practice disparaged); 1909, Reavely v. Harris, 239 Ill. 526, 88 N. E. 238 (allowed on the facts); 1909, Fitzgerald v. Allen, 240 Ill. 80, 88 N. E. 240; 1909, Nix v. Thackaberry, 140 Ill. 352, 88 N. E. 811 ("We have been compelled too frequently of late to comment on counsel testifying in cases which they are themselves conducting"); 1911, Wetzel v. Firebaugh, 251 Ill. 190, 95 N. E. 1085 ("it is not proper" for a solicitor in the case to testify to the testatrix' competency); 1911, Bailey v. Beall, 251 Ill. 577, 96 N. E. 567 (and the fact of a witness having been attorney in the cause may be ascertained for the purpose of affecting his credit); 1913, Mithen v. Jeffery, 259 Ill. 372, 102 N. E. 778 (attorney testifying to conversation with the opponent); 1914, Judy v. Judy, 261 Ill. 470, 104 N. E. 356; 1917, Ravenscroft v. Stull, 280 Ill. 406, 117 N. E. 602 (testator's capacity; reference to the failure to call C., the attorney drafting the will and a member of the firm of counsel representing the executor held improper, inasmuch as C. would have "committed a breach of professional propriety" had he testified); 1918, Flynn v. Flynn, 283 Ill. 206, 119 N. E. 304 (the attorney who drew the will and attested it was a member of the firm whose other partner tried the case; held, not improper, "if he is not to share in the fees that his partner is to be paid for his services in connection with this litigation"); 1919, McKaig v. Appleton, 289 Ill. 301, 124 N. E. 596 (whether an attorney drafting a will should sign as attesting witness); 1919, Barto v. Kellogg, 289 Ill. 528, 124 N. E. 633 (attorney as witness to title proceedings); 1921, Eshelman v. Rawalt, 298 Ill. 192, 131 N. E. 675 (crim. con.; "it is not unlawful, but it is not a proper practice," for the attorney to testify); (Does this series of modern rulings indicate that attorneys in Illinois are more callous in disregard of this rule of ethics, or that trial Courts are more ignorant of it, or that the Supreme Court is more tender of it, than elsewhere? In any event, it is not fitting that the Supreme Court should content itself with empty comment);

Iowa: 1858, Abbott v. Striblen, 6 Ia. 191, 196 (attorney allowed to prove the copy of a document and the original's loss); 1908, Ross v. Ross, 140 Ia. 51, 117 N. W. 1105 (admissible, but open to reflection); 1915, Stickles v. Townsend, 171 Ia. 697, 154 N. W. 307 (delivery of papers; the main witness was the counsel who had acted as attorney; "we much prefer that counsel would not testify as a witness unless it is necessary, and that they should then withdraw from the active management of the case");

Kansas: 1889, Central Branch U. P. R. Co. v. Andrews, 41 Kan. 370, 377, 21 Pac. 276 (attorney competent for his client, even though acting upon a contingent fee); 1901, State v. Herbert, 63 Kan. 516, 66 Pac. 235 (county attorney, allowed to testify to testimony at a former trial; the opinion misconceives the principle);

Kentucky: 1860, Hall v. Renfro, 3 Metc. 51, 53 (attorney held competent for his client; with "the question of professional propriety . . . the Court has no concern");

Louisiana: 1826, Cox v. Williams, 5 Mart. N. S. 139 (early statute forbidding attorney to testify in a case where he has been employed, held not to prevent the opponent calling him); 1852, Madden v. Farmer, 7 La. An. 580 (attorney's testimony not receivable as "full proof" for his client, "particularly in cases where the attorney would be personally responsible if the action was not sustained"); 1833, Sprigg v. Beaman, 6 La. 60, 64 (counsel held not excluded by interest because his practice, without a contract, was to vary his fee according to success); Rev. Civ. C. 1920, § 2283 (a person's "being employed as counsellor or attorney does not disqualify him from being a witness in the cause in which he is employed");

Maine: 1881, Rules of the Supreme Judicial Court, No. 42, in 72 Me. 566, 581 ("No attorney or counsellor shall be permitted to take any part in the conduct of a cause before a jury in which he is a witness for his client, except by special leave of the Court");

Massachusetts: 1848, Potter v. Ware, 1 Cush. 519, 523 ("attorney not disqualified by interest to testify; there may be cases in which they can do it, not only without dishonor, but in which it is their duty to do it; such cases, however, are rare"); 1917, Holbrook v.

tions of the Courts have proved sufficient to prevent the use of such testimony other than in casual, unavoidable, and therefore harmless instances. There is, then, in general, no rule, but only an urgent judicial reprobation, forbidding counsel or attorney to testify in favor of his client.

From this are to be distinguished the prohibition, under the Hearsay rule, of a counsel's *stating unevidenced facts in his argument* (*ante*, § 1806), and the privilege of a client against his attorney's or counsel's *disclosure of confidential communications* (*post*, § 2290).

Seagrave, 228 Mass. 26, 116 N. E. 889 (discretion of the trial Court controls);
Michigan: 1920, Jacobs *v.* Weissinger, 211 Mich. 47, 178 N. W. 65 (mental capacity of grantor);
Nebraska: 1922, Cox *v.* Kee, — Nebr. —, 186 N. W. 974 (payment of a note; the trial attorney having offered himself as a witness, the trial Court ruled that he must in that event withdraw from the case, but the attorney thereupon continued to conduct the case without testifying; the ruling held proper);
New Hampshire: 1833, Rules of Court, 6 N. H. 580 ("No attorney or counsellor shall be permitted to take any part in the conduct of any cause before the jury, after he shall have testified for his client in the same cause");
New Jersey: 1831, Folly *v.* Smith, 12 N. J. L. 139 (attorney held competent for his client to prove his power of attorney);
New York: 1818, Caniff *v.* Myers, 15 John. 246 (attorney held competent to prove his power of attorney); 1823, Tullock *v.* Cunningham, 1 Cow. 256 (same); 1848, Little *v.* Keon, 1 Code Reporter 4 (attorney held competent; quoted *supra*); 1875, Tilton *v.* Beecher, Abbott's Rep. II, 902, Official Report III, 1011, 1016 (Mr. Tracy was allowed to testify for the defendant; quoted *ante*, § 1807; Mr. Beach afterwards made scathing comments on the propriety of this action);
North Carolina: 1810, Slocum *v.* Newby, 1 Murph. 423 (counsel allowed to be witness, not being otherwise interested); 1849, State *v.* Woodside, 9 Ired. 496, 502 (attorney or counsel allowed to be witness; "it is a practice not to be encouraged");
Pennsylvania: 1788, Newman *v.* Bradley, 1 Dall. 240 (counsel not disqualified by interest in judgment-fee); 1814, Miles *v.* O'Hara, 1 S. & R. 32, 34 (not disqualified by expecting a larger fee if successful); 1828, Boulden *v.* Hebel, 17 S. & R. 312 (not disqualified where not legally entitled to a contingent fee); 1847, Mishler *v.* Baumgardner, Pa. Com. Pl., 1 Amer. L. Journ. N. S. 304 (counsel inadmissible; quoted *supra*); 1848, Frear *v.* Drinker, 8 Pa. St. 520 ("It is a highly indecent practice for an attorney to cross-examine witnesses, address the jury, and give evidence himself to contradict the witness," though his testimony is "sometimes indispensable," and no law forbids it); 1849, Bell *v.* Bell, 12 Pa. 235 (an attorney is competent, though it is "commendable delicacy" to withdraw from argument); 1863, Linton *v.* Com., 46 Pa. 294 (attorney not disqualified by interest); 1872, Follansbee *v.* Walker, 72 Pa. 228 (Frear *v.* Drinker quoted and approved); 1884, Perry *v.* Dicken, 105 Pa. 83, 89 (an attorney should decline to testify for his client, except so far as absolute necessity makes it his duty); 1921, Com. *v.* Smith, 270 Pa. 583, 113 Atl. 844 (after testimony by an accused to duress attending a confession to the district attorney, the latter may properly take the stand in denial);
South Carolina: 1819, Reid *v.* Colcock, 1 N. & McC. 592, 597 (attorney not as such disqualified by interest to testify; "but it is a matter of much delicacy," and should be avoided unless indispensable);
Texas: 1854, Spencer *v.* Kinnard, 12 Tex. 180, 188 ("The ends of justice sometimes make it necessary that an attorney should give evidence for his client," but Courts should "only tolerate it in cases of pressing necessity");
Utah: 1899, McLaren *v.* Gillespie, 19 Utah 137, 56 Pac. 680 (an attorney is competent for his client; but he should not be called unless indispensable, and he should then retire from the case, if possible with safety to client's interests); 1911, State *v.* Greene, 38 Utah 389, 115 Pac. 181 (an attorney participating in a trial is competent, but it is improper for him to testify; McCarty, J., diss. on the ground that the attorney in this case should have been excluded from one or the other capacity; the dissenting judge's condemnation of the practice merits wider acceptance; Courts are too lax in enforcing this rule of moral decency);
Washington: 1903, Voss *v.* Bender, 32 Wash. 566, 73 Pac. 697 (a rule of court prohibiting an attorney who testifies for his client from making an argument to the jury, held proper);
West Virginia: 1881, Moats *v.* Rymer, 18 W. Va. 642, 645 ("While there are some cases of extreme character in which such practice is necessary, ordinarily it is much to be regretted");
Wisconsin: 1886, Hardtke *v.* State, 67 Wis. 552, 557, 30 N. W. 723 (counsel for the prosecution testified to a partial admission by the defendant, made to him during the preliminary examination; the "propriety" of this was said to be "very questionable").

§ 1912. **Referee, Arbitrator, Sheriff, as Witness.** (1) A *referee*, sitting in the place of judge and jury, would be affected by a rule of prohibition against a judge's testifying in a trial before himself.[1]

(2) An *arbitrator*, in respect to testifying before the body of which he is a member, would equally be prohibited by a rule affecting a judge.[2] But the usual question here is as to the subsequent disclosure by the arbitrator of the proceedings before him, which involves a different principle (*post*, § 2358).

(3) A *sheriff*, or other court officer charged with the safekeeping of jurors, is not prohibited from testifying to facts relevant to the cause.[3] Whether he, or any one else, may reveal the conduct or utterances of the jurors during their retirement, involves a different principle (*post*, § 2354).

§ 1913. **Documents taken to the Jury-Room.** It was formerly said that writings under seal, received in evidence or as part of the issue, could be taken by the jury for further perusal upon retirement into their room for deliberating upon their verdict, but that other writings could not be:

> *Ante* 1726, Chief Baron GILBERT, Evidence, 17: "These exemplifications [of records], and all other under seal, shall be delivered to the jury to be carried off with them; but sworn copies shall not; . . . [1] the jury are allowed to carry them [the former] away with them as the acts of the most remarkable solemnity, that the most solemn acts may make the last impression. [2] Another reason why matters under seal shall be delivered to the jury is because these things, that are generally of higher or at least of equal credit with matters sworn 'viva voce,' would not be yet understood so well upon the hearing as the evidence 'viva voce' may upon the examination, where the jury have liberty to put what question they please. . . . [3] [Writings not under seal] have no intrinsic credit in themselves, . . . they have no credit but what they derive from something else, viz., from the oath of the person who attests them or from some presumption in their favor, so that they receive their credit from some act in Court, but do not carry it along with them, and therefore cannot be removed out of Court with the jury. But things under seal are supposed to have an intrinsic credit from the impression of the signature, and are supposed to be known by the jury in some measure."

These reasons seem fantastic enough now, and were more or less artificial and 'ex post facto' at the time that they were advanced; although the rule itself had an intimate connection with the history of jury-trial.[1] But with the disappearance of the seal's importance, the rule in its original form has ceased to be maintainable on any pretext.

§ **1912.** [1] 1851, Morss *v.* Morss, 11 Barb. 510, 515 (referee declared incompetent, as being both judge and juror, and being ineligible as the former and probably also as the latter; *ante*, §§ 1909, 1910).

Otherwise of a *commissioner of depositions:* 1685, Bright *v.* Woodward, 1 Vern. 369 ("a commissioner [to take depositions] may be a witness, but then he ought to be examined before any other witness be examined").

[2] The case does not seem to have been ruled upon. It is generally said merely that an arbitrator is admissible if the facts desired from him are provable: 1668, Re Dare Valley R. Co., L. R. 6 Eq. 429, 435; 1872, Duke of Buccleuch *v.* Metropolitan Board, L. R. 5 E. & I. App. 418, 433, 462.

[3] 1887, People *v.* Coughlin, 65 Mich. 704, 32 N. W. 905 (sheriff); 1896, People *v.* Beverly 108 Mich. 509, 513, 66 N. W. 379 (officer in charge); 1900, Reed *v.* Com., 98 Va. 817, 36 S. E. 399 (deputy sheriff); 1888, State *v.* Shores, 31 W. Va. 491, 499, 7 S. E. 413 (sheriff).

§ **1913.** [1] Thayer, Preliminary Treatise on Evidence, 104–112.

Nevertheless, an effort has been made by some Courts, finding the rule ready made at hand, to preserve and adopt it to changed conditions, by making a distinction between written and oral materials of evidence, or between written depositions and oral testimony; and they have discovered reasons of policy which forbid the jury to have this opportunity of emphasis for the one form of evidential matter, as well as invented expedients for keeping from the jury's perusal whatever irrelevant material is bound up in the same document with material justly admitted. Statutes also have in many States affected the common-law rule. But these are all questions of the proper control of the jury in its deliberations, and not of the rules of Evidence, and are therefore without the present purview.[2]

[2] In the following opinions a clue will be found to the authorities and distinctions: 1897, Burton *v.* State, 115 Ala. 1, 22 So. 585; 1897, Koch *v.* State, 115 Ala. 99, 22 So. 471; 1826, Wakeman *v.* Marquand, 5 Mart. N. S. La. 265, 267; 1874, Sawyer *v.* Garcelon, 63 Me. 25; 1882, Tabor *v.* Judd, 62 N. H. 288, 292; 1897, People *v.* Hughson, 154 N. Y. 153, 47 N. E. 1092; 1920, Chitwood *v.* Philadelphia & R. R. Co., 266 Pa. 435, 109 Atl. 645 (plan and photographs); 1901, State *v.* Shaw, 73 Vt. 149, 50 Atl. 863; 1882, Doctor Jack *v.* Terr., 2 Wash. Terr. 101, 106, 3 Pac. 832; 1897, State *v.* Moody, 18 Wash. St. 165, 51 Pac. 356; 1883, Welch *v.* Ins. Co., 23 W. Va. 288, 308; 1895, Starke *v.* Wolf, 90 Wis. 434, 63 N. W. 755.

Distinguish the refusal to send the jury *documents never admitted or formally introduced in evidence:* 1897, State Bank *v.* Brewer, 100 Ia. 576, 69 N. W. 1011; 1897, Gable *v.* Rauch, 50 S. C. 95, 27 S. E. 555.

SUB-TITLE III: OPINION RULE

TOPIC I. GENERAL PRINCIPLE

CHAPTER LXV.

§ 1917. **History.** The so-called Opinion Rule is in its scope much narrower than the term "opinion"; it deals with opinion in a special sense only. And it is not the only rule which may serve to raise an objection to opinion-testimony. What is first to be ascertained, then, is the way in which this rule took shape and was differentiated from other rules affecting opinions as testimony. The steps of development are not as simple to trace as in some other instances, but the general conditions at the beginning and at the end seem clear.

1. The judicial utterances of the 1700s must be approached with the recollection that up to that time there was no traditional or received notion that opinion (or the like) was proper or was improper to listen to, and that (as with so many other commonplace notions of to-day's law of evidence) there had been little or no thought on the subject. Chief Baron Gilbert (*ante*, 1726) has nothing to say about such a rule; Mr. Justice Buller (*ante*, 1767) has nothing to say; there *is* nothing to say at that time.

2. Nevertheless, then and shortly later, there is appearing an appreciation of one important and afterwards fully established principle, — the principle of Testimonial Knowledge (*ante*, § 657), *i. e.* that the witness must speak as a knower, not merely a guesser; that when the witness, speaking (for example) to a sale of goods, declares that he thinks or believes or is persuaded that the sale was not made, such a witness cannot be heard, so far as he means that he did not see the transaction in question but believes so on rumor alone or has otherwise reached by supposition his conclusion. This principle of personal observation came early into play in emphasizing the impropriety of testimony by one who speaks only from hearsay. This

was probably what Coke had in mind in the passage attributed to him in Adams *v.* Canon,[1] in 1622:

"It is no satisfaction for a witness to say that he 'thinketh' or 'persuadeth himself,' and this for two reasons; first, because the judge is to give an absolute sentence, and for this ought to have a more sure ground than 'thinking'; secondly, the witness cannot be sued for perjury."

It is the phrases resorted to for expressing this principle that are here of interest. Such a witness is told by the Court: "That is mere opinion; we want what you *know*, not what you *think* or *believe*." This is one phrase of contrast which the Court might use, — the contrast between knowing (*i. e.* personally observing) and opining (*i. e.* believing without sufficient observation). But there is another phrase; the judge might say, "We want not your *opinion;* have you any *facts?* For we can guess and opine as well as you can; tell us facts if you have them." This demand for "facts" means, as before, some real or positive grounds of knowledge in the witness. The principle of objection which the judge has in mind is the same in both cases; he will have knowledge, not opinion, — facts, not opinion. In the following passages this attitude towards opinion-evidence is illustrated:

1644, *Archbishop Laud's Trial,* 4 How. St. Tr. 315, 399; a witness, testifying to rumors of the bishop's tampering with a jury, said "and thereupon, as he conceives, the petty-jury was changed"; the defendant argues: "[This evidence] is not the knowledge, but the conceit only of the witness; he 'conceives,' which I am confident cannot sway with your lordships for a proof."

1824, Mr. *Thomas Starkie,* Evidence, 173: "A witness examined as to facts ought to state those only of which he has had personal knowledge. . . . It has been said that a witness must not be examined in chief as to his *belief* or *persuasion*, but only as to his *knowledge* of the fact. . . . As far as regards mere belief or persuasion which does not rest upon a sufficient and legal foundation, this position is correct, — as where a man believes a fact to be true merely because he has heard it said to be so." [2]

At this stage, then, and as the distinct first meaning of the disparaging references to "opinion," the profession has in mind a witness who turns out upon examination to have no facts to contribute, no knowledge, no personal acquaintance with the man or the land or the loan or the affray about which he is speaking. In this requirement, however, there is no new principle, no independent "opinion rule," but merely a recognition of an otherwise established general principle of testimonial qualifications that the witness, to be competent at all, must have personal observation (*ante,* §§ 657, 658). Had the matter gone no farther, there would have been no separate "opinion rule," but merely a special application of an ordinary principle of testimonial competency.

3. But, at the same time that this principle is becoming recognized, or shortly after, there occurs a general recognition of what seemed at the time

§ 1917. [1] Dyer, 53 *b*.
[2] See another good example in R. r. Heath, 1744, 18 How. St. Tr. 1, 76.

as an exception to it, — the use of skilled witnesses. A witness is called to the stand, but appears to have no personal acquaintance with the circumstances in dispute; then how can we listen to his mere opinion? Because he is a skilled witness on these matters, says the counsel. But what difference can that make, we ask, since he knows no facts? The answer to this was not at first easy to phrase; though all saw that there was a good answer and that the witness must be heard. The precedent and custom of using such testimony reached far into the past; but in its original and long-persisting form it was hardly regarded as evidence to the jury, but as an aid sought by the Court, and thus as collateral to and parallel with the jury itself, which in theory at least was no more than a body of triers aiding the Court:

1900, Professor *James Bradley Thayer*, Cases on Evidence, 2d ed., 672, note: "The furnishing of such assistance [of skilled persons] *to the Court* was a very ancient thing. It is probable that for a good while after witnesses were regularly allowed before the jury, experts were thought of in the old way as being helpers of the Court, and the Court instructed the jury upon the points on which such aid was furnished. But at last the modern conception came in, which regards the experts as testifying, like other witnesses, directly to the jury. In 1353, in an appeal of mayhem, the viscount was ordered to summon skilful surgeons from London, to inform the Court whether the wound was mayhem or not. The Court had previously inspected it, and could not tell.[3] In 1493,[4] BRIAN, C. J., alleged a precedent, and the case was such: A man was bound in an obligation upon a condition to pay five pounds of fine gold. . . . The obligation ran 'puri auri.' . . . And the masters of grammar were sent for to advise what the Latin was for 'fine,' and they could not tell. In 1619,[5] in ejectment, upon evidence to the jury the question was whether a child who was born January 5, 1611, was the daughter of a man who died March 23, 1610. Several physicians testified that she might be, and gave their scientific reasons. 'The Court held here that it might well be as the physicians had affirmed; . . . and so the Court delivered to the jury that the said Elizabeth, who was born forty weeks and more after the death of the said Edmund Andrews, might well be the daughter of the said Edmund.'"

1554, *Buckley* v. *Thomas*, 1 Plowd. 122. STAUNFORD, J.: "In order to understand it truly, being a Latin word [*licet*], we ought to follow the steps of our predecessors, judges of the law, who, when they were in doubt about the meaning of any Latin words, enquired how those that were skilled in the study thereof took them, and pursued their construction. SAUNDERS, J.: "I grant that if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns, which is an honorable and commendable thing in our law."

Thus the early status of the expert helper of the Court had naturally prevented any question from being raised as to his information in the aspect of testimony to the jury.[6] But by the latter part of the 1700s he took his place with others as a mere witness to the jury, and so the problem had to

[3] Lib. Ass. 145, 5.
[4] Y. B. 9 H. VI, 16, 8.
[5] Alsop *v.* Bowtrell, Cro. Jac. 541.
[6] For a collection of cases showing early instances of the use of expert testimony and also of special juries from the trades and professions, see an interesting article by Mr. (now Judge) Learned Hand, in 15 Harvard Law Review, 40, "Historical and Practical Considerations regarding Expert Testimony," as well as the note in Thayer's Cases, *ubi supra*. The canon law at this time knew such a practice: 1552, Reformatio Legum Ecclesiasticorum, tit. *De fide*, c. 7.

be faced, *i. e.* of squaring the use of such testimony with the general principle above noted that a witness must have personal knowledge, must state facts, not opinions. The traditional use of such testimony was not to be abandoned; this was clear. But the process of accounting for it in theory was at first troublesome. The general notion was expressed (in one shape or another) that the jury needed such help, always had had it, and must have it now, opinion or no opinion. In the great case of Folkes *v.* Chadd, the notable feature of Lord Mansfield's opinion is his frequent use of the word "facts"; he is trying to show that this kind of witness' "opinion" really has a sufficient flavor of fact about it to suffice; and this notion is perhaps the key to the common use of the phrase "matter of science" (in this judgment and in later treatises) to sanction and describe the kind of admissible testimony; for "science" was at that time not used in the sense of "knowledge coördinated, arranged, and systematized," but meant simply "knowledge in general." Lord Mansfield in effect answered the objection that the expert had no personal knowledge, no facts, by pointing out that the subject was in truth one of fact, but of a class of facts about which expert persons alone could have knowledge:

1782, Lord MANSFIELD, C. J., in *Folkes* v. *Chadd*, 3 Dougl. 158 (it was objected that the evidence of Mr. Smeaton, an eminent engineer, as to the cause of a harbor's filling up, "was matter of opinion, which could be no foundation for the verdict of a jury, which was to be built entirely on facts, not opinions"): "The question is, to what has this decay been owing? The defendant says, to this bank. Why? Because it prevents the backwater. That is matter of opinion; the whole case is a question of opinion, from facts agreed upon. Nobody can swear that it was the cause. . . . It is a matter of judgment, what has hurt the harbor. . . . A confusion now arises from a misapplication of terms. It is objected that Mr. Smeaton is going to speak, not as to facts, but as to opinion. That opinion, however, is deduced from facts which are not disputed, — the situation of banks, the course of tides and of the winds, and the shifting of sands. . . . I cannot believe that where the question is whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received. . . . The cause of the decay of the harbor is also a matter of science. . . . Of this, such men as Mr. Smeaton alone can judge. Therefore we are of opinion that his judgment, formed on facts, was very proper evidence."

This, then, is the second notable feature, namely, the general recognition, by the end of the 1700s, that there was a class of persons, *i. e.* those skilled in matters of science, who, though they personally knew nothing about the circumstances of the particular case, might yet, perhaps by way of exception, give their opinion on the matter. This stage of development may be seen in the following passages (and it must be understood that these earlier treatise-writers simply recorded the state of practice and thought at the bar, and their record is as significant in that aspect as a judge's ruling); the language of Peake and Espinasse especially shows the place of the doctrine as a part of the rule as to personal knowledge:

1801, Mr. *T. Peake*, Evidence, 142: "Though witnesses can in general speak only as to facts, yet in questions of science persons versed in the subject may deliver their opinion

upon oath on the case proved by other witnesses. . . . Thus a physician who has not seen the particular patient, may, after hearing the evidence of others, be called to prove on his oath the general effects of a particular disease and its probable consequences in the particular case; for, though not a particular fact, it is still general information, which the rest of mankind stand in need of to enable them to form an accurate judgment on the subject in dispute."

1811, Mr. *Isaac Espinasse*, Nisi Prius, 411 (1st Am. ed.): "It is a general rule that a witness must deliver his testimony according to his knowledge; but there are occasions on which the opinion of the witness is legal and proper evidence, as in all matters of science." [7]

The limits of this apparent exception now become the field of controversy; and the point of view was still that of an exception to a rule about the testimonial qualification of personal knowledge.

4. This being so, it is next to be noted that as yet no one thought of questioning the opinions, conclusions, or inferences of the ordinary or lay witness when he came properly equipped with a basis of "facts," of personal observation. In other words, the disparagement of "opinion" had always in mind the testimony of a person who had no "facts" of his own observation to speak from, and the skilled witness was the person who had to be received by way of exception to that notion. Thus, when an ordinary or lay witness took the stand, equipped with a personal acquaintance with the affair and therefore competent in his sources of knowledge, the circumstance that incidentally he drew inferences from his observed data and expressed conclusions upon them did not present itself as in any way improper. It would not occur to any judge that this witness was doing a wrong thing. In short, it was only "opinion" as a mere guess or a belief without observation which they rejected; but "opinion" as an inference or conclusion from personally-observed data they did not think of disparaging. That this was the attitude toward the lay observer will appear from the following passages:

1806, Mr. *W. D. Evans*, Notes to Pothier, II, 216: "There are also many cases in which witnesses speak from judgment and opinion, without reference to any technical knowledge; such, for instance, is evidence of character, and all other testimony amounting to a general conclusion from particular facts."

1811, Mr. *Espinasse*, Nisi Prius, 411 (after the passage quoted above): "So also as to the value of goods sold, it must always rest in opinion only; and the like as to the sanity of a party, and all other matters of proof which from their nature can only be given from the opinion which the witness may form."

In the United States, the same tradition and attitude of thought is also clearly apparent:

1803, *Forbes* v. *Caruthers*, 3 Yeates, 527; *per* CURIAM: "Mere abstract opinion is not evidence; but a surveyor, or any other person conversant on the subject, may state facts and his opinion on those facts."

1820, WASHINGTON, J., in *Harrison* v. *Rowan*, 3 Wash. C. C. 587 (admitting witnesses to insanity): "The mere opinions of the witnesses are entitled to little or no regard, unless they are supported by good reasons, founded on facts which warrant them in the opinion

[7] So also: 1814, Phillipps, Evidence, 290; 1810, Swift, Evidence, 111.

of the jury. If the reasons are frivolous or inconclusive, the opinions of the witnesses are worth nothing."

1821, DUNCAN, J., in *Rambler* v. *Tryon*, 7 S. & R. 94: "Opinion is no evidence, without assigning the reason of such opinion."

1840, O'NEALL, J., in *Seibles* v. *Blackhead*, 1 McMull. 57: "It is true that the mere opinion of witnesses who have not the aid of science to guide them would not have any weight in such a case, and would be generally inadmissible unless sustained by facts showing the opinion to be true. . . . I find that the witnesses generally said they thought the slave to be unsound, and if they had stopped there such testimony ought to have been rejected; but they go on to fortify their opinions with facts showing some foundations for them, and hence they were admissible and were to be compared with the facts by the jury."

We here see in the language of the American judges that their only objection to "opinion" is that by itself it does not indicate that the witness has the personal acquaintance with the matter which he ought to have; but the moment he exhibits his "facts," *i. e.* his own observed data, they are ready enough to listen to his inferences or conclusions.

The language of these rulings also illustrates the genesis of the later phrase with which we have since been made familiar. "*Mere* opinion," said Lord Mansfield, in Carter *v.* Boehm,[8] is not evidence; "mere abstract opinion," says the Pennsylvania Court in 1803, is not evidence; "opinions not coupled with the facts," "opinion without assigning a reason," say other judges, is no evidence; because, of course, it does not appear that the witness has any personal knowledge. But, in another generation's time, there occurs this mutilation, that "*opinion* is not evidence," — a very different and vastly broader proposition.

Now this new and heterodox phrase would never have obtained currency and established a separate doctrine (peculiarly developed in America) if a motive had not been furnished for it; and to find how that motive or principle was furnished and what it was, we must return to the case of the skilled witness in "matters of science," whose admissibility was by this time universally conceded as an exception to the doctrine that "*mere* opinion" (*i. e.* not founded on fact-knowledge) was inadmissible.

5. When this skilled witness takes the stand and is asked what he thinks, for example (as in Folkes *v.* Chadd) about the cause of a harbor's becoming filled up, it is obvious that one of the first thoughts to occur to the objector would be that the witness was no different from the members of the jury. Here was a man who had never seen the place, had no "facts" to add, and was going to give just what each juryman would ask of his brethren after they retired, *i. e.* his opinion upon the general question in doubt, the cause of the harbor's decay. Why should *he* do this? Why waste time in listening to numbers of such persons when the twelve men in the box have been specially selected for the very purpose of having *their* opinions serve as

[8] Quoted *infra*.

decisive? There would be only one reason for listening to such outside opinions, namely, that the witness was such a person that the jury would be really aided by his opinion. And this in truth was the notion which finally came to serve as a test; *i. e.* whether additional light could be thrown upon the question by a person of skill in the particular subject. The test may be seen in the process of development in the following rulings:

1702, *Hathaway's Trial*, 14 How. St. Tr. 682; cheating by pretending to be bewitched; a witness to the defendant's conduct said: "There appeared to be neither profit nor revenge in the case; and I thought he could not be such a fool to pretend all this for no end, and run the hazard of being whipped." L. C. J. HOLT: "The question is not whether he shall be punished for a fool, but whether he be a knave. Whatever punishment he may suffer, if convicted, does not belong to you to determine."

1766, *Carter* v. *Boehm*, 3 Burr. 1905, 1918; the opinion of an insurance-broker that a certain letter ought to have been disclosed. MANSFIELD, L. C. J.: "Great stress was laid upon the opinion of the broker. But we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court and the jury were to determine the cause."

1807, *Beckwith* v. *Sydebotham*, 1 Camp. 116; ship-surveyors were called to give an opinion of seaworthiness based on the statements of a certain deposition; Mr. *Garrow* objected "that this was an inference which it was for the jury to draw, if the facts would warrant it." ELLENBOROUGH, L. C. J., held that "where there was a matter of skill or science to be decided, the jury might be assisted by the opinion of those peculiarly acquainted with it from their professions or pursuits."

1816, *Durrell* v. *Bederley*, Holt, N. P. 285; underwriters were asked as to whether a fact would have prevented them from writing a policy. GIBBS, C. J.: "Lord Mansfield and Lord Kenyon discountenanced this evidence of opinion, and I think it ought not to be received. It is the province of the jury, and not of the underwriters, to decide what facts ought to be communicated. It is not a question of science, in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless. Such evidence leads to nothing satisfactory, and on that ground ought to be rejected."

It will be noticed that in the two earlier cases, during the 1700s, the testimony was neither objected to nor excluded; even Lord Mansfield merely declared that the jury ought not to regard it. There was up to that time no rule against it, but merely a growing perception of a reason for some kind of a rule. Not until the early 1800s do we find the English judges laying down a distinct rule of a new sort, applicable to opinion-testimony, on the ground, not of lack of personal knowledge, but of its superfluity as an aid to the jury. By 1824 Mr. Starkie is found [9] generalizing that "the general distinction is this, that the jury must judge of the facts for themselves," yet that testimony of witnesses having no personal knowledge will be admitted "wherever the question depends on the exercise of peculiar skill and knowledge that may be made available."

6. This, then, being now looked on as the test for listening to a skilled

[9] Evidence, 174.

witness who knew nothing personally of the matter in controversy, it soon served as a reason for the novel and broader doctrine that was being specially worked out in the United States. The English writers and judges and the early American judges, when they disparaged "*mere* opinion," never had in mind (as above seen) the case of the lay-witness who, having a "fact"-knowledge, included in his testimony an opinion or inference based on those data, — as in the leading instances (used by those writers and judges) of handwriting, character, and sanity. But when, by careless usage, the phrase came to be passed along that "*opinion* is not evidence," the distinction just before established for skilled witnesses not having a "fact"-knowledge was readily enlarged, and was made to apply to the lay-witness who *had* a "fact" knowledge, and to support the new and broad idea that "opinion" in general was not evidence. That distinction or test was, as put by Mr. Garrow, in Beckwith *v.* Sydebotham, "this was an inference which it was for the jury to draw, if the facts would warrant it." Now, if a lay-witness having a "fact"-knowledge had put those facts before the jury and then proposed to add his own inference or conclusion or opinion upon those facts, as made at the time, it is apparent that the same test might be applied to exclude this opinion or inference of his, since the facts had already been laid by him before the jury and they were as competent as he to draw that inference. This language sounds familiar enough to us to-day, but the key to the history of the rule is that it was a novel idea at that time, — say, in the second, third, and fourth decades of the 1800s. The important thing is that at one blow a large portion of the testimony of the lay-witness was hewed off, like the rotten limb of a tree, — a limb whose soundness had until this time scarcely been doubted.

It must be noted, too, that this extension — logical enough, it is true, and correct in theory, but pernicious (as it has proved) in practice — is a peculiarly American doctrine. It has apparently not taken place in England in any important degree.[10] There appear to be no English rulings which indicate that the "opinion" rule has there been thought to exclude the inferences which a "fact"-witness has made from the data he lays before the jury. Certainly no such broad logical extension of the test to lay-witnesses is the familiar possession of the English bar as it is of our own. The great controversies, for example, that have disturbed our Courts over lay opinions upon insanity and upon value have never been dreamed of at the English bar. This conservative attitude is plentifully illustrated in the English cases cited under particular topics in the ensuing sections. The strongest expression looking towards the expansion of the rule for lay-witnesses is found in the following individual utterance, which is not only isolated, but itself also

[10] The following passage is hardly prohibitive: 1878, Taylor, Evidence, 7th ed., § 1416: "On some particular subjects, however, positive and direct testimony may often be unattainable; and in such cases a witness is allowed to testify as to his belief or opinion, or even to draw inferences respecting the fact in question from other facts, provided these last facts be within his personal knowledge."

indicates that the actual practice at the time was opposed to the judicial suggestion:

1838, COLERIDGE, J., in *Wright* v. *Tatham*, 5 Cl. & F. 690: "I do not, indeed, concede, though it is not, perhaps, necessary now to decide the point, that the mere opinion of a witness even on oath is, as such, admissible evidence upon a question of competency. Where you can bring the decision of that question, as you sometimes may, to depend upon deductions from scientific premises, you may hear those deductions expressed as opinions by scientific men. The necessity of the case justifies this departure from the general rule; but competency, in the main, is a question of fact, and the jury are to draw their conclusions from the evidence of the facts before them, not from the opinions which others may have formed from facts not before the jury. I admit that, in practice, where the witness to facts is present, it is by no means uncommon to ask directly for his opinion; such a question it would be idle to object to, for the objection would only lead to a detailed inquiry into particular facts, which the witness is there ready to go into. Nothing therefore would be gained by it. I am not, however, aware that the question has ever, upon argument, been decided to be correct in form."

It would apparently have been more accurate to say that such a question had never been decided to be incorrect. If there had been any working rule of exclusion of the sort suggested, rulings like the following, in a trial remarkable for the strictness and pertinacity with which objections were pressed and decided, would be unaccountable:

1820, *Queen Caroline's Trial*, Linn's ed., II, 266; impeachment of the Queen, charging immoral and undignified conduct; the question was put to a witness for the defence: "Did you in other respects ever perceive that her Majesty conducted herself, either in public or in private, in any way to which a just exception could be taken?"; the Attorney-General objected, but did not mention the opinion rule; the Lord Chancellor "saw no legal objection to the question."

It may therefore be said, on the whole, that the extension of the exclusionary doctrine to inferences of lay-witnesses speaking from their own observation, is to be regarded as an innovation that did not occur earlier than the 1800s, and never obtained orthodox standing in the original home of our jurisprudence.[11]

The sum of the history is, then, that the original and orthodox objection to "mere opinion" was that it was the guess of a person who had no personal knowledge, and the "mere opinion" of an expert was admitted as a necessary exception; the later and changed theory is that wherever inferences and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous, and thus an expert's opinion is received because and whenever his skill is greater than the jury's, while a lay opinion is received because and whenever his facts cannot be so told as to make the jury

[11] It is true that in the broad form of excluding opinion upon the very issue in controversy (*post*, § 1921) modern English rulings are found. But the extreme liberality of attitude in orthodox English practice may be seen in the rulings upon conduct (*post*, § 1949); for a good instance, see the Parnell Commission's Proceedings, 1888, 76th day, Times' Rep. pt. 21, pp. 157, 158.

as able as he to draw the inference. The old objection is a matter of testimonial qualifications, requiring personal observation; the modern one rests on considerations of policy as to the superfluity of the testimony. In the old sense, "opinion" — more correctly, "mere opinion" — is a guess, a belief without good grounds; in the modern sense, "opinion" is an inference from observed and communicable data.

§ 1918. **Theory of the Opinion Rule.** The true theory, then, of the Opinion rule, in the sense we are here to use, is simply that of the exclusion of supererogatory evidence. It is not that there is any fault to find with the witness himself or the sufficiency of his sources of knowledge or the positiveness of his impression; but simply that his testimony, otherwise unobjectionable, is not needed, is superfluous. Thus the principle of exclusion is in no sense one of Testimonial Qualifications, but one of Auxiliary Policy (*ante*, § 1863). The delay and waste avoided might be in a single instance trifling; but its seriousness and its unbearableness can be appreciated if we suppose that there were no evidential limits whatever of the above nature. The time taken in the rehearsal of an interminable multitude of opinions, the confusion of the main issues by an additional mass of testimonial differences and impeachments, and the tendency for the jury now and then to decide simply according to the preponderance of numbers and of influential names, — all these are possibilities, in the absence of some limit of the present nature. Whether these possibilities are so imminent that the rule needs, as a matter of policy, to be enforced as strictly as it is now in this country, is another question (*post*, § 1930); but of the general propriety of the principle in some form there can be no doubt.

What we have to notice, in inquiring as to the scope and the effect of the principle, is that it does not employ any mere shibboleth; it does not rest on a simple caprice, prejudice, or tradition; and, most of all, it does not exclude any specific class of witnesses or all testimony on a specific subject. It simply endeavors to save time and avoid confusing testimony by telling the witness: "The tribunal is on this subject in possession of the same materials of information as yourself; thus, as you can add nothing to our materials for judgment, your further testimony is unnecessary, and merely cumbers the proceedings." It is this living principle which is (or ought to be) applied in each instance; nothing more definite than this is the test involved by the principle. In some instances, one witness may be able to give real help to the tribunal, while another may not, — as where we should listen to the estimate of a certain bullet's calibre by a gunmaker, but not to that of the ordinary witness who found it and produces it. In other instances, no witness at all may be capable of giving real help, — as where clothes of the deceased are brought into court, and the question is whether they were what is commonly described as black.[1] In still other instances,

§ 1918. [1] Yet even here the past conditions may allow of opinion answers: 1905, State v. Miller, 71 N. J. L. 527, 60 Atl. 202 (accused's clothing; comparison between spots on it now

any witness whatever could give the tribunal real help, as in all cases of past events which have to be described by the observers. There is, thus, no special department of knowledge and no fixed formula involved. We are dealing merely with a broad principle that, whenever the point is reached at which the tribunal is being told that which it is itself entirely equipped to determine without the witness' aid on this point, his testimony is superfluous and is to be dispensed with.

The following passages amply illustrate in a variety of phrasings the judicial recognition of this principle; the clearest expressions being those of Mr. Justice Campbell, in Michigan, Mr. Justice Foster, in New Hampshire, and Mr. Justice Bell, in Texas:

1766, MANSFIELD, L. C. J., in *Carter* v. *Boehm*, 3 Burr. 1905, 1918: "It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court and the jury were to determine the cause; and therefore it is improper and irrelevant in the mouth of a witness."

1823, GIBSON, J., in *Cornell* v. *Green*, 10 S. & R. 16: "It is a good general rule that a witness is not to give his impressions, but to state the facts from which he received them, and thus leave the jury to draw their own conclusion; and wherever the facts *can* be stated, it is not to be departed from. But every man must judge of external objects according to the impressions they make on his senses; and after all, when we come to speak of the most simple fact which we have witnessed, we are necessarily guided by our impressions. There are cases where a single impression is made by induction from a number of others, as, where we judge whether a man is actuated by passion, we are determined by the expression of his countenance, the tone of his voice, his gestures, and a variety of other matters; yet a witness speaking of such a subject of inquiry would be permitted directly to say whether the man was angry or not. . . . I take it that wherever the facts from which a witness received an impression are too evanescent in their nature to be recollected, or are too complicated to be separately and distinctly narrated, his impressions from these facts become evidence."

1840, VERPLANCK, Sen., in *Mayor* v. *Pentz*, 24 Wend. 675: "Opinion is admitted when a jury is incompetent to infer, without the aid of greater skill than their own, as to the probable existence of the facts to be ascertained or the likelihood of their occurring from the facts actually proved before them. . . . All these [scientific opinions] are testimonies to general facts which the jury can ascertain in no other way. . . . The same reason of absolute necessity has compelled the admission of opinion in certain cases where the poverty of human language makes it absolutely impossible to separate in words the minute and transient facts observed by the witnesses from the inference as to some other fact irresistibly connected with the former in his own mind. Testimony as to handwriting, I think, resolves itself into this, as no words can fully convey to others the minute particularities on which such judgment is founded. So, too, in questions of identity as to men, to goods, horses, etc., though facts on which such judgment is founded may be partially stated, still the judgment or opinion is admitted."

1858, CAMPBELL, J., in *Evans* v. *People*, 12 Mich. 35: "It is an elementary rule that, where the Court or jury can make their own deductions, they shall not be made by those testifying. In all cases, therefore, where it is possible to inform the jury fully enough to enable them to dispense with the opinions or deductions of witnesses from things noticed

and spots on portions cut off and destroyed, allowed); 1902, State v. Henry, 51 W. Va. 283, 41 S. E. 439 (one who had seen a spotted coat eight months before, allowed to state that he thought the spots to be of blood, although the coat was before the jury).

by themselves or described by others, such opinions or deductions should not usually be received."

1859, BELL, J., in *Cooper* v. *State*, 23 Tex. 331, 337, 339: "There are many things which the mind may clearly apprehend, and yet the mental process cannot be so explained as to be understood by others. A witness may state with much certainty that one with whom he has associated daily for years has become insane, and yet he cannot clearly explain to others how it is that he knows the individual in question to be insane. . . . In all these cases the opinion of the witness is received because the facts, which constitute the cause from which the opinion proceeds as an effect, cannot themselves be presented or communicated to the jury, so as to impart to them the knowledge which the witness actually possesses. . . . The true reason why the opinions of witnesses may be given to the jury, upon questions not involving skill or science, . . . is, because witnesses have a knowledge of the thing about which they speak and have acquired that knowledge in a manner which cannot be communicated, or from facts incapable in their very nature of being explained to others, [so] that they may state what they know in the best way they can. This best way is by giving in the form of an opinion that which cannot be put in the form of explanation or narration."

1875, LOOMIS, J., in *Sydleman* v. *Beckwith*, 43 Conn. 12: "These exceptions to the general rule are allowed on the ground of necessity, where the subject of the inquiry is so indefinite and general as not to be susceptible of direct proof, or where the facts on which the witness bases his opinion are so numerous and so evanescent that they cannot be held in the memory and detailed to the jury precisely as they appeared to the witness at the time. . . . The very basis upon which, as we have seen, this exception to the general rule rests, is that the nature of the subject-matter is such that it cannot be reproduced or detailed to the jury precisely as it appeared to the witness at the time."

1875, FOSTER, C. J., in *Hardy* v. *Merrill*, 56 N. H. 241: "Opinions concerning matters of daily occurrence, and open to common observation, are received from necessity; and any rule which excludes testimony of such a character, and fails to recognize and submit to that necessity, tends to the suppression of truth and the denial of justice. The ground upon which opinions are admitted in such cases is, that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons, not eye-witnesses, to form an accurate judgment in regard to it. How can a witness describe the weight of a horse? or his strength? or his value? Will any description of the wrinkles of the face, the color of the hair, the tones of the voice, or the elasticity of step, convey to a jury any very accurate impression as to the age of the person described? And so, also, in the investigation of mental and psychological conditions, — because it is impossible to convey to the mind of another any adequate conception of the truth by a recital of visible and tangible appearances, — because you cannot, from the nature of the case, describe emotions, sentiments, and affections, which are really too plain to admit of concealment, but, at the same time, incapable of description, — the opinion of the observer is admissible from the necessity of the case; and witnesses are permitted to say of a person, 'He seemed to be frightened'; 'he was greatly excited'; 'he was much confused'; 'he was agitated'; 'he was pleased'; 'he was angry.'" [2]

It will be seen, from these passages, that the instances in which the witness' opinion is excluded by this principle are roughly classed into two groups. First, all witnesses, whether testifying on observed data of their own or on data furnished by others, may state their inferences so far only as they

[2] Compare also the following opinions: 1826, Green, J., Rochester *v.* Chester, 3 N. H. 365; 1844, Shaw, C. J., in Com. *v.* Rogers, 7 Metc. Mass. 504; 1873, Ewing, J., in Eyerman *v.* Sheehan, 52 Mo. 223; 1890, Brown, J., in Van Wyckden *v.* Brooklyn, 118 N. Y. 429, 24 N. E. 179; 1890, Mitchell, J., in Graham *v.* Pennsylvania Co., 139 Pa. 159, 21 Atl. 151.

have some *special skill* which can be applied to interpret or draw inferences from these data. Secondly, witnesses having *no special skill*, who have had *personal observation* of the matter in hand, may, as a result of their personal observation, have drawn inferences or made interpretations which the tribunal could equally well make from the same data of personal observation, if laid before them; and thus if it is possible to detail these data fully for the tribunal, the witness' own inferences are superfluous. But there is also a third group in which exclusion must take place, though Courts seldom find it necessary to point it out, namely, where the witness would detail the data of personal observation (and not only mere inferences), but the *tribunal has an equal opportunity* of personal observation, — as where the question is whether the accused in court has dark or light hair, or whether a house which has been viewed by the tribunal has three or six stories.[3] Now it is apparent that in the first two groups — by far the commonest — the kind of testimony excluded happens to consist in inferences from other data; the witness is giving his judgment, estimate, inference, opinion. This circumstance it is that has led to the common use of "opinion" as the epithet for that which is to be excluded, and the rule of exclusion has thus been briefly termed the Opinion Rule.

§ 1919. **Erroneous Theories: (1) Logical Opposition between "Opinion" and "Fact."** If the above principle is the true one, it is obvious (leaving history out of the question and considering only principle) that there is no virtue in any test based on the mere verbal or logical distinction between "opinion" and "fact." There is perhaps, in all the law of Evidence, no instance in which the use of a mere catch-word has caused so much of error of principle and vice of policy; — error of principle, because the distinction between "opinion" and "fact" has constantly and wrongly been treated as an aim in itself and a self-justifying dogma; vice of policy, because if this specious catch-word had not been so handily provided for ignorant objectors, the principle involved would not have received at the hands of the Bar and the Bench the extensive and vicious development which it has had in this country. It is necessary now to notice why, so far as the principle or the reason of the thing is concerned, the law takes no more special account of a logical difference between "opinion"-testimony and "fact"-testimony than between testimony by a short witness and testimony by a tall witness.

(*a*) In the first place, no such distinction is scientifically possible. We may in ordinary conversation roughly group off distinct domains for "opinion" on the one hand and "fact" or "knowledge" on the other; but as soon as we come to analyze and define these terms for the purpose of that accuracy which is necessary in legal rulings, we find that the distinction vanishes, that a flux ensues, and that nearly everything which we choose to call "fact"

[3] For example: 1898, Irving *v.* Shethar, 71 Conn. 434, 42 Atl. 258 (two accounts before the jury; whether they were kept in the same way, excluded).

either is or may be only "opinion" or inference. This false verbal antithesis is frequently met with in judicial opinions;[1] but perhaps the most careful attempt to justify the distinction is the following:

1849, Sir *George Cornewall Lewis*, Influence of Authority in Matters of Opinion, 1: "It is true that even the simplest sensations involve some judgment; when a witness reports that he saw an object of a certain shape and size, or at a certain distance, he describes something more than a mere impression on his sense of sight, and his statement implies a theory and explanation of the bare phenomenon. When, however, the judgment is of so simple a kind as to become wholly unconscious, and the interpretation of the appearances is a matter of general agreement, the object of sensation may, for our present purpose, be considered a *fact*. . . . The essential idea of *opinion* seems to be that it is a matter about which doubt can reasonably exist, as to which two persons can without absurdity think differently. The existence of an object before the eyes of two persons would not be a matter of opinion, nor would it be a matter of opinion that twice two are four. But when testimony is divided, or uncertain, the existence of a fact may become doubtful, and, therefore, a matter of opinion."

This doctrine is not sustained by sound psychological or metaphysical analysis. A sufficient illustration of the fallacy of this supposed inherent distinction between Fact and Opinion may be found in the following passages:

1828, Dr. *Richard Whately*, Elements of Rhetoric, pt. I, c. II, § 4: "[As to matter of fact and matter of opinion,] decidedly it is *not* meant, at least by those who use language with any precision, that there is any greater certainty, or more general and ready agreement, in the one case than in the other; *e. g.*, that one of Alexander's friends did or did not administer poison to him, every one would allow to be a question of fact, though it may be involved in inextricable doubt; while the question, what sort of an act that was, supposing it to have taken place, all would allow to be a question of opinion, though probably all would agree in their opinion thereupon."

1887, Mr. *James Sully*, Illusions, 328: "It must have been plain to an attentive reader throughout our exposition that, in spite of our provisional distinction, no sharp line can be drawn between much of what on the surface looks like immediate knowledge, and consciously derived or inferred knowledge. On its objective side, reasoning may be roughly defined as a conscious transition of mind from certain facts or relations of facts to other facts or relations of facts recognized as similar. According to this definition, a fallacy would be a hasty, unwarranted transition to new cases not identical with the old. And a good part of immediate knowledge is fundamentally the same, only that here through the exceptional force of association and habit the transition is too rapid to be consciously recognized. Consequently, illusion becomes identified at bottom with fallacious inference; it may be briefly described as collapsed inference. . . . I simply wish to show that, by a kind of fiction, illusion [of the senses] may be described as the result of a series of steps which, if separately unfolded to consciousness (as they no longer are), would correspond to those of a process of inference."[2]

§ 1919. [1] 1841, Gaston, J., in Clary *v.* Clary, 2 Ired. 83 ("But judgment founded on actual observation . . . is more than mere opinion. It approaches to knowledge, and is knowledge, so far as the imperfection of human nature will permit knowledge of these things to be acquired"); 1840, Wilcox, J., in Batchelder *v.* Taylor, 10 N. H. 131; 1839, Parker, C. J., in Hale *v.* Glidden, 11 N. H. 401; 1840, Verplanck, Sen., in Mayor *v.* Pentz, 24 Wend. N. Y. 676; 1884, Harlan, J., in Connecticut Life Ins. Co. *v.* Lathrop, 111 U. S. 612, 4 Sup. 533.

[2] From the point of view applicable to argument before the jury (not the rules of Admissibility), see the passages collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), especially §§ 235, 236.

If then our notion of the supposed firm distinction between "opinion" and "fact," is that the one is certain and sure, the other not, surely a just view of their psychological relations serves to demonstrate that in strict truth nothing is certain. Or if we prefer the suggestion of Sir G. C. Lewis that the test is whether "doubt can reasonably exist," then certainly it must be perceived that the multiple doubts which ought to exist would exclude vast masses of indubitably admissible testimony. Or if we prefer the idea that "opinion" is inference and fact is "original perception," then it may be understood that no such distinction can scientifically be made, since the processes of knowledge and the sources of illusion are the same for both. It is impossible, then (supposing it were desirable), to confine witnesses to some fancied realm of "knowledge" or "fact" and to forbid them to enter the domain of "opinions" or inferences. There are no such contrasted groups of certain and uncertain testimony, and there never can be.

(*b*) Furthermore, an examination of the so-called Opinion rule, as applied in its various instances, shows that the opinion-element is in the very law itself, a merely superficial and casual mark, and not the essential feature. On the one hand, *that which is excluded is not always "opinion"* (in the sense of "inference from observed data" or in any other sense), but may be "fact." For example, where the question is whether the hair of the accused is black or yellow, or whether a house which the jury has viewed is three or six stories high, no witness will be listened to, and yet the testimony excluded deals with "facts," not "opinions," whatever may be the sense taken for those terms. On the other hand, *that which is admitted is not always "fact,"* but often "opinion." For example, all hypothetical estimates of skilled witnesses are to be so described. Furthermore, for lay witnesses, all matters of measure, identity, quality, and the like must be considered as no better than "opinions"; and after all, the question whether Doe struck Roe first, or *vice versa*, may become a mere matter of "opinion." In short, the element of inference from observed data is one which plays a great or less part in every witness' testimony, and yet the rule does not exclude it as such.

It may as well be recognized, then, that there is no virtue in any distinction resting on a contrast between "opinion" and "fact"; and that, while the traditional term "Opinion rule" may be retained for convenience' sake, the essential principle is to-day independent of any such catch-word. This truth has already been plainly emphasized in various judicial utterances:

1888, CAMPBELL, J., in *Kelley* v. *Richardson*, 69 Mich. 436, 37 N. W. 514: "These cases are so common that few persons ever think that what are rightly called facts are at the same time no more nor less than conclusions. Thus, impressions of cold or heat, light and darkness, size, shape, distance, speed, and many personal qualities, physical and mental, are constantly acted on as facts, although not uniformly judged by all observers, for the simple reason that the facts cannot be otherwise communicated."

1875, FOSTER, C. J., in *Hardy* v. *Merrill*, 56 N. H. 241: "All evidence is opinion merely, unless you choose to call it fact and knowledge, as discovered by and manifested to the observation of the witness. . . . And it seems to me quite unnecessary and irrelevant

to crave an apology or excuse for the admission of such evidence, by referring it to any exceptions (whether classified, or isolated and arbitrary) to any supposed general rule, according to the language of some books and the custom of some judges. There is, in truth, no general rule requiring the rejection of opinions as evidence. A general rule can hardly be said to exist, which is lost to sight in an enveloping mass of arbitrary exceptions. . . . Suppose, the day before or a week before the death, a lawyer, farmer, and blacksmith saw the deceased, and had an opportunity to see whether he appeared to be well or sick: suppose the lawyer is asked, 'Did you observe any indications of his being well or sick?' and the answer to be, 'I observed no indication of his being sick; he appeared as well as usual, as well as I ever saw him'; suppose the farmer is asked, 'Did you notice anything unusual in his appearance or conduct?' and the answer is, 'No, I did not'; suppose the blacksmith is asked, 'In your opinion was he well or sick?' and the answer is, 'In my opinion he was perfectly well; his spirits, looks, and behavior, all showed, in my opinion, freedom from weakness and pain'; what legal distinction can be drawn between these questions and answers, to make one competent, and either of the others incompetent? It is all opinion, and nothing but opinion, of the man's physical condition in relation to health or disease. The use or the omission of the word 'opinion,' in either of those questions or answers, does not affect the character of the testimony in the slightest degree. Calling such testimony 'opinion' does not make it 'opinion'; and calling it something else does not make it something else." [3]

§ 1920. **Same: (2) "Usurping the Function of the Jury."** A phrase, often put forward as explaining why the testimony we are concerned with is excluded, declares that the witness, if he were allowed to express his "opinion," would be "usurping the functions of the jury." A milder form of statement is found in a few earlier passages:

1816, GIBBS, C. J., in *Durrell* v. *Bederley*, Holt N. P. 285: "It is the province of the jury, and not of the underwriters, to decide what facts ought to be communicated."

In the United States, the stronger and vituperative charge of "usurpation" came later to be made:

1840, NELSON, C. J., in *Lincoln* v. *R. Co.*, 23 Wend. 432: "Opinions, belief, deductions from facts, and such like, are matters which belong to the jury and by which they arrive at their verdict. When the examination extends to these, and the judgment, belief, and inferences of a witness are inquired into as matters proper for the consideration of a jury, their province is in a measure usurped; the judgment of witnesses is substituted for that of the jury." [1]

This phrase is made to imply a moral impropriety or a tactical unfairness in the witness' expression of opinion.

In this aspect the phrase is so misleading, as well as so unsound, that it should be entirely repudiated.[2] It is a mere bit of empty rhetoric. There is no

[3] *Accord:* Atwood *v.* Atwood, 84 Conn. 169, 79 Atl. 59 (opinion by Wheeler, J.).

§ 1920. [1] 1841, Phillips *v.* Kingfield, 19 Me. 379 ("the witness is not to substitute his opinion for that of the jury").

These seem to be the earliest instances. Other illustrations now abound.

[2] We are of course not here concerned with those rulings, proper enough, which in dealing with the weight of evidence already admitted, forbid the jury to take expert testimony as decisive; that is an entirely different subject; thus, in Head *v.* Hargrave, 105 U. S. 45 (1881), Field, J., says: "To direct them to find the value of the services from the testimony of the experts alone was to say to them that the issue should be determined by the opinions of the attorneys and not by the exercise of their own judgment of the facts on which those opinions were given."

such reason for the rule, because the witness, in expressing his opinion, is not attempting to "usurp" the jury's function, nor could if he desired. He is not attempting it, because his error (if it were one) consists merely in trying to get before the jury a piece of testimony which ought not to go there; and he could not usurp it if he would, because the jury may still reject his opinion and accept some other view, and no legal power, not even the judge's order, can compel them to accept the witness' opinion against their own.[3] That there is no hidden danger of "usurpation" lurking here, and no need of invoking sentiment to repel it, will be clearly seen if we remember that the improper evidence is equally inadmissible before a judge sitting without a jury. Whatever the organization of the tribunal, it is not to waste its time in listening to superfluous and cumbersome testimony.

§ 1921. **Same: (3) Opinions on the Very Issue before the Jury.** Another erroneous test, prevalent in some regions, and nearly allied to the preceding one, if not merely another form of it, is that an opinion can never be received when it touches "the very issue before the jury":

1883, ELLIOTT, J., in *Yost* v. *Conroy*, 92 Ind. 471: "It is a general rule that a witness cannot be allowed to express an opinion upon the exact question which the jury are required to decide." [1]

The fallacy of this doctrine is, of course, that it is both too narrow and too broad, measured by the principle. It is too broad, because, even when the very point in issue is to be spoken to, the jury should have help if it is needed. It is too narrow, because opinion may be inadmissible even when it deals with something other than the point in issue. Furthermore, the rule if carried out strictly and invariably would exclude the most necessary testimony. When all is said, it remains simply one of those impossible and misconceived utterances which lack any justification in principle:

[3] 1864, Campbell, J., in Beaubien *v.* Cicotte, 12 Mich. 507: "Juries are not bound to accept opinions unless they consider them well founded and we do not find in practice that they are often misled by the opinions of eye-witnesses who approve themselves sensible and candid." So also: 1907, Dunn, J., in Chicago Union Traction Co. *v.* Roberts, 229 Ill. 481, 82 N. E. 401 (allowing a question whether a certain injury was the cause of the plaintiff's present condition): "It is not the province of the expert to act as judge or jury. He cannot be called upon to *decide* a question of fact. . . . It was a question for the jury to determine. But it was impossible for them to answer without hearing the opinions of physicians. These opinions did not invade the province of the jury. . . . In any event the testimony was merely the opinion of the witness given as such, upon a state of facts assumed to be true. It still remained for the jury to determine the facts; and the opinion was nevertheless an opinion only."

§ 1921. [1] Other examples: *Eng.* 1899, L. C. Halsbury, in North Cheshire & M. B. Co. *v.* Manchester B. Co., App. Cas. 83, 85; *U. S.* 1876, Brickell, C. J., in Smith *v.* State, 55 Ala. 11; 1873, Chicago & A. R. Co. *v.* R. Co., 67 Ill. 145 ("it amounts to nothing more nor less than permitting the witnesses to usurp the province of the jury"); 1874, Chicago R. I. & P. R. Co. *v.* Moffit, 75 Ill. 529; 1905, Sun Ins. Office *v.* Western W. M. Co., 72 Kan. 41, 82 Pac. 513 (whether there was a "fire"; the issue being as to the spontaneous combustion of wool).

Probably the notion took rise from the following imperfectly reported ruling: 1821, R. *v.* Wright, R. & R. 456 (a physician and asylum-keeper gave an opinion as to symptoms of insanity, etc., and ended: "My firm conviction is that it was an act of insanity"; on consulting, "several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide," namely, whether the act charged was an act of insanity). But here the point was whether the witness was dealing with a matter of law (*post*, § 1958).

1845, Messrs. *Carrington* and *Kirwan*, note in 1 C. & K. 313: "It seems to be a mistake to say that, in putting such a question to the witness as was put in the above case of *Fenwick* v. *Bell* [whether a collision could have been avoided by proper care] you submit to his decision a point which the jury alone can try. On the contrary, it is submitted that the object of putting the question is not at all to decide upon the fact itself, but to prove an entirely new fact, namely, the opinion of a person of competent skill as to what might or might not have been done by the parties under a given state of circumstances. The jury are of course to decide upon the value of this opinion, as well as upon the value of the evidence on which it is founded; and thus it is plain that in the end the whole matter is submitted to their consideration, and that the only effect of the opinion will be to assist them in judging of a question of which the witness may reasonably be supposed, on account of his professional knowledge, to have been more competent to judge than themselves."

1875, DANFORTH, J., in *Snow* v. *R. Co.*, 65 Me. 231: "The reason for its exclusion given by counsel, that it would instruct the jury as to the amount of the verdict to be rendered, would seem to be a very good reason for its admission. Instruction is what the jury want. They would not be bound by it any more than by other testimony, but it would be more or less valuable in enabling them to come to a correct conclusion." [2]

§ 1922. **Same: (4) Opinion inadmissible unless preceded or accompanied by Facts or Grounds.** It has already been seen, in reviewing the history of the doctrine (*ante*, § 1917), that in the beginning the disparagement of opinion rested on grounds totally different from those now received. It was objected to because as a mere guess, the belief of one having no good grounds, it lacked the testimonial qualification of Observation; hence, a *mere* opinion, as soon as it appeared to be such, must be rejected. In a few jurisdictions the modern doctrine has been confused with the earlier one, and it is laid down as a general rule that opinions must be *preceded by a recital of the facts on which they are based*, — usually with the exception that expert witnesses are exempted from this rule.[1]

Now in no aspect is this rule sound. In the first place, then, there is no principle and no orthodox practice which requires a witness having personal observation to state in advance his observed data before he states his infer-

[2] *Accord*, that the coincidence of the question with the very issue in the case is 'per se' no ground of exclusion: *Eng.* 1844, Fenwick *v.* Bell, 1 C. & P.. 312, Coltman, J.; 1874, Mansell *v.* Clements, L. R. 9 C. P. 139, *semble; U. S. Fed.* 1897, New York El. Eq. Co. *v.* Blair, 25 C. C. A. 216, 79 Fed. 896; 1898, Fireman's Ins. Co. *v.* Mohlmann Co., 33 C. C. A. 347, 91 Fed. 85; 1899, Western Coal & M. Co. *v.* Berberich, 36 C. C. A. 364, 94 Fed. 329; *Ga.* 1897, Ryder *v.* State, 100 Ga. 528, 28 S. E. 246; *Ill.* 1906, Goddard *v.* Enzler, 222 Ill. 462, 78 N. E. 805 (citing Chicago & A. R. Co. *v.* R. Co., *supra*, n. 1, and qualifying it by saying that "it is not always a good objection to such a question that it calls for an opinion upon a question to be decided by the jury," provided it is not "the ultimate question to be found by the jury"); *Kan.* 1911, State *v.* Lindsay, 85 Kan. 192, 116 Pac. 209, *semble*; *Mass.* 1891, Poole *v.* Dean, 152 Mass. 589, 591, 26 N. E. 406; *Minn.* 1897, Donnelly *v.* R. Co., 70 Minn. 278, 73 N. W. 157; *N. H.* 1895, Nebonne *v.* R. Co., 68 N. H. 296, 44 Atl. 521; *N. Y.* 1890, Van Wycklen *v.* Brooklyn, 118 N. Y. 429, 24 N. E. 179; 1899, Littlejohn *v.* Shaw, 159 N. Y. 188, 53 N. E. 810; *Tex.* 1891, Scalf *v.* Collin Co., 80 Tex. 517, 16 S. W. 314.

§ **1922.** [1] 1856, Bryan *v.* Walton, 20 Ga. 480; Goodwyn *v.* Goodwyn, 20 Ga. 600; 1860, Choice *v.* State, 31 Ga. 466; 1904, Morrow *v.* National Mas. Acc. Ass'n, 125 Ia. 633, 101 N. W. 468 (experts excepted); 1895, Crockett *v.* Davis, 81 Md. 134, 31 Atl. 710; 1885, Owen, J., in Railroad Co. *v.* Schultz, 43 Oh. St. 270, 282, 1 N. E. 324; 1840, Seibles *v.* Blackhead, 1 McMull. S. C. 56; and many of the cases cited *post*, § 1938.

In Jones *v.* Fuller, 19 S. C. 70 (1882), the form is slightly different; the witness must state the facts supporting his opinion, if they are capable of being stated.

ences from them; all that needs to appear in advance is that he had an opportunity to observe and did observe, whereupon it is proper for him to state his conclusions, leaving the detailed grounds to be drawn out on cross-examination (*ante*, § 655). Any other rule cumbers seriously the examination, and amounts in effect to changing substantially the whole examination into a 'voir dire,' — an innovation on established methods which is unwarranted by policy. Secondly, if the rule were good, it would be as necessary for the expert witness as for the lay witness. Thirdly, no justification for it seems ever to have been attempted; it is simply an instance of traditions misunderstood. Its lack of principle has been more than once judicially exposed:

1878, HINES, J., in *Brown* v. *Com.*, 14 Bush 407: "Exactly what is meant by the expression in some cases, when such evidence has been admitted, that 'the witnesses must detail the facts upon which the opinion is based,' we do not find explained. If the admissibility of the opinion as evidence must depend upon the facts from which it is formed, it is manifest that there is a question for the Court antecedent to its introduction, and that to promulgate a general rule as to the amount and quality of the evidence that should satisfy the Court in every case would be impossible. . . . It is not intended that the admissibility of the evidence shall be made to depend upon the ability of the witness to state specific facts from which the jury may, independent of the opinion of the witness, draw a conclusion of sanity or insanity; for it is the competency of the opinion of the witness that is the subject of inquiry. The ability of the witness to detail certain facts of the mind may add very greatly to the weight of the opinion given in evidence; but they will not of necessity affect the question of competency."

1881, CHALMERS, C. J., in *Wood* v. *State*, 58 Miss. 743: "The qualification that the opinion of the non-expert must be accompanied by a statement of the facts on which it is based is not very important; since, whether the witness be an expert or a non-expert, the grounds of his belief and his opportunities of observation may always be elicited; and, whether the witness be of the one class or the other, his testimony should be rejected by the Court where it consists of a mere naked declaration of opinion with neither learning, observation, nor acquaintance to support it." [2]

§ 1923. **Practical Test for receiving Opinions**: (1) **Skilled Witnesses.** It has already been seen (*ante*, § 1918) that the instances in which inferences are excluded are divisible into three groups, the first two being the commonest and affording the only source of difficulty. What specific tests, by way of reducing the general principle to specific rules, have been afforded by the Courts?

The first group includes witnesses who are sought for their *special skill* in drawing inferences or making interpretations upon data either observed by themselves or furnished by others. For this class, the unsound rule has sometimes been laid down that the witness must be one who employs his skill professionally or commercially:

1884, EARL, J., in *Ferguson* v. *Hubbell*, 97 N. Y. 513: "It is not sufficient to warrant the introduction of expert evidence that the witness may know more of the subject of inquiry and may better comprehend and appreciate it than the jury; but to warrant its

[2] Compare also: 1828, Pollard *v.* Wybourn, 1 Hagg. 727, Dr. Lushington; 1881, Colee *v.* State, 75 Ind. 511, 513.

introduction the subject of the inquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have." [1]

But the only true criterion is: On *this subject* can a jury from *this person* receive appreciable help? In other words, the test is a relative one, depending on the particular subject and the particular witness with reference to that subject, and is not fixed or limited to any class of persons acting professionally:[2]

1867, PIGOT, C. B., in *M'Fadden* v. *Murdock*, 1 Ir. Rep. C. L. 211, 218: "The subjects to which this kind of evidence is applicable are not confined to classed and specified professions. It is applicable wherever peculiar skill and judgment, applied to a particular subject, are required to explain results or to trace them to their causes."

1875, LOOMIS, J., in *Taylor* v. *Monroe*, 43 Conn. 44: "The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter, but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the Court or jury in determining the questions at issue."

1919, YOUNG, J., in *State* v. *Killeen*, 79 N. H. 201, 107 Atl. 601: "No test to determine the qualifications a witness must possess in order to be permitted to testify as an expert, which will reconcile anything like all the cases in which that question has been considered, can be found either in the nature of things or in the decided cases. But an examination of the cases decided since 1860 will show a gradual turning on the part of the Court toward the view that the test is to inquire whether the witness' knowledge of the matter in relation to which his opinion is asked is such, or so great, that it will probably aid the trier in his search for the truth."

No more specific test can be supplied, defining the kind of subject which certainly or usually will need no aid at all from any witness. A few of the most careful attempts are the following:

1851, SHAW, C. J., in *New England Glass Co.* v. *Lovell*, 7 Cush. 321: "[The] experience [must not be] of such a nature that it may be presumed to be within the common experience of all men of common education moving in the ordinary walks of life."

1872, BECK, C. J., in *Hamilton* v. *R. Co.*, 36 Ia. 37: "When the consequences of actions or of combinations of circumstances may only be known by those familiar with the subject, and cannot be understood by those not possessing skill or peculiar knowledge thereof, opinions of experts are competent evidence."

1872, FOSTER, J., in *Ellingwood* v. *Bragg*, 52 N. H. 489: "The subject must be one peculiar and exceptional, concerning which some explanation, such as peculiar knowledge alone can afford, is required in order to render it intelligible to the comprehension and understanding of ordinary men."

§ 1923. [1] *Accord:* 1872, Beck, C. J., in Hamilton *v.* R. Co., 36 Ia. 36.

[2] *Accord: Eng.* 1873, Rowley *v.* R. Co., L. R. 8 Ex. 221 (an insurance accountant; the counsel's argument in objection that "knowledge of a subject, however ample, unless it is professional, does not entitle a witness to speak to matters of opinion," was apparently repudiated); *U. S.* 1855, Woodward, J., in Hyde *v.* Woolfolk, 1 Ia. 166; 1858, Ames, C. J., in Buffum *v.* Harris, 5 R. I. 251; 1846, Royce, J., in Clifford *v.* Richardson, 18 Vt. 627; 1872, Wheeler, J., in Masons *v.* Fuller, 45 Vt. 32.

§ 1924. **Same: (2) Lay Witnesses.** The second group of persons to whom the Opinion rule has to be applied (*ante*, § 1918) includes those who concededly have *no greater skill* than the jury in drawing inferences from the kind of data in question. Such a witness' inferences are inadmissible when the jury can be put into a position of equal vantage for drawing them, — in other words, when *by the mere words and gestures of the witness the data he has observed can be so reproduced that the jurors have those data as fully and exactly as the witness had them at the time he formed his opinion.* This test has been variously phrased in judicial language:

1823, GIBSON, J., in *Cornell* v. *Green*, 10 S. & R. 16: "I take it that whenever the facts from which a witness received an impression are too evanescent in their nature to be recollected, or are too complicated to be separated and distinctly narrated, his impressions from these facts become evidence."

1853, JOHNSON, J., in *Clark* v. *Baird*, 9 N. Y. 185: "Evidence of opinion is also recognized as proper, on the same ground of necessity, in cases where language is not adapted to convey those circumstances on which the judgment must be formed."

1858, CAMPBELL, J., in *Evans* v. *People*, 12 Mich. 35: "Many cases exist in which it is impossible by any description, however graphic, to explain things so as to enable any one but the witness himself to see or comprehend them as they would have been seen or comprehended could the jury have occupied his position of observation."

1875, ENDICOTT, J., in *Com.* v. *Sturtivant*, 117 Mass. 122: "[The condition is that] the subject matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time."

1873, PECK, J., in *Bates* v. *Sharon*, 45 Vt. 481: "[Opinion is admitted] where the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witness who has had the benefit of personal observation."

It is in the application of this test that the Opinion rule really breaks down, as an aid in the investigation of truth. In the vast majority of rulings of exclusion, the data observed by the witness could not, in any liberal and accurate view, be really reproduced to the jury by the witness' words and gestures. The error of the judges consists in giving too much credit to the possibility of such reproduction. What is chiefly wrong is by no means the test itself, but the illiberal and quibbling application of it.

In one State, at least, the test has been so broadly phrased as to eliminate much risk of technical use:

1920, YOUNG, J., in *Paquette* v. *Connecticut V. L. Co.*, 79 N. H. 288, 109 Atl. 836: "The test usually applied in this State to determine the admissibility of opinion evidence is not to inquire whether the issue to which it relates is for the jury; nor whether it is a matter of daily occurrence and open to common observation; but, whether the witness' knowledge of the matter in question will probably aid the triers in their search for the truth."

§ 1925. **Distinction between the Opinion Rule and the Rule of Experiential Qualifications.** In practice, therefore, when an inference is offered, two principles have to be applied. We first ask (from the point of view of Testimonial Qualifications), Is it a matter as to which the witness as such needs

a special experience above the ordinary, and if so, has he this? When this question has been settled in favor of the witness, we ask (from the point of view of the Opinion rule), Does the jury need any inference from the witness, either because of his skill or because his observed data cannot be adequately reproduced by him? The practical distinctions in the working of the two rules have already been examined in detail (*ante*, § 557) and need not be here repeated.

§ 1926. **Flexibility of the Test.** That the test of the Opinion rule is a flexible, a living one; that there is no fixed form of words, no mere shibboleth — such as the word "opinion" conveys — this is the important aspect of the principle never to be lost sight of. The question must be asked on each occasion, Can the jury be fully equipped, by the mere recital of the data, to draw inferences? — in other words, Can *all* the data be *exactly* reproduced by mere testimonial words and gestures? [1]

1885, OWEN, J., in *Railroad Co.* v. *Schulz*, 43 Oh. St. 270, 283, 1 N. E. 324: "It must not be supposed that there is any rule of evidence concerning the opinions of witnesses which is peculiar to fences, highways, bridges, or steamboats, or to any other special subjects of investigation. Where the facts concerning their condition cannot be made palpable to the jurors so that their means of forming opinions are practically equal to those of the witnesses, opinions of such witnesses may be received, accompanied by such facts supporting them as they may be able to place intelligently before the jury."

1890, MITCHELL, J., in *Graham* v. *Pennsylvania Co.*, 139 Pa. 161, 21 Atl. 131: "There is extreme difficulty in laying down any rule precise enough for practical application, and the only proper course is to keep the principle steadily in view, and apply it according to the circumstances of each case."

§ 1927. **Discriminations as to (1) Hypothetical Questions, and (2) Impressions.** (1) When an expert witness, testifying from personal observation, gives his opinion as testimony, it is usually necessary to predicate in express terms, *hypothetically*, the data upon which the opinion is based. The reason is that otherwise the jury would be unable to tell whether his opinion was meant by him to be applied to the facts ultimately found by the jury. This reason, however, is not a deduction from the Opinion rule, but rests on the principle of Testimonial Qualifications that a witness' grounds of knowledge must be made to appear. It has therefore been dealt with under that head (*ante*, §§ 672–684).

(2) A lay-witness speaking of facts from personal observation, and not offering any opinion, may nevertheless qualify the force of his belief or knowledge by describing it as merely an "*impression.*" This may mean that his original observation was not accurate enough to give certainty in his mind, or that his recollection of his original observation has since become dimmed. The propriety of such testimony may thus involve the principles applicable to the Testimonial Qualifications of Observation and

§ 1926. [1] 1917, Shackleford, J., in Kersey v. State, 73 Fla. 832, 74 So. 983 (the above text cited with approval).

of Recollection; from that point of view it has already been considered elsewhere (*ante*, §§ 658, 726, 727).

§ 1928. **Form of the Opinion Rule as Negative or Affirmative.** Shall we say that a witness *may* state his inferences *unless* it appears that the jury *can* be equally equipped? Or shall we say that a witness *may not* state his inferences *unless* it appears that the jury *cannot* be equally equipped?

If we are dealing with the first sort of witness — the witness alleged to be specially skilled — it seems clear that his possession of special skill — *i. e.* skill beyond that of the jury — should first be made to appear; that is, the second form of the test, as above, is the proper one. But if we are dealing with the other sort of witness — the one not claiming greater skill but simply drawing inferences from his own observation which any one in his place could draw — the answer may be different. The answer here virtually depends on our attitude — whether of favor or disfavor — toward the principle involved. If we believe that the drawing of inferences by an observer of the data is a hateful, dangerous, and reprehensible thing, — if we prefer to put obstacles of technical and not real force in the way of the most common sort of testimony, — if we believe that this modern and minor rule about Opinion is a fundamental canon in the investigation of truth, if we are opposed to Baron Parke's wish to employ "a compendious mode of ascertaining the result of the actual observation of the witness," [1] — then, of course, we shall look upon every witness as a possible "usurper" of the jury's function; we shall watch each phase of his testimony anxiously, and stop his mouth as soon as he approaches the insidious heresy of an "opinion" or inference. On the other hand, if we believe that the rule in question, as applied to the unskilled witness who has personally observed the data, is a mere minor rule of convenience not in any way concerned with the value of the testimony, if we hold that it is inconsistent to aim in theory at convenience and simplicity by a rule which in thorough application causes ten times the inconvenience and complication which in theory it was to avoid, if we prefer to make the rules of Evidence our tools rather than to become ourselves their helpless slaves, — then we shall conclude to adopt the first form of the test as above; that is, we shall allow the witness to state freely all the results which he is qualified to reach, and only now and then, when he comes to matters as to which it is instantly clear that the jurors are or can be as fully equipped with the data, we shall exclude his inferences.[2]

The attitude of the Courts, however, has been usually the former, and not the latter. Against this usual attitude the following notable protest is judicially recorded:

1870, DOE, J., in *State* v. *Pike*, 49 N. H. 423: "Opinions, like other testimony, are competent in the class of cases in which they are the best evidence, as when a mere description without opinion would generally convey a very imperfect idea of the force,

§ 1928. [1] 5 Cl. & F. 670.
[2] Approved by Keith, P., in Hot Springs L. & M. Co. v. Revercomb, 110 Va. 240, 65 S. E. 557 (1909).

meaning, and inherent evidence of the things described. Like other testimony, opinions are incompetent in the class of cases in which they are not the best evidence, as when they are founded on hearsay or on evidence from which the jury can form an opinion as well as the witness. A rule that opinions are or are not evidence must necessarily be in conflict with the rule which admits the best evidence. A constant observer of the trial of cases, examining the testimony for the purpose of ascertaining how many opinions are received and how many rejected, will find ten of the former as often as he finds one of the latter; and if he is very critical, he will find the ratio much greater than that. Opinions are constantly given. A case can hardly be tried without them. Their number is so vast and their use so habitual that they are not noticed as opinions distinguished from other evidence. . . . The cases of identity of persons and things and of handwriting having been named in the English books as illustrations of the competency of opinions, those cases were supposed to be peculiar exceptions to the general rule, whereas they are mere instances of the application of the general rule which admits the best evidence. This general, natural, fundamental, comprehensive, and chief rule of evidence was gradually ignored, and special and artificial rules were substituted; or, if there was not an absolute substitution, there was such a removal of emphasis from the general rule to the special rule that the former lost the overshadowing influence and control which belong to it. Entire systems of law, theology, medicine, and philosophy are easily changed by a transfer of emphasis from one point to another. To say the least, the emphasis which belongs to the general rule admitting the best evidence was gradually taken from it and placed upon the fact that there are some opinions which, not being the best evidence, are not evidence; and this fact was gradually transformed into a so-called general rule that opinions are not evidence, and this artificial rule was treated as a rule of law. The objection to this supposed rule against opinions is that it has usurped the place of the supreme rule admitting the best evidence; that it is a mere statement of the supposed fact that opinions are not admitted under the rule of the best evidence; and that, as a statement of that kind, it is not true. . . . When the fact that some opinions are not the best evidence had been magnified and turned into the so-called general rule of law that opinions are not evidence, and the rule admitting the best evidence was supplanted by it, it was thought necessary to find a special precedent for every opinion before it could be admitted. The judgments of Westminster Hall were searched to find a decision that an opinion as to the value of property was competent, and to find another decision that an opinion as to sanity was competent. No such decisions could be found. None had ever been made; because such opinions had always been received as unquestionably competent. The reason of the failure to find the decisions was not understood here. The failure was taken as conclusive proof that in England the opinions were not admitted. When an American mistake of this magnitude is discovered, it is fit to be corrected at once. To return to the true principle is not to change the law, but to cease violating the law; or, putting it in a milder form, to allow that which is the law 'de facto' to yield to that which is the law 'de jure.''

§ 1929. **Future of the Opinion Rule.** If one were asked to name the rules most peculiar to the Anglo-American evidence-law, he ought perhaps to name the Character rule, the Hearsay rule, and the Opinion rule. Neither rule is found on the Continent. All three are indigenous judicial developments. All are the product of the jury-system. All are founded on a peculiar cautiousness in our law, and all have been developed with an equally peculiar rigidity and stolid disregard of practical consequences. All three are complex and far-reaching in application, as well as voluminous in detailed development. But a radically different future may be predicted for them. The Hearsay rule and the Character rule will always remain in our law, in

a more or less relaxed form; while the Opinion rule will in substance disappear. An important difference between them is that the first two are the solid growth of experience; while the last rule, in its American development, is merely the logically technical development of a misunderstood term.

The Opinion rule day by day exhibits its unpractical subtlety and its useless refinement of logic. Under this rule we accomplish little by enforcing it and we should do no harm if we dispensed with it. We accomplish little, because, from the side on which the witness appears and from the form of the question, his answer, *i. e.* his opinion, may often be inferred We should do no harm, because, even when the final opinion or inference is admitted, the inference amounts in force usually to nothing unless it appears to be solidly based on satisfactory data, the existence and quality of which we can always bring out, if desirable, on cross-examination. Add to this that, under the present illiberal application of the rule, and the practice as to new trials, a single erroneous ruling upon the single trifling answer of one witness out of a dozen or more in a trial occupying a day may overturn the whole result and cause a double expense of time, money, and effort; and we perceive the absurdly unjust effects of the rule. And, finally, the utter impossibility of a consistent application of the rule, and the consequent uncertainty of the law, and we understand how much more it makes for injustice rather than justice. It has done more than any one rule of procedure to reduce our litigation towards a state of legalized gambling.[1]

The remedy (whenever one shall be undertaken) ought to be radical. The only purpose for which we need any weapon of the sort is the potential need of saving the time that in some cases might be otherwise taken by marshalling an interminable multitude of opinions, and of preventing the consequent confusion of issues and the possibility of forcing a verdict by mere preponderance of numbers and influential names.[2] But all this is mere possibility; it would not even be feasible in the ordinary case; and, whenever it was feasible, and if it should then be attempted, the ordinary judicial discretion to limit the number of witnesses (*ante*, § 1907), and the rule requiring personal knowledge (*ante*, §§ 664, 1364, 1917), would quite answer all practical purposes. For this reason there seems to be no objection against taking a radical step, — the entire abolition of the rule as such, leaving only in its place some specific discretion in the judge to meet the possibilities above mentioned.

For this purpose, some such statute as the following would seem to be adequate: "An inference or opinion may always be stated to the tribunal by a witness experientially qualified to form it, provided either that he has had adequate personal observation of the matter in question, or if not, and if an expert, that he states on cross-examination the data from which the

§ 1929. [1] Approved in Pope *v.* State, 174 Ala. 63, 57 So. 245.

[2] An example of this possibility for evil appears in the French trials of Captain Dreyfus and M. Zola, where the opinions of eminent generals were invoked to overwhelm the tribunal.

inference is drawn. It is immaterial whether or not the data are capable of being so stated by him or by others that the tribunal is equally capable of drawing the inference, and whether or not the data are stated by him before stating his inference, and whether or not the inference involves the very subject of the issue, or one of the issues, before the tribunal; provided that the trial judge may in any case in his discretion exclude testimony involving an inference from data observed, or any other superfluous testimony, whenever in his judgment such testimony is undesirable because merely cumulative or of undue personal weight."

Or the following text would equally answer the purpose:

"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.

"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; but

" (3) Except that in the latter case the judge may permit the inference to be stated if the witness is specially qualified by experience to draw inferences on the subject; the opponent in that case being entitled to ask on cross-examination for a statement of the data from which the inference was drawn."

TOPIC II: OPINION RULE, APPLIED TO SUNDRY TOPICS

CHAPTER LXVI.

1. Sanity

§ 1933. **History of the Rule as to Laymen's Opinions.** At common law in England there never had been any question that the opinions of lay-witnesses as to sanity or insanity could be received. Wherever a person presented himself as having had acquaintance with and therefore observation of a testator or an accused person whose sanity was in question, *i. e.* wherever the witness had the fundamental testimonial qualification of personal observation (*ante*, §§ 657, 689) no one thought of objecting on the score of the Opinion rule. This plainly appears in the long list of trials in which such testimony was received.[1] Moreover, when the Opinion rule began to be discussed and formulated, in the last part of the 1700s and the early part of the 1800s, the judges and the treatise-writers constantly named this subject as one upon which lay opinions were always and unquestionably received.[2]

In the United States, however, when the phrase "*mere* opinion" (*i. e.* opinion not resting on observed data) "is not evidence," came to be distorted into the phrase "*opinion* is not evidence" (*ante*, § 1917), one of the first subjects to come up for consideration was that of sanity. The ruling which lent most aid to the doubters (and probably the earliest excluding ruling) was that of Poole *v.* Richardson, in 1807.[3] This, however, was entirely misunderstood by those who relied on its authority.[4] As in so many of the early rulings, the notion at the base of it was not the modern notion of opinion as "inference," but the old one of opinion as "belief having no observed data to support it "(*ante*, § 1917). However, it served, whether rightly or wrongly understood, to raise the doubt. Speedily the controversy spread; and sooner or later every Court had to face the objection based on the Opinion rule. Generally, the view favoring admission prevailed; the great law-making and argument-furnishing precedent for the earlier

§ 1933. [1] The following list could doubtless be added to: 1724, Arnold's Trial, 16 How. St. Tr. 706–766, *passim;* 1741, Goodere's Trial, 17 How. St. Tr. 1057, *passim;* 1746, Evans *v.* Blood, 3 Bro. P. C. 632, 636; 1746, Bradshaw's Trial, 18 How. St. Tr. 418; 1760, Earl Ferrers' Trial, 19 How. St. Tr. 923–953, *passim;* 1762, Lowe *v.* Jolliffe, 1 W. Bl. 364 (Lord Mansfield); 1790, Frith's Trial, 22 How. St. Tr. 313–317, *passim;* 1792, Attorney-General *v.* Parnther, 3 Bro. Ch. C. 444 (Lord Thurlow); 1800, Hadfield's Trial, 27 How. St. Tr. 1330; 1802, Wall's Trial, 28 How. St. Tr. 113; 1803, Wood *v.* Hammerton, 9 Ves. Jr. 145; 1812, Bellingham's Case, Annual Register 305; 1812, Bowler's Case, Ann. Reg. 309; 1822, Marquis of Londonderry's Case, Ann. Reg. 435; 1828, Ley's Case, 1 Lew. Cr. C. 239; 1831, Offord's Case, Annual Register 109; 1837, R. *v.* Goode, 7 A. & E. 535, 538; 1837, Wright *v.* Tatham, 7 A. & E. 314, 359, 365, 373, 384, 396, 401; on appeal in 5 Cl. & F. 698, 713, 719, 720, 724, 728, 735, 738, 746, 754, 759 (in this case, the hesitation of Mr. J. Coleridge, at p. 690, upon the present point is apparently the first and only instance in England where any questioning of such evidence occurred; see the quotation *ante*, § 1917); 1840, R. *v.* Oxford, 1 Towns. St. Tr. 125–134, 4 St. Tr. N. S. 497, 528, 9 C. & P. 538, 547 (Denman, L. C. J.); "There may be cases where medical testimony may be essential; but I cannot agree with the notion that moral insanity can better be judged of by medical men than by others"); 1843, R. *v.* M'Naughton, 4 St. Tr. N. S. 847, 909 ff., 1 Towns. St. Tr. 354; 1843, Bowman *v.* Bowman, 2 M. & Rob. 501; 1843, R. *v.* Higginson, 1 C. & K. 130; 1895, Aitken *v.* McMeckan, App. Cas. 310.

[2] Some examples will be found *ante*, § 1917.

[3] 3 Mass. 330. There was an earlier one in the same year, Chase *v.* Lincoln, 3 Mass. 237; but it is little cited.

[4] As noted *post*, § 1938, under Massachusetts.

rulings being the opinion of Mr. J. Gaston, in Clary *v.* Clary, in North Carolina, in 1841,[5] and for the more recent rulings, the opinions of Mr. J. Doe, dissenting, in Boardman *v.* Woodman, in New Hampshire, in 1866,[6] and of Mr. J. Foster, in Hardy *v.* Merrill, in the same court, in 1875.[7] The opinion of Mr. J. Doe succeeded in bringing about a change of heart in his own Court, and is the arsenal of arguments to whose supplies it is chiefly due that the Courts of the country are to-day so nearly unanimous in accepting the common-sense view of the subject.[8] A judicial revolution also occurred in the decisions of the New York Court; and later years saw an effort in the Court of Massachusetts, the original home of the error, to retreat so far as might be from their early position. The scars of the controversy, however, in spite of the general victory for correct reasoning and good sense, are seen in some technical and fantastic distinctions which still disfigure the rule as now applied in some jurisdictions, notably in New York, — distinctions which serve only to confuse, and would never have been imagined but for the supposed necessity of conceding something to the demands of the Opinion rule.

It should be added that the controversy has throughout centered almost entirely on the Opinion rule; and the exclusion has never entirely, and only once or twice partially, proceeded on the doctrine of Experiential Qualifications (*ante*, § 568), *i. e.* that lay observers were not fitted to judge of sanity or insanity. That question has almost unanimously by the excluding judges been either ignored or answered affirmatively.[9]

§ 1934. **Principle and Policy of the Rule.** The *argument for exclusion* was usually based upon precedent and the shibboleth of "opinion evidence," rather than upon principle or deliberate reasoning; the following passage represents perhaps the clearest argument:

1853, MASON, J., in *DeWitt* v. *Barley*, 9 N. Y. 387: "There is no such insuperable difficulty in describing the mental manifestations which are relied upon in any case to prove insanity as there is in the cases of personal identity and handwriting. Those manifestations which usually attend a sound mind are made familiar to all by the intercourse of all classes of men, and the evidences or mental manifestations which characterize insanity, so far as they fall under the observation of men generally, are of that character which witnesses can describe or relate. They generally consist in acts or words and frequently in both combined; and there is no more difficulty in describing and relating them to a jury than there is in many other cases where the witness is required to state the facts and circumstances and is not permitted to give his opinion upon the conclusion to which they lead."

The *argument for admission* is of two sorts; the first is directed to show that the principle of the Opinion rule does not exclude the kind of testimony

[5] 2 Iredell 80.
[6] 47 N. H. 144.
[7] 59 N. H. 250.
[8] One may be pardoned for noting here the singular coincidence that on the morning of the very day when the above words of justice and respect to this great jurist were being penned, a thousand miles away, he had died suddenly, under a stroke of paralysis.
[9] The authorities on that point have been collected *ante*, § 568; but wherever that reason has affected a Court excluding lay witnesses' opinions, it will here be noted.

in question; the second points out the practical inconvenience involved in excluding it, and also urges that in any case the rule accomplishes nothing. (1) The argument from principle is thus stated:

1841, GASTON, J., in *Clary* v. *Clary*, 2 Ired. 80: "In the first place, it seems to us that the restriction of the evidence to a simple narration of facts, having or supposed to have a bearing on the question of capacity, would if practicable shut out the ordinary means of truth; and, if freed from this objection, cannot in practice be effectually enforced. The sanity or insanity of an individual may be a matter notorious and without doubt in a neighborhood, and yet few, if any, of the neighbors may be able to lay before the jury distinct facts that would enable them to pronounce a decision thereon with reasonable assurance of its truth. If the witness may be permitted to state that he has known the individual for many years, has repeatedly conversed with him and heard others converse with him; that the witness has noticed that in these conversations he was incoherent and silly; that in his habits he was occasionally highly pleased and greatly vexed without a cause; and that in his conduct he was wild, irrational, extravagant, and crazy, — what would this be but to declare the judgment or opinion of the witness of what is incoherent or foolish in conversation, what reasonable cause of pleasure or resentment, and what the indicia of sound or disordered intellect? If he may not testify, but must give the supposed silly or incoherent language, state the degrees, and all the accompanying circumstances of highly excited emotion, and specifically set forth the freaks or acts regarded as irrational, and this without the least intimation of any opinion which he has formed of their character, where are such witnesses to be found? Can it be supposed that those not having a special interest in the subject shall have so charged their memories with those matters, as distinct independent facts, as to be able to present them in their entirety and simplicity to the jury? Or if such a witness be found, can he conceal from the jury the impression which has been made upon his own mind; and when this is collected, can it be doubted but that his judgment has been influenced by many, very many circumstances which he has not communicated, which he cannot communicate, and of which he himself is not aware?"

1849, CHILTON, J., in *Norris* v. *State*, 16 Ala. 779: "Does not even a casual observer of mental phenomena fully recognize the impossibility of communicating to another the facts and almost numberless minute circumstances indicating a morbid action of the brain and consequent mental aberration, the main force of which may consist in some peculiar characteristic which none but the observer can fully appreciate? The jury, unlike the witnesses, have no knowledge of the condition of the accused from personal observation. How then shall they be placed in possession of those mysterious and indescribable phases which insanity wears, which, though they make a correct and vivid impression upon the mind of the observer, yet lose much of their force by attempted description? Must the prisoner lose the benefit of such testimony altogether; or shall the witness be required to furnish as well as he may a pantomimic delineation of the wild look, the vacant stare, the unnatural gait, the distorted countenance, the idiotic laugh, as well as the numberless caprices and sudden and apparently causeless exhibitions of joy and sorrow? Were such the law, the force of the testimony would be made to depend upon the powers of the witness for imitation."

1866, DOE, J., in *Boardman* v. *Woodman*, 47 N. H. 144: "From the nature of the subject, it cannot generally be so described by witnesses as to enable others to form an accurate judgment in regard to it. . . . The opinion of an unprofessional witness is competent, not because he can give no description of the appearances which indicate sanity or insanity, but because ordinarily he cannot give an adequate description of them." [1]

§ 1934. [1] The following are also leading opinions: 1855, Hempstead, J., in Kelly's Heirs *v.* McGuire, 15 Ark. 601; 1864, Campbell, J., in Beaubien *v.* Cicotte, 12 Mich. 489;

(2) The argument from practical policy is thus stated:

1866, DOE, J., in *Boardman* v. *Woodman*, 47 N. H. 144: "To ask a witness on such a trial whether Miss B. appeared peculiarly or strangely, was substantially to ask whether in the witness' opinion she was insane. The appellant's witnesses were allowed to testify that she appeared excited. It is some consolation to reflect that, where the refinements of the law attempt to enforce a rule not based upon reason or principle or the common experience of mankind, it is usually found impracticable in its application to the detail of a trial.[2] But this consolation is diminished by the fact that swift witnesses, however instructed, checked, and reprimanded, generally succeed in giving their opinions, while the cautious and impartial, whose opinions are much more valuable, are often limited to very meagre and unsatisfactory testimony."

1875, FOSTER, C. J., in *Hardy* v. *Merrill*, 56 N. H. 250: "Now let us imagine a scene that might very probably be exhibited in any court where the Massachusetts rule prevails. One witness says: 'He did not appear as usual; he did not appear natural.' 'Very well,' says a learned barrister, 'very well, Mr. Witness. You may say that, — that is quite regular, — that is your opinion. Now tell us in what respect he did not appear "as usual" or "natural."' 'Well, I can't describe it, but I should call it wandering, delirious; he was incoherent in his talk.' 'Very well, Mr. Witness, you acquit yourself like a sensible man. Now tell the jury whether in your opinion he was then of sound mind.' 'I object,' thunders the learned barrister on the other side. 'I object,' thunders the opposing junior. 'Counsel know better; it is an insult and an outrage to put such a question.' . . . The witness is confounded. The jury are confounded. Everybody is confounded, — except those who understand that 'incoherence of thought' and 'delirium,' vulgarly called 'wandering,' is not a state of mental unsoundness, is not mental disease; and that 'as usual' or 'natural' is not a condition of mental health. Whether it is such condition or not is a question then solemnly debated. . . . At the close of the scene which I have described, not a man of the laity goes out of the room without being disgusted with this exhibition of the law as a system of arbitrary rules, that ignoring all legal ideas decides upon a distinction purely verbal. And why should not the laymen be disgusted with the senseless subtlety which permits one party to show by his witness that a testator 'appeared perfectly natural,' and forbids the adverse party to offer the testimony of another witness that 'he did n't appear to be in his right mind'? . . . The selection of the phraseology in which such an opinion may be expressed, and that in which it cannot be uttered, depends on no legal principle, but on the mere whim of the Court. Such an arbitrary and senseless choice or rejection of terms in which to express an admissible opinion is mere, sheer logomachy, a waste of precious time given us for better purposes, a verbal quibble unworthy of the law and calculated to bring it into contempt."[3]

Before noting the state of the law in the different jurisdictions, three distinctions, occasionally made in the rulings, must be mentioned:

§ 1935. **Facts Observed need not Precede Statement of Opinion.** It has been already noticed (*ante*, §§ 1917, 1922) that the general rule, in a few

1870, Doe, J., in State *v.* Pike, 49 N. H. 414; 1852, Parker, P. J., in DeWitt *v.* Barley, 13 Barb. N. Y. 554; 1853, Denio, J., in De Witt *v.* Barley, 9 N. Y. 389.

[2] As was conceded by Colt, J., in 127 Mass. 423: "It is impossible to prevent witnesses from having opinions or to frame questions and restrain answers so as to leave no inference as to what such opinions are. Whatever facts a witness states, under any form of interrogatory, are stated because he has formed an opinion in advance that they support one side or the other and prove sanity or insanity. The difficulty is inherent."

[3] For an example of the kind of examination satirized by the learned judge, see Matter of Ross, 87 N. Y. 519 (1882); but a more glaring instance of the degradation of the general principle to a mere rule for legal guessing is found in Holcomb *v.* Holcomb, Paine *v.* Aldrich, N. Y., cited *post*, § 1938.

Courts, requires that a statement of the facts (or observed data) must precede the witness' statement of his opinion or conclusion; and that this on principle is an unsound limitation. Now the chief field for the application of this misconceived requirement has been the present topic; and in a number of jurisdictions the Courts are found requiring that "the facts," *i. e.* observed data, "must accompany (or precede) the opinion." This requirement in some of the remaining jurisdictions has been expressly negatived;[1] in the others it does not exist in practice, but has not been expressly passed upon.

§ 1936. **Attesting Witnesses to Wills; their Opinions always Received.** Whatever the result of the controversy as to lay-witnesses in general, all Courts have preserved the traditional practice of receiving the opinions of attesting witnesses to wills. The theory that the law had provided this preappointed testimony for the express purpose of securing witnesses to the testator's capacity as well as to his signature, as well as the unquestioned practice, prevailed over any theory that the judges might have as to the bearing of the Opinion rule.[1]

§ 1937. **Opinion as to Sanity, distinguished from Opinion as to Testamentary or Criminal Capacity.** Opinion as to *sanity* and opinion as to general testamentary or criminal *capacity* are entirely distinct. The latter sort of opinion is inadmissible (when it is) because a question of law may be involved, and witnesses' conclusions are not needed on such points. Rulings excluding such opinions (*post*, § 1958) may well coexist with rulings receiving opinions as to sanity.

§ 1938. **State of the Law in the Various Jurisdictions.** Of the state of the law in the various jurisdictions, it is enough to note in general that laymen's opinions are to-day everywhere conceded to be admissible, subject to local qualifications and quibbles.[1]

§ 1935. [1] 1909, State *v.* Rumble, 81 Kan. 16, 105 Pac. 1; 1881, Wood *v.* State, 58 Miss. 743; 1889, State *v.* Lewis, 20 Nev. 345, 22 Pac. 241; 1877, Garrison *v.* Blanton, 48 Tex. 303.

For the general doctrine that an *expert need not state beforehand the facts observed* by him, see *ante*, § 675.

§ 1936. [1] The fact is that the attesting-witness exception obtained even under the old sense of "opinion"; *i. e.* those whose names were subscribed were called and asked as to (1) the execution of the will, and (2) the testator's soundness of mind; and it was not necessary to show beforehand that they had intimately observed him or even known him at all; thus, their judgment might be "*mere* opinion," *i. e.* belief not founded on any observed data; yet it would be received by way of exception; the authorities are collected *ante*, § 689.

§ 1938. [1] Under each jurisdiction compare the cases cited *ante*, § 689, and *post*, §§ 1958, 1974:

Federal: Lay opinion is receivable: (1) Supreme Court: 1877, Insurance Co. *v.* Rodel, 95 U. S. 238; 1884, Connecticut Life Ins. Co. *v.* Lathrop, 111 U. S. 612, 4 Sup. 533; 1902, Raub *v.* Carpenter, 187 U. S. 159, 23 Sup. 72 (an opinion based on the person's general condition of health and "all you know about him yourself," excluded; "the opinion of the witness from facts he did not disclose was inadmissible"); 1903, Queenan *v.* Oklahoma, 190 U. S. 548, 23 Sup. 762 (cited *ante*, § 689); (2) Lower Courts: 1820, Harrison *v.* Rowan, 3 Wash. C. C. 582, 587; 1880, Kilgore *v.* Cross, 1 Fed. 582 (if accompanied by the facts); 1884, Parkhurst *v.* Hosford, 21 Fed. 833; 1896, Mutual Life Ins. Co. *v.* Leubrie, 18 C. C. A. 332, 71 Fed. 843; 1909, Turner *v.* American Security & T. Co., 213 U. S. 257, 29 Sup. 420; 1910, Waller *v.* U. S., 8th C. C. A., 179 Fed. 810.

Alabama: A few early rulings excluded lay opinions, except those of attesting witnesses: 1843, State *v.* Brinyea, 5 Ala. 243, *semble*; 1848, McCurry *v.* Hooper, 12 Ala. 827; 1848, Watson *v.* Anderson, 13 Ala. 202 (lay witnesses

were by agreement allowed to testify); 1850, McAllister *v.* State, 17 Ala. 437, *semble;* but the later and now established doctrine admits them, with the proviso that the facts (or observed data) must be stated in connection with the opinion: 1845, Bowling *v.* Bowling, 8 Ala. 541; 1848, Roberts *v.* Trawick, 13 Ala. 84; 1848, Rembert *v.* Brown, 14 Ala. 367 (which seems to be *contra*, but really only requires that the witness shall not express his conclusions without the grounds for them; the opinion does not refer to Bowling *v.* Bowling); 1849, Norris *v.* State, 16 Ala. 777; 1854, Florey's Ex'rs *v.* Florey, 24 Ala. 247; 1854, Powell *v.* State, 25 Ala. 27; 1859, Stubbs *v.* Houston, 33 Ala. 564; 1860, Re Carmichael, 36 Ala. 617; Fountain *v.* Brown, 38 Ala. 75; 1882, Ford *v.* State, 71 Ala. 397; 1895, Yarbrough *v.* State, 105 Ala. 43, 16 So. 758; 1900, Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481; 1901, Caddell *v.* State, 129 Ala. 57, 30 So. 76 ("opinions affirming sanity may be based on a mere negation of unnatural or peculiar conduct, without a specification of facts"); 1904, Parrish *v.* State, 139 Ala. 16, 36 So. 1012 (an opinion to insanity must be preceded by a statement of observed facts; but an opinion to sanity need only negative generally any data of insanity); 1904, Porter *v.* State, 140 Ala. 87, 37 So. 81; 1905, Braham *v.* State, 143 Ala. 28, 38 So. 919 (rule followed; but the addition of "State any other peculiarities about him" will make the question objectionable; this sort of quiddity may seem to our Courts to be worth enunciating; but they may be assured that from the standpoint of clear-minded and efficient justice it is a senseless mumbling; here its absurdity of quibbling is further shown by the allowance in the same case of a question to another witness, "Did you observe anything unusual, peculiar, or unnatural?"); 1915, James *v.* State, 193 Ala. 55, 69 So. 569; 1915, Woodward Iron Co. *v.* Spencer, 194 Ala. 285, 69 So. 902.

Arkansas: Lay opinions are received: 1855, Kelly's Heirs *v.* McGuire, 15 Ark. 600; 1860, Beller *v.* Jones, 22 Ark. 95; 1895, Shaeffer *v.* State, 61 Ark. 245, 32 S. W. 679 ("not admissible until it first be shown by his own testimony that he has information on which it can reasonably be based"); 1898, Green *v.* State, 64 Ark. 523, 43 S. W. 973 (after stating the grounds); 1905, Byrd *v.* State, 76 Ark. 286, 88 S. W. 956; 1919, Walker *v.* State, 138 Ark. 517, 212 S. W. 319 (mental condition of a dying declarant, allowed).

California: Lay opinions were for a long time treated as admissible without qualification: C. C. P. § 1870, par. 10 ("the opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given," are admissible); 1880, Estate of Brooks, 54 Cal. 474 (yet, in Estate of Toomes, 54 Cal. 513, the point was treated as unsettled); 1881, People *v.* Wreden, 59 Cal. 393; and the rulings collected *ante*, § 689; but later rulings ignored this, and appear to have veered over to the Massachusetts distinction (*infra*), admitting only an opinion as to the rationality of specific acts: 1895, Wax's Estate, 106 Cal. 343, 39 Pac. 624; 1898, People *v.* Arrighini, 122 Cal. 123, 54 Pac. 591 (whether they saw "anything strange or peculiar" in the accused's manner, allowed); 1901, Keithley's Estate, 124 Cal. 9, 66 Pac. 5 (whether a person appeared rational, allowed); the prior decisions are now harmonized by the rule that a person who is an "intimate acquaintance," under C. C. P. § 1870, *supra* (cited and construed *ante*, § 689), may testify to the condition of sanity or insanity in general, while a person who is not an "intimate acquaintance," but has still observed the party's conduct, may state whether his conduct or appearance as observed was rational or irrational: 1904, People *v.* Manoogian, 141 Cal. 592, 75 Pac. 177.

Columbia (District): 1895, Taylor *v.* U. S., 7 D. C. App. 27, 34 (admissible, following Ins. Co. *v.* Lathrop U. S.); 1899, Horton *v.* U. S., 15 D. C. App. 310, 324 (the grounds of the opinion must first be stated); 1901, Raub *v.* Carpenter, 17 D. C. App. 505, 512 (similar).

Connecticut: Lay opinions are received, when accompanied by the facts observed: 1822, Grant *v.* Thompson, 4 Conn. 208; 1858, Dunham's Appeal, 27 Conn. 198; 1896, Kimberley's Appeal, 68 Conn. 428, 36 Atl. 847 (following Shanley's Appeal); 1900, State *v.* Cross, 72 Conn. 722, 46 Atl. 148; 1905, Nichols *v.* Wentz, 78 Conn. 429, 62 Atl. 610.

Delaware: Lay opinions have always been admitted: 1838, Duffield *v.* Morris, 2 Harringt. 375, 385 (but not without stating the facts; except for attesting witnesses); 1899, Steele *v.* Helm, 2 Marv. 237, 43 Atl. 153 (admissible after first stating the facts); 1901, Pritchard *v.* Henderson, 3 Pen. Del. 128, 50 Atl. 218, *semble* (the facts need not be stated beforehand).

Florida: Lay opinions are admissible: 1892, Armstrong *v.* State, 30 Fla. 170, 201, 11 So. 618 (admissible, after stating the data); 1906, Leaptrot *v.* State, 51 Fla. 57, 40 So. 616 (specific facts must be stated); 1919, Hall *v.* State, 78 Fla. 420, 83 So. 513 (rule of Armstrong *v.* State followed).

Georgia: Lay opinions are received when accompanied by the facts observed: 1849, Potts *v.* House, 6 Ga. 336; Foster *v.* Brooks, ib. 293; Dicken *v.* Johnson, 7 Ga. 486; 1853, Walker *v.* Walker, 14 Ga. 251; 1860, Choice *v.* State, 31 Ga. 466; 1886, Frizzell *v.* Reed, 77 Ga. 722, 731; 1895, Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 271; 1898, Scott *v.* McKee, 105 Ga. 256, 31 S. E. 183 (subscribing witness need not state the data for his opinion); 1900, Herndon *v.* State, 111 Ga. 178, 36 S. E. 634; but an intervening decision has served to introduce an element of confusion and uncertainty: 1895, Welch *v.* Stipe, 95 Ga. 762, 22 S. E. 670

(this latest form of the test is: "Before the opinion of a non-expert witness can be considered it must appear not only that the witness has the opportunity of learning the facts upon which the opinion is predicated, but it must appear that the opinion was in fact based upon the facts and circumstances so ascertained, and not upon bare conjecture; and, in addition to this, it must appear that the witness, in the expression of the opinion, speaks with reference to the facts upon which it is predicated. . . . But where [as here] she neither states the facts coming under her observation nor states that the opinion expressed is the result of such observation, there is no possible theory upon which it can be received in evidence"); 1911, Strickland *v.* State, 137 Ga. 115, 72 S. E. 922 (lay opinion admitted; virtually repudiating the doctrine that the observed data must be stated by the witness beforehand, as laid down in Welch *v.* Stipe).

Hawaii: 1914, Sumner *v.* Jones, 22 Haw. 23 (data should be stated beforehand).

Idaho: 1921, Fritcher *v.* Kelly, — Ida. —, 201 Pac. 1037 (whether data need be stated beforehand, not decided).

Illinois: Lay opinions have always been admissible: 1867, Reed *v.* Taylor, 45 Ill. 489; 1875, Rutherford *v.* Morris, 77 Ill. 397; 1876, Carpenter *v.* Calvert, 83 Ill. 70; 1883, Upstone *v.* People, 109 Ill. 175; 1886, American Bible Soc. *v.* Price, 115 Ill. 642, 5 N. E. 126; 1893, Jamison *v.* People, 145 Ill. 357, 377, 34 N. E. 486 (admissible when stating the data); 1897, Grand Lodge *v.* Wieting, 168 Ill. 408, 48 N. E. 59; 1903, Wallace *v.* Whitman, 201 Ill. 59, 66 N. E. 311 (that a testator "acted foolish," excluded); 1904, Chicago U. T. Co. *v.* Lawrence, 211 Ill. 373, 71 N. E. 1024 ("If a non-expert witness gives an opinion without sufficient knowledge of facts to support it, opposing counsel may upon cross-examination show that it is of little value"); 1906, Compher *v.* Browning, 219 Ill. 429, 76 N. E. 678 (whether a testatrix was "easily influenced or susceptible to flattery," excluded); 1909, Snell *v.* Wilson, 239 Ill. 279, 87 N. E. 1022 (importance of latitude on cross-examination, emphasized); 1910, Graham *v.* Deuterman, 244 Ill. 124, 91 N. E. 61; 1913, Brainard *v.* Brainard, 259 Ill. 613, 103 N. E. 45 ("It is only after he has detailed the facts and circumstances . . . that the opinion becomes of any value"); 1916, Walker *v.* Struthers, 273 Ill. 387, 112 N. E. 961 (now said, citing only Graham *v.* Deuterman, that "before they may give their opinions," the data must be stated and the trial judge must pass upon their efficiency); 1915, Scott *v.* Couch, 271 Ill. 395, 111 N. E. 272; 1917, Hettick *v.* Searcy, 278 Ill. 116, 115 N. E. 842 (rule of Brainard *v.* Brainard followed).

Indiana: Lay opinions are received, whether with the requirement that the facts observed must accompany them, cannot be told: 1839, Doe *v.* Reagan, 5 Blackf. 217 (accompanied by the reasons); 1854, Kenworthy *v.* Williams, 5 Ind. 379; 1871, Rush *v.* Magee, 36 Ind. 78; 1872, Leach *v.* Prebster, 39 Ind. 494; 1879, State *v.* Newlin, 69 Ind. 112; 1881, Colee *v.* State, 75 Ind. 514 (if the facts are stated); 1882, Ryman *v.* Crawford, 86 Ind. 268; 1883, Sage *v.* State, 91 Ind. 143; 1884, Goodwin *v.* State, 95 Ind. 558; 1887, Cline *v.* Lindsay, 110 Ind. 337, 11 N. E. 441; 1888, Johnson *v.* Culver, 116 Ind. 289, 19 N. E. 129; 1892, Hamrick *v.* Hamrick, 134 Ind. 324, 34 N. E. 3; 1895, Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448; 1895, Bower *v.* Bower, 142 Ind. 194, 41 N. E. 523; 1900, Blume *v.* State, 154 Ind. 343, 56 N. E. 771 (if the facts are stated); 1906, Heaston *v.* Krieg, 167 Ind. 101, 77 N. E. 805; 1906, Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755 (rule applied); 1908, Lawson *v.* State, 171 Ind. 431, 84 N. E. 974 (the facts must be stated); 1915, Barr *v.* Sumner, 183 Ind. 402, 107 N. E. 675, 109 N. E. 193 (the opinion need not be rejected because the facts detailed as its basis do not of themselves fully support it); 1915, Eckman *v.* Funderburg, 183 Ind. 208, 108 N. E. 577 (whether the party's conversation was "intelligent," allowed).

Iowa: Lay opinions are to be received, with the requirement that the facts must accompany them: 1859, Pelamourges *v.* Clark, 9 Ia. 11 (here the Court professed to follow DeWitt *v.* Barley, N. Y., and permitted opinions to be given, provided the reasons are described as fully as possible); 1871, State *v.* Porter, 34 Ia. 137; 1876, Butler *v.* Ins. Co., 45 Ia. 97; 1880, Severin *v.* Zack, 55 Ia. 30, 7 N. W. 404 (accompanied by the facts); 1882, Smith *v.* Hickenbottom, 57 Ia. 736, 11 N. W. 664; 1887, Norman's Will, 72 Ia. 86, 33 N. W. 374 (same); State *v.* Winter, 72 Ia. 635, 34 N. W. 475 (same); 1888, Meeker *v.* Meeker, 74 Ia. 354, 37 N. W. 773; 1894, Denning *v.* Butcher, 91 Ia. 425, 430, 59 N. W. 69 (admissible, if the facts detailed satisfy the Court as a sufficient basis for the opinion; but this apparently means merely facts affecting the extent of his observation, under § 689, *ante*); 1896, Kostelecky *v.* Scherhart, 99 Ia. 120, 68 N. W. 591; 1897, Furlong *v.* Carraher, 102 Ia. 358, 71 N. W. 210 (applying the requirement strictly); 1897, State *v.* McDonough, 104 Ia. 6, 73 N. W. 357 (feeble-minded person); 1898, Manatt *v.* Scott, 106 Ia. 203, 76 N. W. 717; 1898, Goldthorp *v.* Goldthorp, 106 Ia. 722, 77 N. W. 471; 1899, Furlong *v.* Carraher, 108 Ia. 492, 79 N. W. 277 (the data must first be stated, except for a subscribing witness); 1899, Alvord *v.* Alvord, 109 Ia. 113, 80 N. W. 306 (the data stated must tend to support the witness' opinion); 1899, State *v.* Robbins, 10 Ia. 650, 80 N. W. 1061 (the question must be based not upon "your acquaintance" with him, but "the actions that you have seen"); 1900, State *v.* Wright, 112 Ia. 436, 84 N. W. 541; 1901, Hertrich *v.* Hertrich, 114 Ia. 643, 87 N. W. 689; 1904, Stutsman *v.* Sharpless, 125 Ia.

335, 101 N. W. 105; 1905, Lucas *v.* McDonald, 126 Ia. 678, 102 N. W. 532 (precedent statement of data not required for witness to sanity); 1906, State *v.* Hayden, 131 Ia. 1, 107 N. W. 929 (a witness to sanity need not limit his opinion to data expressly detailed by him); 1909, McBride *v.* McBride, 142 Ia. 169, 120 N. W. 709 (witness to mental unsoundness must speak only as to the period of observation; in this State, there is much petty and futile learning about the details of the present rule); 1909, Spiers *v.* Hendershott, 142 Ia. 446, 120 N. W. 1058 (non-expert must first detail all circumstances observed); 1920, Dolan *v.* Henry, 189 Ia. 104, 177 N. W. 712 (expert may testify to probable duration of a condition of mind at other times than those of observation; distinguishing the rule of McBride *v.* McBride, but not citing that case; see comment *supra*); 1921, Armstrong's Est., 191 Ia. 1210, 183 N. W. 386 (witness must first detail facts observed); 1918, Hanrahan's Estate, 182 Ia. 1242, 166 N. W. 529.

Kansas: Lay opinions may be received, when accompanied by the facts: 1884, Baughman *v.* Baughman, 32 Kan. 538, 4 Pac. 1003; 1898, State *v.* Beuerman, 59 Kan. 586, 53 Pac. 874; 1900, Zirkle *v.* Leonard, 61 Kan. 636, 60 Pac. 318; 1903, Grimshaw *v.* Kent, 67 Kan. 463, 73 Pac. 92; 1905, Howard *v.* Carter, 71 Kan. 85, 80 Pac. 61; 1909, State *v.* Rumble, 81 Kan. 16, 105 Pac. 1 (the witness may first state the observed data, or he need not if opportunity to cross-examine is given; prior rulings examined); 1918, Stafford *v.* Sutcliffe, 103 Kan. 592, 175 Pac. 981 (whether the witness must first state the data, not decided); 1920, Cunningham *v.* Cunningham, 107 Kan. 318, 191 Pac. 294 (that a testator was "not in his right mind").

Kentucky: Lay opinions have always been receivable, and at first without any qualification: 1829, M'Daniel's Will, 2 J. J. Marsh. 337; then the qualification was laid down (under the erroneous impression that the Court was thus following the practice of Massachusetts and Pennsylvania) that the facts must accompany the opinion: 1843, Hunt's Heirs *v.* Hunt, 3 B. Monr. 577; 1844, in Jones' Adm'r *v.* Perkins, 5 B. Monr. 223, *semble:* but this qualification seems since to have been dropped: 1878, Brown *v.* Com., 14 Bush 404; 1883, Wise *v.* Foote, 81 Ky. 12; 1894, Newcomb's Ex'rs *v.* Newcomb, 96 Ky. 120, 27 S. W. 997; 1895, Phelps *v.* Com., — Ky. —, 32 S. W. 470; 1896, American Accident Co. *v.* Fiddler, — Ky. —, 36 S. W. 528; 1900, Abbott *v.* Com., 107 Ky. 624, 55 S. W. 196; but the qualification referred to was once more dallied with: 1906, Stafford *v.* Tarter, — Ky. —, 96 S. W. 1127; 1911, Banks *v.* Com., 145 Ky. 800, 141 S. W. 380; 1921, Baker *v.* Lemon, 192 Ky. 473, 233 S. W. 1050 (will).

Louisiana: 1875, State *v.* Coleman, 27 La. An. 691, 692 (opinion inadmissible "without detailing the facts"); 1901, State *v.* Smith, 106 La. 33, 30 So. 248 (opinion admissible when the data for it are stated); 1904, State *v.* Lyons, 113 La. 959, 37 So. 890 (an opinion to sanity need not be preceded by a recital of the facts and reasons; as to insanity, the question is left open).

Maine: Here, following the Massachusetts doctrine, lay opinions (except those of attesting witnesses) were excluded: 1831, Ware *v.* Ware, 8 Me. 55 (excluding even medical testimony); 1859, Wyman *v.* Gould, 47 Me. 159; 1870, Robinson *v.* Adams, 62 Me. 410 (negative opinion, that "he observed nothing peculiar," held not to be excluded by the rule); 1885, Fayette *v.* Chesterville, 77 Me. 33.

Maryland: Lay opinion was originally admitted without qualification: 1844, Brooke *v.* Berry, 2 Gill 98; and this apparently still obtains for attesting witnesses: 1877, Williams *v.* Williams, 47 Md. 325; but, as to other lay witnesses, the requirement applies that the facts observed must accompany the opinion: 1848, Brooke *v.* Townshend, 7 Md. 27; 1852, Stewart *v.* Redditt, 3 Md. 78; 1854, Dorsey *v.* Warfield, 7 Md. 73; 1862, Weems *v.* Weems, 19 Md. 344; 1867, Higgins *v.* Carlton, 28 Md. 137; 1872, Waters *v.* Waters, 35 Md. 542; 1877, Williams *v.* Williams, 47 id. 326; 1882, Chase *v.* Winans, 59 Md. 482, *semble;* 1901, Safe Deposit & T. Co. *v.* Berry, 93 Md. 560, 49 Atl. 401 (opinion inadmissible unless the witness first so states facts that it may be seen whether his conclusion "has any relation to or can fairly be said to be dependent on them"); 1901, Brashears *v.* Orme, 93 Md. 442, 49 Atl. 620 (similar); 1902, Jones *v.* Collins, 94 Md. 403, 51 Atl. 398 (whether the witness "had observed anything that indicated a lack of mind or of understanding on his part," allowed; a subscribing witness and a physician may express an opinion without first reciting the facts observed; Pearce, J., diss. on the latter point); 1904, Watts *v.* State, 99 Md. 30, 57 Atl. 542 (rule applied to exclude and admit certain opinions); 1905, Struth *v.* Decker, 100 Md. 368, 59 Atl. 727 (some opinions admitted and some excluded on the facts; opinion obscure); 1914, Whisner *v.* Whisner, 122 Md. 195, 89 Atl. 393 (the witness must first state the data for his opinion).

Massachusetts: In this jurisdiction, the 'fons et origo mali', and for long the main support of the error, there appear three distinct stages in the progress of doctrine. (1) First, a group of early rulings, extending down to the second quarter of the 1800s, and dominated by the older sense of "opinion" (*ante* § 1917) as "belief not resting on personal observation," excluded "mere opinion" (unless from attesting witnesses); but did not exclude the opinions of those lay witnesses who spoke from personal observation and were ready to show that they had sufficiently observed: 1807, Chase *v.* Lincoln, 3 Mass. 237; 1807, Poole *v.* Richardson, 3 Mass. 330

("other [than subscribing] witnesses were allowed to testify to the appearance of the testator, and to any particular facts from which the state of his mind might be inferred, but not to testify merely their opinion or judgment"); 1808, Buckminster *v.* Perry, 4 Mass. 594 ("Two or three witnesses [not subscribing ones] were of opinion that the testator was much broken and very forgetful about the time the will was made; and they testified particularly to several slight instances of a want of recollection"); 1811, Hathorn *v.* King, 8 Mass. 371 (physicians present at a deathbed were allowed to give their opinions, after stating the facts supporting them); 1812, Dickinson *v.* Barber, 9 Mass. 225 (physicians who gave mere opinions, stating no facts observed by themselves and predicating no hypothesis of others' testimony, were excluded); 1827, Needham *v.* Ide, 5 Pick. 511 ("mere opinions of other [than subscribing] witnesses were not competent evidence, and were not entitled to any weight, further than they were supported by the facts, and circumstances proved at the trial"). (2) Next, the true meaning of Poole *v.* Richardson was misunderstood, and in a series of rulings the doctrine was established that lay opinion (in the sense of an inference from personally observed data) as to a person's sanity was inadmissible: 1854, Com. Wilson, 1 Gray 339; 1856, Baxter *v.* Abbott, 7 Gray 79; 1861, Hubbell *v.* Bissell, 2 All. 200; 1861, Com. *v.* Fairbanks, 2 All. 511; 1868, Townsend *v.* Pepperell, 99 Mass. 42, 46; 1868, Hastings *v.* Rider, 99 Mass. 625. (3) By this time the New Hampshire decisions had become familiar to the profession, and the unsoundness of the Massachusetts doctrine had been frequently pointed out; and in the last quarter of the 1800s comes a third stage, in which an effort is made to confine the orthodox rule within narrowest limits, and while acknowledging its sway, to avoid some of its unfortunate effects; in the following rulings all the questions named were held proper, except as otherwise noted: 1872, Barker *v.* Comins, 110 Mass. 480, 487 ("Did you notice any change in his intelligence or understanding, any want of coherence in his remarks?"); 1874, Nash *v.* Hunt, 116 Mass. 251 ("observed no incoherence of thought, nor anything unusual or singular in respect to his mental condition"); 1875, May *v.* Bradlee, 127 Mass. 418, 422 ("any fact which led you to infer that there was any derangement of intellect"); 1884, Com. *v.* Brayman, 136 Mass. 439, 440 (whether a person had failed, mentally or physically, at a certain time); 1886, Cowles *v.* Merchants, 140 Mass. 381, 5 N. E. 288 (going back to the old strictness); 1891, Poole *v.* Dean, 152 Mass. 590, 26 N. E. 406 ("ordinary business capacity" but this was an expert opinion, and perhaps was considered from the will-capacity standpoint); 1891, McConnell *v.* Wildes, 153 Mass. 490, 26 N. E. 1114 (following May *v.* Bradlee); 1892, Smith *v.* Smith, 157 Mass. 389, 32 N. E. 348 ("whether from the general appearance of the testator he considered him capable of making a contract or of transacting important business," excluded; following "the rule early adopted and uniformly adhered to [!] by this Court"); 1896, Laplante *v.* Warren Cotton Mills, 165 Mass. 487, 43 N. E. 294 (that "he was not a bright boy," allowed; note that other cases involving, as here, injuries to an employee seem to be concerned with the relevancy of the fact, and not with the opinion rule); 1897, Clark *v.* Clark, 168 Mass. 523, 47 N. E. 510 ("whether your sister has failed or has not failed in her mental capacity during the past five years"); 1901, Hogan *v.* Roche's Heirs, 179 Mass. 510, 61 N. E. 57 (whether a testatrix "knew what she was talking about" in a certain utterance); 1902, Ratigan *v.* Judge, 181 Mass. 572, 64 N. E. 204 ("Was he subject to delusions or hallucinations?" held improper); this modified result is accompanied by a decided qualification of theory, closely approaching that of the New York Court, but less liberal in form; this modification (as put forward in Nash *v.* Hunt, *supra*) admits such evidence as does not involve "as opinion as to the condition of the mind itself, but only of its manifestations in conversation with the witness"; 1904, McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. 358 ("From these facts . . . what do you infer in your mind as to Mr. J's mental capacity?" excluded; but "Did you ever notice anything to indicate that he was not of sound mind?" admitted; this local rule of logomachy, unworthy though it is of the dignity of justice, seems to be consistently and skilfully applied by bench and bar); 1908, Gorham *v.* Moor, 197 Mass. 522, 84 N. E. 436 (whether they ever saw or heard anything that indicated anything singular or unusual respecting her mental condition, allowed); 1909, Jenkins *v.* Weston, 200 Mass. 488, 86 N. E. 955; 1911, Leary *v.* Webber Co., 210 Mass. 68, 96 N. E. 136 (rule applied to testimony about a half-witted employee); 1912, Com. *v.* Spencer, 212 Mass. 438, 99 N. E. 266 (noting that physician's opinion is an exception to the general rule); 1917, Raymond *v.* Flint, 225 Mass. 521, 114 N. E. 811 ("Did you observe any facts . . . by your sister's conversation, or notice anything that indicated a failing of her mind?" allowed); 1919, Old Colony Trust Co. *v.* Di Cola, 233 Mass. 119, 123 N. E. 454 ("only the witnesses to the will, the testator's family physician, and experts . . . are competent to give their opinions of the testator's mental condition"); 1922, Neill *v.* Brackett, — Mass. —, 135 N. E. 690 (family physician may testify to testator's mental condition; layman may testify to "appearance of marked mental decline").

Michigan: Lay opinions have always been admissible, but the modern rulings show the influence of the qualification that "facts" must accompany the inference: 1864, Beaubien *v.* Cicotte, 12 Mich. 489 (opinion by Camp-

bell, J.); 1870, Kempsey *v.* McGinniss, 21 Mich. 128; 1873, Johnson *v.* McKee, 27 Mich. 473; 1878, People *v.* Finlay, 38 Mich. 484; 1879, Fraser *v.* Jennison, 42 Mich. 215, 3 N. W. 882 (whether deceased was eccentric, allowed); 1883, Rice *v.* Rice, 50 Mich. 448, 15 N. W. 545; 1892, Prentis *v.* Bates, 93 Mich. 234, 242, 53 N. W. 153 ("Before the witness is permitted to express an opinion, he must testify to something in the appearance of the party which is sufficient at least to justify the inference of incompetency"), 1893, Lynch *v.* Doran, 95 Mich. 395, 407, 54 N. W. 882 (similar); 1893, O'Connor *v.* Madison, 98 Mich. 183, 187, 57 N. W. 105 (the witness must first state some facts "that legitimately tends to show incompetency"); 1894, People *v.* Borgetto, 99 Mich. 336, 58 N. W. 328 (similar); 1896, Sagar *v.* Hogmire, 108 Mich. 410, 66 N. W. 327 (after stating the facts); 1897, Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322 (following Prentis *v.* Bates); 1898, Lamb *v.* Lippincott, 115 Mich. 611, 73 N. W. 887 (witness to insanity must first state some conduct tending to show it; but witness to sanity need not state conduct tending to show it); 1900, People *v.* Casey, 124 Mich. 279, 82 N. W. 883 (on this point, long settled locally, the opinion cites four of the above decisions in its own Court, and eleven of other Courts); 1904, Roberts *v.* Bidwell, 136 Mich. 191, 98 N. W. 1000 (rule of O'Connor *v.* Madison applied); 1905, Hibbard *v.* Baker, 141 Mich; 124, 104 N. W. 399 (rule of Prentis *v.* Bates applied, in an instance which glaringly exhibits the fallacy of that rule); 1917, Walsh's Estate, 196 Mich. 42, 163 N. W. 70 (testator).

Minnesota: Lay opinions are admissible, when preceded by the facts observed: 1880, Pinney's Will, 27 Minn. 281, 6 N. W. 791, 7 N. W. 144; 1886, Woodcock *v.* Johnson, 36 Minn. 218, 30 N. W. 894; 1903, Scott *v.* Hay, 90 Minn. 304, 97 N. W. 106 (and even experts must first detail the facts observed).

Mississippi: Lay opinions are admissible: 1881, Wood *v.* State, 58 Miss. 742; 1884, Reed *v.* State, 62 Miss. 408; 1896, Sheehan *v.* Kearney, 82 Miss. 688, 21 So. 46; 1921, Ward *v.* Ward, 124 Miss. 697, 87 So. 153 (but the data observed must first be stated).

Missouri: Lay opinions are admissible, but the original rule has been marred by the modern qualification that the "facts" must first be stated: 1848, Baldwin *v.* State, 12 Mo. 234; 1862, Farrell's Adm'r *v.* Brennan's Adm'x, 32 Mo. 334; 1870, State *v.* Klinger, 46 Mo. 228; 1876, Crowe *v.* Peters, 63 Mo. 435; 1877, Moore *v.* Moore, 67 Mo. 195; 1881, State *v.* Erb, 74 Mo. 204; 1882, Appleby *v.* Brock, 76 Mo. 317; 1887, State *v.* Bryant, 93 Mo. 299, 6 S. W. 102; 1891, State *v.* Williamson, 106 Mo. 170, 17 S. W. 172; 1899, State *v.* Bronstine, 147 Mo. 520, 49 S. W. 512; 1899, State *v.* Soper, 148 Mo. 235, 49 S. W. 1007 (but witnesses to sanity need not state the data beforehand); 1900, State *v.* Holloway, 156 Mo. 222, 56 S. W. 734; 1906, State *v.* Speyer, 194 Mo. 459, 91 S. W. 1075 (exclusion of the reasons for the opinion of insanity, held erroneous); 1915, State *v.* Ross, — Mo. —, 178 S. W. 475 (data need not be stated beforehand); 1921, Mayes *v.* Mayes, — Mo. —, 234 S. W. 100 (whether a testator was of sound mind, allowed); 1921, Rayl *v.* Golfinopulos, — Mo. —, 233 S. W. [illegible] (will). 1969

Montana: Lay opinions are admissible: Rev. C. 1921, § 10531, par. 10 (like Cal. C. C. P. § 1870); 1889, Terr. *v.* Roberts, 9 Mont. 15, 22 Pac. 132.

Nebraska: Lay opinion is admissible, after the "facts" are first stated: 1879, Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857; 1893, Shults *v.* State, 37 Nebr. 481, 496, 55 N. W. 1080; 1895, Pflueger *v.* State, 46 Nebr. 493, 64 N. W. 1094; 1896, Hay *v.* Miller, 48 Nebr. 156, 66 N. W. 1115; Hoover *v.* State, 48 Nebr. 184, 66 N. W. 1117; 1898, Lamb *v.* Lynch, 56 Nebr. 135, 76 N. W. 428 (admissible, if the main facts are first detailed to the jury); 1898, Snider *v.* State, 56 Nebr. 309, 76 N. W. 574; 1904, Bothwell *v.* State, 70 Nebr. 747, 99 N. W. 669; 1906, Isaac *v.* Halderman, 76 Nebr. 823, 107 N. W. 1013; 1907, Wilson's Estate, 78 Nebr. 758, 111 N. W. 788 (where the witnesses testify to sanity, the particular data need not first be stated; prior cases reviewed).

Nevada: Lay opinion is admissible: 1889, State *v.* Lewis, 20 Nev. 345, 22 Pac. 241.

New Hampshire: The early practice here was probably like the English practice (as Mr. J. Doe points out in 49 N. H. 417). But in 1866, after the supposed doctrine of Poole *v.* Richardson, Mass., had raised the widespread controversy, the New Hampshire Court laid down the following rule, in effect the same as the modern Massachusetts rule: 1866, Boardman *v.* Woodman, 47 N. H. 134 (Sargent, J.: "[The witness] may state the acts and sayings of the person whose sanity is questioned, and may describe his appearance, but may not give his present opinion as to his sanity or insanity, nor state the impression made upon witness' mind at the time of the acts, sayings, or appearances testified to, in regard to the sanity or insanity of such person at such times"); but from this result (the Court is composed of three members) Mr. J. Doe dissented in a vigorous opinion (quoted *ante*, § 1934). Then in 1870, the majority view was re-declared in State *v.* Pike, 49 N. H. 407, Mr. J. Doe again dissenting, in an opinion based on a renewed and careful study of the subject; in 1871, in State *v.* Jones, 50 N. H. 381, and in 1874, in State *v.* Archer, 54 N. H. 465, the same result was repeated. In 1874, the Democratic majority in the Legislature, for political reasons, abolished the existing Supreme Court (whose members were Republicans) and created a new one; and in the new appointments two of the Republican ex-judges, not including Judge Doe, were given positions; in 1876, by another

political convulsion, there was another "remodelling" of the Court, and Mr. Doe was now appointed Chief Justice. But in the meantime, and during his absence from the Bench, the Court as reconstituted by his political opponents repudiated the former precedents, and adopted in Hardy *v.* Merrill, 56 N. H. 227 (1875), the policy for which Mr. J. Doe had so long contended, — that of the unrestricted admission of lay opinion; the result being in an unusual way a tribute to his sagacity and learning; that policy has since remained the law of the State: 1888, Carpenter *v.* Hatch, 64 N. H. 576, 15 Atl. 219; 1903, Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459 (discretion of the trial Court controls as to the witness' qualification).

New Jersey: Lay opinion is admissible: 1854, Matter of Vanauken, 10 N. J. Eq. 186 (but the witness must give the "facts"); 1854, Stackhouse *v.* Horton, 15 N. J. Eq. 208; 1896, Genz *v.* State, 58 N. J. L. 482, 34 Atl. 816; 1916, Re McCraven, 87 N. J. Eq. 28, 99 Atl. 619 (the witness may "state facts as to the actions of the alleged lunatic, and then tell what, in his or her opinion, they indicate as to soundness or unsoundness of mind").

New Mexico: 1896, Territory *v.* Padilla, 8 N. M. 510, 46 Pac. 346 (only the details are admissible, not the opinion; purporting to follow the Massachusetts rule); 1911, Terr. *v.* McNab, 16 N. M. 625, 120 Pac. 907 (admitting lay opinion; following Com. M. L. Ins. Co. *v.* Lathrop, U. S., but ignoring Terr. *v.* Padilla).

New York: Here the profession has been vouchsafed what seem to be five distinct stages of doctrine. (1) First is found, as in other early rulings in this country, the traditional English practice of receiving lay opinions without question: 1828, Fisher *v.* Clark, 1 Paige Ch. 173, Walworth, C. (question not raised); 1847, Arnot *v.* People, 4 Denio 9. (2) Next is found the opposite doctrine — of entire exclusion — adopted by a divided Court; the dissenting opinion of Mr. J. Denio, and the majority opinion of Mr. J. Mason, and that of the eminent Mr. P. J. Parker, are leading opinions: 1853, DeWitt *v.* Barley, 9 N. Y. 387 (by Ruggles, C. J., Johnson, Taggart, Gardiner, and Mason, JJ.; against Denio, Willard, and Morse, JJ.). (3) Next after five years, in the course of the same litigation, the original doctrine obtained the upper hand; the membership of the Court having been almost entirely changed, the dissenting opinion of Denio, J., in the former decision, now being adopted: 1858, DeWitt *v.* Barley, 17 N. Y. 340 (opinion by Selden, J., adopting the dissenting opinion of Denio, J., in 9 N. Y.; concurred in by Johnson, C. J., Comstock, Denio, Roosevelt, Harris, Pratt, and Strong, JJ.); 1862, Delafield *v.* Parish, 25 N. Y. 9, 37, 82, 165. (4) It chanced, however, that Mr. J. Selden, in his opinion, employed the following passage: "It is required that the jury should be furnished with every practicable means of testing the accuracy of the opinion. The witness must state, as far as he is able, the facts and reasons upon which he bases his conclusions; and if the jury are able to see from this statement that such conclusion is unfounded, they are of course to disregard it"; this requirement, perfectly proper for all testimony whatsoever, and not constituting in any way a modification of the rule adopted, served to create a misunderstanding, and led within a decade to the fourth form of doctrine, practically the same as the third stage of the Massachusetts rule, as soon afterward promulgated: 1866, Clapp *v.* Fullerton, 34 N. Y. 194; Porter, J.: "[The layman] may characterize as rational or irrational the acts or declarations to which he testifies. . . . But to render his opinion admissible even to this extent, it must be limited to his conclusions from the specific facts he discloses. . . . He may testify to the impression produced by what he witnessed; but he is not legally competent to express an opinion on the general question whether the mind of the testator was sound or unsound"; this form of doctrine prevailed for a quarter of a century: 1867, O'Brien *v.* People, 36 N. Y. 282; 1881, Rider *v.* Miller, 86 N. Y. 511; 1882, Matter of Ross, 87 N. Y. 519; 1884, Holcomb *v.* Holcomb, 95 N. Y. 320; People *v.* Conroy, 97 N. Y. 67. (5) As between this form, and a rule admitting a general opinion absolutely, it would hardly be supposed that a crevice could be found in which a new species of legal flora could find nourishment; but there was, and it was soon filled as follows: The layman may speak, it was said, as to the person's general rationality with reference to a particular appearance or act of conduct, but not as to that general rationality independent of such appearances or acts; thus, in 1889, People *v.* Packenham, 115 N. Y. 202, 21 N. E. 1035, the question "from what you saw and heard him say at that time, was he rational or irrational?" was held admissible; and a further example of the verbalistic acuteness necessarily cultivated by this logomachy was the ruling in Paine *v.* Aldrich (1892), 133 N. Y. 546, 30 N. E. 725, declaring this question reprehensible: "Taking into consideration these facts that you have stated here in your testimony to-day, which you learned from your contact with Mr. Paine and from his conversations with you, what impression did he give you as to whether or not he was rational or irrational?" while this one was pronounced unexceptionable: "From the conversations you had with him and from his actions, his acts in your presence, were those conversations or those acts those of a rational or an irrational man?"; the rulings since Paine *v.* Aldrich consist of attempts to effectuate the above distinctions of tweedledum and tweedledee: 1893, People *v.* Taylor, 138 N. Y. 398, 409, 34 N. E. 275 (acts stated may be spoken of as rational or the reverse); 1895,

People *v.* Strait, 148 N. Y. 566, 42 N. E. 1045 (lay witnesses may say "whether the acts and declarations testified to impressed them as rational or irrational," but cannot give an opinion as to "general soundness or unsoundness"); 1896, People *v.* Youngs, 151 N. Y. 210, 45 N. E. 460 (a question whether the person's acts and conversations were rational or irrational, held improper in form, because it did not call merely for the impression made upon the observer, but for a statement as to the absolute rationality, etc.; yet in this instance the testimony was held practically to answer the rule); 1897, People *v.* Burgess, 153 N. Y. 561, 47 N. E. 889 ("acts impressing the witness as rational," allowed); 1897, People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730 ("whether such acts or conduct impressed them as rational or irrational," allowed); 1898, Wyse *v.* Wyse, 155 N. Y. 367, 49 N. E. 942; "What impression did Mr. W.'s language and conduct make upon your mind as to the condition of his mind? Was it rational or irrational?" held improper); 1902, People *v.* Truck, 170 N. Y. 203, 63 N. E. 281 ("A witness may state whether the actions of a person impressed him as rational or irrational, but can go no further"); of these rulings all that can be said is that they belong rather to some system which decides controversies by mumbling magic formulas before a fetish; 1904, People *v.* Spencer, 179 N. Y. 408, 72 N. E. 461 (rule applied); 1906, Myer's Will, 184 N. Y. 54, 76 N. E. 920 ("What was the impression these acts and conversations made on you as to whether they were rational or irrational?" "She was irrational"; the answer held improper); 1906, People *v.* Pekarz, 185 N. Y. 470, 78 N. E. 294 (a sweetened morsel of quibbling; the Court also complacently declares that the modern tweedledee rule has "run through the cases from an early day"!); 1909, People *v.* Hill, 195 N. Y. 16 87 N. E. 813 (quibbles applied); 1921, Eno's Will, Sup. App. Div., 187 N. Y. Suppl. 757, 775 (a good example of the futile nonsensicality of the New York rule).

North Carolina: Lay opinion has always been admissible: 1832, Griffin *v.* Ing, 3 Dev. 356; 1839, Norwood *v.* Marrow, 4 Dev. & B. 442; 1841, Clary *v.* Clary, 2 Ired. 70 (quoted *ante*, § 1934); 1863, McDougald *v.* McLean, Winst. 120; 1874, State *v.* Ketchey, 70 N. C. 624; 1881, McLeary *v.* Norment, 84 N. C. 236; 1882, Horah *v.* Knox, 87 N. C. 483; 1884, Barker *v.* Pope, 91 N. C. 168; 1885, McRae *v.* Malloy, 93 N. C. 159; 1888, State *v.* Potts, 100 N. C. 462, 6 S. E. 657; 1900, Whitaker *v.* Hamilton, 126 N. C. 465, 35 S. E. 815; 1921, White *v.* Hines, 182 N. C. 275, 109 S. E. 31 (that the party was "crazy" and "not normal," allowed); 1915, Rawling's Will, 170 N. C. 58, 86 S. E. 794.

North Dakota: 1902, State *v.* Barry, 11 N. D. 428, 92 N. W. 809 (admissible, after stating the observed data).

Ohio: Lay opinion is admissible: 1833, State *v.* Gardiner, Wright 398 (no question raised); 1843, Clark *v.* State, 12 Oh. 487.

Oklahoma: 1901, Queenan *v.* Terr., 11 Okl. 261, 71 Pac. 218 (New York rulings followed, without citing any others; in apparent ignorance of their heterodox status and their inconsistencies); 1915, Farmers' & Merchants' Bank *v.* Haile, 46 Okl. 636, 149 Pac. 214; 1920, Almerigi *v.* State, — Okl. Cr. App. —, 188 Pac. 1094 (admissible); 1921, Payton *v.* Shipley, 80 Okl. 145, 195 Pac. 125 (testamentary competency; lay witnesses must state the facts on which their opinion is based).

Oregon: Laws 1920, § 727, par. 10 (like Cal. C. C. P. § 1870); 1906 Lassas *v.* McCarty, 47 Or. 474, 84 Pac. 76 (statute applied).

Pennsylvania: the condition of the rulings in this State is a singular one; the following congeries of cases speaks for itself; certainly no one outside the Court should venture to define the exact state of the doctrine; 1821, Rambler *v.* Tryon, 7 S. & R. 92 (attesting will-witness' opinion receivable absolutely, as in all subsequent rulings; ordinary lay-witness' opinion receivable when accompanied by the grounds for it); 1822, Irish *v.* Smith, 8 S. & R. 576 (lay-witness' opinion receivable, with an implication only that the facts observed must accompany it); 1849, Logan *v.* McGinnis, 12 Pa. St. 31 (the novel distinction was taken that attesting witnesses to the will could give their opinion without facts, while other persons could give facts but not opinions; none of the preceding rulings in this State being examined); 1854, Wilkinson *v.* Pearson, 23 Pa. 119 (returning to the ruling of Irish *v.* Smith); 1861, Bricker *v.* Lightner's Ex'r, 40 Pa. 205 (admitting opinions of laymen with the facts of their observation); 1861, Dean *v.* Fuller, 40 Pa. 478 (requiring of subscribing witnesses to a will the opinion only, but of deed-witnesses, and all others, the facts as well as the opinion, — though as to the opinion of the latter group the Court hesitates); 1867, Titlow *v.* Titlow, 54 Pa. 223 (the still different statement is made that subscribing witnesses may give opinions without the facts, but others may not; yet in the next sentence the former alternative is contradicted, and the effect of the opinion becomes unintelligible; Bricker *v.* Lightner's Ex'r is the only local authority cited); 1868, Rouch *v.* Zehring, 59 Pa. 78 (requiring the facts to accompany the opinion); 1869, Dickinson *v.* Dickinson, 61 Pa. 405 (here a new form appears; the ordinary witness may give facts and then his opinion, but the facts must "tend to show want of testamentary capacity," and the witness was here declared incompetent because the facts detailed by her did not seem to the judge to indicate insanity); 1871, Pidcock *v.* Potter, 68 Pa. 351 (here we learn that "it has always been the rule, after a non-professional witness has stated the facts upon which his opinion is founded," to admit his opinion; and that "from Rambler *v.* Tryon . . . to Dickinson *v.* Dickinson, our

decisions have been uniform on this point"); 1884, First Nat'l Bank *v.* Wireback's Ex'r, 106 Pa. 45, Clark, J. (here Pidcock *v.* Potter is ignored, and Dickinson *v.* Dickinson's peculiar form is reverted to; in this case "the particular facts, stated by each of these several witnesses must be taken alone, as the basis of the proposed opinion of that witness; thus considered, they are found to be in themselves inconclusive in their nature; . . . such facts could not reasonably be assumed as the basis of an opinion," and it was excluded); 1885, March 9, Taylor *v.* Com., 109 Pa. 270, Mercur, C. J. (here the form in Pidcock *v.* Potter is now reinstated, no authorities being mentioned; "the jury could decide whether those acts and conversations justified the conclusion the witnesses drew therefrom"); 1885, May 29, Shaver *v.* McCarthy, 110 Pa. 348, 5 Atl. 614, Clark, J. (here the Dickinson *v.* Dickinson peculiarity — "facts and circumstances must furnish the ground of the opinion expressed; whether they are relevant and pertinent for the purpose is a question for the determination of the Court" — is once more resorted to, Pidcock *v.* Potter not being mentioned); 1891, Elcessor *v.* Elcessor, 146 Pa. 363, 23 Atl. 230, Mitchell, J. (to the same effect, — "facts that afford a fair foundation for an opinion"); 1892, Doran *v.* McConlogue, 150 Pa. 98, 24 Atl. 357 ("Without such facts, as we have often held, opinions are of no value"); since 1892, the following rulings seem to exclude opinion more rigidly, under the distinctions peculiar to New York, local precedents being temporarily laid aside: 1899, Com. *v.* Wireback, 190 Pa. 138, 42 Atl. 542 ("From what you saw of him, do you think he was of sound or unsound mind?", excluded; "from the conversation you had . . . and from your observation . . ., did you or did you not discover anything that would lead you to believe he was of unsound mind?", admitted); 1899, Com. *v.* Cressinger, 193 Pa. 326, 44 Atl. 433 (Com. *v.* Wireback approved); 1901, Hepler *v.* Hosack, 197 Pa. 631, 47 Atl. 847 (approved); 1903, Com. *v.* Gerhardt, 205 Pa. 387, 54 Atl. 1029 (Com. *v.* Wireback approved).

Philippine Isl. C. C. P. 1901, § 298, par. 10 (like Cal. C. C. P. § 1870).

South Carolina: Lay opinion is receivable: 1794, Heyward *v.* Hazard, Bay 335; 1903, Scarborough *v.* Baskin, 65 S. C. 558, 44 S. E. 63 (after stating the facts).

South Dakota: Lay opinion is admitted: 1903, Halde *v.* Schultz, 17 S. D. 465, 97 N. W. 369.

Tennessee: Lay opinion is receivable; attesting witnesses stating merely the opinion without any grounds, and others preceding their opinion by the facts observed: 1835, Gibson *v.* Gibson, 9 Yerg. 332; 1859, Norton *v.* Moore, 3 Head 480; 1865, Van Huss *v.* Rainbolt, 2 Coldw. 141 (that a subscribing witness need not state his grounds); 1868, Puryear *v.* Reese, 6 Coldw. 23; 1872, Dove *v.* State, 3 Heisk. 365; 1900, Jones *v.* Galbraith, — Tenn. —, 59 S. W. 350 (in chancery, it is not improper if the data are given by answers subsequent to the opinion expressed); 1907, Atkins *v.* State, 119 Tenn. 458, 105 S. W. 353.

Texas: In 1855, Gehrke *v.* State, 13 Tex. 572, lay testimony was rejected, on grounds somewhat confused; in 1859, Cooper *v.* State, 23 Tex. 337, the propriety of such testimony was assumed as beyond dispute; while in 1873, Hickman *v.* State, 38 Tex. 191, the matter was left undecided; in subsequent rulings the testimony is admitted, when accompanied with the facts on which it is based: 1874, Thomas *v.* State, 40 Tex. 63 (no local precedents cited); Holcomb *v.* State, 41 Tex. 125 (no local precedents cited); 1877, Garrison *v.* Blanton, 48 Tex. 303; 1885, Haney *v.* Clark, 75 Tex. 93, 96; 1891, Scalf *v.* Collin Co., 80 Tex. 517, 16 S. W. 314; 1895, Brown *v.* Mitchell, 87 Tex. 140, 26 S. W. 1059; 1911, Turner *v.* State, 61 Tex. Cr. 97, 133 S. W. 1052 (the witness must first state the conduct which he has observed; but if his opinion is that the person is sane, it is sufficient to state that he has never noticed conduct indicating insanity; prior cases reviewed); 1921, Barton *v.* State, 89 Tex. Cr. 387, 230 S. W. 989 (rule held not applicable to testimony that witness "did not notice anything peculiar or unusual about his mental condition," because this was not an "opinion as to the sanity or insanity of the appellant"; we mortals do delight to fool ourselves with words!).

Utah: 1898, Christensen's Estate, 17 Utah 412, 53 Pac. 1003 (lay opinion admissible).

Vermont: In 1835, Lester *v.* Pittsford, 7 Vt. 159, lay opinion was admitted; in 1845, Morse *v.* Crawford, 17 Vt. 502, the qualification was appended that the facts supporting the opinion must accompany it; and this the subsequent cases follow; 1861, Crane *v.* Crane, 33 Vt. 15; 1875, Hathaway's Adm'r *v.* Ins. Co., 48 Vt. 350; 1878, State *v.* Hayden, 51 Vt. 303; 1883, Westmore *v.* Sheffield, 56 Vt. 247; 1892, Fairchild *v.* Bascomb, 64 Vt. 243, 24 Atl. 255; 1896, Frary *v.* Gusha, 66 Vt. 264; 1898 Re McCabe, 70 Vt. 155, 40 Atl. 52 (by a layman, that the person charged as insane was suffering from paresis, the witness having observed the same symptoms as in his own father similarly afflicted, excluded); 1901, Sargent *v.* Burton, 74 Vt. 24, 52 Atl. 72; 1919, Clogston's Estate, 93 Vt. 46, 106 Atl. 594 (certain testimony held inadmissible, as based on improper data).

Virginia: Lay opinion is receivable: 1825, Burton *v.* Scott, 3 Rand. 404; 1847, Mercer *v.* Kelso's Adm'r, 4 Gratt. 118 (no question raised); 1870, Beverley *v.* Walden, 20 Gratt. 158 (same); 1878, Cheatham *v.* Hatcher, 30 Gratt. 63 (same); 1887, Fishburne *v.* Ferguson's Heirs, 84 Va. 106, 4 S. E. 575; 1894, Whitelaws *v.* Sims, 90 Va. 588, 19 S. E. 113; 1920, McComb *v.* Farrow, 128 Va. 455, 104

2. Value

§ 1940. **History.** Our orthodox common law was not troubled with any doubts concerning value-testimony as tainted by the vice of opinion.[1] It recognized fully that value-testimony necessarily involved "opinion," by which was meant a mere estimate, as distinguished from a knowing through the senses. But it also recognized that value-testimony had to be employed, and it was precisely one of the typical accepted instances (*ante*, § 1917) in which "opinion" was received. When the new sense of "opinion" (as "inference") came in (*ante*, § 1917), and received its peculiar American development, it was then seen that the fundamentals of faith were brought thereby into the dark shadow of doubt, and that the question of the propriety of value-testimony had to be faced.

But here are to be noted several stages of thought. (1) In a New York ruling of 1840 the question is first found raised, under the old sense of "opinion"; *i. e.* such testimony was objected to and excluded because it involved mere speculation or guessing over what no witness could pretend to have sensible knowledge of.[2] The argument, as accepted in New York, did not exclude value-testimony absolutely; for the same judge admitted testimony as to the value of a dog while excluding it as to the value of business profits. Moreover, though there are still traces of it in New York rulings,[3] it never obtained acceptance elsewhere. Still, it served to throw doubt on value-testimony. (2) Meanwhile, the principle of the Opinion rule had already been invoked in New Hampshire to exclude value-testimony, and had effected the exclusion in that State; and the question, thus presented in two jurisdictions, was thenceforth raised all along the line. Why should a witness testify that the value of a piece of land was so much, when he could state its features sufficiently in detail and leave the jury to make their own inference? Fortunately, the futility of this argument was everywhere else seen; and, though the question was brought up and had to be settled in almost every other jurisdiction, it was settled in favor of receiving such testimony. This view was also afterward taken in New Hampshire (by legislation) and in New York. (3) But the unrest and doubt created in arguing

S. E. 812 (opinion to testator's sanity, admitted).

Washington: 1902, Higgins *v.* Nethery, 30 Wash. 239, 70 Pac. 489 (lay opinion receivable).

West Virginia: Lay opinion is receivable: 1877, Jarrett *v.* Jarrett, 11 W. Va. 584, 626; 1882, Nicholas *v.* Kershner, 20 W. Va. 255; 1888, Kerr *v.* Lunsford, 31 W. Va. 659, 680, 8 S. E. 493; 1892, State *v.* Maier, 36 W. Va. 757, 762, 15 S. E. 991, *semble;* 1912, Freeman *v.* Freeman, 71 W. Va. 303, 76 S. E. 657.

Wisconsin: In 1874, Burnham *v.* Mitchell, 34 Wis. 132, the opinion of a non-expert was admitted, with an implication that the witness' facts and reasons should accompany it; this subsequently became the rule; 1881, Yanke *v.* State, 51 Wis. 468, 8 N. W. 276; 1899, Crawford *v.* Christian, 102 Wis. 51, 78 N. W. 406 (excluded because not shown to have knowledge of facts); 1907, Duthey *v.* State, 131 Wis. 178, 111 N. W. 222 (proper form of question stated).

Wyoming: 1916, Flanders *v.* State, 24 Wyo. 81, 156 Pac. 39 (that the accused was "crazy," excluded).

§ 1940. [1] The question seems to have been once raised in England: 1849, Gauntlett *v.* Whitworth, 2 C. & K. 720 (whether certain nuisances depreciated house-values in a locality; admitted).

[2] In this aspect the objection has been dealt with elsewhere (*ante*, § 663).

[3] Noted *post*, § 1943, under New York.

the question has left its traces. All that can be said to have been conceded by universal assent is that the simple question of market value or of value in its ordinary form is not affected by the Opinion rule. For many forms of value-testimony (such as the amount of damage by tort or breach of contract) most Courts still have some doubt and disfavor, — the result of the general inclination to consider strictly and admit grudgingly every sort of inference of which the data can possibly be substituted for the jury. It is enough here to note that historically we should probably not be troubled with these doubts to-day if it had not been for the widespread doubt (now at rest) prevailing during an earlier generation over value-testimony pure and simple.

§ 1941. **Theory and Policy; in general.** The theory on which the Opinion rule is made to exclude value-testimony is, of course, that the witness can sufficiently detail to the jury the various data affecting the value, and the jury can then draw from his data their inference as to the value. As this theory has nowhere been defended except in New Hampshire, and even there with little attempt to expound the principle, no judicial exposition of it is available. The answer to it, namely, that the witness can *not* be expected to reproduce the data sufficiently and exactly to the jury, has been many times clearly expounded:

1857, SKINNER, J., in *Illinois C. R. Co.* v. *Van Horn*, 18 Ill. 259: "To describe to a jury a piece of ground, however minutely, with its supposed adaptations to use, its advantages and disadvantages, and demand of them, upon this information alone, a verdict as to its value would be merely farcical."

1870, DOE, J., in *State* v. *Pike*, 49 N. H. 422: "The exception introduced by Judge Green and Judge Harris in *Rochester* v. *Chester* was peculiar to this State; it seems never to have prevailed anywhere else in the whole world. Not only was it a local peculiarity; it was a troublesome and mischievous one. . . . It was unjust; it often resulted in excessive, often in insufficient damages. It was expensive and annoying; the parties were compelled to summon a greater number of witnesses than would have been necessary if their opinions could have been taken; and the process of obtaining from them such testimony as they were allowed to give, and excluding their opinions, was difficult and tedious. It was inconsistent with itself; for . . . the witness who was not permitted to say that he thought a certain horse was worth more or less than a thousand dollars was permitted to give his opinion of the age, size, weight, form, speed, strength, endurance, health, appetite, docility, timidity, and general disposition of the horse."

1897, CALDWELL, J., in *St. Louis I. M. & S. R. Co.* v. *Edwards*, 24 C. C. A. 300, 78 Fed. 745 (admitting testimony as to the damage to cattle): "Nor is it any answer to say that the witness can tell the jury how long the cattle were in the cars, or how they looked and acted, and that from that imperfect information the jury may arrive at a correct conclusion as to the damage. The poverty of the English language makes it absolutely impossible for a witness to present to the minds of the jurors the appearance of cattle, and what that appearance denotes, as it is presented to his practised and experienced eyes. The experience of the witness and the appearance of the cattle cannot be photographed on the minds of the jurors. The knowledge of the condition of these cattle, and how that condition affected their value, must of necessity have existed in the mind of the witness who had had such a large and extended experience in shipping cattle with far greater clearness and certainty than it could have been communicated to the minds of the jurors

by any statement he might have made of what he saw merely, however clear and lucid such statement might have been. It is obvious that, if witnesses were to be permitted to state to a jury those facts only of which they have absolute knowledge, not only the range of inquiry, but the province of remedial justice, would be very materially contracted."

§ 1942. **Same: Land taken by Eminent Domain.** So far as principle is concerned, the only other question that needs examination is that raised by the rulings of various Courts admitting testimony to the value of a given piece of land — *e. g.* where it has been sold or taken by eminent domain — but rejecting it when it deals with the total amount of the *loss or benefit to the estate of which a part has been taken* by eminent domain. Here three observations may be made. (1) Where, as in some jurisdictions, it has been a disputed point whether the right to compensation excludes or includes a set-off or diminution to the extent of benefit received, then of course we are not dealing with a question of Evidence, but a question of substantive law. It is assumed here that the law of the State allows the benefit to be deducted. (2) The Courts have probably been moved by the circumstance that the question asked of the witness is in substance the final issue for the jury, *i. e.* What was the total amount of damage received? or, Was there on the whole a benefit or a loss? This is not in form a value-inquiry; [illegible] effect it is simply an inquiry as to the value by which the compla[illegible] estate has been diminished. Moreover, though it is usually the exact [illegible] mate issue on which the jury must return a finding, that is no objection on principle to the testimony (*ante*, § 1921). (3) A few Courts have noticed the inconsistency of allowing the witness to speak of land-values generally while rejecting his statement as to the total damage done by a forcible taking.[1] That inconsistency comes prominently to view where (as in some jurisdictions) the witness is allowed to state the value of the piece of land taken and then the value of the whole estate before the taking and after the taking, but it is not allowed to state the net value of loss or benefit. That there is any inconsistency is denied in the following way:

1883, ELLIOTT, J., in *Yost* v. *Conroy*, 92 Ind. 465: "There is, however, not the slightest conflict between the two propositions stated. . . . Many things enter into the estimate of benefits and damages besides the value of the land taken and the value of the residue with and without the improvement; so that, in expressing an opinion as to the value, a witness does not give an opinion as to the amount of the benefit or damages; he does no more than furnish evidence upon one of the elements of the estimate."

It seems impossible, however, to escape the argument that there is in truth an inconsistency:

1869, GRAY, J., in *Swan* v. *Middlesex*, 101 Mass. 178: "The witnesses, being competent to testify to the value of the land affected before and after the alteration of the highway, might testify to the simple question of arithmetic which of those two values was the greater, — in other words, whether the petitioners' estate was benefited or injured."

1875, DANFORTH, J., in *Snow* v. *R. Co.*, 65 Me. 231: "The value of the amount of damage

§ 1942. [1] The rulings are placed with the others in the next section.

to property must necessarily be a matter of opinion, and the judgment of one well acquainted with its situation and character, its surroundings and facility of market, must be more satisfactory than any description without such judgment. It is true, this, like all oral testimony, may at times prove unreliable; but its value can be readily and satisfactorily tested by cross-examination. . . . The difference in value before and after the location would be a valid test of that damage, and it would seem to be immaterial whether the testimony was admitted in this form or in answer to a direct question as to the amount of the damage. In either case it must come as an opinion, and in either case it is a question of value."

§ 1943. **State of the Law in the Various Jurisdictions: (1) Property-Value.** In all jurisdictions testimony to the value of a specific piece of property is now received, as not obnoxious to the Opinion rule. In a few jurisdictions the testimony has been received without raising the question.[1] Nevertheless, it may be said that no Court would reject value-testimony absolutely and in the ordinary form. It is for the variations from simple value-testimony that doubt and exclusion is found.[2]

§ 1943. [1] Compare the rulings cited *ante*, §§ 711–720 (testimonial qualifications for value-witnesses).

[2] *Federal:* 1813, Den *v.* Wright, 1 Pet. 73 (value of land; admitted); 1843, Alfonso *v.* U. S., 2 Story 426 (value in general; admitted); 1886, Lehigh V. C. Co. *v.* Chicago, 26 Fed. 419 (damage by taking; admitted); 1887, Laflin *v.* R. Co., 33 Fed. 422 (same); 1890, Montana R. Co. *v.* Warren, 137 U. S. 352, 11 Sup. 96 (damage by taking; admitted); 1896, The Conqueror, 166 U. S. 110, 131, 17 Sup. 510 (use of a yacht; admitted); 1897, St. Louis I. M. & S. R. Co. *v.* Edwards, 24 C. C. A. 300, 78 Fed. 745 (damage to cattle in shipment, admitted; quoted *supra*, § 1941);
Alabama: 1851, Montgomery & W. P. R. Co. *v.* Varner, 19 Ala. 186 (damage under eminent-domain taking; excluded); 1868, Alabama & F. R. Co. *v.* Burkett, 42 Ala. 87 (same); 1878 Haralson *v.* Campbell, 63 Ala. 277 (same); 1905, Alabama C. C. & I. Co. *v.* Turner, 145 Ala. 639, 39 So. 603 (mill site); 1906, Central of Ga. R. Co. *v.* Keyton, 148 Ala. 675, 41 So. 918 ("State if your property was damaged by the overflow," held improper, but "State the effect of the overflow on your houses and lot," held proper; if Justice is to be regarded as a machine for splitting hairs, then the machine works very delicately in this State); 1921, Burnett & Bean *v.* Miller, 205 Ala. 606, 88 So. 871 (breach of contract to alter a house; difference between value as it is and value as it would have been, allowed);
Arkansas: 1884, Texas & St. L. R. Co. *v.* Kirby, 44 Ark. 106 (damage under eminent domain; admitted); 1900, St. Louis, I. M. & S. R. Co. *v.* Ayres, 67 Ark. 371, 55 S. W. 159, *semble* (witness may state value before and after, and then total damages); 1902, St. Louis I. M. & S. R. Co. *v.* Jacobs, 70 Ark. 401, 68 S. W. 248 (damage to cattle, excluded); 1903, St. Louis I. M. & S. R. Co. *v.* Hall, 71 Ark. 302, 74 S. W. 293 (total damage to land by fire, admitted);
Florida: 1887, Sullivan *v.* Lear, 23 Fla. 473, 2 So. 846 (property-value; admitted);
Georgia: Rev. C. 1910, § 5875 (testimony to "market value," admissible); 1873, Brunswick & A. R. Co. *v.* McLaren, 47 Ga. 548 (damage under eminent domain; excluded); 1883, Cincinnati & G. R. Co. *v.* Mims, 71 Ga. 244 (same; admitted); 1909, Miller *v.* Luckey, 132 Ga. 581, 64 S. E. 658 (land-trespass; value before and value after must be stated);
Idaho: 1919, Kirk *v.* Madareita, 32 Ida. 403, 184 Pac. 225 (lump-sum estimates of damage to pasturage, excluded);
Illinois: the value of land may be stated: 1864, Ottawa Gaslight Co. *v.* Graham, 35 Ill. 349; 1870, Hayes *v.* R. Co., 54 Ill. 376; 1871 Cooper *v.* Randall, 59 Ill. 320; 1875, Keithsburg & E. R. Co. *v.* Henry, 79 Ill. 294; so also of damage under eminent-domain taking: 1864, Ottawa Gaslight Co. *v.* Graham, 35 Ill. 349; 1870, Hayes *v.* R. Co., 54 Ill. 376; 1871, Cooper *v.* Randall, 59 Ill. 320; 1872, Lafayette B. & M. R. Co. *v.* Winslow, 66 Ill. 219; 1874 Galena & S. W. R. Co. *v.* Haslam, 73 Ill. 497; 1877, Hyde Park *v.* Dunham, 85 Ill. 578; 1881 Green *v.* Chicago, 97 Ill. 372; 1885, Spear *v.* Drainage Com'rs, 113 Ill. 634; 1896, Chicago P. & M. R. Co. *v.* Mitchell, 159 Ill. 406; 42 N. E. 973 (*contra:* 1873, Chicago & A. R. Co. *v.* R. Co., 67 Ill. 145); and the value of land before taking and after taking: 1895, Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567; whether a certain fact would affect the value is admissible: 1870, Hayes *v.* R. Co., 54 Ill. 375; 1911, Springfield & N. E. Traction Co. *v.* Warrick, 249 Ill. 470, 94 N. E. 933 (railroad fence; opinion that the amount of damage to plaintiff by reason of stock trespass would be $10 a year, etc., held improper);

Indiana: value-testimony in general is admissible: 1883, Yost *v.* Conroy, 92 Ind. 464; in particular, the value of property: 1858, Evansville R. Co. *v.* Fitzpatrick, 10 Ind. 122; 1860, Sinclair *v.* Roush, 14 Ind. 451; 1862, Crouse *v.* Holman, 19 Ind. 38; the value of personal property: 1870, Kirkpatrick *v.* Snyder, 33 Ind. 171; including that of land: 1875, Logansport *v.* McMillen, 49 Ind. 494; 1876, Holten *v.* Board, 55 Ind. 199; 1888, Johnson *v.* Culver, 116 Ind. 289, 19 N. E. 129; but not of damage under eminent-domain taking: 1858, Evansville R. Co. *v.* Fitzpatrick, 10 Ind. 122; 1860, Sinclair *v.* Rush, 14 Ind.451; 1862, New Albany & S. R. Co. *v.* Huff, 19 Ind. 318; 1875, Logansport *v.* McMillen, 49 Ind. 494; 1877, Baltimore R. Co. *v.* Johnson, 59 Ind. 247, 480; 1877, Baltimore P. & C. R. Co. *v.* Stoner, 59 Ind. 579; 1878, Noah *v.* Angle, 63 Ind. 425; 1882, Hagaman *v.* Moore, 84 Ind. 501 (benefit only); 1883, Yost *v.* Conroy, 92 Ind. 465 (examining the preceding rulings; quoted *supra*, § 1942); yet the value before the taking and after the taking may be stated: 1870, Ferguson *v.* Stafford, 33 Ind. 164; 1875, Frankfort & K. R. Co. *v.* Windsor, 51 Ind. 239 (value of two halves as cut by railroad); 1882, Indianapolis D. & S. R. Co. *v.* Pugh, 85 Ind. 281; 1906, Schmoe *v.* Cotton, 167 Ind. 364, 79 N. E. 184 (moreover "a judgment should not be reversed merely because a part or all of the witnesses have stated the damages, instead of the value, where the damages depend wholly on the value before and after the injury"); furthermore, while damage to personalty may be estimated, if the data also are given: 1870, Kirkpatrick *v.* Snyder, *supra;* yet land damage caused by unskilful sowing may not be: 1871, Bissell *v.* Wert, 35 Ind. 54;

Iowa: the value of personal property may be stated: 1865, Anson *v.* Dwight, 18 Ia. 244; 1885, Tubbs *v.* Garrison, 68 Ia. 48, 25 N. W. 921; as well as the value of land; but the damage done to personalty may not be stated: 1853, Whitmore *v.* Bowman, 4 G. Greene 149; 1865, Anson *v.* Dwight, 18 Ia. 244, *semble;* nor the damage to land under eminent-domain taking: 1861, Dalzell *v.* Davenport, 12 Ia. 441; 1865, Prosser *v.* Wapello Co., 18 Ia. 330; 1872, Cannon *v.* Iowa City, 34 Ia. 204; 1870, Russell *v.* Burlington, 30 Ia. 265; 1873, Harrison *v.* R. Co., 36 Ia. 325; 1887, Lewis *v.* Ins. Co., 71 Ia. 97, 32 N. W. 190; though the value before the taking and after the taking may be stated: 1855, Sater *v.* R. Co., 1 Ia. (Cole's ed.) 394; 1885, Henry *v.* R. Co., 2 Ia. 308; 1861, Dalzell *v.* Davenport, 12 Ia. 440; 1905, Parrott *v.* Chicago G. W. R. Co., 127 Ia. 419, 103 N. W. 352 (damage under eminent-domain taking, excluded); 1907, Iowa-Minn. Land Co. *v.* Conner, 136 Ia. 674, 112 N. W. 820 (contract for sale of land);

Kansas: the value of land in general may be stated: 1888, St. Louis K. & A. R. Co. *v.* Chapman, 38 Kan. 310, 16 Pac. 695; but not the damage by eminent-domain taking: 1878, Roberts *v.* Brown Co., 21 Kan. 253; 1885, Parsons Water Co. *v.* Knapp, 33 Kan. 756, 7 Pac. 568; 1888, Wichita & W. R. Co. *v.* Kuhn, 38 Kan. 676, 17 Pac. 322: 1889, Leroy & W. R. Co. *v.* Ross, 40 Kan. 605, 20 Pac. 197; 1889, Ottawa O. C. & C. G. R. Co. *v.* Adolph, 41 Kan. 602, 21 Pac. 643; nor even the diminution of value after the taking: 1888, Wichita & W. R. Co. *v.* Kuhn, 38 Kan. 676, 17 Pac. 322; 1889, Leroy & W. R. Co. *v.* Ross, 40 Kan. 605, 20 Pac. 197; yet the value before the taking and after the taking may be stated: 1880, Kansas Cent. R. Co. *v.* Allen, 24 Kan. 34; 1882, Leavenworth T. & S. W. R. Co. *v.* Paul, 28 Kan. 820;

Kentucky: 1901, Illinois C. R. Co. *v.* Smith, 110 Ky. 203, 61 S. W. 2 (value of damage by eminent domain; excluded);

Maine: the value of personalty may be stated: 1866, Haskell *v.* Mitchell, 53 Me. 470; 1870, Whiteley *v.* China, 61 Me. 202; 1878, Washington Ice Co. *v.* Webster, 68 Me. 466; as well as the value of realty: 1875, Snow *v.* R. Co., 65 Me. 230 (land); 1839, Tebbetts *v.* Haskins, 16 Me. 285 (cost of a house); in the following case the value of mills was not allowed to be stated, as being on the facts a matter of common knowledge: 1860, Clark *v.* Walter Power Co., 52 Me. 77;

Maryland: 1905, Baltimore B. R. Co. *v.* Sattler, 100 Md. 306, 59 Atl. 654 (smoke-nuisance; expert testimony to the amount of damage and the diminution of land value, excluded); 1906, Western Union T. Co. *v.* Ring, 102 Md. 677, 62 Atl. 801 (value of trees cut, excluded); 1917, Western Union Tel. Co. *v.* Rasche, 130 Md 126, 99 Atl. 991 (value before and after a trespass, allowed);

Massachusetts: value may be stated, of realty as well as of personalty; that certain circumstances would or would not affect value may of course also be stated: 1873, Miller *v.* Smith, 112 Mass. 476 (whether cribbing, etc., affects the value of horses); 1878, Chandler *v.* J. P. Aqueduct, 125 Mass. 551 (for what purpose land was suited); moreover, the damage done by eminent-domain taking or otherwise may be stated: 1847, Vandine *v.* Burpee, 13 Metc. 288 (damage to garden and nursery); 1847, Wyman *v.* R. Co., 13 Metc. 326; 1851, Walker *v.* Boston, 8 Cush. 279; 1853, Dwight *v.* Co. Com'rs, 11 Cush. 203; 1854, Shaw *v.* Charlestown, 2 Gray 109; 1863, Shattuck *v.* Stoneham R. Co., 6 All. 117; 1869, Swan *v.* Middlesex, 101 Mass. 177; 1874, Tucker *v.* R. Co., 118 Mass. 547; 1893, Taft *v.* Com., 158 Mass. 526, 529, 546, 33 N. E. 1046; 1896, Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029; on this point compare the cases cited *ante*, § 714, under Massachusetts, many of which involved eminent-domain taking; it has been ruled that the value of a reversion subject to the public easement could not be stated: 1861, Boston & W. R. Co. *v.* O. C. & F. R. R. Co., 3 All. 142;

Michigan: the amount of damage in eminent-

domain taking may be stated: 1886, Grand Rapids *v.* R. Co., 58 Mich. 647, 26 N. W. 159; 1905, Withey *v.* Pere Marquette R. Co., 141 Mich. 412, 104 N. W. 773 (personalty injured in a railroad collision; testimony to the damage, allowed); and cases cited *ante*, § 716;

Minnesota: not only may the value before the taking and after the taking be stated: 1872, Simmons *v.* R. Co., 18 Minn. 189 (explaining Winona & S. P. R. Co. *v.* Denman, 10 Minn. 267); 1872, Colvill *v.* R. Co., 19 Minn. 285; 1873, St. Paul & S. C. R. Co. *v.* Murphy, 19 Minn. 510; 1889, Emmons *v.* R. Co., 41 Minn. 133, 42 N. W. 789; but the total damage by the taking may be stated: cases *supra*, and these: 1873, Lehmicke *v.* R. Co., 19 Minn. 481; 1882, Leber *v.* R. Co., 29 Minn. 261, 13 N. W. 31; 1883, Sherman *v.* R. Co., 30 Minn. 228, 15 N. W. 239; 1908, Mandery *v.* Mississippi & R. R. B. Co., 105 Minn. 3, 116 N. W. 1027 ("What was the damage, or how much less was the land worth, etc.?" allowed); so, for personalty, the diminution of value after being repaired may be stated: 1883, Johnston Harvester Co. *v.* Clark, 31 Minn. 167, 17 N. W. 111; in an earlier case, which would hardly be followed to-day, the damage to crops was not allowed to be stated: 1862, Sowers *v.* Dukes, 8 Minn. 25; the following case probably supersedes this: 1898, Robbins *v.* Willmar, 71 Minn. 493, 73 N. W. 1097 (amount of damage to property by water, admitted);

Mississippi: 1866, Whitfield *v.* Whitfield, 40 Miss. 357 (value of personalty, admitted); 1900, Board *v.* Hendricks, 77 Miss. 483, 27 So. 613 (land value, excluded, for reasons obscurely stated);

Missouri: the value may be stated of personalty: 1873, Cantling *v.* R. Co., 54 Mo. 391; as well as of realty: 1868, Thomas *v.* Mallinckrodt, 43 Mo. 65; and the damage by eminent-domain taking may be stated: 1876, Tate *v.* R. Co., 64 Mo. 153; 1886, Springfield & S. R. Co. *v.* Calkins, 90 Mo. 543, 3 S. W. 82; 1888, St. Louis *v.* Ranken, 95 Mo. 192, 8 S. W. 249; 1896, Union Elev. Co. *v.* R. Co., 135 Mo. 353, 36 S. W. 1071; but apparently not of damage done to personalty: 1899, Sallee *v.* St. Louis, 152 Mo. 615, 54 S. W. 463 ("amount of damage done to the wagon and harness," excluded); 1906, Southern Mo. & A. R. Co. *v.* Woodard, 193 Mo. 656, 92 S. W. 470;

Montana: 1905, Watson *v.* Colusa P. M. & S. Co., 31 Mont. 513, 79 Pac. 14 (land injured by smelting works; value before and after, admitted; opinion obscure);

Nebraska: the value of personalty may be stated: 1882, Keith *v.* Tilford, 12 Nebr. 275, 11 N. W. 315; 1894, Western H. I. Co. *v.* Richardson, 40 Nebr. 1, 9, 58 N. W. 597 (the lump value of a stock of goods); as well as that of realty: cases cited *infra;* it was originally held that, in eminent-domain taking, not even the value after taking could be stated: 1881, Fremont E. & M. V. R. Co. *v.* Whalen, 11 Nebr. 591, 10 N. W. 491; but this was overruled, and now the value before the taking and after the taking may be stated: 1882, Republican V. R. Co. *v.* Arnold, 13 Nebr. 487, 14 N. W. 478; 1883, Burlington & M. R. Co. *v.* Schluntz, 14 Nebr. 422, 16 N. W. 439; 1888, Northeastern N. R. Co. *v.* Frazier, 25 Nebr. 55, 40 N. W. 609; though the total damage may not be stated, and this is applied also to damage caused by a trespass: 1883, Burlington & M. R. Co. *v.* Schluntz, 14 Nebr. 423, 16 N. W. 439; Burlington & M. R. Co. *v.* Beebe, 14 Nebr. 472, 16 N. W. 747; 1888, Fremont E. & M. V. R. Co. *v.* Marley, 25 Nebr. 145, 40 N. W. 948; 1902, Read *v.* Valley L. & C. Co., 66 Nebr. 423, 92 N. W. 622 (the amount of damage that would have been suffered if the defendant had not acted as charged, excluded); 1906, McCook *v.* McAdams, 76 Nebr. 1, 106 N. W. 988 (damage by flooding);

Nevada: 1915, McLeod *v.* Miller & Lux, 40 Nev. 447, 153 Pac. 566, 167 Pac. 27 (flowage; value before and after allowed, but not value of damage);

New Hampshire: in this State the radical position was early taken of refusing to allow the value of anything to be directly stated: 1826, Rochester *v.* Chester, 3 N. H. 365 (Green, J., "there is perhaps no species of property in the community, of the value of which the jury are better acquainted, than houses and lands"); 1833, Peterboro *v.* Jeffrey, 6 N. H. 463, Upham, J.; 1844, Robertson *v.* Stark, 15 N. H. 113, Parker, C. J.; then came two decisions limiting this doctrine: 1839, Whipple *v.* Whipple, 10 N. H. 131 (horses); 1840, Beard *v.* Kirk, 11 N. H. 401 (sleds); but the former position was again resumed: 1850, Hoitt *v.* Moulton, 21 N. H. 591; 1851, Concord Railroad *v.* Greely, 23 N. H. 243; 1853, Marshall *v.* Fire Ins. Co., 27 N. H. 162; 1864, Low *v.* Railroad, 45 N. H. 381; finally, this unfortunate heterodoxy was abolished by statute: Pub. St. 1891, c. 224, § 22 (opinions as to "value of any real estate, goods, or chattels," are admissible from qualified witnesses);

New Jersey: 1873, Haulenbeck *v.* Cronkright, 23 N. J. Eq. 413 (value of realty; admissible);

New York: in this State there came first a line of rulings favorable on the whole to the reception of value-testimony; 1840, Brill *v.* Flagler, 23 Wend. 356 (dogs; admitted); 1840, Mayor *v.* Pentz, 24 Wend. 675, *semble* (in general; admitted); 1842, Dunham *v.* Simmons, 3 Hill 609 (damage to a horse; excluded); 1843 Paige *v.* Kelley, 5 Hill 604 (cost of raising a sunken boat; excluded); 1847, Lamoure *v.* Caryl, 4 Denio 373 (services admitted); 1847, Howard *v.* Ins. Co., 4 Denio 507 (value of stock of goods; admitted, distinguishing, but not satisfactorily, Phenix Fire Ins. Co. *v.* Phillip, 13 Wend. 81); 1847, Joy *v.* Hopkins, 5 Wend. 84 (personalty; admitted); 1849, Morehouse *v.* Mathews, 2 N. Y. 514

(damage to animals; excluded); during the same period, however, there were rulings (Norman *v.* Wells being the leading one) excluding value-statements, as already mentioned (*ante*, § 1940), on the theory that they involved mere speculation or guessing; these rulings are noted *ante*, § 663; the law being in this state of uncertainty, the decision in Clark *v.* Baird, 1853, 9 N. Y. 185, set the question at rest, from the point of view of both theories, by holding value-statements in general proper; and this has been subsequently adhered to: 1866, Robertson *v.* Knapp, 35 N. Y. 92; 1891, Roberts *v.* R. Co., 128 N. Y. 465, 28 N. E. 486; disposing of the apparent contrary ruling in Avery *v.* R. Co., 1890, 121 N. Y. 31, 24 N. E. 20; but it may be supposed that the rulings of Dunham *v.* Simmons and Morehouse *v.* Mathews, *supra*, as to damage to personalty, would still be followed; moreover, the doctrine of Indiana and a few other jurisdictions, noticed above, that in taking of land by eminent domain statements as to the whole amount of damage are not receivable, though statements of the value before the taking and after the taking are receivable, has been adopted in New York; 1891, Roberts *v.* R. Co., 128 N. Y. 455, 28 N. E. 486; 1893, Sixth Av. R. Co. *v.* El. R. Co., 138 N. Y. 548, 552, 34 N. E. 400; however in Solomon *v.* R. Co., 1886, 103 N. Y. 436, 9 N. E. 430, there had been an effort to hark back to the doctrine of Norman *v.* Wells, *supra*, by saying that a speculative estimate of value would not always be admissible; and a little later this is found taking definite shape in rulings that an estimate of what the value of an estate would now have been had the right of taking not been exercised would be improper; here, however, the Opinion rule seems to be the subordinate one, and the main consideration is that the statement is a mere speculation or guess, *i. e.* an employment of the old doctrine above alluded to; the dissenting opinion of Gray, J., in the Roberts case sufficiently shows the fallacy of this view; it seems, however, to be still the law: 1889, McGean *v.* R. Co., 117 N. Y. 219, 22 N. E. 957; 1891, Roberts *v.* R. Co. 128 N. Y. 465, 28 N. E. 486; 1892, Becker *v.* R. Co., 131 N. Y. 513, 30 N. E. 499; 1907, Shaw *v.* N. Y. Elev. R. Co., 187 N. Y. 186, 79 N. E. 984 (rule of Roberts *v.* R. Co. held not to exclude certain opinions of value);

North Carolina: 1908, Wade *v.* Carolina T. & T. Co., 147 N. C. 219, 60 S. E. 987 (decrease in land-value by telegraph structure, allowed);

North Dakota: 1897, Anderson *v.* Bank, 6 N. D. 497, 72 N. W. 916 (value of a promissory note; expert testimony excluded);

Ohio: a statement as to the damage by eminent-domain taking is not receivable: 1855, Atlantic & G. W. R. Co. *v.* Campbell, 4 Oh. St. 585; 1856, Cleveland & P. R. Co. *v.* Ball, 5 Oh. St. 573; yet the value before the taking and after the taking may be stated: Atlantic & G. W. R. Co. *v.* Campbell, *supra*, *semble*; C. & P. R. Co. *v.* Ball, *supra*;

Oklahoma: 1895, Coyle *v.* Baum, 3 Okl. 695, 41 Pac. 389 (personalty; value before and after injury may be stated); 1903, Tootle *v.* Kent, 12 Okl. 674, 73 Pac. 310 (total damage to a stock of goods converted, excluded);

Oregon: 1882, Portland *v.* Kamm, 10 Or. 381 (damage by eminent-domain taking; admitted); 1904, Pacific L. S. Co. *v.* Murray, 45 Or. 103, 76 Pac. 1079 (trespass by sheep; amount of damages, excluded; citing prior cases in this jurisdiction); 1913, Portland *v.* Tigard, 64 Or. 404, 129 Pac. 755 (street benefits; expert testimony to the amount of benefit and damage allowed); 1918, Boyd *v.* Grove, 89 Or. 80, 173 Pac. 310 (trespass by sheep; value of land before and after the trespass, admitted, but not "categorically the quantum of damages");

Pennsylvania: the value of personalty may be stated: 1840, Clark *v.* Spence, 10 Watts 336; 1843, Bingham *v.* Rogers, 6 W. & S. 501; 1845, Whitesell *v.* Crane, 8 Pa. 371; 1846, McGill *v.* Rowland, 2 Pa. St. 452; 1859, Mish *v.* Wood, 34 Pa. 452; 1875, Adams Expr. Co. *v.* Schlessinger, 75 Pa. 248, 256; as well as the value of realty: 1826, Kellogg *v.* Krauser, 14 S. & R. 141; 1834, Ley *v.* Huber, 3 Watts 368; 1859, Searle *v.* R. Co., 33 Pa. 63; 1861, East Pa. R. Co. *v.* Hiester, 40 Pa. 55; 1862, Brown *v.* Corey, 43 Pa. 495, 506; 1864, East Pa. R. Co. *v.* Hottenstine, 47 Pa. 30; 1865, Pennsylvania R. Co. *v.* Henderson, 51 Pa. 321; 1869, Delaware L. & W. R. Co. *v.* Burson, 61 Pa. 369; 1873, Pittsburgh V. & C. R. Co. *v.* Rose, 74 Pa. 369; 1876, Pennsylvania & N. Y. R. Co. *v.* Bunnell, 81 Pa. 426; 1886, Pittsburgh V. & C. R. Co. *v.* Vance, 115 Pa. 332, 8 Atl. 764; furthermore, in eminent-domain taking, the value before and after the taking may be stated: 1862, Brown *v.* Corey, 43 Pa. 495, 506; 1864, East Pa. R. Co. *v.* Hottenstine, 47 Pa. 30; 1876, Pennsylvania & N. Y. R. Co. *v.* Bunnell, 81 Pa. 426; as well as the total damage: 1867, Pennsylvania R. Co. *v.* Bruner, 55 Pa. 319, 321, *semble;* 1871, White Deer Creek Impr. Co. *v.* Sassaman, 67 Pa. 420; 1896, Lee *v.* Water Co., 176 Pa. 223, 35 Atl. 184; as to eminent-domain taking: *Contra, semble:* 1908, Byrne *v.* Cambria & C. R. Co., 219 Pa. 217, 68 Atl. 672; but the statute of 1915, April 21, Dig. 1920, § 2186, restored the original rule;

Rhode Island: at first the damage by eminent-domain taking was allowed to be stated, though by experts only: 1856, Buffum *v.* R. Co., 4 R. I. 223; 1860, Howard *v.* Providence, 6 R. I. 514; but in Tingley *v.* Providence, 1867, 8 R. I. 499, this practice was abandoned; and while the witness was allowed to state market values before and after, he was prohibited from stating the fact or the amount of total damage exceeding benefit; followed in Brown *v.* R. Co., 1878, 12 R. I. 238;

South Carolina: 1901, Dent *v.* R. Co., 61 S. C. 329, 39 S. E. 527 (damage under eminent domain; admitted);

South Dakota: 1900, Schuler *v.* Board, 12 S. D.

§ 1944. **State of the Law in the Various Jurisdictions: (2) Other Values (Services, Personal Injuries, Breaches of Contract, etc.).** In dealing with other values, the Courts are apt too often to see some violation of the Opinion rule in the most straightforward and practical questions.[1] Of the remaining

460, 81 N. W. 890 (total damage by eminent domain; allowed);
Tennessee: 1904, Wray v. Knoxville L. F. & J. R. Co., 113 Tenn. 544, 82 S. W. 471 (damage by taking land, allowed; settling a prior conflict of rulings);
Texas: statements as to land-value are receivable: 1856, Haas v. Choussard, 17 Tex. 592 (mill-site);
Vermont: 1858, Laurent v. Vaughn, 30 Vt. 94 (personalty; admitted); 1860, Crane v. Northfield, 32 Vt. 126 (same);
Washington: 1892, Seattle & M. R. Co. v. Gilchrist, 4 Wash. 509, 513, 30 Pac. 738 (damage to land by taking; allowable); 1894, Ingram v. Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34 (value of realty before and after injury, and value of personalty destroyed; allowed); 1905, Johnson v. Tacoma, 41 Wash. 51, 82 Pac. 1092 (value of benefits to realty; S. & M. R. Co. v. Gilchrist, followed); 1917, King County v. Joyce, 96 Wash. 520, 165 Pac. 399 (condemnation of land; that benefits would out-weigh damage, allowed);
West Virginia: 1884, Railroad Co. v. Foreman, 24 W. Va. 673 (damage by eminent-domain taking; admitted); 1896, Blair v. Charleston, 43 W. Va. 62, 26 S. E. 341 (value after taking; admitted); 1900, Kay v. R. Co., 47 W. Va. 467, 35 S. E. 973 (value before and after is alone allowable);
Wisconsin: the value of property may be stated: 1867, Noonan v. Ilsley, 22 Wis. 35; but as to damage or benefit done to land, there has been some fluctuation; there first occur the following favorable rulings: 1851, Milwaukee & M. R. Co. v. Eble, 3 Pinney 334 (whether and how a railroad would increase or diminish land value); 1854, Cole v. Clarke, 3 Wis. 327 (on a 'quantum meruit,' whether plaintiff's work had on the whole benefited defendant's premises); but, as regard to damage by land-taking or highway-improvements, a statement of the whole amount is now excluded: 1867, Farrand v. R. Co., 21 Wis. 435; 1872, Church v. Milwaukee, 31 Wis. 520; but the value before the taking and after the taking may be stated: 1869, Snyder v. R. Co., 25 Wis. 65; 1875, Hutchinson v. R. Co., 37 Wis. 610; 1883, Neilson v. R. Co., 58 Wis. 520, 17 N. W. 310; there is also the following ruling: 1883, Watson v. R. Co., 57 Wis. 351, 15 N. W. 468 (probable cost of land-improvements; excluded).

§ 1944. [1] On all these topics, compare also the rulings cited *ante*, §§ 715, 716, which sometimes imply a rule on the present subject:

SERVICES: the testimony is admitted in the following cases, except as otherwise noted: 1886, Dushane v. Benedict, 120 U. S. 647, 7 Sup. 696 (damage by loss of services; excluded because not accompanied by facts); 1858, Butler v. King, 10 Cal. 341 (excluded); 1908, Ferry v. Henderson, 32 D. C. App. 41 (building superintendent's services); 1875, Covey v. Campbell, 52 Ind. 158; 1880, Johnson v. Thompson, 72 Ind. 170; 1898, Clark v. Elsworth, 104 Ia. 442, 73 N. W. 1023 (attorney's services); 1903, Croft v. Chicago R. I. & P. R. Co., 134 Ia. 411, 109 N. W. 723 (wife's services); 1907, Morehead's Trustee v. Anderson, 125 Ky. 77, 100 S. W. 340 (attorney's services); 1897, Fowler v. Fowler, 111 Mich. 676, 70 N. W. 336 (services on a farm); 1870, Allis v. Day, 14 Minn. 518 (attorney's services); 1901, Calhoun v. Akeley, 82 Minn. 354, 85 N. W. 170 (legal services); 1887, Hurt v. R. Co., 94 Mo. 260, 7 S. W. 1 (damage by loss of service, excluded); 1899, Sprague v. Sea, 152 Mo. 327, 53 S. W. 1074 (value of housekeeping services); 1885, Alt v. Fig Syrup Co., 19 Nev. 119, 7 Pac. 174; 1902, Harris v. Smith, 71 N. H. 330, 52 Atl. 854 (hauling wood); 1876, Williams v. Brown, 28 Oh. St. 551 (attorney's services); 1898, Ward v. R. Co., 53 S. C. 10, 30 S. E. 594 (services of a physician); 1898, Camp v. Ristine, 101 Tenn. 534, 47 S. W. 1098 (same); 1901, Watriss v. Trendall, 74 Vt. 54, 52 Atl. 118 (value of boarding-services); 1896, Turner v. R. Co., 15 Wash. 213, 46 Pac. 243, *semble* (attorney's time, excluded).

PERSONAL INJURIES: in the following cases, an estimate of the damage done by a personal injury is excluded, though sometimes the ruling is applied only to the plaintiff's own estimate: 1886, Little Rock M. R. & T. R. Co. v. Haynes, 47 Ark. 500, 1 S. W. 774 (plaintiff himself); 1877, Central R. & B. Co. v. Kelly, 58 Ga. 110; 1880, Thomas v. Hamilton, 71 Ind. 277; 1870, Tefft v. Wilcox, 6 Kan. 55; 1856, Wilcox v. Leake, 11 La. An. 179; 1908, Cincinnati Traction Co. v. Stephens, 75 Oh. St. 171, 79 N. E. 235 (father's opinion of value of child's services, excluded); 1903, Tenney v. Rapid City, 17 S. D. 283, 96 N. W. 96; 1888, Bain v. Cushman, 60 Vt. 343, 15 Atl. 171 (plaintiff himself); 1903, DeWald v. Ingle, 31 Wash. 616, 72 Pac. 469. *Contra:* 1905, Roundtree v. Charleston & W. C. R. Co., 72 S. C. 474, 52 S. E. 231 (plaintiff allowed to testify to the money amount of injury to her health).

CONTRACT'S NON-PERFORMANCE: 1914, Troy L. & C. Co. v. Boswell, 186 Ala. 409, 65 So. 141 (damage to house by non-performance of contract to supply gutters, excluded); 1847, Pierson v. Wallace, 7 Ark. 291 (damage by non-payment, excluded); 1902, Foote & D.

classes of values, nothing special need be said; except that in personal-injury cases the exclusion of opinions of value is perhaps reasonable, not because of the Opinion rule (which would insist on the grounds being substituted for the inference), but because there are no precise grounds, *i. e.* the injury is one not capable of being stated in terms of money, except so far as it involves the loss of income or support. Nevertheless, so long as the law gives compensation in the shape of money, there is an inconsistency in excluding estimates in money.

3. Insurance Risk (Increase or Materiality)

§ 1946. **Principle.** Whether expert testimony by professional insurance men is receivable to throw light upon the effect of a given circumstance in forming a "material risk" or in causing an "increase of risk," has been the subject of a controversy more than a hundred years old, — a controversy mainly due to the failure to distinguish the different issues which may in this or that case be involved, and impossible to settle until a clear appreciation of this difference of issues is gained.

The general question, whether a given circumstance has increased a risk, either represents or is closely connected with at least four distinct issues,

Co. *v.* Maloney, 115 Ga. 985, 42 S. E. 413 (damage to business by breach of contract, excluded); 1873, Linn *v.* Sigsbee, 67 Ill. 75 (trade lost by breach of contract restraining trade, excluded); 1867, Mitchell *v.* Allison, 29 Ind. 44 (damage by failure to perform, excluded); 1870, Ferguson *v.* Stafford, 33 Ind. 164 (amount gained if contract had been performed, allowed); 1882, Ætna L. Ins. Co. *v.* Nexsen, 84 Ind. 347 (value of life insurance policy, allowed); 1898, Ironton Land Co. *v.* Butchart, 73 Minn. 39, 75 N. W. 749 (value of land with a contract performed and unperformed allowed); 1872, Fitzgerald *v.* Hayward, 50 Mo. 521 (damage by non-performance, allowed); 1901, U. S. *v.* McCann, 40 Or. 13, 66 Pac. 274 (amount of damage from breach of contract, excluded); 1882, Jones *v.* Fuller, 19 S. C. 66, 70 (marriage-promise; estimate by persons knowing the circumstances of the parties, allowed); 1876, Waco Tap R. Co. *v.* Shirley, 45 Tex. 375 (probable cost of completing a contract allowed).

SUNDRIES: 1915, Dowagiac Mfg. Co., *v.* Minnesota M. Plow Co., 235 U. S. 641, 35 Sup. 221 (reasonable royalty, as measure of damages for infringement of patent); 1897, Arkansas M. R. Co. *v.* Griffith, 63 Ark. 491, 39 S. W. 550 (by a farmer, as to the cost of his living, admitted); 1904, McCrary *v.* Pritchard, 119 Ga. 876, 47 S. E. 341 (amount of damages by false representations, excluded); 1911, Jenkins *v.* Commercial Nat'l Bank, 19 Ida. 290, 113 Pac. 463 (wrongful foreclosure of a mortgage, excluded); 1909, Foster-Milburn Co. *v.* Chinn, 134 Ky. 424, 120 S. W. 364 (libel on the plaintiff by publishing a forged testimonial for pills; physicians' testimony that a testimonial of this sort was damaging to the person's repute, held improper; on the record, one of the most unjust of quibbles); 1898, Burton *v.* B. S. C. Co., 171 Mass. 437, 50 N. E. 1028 (value of the use of inventions, allowed); 1913, Nelson Theatre Co. *v.* Nelson, 216 Mass. 30, 102 N. E. 926 (value of a theatre leasehold, based on gross receipts and net profits, held not improperly admitted in discretion); 1899, Graves *v.* Kennedy, 119 Mich. 621, 78 N. W. 667 (value of insurance business bought, allowed); 1912, Eesley Light & P. Co. *v.* Commonwealth P. Co., 172 Mich. 78, 137 N. W. 663 (estimate of proportion of cost of coal used, due to obstruction of water-power, admitted; liberal opinion by Stone, J.); 1907, Crosby *v.* Wells, 73 N. J. L. 790, 67 Atl. 295 (whether oil lands were profitable territory, or not, allowed).

The following crudely phrased statute aims to liberalize the practice in *patent causes:* U. S. Rev. St. 1878, § 4921, as amended by St. 1897, Mar. 3, c. 391, § 6, and St. 1922, Feb. 18, c. —, § 8 (patent infringement; if damages or profits "are not susceptible of calculation and determination with reasonable certainty, the Court may, on evidence tending to establish the same, in its discretion, receive opinion on expert testimony, which is hereby declared to be competent and admissible, subject to the general rules of evidence applicable to this character of testimony").

for each of which the problem of the Opinion rule's application must receive an independent solution. (1) The question may be whether an insurance *broker has fulfilled his duty* to his principal (the insured) which requires him to provide by new policies or new clauses against any change of "risk" (*i. e.* of circumstances possibly affecting the property's status with reference to existing policies) brought to his notice. (2) The question may be, in an action for the *value of property* confiscated, whether the *owner of property* near to a new public servitude, *e. g.* a railroad, *has been injured* by it with reference to (*a*) an actual increased danger from fire, or (*b*) an increased expense necessarily imposed upon him for insurance, whether or not the danger has in fact increased. (3) The question may be, in an action by an *insured against the insurers*, whether there existed at the making of the contract an undisclosed or misrepresented circumstance "*material to the risk*," or whether there has since been an "*increase of risk*," which circumstance or increase, by not having been communicated according to the terms of the policy, has forfeited the policy. These different issues may be examined in order:

(1) *Insurance broker's duty.* The solution here can best be illustrated by the following case:

1833, *Chapman* v. *Walton*, 10 Bing. 57; an insurance broker received a letter from the insured, announcing the alteration of the voyage in certain respects, and was told to "do the needful" with it; he procured certain alterations in the policies, but the ship was lost at a place not covered by the altered policies, and the broker was sued for breach of duty. TINDAL, C. J.: "The point to be determined is, not whether the defendant arrived at a correct conclusion upon reading the letter, but whether, upon the occasion in question, he did or did not exercise a reasonable and proper care, skill, and judgment. This is a question of fact, the decision of which appears to us to rest upon this further inquiry, viz., whether other persons exercising the same profession or calling, and being men of experience therein, would or would not have come to the same conclusion as the defendant. . . . It is not a simple abstract question, as is supposed by the plaintiff, what the words of the letter mean. It is what others conversant with the business of a policy broker would have understood it to mean, and how they would have acted upon it under the same circumstances. . . . This conclusion, it appears to us, neither judge nor jury could arrive at from the simple perusal of the letter, unassisted by evidence; because they would not have the experience upon which a judgment could be formed."

This result is not to be questioned. The case is the ordinary one of the propriety of professional conduct, and it is obvious that skilled aid must be employed to explain to the tribunal the situation as it would be understood and dealt with by a person of ordinary skill in the profession. Thus, incidentally, the question may arise whether a particular circumstance, *e. g.* the stopping at a specific port not mentioned in the original policy, would *by possibility so affect the attitude of the insurer* that the broker as a prudent agent ought to cover it by a new clause.

(2) *Injury to property by eminent-domain process.* Here we assume that by the substantive law the owner may include in his bill of damages (*a*) an

actual increased danger from fire, or (*b*) an increased expense necessarily imposed for insurance, irrespective of actual increase of danger. As to the employment of expert testimony on the first point, the question is the same as one to be taken up under the next head (3) (*a*), and it is enough to refer to what is said there. As to its employment on the second point, there can be no doubt of its propriety. The issue is, Can the owner get insurance at the same rates as before? and insurance experts are certainly capable of helping the jury to determine whether he can or cannot.

(3) *Uncommunicated "increase of risk" or "misrepresentation of material facts," as forfeiting a policy.* (*a*) Here let us first assume that the issue is whether there has been an *actual* (or objectively real) increase of danger by the subsequent circumstance, or whether the preëxisting and concealed circumstance was actually (or, in objective reality) "material," *i. e.* made the fire-danger greater than it would have been. On this assumption, it is a fairly disputable question whether any expert testimony is needed to aid the jury. Certainly, on some points they clearly do not need it:

1853, *Hills* v. *Ins. Co.*, 2 Mich. 479; the fact of pending litigation was not disclosed, and the opinion of underwriters was offered to show it to be material, inasmuch as "the insured might be tempted to fire his property, or in case of accidental fire, be less disposed to make exertions to put it out, or less vigilant to insure against fire." WING, P. J.: "This is not a question of science or skill; . . . it is a mere deduction of reason from a fact, founded upon the common experience of mankind that a man may be tempted to do wrong when placed in circumstances where his cupidity may be excited. A jury does not need evidence to convince them that this may be the effect."

It seems clear, from this point of view, that the use of expert testimony may or may not be necessary according to the nature of the circumstance at issue in each case. There should be a liberal leaning towards the use of such aid whenever it is by possibility useful; but at any rate, there can be no hard-and-fast rule against it. This doctrine is well set forth in the following opinion:

1853, RANNEY, J., in *Protection Ins. Co.* v. *Harmer*, 2 Oh. St. 457: "The application of the doctrine to cases of insurance is as obvious and easy as to any other. A fact concealed or not communicated is claimed to have been material to the risk assumed; because from its probable or necessary results, it increased the chances of loss. The question is, did it so increase them? If the answer can be given from ordinary experience and knowledge, the jury must respond to it unaided. . . . In cases of life and marine insurance, such [expert] testimony may often become indispensable. . . . In cases of fire insurance, it is more difficult to see when a necessity for such evidence could ever arise. But I am not prepared to say that it might not, and if it did, no doubt it should be governed by the same principles. It is therefore impossible to say that the opinions of witnesses are never to be received in determining the materiality of facts not disclosed; much less can it be said that they are to be received in all cases. In each case it must depend on the nature of the inquiry. . . . There was nothing in the question raised here [whether the fact of a suspected incendiary fire, shortly before, was material] requiring either science or skill to determine. The effect that a previous fire might have upon the safety of the building thereafter could be as well understood by one man as another. Every man of sense would know that it would depend entirely upon the cause of the fire."

1896, TAFT, J., in *Penn M. L. Ins. Co. v. M. S. B. & T. Co.*, 19 C. C. A. 286, 72 Fed. 428, 430: "If it requires scientific knowledge or peculiar skill to trace the possible causal or evidential connection between the fact claimed to be material and the loss or death insured against, then, of course, the testimony of those learned in the necessary science, or trained in the particular craft, should be furnished to the jury, to enable them properly to estimate the weight which a reasonably prudent insurer would naturally give to the fact, in his calculation of chances. But where the calculation of the chances involves a consideration only of facts of everyday life, of the motives of men living in the same community with members of the jury, and of those ordinary physical and natural causes of which every man is presumed to have an understanding, it is difficult to see why an insurance examiner should be permitted to influence the jury by giving his sworn opinion on the very issue which they are assembled to try, and of which they are presumed to have the same opportunities upon which to found a reliable judgment as he. It is true, he may have had occasion, in his business, to consider and weigh facts of this character, for this purpose, much more frequently than the jury, but that does not render his opinions on the facts competent evidence. . . . Certainly, there is the same ground for excluding the individual opinions of insurance men [in life insurance] upon the materiality of particular facts as in marine and fire insurance. Of course, the evidence of physicians as to the tendency of diseases and bodily conditions or habits to shorten life is competent, but insurance men are not experts upon these subjects. Facts other than those relating to the health and habits of the applicant usually either relate to the motive of the applicant to destroy himself, or increase the probability of death by exposure to bodily injury. Of the materiality of this class of facts the jury can judge quite as well as one experienced in passing on insurance risks. They are within the common knowledge of mankind."

(*b*) But is the above assumption of (*a*) correct? Is it true, in the words of the judge first quoted, that "the question is, Did the fact concealed or not communicated, from its probable or necessary results, increase the chances of loss?" Are we investigating the objective reality of an increase of danger, or is our true purpose of inquiry something quite different? The latter, it seems clear. The inquiry before the Court in such a case is, in truth, Is the circumstance in question one which *would have influenced the insurer* (or promiser) to fix a higher rate of premium? In other words, not the objective reality of an increase of danger is involved, but the relation which the circumstance in question subjectively bears to the insurer's settled classified terms of charge. When the policy is agreed to be void "if any material fact or circumstance has not been fairly represented . . . or if, without the assent of the Company, the situation or circumstances affecting the risk shall be so altered as to cause an increase of such risks," the proviso is inserted with reference to the course which the insurer would have taken, had he in view of those facts been entering anew upon the contract, *i. e.* with reference to his either increasing the premium or refusing the insurance altogether, as induced by the circumstance in question. Thus the word "risk" does not mean "actual danger," but "danger as determined by the insurer's classification of the various circumstances affecting the rate of premium." Our main inquiry, then, is as to the insurer's schedule of classified "risks" (*i. e.* combinations of circumstances); and as we may desire further evidence than his own word for it, we may examine, secondarily, the usage of insurers in the same community, because

their custom will tend to show what the individual insurer's practice is, as conforming presumably to the local methods (*ante*, §§ 376, 379). We do not look at the usage as simply incorporated into the contract,[1] but merely as throwing light on the probable practice of an individual of the class.

Thus we are in no way concerned with the question of an actual increase of danger. Perhaps it might be clear that the circumstance in the case in hand did not really increase the danger; but if nevertheless it fell within a class of circumstances scheduled by the insurer (for whatever reason seems best to him) as increasing the danger, it would "increase the risk" under the terms of the contract. A proper mode of obtaining aid, then, as to the insurer's practice in the matter, is to call in persons skilled in the insurance business, who may appropriately add to the jury's information on this subject.[2] The form of question proper to be put would be: "Would you as a professional insurer, and according to local practice, regard this concealed or misrepresented circumstance as material?" or, "With reference to local practice, would this circumstance be regarded as increasing the risk?" or, "as calling for a higher rate?" or, "as bound to be communicated?" or, to the promisor himself or his agents, "Would you according to your practice or rules have charged a higher rate of premium in view of this circumstance?"

This is the view accepted by a few Courts only. The following passages illustrate it:

1839, Joy, C. B., in *Quin* v. *Assurance Co.*, Jones & Car. (Ir.) 331: "Now what is the test of materiality? It is this: whether the misrepresentation was such as to induce the insurers, either to insure when they would not have done so if they had known that the premises were so circumstanced as they actually were, or to have required a higher premium. If either were the consequence of misdescription, it was necessarily material."

1853, Black, C. J., in *Hartman* v. *Ins. Co.*, 21 Pa. 477: "I think none of the cases go so far as to say that one who knows the practice, not only of the particular office, but of insurance offices generally, may not give his opinion of the influence which a given fact would have had as an element in the contract."

1854, Curtis, J., in *Hawes* v. *Ins. Co.*, 2 Curt. 230: "True, it is but an opinion; and so is nearly all evidence of value. If you inquire of a sugar broker, whether the existence of a certain quality in sugar — as, for instance, dryness — affects the value of the article in the market, you do but get his opinion or judgment that the existence of that fact has an influence with purchasers generally in determining the price. . . . Yet such and similar evidence is constantly admitted. Here the inquiry is in substance whether the market price of insurance is affected by particular facts."

§ 1946. [1] And whether the insured knew of the usage is thus immaterial.

[2] The truth is that the above principle is necessarily implied in the theory of "material representation" now accepted for the substantive law in construing insurance contracts, "materiality" means that which would subjectively affect the insurer's attitude towards the proposed contract; thus the point of view is always subjectively the insurer's state of mind. Compare the following exposition of "materiality" by Tindal, C. J., in Elton *v.* Larkins (1832), *post:* "A material concealment is a concealment of facts which *if communicated to the party who underwrites would induce him* either to refuse the insurance altogether or not to effect it, except at a larger premium than the ordinary premium"; which only needs to be qualified by the statement of Blackburn, J., in Ionides *v.* Pender, *post*, that the insurer's attitude must be "the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act."

1896, TAFT, J., in *Penn M. L. Ins. Co.* v. *M. S. B. & T. Co.*, 19 C. C. A. 286, 72 Fed. 428: "Materiality of a fact, in insurance law, is subjective. It concerns rather the impression which the fact claimed to be material would reasonably and naturally convey to the insurer's mind before the event, and at the time the insurance is effected, than the subsequent actual causal connection between the fact, or the probable cause it evidences, and the event. Thus, it is by no means conclusive upon the question of the materiality of a fact that it was actually one link in a chain of causes leading to the event. And, on the other hand, it does not disprove that a fact may have been material to the risk because it had no actual subsequent relation to the manner in which the event insured against did occur. A fair test of the materiality of a fact is found, therefore, in the answer to the question whether reasonably careful and intelligent men would have regarded the fact, communicated at the time of effecting the insurance, as substantially increasing the chances of the loss insured against. The best evidence of this is to be found in the usage and practice of insurance companies in regard to raising the rates or in rejecting the risk on becoming aware of the fact."

(*c*) A qualification of this result may sometimes be necessary. It may be asked, since the sense of words used in a contract must be the ordinary and natural one (as being presumably the one common to both), and not a peculiar sense put forward by one party alone, why can the insurer claim that his own standard of classification shall be adopted, as above? Because the whole transaction presupposes that he has his various charges appropriate to various "risks," and the liberty to raise his premium or decline the insurance entirely must be naturally understood by the insured as dependent on the insurer's established classes of circumstances and "risks"; so that *the insurer's sense of the phrase* is adopted into the contract. But (and here the qualification comes) it may clearly appear in a given case that the phrase was *not* used with reference to the insurer's sense or classification, and that it is to be interpreted according to the sense used by the insured, *i. e.* the ordinary sense of "increase of risk," which therefore is to be applied by the jury acting on the standards and knowledge of the average layman. If the case is of this sort, it would seem that expert testimony might, on occasion only, be resorted to (as in (*a*) *supra*), where the nature of the matter called for it.[3] But how shall we determine whether the case is of this sort? Is it necessary that the policy should expressly speak of an increase of risk "to the knowledge of the insured"? Or is it enough that the insured did not know of the insurer's classification? or that it was not set out in the policy? And when the proviso "to the knowledge of the insured" is expressed, does this mean a knowledge of what he considers a risk, or a knowledge of the risks as classified by the insurer? For,

[3] The argument might be made, to be sure, that the test would be purely subjective as to the insured; *i. e.* "Was the risk, *as the insured supposed*, increased?", and hence expert testimony would never be appropriate. This, however, would only be sound where the policy speaks (as it sometimes does) of an "increase of risk with the knowledge of the insured." When it does not, "increase of risk" would be an objective fact, as to which expert testimony might be needed. Where the "knowledge of the insured" is expressly taken as the standard, it would seem that a foolish owner might ignorantly endanger his property with impunity; or that one who, for example, allowed his workman to thaw out dynamite over a stove might show that he had never known that this was a dangerous proceeding.

if the latter is meant, then if the schedule is shown to the insurer or accepted by him, expert testimony could be resorted to, and if not shown nor accepted, expert testimony could not be resorted to. These are queries which have seldom been answered by the Courts, but they may well arise; and the following case illustrates one method of solution:

1882, *Franklin Fire Ins. Co.* v. *Gruver*, 100 Pa. 273: the Court properly distinguished (as in (*b*) *supra*), between expert testimony as to the increase of actual danger, and expert testimony of the customary higher rates, accepting the latter only; but the clause read "or if the risk shall be increased . . . within the knowledge of the assured," and the Court pointed out that "the knowledge of the plaintiff was thus made a material factor in this condition; therefore, proof by experts that, from a technical point of view, the risk [or rate of insurance [4]] was increased, came to nothing unless accompanied by proof that the assured knew that the erections complained of created hazards for which by the rules of insurance an additional rate would be charged. But of this he knew nothing. He did not even know the class in which he was insured. . . . It does, therefore, seem to me that without some proof by the company that the plaintiff had some notice or knowledge of the rules of insurance, its expert evidence would come to nothing."

§ 1947. **State of the Law in the Various Jurisdictions.** As the Courts have not always borne in mind the various possible distinctions above discussed, it is not easy to determine the exact state of the law. The rulings may now be examined in the order of the above topics.

(1) *Insurance broker's duty.* There seems to be little authority on the specific point. The view above set forth would probably prevail;[1] it harmonizes with the general doctrine as to expert testimony of professional skill.

(2) *Injury to property by eminent-domain process.* Here, also, there is little authority; the rulings should be considered in the light of the distinctions noted above.[2]

(3) *Forfeiture of policy for "material" misrepresentation or uncommunicated "increase of risk."* Here a difficulty in stating the law arises from the failure of many Courts to exhibit the principle on which they have decided. They have either admitted or rejected the expert testimony; but that has in itself no significance; everything depends, or ought to depend, upon the principle applied. With reference, then, to the exposition under (3) in the preceding section, we find the greater number of Courts proceeding without any notice of theory (*b*) and therefore apparently upon the assumption of theory (*a*). When the question is asked whether a *representation was "material"* to the risk or whether there was an "*increase of risk*," one group of judges has

[4] As appears from a previous sentence.

§ 1947. [1] 1833, Chapman *v.* Walton, 10 Bing. 57, quoted *ante*, § 1946; 1903, Trenton P. Co. *v.* Title G. & T. Co., N. Y., cited *post*, §1951. The following case seems distinguishable: 1900, Hill *v.* Amer. Surety Co., 107 Wis. 19, 81 N. W. 1024 (whether the witness company would have insured property in the hands of an assignee, excluded, on the issue whether the assignee was derelict in not procuring insurance).

[2] 1889, Pingery *v.* R. Co., 78 Ia. 442, 43 N. W. 285 (whether the proximity of a railroad depreciated the value by increasing the risk of fire; expert testimony held receivable as to increase of risk, but not as to increase of insurance rates); 1840, Webber *v.* Eastern R. Co., 2 Metc. Mass. 149 (whether proximity of a railroad would increase a fire risk; admitted).

believed in admitting expert testimony as a rule,[3] another group has believed in excluding it as a rule,[4] and a third group has chosen the preferable and proper course of letting the result depend upon the case in hand.[5] Moreover, when the question is in the form, "whether the *usage of underwriters* or of the insurer was to charge higher rates for such risks," it would on this theory equally be excluded,[6] certainly by Courts excluding the former question (as to the individual expert's opinion); [7] and equally (one would suppose) by Courts allowing the former question, because here the usage is offered merely as hearsay opinion evidence.[8]

[3] The question being here whether the *misrepresentation was material:* 1828, Lindeman *v.* Desborough, 8 B. & C. 587, *semble* (life); 1830, Rickards *v.* Murdock, 10 B. & C. 527, *semble* (marine); and the other English cases cited in n. 8, *infra; U. S.* 1876, Leitch *v.* Ins. Co., 66 N. Y. 107 (marine); 1806, Moses *v.* Ins. Co., 1 Wash. C. C. 388 (marine); 1809, Marshall *v.* Ins. Co., 2 Wash. C. C. 358 (marine).

The question being here whether the *risk was increased:* 1866, Schmidt *v.* Ins. Co., 41 Ill. 299, *semble* (fire; 1884, German-Amer. Ins. Co. *v.* Steiger, 109 Ill. 254, 258, 259 (fire); 1896, Traders' Ins. Co. *v.* Catlin, 163 Ill. 256, 45 N. E. 255; 1864, Mitchell *v.* Ins. Co., 32 Ia. 424, *semble* (fire); but in Stennett *v.* Ins. Co. (1886), 68 Ia. 675, 28 N. W. 12, the question is regarded as open); 1886, Planters' Mut. Ins. Co. *v.* Rowland, 66 Md. 244, 7 Atl. 257, *semble* (fire); 1833, Lapham *v.* Atlas Ins. Co., 24 Pick. Mass. 3, 7 (marine); 1853, Daniels *v.* Ins. Co., 12 Cush. Mass. 420, 430 (fire); 1903, Taylor *v.* Security M. F. I. Co., 88 Minn. 231, 92 N. W. 952, *semble* (fire); 1867, Kern *v.* Ins. Co., 40 Mo. 21, 26 (fire); 1904, Hanna *v.* Orient Ins. Co., 109 Mo. App. 152, 82 S. W. 152, 82 S. W. 115, *semble* (fire); 1854, Schneck *v.* Ins. Co., 24 N. J. L. 451 (fire).

[4] The question here being whether the *misrepresentation was material: Eng.* 1766, Carter *v.* Boehm, 3 Burr. 1914, 1918, Lord Mansfield (marine); 1816, Durrell *v.* Bederley, Holt N. P. 284, Gibbs, C. J. (marine); 1918, Yorke *v.* Yorkshire Ins. Co., 1 K. B. 662 (false representations of health; the insured "was addicted to the veronal habit"; medical testimony as to the veronal habit being material, admitted; Carter *v.* Boehm, *supra*, treated as overruled); *Can.* 1913, Anglo-American Fire Ins. Co. *v.* Hendry, 15 D. L. R. 832, Can. Sup. (materiality of non-disclosure of a previous fire; opinion of underwriters and insurance brokers, held admissible); *U. S.* 1920, Bohen *v.* North Amer. Life Ins. Co., 188 Ia. 1349, 177 N. W. 706 (life); 1863, Rawls *v.* Ins. Co., 27 N. Y. 293 (life); 1873, Higbie *v.* Ins. Co., 53 N. Y. 604 (life); 1885, Schwarzbach *v.* Protective Union, 25 W. Va. 622, 651 (fire).

The question here being whether the *risk was increased*: 1902, Southern M. I. Co. *v.* Hudson, 115 Ga. 638, 42 S. E. 60 (fire); 1858, Joyce *v.* Ins. Co., 45 Me. 168 (fire); 1871, Cannel *v.* Ins. Co., 59 Me. 591; 1880, Thayer *v.* Ins. Co., 70 Me. 539; 1903, New Era Ass'n *v.* Mactavish, 133 Mich. 68, 94 N. W. 599 (life); 1882, Kirby *v.* Ins. Co., 9 Lea Tenn. 142 (fire); 1905, Prudential F. Ins. Co. *v.* Alley, 104 Va. 356, 51 S. E. 812 (fire; erection of adjoining building).

[5] Not all of the following cases lay down so broad a rule; most of them exclude expert testimony as to whether leaving a building vacant increases the risk; but they also imply or declare that upon other matters such testimony would be receivable: 1876, Milwaukee R. Co. *v.* Kellogg, 94 U. S. 472, *semble* (fire); 1896, Penn M. L. Ins. Co. *v.* M. S. B. & T. Co. 19 C. C. A. 286, 72 Fed. 413 (cited *infra*, note 10); 1856, Mulry *v.* Ins. Co., 5 Gray Mass. 545 (whether failure to occupy a building increased the fire risk, a matter said in this instance to be one of common knowledge); 1867, Lyman *v.* Ins. Co., 14 All. 335 (similar); 1853, Hills *v.* Ins. Co., 2 Mich. 479 (fire); 1831, Jefferson Ins. Co. *v.* Cotheal, 7 Wend. N. Y. 77 (fire); 1878, Cornish *v.* Ins. Co., 74 N. Y. 297 (fire); 1853, Protection Ins. Co. *v.* Harmer, 2 Ohio St. 457 (fire).

[6] 1884, German American Ins. Co. *v.* Steiger, 109 Ill. 254, 258, 259 (custom of insurers, excluded); 1876, Insurance Co. *v.* Eshelman, 30 Oh. St. 655 (whether the company would have insured if the disease had been disclosed, excluded); 1903, Murphy *v.* Prudential Ins. Co., 205 Pa. 444, 55 Atl. 19 (to a medical examiner, whether if certain ailments had existed he would have considered the plaintiff a first-class risk, excluded, because the only issue was as to the truth of the facts stated in the application; unsound, because one of the issues was whether the facts were material to the risk); 1885, Schwarzbach *v.* Protective Union, 25 W. Va. 622, 651; 1894, Commercial Bank *v.* Ins. Co., 87 Wis. 297, 303, 58 N. W. 391 (action on an adjustment-promise; insurer not allowed to testify that he would not have made the adjustment if he had known of the alteration of account-books).

[7] Durrell *v.* Bederley, Schwarzbach *v.* Protection Union, Joyce *v.* Ins. Co., Connell *v.* Ins. Co., Rawls *v.* Ins. Co., *supra*.

[8] And yet we find some of these Courts admitting it; this seems an inconsistency; if the

A few Courts, however, adopt the correct theory (*supra* (*b*)); the result of which is that the question, "Was there in your opinion an increase of risk?" should properly not be asked,[9] because the actual state of danger is immaterial, and therefore the witness' own estimate of it is immaterial; while insurance experts may of course be called to speak as to the usage of the trade or of the insurer in charging higher rates for such circumstances.[10]

Finally, of the Courts accepting this view, we occasionally find one paying attention to the modification (*c*) above pointed out; [11] and the sort of clause thus dealt with is so common in such policies that there is here ample room for a further development and systematization of the principle.[12]

usage, etc., is to be admitted, it can only be on theory (*b*); yet in the following decisions both sorts of testimony are admitted: 1791, Chauraud *v.* Angerstein, Peake N. P. 44, Lord Kenyon, C. J. (marine); 1804, Haywood *v.* Rogers, 4 East 592 (marine); 1817, Berthon *v.* Loughman, 2 Stark. 258, Holroyd, J. (marine) (but in these English cases it does not appear clearly that the Courts were proceeding on this theory; and if they did not, then the rulings belong under note 10, *infra*); and the following American cases cited *supra*, note 3; Mitchell *v.* Ins. Co., Planters' Mut. Ins. Co. *v.* Rowland, Kern *v.* Ins. Co., Moses *v.* Ins. Co., Marshall *v.* Ins. Co., Taylor *v.* Security M. F. I. Co., New Era Ass'n *v.* Mactavish. The following early case does not indicate its principle: 1672, Pickering *v.* Barkley, Vin. Abr., "Evidence," P. b. 11, vol. XII, 175 (to prove that pirates were within the excepted risk of "perils of the sea," "the master of the Trinity-house and other sufficient merchants" were called in).

[9] 1817, Berthon *v.* Loughman, 2 Stark. 258 (marine); 1839, Quin *v.* Ins. Co., *infra*, *loc. cit.* 336 (fire); 1870, Luce *v.* Ins. Co., *infra* (apparently settling the prior conflict in Massachusetts rulings); 1893, First Congreg. Church *v.* Ins. Co., *infra;* 1854, Hawes *v.* Ins. Co., *infra* (marine); 1896, Penn M. L. Ins. Co. *v.* M. S. B. & T. Co., *infra* (life).

[10] *England:* 1832, Elton *v.* Larkins, 5 C. & P. 385; 1839, Quin *v.* Ass. Co., Jones & Car. 332 (fire; this case, decided by a majority, is an arsenal of arguments, and its opinions, too long for quotation, will repay special study; it should be regarded as the leading case on the subject); 1874, Ionides *v.* Pender, L. R. 9 Q. B. 535, 539 (marine).

United States: 1828, M'Lanahan *v.* Ins. Co., 1 Pet. 188, Story, J. (marine); 1854, Hawes *v.* Ins. Co., 2 Curt. 230 (marine); 1896, Penn M. L. Ins. Co. *v.* M. S. B. & T. Co., 19 C. C. A. 286, 72 Fed. 413 (life insurance; whether the existence of other insurance and the commission of embezzlements were material; expert opinion excluded as to the actual increase of risk involved in the fact, unless it is a matter of "scientific knowledge or peculiar skill," but admitted to show the usage of life insurance companies generally in rejecting an application based upon such a fact, since the interpretation depends on what the usage is; in the case of other kinds of insurance, usage as to charging a higher rate may also be asked for; the opinion contains the fullest citation of authorities); 1906, Provident S. L. Assur. Soc'y *v.* Whayne's Adm'r, 131 Ky. 84, 93 S. W. 1049, *semble* (life; following Penn M. L. Ins. Co. *v.* M. S. B. & T. Co., Fed., *infra*); 1834, Fiske *v.* Ins. Co., 15 Pick. Mass. 312, 319 (marine), *semble;* 1838, Merriam *v.* Ins. Co., 21 Pick. Mass. 163 (*semble*, in its logical consequence); 1872, Luce *v.* Ins. Co., 105 Mass. 302 (fire); s. c. 110 Mass. 363; 1893, First Congreg. Church *v.* Ins. Co., 158 Mass. 475, 481, 33 N. E. 572 (fire); 1853, Hartman *v.* Ins. Co., 21 Pa. 477 (life); 1882, Franklin Fire Ins. Co. *v.* Gruver, 100 Pa. 273 (fire); 1892, Pelzer Mfg. Co. *v.* Sun Fire Office, 36 S. C. 263, 15 S. E. 562, *semble* (fire).

[11] 1882, Franklin Fire Ins. Co. *v.* Gruver, 100 Pa. 273 (fire; see quotation *supra*); probably also: 1853, Hobby *v.* Dana, 17 Barb. N. Y. 111 (fire); 1892, Loomis *v.* Ins. Co., 81 Wis. 366, 51 N. W. 564 (fire).

The distinction made by Mr. Justice Gray in Luce *v.* Ins. Co., *supra*, must here be adverted to. He confines the testimony to the usage of underwriters, and rightly enough, so far as this excludes the opinion of individual underwriter-witnesses, because we may infer from the general usage the insurer's usage, though not from an individual's practice. But he also excludes the practice of the insurer himself, because it is a practice not known to the insured. This seems incorrect. In the first place the trade-usage is no better known to the insured, who is an outsider, and thus the learned judge's principle is inconsistently applied. In the next place, the insured's actual knowledge is immaterial, as explained *supra*, unless it is a special proviso of the contract, in which case it may be shown without resorting to trade usage.

[12] The following cases do not affect the points above dealt with: The ruling in Astor *v.* Ins. Co. (1827) 7 Cow. N. Y. 217, as to the rates of insurance in other offices, has other bearings. In Brink *v.* Ins. Co. (1877), 49 Vt. 445, 459, it was properly ruled that one who has seen

4. Conduct (including Care, Reasonableness, Safety, and the like)

§ 1949. **History and General Principle.** This topic is one of the few upon which there has ever existed in the English precedents any foundation for doubt. The subject of the testimony in question is manifold; sometimes it is whether proper care was taken, sometimes whether action was reasonable, sometimes whether sufficient skill was shown, sometimes whether a place or a machine was safe; but all the forms seem reducible to a general one, namely, whether a certain standard of conduct was observed.

Looking first at the orthodox practice in *England*,[1] it is clear that there is not and never has been any real question as to the propriety of such testimony. In all but a few of the rulings the testimony was even received without objection, — as may be easily understood from the history of the general rule in that country (*ante*, § 1917). The morbid and doctrinaire theory of cautiousness which is the foundation of the American rulings has never been known at the English bar. Into no English judge's mind did the idea enter to exclude the opinion of an observer who proposed to state whether a party had used due care or acted reasonably or managed skilfully.

We may start, then, with the understanding that the rulings on this point in the *United States* are purely a modern excrescence upon the body of the common law, due to the unhealthy influence of a form of principle with which our Courts have drugged themselves for two generations past.

§ 1950. **Discriminations as to Other Principles; (1) Other Persons' Conduct as evidencing Danger, Reasonableness, or the like; (2) Moral Character, Professional Skill, and other General Traits.** (1) It is necessary to discriminate a sort of evidence sometimes confused with that in question, namely,

the premises may speak as to the nature of the danger. In Liverpool Ins. Co. *v.* McGuire (1876), 52 Miss. 232, the evidence as to increase of risk was rejected because immaterial under the circumstances. In the following case testimony as to the defendant's custom was wrongly rejected as varying the terms of the policy (a reason not applicable); Summers *v.* Ins. Co. (1848), 13 La. An. 505 (life of a slave). For a case turning on a peculiar state of facts, see Martin *v.* Ins. Co. (1880), 42 N. J. L. 47.

§ 1949. [1] 1816, Jones *v.* Boyce, 1 Stark. 493 (that the coachman had been compelled to take a certain course, and that a passenger's conduct in jumping was proper, allowed); 1817, Jackson *v.* Tollett, 2 Stark. 38 (that a coachman had adopted the most prudent course, allowed); 1824, Walton *v.* Nesbit, 1 C. & P. 72, Abbott, C. J. (of an experienced mariner, whether an officer of competent skill would have omitted to make soundings, etc., allowed; the issue being negligence); 1824, Fenwick *v.* Bell, 1 C. & P. 312, Coltman, J. (an expert was allowed to be asked whether a collision could have been avoided); 1826, Jameson *v.* Drinkald, 12 Moore 148, 157 (admitting testimony as to the blamable conduct causing the accident, and excluding testimony as to the general fault of either side or the merits of the case; with some doubt and obscurity of language); 1834, Drew *v.* New River Co., 6 C. & P. 755 (that the condition of a sidewalk was such as to make it unsafe for persons to pass; allowed); 1835, Wilkes *v.* Market Co., 2 Bing. N. C. 281 (that an obstruction in the street was unreasonable and unnecessary, allowed); 1840, Sills *v.* Brown, 9 C. & P. 604, Coleridge, J. (allowing the question, "What was the duty of a captain under certain specified circumstances?", but excluding the question, "Was the conduct of the captain here right or not?"; here his objection, as the case shows, was merely that the hypothetical form should be employed).

In *marine affairs*, there is found in Canada a rule excluding experts where a nautical assessor sits with the Court: 1921, Fraser *v.* S. S. Aztec, 56 D. L. R. 440, Can. Exch. (collision in a lock; expert evidence not admissible, "as the Court had the assistance of a Nautical Assessor").

testimony not of the witness' own judgment as to the quality of conduct as observed by him, but of the fact of *other persons' conduct* offered as evidence of the conduct properly to be expected in the case in hand. For example, testimony that the person in issue, as seen by the witness to jump from a train after a collision, was not prudent in so doing, raises the present question of the Opinion rule; but testimony that other persons at the same time jumped also is of the second sort, and raises a different question. The legal danger is that the conduct of the other persons, instead of being taken by the jury merely as evidence of the condition or quality of the external object, may be used by them as furnishing a fixed legal standard for the case in hand. The evidential question, however, is merely of the relevancy of other persons' conduct under similar circumstances, and does not involve the opinion of the testifying person nor the Opinion rule; it is accordingly elsewhere dealt with (*ante*, §§ 459–461).

(2) The opinion of a witness, as here desired, upon the prudence, reasonableness, or care, of a *specific act* of conduct by a person in issue must be distinguished from his opinion as to the other person's *general traits of moral character or professional skill*. It is quite possible for the Opinion rule to exclude the former while admitting the latter. For example, the witness' opinion whether an engineer, as observed by him on a given occasion, acted carefully, is distinct from the witness' opinion whether the engineer, with whom he has had a long and intimate acquaintance, possesses the general trait of carefulness and prudence. The application of the Opinion rule to the latter sort of inquiry rests on different considerations and has a peculiar history of its own (*post*, §§ 1980–1988).

§ 1951. **Application of the Principle: Testimony as to the Safety, Care, Prudence, Duty, Skill, Propriety, of Specific Conduct.** In the application of the rule to testimony on the present topics will be found no questions of principle having any consequence or difficulty.[1] The decision is apt to depend

§ 1951. [1] In the following citations, it must be remembered that an excluding decision means usually that the jury are not to be aided by *any one's* inference on the point in question, *i. e.* no question of the competency of the witness is raised, though the Court, in a given case, may say that on this or that point the opinion of a certain expert, but not of a layman, will be received; the witness thus admitted must of course be qualified by experience on that subject, according to the rules already examined under Testimonial Qualifications, *ante*, §§ 559–571; on this point the distinction between the effect of the Opinion rule and the rules for Experiential Qualifications (as noticed *ante*, §§ 557, 1925) is to be observed. In the following citations, where the testimony is *excluded*, it is to be understood, unless otherwise noted, that the Court under the Opinion rule excludes all testimony, even that of experts; and, where the testimony is *admitted*, that the Court assumes the particular witness offered to be competent on that point; for example, in one ruling, testimony that a steamboat did or did not have a sufficient number of hands was held proper; the note does not record, but it is to be understood, in all such cases, that the Court would of course listen only to a witness skilled in that matter; again, another ruling excludes testimony as to whether a railroad trackwalker was a necessary precaution; the note does not record, but it is to be understood, in all such cases, that even an expert in such matters is to be excluded.

CANADA: *Dom.* 1920, Fraser *v.* S. S. Aztec, 56 D. L. R. 440 (cited more fully *ante*, § 1949); *N. Br.* 1883, Courser *v.* Kirkbride, 23 N. Br. 404 (whether "anything more could have been done than was done to prevent the collision" of wagons, excluded); 1885, Morrow *v.* Waterous, 24 N. Br. 442, 449, 456 (that a mill's

chiefly on the Court's general attitude — of favor or disfavor — towards the extension of the exclusionary rule. That the exclusionary rulings are a

foundation was insufficient, excluded, by a majority); 1885, McNair *v.* Stewart, N. Br. 471 (loss of a scow; whether it was "good or bad management" to tow three scows at once, excluded); 1914, Guelph Worsted Spinning Co. *v.* Guelph, 18 D. L. R. Ont. (that the mode of construction of a bridge was safe for a certain purpose, allowed without question); *Que.* 1879, The Attila, 5 Que. 342 (expert evidence as to nautical men's conduct was not rejected as matter of law, but merely declared of no value).

UNITED STATES: *Federal:* 1854, Weston *v.* Foster, 2 Curt. 121 (whether a ship was fully loaded, allowed); 1869, Chicago *v.* Greer, 9 Wall. 733 (whether a test of material was fair, allowed); 1875, The City of Washington, 92 U. S. 39 (whether certain conduct was good seamanship, allowed, for an expert); 1877, Transportation Line *v.* Hope, 95 U. S. 298 (whether it was safe to tug in a certain way, allowed); 1886, Chandler *v.* Thompson, 30 Fed. 40 (skill in management of machinery, allowed); 1887, Union Ins. Co. *v.* Smith, 124 U. S. 421, 8 Sup. 534 (like City of Washington's case); 1893, Pullman P. C. Co. *v.* Harkins, 5 C. C. A. 326, 55 Fed. 932 (whether machinery was dangerous, allowed); 1894, Union P. R. Co. *v.* Novak, 9 C. C. A. 629, 61 Fed. 573, 15 U. S. App. 400, 413 (whether two brakemen were necessary, allowed); 1894, Flynt B. & C. Co. *v.* Brown, 14 C. C. A. 308, 67 Fed. 68 (usual and ordinary way of construction, allowed); 1894, Northern P. R. Co. *v.* Urlin, 158 U. S. 273, 15 Sup. 840 (whether a medical examination was made in a careful manner, allowed); 1896, Atlantic Ave. R. Co. *v.* Van Dyke, 18 C. C. A. 632, 72 Fed. 458 (whether an electrical motor could be safely operated without a sandbox, excluded; but whether it could be stopped quickly without a sandbox, allowed); 1896, Crane Co. *v.* Columbus Const. Co., 20 C. C. A. 233, 73 Fed. 984 (whether a gas-pipe was laid with proper skill and care, excluded; but whether the workmen were men of experience or skill, and whether specific carelessness or unskilfulness was shown, admitted); 1896, Blanchard *v.* Bank, 21 C. C. A. 319, 75 Fed. 249 (whether books were properly kept, excluded); 1896, Illinois Cent. R. Co. *v.* Davidson, 22 C. C. A. 306, 76 Fed. 517 (the safe method of constructing railroad platforms, etc., admitted); 1897, New York El. Eq. Co. *v.* Blair, 25 C. C. A. 216, 79 Fed. 896 (whether it was necessary to hoist pipe in a certain way, in properly performing a duty, excluded); 1897, Blumenthal *v.* Craig, 26 C. C. A. 427, 81 Fed. 320 (whether a witness would have known a machine to be more dangerous, allowed); 1897, Campbell *v.* Mayor, 81 Fed. 182 (firemen allowed to state their estimates as to the saving to be made by the use of certain apparatus); 1899, Western Coal & M. Co. *v.* Berberich, 36 C. C. A. 304, 94 Fed. 329 (whether a room was safe to work in, allowed); 1899, Hunt *v.* Kile, 38 C. C. A. 641, 98 Fed. 49 (whether an apparatus was "ordinarily safe and proper," excluded); 1901, Hutchinson Cooperage Co. *v.* Snider, 46 C. C. A. 517, 107 Fed. 633 (whether a machine was properly constructed or safe, allowed for experts); 1901, Southern Pacific Co. *v.* Arnett, 50 C. C. A. 17, 111 Fed. 849 (certain questions as to the proper method of providing for cattle in transit, variously disposed of; Caldwell, J., diss. on one point, on the ground of the witnesses' lack of qualifications); 1902, Texas & P. R. Co. *v.* Watson, 190 U. S. 287, 23 Sup. 681 (whether certain behavior of an engine indicated wrong operation or construction, etc., allowed); 1903, Crane *v.* Fry, 126 Fed. 278, 61 C. C. A. 260 (proper handling of a tie-boom, allowed); 1903, Wabash S. D. Co. *v.* Black, 126 Fed. 721, 727, 126 C. C. A. 639 (whether a pulley was safe, allowed); 1906, Gila Valley G. & N. R. Co. *v.* Lyon, 203 U. S. 465, 27 Sup. 145 (whether a certain kind of buffer was a safe and proper one, allowed, in the trial Court's discretion); 1908, United States Smelting Co. *v.* Parry, 8th C. C. A., 166 Fed. 407 (that a scaffold was dangerous, allowed); 1915, Walsh *v.* Rend Collieries Co., 7th C. C. A., 228 Fed. 311 (whether a certain way of supporting a mine roof was proper or safe, allowed); 1919, Thompson *v.* U. S., 8th C. C. A., 258 Fed. 196 (unlawfully dispensing narcotic drugs under U. S. St. Dec. 17, 1914, Anti-Narcotic Act; physicians allowed to testify to "well-recognized methods among the medical fraternity of treating persons addicted to the use of narcotic drugs for the purpose of curing them"); *Alabama:* 1848, Jones *v.* Hatchett, 14 Ala. 744 (that a fire could have been stopped, excluded); 1854, Gibson *v.* Hatchett, 24 Ala. 207 (same); 1856, McCreary *v.* Turk, 29 Ala. 245 (whether a steamer had enough hands, excluded); 1858, Hall *v.* Goodson, 32 Ala. 287 (whether a slave's whipping appeared unreasonable, excluded); 1877, Wood *v.* Brewer, 57 Ala. 517 (whether work was well done, allowed); 1893, McCarthy *v.* R. Co., 102 Ala. 193, 203, 14 So. 370 (whether cars were well and carefully loaded, allowed); 1895, Alabama G. S. R. Co. *v.* Hall, 105 Ala. 599, 17 So. 176 (whether a train's speed was dangerous, excluded); 1895, Pate *v.* McConnell, 106 Ala. 449, 18 So. 98 (whether an inexperienced person could have coupled cars, excluded); 1895, Culver *v.* R. Co., 108 Ala. 330, 18 So. 827 (whether a place near a track was safe for standing, admitted); 1897, Alabama M. R. Co. *v.* Jones, 114 Ala. 519, 21 So. 507 (whether a place was dangerous for a train to stop, admitted); 1898, Orr *v.*

modern heterodoxy may easily be seen by noting that out of the many hundred rulings the dates of two or three only fall before 1850 and of less than

State, 117 Ala. 69, 23 So. 696 (that rock was likely to do injury, excluded); 1900, Louisville & N. R. Co. *v.* Tegnor, 125 Ala. 593, 28 So. 510 (whether a track's condition made it dangerous allowed on cross-examination of one who had testified on the same subject); 1902, Louisville & N. R. Co. *v.* Banks, 132 Ala. 471, 31 So. 573 (certain questions as to the proper handling of a locomotive to avoid collision, ruled upon); 1903, Birmingham R. & E. Co. *v.* Jackson, 136 Ala. 279, 34 So. 994 (that a person had to get on one track in order to cross another, excluded); 1903, Western R. Co. *v.* Arnett, 137 Ala. 414, 34 So. 997 (that a place on the car was usual and customary allowed; but that it was possible to fail, if he had been behind the lever, excluded); 1904, Sloss-Sheffield S. & I. Co. *v.* Mobley, 139 Ala. 425, 36 So. 181 (whether a mode of coupling was safe, allowed); 1904, Davis *v.* Kornman, 141 Ala. 479, 37 So. 789 (the proper precaution to guard a dangerous machine, allowed); 1904, Northern Ala. R. Co. *v.* Shea, 142 Ala. 119, 37 So. 796 (that a certain speed was dangerous, allowed); 1905, Western U. Tel. Co. *v.* Merrill, 144 Ala. 618, 39 So. 121 (that everything was done to send a message, etc., excluded); 1905, Wallace *v.* North Ala. T. Co., 145 Ala. 682, 40 So. 89 (whether it was impossible to stop a car, allowed); 1906, Williamson I. Co. *v.* McQueen, 144 Ala. 265, 40 So. 306 (whether a furnace was in good condition, etc., allowed); 1906, Birmingham R. L. & P. Co. *v.* Martin, 148 Ala. 8, 42 So. 618 (to an engineer, whether he handled the engine carefully, not allowed); 1907, Southern Coal & C. Co. *v.* Swinney, 149 Ala. 405, 42 So. 808 (whether a latch was safe, allowed); 1912, Alabama C. G. & A. R. Co. *v.* Heald, 178 Ala. 636, 59 So. 461 ("The motorman had not time to stop the car," excluded); 1915, Burnwell Coal Co. *v.* Setzer, 191 Ala. 398, 66 So. 604 (safety of or danger of a place, allowed); 1915, Knowlton *v.* Central of Ga. R. Co., 192 Ala. 456, 68 So. 281 (fire set by engine; expert testimony that the engineer was careful in handling the engine when passing this spot, allowed, if the data are first stated); 1921, Taylor *v.* Lewis, 206 Ala. 338, 89 So. 581 (injury by automobile; "could you have stopped the car any earlier than you did?", held not allowable);

Arizona: 1904, Huachuca W. Co. *v.* Swain, 4 Ariz. 113, 77 Pac. 619 (whether a person could "fail to perceive" a ditch, excluded; with a disquisition on the tweedledum and tweedledee of this subject);

Arkansas: 1896, Fordyce *v.* Lowman, 62 Ark. 70, 34 S. W. 255 (whether a brakeman ought to have understood a risk, excluded); 1899, Little Rock T. & E. Co. *v.* Nelson, 66 Ark. 494, 52 So. W. 7 (whether a person could easily have got on a car, excluded); 1910, Dardanelle P. B. & T. Co. *v.* Croom, 95 Ark. 284, 129 S. W. 280 (that a guard rail was built "in an improper manner" and was not "safe," allowed);

California: 1867, Enright *v.* R. Co., 33 Cal. 236 (whether a fence was sufficient to turn cattle, excluded); 1878, Shafter *v.* Evans, 53 Cal. 33 (whether a cattle-corral was safe, excluded); 1895, Fogel *v.* R. Co., — Cal. —, 42 Pac. 565 (whether the accident could have been avoided, excluded); 1895, Howland *v.* R. Co., 110 Cal. 513, 42 Pac. 983 (whether a car could have been stopped, allowed); 1896, Redfield *v.* R. Co., 112 Cal. 220, 43 Pac. 1117 (whether an electric car could be safely operated by one man, excluded); 1900, Limburg *v.* Glenwood L. Co., 127 Cal. 598, 60 Pac. 176 (safety of a mode of driving, not allowed); 1901, Snyder *v.* Holt Mfg. Co., 134 Cal. 324, 66 Pac. 311 (whether a bolt and nut were sufficient, allowed for an expert); 1903, Dyas *v.* Southern P. Co., 140 Cal. 296, 73 Pac. 972 (sufficiency of a derrick, etc., allowed); 1903, Luman *v.* Golden A. C. M. Co., 140 Cal. 700, 74 Pac. 307 (whether a hoisting-machine was safe, excluded); 1906, Bundy *v.* Sierra L. Co., 149 Cal. 772, 87 Pac. 622 (safe mode of constructing a trestle, not decided);

Colorado: 1888, Denver S. P. & P. R. Co. *v.* Wilson, 12 Colo. 24, 20 Pac. 340 (whether a track-walker was necessary on a railroad, excluded); 1894, McGonigle *v.* Kane, 20 Colo. 292, 38 Pac. 367 (safety of an elevator, allowed); 1895, Grant *v.* Varney, 21 Colo. 329, 40 Pac. 773 (proper method of timbering a mine, allowed); 1898, Smuggler U. M. C. Co. *v.* Broderick, 25 Colo. 16, 53 Pac. 169 (whether a place in a mine was a safe place to work in, excluded); 1900, Holy Cross G. M. & M. Co. *v.* O'Sullivan, 27 Colo. 237, 60 Pac. 570 (whether "missed shots" in a mine-blast could with ordinary care be detected, not allowed); 1904, Wilson *v.* Harnette, 32 Colo. 172, 75 Pac. 395 (whether an ore lead would justify expense in following, allowed); 1913, Meeker *v.* Fairfield, — Colo. —, 136 Pac. 471 (whether a crosswalk was safe, excluded); 1919, National Fuel Co. *v.* McNulty, 65 Colo. 176, 177 Pac. 979 (mine-accident; whether an entry was a "reasonably safe place to work," allowed; Teller, J., diss.);

Columbia (Dist.): 1887, Tolson *v.* Coasting Co., 17 D. C. 44 (whether a place was safe for standing, excluded); 1894, District of Col. *v.* Haller, 4 D. C. App. 405, 413 (whether a sidewalk was in a dangerous condition, not allowed);

Connecticut: 1845, Porter *v.* Mfg. Co., 17 Conn. 255 (sufficiency of a dam, allowed); 1858, Dunham's Appeal, 27 Conn, 198, *semble* (whether a road was safe, admissible); 1875, Taylor *v.* Monroe, 43 Conn. 43 (whether road needed a railing, allowable for experts);

a score before 1860. Though many Courts still refuse to be led aside into these quibbles, a great body of unfavorable rulings exists to tempt the Bar to

1893, Ryan *v.* Bristol, 63 Conn. 26, 37, 27 Atl. 309 (whether a place was dangerous, allowed); 1900, Barber *v.* Manchester, 72 Conn. 675, 45 Atl. 1014 (whether a machine was likely to frighten horses, allowed); 1900, Dean *v.* Sharon, 72 Conn. 367, 45 Atl. 963 (whether a highway was "reasonably safe," allowed); 1905, Campbell *v.* New Haven, 78 Conn. 394, 62 Atl. 665 (whether a sidewalk was in safe condition for travel, allowed); 1912, Schafer, Jr. & Co. *v.* Ely, 84 Conn. 501, 80 Atl. 775 (whether a building had been constructed in a workmanlike manner and according to plans, allowed; liberal opinion, by Wheeler, J.);

Florida: 1897, Camp *v.* Hall, 39 Fla. 535, 22 So. 792 (whether an injury was received by the person's own carelessness, excluded); 1906, Jacksonville El. Co. *v.* Sloan, 52 Fla. 257, 42 So. 516 (whether "all precautions possible" were taken, allowed);

Georgia: Rev. C. 1910, §§ 5285, 5287 (quoted *post*, § 1978); 1881, Augusta & S. R. Co. *v.* Dorsey, 68 Ga. 236 (whether a railroad employee's conduct was prudent, allowed); 1886, East Tennessee V. & G. R. *v.* Wright, 76 Ga. 536 (whether the defendant was negligent, excluded); 1900, Lowman *v.* State, 109 Ga. 501, 34 S. E. 1019 (that the time had come for the accused to either run or fight, excluded); 1901, Mayor *v.* Wood, 114 Ga. 370, 40 S. E. 239 (whether a street was wide enough, and whether a place was dangerous, excluded); 1905, Southern R. Co. *v.* Cunningham, 123 Ga. 90, 50 S. E. 979 (whether cars were managed in a way "unusual or unnecessary," allowed); 1905, Evans *v.* The Josephine Mills, 124 Ga. 318, 52 S. E. 538 (whether a machine was dangerous, not allowed, for non-experts); 1921, Fincher *v.* Davis, 27 Ga. App. 494, 108 S. E. 905 (malpractice; to a physician, "Was this operation done in a skilful manner?" allowed);

Hawaii: 1898, Laupahoehoe Sugar Co. *v.* Wilder S. S. Co., 11 Haw. 261 (whether certain things were "perils of the sea"; whether certain circumstances might have misled experienced mariners; whether a prudent captain ought to have taken a certain precaution; allowed); 1906, Terr. *v.* Cotton, 17 Haw. 618, 635 (whether it was safe or prudent to moor a dredger, etc., allowed);

Idaho: 1911, Knauf *v.* Dover L. Co., 20 Ida. 773, 120 Pac. 157 (proper method of constructing a slasher, allowed);

Illinois: 1851, Ward *v.* Salisbury, 12 Ill. 369 (whether a ship was managed skilfully or not, allowed); 1872, Chicago & N. W. R. Co. *v.* Ingersoll, 65 Ill. 402 (whether grain could have been delivered, excluded); 1873, Kendall *v.* Limberg, 69 Ill. 358 (whether conduct was brutal, excluded); 1875, Hopkins *v.* R. Co., 78 Ill. 33 (whether cars were carefully coupled, excluded); 1875, Chicago *v.* McGiven, 78 Ill. 348 (whether a sidewalk cellar-light was safe, excluded); 1877, Hoener *v.* Koch, 84 Ill. 409 (whether a physician's work was unskilful, excluded); 1884, Chicago & N. W. R. Co. *v.* Moranda, 108 Ill. 583 (safety of standing a distance from the cars, excluded); 1895, St. Louis A. & T. H. R. Co., *v.* Bauer, 156 Ill. 106, 40 N. E. 448 (duty of a brakeman, admitted); 1895, Springfield R. Co. *v.* Welsh, 155 Ill. 511, 40 N. E. 1034 (whether all means were used to stop a car, excluded); 1897, Springfield *v.* Coe, 166 Ill. 22, 46 N. E. 709 (by the plaintiff, "We walked carefully," inadmissible; should not the Court also have ruled that, instead of alleging "we walked," the witness should have said, "We placed the feet alternately upon the ground, touching with the heel, and producing forward motion," leaving it to the jury to say whether it was a "walk" or a "run?"); 1901, Gundlach *v.* Schott, 192 Ill. 509, 61 N. E. 332 (whether a pulley-belt construction was "reasonably safe," admitted); 1902, Springfield C. R. Co. *v.* Puntenney, 200 Ill. 9, 65 N. E. 442 (by a motorman, whether he knew of anything more he could have done to avoid injury, excluded); 1902, Slack *v.* Harris, 200 Ill. 96, 65 N. E. 669 (effect of alterations upon the operation of an elevator car, admitted); 1902, Donk Bros. C. & C. Co. *v.* Stroff, 200 Ill. 483, 66 N. E. 29 (number of timbers necessary to prevent a roof from falling, allowed); 1903, Beardstown *v.* Clark, 204 Ill. 524, 68 N. E. *semble* (whether with ordinary care a hole could have been seen and avoided, excluded); 1904, Henrietta Coal Co. *v.* Campbell, 211 Ill. 216, 71 N. E. 863 (whether certain conditions of a roadway made it safe, for experts); 1905, Kellyville Coal Co. *v.* Strine, 217 Ill. 516, 75 N. E. 375 (practicability of using crossbar props in a mine, allowed); 1905, Siegel, Cooper & Co. *v.* Troka, 218 Ill. 559, 75 N. E. 1053 (whether the construction of an elevator door was safe, excluded); 1906, Schillinger Bros. Co. *v.* Smith, 225 Ill. 74, 80 N. E. 65 (whether boards were fit for scaffolding, not decided); 1908, Yarber *v.* Chicago & A. R. Co., 235 Ill. 589, 85 N. E. 928 (whether a mode of raising a car was "reasonably safe," excluded); 1913, Keefe *v.* Armour & Co., 258 Ill. 28, 101 N. E. 252 (whether a method of generating gas in a tank was reasonably safe, excluded); 1916, Bell *v.* Toluca Coal Co., 272 Ill. 576, 112 N. E. 311 (whether the condition of a mine as observed by an inspector was such as he would deem necessary to report as unsafe, not allowed, erroneous); 1913, Keefe *v.* Armour & Co., 258 Ill. 28, 101 N. E. 252 (whether a mode of testing tank-cars was reasonably safe, excluded); 1918, Thompson *v.* Hughes, 286 Ill. 128, 121 N. E. 387 (whether land was sufficiently titled, not allowed); 1920, Loftus *v.* Chicago

raise the question at every opportunity. Even the experienced casuist would be puzzled to demonstrate a consistency between these rulings in the same

Railway Co., 293 Ill. 475, 127 N. E. 654 (contributory negligence in crossing the track; "he took large steps when he saw there was not a chance for him to get away," excluded as or "conclusion"; such nonsense in the law does the Opinion rule produce);
Indiana: 1878, Louisville N. A. & C. R. Co. *v.* Spain, 61 Ind. 462 (whether a fence was sufficient to turn stock, allowed); 1881, Niagara F. Ins. Co. . Greene, 77 Ind. 595 (reasonable time, in an agent's contract, allowed, for an expert); 1883, Albion *v.* Herrick, 90 Ind. 549 (whether a street was so dangerous that a prudent man would not cross, excluded); 1888, Grand Rapids & I. R. Co. *v.* Ellison, 117 Ind. 241, 20 N. E. 135 (whether an engineer did his duty, excluded); 1895, Bonebrake *v.* Board, 141 Ind. 62, 40 N. E. 141 (whether a bridge sufficed to sustain a load, allowed); 1898, Siever *v.* P. B. & L. Co., 151 Ind. 642, 50 N. E. 877 (that an elevator gearing was a safe appliance, allowed); 1900, Chicago & E. I. R. Co. *v.* Grimm, 25 Ind. App. 494, 57 N. E. 641 (safety of mode of running train, allowed); 1921, Pittsburgh C. C. & St. L. R. Co. *v.* Edwards, — Ind. —, 129 N. E. 310 (injury at a derrick; how many men were required to do the work, held allowable);
Iowa: 1868, Phillips *v.* Starr, 26 Ia. 350 (whether an item in a contract's performance was material, excluded); 1872, Bills *v.* Ottumwa, 35 Ia. 111 (whether a mode of loading a wagon was safe, excluded); 1875, Gilruth *v.* Gilruth, 40 Ia. 346 (safety of a car for coupling, excluded); 1872, Hamilton *v.* R. Co., 36 Ia. 36 (proper way to couple cars, excluded); 1873, Muldowney *v.* R. Co., 36 Ia. 472 (same); 1876, Belair *v.* R. Co., 43 Ia. 667 (same); 1876, Cooper *v.* Central R. Co., 44 Ia. 140 (safety of speed, excluded); 1877, Locke *v.* R. Co., 46 Ia. 110 (reason for not leaving a flagman, excluded); 1877, Hollowell *v.* Dickerson, 46 Ia. 569 (safety of street, excluded); 1878, Taylor *v.* Lumbering Co., 47 Ia. 664 (whether repairs were necessary, allowed); 1882, Allen *v.* R. Co., 57 Ia. 626, 11 N. W. 614 (duty of brakeman, excluded); 1882, Jasper Co. *v.* Osborn, 59 Ia. 213, 13 N. W. 104 (ability to live peacefully, excluded); 1882, Brant *v.* Lyons, 60 Ia. 174, 14 N. W. 227 (negligence as the cause of an injury, excluded); 1883, Funston *v.* R. Co., 61 Ia. 455, 16 N. W. 518 (whether a team could be turned in a certain space, allowed); 1883, Kitteringham *v.* R. Co., 62 Ia. 286, 17 N. W. 585 (time required to make repairs, allowed); 1885, Baldwin *v.* R. Co., 68 Ia. 38, 25 N. W. 918 (safe mode of piling lumber, excluded); 1886, Kuhns *v.* R. Co., 70 Ia. 564, 31 N. W. 868 (safety of running an engine backwards, allowed); 1887, Grinnell *v.* R. Co., 73 Ia. 95, 34 N. W. 758 (time required to stop a train, allowed); 1888, Gadbois *v.* R. Co., 75 Ia. 533, 39 N. W. 871 (that a train was started in an unusual way, excluded); 1894, Betts *v.* R. Co., 92 Ia. 343, 60 N. W. 623 (sufficiency of cattle cars, allowed); 1894, Reifsnider *v.* R. Co., 90 Ia. 76, 81, 57 N. W. 692 (the proper position of a brakeman under certain conditions, allowed); 1895, Duer *v.* Allen, 96 Ia. 36, 64 N. W. 682 (prudent mode of conducting a creamery, excluded); 1897, Kelly *v.* West Bend, 101 Ia. 669, 70 N. W. 726 (what part of a lawyer's work was unnecessary, excluded); 1897, Ridler *v.* Ridler, 103 Ia. 470, 72 N. W. 671 (child's suit for services; whether she worked at home as a hired girl, excluded); 1899, McKay *v.* Johnson, 108 Ia. 610, 79 N. W. 390 (that an engine worked well, admitted; whether it was an engineer's duty to keep the screws tight, etc., admitted); 1899, Anderson *v.* R. Co., 109 Ia. 524, 80 N. W. 561 (usual implements for certain work, allowed); 1899, Taylor *v.* Star Coal Co., 110 Ia. 40, 81 N. W. 249 (whether a mine-roof was likely to fall, allowed); 1901, Quinlan *v.* R. Co., 113 Ia. 89, 84 N. W. 960 (what were the duties of a brakeman, allowed); 1901, Cahow *v.* R. Co., 113 Ia. 224, 84 N. W. 1056 (how many men would be needed to move safely a railroad tender, excluded); 1901, Wimber *v.* R. Co., 114 Ia. 551, 87 N. W. 505 (who had authority to start an engine, allowed); 1901, Brooks *v.* Sioux City, 114 Ia. 641, 87 N. W. 682 (that a walk was "in bad condition," held improper; that it was "a good and sound walk," held proper); 1902, Fitch *v.* Mason C. & C. L. T. Co., 116 Ia. 716, 89 N. W. 33 (whether with care a car could be run without lurching, excluded); 1904, Collins *v.* Chicago, M. & St. P. R. Co., 122 Ia. 231, 97 N. W. 1103 (whether a cattle-gate was sufficient, excluded); 1905, Schroeder *v.* Chicago & N. W. R. Co., 127 Ia. 365, 103 N. W. 985 (whether an unblocked switch-frog is dangerous, allowed, for experts); 1905, Hofacre *v.* Monticello, 128 Ia. 239, 103 N. W. 488 (whether ice elsewhere was as bad, etc., allowed on cross-examination); 1905, German Ins. Co. *v.* Chicago & N. W. R. Co., 128 Ia. 386, 104 N. W. 361 (whether sparks could pass a netting, whether an engine could be operated without emitting cinders, etc., allowed); 1906, Hamner *v.* Janowitz, 131 Ia. 20, 108 N. W. 109 (the proper and safe method of structure for a crane-track, allowed); 1909, Bruggeman *v.* Illinois C. R. Co., 147 Ia. 187, 123 N. W. 1007 (whether a train could have been stopped more quickly, excluded); 1913, Escher *v.* Carroll Co., 159 Ia. 627, 141 N. W. 38 (whether a bridge was reasonably safe, excluded; on this point, this Court does not seem to be able to free itself from the shackles of the Opinion rule as courageously as its repute demands); 1917, Ingwersen *v.* Carr, 180 Ia. 988, 164 N. W. 217 (malpractice;

jurisdiction. On the whole, the general impression produced, on an unprejudiced reading of these rulings, is that an enormous mass of the most useful

whether the defendant exercised his best skill and knowledge, etc., allowed);
Kansas: 1868, Northern Mo. R. Co. *v.* Akers, 4 Kan. 471 (number of men necessary in driving mules, allowed); 1870, Tefft *v.* Wilcox, 6 Kan. 58 (duty of a physician as to treatment of a case, allowed); 1881, Monroe *v.* Lattin, 25 Kan. 353 (negligence of a driver, excluded); 1881, Parsons City *v.* Lindsay, 26 Kan. 431 (whether a street was dangerous, excluded); 1883, Kansas P. R. Co. *v.* Peavey, 29 Kan. 177 (proper mode of coupling, allowed); 1884, Dow *v.* Julien, 32 Kan. 578, 4 Pac. 1000 (whether care was exercised, excluded); 1885, Missouri Pac. R. Co. *v.* Mackey, 33 Kan. 303, 6 Pac. 291 (duty of fireman; obscure distinction); 1885, St. Louis & S. F. R. Co. *v.* Ritz, 33 Kan. 405, 6 Pac. 533 (proper construction of cattle-guards, excluded); 1888, Topeka *v.* Sherwood, 39 Kan. 692, 18 Pac. 933 (whether a sidewalk was dangerous, excluded); 1895, Insley *v.* Shire, 54 Kan. 793, 39 Pac. 713 (whether there was negligent management, excluded); 1897, Murray *v.* Board, 58 Kan. 1, 48 Pac. 554 (safety of a bridge, excluded); 1900, Missouri K. & T. R. Co. *v.* Merrill, 61 Kan. 671, 60 Pac. 819 (what would be the proper mode of mounting a car under certain conditions, allowed); 1903, Missouri & K. Tel. Co. *v.* Vandevort, 67 Kan. 269, 72 Pac. 771 (whether poles were likely to frighten horses, excluded); 1911, Duncan *v.* Atchison T. & S. F. R. Co., 86 Kan. 112, 119 Pac. 356 (whether a bridge was a safe place for coupling cars, not allowed); 1913, Root *v.* Cudahy P. Co., 88 Kan. 413, 129 Pac. 147 (whether an elevator was safe, not allowed);
Kentucky: 1878, Claxton's Adm'r *v.* R. Co., 13 Bush 643 (safety of machinery, allowed); 1897, Louisville & N. R. Co. *v.* Bowen, — Ky. —, 39 S. W. 31 (that a signal ought to have been given at a crossing, excluded); 1899, Louisville & N. R. Co. *v.* Milliken, — Ky. —, 51 S. W. 796 (whether a mode of sitting on a freight car was careless or improper, excluded); 1913, Newport R. M. Co. *v.* Mason, 152 Ky. 224, 153 S. W. 220 (safety of a floor covering, allowed); 1918, Barrett's Adm'r *v.* Brand, 179 Ky. 740, 201 S. W. 331 (malpractice; whether the approved professional methods were followed, allowed);
Louisiana: 1900, State *v.* Austin, 104 La. 409, 29 So. 23 (by an accused, whether his belief in the deceased's designs was negligently formed, excluded);
Maine: 1868, Hill *v.* R. Co., 55 Me. 444 (whether the blowing of a whistle was safe, excluded; 1875, State *v.* Watson, 65 Me. 76 (spreading of fire, excluded), 1884, Mayhew *v.* Mining Co., 76 Me. 111 (whether an apparatus was proper, excluded); 1896, Marston *v.* Dingley, 88 Me. 546, 34 Atl. 414 (whether a photograph was skilfully reproduced in a newspaper, admitted);
Maryland: 1856, Scaggs *v.* R. Co., 10 Md. 270, 281 (whether a collision could have been avoided, excluded); 1872, Waters *v.* Waters, 35 Md. 538 (propriety of a testator's disposition of his property, admitted); 1886, Baltimore Elev. Co. *v.* Neal, 65 Md. 452, 5 Atl. 338 (whether a marine collision could have been avoided by care, admitted); 1886, Baltimore & Y. T. R. Co. *v.* Leonhardt, 66 Md. 77, 5 Atl. 346 (whether it was safe to descend from a certain car, inadmissible; but whether a road was dangerous, admissible); 1886, Baltimore & L. T. Co. *v.* Cassell, 66 Md. 430, 7 Atl. 805 (safety of a road, allowed); 1887, Stumore *v.* Shaw, 68 Md. 18, 11 Atl. 360 (prudence of a shipping-broker, allowed); 1898, Baltimore & S. P. Co. *v.* Hackett, 87 Md. 224, 39 Atl. 510 (whether a water-outlet was adequately constructed, admissible); 1899, Tall *v.* Baltimore S. P. Co., 90 Md. 248, 44 Atl. 1007 (whether a captain interfered to prevent an affray with sufficient promptness, excluded); 1908, Commissioners *v.* State, 107 Md. 210, 68 Atl. 602 (what was necessary to safeguard a bridge, excluded; the deplorable extreme of this ruling may be gathered from the circumstance that though the witness was "a former keeper of this bridge," the opinion states that he "was not shown to possess any special skill or knowledge derived from or relating to any trade, profession, or technical pursuit which would qualify him to instruct the jury"; if there is no presumption that a bridge-keeper knows something special about safeguards for bridges, then there ought to be none that a judge knows something special about the law of Evidence); 1908, Fletcher *v.* Dixon, 107 Md. 420, 68 Atl. 875 ("Please state whether or not in your opinion that horse was fit for a lady to drive," excluded; thus is Common Sense shut out of court and Scholasticism enshrined on an altar); 1913, Capital Traction Co. *v.* Contner, 120 Md. 78, 87 Atl. 904 (whether a motorman could have stopped the car in time, excluded); 1919, County Commissioners *v.* Pel Air S. I. Ass'n, 134 Md. 548, 107 Atl. 348 (whether a drain pipe was "sufficient to drain the surface water," not allowed);
Massachusetts: 1850, Raymond *v.* Lowell, 6 Cush. 531 (proper condition of a street, excluded); 1851, Lund *v.* Tyngsborough, 9 Cush. 37, 39 (safety of a place in a road, allowed); 1853, Twombly *v.* Leach, 11 Cush. 402, 405 (whether certain treatment was proper according to the medical profession, admitted); 1861, Nowell *v.* Wright, 3 All. 170 (proper condition of a street, excluded); 1864, White *v.* Ballou, 8 All. 408 (cooper trade; whether certain conduct was prudent, ex-

testimony is daily excluded under their influence. The apparent purpose of the rule might have been supposed to be (by one unacquainted with our juris-

cluded); 1864, Bliss *v.* Wareham, 8 All. 564 (general condition, as to safety, of a bridge, excluded); 1867, Simmons *v.* Steamboat Co., 97 Mass. 371 (whether a place was not manifestly improper for passengers, excluded); 1869, Ryerson *v.* Abington, 102 Mass. 530 (safety of a highway, excluded); 1871, Higgins *v.* Dewey, 107 Mass. 495 (whether a fire would probably spread, excluded); 1877, Buxton *v.* S. P. Works, 121 Mass. 448 (whether an injury could have occurred with care by the plaintiff, excluded); 1883, Amstein *v.* Gardner, 134 Mass. 9 (whether a cattle-guard was necessary, excluded); 1884, Donnelly *v.* Fitch, 136 Mass. 558 (whether a horse of certain qualities called for certain care, allowed); 1887, Freeman *v.* Ins. Co., 144 Mass. 579, 12 N. E. 372 (time required to stop a train, allowed); 1887, Gilbert *v.* Guild, 144 Mass. 605, 12 N. E. 368 (whether a machine's danger was obvious, excluded); 1894, McGuerty *v.* Hale, 161 Mass. 51, 36 N. E. 682 (whether a boy was a proper person to put at certain work, excluded); 1895, Lang *v.* Terry, 163 Mass. 138, 38 N. E. 802 (proper way of managing a machine, allowed); 1895, Twomey *v.* Swift, 163 Mass. 273, 39 N. E. 1018 (whether a person was negligent, excluded); 1896, McCarthy *v.* Boston Duck Co., 165 Mass. 165, 42 N. E. 568 (whether a pulley was a proper one, admitted); 1898, O'Brien *v.* Look, 171 Mass. 36, 50 N. E. 458 (whether a mode of using machinery was proper, allowed); 1898, Edwards *c.* Worcester, 172 Mass. 104, 51 N. E. 447 (whether a road was safe and convenient, excluded); 1899, Leslie *v.* R. Co., 172 Mass. 468, 52 N. E. 542 (what was the proper way of turning a stone in a derrick, allowed); 1902, Whitman *v.* R. Co., 181 Mass. 138, 63 N. E. 334 (whether the plaintiff thought he could cross a track safely, excluded); 1904, Meehan *v.* Holyoke St. R. Co., 186 Mass. 511, 72 N. E. 61 (proper way of stringing telegraph wires, excluded); 1906, Erickson *v.* American S. & W. Co., 193 Mass. 119, 78 N. E. 761 (that cast-iron was unsuitable for a steam-pipe, allowed); 1912, Robinson *v.* Springfield St. R. Co., 211 Mass. 483, 98 N. E. 576 ("Was there anything you could have done to avoid the collision?" held proper on the facts); 1916, Lynch *v.* Larivee Lumber Co., 223 Mass. 335, 111 N. E. 861 (the proper way of piling lumber, excluded); 1917, Mark *v.* Stuart-Howland Co., 226 Mass. 35, 115 N. E. 42 (repudiation of a contract; whether a party's order under a contract was reasonable, not allowed); 1919, Eldredge *v.* Barton, 232 Mass. 183, 122 N. E. 272 (admission by a decedent, "it is my fault," possibly allowable);

Michigan: 1851, Daniels *v.* Mosher, 2 Mich. 183 (an opinion by an eye-witness that certain farm work was well done, received; but a similar opinion by others, based on the facts testified to at the trial, rejected); 1875, Clark *v.* Locomotive Works, 32 Mich. 257 (what ought to have been done with a vessel, excluded; whether an engine worked in the ordinary way, admitted); 1882, Marcott *v.* R. Co., 49 Mich. 101, 13 N. W. 374 (whether certain conduct interfered with an employee's work, admitted); 1883, Huizega *v.* Lumber Co., 51 Mich. 275, 16 N. W. 643 (machinery's safety, admitted); 1886, Laughlin *v.* R. Co., 62 Mich. 226, 28 N. W. 873 (Campbell, C. J.: "No amount of description can enable a jury to see the place as the witnesses saw it, and, while witnesses must describe the place as well as they can, it is always competent, for those who are familiar with the highways and their use, to give their impressions received at the time concerning safety or convenience of passage and other conditions of an analogous nature"); 1887, Harris *v.* Clinton, 64 Mich. 457, 31 N. W. 425 (*contra* to the preceding case, which is not cited); 1887, Zube *v.* Webber, 67 Mich. 58, 34 N. W. 264 (whether more force than necessary was used in an ejectment, excluded); 1888, Merkle *v.* Bennington, 68 Mich. 143, 35 N. W. 846 (whether a bridge was in good repair, admitted); 1888, Cross *v.* R. Co., 69 Mich. 369, 37 N. W. 361 (like Laughlin *v.* R. Co., *supra*); 1895, Lau *v.* Fletcher, 104 Mich. 295, 62 N. W. 357 (whether machinery was safe, allowed); 1898, Van Worden *v.* Winslow, 117 Mich. 564, 76 N. W. 87 (propriety of opening celery trenches, allowed); 1898, Detzur *v.* Brewing Co., 119 Mich. 282, 77 N. W. 948 (whether a broken window was safe, excluded); 1900, People *v.* Detroit & S. P. R. Co., 125 Mich. 366, 84 N. W. 290 (whether a roadbed was safe, excluded); 1903, Storrie *v.* Grand Trunk El. Co., — Mich. —, 96 N. W. 569 (the "necessity or expediency of entering in front of the drums," etc. allowed); 1904, Johnson *v.* Detroit & M. R. Co., 135 Mich. 353, 97 N. W. 760 (efficiency of a cattle-guard, allowed); 1915, Loose *v.* Deerfield Tp., 187 Mich. 206, 153 N. W. 913 (whether a highway was reasonably safe for automobiles, excluded); 1920, Luttenton *v.* Detroit J. & C. R. Co., 209 Mich. 20, 176 N. W. 558 (whether the crossing was "more dangerous than any other place," allowed);

Minnesota: 1862, Sowers *v.* Dukes, 8 Minn. 24 (sufficiency of a fence to turn stock, excluded); 1875, Getchell *v.* Hill, 21 Minn. 465 (propriety of certain medical treatment, allowed); 1877, Hayward *v.* Knapp, 23 Minn. 434 (safety of a mooring-place, allowed, for an expert); 1878, Shriver *v.* R. Co., 24 Minn. 509 (whether marbles were properly packed for carriage, allowed); 1881, Krippner *v.* Biebl, 28 Minn. 141, 9 N. W. 671 (propriety of measures taken to stop a fire, allowed); 1884, Kolsti *v.* R.

prudence) to exclude testimony in proportion to its significance and directness; and the wonder often is how a jury can under the circumstances come to an intelligent conclusion without the aid of the banished testimony.

Co., 32 Minn. 134, 19 N. W. 655 (practicability of locking or fencing turntables, allowed); 1885, Mantel *v.* R. Co., 33 Minn. 62, 21 N. W. 853 (whether due care required certain conduct, excluded); 1887, Lindsley *v.* R. Co., 36 Minn. 544, 33 N. W. 7 (proper mode of caring for cattle in transit, admitted); 1889, Goodsell *v.* Taylor, 41 Minn. 209, 42 N. W. 873 (same); 1890, Armstrong *v.* R. Co., 45 Minn. 87, 47 N. W. 459 (suitability of a stable for keeping horses, allowed); 1896, Morris *v.* Ins. Co., 63 Minn. 420, 65 N. W. 655 (whether it was dangerous to thresh with steam in a high wind, excluded); 1897, Peterson *v.* Johnson-Wentworth Co., 70 Minn. 538, 73 N. W. 510 (whether a guard could have been placed around a gearing, allowed); 1899, Moore *v.* Townsend, 76 Minn. 64, 78 N. W. 880 (that a ladder was dangerous, excluded); 1899, Sieber *v.* R. Co., 76 Minn. 269, 79 N. W. 95 (whether an engineer's methods in "bucking" snow were proper and prudent, allowed); 1904, McDonald *v.* Duluth, 93 Minn. 206, 100 N. W. 1102 (whether a railing was safe, excluded); 1905, Scarlotta *v.* Ash, 95 Minn. 240, 103 N. W. 1025 (that a machine "operated all right," allowed); 1906, Carlin *v.* Kennedy, 97 Minn. 141, 106 N. W. 340 (whether a machine could be guarded, etc., allowed);

Mississippi: 1895, Kansas City M. & B. R. Co. *v.* Spencer, 72 Miss. 491, 17 So. 168 (how cattle-guards should be built, excluded); 1899, Grace *v.* R. Co., — Miss. —, 25 So. 875 (whether cattle-guards were properly constructed, excluded);

Missouri: 1859, Hill *v.* Sturgeon, 28 Mo. 329 (prudence of certain nautical conduct, admitted); 1872, Gavisk *v.* R. Co., 49 Mo. 276 (whether due care was taken, excluded); 1876, Rickey *v.* Zeppenfeldt, 64 Mo. 276 (whether a train could have been stopped, allowed); 1877, Koons *v.* R. Co., 65 Mo. 597 (dangerousness of a turntable, excluded); 1881, Greenwell *v.* Crow, 73 Mo. 639 (safety of a place of deposit, admitted); 1886, Brown *v.* Road Co., 89 Mo. 155, 1 S. W. 129 (safety of a road, admitted); 1887, Gutridge *v.* R. Co., 94 Mo. 472, 7 S. W. 476 (whether with due care an injury would have occurred, excluded); 1893, Czezewzka *v.* R. Co., 121 Mo. 201, 212, 25 S. W. 911 (the proper position of a street-car driver, allowed); 1896, Benjamin *v.* R. Co., 133 Mo. 274, 34 S. W. 590 (safety of a coal-hole cover, excluded); 1901, Hurst *v.* R. Co., 163 Mo. 309, 63 S. W. 695 (whether a switch-yard was in reasonably safe condition, not allowed); 1908, Meily *v.* St. Louis & S. F. R. Co., 215 Mo. 567, 114 S. W. 1013 (how many men required to load a car, allowed); 1921, Laycock *v.* United R. Co., — Mo. —, 234 S. W. 90 (personal injury; whether a car lurched "enough to throw a man," allowed);

Montana: 1897, State *v.* Giroux, 19 Mont. 149, 47 Pac. 798 (whether a parent was a fit person to have the custody of a child, excluded); 1903, Metz *v.* Butte, 27 Mont. 506, 71 Pac. 761 (whether a sidewalk was reasonably safe, excluded); 1903, Coleman *v.* Perry, 28 Mont. 1, 72 Pac. 42 (whether a mangle was out of repair, allowed);

Nebraska: 1900, Missouri P. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744 (duties of a car-inspector, allowed; whether a track was properly constructed, allowed); 1903, Chicago R. I. & P. R. Co. *v.* Holmes, 68 Nebr. 826, 94 N. W. 1007 (whether an injured switchman did what was "necessary for him to do," excluded); 1908, Maxson *v.* Case Threshing M. Co., 81 Nebr. 546, 116 N. W. 281 (that a mode of putting on a belt was dangerous, allowed);

New Hampshire: 1881, Wells *v.* Eastman, 61 N. H. 507 (proper time for firing brush, admitted); 1898, Nourie *v.* Theobald, 68 N. H. 564, 41 Atl. 182 (that it was dangerous to take down a building, excluded); 1901, Challis *v.* Lake, 71 N. H. 90, 51 Atl. 260 (what treatment a physician of reasonable skill ought to have given, allowed); 1920, Gardner *v.* Commercial Machine Co., — N. H. —, 111 Atl. 317 (injury while handling wheelbarrows; testimony that an employee "ought to have waited his turn," held allowable, as probably helpful to the jury); 1920, Paquette *v.* Connecticut V. L. Co., 79 N. H. 288, 109 Atl. 836 (whether a certain kind of blow in timber-felling was dangerous, allowed);

New York: 1850, Price *v.* Powell, 3 N. Y. 323 (whether a cargo was properly stowed, admitted); 1863, Curtis *v.* Gano, 26 N. Y. 427 (whether a construction was workmanlike, allowed); 1863, Moore *v.* Westervelt, 27 N. Y. 238 (whether a ship was safely moored, allowed); 1865, Walsh *v.* Ins. Co., 32 N. Y. 442 (effect of a mode of loading a ship, allowed); 1874, Haggerty *v.* R. Co., 61 N. Y. 624 (whether anything could have been done to prevent the injury, excluded); 1877, Baird *v.* Daly, 68 N. Y. 551 (whether a ship was unseaworthy, allowed); 1877, Carpenter *v.* Transp. Co., 71 N. Y. 579 ("whether acts are seamanlike and proper," admitted; whether anything which might have avoided the harm was done or omitted, excluded); 1879, Scattergood *v.* Wood, 79 N. Y. 265 (whether a machine was inferior in working, allowed); 1880, Ginterman *v.* Steamship Co., 83 N. Y. 365 (how a vessel should have been handled, allowed); 1881, Hart *v.* Bridge Co., 84 N. Y. 60 (whether certain gates were customary and safe; obscure

5. Law

§ 1952. In general. The exclusion of testimonial opinion here rests on a ground slightly different from that of all the other instances. The general principle (*ante*, § 1918) is exemplified, to be sure, that the tribunal does not

ruling); 1881, Ward *v.* Kilpatrick, 85 N. Y. 415 (whether work was "well done," allowed); 1884, Ferguson *v.* Hubbell, 97 N. Y. 512 (whether it was dry enough to fire fallow land, excluded); 1891, O'Neil *v.* R. Co., 129 N. Y. 125, 29 N. E. 84 (distance in which a truck could be stopped, admitted); 1899, Kumberger *v.* Congress S. Co., 158 N. Y. 339, 53 N. E. 3 (whether a place was proper for an engine, admitted); 1899, Littlejohn *v.* Shaw, 159 N. Y. 188, 53 N. E. 810 (whether a substance "gambier" was merchantable, allowed); 1900, Dougherty *v.* Milliken, 163 N. Y. 527, 57 N. E. 757 (whether a mode of anchoring derricks was sufficient, not allowed; the opinion employs an unsound analysis of the Opinion rule; two judges dissenting); 1901, Finn *v.* Cassidy, 165 N. Y. 584, 59 N. E. 311 (how an excavation ought to have been made, allowed; Gray, J., and Parker, C. J., diss.); 1903, New York C. I. Co. *v.* U. S. Radiator Co., 174 N. Y. 331, 66 N. E. 967 (whether goods were "needed" under a contract, allowed); 1903, Trenton Potteries Co. *v.* Title G. & T. Co., 176 N. Y. 65, 68 N. E. 132 (what ought to have been done in framing a policy of title-insurance, excluded); 1919, Noah *v.* Bowery Savings Bank, 225 N. Y. 284, 122 N. E. 235 (forgery of depositor's name; whether a signature of a certain sort would "tend to excite suspicion in the mind of the ordinarily competent signature-clerk," not allowed; another instance of the wearisome unpracticality of the Opinion rule);

North Carolina: 1849, Sikes *v.* Paine, 10 Ired. 280 (whether there was a deficiency in performing a contract to repair, allowed); 1896, Tillett *v.* R. Co., 118 N. C. 1031, 24 S. E. 111 (whether a car was coupled negligently, excluded); 1898, Phifer *v.* R. Co., 122 N. C. 940, 29 S. E. 578 ("Were you careful?" excluded); 1901, Raynor *v.* R. Co., 129 N. C. 195, 39 S. E. 821 (whether more than necessary force was used in expelling a passenger, excluded); 1901, Jeffries *v.* R. Co., 129 N. C. 236, 39 S. E. 836 (whether anything was omitted that could have been done to save life, excluded); 1902, Cogdell *v.* R. Co., 130 N. C. 313, 41 S. E. 541 (whether a man could safely stand on a plank, etc., not allowed); 1904, Marks *v.* Harriet Cotton Mills, 135 N. C. 287, 47 S. E. 432 (whether cog-wheels should have been covered, etc., not allowed); 1919, Brewer *v.* Ring, 177 N. C. 476, 99 S. E. 358 (malpractice; whether a diagnosis was made according to the approved practice and principles of the medical profession; allowed); 1919, Barnes *v.* Seaboard Airline R. Co., 178 N. C. 264, 100 S. E. 519 (whether a mode of stopping a train made loading it more unsafe, allowed); 1921, Marshall *v.* Interstate T. & T. Co., 181 N. C. 292, 106 S. E. 818 (whether a place was "safe" for workmen, excluded; Hoke, J. and Clark, C. J., diss., quoting with approval the text above); 1921, Marshall *v.* Interstate T. & T. Co., 181 N. C. 410, 107 S. E. 498 (that conditions of an electric plant were not safe, not allowed);

North Dakota: 1896, Ouverson *v.* Grafton, 5 N. D. 281, 65 N. W. 677 (whether a threshing-machine was calculated to frighten ordinary horses, excluded);

Ohio: 1850, Stewart *v.* State, 19 Oh. 307 (whether there was time to avoid an attack, allowed); 1851, Cincinnati & F. M. Ins. Co. *v.* May, 20 Oh. 223 (whether an act was careful or skilful, excluded; but other principles mainly controlled the ruling); 1860, Bellefontaine & I. R. Co. *v.* Bailey, 11 Oh. St. 335 (whether an injury at a railroad-crossing could have been avoided, allowed); 1871, Cincinnati & Z. R. Co. *v.* Smith, 22 Oh. St. 246 (proper place for a brakeman, allowed); 1875, Soldwater Turnpike Co. *v.* Coover, 26 Oh. St. 59 (danger of a place in the road, excluded); 1877, Insurance Co. *v.* Tobin, 32 Oh. St. [illegible] (whether a vessel was seaworthy, allowed; whether it was prudent to run a steamboat under the circumstances, excluded); 1895, Railroad Co. *v.* Schultz, 43 Oh. St. 275, 1 N. E. 324 (from witnesses not expert, whether a fence was sufficient to turn stock, excluded); 1900, Ohio & I. T. Co. *v.* Fishburn, 61 Oh. 608, 56 N. E. 457 (proper time for "shooting" an oil-well, allowed);

Oklahoma: 1912, Hicks *v.* Davis, 32 Okl. 195, 120 Pac. 260 (whether a gang plank was constructed in a prudent mode, excluded); 1919, Federal Oil & Gas Co. *v.* Campbell, —Okl.—, 183 Pac. 894 (whether employer's premises and instrumentalities were safe for working, not allowed);

Oregon: 1869, Heath *v.* Glisan, 3 Or. 67 (propriety of certain surgical treatment, allowable); 1869, Williams *v.* Poppleton, 3 Or. 143, 151; 1900, State *v.* Mims, 36 Or. 31[illegible] 61 Pac. 888 (which party in an affray had the advantage, excluded); 1900, Chan Sing *v.* Portland, 37 Or. 68, 60 Pac. 718 (whether the injury would have happened, if defendant had done certain things, not allowed); 1911, Weiss *v.* Kohlhagen 58 Or. 144, 113 Pac. 46 (whether an excavation was necessary, allowed); 1921, Lehman *v.* Knott, 100 Or. 59, 196 Pac. 476 (whether a surgical treatment was "proper and usual," held allowable, but whether it was "unskilful

need the witness' judgment and hence will insist on dispensing with it. But here it is not that the jury can of themselves determine equally well; it is

and negligent," held not allowable; here are Tweedle-dum and Tweedle-dee in the saddle again); 1921, Patterson *v.* Howe, — Or. —, 202 Pac. 225 (malpractice; to an expert, whether the operation performed "was a skilful dental operation," held reversible error; this ruling would mark our law of Evidence as a system of rules devised to obstruct ascertainment of the truth);

Pennsylvania: 1851, Beatty *v.* Gilmore, 16 Pa. 468 (safety or danger of a place, allowed); 1871, Delaware & C. Towboat Co. *v.* Starrs, 69 Pa. 38, 41 (prudence of a towboat captain, allowed); 1876, Sinnott *v.* Mullin, 82 Pa. 337, 342 (proper mode of building a retaining wall, allowed); 1882, Olmsted *v.* Gere, 100 Pa. 131 (skilfulness of a surgical operation, allowed); 1883, American Steamship Co. *v.* Landreth, 102 Pa. 135, *semble* (opposed to Beatty *v.* Gilmore); 1889, Long *v.* R. Co., 126 Pa. 143, 19 Atl. 39 (propriety of a safety-device at a switch, excluded); 1890, Graham *v.* Penna. Co., 139 Pa. 149, 160, 21 Atl. 151 (danger of a place, excluded; distinguishing Beatty *v.* Gilmore on the ground that an adequate description was in that case impossible); 1892, McNerney *v.* Reading, 150 Pa. 611, 616, 25 Atl. 57 (whether a place was dangerous, allowed); 1893, Elder *v.* Coal Co., 157 Pa. 490, 499, 27 Atl. 545 (whether certain precautions were sufficient, allowed; but not whether the conduct was negligent); 1895, Kitchen *v.* Union Tp., 171 Pa. 145, 33 Atl. 76 (whether a place was dangerous, admitted); 1897, Platz *v.* McKean, 178 Pa. 601, 36 Atl. 136 (safety of a sluice, excluded); 1897, Cookson *v.* R. Co., 179 Pa. 184, 36 Atl. 194 (whether a place was the proper one to stop, look, and listen, admitted); Auberle *v.* McKeesport, 179 Pa. 321, 36 Atl. 212 (whether the absence of a guard-rail made a bridge dangerous, excluded); 1898, Woeckner *v.* Motor Co., 187 Pa. 206, 41 Atl. 28 (that a motorman exercised good judgment, excluded on the facts); 1898, Whitaker *v.* Campbell, 187 Pa. 113, 41 Atl. 38 (whether it was dangerous to clean a machine, admitted); 1898, Beardslee *v.* Columbia Tp., 188 Pa. 496, 41 Atl. 618 (contributory negligence; opinions of non-experts, excluded); 1902, Siegler *v.* Mellinger, 203 Pa. 256, 52 Atl. 175 (that a place was dangerous, excluded); 1903, Seifred *v.* Pa. R. Co., 206 Pa. 399, 55 Atl. 1061 (that a railroad crossing was dangerous, excluded; no authority cited); 1917, Campbell *v.* Well Bros. Co., 256 Pa. 446, 100 Atl. 1050 (whether a method of raising a derrick was more dangerous than the usual one, allowed); 1917, Kuhn *v.* Ligonier V. R. Co., 255 Pa. 445, 100 Atl. 142 (railroad collision; whether "the verbal order was as safe as a written order under the circumstances," not allowed);

Rhode Island: 1858, Buffum *v.* Harris, 5 R. I. 250 (sufficiency and expediency of a drain, etc., allowed); 1894, Wilson *v.* R. Co., 18 R. I. 598, 601, 29 Atl. 300 (whether a person seemed to drive carefully, allowed); 1903, Ennis *v.* Little, 25 R. I. 342, 55 Atl. 884 (whether a certain condition of an eyebolt was defective, excluded);

South Carolina: 1883, Ward *v.* R. Co., 19 S. C. 522, 526 (whether there was time to avoid injury, allowed); 1884, Couch *v.* R. Co., 22 S. C. 561 (whether a place was dangerous, excluded); purporting to follow the preceding case); 1885, Bridger *v.* R. Co., 25 S. C. 26 (similar); 1901, Easler *v.* R. Co., 59 S. C. 311, 37 S. E. 938 (whether passengers had sufficient time to leave a railroad car, allowed); 1903, Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810 (whether it "takes a woman of health to run seven looms," not allowed); 1904, Koon *v.* Southern Ry., 69 S. C. 101, 48 S. E. 86 (whether a pile-driver was safe, allowed);

South Dakota: 1909, Reeves *v.* Chicago M. & St. Paul R. Co., 24 S. D. 84, 123 N. W. 498 (proper place for a brakeman, allowed);

Tennessee: 1874, Lawrence *v.* Hudson, 12 Heisk, 672 (negligence of a stage-driver in leaving his seat, excluded); 1896, Louisville & N. R. Co. *v.* Reagan, 96 Tenn. 128, 33 S. W. 1050 (proper way to uncouple cars, admitted); 1897, Bruce *v.* Beall, 99 Tenn. 303, 41 S. W. 445 (probable life of an elevator-cable, admitted; but, whether a prudent person would have discontinued its use, excluded);

Texas: 1879, Houston & T. C. R. Co. *v.* Smith, 52 Tex. 186 (whether there was time to get out of the way, excluded); 1885, International & G. N. R. Co. *v.* Klaus, 64 Tex. 294 (whether a bridge span was large enough, allowed); 1888, Telegraph Co. *v.* Cooper, 71 Tex. 512, 9 S. W. 598 (effect of timely assistance at childbirth, allowed); 1890, Gulf Colo. & S. F. R. Co. *v.* Compton, 75 Tex. 673, 13 S. W. 667 (safety of a train-hand equipment, allowed); 1896, McCray *v.* R. Co., 89 Tex. 168, 34 S. W. 95 (whether a rail would have fallen if the car was properly loaded, admitted); 1901, Lipscomb *v.* R. Co. 95 Tex. 5, 64 S. W. 923 (whether it was a station agent's duty to hire guards, excluded); 1903, Lentz *v.* Dallas, 96 Tex. 258, 72 S. W. 59 (whether an iron grating was too light for the purpose, not allowed);

Utah: 1897, Wright *v.* S. P. Co., 15 Utah 421, 49 Pac. 309 (whether it was necessary to have certain employees on an engine, admitted) 1897, State *v.* McCoy, 15 Utah 136, 49 Pac. 420 (whether an abortion was necessary to save life, admitted); 1898, Hayes *v.* R. Co., 17 Utah 99, 53 Pac. 1001 (whether sheds were "carefully and properly built," allowed); 1903, Fritz *v.* Tel. Co., 25 Utah 263, 71 Pac. 209 (how many linemen should help in stringing wires, etc., allowed); 1903, Black *v.* R. M.

that the judge (or the jury as instructed by the judge) can determine equally well. The principle is the same; but the peculiarity is that a different member

B. Tel. Co., 26 Utah 451, 73 Pac. 514 (whether it would be the "proper thing" for a lineman to do a certain thing, excluded); 1904, Johnson *v.* Union P. C. Co., 28 Utah 46, 76 Pac. 1089 (safer way of letting rails down a mine, excluded); 1904, Meyers *v.* Highland B. G. M. Co., 28 Utah 96, 77 Pac. 347 (whether a light in a mine was necessary, sufficient, etc., not allowed; McCarty, J., diss.); 1905, Lee *v.* Salt Lake, 30 Utah 35, 83 Pac. 562 (difficulty of riding a bicycle over a depression, not allowed); 1907, Smith *v.* Ogden & N. W. R. Co., 33 Utah 129, 93 Pac. 185 (whether a fire could have been put out, not allowed);

Vermont: 1835, Lester *v.* Pittsford, 7 Vt. 158 (safety of a road, excluded); 1857, Fraser *v.* Tupper, 29 Vt. 410 (whether fires were properly set, excluded); 1860, Crane *v.* Northfield, 32 Vt. 124 (safety of a road, excluded); 1873, Oakes *v.* Weston, 45 id. 430 (reasonableness of a wagon-load, excluded); 1875, Dean *v.* McLean, 48 Vt. 413, 421 (proper manner of floating logs, admitted); 1876, Bixby *v.* R. Co., 49 Vt. 126 (whether an accident would have happened if certain precautions had been taken, excluded); 1881, Evarts *v.* Middlebury, 53 Vt. 628 (whether certain horse-shoes were proper for winter use, allowed); 1881, Weeks *v.* Lyndon, 54 Vt. 640, 645 (safety of a road, excluded); 1886, Stowe *v.* Bishop, 58 Vt. 499, 3 Atl. 494 (prudence of a mode of leaving a horse, excluded); 1886, Bemis *v.* R. Co., 58 Vt. 637, 3 Atl. 531 (prudence of a mode of using a crane, excluded); 1894, Houston *v.* Brush, 66 Vt. 331, 339, 29 Atl. 380 (whether a tackle-block was suitable, excluded); 1896, Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280 (whether a sluice was sufficient to carry off water, allowed); 1897, Sawyer *v.* Shoe Co., ib. 486, 38 Atl. 311 (safe manner of fastening a machine, allowed); 1919, Clogston's Estate, 93 Vt. 46, 106 Atl. 594 (undue influence; that witness "never saw E. misuse or abuse his father," allowed); 1919, State *v.* Gile, 93 Vt. 142, 106 Atl. 829 (statutory rape; whether the mother had seen defendant "do things I thought he ought not to do," allowed);

Virginia: 1895, Bertha Zinc Co. *v.* Martin's Adm'r, 93 Va. 791, 22 S. E. 869 (whether thawing dynamite before an open fire was a safe proceeding, allowed); 1896, Norfolk & C. R. Co. *v.* Lumber Co., 92 Va. 413, 23 S. E. 737 (whether an accident would have happened had certain precautions been taken, excluded); 1897, Childress *v.* R. Co., 94 Va. 186, 26 S. E. 424 (whether the place of a railroad accident was dangerous, excluded); 1899, Roanoke *v.* Shull, 97 Va. 419, 34 S. E. 34 (whether a person with ordinary care could have seen a hole, excluded); 1900, Southern R. Co. *v.* Mauzy, 98 Va. 692, 37 S. E. 285 (testimony to the best and safest mode of loading car wheels, excluded); 1905, Virginia I. C. & C. Co. *v.* Tomlinson, 104 Va. 249, 51 S. E. 362 (whether a mode of starting a belt was dangerous, not allowed); 1907, Virginia-Carolina C. Co. *v.* Knight, 106 Va. 674, 56 S. E. 725 (whether a snatch-block was a safe appliance, excluded); 1909, Hot Springs L. & M. Co. *v.* Revercomb, 110 Va. 240, 65 S. E. 557 (whether a river was floatable for logs, allowed; good opinion by Keith, P.); 1916, Reid *v.* Medley's Adm'r, 118 Va. 462, 87 S. E. 616 (propriety of a method of raising a house, allowed);

Washington: 1905, Lambert *v.* La Conner T. & T. Co., 37 Wash. 113, 79 Pac. 608 (whether a captain could have prevented a collision, allowed); 1906, Smith *v.* Dow, 43 Wash. 407, 86 Pac. 555 (the proper way to tie packages, allowed); 1918, Holt *v.* School Dist. No. 71, 102 Wash. 442, 173 Pac. 335 (injury on playground apparatus; "why this particular ladder was dangerous for small children to play upon," inadmissible "by strict rules");

West Virginia: 1899, State *v.* Hull, 45 W. Va. 767, 32 S. E. 240 (rape; by a physician, whether a woman would have voluntarily submitted to certain injuries, excluded); 1905, Wheeling M. & F. Co. *v.* Wheeling, S. & I. Co., 58 W. Va. 62, 51 S. E. 129 (certain testimony as to good faith, diligence, etc., in performing a contract, excluded under the issues); 1915, Colebank *v.* Standard Garage Co., 75 W. Va. 389, 84 S. E. 1051 (whether an automobile's speed was unreasonable, excluded);

Wisconsin: 1867, Wright *v.* Hardy, 22 Wis. 351 (propriety of a mode of amputation, allowed); 1868, Reynolds *v.* Shanks, 23 Wis. 307 (proper mode of construction of a wall, excluded); 1872, Leopold *v.* Van Kirk, 29 Wis. 553 (whether due care would have prevented the harm, allowed); 1872, Kelley *v.* Fond du Lac, 31 Wis. 185 (safety of a road, excluded); 1874, Montgomery *v.* Scott, 34 Wis. 345 (similar); 1875, Oleson *v.* Tolford, 37 Wis. 331 (whether a stage was overloaded, excluded); 1874, Montgomery *v.* Scott, 34 Wis. 345 (like Kelley *v.* Fond du Lac); 1878, Griffin *v.* Willow, 43 Wis. 511 (same); Benedict *v.* Fond du Lac, 44 Wis. 496 (same); 1879, Mellor *v.* Utica, 48 Wis. 459, 4 N. W. 655 (same); 1882, Veerhusen *v.* R. Co., 53 Wis. 694, 11 N. W. 433 (sufficiency of a fence, excluded); 1884, Fitts *v.* R. Co., 59 Wis. 330, 18 N. W. 186 (proper construction of a turntable, admitted); 1885, Baker *v.* Madison, 62 Wis. 143, 22 N. W. 141, 583 (like Kelley *v.* Fond du Lac); 1885, Quinn *v.* Higgins, 63 Wis. 666, 24 N. W. 482 (propriety of a surgeon's mode of treatment, allowed); 1885, Lawson *v.* R. Co., 64 Wis. 459, 24 N. W. 618 (safety of a position occupied in riding in a car, excluded); 1886, Seliger *v.* Bastian, 66 Wis. 522, 29 N. W. 244

of the tribunal is relied upon as equipped with the data. It is not the common knowledge of the jury which renders the witness' opinion unnecessary, but the special legal knowledge of the judge. This peculiarity of the principle's application comes specially into prominence in one of the topics presenting themselves under this head, — evidence of foreign law; for just there even the judge's special competence will usually cease, and the aid of testimony will be needed.

§ 1953. **Foreign Law.** No doubt has ever been made that properly skilled testimony may be sought in proving the existence of a foreign rule of law in general.[1] The question that involves the present principle is: When the *text of a foreign statute* is before the Court, may any aid be received in construing or interpreting it? No one doubts that the aid of a mere translator is proper. But when a translation, if necessary, has been made, is anything further needed in the way of comment on the text?[2]

The answer has always and properly been that such aid may at any time be needed and may always be offered.[3] The effect of this conclusion, however,

(prudent way of performing work, excluded); 1886, Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565 (propriety of a mode of construction, allowed); 1886, Gates *v.* Fleischer, 67 Wis. 509, 30 N. W. 674 (like Quinn *v.* Higgins); 1891, Trapp *v.* Druecker, 79 Wis. 640, 48 N. W. 664 (propriety of an inventor's lengthy methods in pursuance of a contract, excluded); 1899, Daly *v.* Milwaukee, 103 Wis. 588, 79 N. W. 752 (whether a cast-iron elbow was obviously safe, allowed); Innes *v.* Milwaukee, 103 Wis. 582, 79 N. W. 783 (same); 1904, Northern Supply Co. *v.* Wangard, 123 Wis. 1, 100 N. W. 1066 (whether potatoes were of good stock, etc., allowed); 1906, Hamann *v.* Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081 (whether work was done in a dangerous way, excluded; the opinion makes a well-meaning but vain effort to infuse into the rule some savor of rationality); 1906, Anderson *v.* Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077 (whether a machine was dangerous, excluded); 1907, Zarnik *v.* Reiss C. Co., 133 Wis. 290, 113 N. W. 752 (whether a door was safely locked, allowed); 1911, Benson *v.* Superior Mfg. Co., 147 Wis. 20, 132 N. W. 633 (whether a hooking device was safe, suitable, etc., excluded); 1911, Cook *v.* Doud Sons & Co., 147 Wis. 271, 133 N. W. 40 (whether an engine "threw more sparks than it should," allowed).

§ 1953. [1] Questions depending on other principles are: Whether the witness is sufficiently *qualified* in his subject (*ante*, §§ 564, 690); whether the rule of producing the original requires the production of the *text of a foreign statute* (*ante*, § 1271); whether a Hearsay exception exists for *printed copies* of foreign decisions or foreign statutes presented (*ante*, §§ 1684, 1697, 1703) or for a *certificate* obtained from the foreign court (*ante*, § 1674); whether the fact of foreign law is to be proved to the *judge* or to the *jury* (*post*, § 2558).

[2] The principle that the construction and interpretation of documents is for the judge, not the jury (*post*, § 2556), has nothing to do here. It simply differentiates the functions of judge and jury. Having given a specific duty to the judge, it says nothing about what aid he shall seek in performing it. The present question arises equally where a judge is sitting without a jury.

[3] *Eng.* 1844, Sussex Peerage Case, 11 Cl. & F. 115; 1851, Bruce, V. C., in Guepratte *v.* Young, 4 De G. & S. 221, 227; 1863, Lord Chelmsford, in Di Sora *v.* Phillipps, 10 H. L. C. 640; *U. S. Fed.* 1904, Slater *v.* Mexican Nat'l R. Co., 194 U. S. 120, 24 Sup. 581 (deposition of a Mexican lawyer to the construction of Mexican statutes, received, additionally to the agreed translation of them); 1906, Re International Mahogany Co., 147 Fed. 147, C. C. A. (copy of the text of a Cuban statute, held not to override the testimony of a Cuban lawyer); *N. H.* 1917, Hansen *v.* Grand Trunk R. Co., 78 N. H. 518, 102 Atl. 625; *Pa.* 1894, Bollinger *v.* Gallagher, 163 Pa. 245, 252, 29 Atl. 751; *P. R.* 1915, Fernandez *v.* Calaf. 8 P. R. 363, 376 (French civil code in San Domingo; expert opinions of its interpretation, considered); *Wash.* 1905, Clark *v.* Eltinge, 38 Wash. 376, 80 Pac. 556 (construction of a Montana statute; the testimony of a Montana attorney as to the "consensus of opinion of the bench and bar of Montana," excluded; otherwise if he had testified that the Montana courts "had construed the statute in a certain manner" or "had never passed upon said statute"); *Contra:* 1922, Public Service R. Co. *v.* Wursthorn, 3d C. C. A., 278

must be distinguished from the effect of the rule of producing the verbatim text (*ante*, § 1271); that is, assuming the production of the complete text, the present question remains, whether an expert's interpretation of that text is admissible:

1844, DENMAN, L. C. J., in *Baron de Bode's Case*, 8 Q. B. 265: "There is another general rule, that opinions of persons of science must be received as to the facts of their science. That rule applies to legal men. . . . Properly speaking, the nature of such evidence is, not to set forth the contents of the written law, but its effect and the state of law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law; the witness is called upon to state what law does result from the instrument."

1844, Lord BROUGHAM, in *Sussex Peerage Case*, 11 Cl. & F. 115: "It is perfectly clear that the proper mode of proving a foreign law is not by showing to the House the book of the law; for the House has not organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it."

§ 1954. Trade Usage, as involving (1) an Opinion of Law or (2) an Opinion without stating Instances. (1) When a trade usage is material to the issue, usually by implied incorporation into a contract (*post*, §§ 2440, 2464), the witness to prove it is apt to state it by declaring that usage attributes a certain *right* or *liability* in certain circumstances. This is of course a violation of the Opinion rule; the witness should state the tenor of the usage or practice, omitting any reference to the legal effect.[1]

(2) It has sometimes been said that a witness to trade usage may state only *specific instances*, or must at least mention one or more in support of his statement of the general practice. This notion is traceable to some remarks

Fed. 408 (personal injury; a witness learned in the common law of New Jersey, excluded; unsound; the opinion is misled by some notion of judicial notice).

But the Court may of course also consult the text, and not merely listen to the opinion; 1857, Bremer *v.* Freeman, 10 Moo. P. C. 306, 363, *semble*; 1889, Concha *v.* Murieta, L. R. 40 Ch. D. 543, 549, 554; 1919, Martin *v.* Otis, 233 Mass. 491, 124 N. E. 294, (and the expert's opinion may of course not be accepted as conclusive).

§ 1954. [1] 1896, Conner *v.* R. Co., 146 Ind. 430, 45 N. E. 662 (the mere assertion of a "custom" does not involve opinion); 1874, Haskins *v.* Warren, 115 Mass. 514, 535 ("Usage is matter of fact, not of opinion; . . . [witnesses'] conclusions or inferences as to its effect, either upon the contract or the legal title or rights of the parties, are not competent to show the character or force of the usage; . . . the effect is to be determined by the Court, or the jury under its direction"); 1836, Allen *v.* Merchants' Bank, 15 Wend. N. Y. 482, 488 ("The inquiry . . . is not after the opinion of traders and merchants in respect to the law upon a given question, but after the evidence of a fact, to wit, the usage or practice in the course of mercantile business"); 1809, Dean *v.* Swoop, 2 Binn. Pa. 72 ("the general understanding and belief of the country as to the liability of carriers by water"; not decided); 1804, Ruan *v.* Gardner, 1 Wash. C. C. 145, 149 (insurance; a witness was offered to prove that goods with a particular mark "must be on board, in order to recover"; Per Curiam: "You may examine witnesses to prove a particular course of trade, or other matters in the nature of facts, but not to show what the law is; nothing could be more dangerous than to fix the law upon the opinions of particular men").

In *Louisiana* it seems to have been at one time the law that, where the *value of legal services* was in issue, the judge would not accept *testimony from lawyers* as experts as to the value of the services, but would rely upon his own professional knowledge. But no such rule now exists; 1916, Hunt *v.* Hill, 138 La. 583, 70 So. 522 (examining the precedents).

In *Canada* there is a rule that in maritime cases, the assessors being nautical men, no mariners will be called expert as witnesses to the propriety of navigation conduct in collisions: *ante*, § 563.

of Lord Mansfield and later judges, which do not justify it.[2] There have indeed been judges who have refused, on all the facts of a case, to credit testimony to usage, which could not adduce instances in verification.[3] But there is no rule of exclusion.[4] The usage is itself a fact, and the Opinion rule does not treat such testimony as an inference from data which can be adequately stated without the inference.

(3) Distinguish here (*a*) the *experiental qualifications* of a witness to usage (*ante*, § 565); (*b*) the numerous questions of substantive law as to the *binding effect* of a usage upon a *contract*, and as to the materiality of usage under the Parol Evidence rule (*post*, §§ 2440, 2464); (*c*) the question whether *one witness* to usage suffices (*post*, § 2053); and (*d*) whether, when instances are given, *one instance* suffices (*ante*, § 379).

§ 1955. **Interpretation of Documents; (1) Expert Interpretation of Technical Words or Phrases.** When a document is to be construed or interpreted, the judge usually has this function; sometimes the jury has it, and either may need testimonial aid in fulfilling it. There are thus to be kept apart three entirely distinct principles, all of which may call for application at the same time:

(a) The principle determining the *respective functions of judge and jury* (*post*, § 2556); this question being, whose function it is to determine the effect of the words, written or oral. (b) The principle of the Parol Evidence rule, or Integration (*post*, §§ 2440, 2464), determining whether the *ordinary sense* of the words in the document is alone to control, or whether other negotiations or general usage, as fixing the *special sense* of the words, may be regarded; for example, we ask whether "free on board" in a document is to

[2] 1761, Edie *v.* East India Co., 1 W. Bl. 295, 297, 2 Burr. 1216, 1222 (L. C. J. Mansfield: "Many witnesses were examined by defendants to prove this usage; but it did not appear that in any one fact the indorsee of such special indorsement ever lost the money by such omission [of the words 'or order']; the evidence was only matter of opinion"; in the report in Burrow the point is similar); 1833, Cunningham *v.* Fonblanque, 6 C. & P. 43 (Park, J., to the jury: "Now, there is not a single witness who has proved the reciprocity of the practice; that is, by instances; two witnesses stated it, but did not produce any instances"; this is headnoted by the reporter: "An usage of trade must be proved by instances, and cannot be supported by evidence of opinion merely"; the verdict was set aside "on the counts relating to usage," but that doubt was as to the admissibility of usage at all), 1836, Hall *v.* Benson, 7 C. & P. 711, 714 (Tindal, C. J.: "Is there any general course of business? Let your mind revolve over instances. I am not asking you whether it is just and proper, but whether there is any prevailing course of business").

[3] 1903, Ames M. Co. *v.* Kimball S. S. Co., 125 Fed. 333; 1878, Bishop *v.* Clay Ins. Co., 45 Conn. 430, 355; 1871, Chenery *v.* Goodrich, 106 Mass. 566, 571; 1836, Mills *v.* Hallock, 2 Edw. Ch. 652, 656.

[4] *Eng.* 1761, Camden *v.* Cowley, 1 W. Bl. 417 (L. C. J. Mansfield "ruled that insurance-brokers and others might be examined as to the general opinion and understanding of the persons concerned in the trade; though they knew no particular instance in fact, upon which such opinion was founded"); *U. S.* 1866, Hamilton *v.* Nickerson, 13 All. Mass. 351 (a well qualified witness, who "could not state individual cases," admitted; "the 'factum probandum' was not a single isolated act or occurrence, but the result or conclusion derived from a series of similar acts or circumstances, creating and establishing in the mind of the witness a conviction of belief of the complex whole or comprehensive fact"); 1919, Jarecki Mfg. Co. *v.* Merriam, 104 Kan. 646, 180 Pac. 224 (custom for vendor to make good any cables sold; citing the above text with approval).

The following case is obscure: 1859, Shackelford *v.* R. Co., 37 Miss. 202, 208.

be construed with any reference at all to trade usage, — not how the trade usage is to be got at. The vast majority of the rulings upon the interpretation of phrases involve a dispute over this principle only. (c) Finally, the Opinion rule, — the one in hand. Here we assume that, by the preceding principle, resort may be had to usage or the like, and we ask how it is to be evidenced, and whether we need any testimonial aid. It is obvious that, by the principle of the Opinion rule (*ante*, § 1918), the judge (or the jury) will not resort to outside aid if the question is merely one of ordinary usage which will be as familiar to him (or to them) as to any one; while if it is one of the usage in special trade or locality, or if for another reason aid is necessary, it will be sought.

Three classes of cases, in this application of the Opinion rule, are to be distinguished: (1) expert interpretation of the meaning of *technical words or phrases;* (2) the application of a *description of premises* to marks on boundaries of a particular piece of land; and (3) a statement of the *contents of a lost document.*

(1) *Expert interpretation of technical words or phrases.* Here it is obvious that the interpretation of the meaning of the document in respect to ordinary words, being a part of the function of the Court (*post*, § 2550), is not for a witness to speak to. But so far as the words are technical, and the witness speaks to technical usage or meaning, there is no prohibition; the Court must determine anew in each instance whether it needs any testimonial aid to interpret the word or phrase in dispute.[1]

§ **1955.** [1] So much depends upon the circumstances of each case, and so trifling in value is any one ruling as an illustration of the principle, that no attempt is made to set out the words or passages in dispute:

ENGLAND: 1856, Kirkland *v.* Nisbet, 3 Macq. Sc. App. C. 766 (excluding a question on cross-examination, "what would the employer be entitled to expect?" to a witness to trade usage, when shown the terms of a specific letter; "Evidence as to mercantile usage may be received; . . . but you cannot ask a witness what is the meaning of a written document").

UNITED STATES: *Fed.* 1807, Winthrop *v.* Ins. Co., 2 Wash. C. C. 7, 10; 1859, Ogden *v.* Parsons, 23 How. 169 (what is a "full cargo"); *Conn.* 1898, Fuller *v.* Ins. Co., 70 Conn. 647, 41 Atl. 4 (insurance policy); *Ga.* 1882, Wylly *v.* Gazan, 69 Ga. 510 (auction-sale document); *Ill.* 1856, Sigsworth *v.* McIntyre 18 Ill. 126 (contract); 1889, Pennsylvania R. Co. *v.* Connell, 127 Ill. 424, 20 N. E. 89 (telegram); 1898, Louisville & N. R. Co., *v.* R. Co., 174 Ill. 448, 51 N. E. 824 ("necessary signals and switchmen," interpreted by an expert); *Ind.* 1861, Howe *v.* McBride, 17 Ind. 499 (technical usage in general); *Ia.* 1859, Campbell *v.* Rusch, 9 Ia. 341 (contract); 1872, Haver *v.* Tenney, 36 Ia. 81; 1906, Tubbs *v.* Mechanics' Ins. Co., 131 Ia. 217, 108 N. W. 324 (expert opinion as to the meaning of "machinery" in a fire insurance policy, excluded); *Md.* 1899, Schwartz *v.* Wilmer, 90 Md. 136, 44 Atl. 1059 (effect of the words "protest waived"; excluded); *Mass.* 1898, Burton *v.* B. S. C. Co., 171 Mass. 439, 50 N. E. 1029 (explanation of patent specifications allowed); *Mich.* 1875, Clark *v.* Locomotive Works, 32 Mich. 257 (contract); *Minn.* 1879, Wilder *v.* De Cou, 26 Minn. 18, 1 N. W. 48; 1894, Cargill *v.* Thompson, 57 Minn. 534, 59 N. W. 638 (hydraulic contract; experts may explain meanings of technical phrases but are not to construe the clauses); *N. Y.* 1857, Silverthorn *v.* Fowle, 4 Jones L. 362; 1905, Kitchings *v.* Brown, 180 N. Y. 414, 73 N. E. 241 (meaning of "tenement house" in a deed; expert testimony admitted); *N. Car.* 1888, Long *v.* Davidson, 101 N. C. 175, 7 N. E. 758; *N. Dak.* 1915, Gudmundson *v.* Thingvalla Lutheran Church, 29 N. D. 291, 150 N. W. 750, 760, 763, 770 (whether a certain theological creed as framed in a church constitution was departed from by the terms of a church resolution); *Pa.* 1897, Clayton Co. *v.* R. Co., 179 Pa. 350, 36 Atl. 287 (meaning of "excavated and prepared" as applied to a roadbed, admitted; *P. I.* 1919, Cruz *v.* Alberto, 39 P. I. 991 (contract with a Spanish clause as to renewing for six years; expert testimony to the meaning of the Spanish words, excluded; "the question

§ 1956. **Same: (2) Location of Descriptions in Deeds, Maps, and Surveys.** When a *description of premises* is to be interpreted, the distinction seems sound and simple that if a witness (usually a surveyor) is attempting merely to *construe the untechnical terms* of a deed, map, or the like, his testimony is unnecessary and improper; but if he is offering his judgment, being that of an experienced observer familiar with the ground, as to the *specific actual place signified* by a mark or line named in the description, his testimony is admissible; for in the latter case he has what the Court cannot possibly have, namely, an acquaintance with the features of the land and the other data which were probably associated in the mind of the map-maker or deed-maker with the phrases used and are therefore essential to be considered in interpreting these. In accordance with this view, most Courts have declared testimony of the latter sort admissible;[1] a few, however, have excluded it, misled by other analogies.[2] Testimony merely attempting to

for decision is after all merely a question of law"); *Tenn.* 1871, Nashville & C. R. Co. *v.* Carroll, 6 Heisk. 368; *Tex.* 1920, Ochoa *v.* State, 87 Tex. Cr. 318, 221 S. W. 973 (murder of his own son; letters written by defendant to a woman, his accomplice, stated that "everything has been a complete failure"; held error for the accomplice to testify to her interpretation of it, viz. "the time had passed and I had not poisoned the boy"; the ruling makes law absurd).

It was common enough for the masters in Chancery to consult Scotch advocates upon the effect of a Scotch marriage-settlement or the like: 1841, Williams *v.* Williams, 3 Beav. 547; 1850, Hitchcock *v.* Clendinen, 12 id. 534; 1854, Re Todd, 19 id. 582.

Compare the cases cited *post*, § 2464.

§ 1956. [1] *Ala.* 1901, Barrett *v.* Kelly, 131 Ala. 378, 30 So. 824 (by a surveyor familiar with the property, that the lines as shown upon a map were correct, allowed); 1904, Dorlan *v.* Westervitch, 140 Ala. 283, 37 So. 382 (that the land described in a deed and in a declaration is the same, allowed); 1915, Smith *v.* Bachus, 195 Ala. 8, 70 So. 261 (location of description of lands in a deed; "do you know where the C. C. survey that was made in 1897 or 1898 ran with reference to these lands?" allowed); *Ind.* 1881, Grusenmeyer *v.* Logansport, 76 Ind. 549, 552 (whether a place is within the limits of a city); 1882, Indianapolis *v.* McAvoy, 86 Ind. 587, 589 (same); 1884, Strosser *v.* Ft. Wayne, 130 Ind. 443, 447 (same); 1897, Shea *v.* Muncie, 148 Ind. 14, 46 N. E. 138 (same); *Pa.* 1803, Forbes *v.* Caruthers, 3 Yeates 527 (source of an evident error in distances named) 1845, Farr *v.* Swan, 2 Pa. St. 247 (location of a deed); 1880, Northumberland Coal Co. *v.* Clement, 95 Ind. 138 (same); 1888, Jackson *v.* Lambert, 121 Pa. 191, 15 Atl. 502 (same); 1905, Brundred *v.* McLaughlin, 213 Pa. 115, 62 Atl. 565 ("Where in your opinion is the line between Nos. 83 and 84?" allowed); *Tex.* 1904, Baker *v.* State, 47 Tex. Cr. 482, 83 S. W. 1122 (limits of Federal land); *Utah:* 1909, Tate *v.* Rose, 35 Utah 229, 99 Pac. 1003 (identity of description in patent with land in issue); *Va.* 1895, Holleran *v.* Meisel, 91 Va. 143, 21 S. E. 658 (location of a patent); 1910, Richmond *v.* Jones, 111 Va. 214, 68 S. E. 181 (Holleran *v.* Meisel approved, but drawing an obscure distinction between knowledge and opinion); *W. Va.* 1868, Randolph *v.* Adams, 2 W. Va. 524 (accuracy of a survey); 1913, Winding Gulf C. Co. *v.* Campbell, 72 W. Va. 449, 78 S. E. 384 (location of a survey); *Wis.* 1885, Toomey *v.* Kay, 62 Wis. 107, 22 N. W. 286 (that a line was run correctly).

[2] 1901, Ii Estate *v.* Judd, 13 Haw. 319, 323 (to a surveyor, what land was signified by the description in a will); 1888, Hockmoth *v.* Des Grands Champs, 71 Mich. 523, 39 N. W. 737 (whether corner of survey corresponded with government map); 1908, Keefe *v.* Sullivan Co. R. Co., 75 N. H. 116, 71 Atl. 379 (civil engineers not admitted to testify where a point of curve on the survey began, and whether a fence was upon the true line; this ruling almost makes one despair of the final victory of Common Sense in the law; if a Court with the high traditions of the New Hampshire Court backslides in this manner, little can be hoped for elsewhere; moreover the opinion has failed to fortify itself respectably on the subject, for it cites no rulings on the specific point, and ignores the precedents cited in this and the preceding note); *N. Y.* 1858, Stevens *v.* West, 6 Jones L. 53; 1859, Clegg *v.* Fields, 7 Jones L. 39 (identity of boundaries with those named in a deed, etc.); *Pa.* 1859, Ormsby *v.* Ihmsen, 34 Pa. 472 (application of a deed to premises); *Va.* 1896, Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232 (identity of land surveyed); 1910, Richmond *v.* Jones, 111 Va. 214, 68 S. E. 181 (opinion as to identity of land included in certain deeds, excluded).

construe the untechnical passages of the description is of course usually inadmissible.[3]

§ 1957. **Same: (3) Contents of a Lost Document.** By the principle of Completeness (*post*, § 2105) it is regarded as unsafe to listen to any testimony of the contents of a lost writing unless that testimony purports to reproduce at least the *substance of the contents;* and some Courts even require the fairly complete details of its contents. In most of these instances, in spite of the occasional invocation by the Courts of the Opinion rule, we are not dealing with that rule at all, but with the entirely distinct principle of Completeness. In a rare case only, the Opinion rule may properly be invoked to exclude testimony on this subject, — as when the witness, without reciting the substance of the contents, merely expresses his opinion as to the meaning or the legal sufficiency of it.[1] The theoretical difference between the Opinion rule and the Completeness rule here lies in this, that under the latter we require at least the substance to be given (instead of a mere fragment), while under the former we reject the opinion or inference from the substance, and require the latter alone.

§ 1958. **Testator's or Grantor's Capacity; Accused's Capacity.** (1) It is easy to see that on principle the opinion of no witness whatever is needed to tell the Court whether *testamentary capacity* existed, because that is a matter of applying a legal definition to the data of the testator's mental condition, and the judge (in theory) needs no assistance on that point, even from a legal witness. The data of the mental condition are to be presented, and the jury, under the judge's instructions, are to apply the definition to them:

1862, ALDIS, J., in *Fairchild* v. *Bascomb*, 35 Vt. 416: "What is sufficient capacity to transact business or to make a will is a matter of law, depending somewhat upon the nature of the business. A witness may not correctly apprehend the rule of law, and if he uses such expressions may be misled himself or may mislead the jury. Hence the question should be framed so as to require him to state the measure of the testator's capacity in his own language, and by such ordinary terms or forms of expression as will best convey his own ideas of the matter."

[3] 1856, Blumenthal *v.* Ralls, 24 Mo. 113; 1859, Whittelsey *v.* Kellogg, 28 Mo. 405; 1860, Schultz *v.* Lindell, 30 Mo. 321.

The question whether testimony may be received that a certain stone, post, mark, etc., was *intended as a boundary*, is a different one (*post*, § 1963).

§ **1957.** [1] 1892, Alexander *v.* Handley, 96 Ala. 220, 223, 11 So. 390 (whether a lost document made X a partner, excluded); 1898, Murphy *v.* State, 118 Ala. 137, 23 So. 719 (that a document was a copy, allowed); 1850, Massure *v.* Noble, 11 Ill. 531 (testimony that the contents of a lost petition for partition were all that was necessary, excluded); 1897, Ryder *v.* Jacobs, 182 Pa. 624, 38 Atl. 471 (bookkeeping; whether accounts were in partnership form; excluded on the facts. This principle probably explains the following ruling: 1895, Edwards *v.* Rives, 35 Fla. 89, 17 So. 416 (admitting the "substance of the contents," but not "the effect of the substance of the contents"; but of course this is after all mere quibbling).

For the rulings, superficially like these, under the Completeness rule, see *post*, § 2105.

Compare the application of the rule requiring the production of the original, where the witness is desired to testify summarily to the *effect of a document* or to the *state of accounts therein* (*ante*, §§ 1230, 1244).

Compare also the rule that a *party may explain his meaning* in a document offered against him as an admission (*ante*, §§ 1044, 1059, *post*, § 1972).

But a difficulty arises. It is desirable to obtain from witness a compact statement of the general mental condition of the testator. It is, for instance, a better index of the witness' results of observation to say, "I would or would not trust him to buy property intelligently," than merely to say, "He once did this or that wise or foolish act." The general statement often conveys a more accurate understanding of his condition than a rehearsal of many single acts, — acts which indeed are in detail largely forgotten, cannot be reproduced in statement, and have left only the general impression. Such a general statement is perfectly legitimate; but the difficulty lies in distinguishing it from a statement involving the use of some legal definition of testamentary capacity. The ordinary witness, though using a compendious statement, may really have no desire to attempt a legal definition and may be thinking only of the deceased's general capacity to take care of himself and his property. Nevertheless, in distinguishing between the proper and improper forms of statement, an easy opportunity is offered for judicial quibbling. In the dilemma thus presented, the solution seems often to depend merely on whether the Court is disposed to stick at trifles and the forms of things, or to follow practical good sense:

1861, WOODWARD, J., in *Daniel* v. *Daniel*, 39 Pa. 191, 211: "The Court would not allow Paul Schlegel to be asked whether the testator had capacity 'to understand a will.' The witness was allowed to answer, and did answer, that he was 'fit to make a will.' We think that throughout this cause there was too much refinement of distinctions in raising and ruling questions of evidence on the part both of counsel and of Court; and here is a remarkable instance of excessive nicety. What is the distinction between that mental condition which is competent to understand a will, and that which is fit to make a will? If a microscopic vision could detect a distinction, who has scales nice enough to tell how much it would weigh in the jury-box? The plaintiffs in error undertake to convince us that their cause was damaged by the witness testifying that the testator was fit to make a will, instead of testifying that he was competent to understand a will. We do not think the error, if error there was, did them any damage. We do not suppose the jury would have been swayed a hair's breadth by one form of answer, more than by the other."

By all Courts a mere abstract statement that the person was or was not "capable" of making a will or a contract or a deed seems to be held improper; but there is great contrariety of ruling upon other forms of statement.[1]

§ 1958. [1] Compare with the following cases those collected *ante*, § 1938 (insanity); in the following citation, where nothing is specially noted, the Court *excluded* a general question as to capacity to make a will:

CANADA: 1883, Doe *v.* Gilbert, 22 N. Br. 576, 582 ("Was he of sound disposing mind, memory, and understanding?" excluded).

UNITED STATES: *Alabama:* 1859, Walker *v.* Walker's Ex'r, 34 Ala. 472; 1868, Stuckey *v.* Bellah, 41 Ala. 707 (capacity to dispose of property at the time of a gift, admitted); 1873, Hewlett *v.* Wood, 55 Ala. 635 ("capacity for business" excluded); 1897, Torrey *v.* Burney, 113 Ala. 496, 21 So. 348 ("capable of transacting ordinery business," excluded); 1900, Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481 ("capable of making a deed," allowed on cross-examination); 1911, Council *v.* Mayhew, 172 Ala. 295, 554 So. 314; 1917, Wear *v.* Wear, 200 Ala. 345, 76 So. 111 (whether testator was "mentally capable of transacting ordinary business," allowable).

California: 1909, In re Coburn, 11 Cal. App. 604, 105 Pac. 924;

Colorado: 1900, Shapter *v.* Pillar, 28 Colo. 209, 63 Pac. 302 (adjudication as lunatic; opinion as to "degree of incapacity," inadmissible); 1905, Denver & R. G. R. Co. *v.* Scott, 34 Colo. 99, 81 Pac. 763 (to a physician, "Whether S.

(2) The capacity of an *accused person* to be legally responsible for the crime charged depends also upon a legal definition; and it would therefore

was able to transact business, including such business as the settlement of the claim . . . for injuries from which he was suffering?" excluded; this is an over-strict application of the rule; if Courts cannot handle it any more practically than this, the whole rule should go by the board);

Columbia (Dist.): 1908, Macafee *v.* Higgins, 31 D. C. App. 355 (whether a testator "was capable and was of sufficient mental capacity to understand and execute a valid deed or contract," held not reversible error; a most enlightened ruling, worthy of notice by all other Courts);

Connecticut: 1899, Turner's Appeal, 72 Conn. 305, 44 Atl. 310; 1902, Hayes *v.* Candee, 75 Conn. 131, 52 Atl. 826 (whether the grantor was capable of transacting business, and whether she was capable of making a deed of real estate; the former held clearly allowable, and the latter also on the facts, good opinion); 1911, Atwood *v.* Atwood, 84 Conn. 169, 79 Atl. 59 (whether a grantor was capable of making any contract, allowed, but not whether she was capable of making a particular contract or will; this tweedledum and tweedledee still satisfies a court which in the same opinion takes an advanced liberal stand on other aspects of this benighted Opinion rule);

Georgia: 1896, Jones *v.* Grogan, 98 Ga. 552, 25 S. E. 590 (whether there was undue influence allowed, if the data were stated);

Illinois: 1887, Schneider *v.* Manning, 121 Ill. 386, 12 N. E. 267 (excluding "capacity to dispose by will or deed," but admitting "capacity to transact business"); 1888, Keithley *v.* Stafford, 126 Ill. 520, 18 N. E. 740 ("Was he capable of transacting ordinary business?", left undecided with a reference to the Schneider ruling); 1901, Ring *v.* Lawless, 190 Ill. 520, 60 N. E. 881 (opinions as to "capacity to transact the ordinary business affairs of life," admitted); 1901, Neely *v.* Shepard, 190 Ill. 637, 60 N. E. 922 (similar); 1903, Baker *v.* Baker, 202 Ill. 595, 67 N. E. 410 ("whether he had sufficient mind and memory to understand the will in question," "whether or not he was able to understandingly execute a will," not allowed); 1908, Garrus *v.* Davis, 234 Ill. 326, 84 N. E. 924 ("capable of executing a valid will," not allowed); 1911, Wetzel *v.* Firebaugh, 251 Ill. 190, 95 N. E. 1085 (whether the testatrix "had sufficient mental capacity to understand the business she was engaged in, of making a will," held improper); 1911, Adams *v.* First Methodist Episcopal Church, 251 Ill. 268, 96 N. E. 253 ("Was there any fraud, duress, or undue influence used to induce A. S. A. to sign her name?" held improper); 1911, Bailey *v.* Beall, 251 Ill. 577, 96 N. E. 567 ("sufficient mental capacity to make a will," excluded); 1916, Lyman *v.* Kaul, 275 Ill. 11, 113 N. E. 944 (that a testator "was a man of strong character and will and not easily influenced," held improper; another ruling of the sort which chokes off practical attempts to get at the truth); 1917, Teter *v.* Spooner, 279 Ill. 39, 116 N. E. 673 (that the testator was a "man of decided opinions," *i. e.* not easily influenced, held improper; this is one of the most clean-cut instances of the irrationality and childishness of the Opinion rule as it cumbers our law today); 1920, Baddeley *v.* Watkins, 293 Ill. 394, 127 N. E. 725 (testamentary capacity; "whether she had sufficient mind and memory to recall to her mind her property and to make disposition of it understandingly according to some plan she had formed in her mind," held improper, with two other questions; these tweedledum and tweedledee discriminations raise the corresponding inquiry whether supreme courts have sufficient mind and memory of the objects of the administration of justice to employ the system of rules of evidence as a means to an end);

Indiana: 1892, Hamrick *v.* Hamrick, 134 Ind. 324, 34 N. E. 3 (opinion as to sanity, admissible; but not as to capacity to manage an estate);

Iowa: 1859, Pelamourges *v.* Clark, 9 Ia. 16; 1876, Ashcraft *v.* De Armond, 44 Ia. 233 (contract); 1899, Furlong *v.* Carraher, 109 Ia. 492, 79 N. W. 277; 1901, Betts *v.* Betts, 113 Ia. 111, 84 N. W. 975 (whether the testator was "capable of transacting business intelligently," excluded; such a ruling seems to render witnesses incapable of giving testimony intelligently); 1903, McGibbons *v.* McGibbons, 119 Ia. 140, 93 N. W. 55 ("ability to understand in a reasonable manner the nature and effect of her acts in business transactions"; excluded); 1905, Glass' Estate, 127 Ia. 646, 103 N. W. 1013 (whether the testator was capable of making the will, excluded; whether he was "capable of transacting ordinary business and of intelligently disposing of property," allowed; Betts *v.* Betts, *supra*, said to have been "practically overruled"); 1904, State *v.* McGruder, 125 Ia. 741, 746, 101 N. W. 646 (whether a boy was "capable of knowing or appreciating the distinction between right and wrong," allowed); 1909, State *v.* Bennett, 143 Ia. 214 121 N. W. 1021 (whether an accused was "irresponsible mentally for her acts," not allowed; Betts *v.* Betts, *supra*, cited); 1909, Overpeck's Will, 144 Ia. 401, 120 N. W. 1044, 122 N. W. 928 (whether a testatrix was "in the condition to comprehend the value of her property," etc., allowed; Glass *v.* Glass affirmed); 1910, Searles *v.* Insurance Co., 148 Ia. 65, 126 N. W. 801 (whether an insured

be equally improper to ask for the witness' testimony without first eliminating the element of law from the question. But an inquiry whether he knew

was "capable of transacting business," allowed; Glass *v.* Glass affirmed; Betts *v.* Betts apparently discarded); 1909, Overpeck's Will, 144 Ia. 400, 120 N. W. 1044 (Glass' Estate followed); 1912, Erwin *v.* Fillenwarth, 160 Ia. 210, 137 N. W. 502 (the unworkability of this complicated quiddity as exhibited in this State is shown by the continuous grist of decisions needed to correct errors; it is wearisome to chronicle the particular divagations; indeed, the Court itself in the present opinion remarks, whether complacently or exhaustedly cannot be told, "Nothing need be added to what has been said in these decisions"); 1916, Eveleth's Will, 177 Ia. 716, 157 N. W. 257 (whether a testator was capable of understanding the amount of his property, approving Overpeck's Will, *supra*); 1918, John's Will, 184 Ia. 416, 165 N. W. 1021 (whether a testator "lacked ability to comprehend transactions," etc., not allowed);
Kansas: 1921, Cole *v.* Drum, 109 Kan. 148, 197 Pac. 1105 (whether testator had sufficient capacity to make a valid will);
Maine: 1895, Hall *v.* Perry, 87 Me. 569, 33 Atl. 160; 1896, Hewett *v.* Hurley, 88 Me. 431, 34 Atl. 274 (by a doctor, that the person was "not capable of transacting business," excluded);
Maryland: 1902, Jones *v.* Collins, 94 Md. 403, 51 Atl. 398 (whether the testator was "capable of executing a valid deed or contract," allowed); 1902, Berry *v.* Safe D. & T. Co., 96 Md. 45, 53 Atl. 720 (medical experts not admitted upon the question of capacity to make a will; the opinion is unsound and lengthily obscures the subject with technical refinements quite as objectionable as the theories of the medical experts denounced in the opinion); 1905, Struth *v.* Decker, 100 Md. 368, 59 Atl. 727 (excluded; opinion obscure); 1906, Baugher *v.* Gesell, 103 Md. 450, 63 Atl. 1078 (Berry *v.* Safe D. & T. Co., *supra*, followed; whether the testator "was of sound and disposing mind and capable of making a valid deed or contract," excluded); 1906, Kelly *v.* Kelly, 103 Md. 548, 63 Atl. 1082 (similar; but decided on another ground, by another judge, without noticing the preceding opinion, dated the same day);
Massachusetts: 1879, May *v.* Bradlee, 127 Mass. 419; 1891, Poole *v.* Dean, 152 Mass. 590, 26 N. E. 406 ("usual and ordinary capacity for doing business," allowed); 1892, Smith *v.* Smith, 157 Mass. 389, 32 N. E. 348 (whether he was capable of making a contract or transacting important business, excluded);
Michigan: 1862, White *v.* Bailey, 10 Mich. 158; 1870, Kempsey *v.* McGuiness, 21 Mich. 141 (various forms distinguished and discussed); 1903, Page *v.* Beach, 134 Mich. 51, 95 N. W. 981 ("What was his capacity?", held improper; form of question discussed in detail);
Minnesota: 1880, Pinney's Will, 27 Minn. 282, 6 N. W. 791, 7 N. W. 144 ("capacity to understand any disposition he might in a will make of his property," allowed);
Missouri: 1862, Farrell's Adm'r *v.* Brennan's Adm'x, 32 Mo. 334 ("sound enough to make a will," excluded); 1918, Heinbach *v.* Heinbach, 274 Mo. 301, 202 S. W. 1123 (whether testator "had sufficient mind to comprehend who his children were," allowed);
Nebraska: 1907, Cheney's Estate, 78 Nebr. 274, 110 N. W. 731 ("able to make" a will, not allowed); 1918, Gunderman's Estate, 102 Nebr. 590, 168 N. W. 359 (testator; obscure);
New Hampshire: 1903, Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459 ("influence of the testator's wife over him," allowed);
North Carolina: 1832, Griffin *v.* Ing, 3 Dev. 356; 1882, Bost *v.* Bost, 87 N. C. 478; Horah *v.* Knox, 87 N. C. 485 ("mind and intelligence sufficient to enable him to have a reasonable judgment of the kind and value of the property he proposed to will, and to whom he was willing it"; "competent or of sufficient capacity to transact business involving a disposition of her property"; allowed); 1896, Smith *v.* Smith, 117 N. C. 326, 348, 23 S. E. 270 (that the testator's mental capacity was "good," admissible; but that he "was a man of great will power," "could not be influenced by any power on earth," inadmissible; a puerile splitting of hairs, which in the name of justice caused a new trial); 1904, Re Peterson, 136 N. C. 13, 48 S. E. 561 (question discussed);
North Dakota: 1920, Prescott *v.* Merrick, — N. D. —, 179 N. W. 693 (whether testator "was of sufficient mind and memory to execute a will," etc., allowed);
Ohio: 1864, Runyan *v.* Price, 15 Oh. St. 14; 1914, Bahl *v.* Byal, 90 Oh. 129, 106 N. E. 766 (distinguishing Runyan *v.* Price); 1917, Niemes *v.* Niemes, 97 Oh. 145, 119 N. E. 503 (whether the testator could "understand and decide large and complicated business transactions," held not improper);
Oklahoma: 1918, Campbell *v.* Dick, — Okl. —, 176 Pac. 520 (whether a grantor, an Indian woman, knew and understood the effect of her deed, allowed);
Pennsylvania: 1824, Wogan *v.* Small, 11 S. & R. 143 (fit to make a will, allowed); 1854, Wilkinson *v.* Pearson, 23 Pa. 120 ("capable of making a contract or transacting important business" allowed); 1861, Daniel *v.* Daniel, 39 Pa. 191, 211 (whether the testator was "fit to make a will," held not error; quoted *supra*);
Tennessee: 1835, Gibson *v.* Gibson, 9 Yerg. 331; 1905, Nashville C. & St. L. R. Co. *v.* Brundige, 114 Tenn. 31, 84 S. W. 805 (opinion as to

the difference between right and wrong, or whether his will could control his actions, would be proper.[2]

(3) The peculiar practical difference, it may be noted, between the present application of the Opinion rule and its application to the topic of sanity (*ante*, § 1938) is of course that here even an expert, medical or legal, may not speak so as to employ a legal definition, while there it is conceded that a medical expert may always give an opinion on sanity.

§ 1959. **Solvency.** In testimony to solvency, the opportunity for quibbling arises anew, and for the same reason, namely, that in strictness solvency is a matter of legal definition, and yet it is also a term commonly employed without any thought of legal definition to designate briefly a certain mercantile condition as understood by all. There is here less plausibility and less judicial support for the technical attitude than in the preceding subject.[1]

being "in a condition to transact business or make a contract," excluded; unsound);
Texas: 1895, Brown *v.* Mitchell, 88 Tex. 351, 31 S. W. 623 (capacity to make a will, excluded; distinguishing preceding rulings in which the testimony had been treated as involving the question of sanity only, not the question of the legal capacity of the person);
Vermont: 1881, Melendy *v.* Spaulding, 54 Vt. 517 ("capacity to dispose," allowed, subject to the trial Court's discretion); 1890, Blood's Estate, 62 Vt. 359, 19 Atl. 770.

[2] *Accord:* 1904, State *v.* McGruder, 125 Ia. 741, 101 N. W. 646; 1911, Banks *v.* Com., 145 Ky. 800, 141 S. W. 380 (whether the accused could know right from wrong, allowed); 1893, Shults *v.* State, 37 Nebr. 481, 497, 55 N. W. 1080 (whether he knew the difference between right and wrong, excluded); 1895, Pflueger *v.* State, 46 Nebr. 493, 64 N. W. 1094 (allowed; overruling Shults *v.* State on this point); 1910, State *v.* Roselair, 57 Or. 8, 109 Pac. 865 (whether he knew right from wrong, allowed); 1919, State *v.* Kelsie, 93 Vt. 450, 108 Atl. 391 (murder; a medical expert allowed to testify that the accused, aged 34, had only the mentality of an 8-year-old, and would be classed as an imbecile).

Contra: 1904, State *v.* Brown, 181 Mo. 192, 79 S. W. 1111; 1906, Reed *v.* State, 75 Nebr. 509, 106 N. W. 649 (Shults *v.* State, *supra*, followed; ignoring Pflueger *v.* State, *supra*); 1901, State *v.* Palmer, 161 Mo. 152, 61 S. W. 651 (whether an accused could distinguish between right and wrong, not allowed).

A similar question arises for a *child's* capacity: 1906, Neville *v.* State, 148 Ala. 681, 41 So. 1011 (larceny by a boy of ten; testimony that "he was a bright boy mentally," etc., admitted).

For expert testimony to *mental defects* of a *witness*, see *ante*, § 934.

§ 1959. [1] *Ala.* 1845, Lawson *v.* Orear, 7 Ala. 786, *semble* (not allowed for insolvency, but allowed for pecuniary worth or for embarrassment by debts); 1846, Massey *v.* Walker, 10 Ala. 290 (same); 1848, Chenault *v.* Walker, 14 Ala. 154 (same); *Ga.* 1910, Cabaniss *v.* State, 8 Ga. App. 129, 68 S. E. 849 (allowed for insolvency, under Civil Code, § 5285); *Ill.* 1898, Swan *v.* Gilbert, 175 Ill. 204, 51 N. E. 604 (allowed); 1919, People *v.* Paisley, 288 Ill. 310, 123 N. E. 573 (receiving bank deposits when insolvent; expert accountant's opinion as to solvency, excluded); *Ia.* 1897, State *v.* Boomer, 103 Ia. 106, 72 N. W. 424 (allowed); 1912, Moore *v.* Fryman, 154 Ia. 534, 134 N. W. 534 (insolvency, allowed); *Kan.* 1894, State *v.* Myers, 54 Kan. 206, 38 Pac. 296 (excluded); *Ky.* 1835, Com. *v.* Thompson, 3 Dana 301 (that he "considered them good," allowed); *Md.* 1871, Hayes *v.* Wells, 34 Md. 518 (excluded); *N. J.* 1843, Brundred *v.* Paterson M. Co., 4 N. J. Eq. 294, 305 (admitted; though declaring a mere opinion insufficient); *Pa.* 1920, William Schuette & Co. *v.* Swank, 265 Pa. 576, 109 Atl. 531 (solvency; excluded); *S. D.* 1902, State *v.* Stevens, 16 S. D. 309, 92 N. W. 420 (whether a bank was "insolvent," not allowed, on a prosecution for receiving money when insolvent); *Vt.* 1846, Hard *v.* Brown, 18 Vt. 97 (allowed); 1855, Sherman *v.* Blodgett, 28 Vt. 149 (same); 1856, Richardson *v.* Hitchcock, 28 Vt. 762 (same); 1860, Noyes *v.* Brown, 32 Vt. 431 (excluded in discretion of the Court, when all the facts have been shown).

Distinguish the question whether *reputation* is admissible under the Hearsay rule to prove solvency (*ante*, § 1623) or as a circumstance to prove another person's knowledge of solvency (*ante*, § 273), whether a witness to solvency is *qualified* as to opportunity for observation (*ante*, § 660), and whether the rule for *documentary originals* applies (*ante*, §§ 1244, 1250).

§ 1960. **Miscellaneous Instances (Possession, Ownership, Necessity, Authority, etc.).** In most of the remaining instances in which this application of the Opinion rule is concerned, the difficulty arises from the employment in statutory or common-law phraseology of terms having also an untechnical use. When the issue then arises on the application of the law to the facts, and it is desired to prove that the conditions or qualities named in the law do or do not exist, a direct question upon the point in issue is often forbidden by a strict application of the Opinion rule. Yet it seems unfortunate that a term existing in common use among laymen should be tabooed because the law also has been obliged to use it. Among Pacific Islanders, upon the death of a chieftain, certain words associated with his name were put under "taboo"; they passed out of the language, and could thenceforth be used by no other member of the community. Are we to exemplify in our law of Evidence this custom of the primitive Polynesians? If a witness, in the course of his testimony, comes to mention that A "possessed" or B "owned" or C was "agent," let him not be made dumb under the law, and be compelled by evasions and circumlocutions to attain the simple object of expressing his natural thought. If there is a real dispute as to the net effect of the facts, these may be brought out in detail on cross-examination.

The phrases of this class of chief occurrence are the following: whether a person was in *possession;*[1] whether a person was *owner;*[2] whether there

§ 1960. [1] With the following, compare the cases cited *ante*, § 1246: 1903, Wright *v.* State, 136 Ala. 139, 34 So. 233 (admitted; "possession is a collective fact"); 1906, Driver *v.* King, 145 Ala. 585, 40 So. 315 (in possession, allowed, but not "in open and notorious possession of land"); 1918, Paterson Lumber Co. *v.* Patrick, 202 Ala. 363, 80 So. 445 (admitted); 1910, Cabaniss *v.* State, 8 Ga. App. 129, 68 S. E. 849 (admitted); 1899, Knight *v.* Knight, 178 Ill. 553, 53 N. E. 306 (allowed); 1902, Chicago *v.* Peck, 196 Ill. 260, 63 N. E. 711 (whether possession was surrendered by a lessee, allowed); 1902, State *v.* Brundige, 118 Ia. 92, 91 N. W. 920 ("Who occupied the upstairs of that house?", allowed); 1898, Jacob Tome Inst. *v.* Davis, 87 Md. 591, 41 Atl. 166 (from whom possession was obtained, allowed); 1910, Jacobs *v.* Disharoon, 113 Md. 92, 77 Atl. 258 (not clear); 1863, Knapp *v.* Smith, 27 N. Y. 281 (allowed); 1877, Miller *v.* R. Co., 71 N. Y. 385 (who possessed land; allowed for "uninclosed, unoccupied woodland"); 1898, Arents *v.* R. Co., 156 N. Y. 1, 50 N. E. 422 (excluded); 1918, State *v.* Johnson, 176 N. C. 722, 97 S. E. 14 (murder, "did you take possession of the property?", allowed); 1898, Tetrault *v.* O'Connor, 8 N. D. 15, 76 N. W. 225 (fraud of creditors; that a person was "in possession," excluded); 1914, Fadden *v.* McKinney, 87 Vt. 316, 89 Atl. 351 (wife's possession and control, excluded).

[2] With the following, compare the cases cited *ante*, § 1246: *Can.* 1915, Tucker *v.* Jones, 25 D. L. R. 279, Sask. (proof of title to land in Iowa; testimony of an Iowa attorney, who had examined and checked the abstract of title, that T. was the owner of the land, held improper; "it was for the Court here to construe what the effect of those documents was"); *U. S. Fed.* 1919, Thompson *v.* U. S., 2d C. C. A., 256 Fed. 616 (larceny of sugar belonging to the U. S.; testimony by the custodian that the sugar was the property of the U. S., giving details as to the basis for that statement, held erroneous, though not reversible error; ruling unsound, in holding the statement inadmissible); *Ala.* 1892, Steiner *v.* Tranum, 98 Ala. 315, 318, 13 So. 365 (personalty; allowed); 1903, Hunnicutt *v.* Higinbotham, 138 Ala. 472, 35 So. 469 (money; allowed); 1905, Rosco *v.* Jefferson, 142 Ala. 705, 38 So. 246 (title to personalty under a levy; testimony to ownership, allowed); *Ark.* 1902, Benson *v.* Files, 70 Ark. 423, 68 S. W. 493 (that the witness was "owner" of land, excluded); *Cal.* 1909, Perkins *v.* Sunset Tel. & T. Co., 155 Cal. 712, 103 Pac. 190 (that a claim was the witness' property, allowed); *Conn.* 1922, Potts *v.* Buckley, — Conn. —, 115 Atl. 727 (personal services; "this business of making the butter, etc. . . . whose business was that?" "Mine," allowed); *Ia.* 1899, Murphy *v.* Olberding, 107 Ia. 547, 78 N. W. 205 (personalty; allowed); *Kan.*

was a *sale*, or passing of title;[3] whether a person had *authority* as agent;[4] whether there was a "*necessity*" for a road, for infant's supplies, or the like,[5] or a "public utility" for a ditch or highway.[6]

No more detailed classification of the *miscellaneous instances* seems useful or practicable.[7]

1903, Sparks *v.* Galena Nat'l Bank, 68 Kan. 148, 74 Pac. 619 (mining property, allowed); *Miss.* 1859, Dunlap *v.* Hearn, 37 Miss. 475 (excluded); *N. Y.* 1877, Wolf *v.* Williams, 69 N. Y. 621 (who owned a house; allowed); 1877, Miller *v.* R. Co., 71 N. Y. 385 (who owned land; excluded); 1902, Pichler *v.* Reese, 171 N. Y. 577, 64 N. E. 441 (claimant's testimony to ownership of personalty; admitted); *Okl.* 1913, Fort Smith & W. R. Co. *v.* Winston, 40 Okl. 173, 136 Pac. 1075 (personalty, allowed); *S. D.* 1905, Hawley *v.* Bond, 20 S. D. 215, 105 N. W. 464 ("Who was then the owner of that cow?" allowed); 1918, Knittle *v.* Ernst, 40 S. D. 594, 168 N. W. 754 ("Who was the owner of this cow?" "I was," allowed; Smith, J., diss.; the layman will always rightly wonder why the Law is so queer and un-human a concoction that a person cannot be allowed, without an expensive and solemn judicial dubitation, to say that he owns a cow; especially as this precise question had already been determined in the same court); *Tex.* 1888, Gilbert *v.* Odum, 69 Tex. 673, 7 S. W. 510 (land; excluded); 1913, Webb *v.* Reynolds, — Tex. Civ. App. —, 160 S. W. 152 (that a person was "owner" of a note, allowed); 1920, Magee *v.* Paul, 110 Tex. 470, 221 S. W. 254 (that a person "owned" a land-certificate, excluded, but not that he "sold" it; a notable triumph of quibbling).

[3] 1902, Ward *v.* Shirley, 131 Ala. 568, 32 So. 489 (that a sale was absolute and unconditional excluded); 1896, Bleckley *v.* White, 98 Ga. 594, 25 S. E. 592 (that "title passed from B. to R.," excluded); 1894, Burnap *v.* Sharpsteen, 149 Ill. 225, 235, 36 N. E. 1008 (that a deed was delivered, excluded); 1898, Evans *v.* Gerry, 174 Ill. 595, 51 N. E. 615 (title-examiners not admitted, in a bill for conveyance, to show title to be defective); 1896, Ward *v.* Dickson, 96 Ia. 708, 65 N. W. 998 (by an alleged vendor, whether he had sold the articles; excluded); 1905, Renshaw *v.* Dignan, 128 Ia. 722, 105 N. W. 209 (that no deed had been received or accepted, allowed on the facts); 1897, Wright *v.* Wright, 58 Kan. 525, 50 Pac. 444 (by one who merely heard testimony, as to the title to a certificate, excluded); 1915, Spaeth *v.* Kouns, 95 Kan. 320, 148 Pac. 651 (breach of contract to give a merchantable title; experts admitted to say whether the abstract offered showed a merchantable title free from incumbrances; a sane opinion); 1880, Nicolay *v.* Unger, 80 N. Y. 57 (the issue being whether bonds were pledged or were sold, a statement that they were sold was excluded).

For the application of the rule about producing the *original document*, see *ante*, § 1247.

[4] 1901, Farrell *v.* U. S., 49 C. C. A. 183, 110 Fed. 942 (whether the witness as Indian agent had authority over a certain Indian, excluded; but whether he exercised control in fact, admitted); 1909, Mobile, J. & K. C. R. Co. *v.* Hawkins, 163 Ala. 565, 51 So. 37 (whether an authority was withdrawn, allowed); 1916, Colby *v.* Atlanta Brewing & Ice Co., 196 Ala. 374, 72 So. 45 (excluded); 1884, Hoadley *v.* Hammond, 63 Ia. 603, 19 N. W. 794 (allowed); 1907, Fritz *v.* Chicago G. & E. Co., 136 Ia. 699, 114 N. W. 193 (whether a person was agent, (allowed); 1873, Short Mountain Coal Co. *v.* Hardy, 114 Mass. 197 (excluded); 1876, Providence Tool Co. *v.* Mfg. Co., 120 Mass. 37 (same); 1863, Knapp *v.* Smith, 27 N. Y. 281 (whether a person had acted as agent or for himself, allowed); 1907, People *v.* Mingey, 190 N. Y. 61, 82 N. E. 728 (whether the witness' firm authorized an indorsement of its name, allowed on the facts); 1847, Steamboat Albatross *v.* Wayne, 16 Oh. 513, 514 (whether "he considered himself authorized," excluded); 1911, Hutchings *v.* Cobble, 30 Okl. 158, 120 Pac. 1013 (excluded).

[5] 1899, Miller *v.* Mayer, 124 Ala. 434, 26 So. 892 (whether the sale of an intestate's property to pay debts was necessary, excluded); 1919, Polk Co. *v.* Owen, 187 Ia. 220, 174 N. W. 99 (pauper maintenance; whether the parent had so refused support as to make application to the county necessary, whether the dwelling-space was sufficient, etc., excluded); 1892, Detroit *v.* Brennan, 93 Mich. 338, 53 N. W. 525 (whether the opening of a street was necessary, excluded); 1895, Grand Rapids *v.* Bennett, 106 Mich. 528, 64 N. W. 585; 1852, Merritt *v.* Seaman, 6 N. Y. 175 (whether articles for an infant were necessaries, excluded); 1889, Burwell *v.* Sneed, 104 N. C. 120, 10 S. E. 152 (whether a road was necessary, excluded); 1909, Fowler *v.* Delaplain, 79 Oh. 279, 87 N. E. 260 (whether a building was "necessary," under a leasing clause, excluded).

[6] 1883, Losbbaugh *v.* Birdsell, 90 Ind. 466 (excluded); 1883, Yost *v.* Conroy, 92 Ind. 470 (same); 1896, Johnson *v.* Anderson, 143 Ind. 493, 42 N. E. 815 (same).

[7] *Federal:* 1899, National Cash-Register Co. *v.* Leland, 37 C. C. A. 372, 94 Fed. 502 (patent-infringement; whether certain machine-parts were "mechanical equivalents" allowed; whether a certain omission was a "fatal fault," not allowed); *Alabama:* 1873, Avary *v.* Searcy, 50 Ala. 55 (whether a fence

was a "partition fence," allowed); 1906, Owen *v.* McDermott, 148 Ala. 669, 41 So. 730 (owing money; allowed); 1909, Mobile J. & K. R. Co. *v.* Hawkins, 163 Ala. 565, 51 So. 37 (whether a person had performed his duties under a contract, etc.; not decided); 1920, Wilson *v.* State, — Ala. —, 84 So. 783 (keeping a house of prostitution; whether the house was a house of prostitution, excluded); *Arkansas:* 1853, Lindauer *v.* Ins. Co., 13 Ark. 470 (whether a defendant was bound by contract, excluded); *California:* 1892, Kreuzberger *v.* Wingfield, 96 Cal. 251, 256, 31 Pac. 109 (whether work had been done according to the terms of a contract, allowed); 1900, Union Sheet M. W. *v.* Dodge, 129 Cal. 390, 62 Pac. 41 (whether a bond was a statutory one, excluded); 1898, People *v.* Reed — Cal. —, 52 Pac. 835 (whether a killing was done in self-defence, inadmissible); 1905, Sampson *v.* Hughes, 147 Cal. 62, 81 Pac. 292 ("Did you wilfully, negligently, etc., omit to watch the fire, etc?" excluded); *Georgia:* 1873 Mobley *v.* Breed, 48 Ga. 44, 47 (whether certain proceedings were according to law, excluded); 1895, Cunneen *v.* State, 95 Ga. 330, 22 S. E. 538 (on a charge of "carrying on" an illegal business, whether the accused did not carry it on, excluded); 1905, Allison *v.* Wall, 121 Ga. 822, 49 S. E. 831 (what would be a reasonable time for removing timber; not allowed); 1920, Rudulph *v.* Brown, 150 Ga. 147 103 S. E. 251 (living as man and wife; allowed); 1922, Payne *v.* Allen, — Ga. App. — 110 S. E. 345 (that a person was "dependent" for support, allowed); *Illinois:* 1873, Chicago & A. R. Co. *v.* R. Co., 67 Ill. 145 (whether there was duty to keep in repair, excluded); 1902, People *v.* Lehr, 196 Ill. 361, 63 N. E. 725 (whether certain conduct was "practising medicine" under a statute, excluded); 1902, Treat *v.* Merchants' Life Ass'n, 198 Ill. 431, 64 N. E. 992 (on an issue of suicide, expert testimony that the deceased's wound was self-inflicted was held inadmissible); 1904, Sokel *v.* People, 212 Ill. 238, 72 N. E. 382 (that the witness saw the defendant married by a rabbi, excluded, the validity of the marriage being in issue; why did not the Court also hold that it was matter of opinion whether the celebrant was a rabbi and the place was a synagogue?); 1905 National Fire Ins. Co. *v.* Hanberg, 215 Ill. 378, 74 N. E. 377 ("net receipts" of an insurance company, in a statute, not allowed to be interpreted by the opinion of insurance experts); 1915, People *v.* Krittenbrink, 269 Ill. 244, 109 N. E. 1005 (larceny of morphine from P. D. & Co. a corporation; witness' statement that P. D. & Co. "did business as a corporation," held incompetent); 1917, Interstate Finance Co. *v.* Commercial Jewelry Co., 280 Ill. 116, 117 N. E. 440 (whether notes, etc., were collectible, not allowed; unsound); 1919, Peobody Coal Co. *v.* Industrial Commission, 289 Ill. 449, 124 N. E. 566 (whether a disability impaired earning capacity to the extent of 25 per cent, not allowed); 1922, Central Illinois Public Service Co. *v.* Ind. Com., 302 Ill. 27, 134 N. E. 124 (workman's injury; the plaintiff not allowed to testify to the percentage of his loss of use of arm and leg); *Indiana:* 1883, Hilton *v.* Mason, 92 Ind. 168 (whether a railroad was finished, allowed); 1907, Chicago & E. R. Co. *v.* Lawrence, 169 Ind. 319, 82 N. E. 768 (whether a specific act was the duty of the switchman, not allowed on the facts). *Iowa:* 1901, Hicks *v.* Williams, 112 Ia. 691, 84 N. W. 935 (whether the witness had paid the amount due on a note, excluded); *Kentucky:* 1835, Gentry *v.* McMinnis, 3 Dana Ky. 383 (whether a person was free, not slave, allowed); 1915, Hume *v.* Grant, 165 Ky. 723, 178 S. W. 1028 (whether a person was a voter, not allowed); *Louisiana:* 1898, Studebaker B. M. Co. *v.* Endom, 50 La. An. 674, 23 So. 872 (whether a note was owed, allowable); *Maine:* 1898, Carter *v.* Clark, 92 Me. 225, 42 Atl. 398 (whether a fence was near the line of a certain estate, allowed); 1916, Gray *v.* Maine Central R. Co., 114 Me. 530, 96 Atl. 1067 (personal injury; whether employees were in the performance of their duty at the time, allowed); *Maryland:* 1898, Metropolitan Sav. Bank *v.* Manion, 87 Md. 68, 39 Atl. 90 (whether a number of windows in a stable would create a nuisance, excluded); *Massachusetts:* 1898, O'Donnell *v.* Pollock, 170 Mass. 441, 49 N. E. 745 ("who kept the dog" whose bite was sued for, excluded); 1898, McIsaac *v.* Lighting Co., 172 Mass. 89, 51 N. E. 524 (whether inspection was part of a lineman's work, excluded); 1900, Mulhall *v.* Fallon, 176 Mass. 266, 57 N. E. 386 (whether the mother of a deceased, in a statutory action for death, was "dependent" upon him, allowed); *Michigan:* 1912, Crane *v.* Ross, 168 Mich. 623, 135 N. W. 83 (whether an agreement was reached, the agreement being in writing, excluded); *Mississippi:* 1904, Majors *v.* State, — Miss. —, 35 So. 824 (whether a certain stick was a deadly weapon, excluded, the stick having been exhibited to the jury); *Nebraska:* 1897, Peck *v.* Tingley, 52 Nebr. 171, 73 N. W. 450 (to whom the consideration moved, excluded); *Nevada:* 1905, State *v.* Nevada C. R. Co., 28 Nev. 186, 81 Pac. 99 (expert accountant's statement of the "net earnings" of a railroad company as shown by their books, etc., excluded, partly on this principle and partly on that of § 1230, *ante*); *New York:* 1856, Sweet *v.* Tuttle, 14 N. Y. 471 (on whose behalf services were rendered, this being a main issue, allowed); *Ohio:* 1902, State *v.* Ehinger, 67 Oh. 51, 65 N. E. 148 (under a statute forbidding the sale of a substance in the form of butter and made as a substitute for and in imitation of butter, an expert was allowed to testify that a particular substance "looked like and was a substitute for or imitation of butter"); *Oregon:* 1915, Porges *v.* Jacobs, 75 Or. 488, 147 Pac. 396 (that a stable was a nuisance, held highly improper; the trial Court had made a valiant effort to cast off the rusty shackles of the

6. State of Mind (Intention, Feelings, Knowledge, Meaning, Understanding, and the like)

§ 1962. **General Principle.** The application of the Opinion rule to these topics is involved in special difficulty. The difficulty lies in the necessity of distinguishing a number of principles potentially applicable, with varying results, to the same evidence, and in the plausibility of certain erroneous applications. The clearest understanding will perhaps be reached by taking up first the cases in which the Opinion rule is genuinely concerned, and afterwards those in which some other doctrine is involved. Among the former, moreover, we may distinguish conveniently between those in which the testimony is (1) as to *another person's state of mind in general*, as inferred from his conduct alone and (2) those in which the special state of mind in question is the *meaning or sense in which he used words*.

Now the theory on which the Opinion rule is invoked (*ante*, § 1918) is that the conduct and other circumstances, from which the eye-witness drew the inference as to the person's state of mind, may be detailed to the jury so as to equip them equally well to draw the inference. For instance, the witness (as in one ruling) may not be allowed to state whether in his opinion the person heard what was said to him; the witness must, that is, detail where the persons were, their distance apart, the previous incidents of their meeting, their subsequent conduct, and anything else he can remember as bearing upon the matter; then the jury will be equally well fitted to draw the inference. Can anything be said in answer to this? One might argue that the witness could hardly be expected to recall on the stand every salient circumstance of the occasion; and that, so far as he could recall them, he would be unable to express or reproduce each subtle suggestion in its full significance; and that, so far as he did, there would thus be introduced by him new inferences, which must either call for a sacrifice of consistency or else must in turn be reanalyzed into a labyrinth of data which no human witness could cope with; and, finally, that this multifarious reproduction of data would in the end so confuse the jury that their own inference would be much less trustworthy than that of the witness. But after all, argument is

Opinion rule; thus: Counsel: "We object to his conclusion;" Court: "We are here to get at the facts, and if you can get at them according to the Rules of Evidence, all right, but if not, and only by setting aside the Rules of Evidence, let us do that. I will overrule the objection"; then the witness further added copious details about the alleged nuisance; but the Supreme Court was shocked at the intrusion of so illegal a thing as the witness' opinion, and warned the trial Court, so that "the error may be evaded [!] hereafter"); *Pennsylvania:* 1845, Mertz *v.* Detweiler, 8 W. & S. 376 (physician's responsibility in case of a patient's disregard of advice, excluded); 1855, McCandless *v.* McWha, 25 Pac. 95 (*contra* to preceding case); 1895, Owens *v.* Lancaster, 193 Pa. 436, 44 Atl. 559 (whether a sewer was a nuisance, excluded); *South Dakota:* 1897, Erickson *v.* Sophy, 10 S. D. 71, 71 N. W. 758 (whether a thing was done according to contract, excluded); 1903, Henry *v.* Taylor, 16 S. D. 424, 93 N. W. 641 (whether a person was adopted, and whether two persons were married, inadmissible); 1916, State ex rel. Kiihl *v.* Chambers, 37 S. D. 555, 159 N. W. 113 (bastardy; to the complainant, "who is the father of that child?", allowed); *Texas:* 1919, Walker *v.* State, 85 Tex. Cr. 482, 214 S. W. 331 ("Were the questions asked of a dying declarant such as would lead him to make any particular answer?", held to call for a conclusion only; this is unpractical pedantry).

of little service in such a matter. No reasoning can avail against the perverse and morbid attitude which will invoke the Opinion fetish to exclude such testimony.

§ 1963. (1) **Testimony to a State of Mind, in general (Intention, Motive, Purpose, Feelings, etc.).**[1] There are found numerous rulings excluding, under the Opinion rule, statements by observers involving *sundry inferences* as to *another person's* state of mind,[2] and even as to his *own state of mind*.[3] In other

§ 1963. [1] Testimony to external *appearance* of an emotion, or the like, is dealt with *post*, § 1974.

[2] *Cal.* 1886, Hartman *v.* Rogers, 69 Cal. 646, 11 Pac. 581 (nature of intention not specified); *Conn.* 1896, Lovell *v.* Hammond Co., 66 Conn. 500, 34 Atl. 511 (whether another witness had any grounds for his assertion); *Ga.* 1892, Gardner *v.* State, 90 Ga. 310, 315, 17 S. E. 86 (by a bystander, as to the deceased's object in struggling for a pistol); *Ill.* 1876, Carpenter *v.* Calvert, 83 Ill. 70 (whether a devisee's influence was due to the testator's fear or affection); *Ind.* 1882, Dyer *v.* Dyer, 87 Ind. 19 (whether another person heard what was said); *Ia.* 1875, State *v.* Maxwell, 42 Ia. 209 (by an inmate of a house entered by defendant, that he did not intend to steal); 1883, Sweet *v.* Wright, 62 Ia. 217, 17 N. W. 468 (good faith of a sale); 1917, Roddy *v.* Gazette Co., 179 Ia. 50, 161 N. W. 94 (libel; the plaintiff's belief that others believed the statement, excluded); *Ky.* 1884, Crittenden *v.* Com., 82 Ky. 168 (whether defendant was impatient; whether he was looking for the deceased, was "mad," and would hurt him); *Md.* 1899, Tucker *v.* State, 89 Md. 471, 43 Atl. 778 (as to the impression produced on R.'s mind by J.'s attack on R., defendant excusing the killing of J. as done in defence of R.; excluded); *Minn.* 1875, Hathaway *v.* Brown, 22 Minn. 214 (whether the witness-vendee knew that M. the vendor had a purpose to defraud creditors; not decided); *Mich.* 1893, Cole *v.* R. Co., 95 Mich. 77, 80, 54 N. W. 638 (whether a person was shamming); *N. Y.* 1881, Abbott *v.* People, 86 N. Y. 461, 471 (murder; a witness' opinion as to how he understood the deceased to mean in reaching for a wrench just before the fatal blow); 1896, People *v.* McLaughlin, 150 N. Y. 365, 44 N. E. 1017 (bribery; one who has paid money to B. for a police-captain cannot say that he paid it to B. for the defendant, because it involves the "conclusions of the witness, his purpose, or the object of another person"; a ruling sufficiently ridiculous); 1911, Bogart *v.* New York, 200 N. Y. 379, 93 N. E. 937 (death of B. at an automobile race; question to his wife, whether she "knew when he went out that he was going to see the automobile races," held improper, because it did not call for B.'s "acts or statements" but only the witness' "conjecture or conclusion"; no authority cited; this is a scholastic ruling; the husband does not have to say formally and solemnly, "Mary, I am going to the races," in order to express a clear intention; does not a learned judge's wife have a clear knowledge whether he expects to have two or four lumps of sugar put into his coffee without his telling her in a fixed formula every morning of his life? It is time that human nature off the Bench was recognized on the Bench; such rulings are to the laity absurd); *N. Car.* 1885, State *v.* Vines, 93 N. C. 497 (whether the shooting of a pistol was accidental); *Pa.* 1876, Sinnott *v.* Mullin, 82 Pa. 337, 342 (purpose in building a wall); *Utah:* 1893, Hamer *v.* Bank, 9 Utah 215, 33 Pac. 941 (what motive P.'s words and conduct showed); 1901, Watson *v.* Mining Co., 24 Utah 222, 66 Pac. 1067 (expert opinion as to defendant's intention to running a mine-incline); *Vt.* 1915, McCarthy's Adm'r *v.* Northfield, 89 Vt. 99, 94 Atl. 298 (employee's death at a switchboard; whether the deceased knew of the high voltage current not allowed; the opinion ignores the contrary view, and the decision is unsound in any view); *Wash.* 1897, Martin *v.* S. T. & T. Co., 18 Wash. 260, 51 Pac. 376 (action for damages by loss of suit through defendant's failure to transmit a message to a material witness; question to one present at the trial, whether the testimony of the absent witness would have changed the verdict, excluded); *W. Va.* 1917, State *v.* Dushman, 79 W. Va. 747, 91 S. E. 809 (receiving stolen brass; issue whether defendant knew the brass was stolen; "he couldn't help from knowing it, judge, because it was branded there," held fatal error; the mumbling futility of the Opinion rule is here illustrated; to reverse a verdict on account of such a piece of testimony in the whole mass is just as rational, could Courts only stop to reflect, as to us seem the pitiful fetish-formulas of an African tribe).

[3] 1885, Brant *v.* Gallup, 111 Ill. 487, 492 (opponent's explanation of his motives in writing certain letters introduced as admissions excluded); 1890, Flower *v.* Brumbach, 131 Ill. 646, 652, 23 N. E. 335 (fraudulent representations; defendant's testimony as to his intent not to mislead therein, excluded); 1912, Robinson *v.* Western Union T. Co., 169 Mich. 503, 135 N. W. 292 (sender's intent to act, on an issue whether a telegram had been properly transmitted, admitted).

jurisdictions, the testimony has been expressly sanctioned.[4] In particular, a *surveyor* may state whether certain monuments or marks were *intended as boundaries;*[5] and a witness may state whether he has any *bias* or ill-feeling.[6]

How baseless are the exclusionary rulings in the orthodox practice of the common law may be seen in the following extracts from the annals of two generations of English trials:[7]

1793, *Frost's Trial*, 22 How. St. Tr. 484; the witness had testified to the defendant's utterance of seditious words at a coffee-house; "I said he ought to be turned out of the coffee-room; upon which he walked up the room and placed his back to the fire, and wished, I believe, rather to retract, if he could have retracted, what he had said." Cross-examined: "What do you mean by saying, he wished to retract?" "I rather thought he was sorry for what he had said; that is what I mean by it."

1799, *Earl of Thanet's Trial*, 27 How. St. Tr. 927; charge that the defendant obstructed the officers and aided O'Connor, a prisoner, to escape during his trial; Richard Brinsley Sheridan on the stand for the defence. Mr. *Law* (afterwards L. C. J. Ellenborough) cross-examining for the prosecution: "My question is whether, from what you saw of

[4] *Cal.* 1872, People *v.* Sanford, 43 Cal. 32 (whether a dying man's mind was clear or not); 1887, People *v.* Ching Hing Chang, 74 Cal. 394, 16 Pac. 201 (by a person robbed, as to defendant's intention to rob him); *Colo.* 1895, Taylor *v.* People, 21 Colo. 426, 42 Pac. 653 (the accused, testifying that he thought the deceased was going to shoot); *Ga.* 1851, Berry *v.* State, 10 Ga. 514, 529 (that another person apparently knew of a certain fact); 1906, Fitzgerald *v.* Benner, 219 Ill. 485, 76 N. E. 709 (delay in performing a contract; "He kept putting me off," allowed, on the facts); *Ia.* 1859, Pelamourges *v.* Clark, 9 Ia. 16 (feelings of another person toward the speaker); 1896, Kuen *v.* Upmier, 98 Ia. 393, 67 N. W. 374 (whether another person understood English); 1907, State *v.* Bennett, 137 Ia. 427, 110 N. W. 150 (seduction; by the prosecutrix, that she yielded because of the defendant's promises, allowed); 1908, Kinner *v.* Boyd, 139 Ia. 14, 116 N. W. 1044 ("terribly excited," allowed, for a plaintiff speaking of himself); *Kan.* 1886, State *v.* Baldwin, 36 Kan. 10, 12 Pac. 318 (in good spirits; in fear; nervous; apathetic, etc.); *Me.* 1858, Tobin *v.* Shaw, 45 Me. 348 (depression, after breach of promise of marriage); *Md.* 1903, Sellman *v.* Wheeler, 95 Md. 751, 54 Atl. 512 (that an injury "made me nervous"); *Mass.* 1905, McCrohan *v.* Davison, 187 Mass. 466, 73 N. E. 553 (injury by a wagon while crossing a street; the plaintiff's testimony "I thought I would have plenty of time to pass," admitted); *Mont.* 1920, Beadle *v.* Harrison, 58 Mont. 606, 194 Pac. 134 (good faith of defendant sued for malicious prosecution); 1922, Walker *v.* Russell, — Mass. —, 134 N. E. 388 (broker's commission; customer's testimony that he was willing to buy; admitted); *N. Y.* 1825, M'Kee *v.* Nelson, 4 Cow. 355 (that another person was sincerely attached); *Okl.* 1908, Price *v.* State, 1 Okl. Cr. 358, 98 Pac. 447 (intention of an assailant); *Or.* 1915, Macchi *v.* Portland R. L & P. Co., 76 Or. 215, 148 Pac. 72 (by an injured plaintiff, "I thought I had time enough to get out of the way," allowed); *S. D.* 1912, State *v.* Holter, 30 S. D. 353, 138 N. W. 953 (whether the woman in seduction, would have consented without a marriage-promise); *Tenn.* 1916, Pennington *v.* State, 136 Tenn. 533, 190 S. W. 546 (that the deceased "realized he was going to die," allowed); *Tex.* 1888, Schmick *v.* Noel, 72 Tex. 3, 8 S. W. 83 (good faith of a sale, the seller being the witness); 1915, Latham *v.* State, 75 Tex. Cr. 575, 172 S. W. 797 (to a bystander, as to deceased's conduct, "what did you think he was doing with his right hand?", *i. e.* drawing a pistol, allowed; one judge diss.; prior cases collected).

[5] 1826, Davis *v.* Mason, 4 Pick. Mass. 157; 1877, Knox *v.* Clark, 123 Mass. 217; 1858 Stevens *v.* West, 6 Jones L. N. C. 53; 1859 Clegg *v.* Fields, 7 Jones L. N. C. 39. Distinguish the rule about construction of documents (*ante*, § 1956).

[6] 1879, Butler *v.* State, 34 Ark. 484 (ignoring the contrary *obiter dictum* in Cornelius *v.* State, 1852, 12 Ark. 801); 1901, Blanchard *v.* Blanchard, 191 Ill. 450, 61 N. E. 481; 1859, State *v.* Adams, 14 La. An. 630 ("Are you not anxious that the defendant should be convicted?"; admitted); 1881, State *v.* Willingham, 33 La. An. 537 (where the objection was a different and unconnected one); 1881, State *v.* Gregory, 33 La. An. 743; 1884, State *v.* Kane, 36 La. An. 154 (like State *v.* Adams, with special features); 1885, State *v.* Melton, 37 La. An. 77, 78; 1880, State *v.* Miller, 71 Mo. 591.

For a question "whether A. is telling the truth, if he says so-and-so," see *ante*, § 787.

[7] The Answer of the Judges (quoted *ante*, § 661), given in 1791, is explicit.

the conduct of Lord Thanet and Mr. Fergusson, they did not mean to favour the escape of O'Connor?" "I will say that I saw nothing that could be auxiliary to that escape." "I ask you again whether you believe [as above]?" "I have no doubt that they *wished* he might escape; but from anything I saw them *do*, I have no right to conclude that they did." "I will have an answer. I ask you again [as above]?" "If the learned gentleman thinks he can entrap me, he will find himself mistaken." Mr. *Erskine*, for the defence: "It is hardly a legal question." KENYON, L. C. J.: "I think it is not an illegal question."

1820, *R. v. Hunt*, 1 State Tr. N. S. 171, 370, 377; seditious utterances. *Witness:* "My impression was [from the words and conduct] that you [the defendant] merely wished the people to stand, and to prevent danger from their running away." Mr. *Scarlett*, for the prosecution, objected to any questions respecting the witness' impressions of what was said. BAYLEY, J., "said the witness had a right to give his impressions of what he had seen and heard"; . . . "From what you observed and knew, had you reason to think that their spirits were somewhat exasperated?" "Yes; I think many of the working class were very much discontented." [8]

§ 1964. **Same: Rule of Testimonial Knowledge (of Another's Intention), distinguished.** It has sometimes been argued that one person's testimony to another's intention (or other state of mind) is always and radically inadmissible because one person *cannot possibly know* what another's state of mind is. This argument invokes a rule of Testimonial Qualifications, requiring Knowledge (*ante*, § 661), and has sometimes received judicial sanction.[1]

§ 1965. **Same: Rule of Testimonial Interest (One's Own Intention), distinguished.** Testimony to one's own intention, or other state of mind, has often been attacked on the ground of what is really a *disqualification by Interest* (*ante*, § 581); *i. e.* the argument is that, since a person's own intention can be known only to himself, his statement of what it is or was cannot be safeguarded by the possibility of exposing its falsity, through the aid either of conflicting circumstances or of opposing eye-witnesses; and that thus the influence of self-interest in falsifying is too dangerous, and that such testimony should consequently be forbidden. This argument has been generally repudiated.[1]

§ 1966. **Same: Alabama Doctrines.** The foregoing supposed principles, *i. e.* disqualification by interest to speak of one's own intention, disqualification by lack of knowledge to speak of another's intention, and the Opinion rule proper (*ante*, §§ 1963–1965), have made hopeless confusion in the rulings of the Court of Alabama. By accepting in full the two former undesirable

[8] Other instances are as follows: 1794, Horne Tooke's Trial, 25 How. St. Tr. 420 ("From what you knew of the professed objects of this Convention, . . . have you any reason to believe anything criminal was intended?" this question being put to many witnesses); 1800, Tandy's Trial, 25 How. St. Tr. 1215 (on the issue whether a person, who could have avoided attainder by surrender before a certain date, was able and intended at a certain time to surrender, the question to a competent person was allowed: "Can you form any belief of the object or intention with which he sought at any time to be set at liberty?"); 1817, Watson's Trial, 32 How. St. Tr. 67 (that a person must have heard a thing which was read, allowed); 1820, Queen Caroline's Trial, Linn's ed., I, 150 (whether the witness knew what a certain person's motions, said to be lewd, were intended to represent, allowed).

§ 1964. [1] The cases on both sides are collected *ante*, § 661. Whether a Court is ruling upon that ground or the present one is sometimes difficult to learn.

§ 1965. [1] The cases are collected *ante*, § 581

principles, by confusing them and the Opinion rule, and by occasionally ignoring some precedents and misusing others, the law there has for long been in such a state that not only is it difficult to say what the rule is, not only is heterodoxy disseminated by the citation of such precedents in other Courts, but it is hard to see, in view of the apparently comprehensive rules of exclusion, how any intelligent legal inquiry at all can there be conducted upon these points.[1]

§ 1966. [1] The various rulings may be classed roughly into four series:

(1) In Barnett *v.* Stanton, 2 Ala. 187 (1841), it was said that a mere assertion of value by a seller is not a warranty, being "mere matter of opinion, not knowledge"; this case and its successors, Williams *v.* Cannon, 9 Ala. 350 (1846), and Bradford *v.* Bush, 10 Ala. 390 (1846), which had required the jury to determine the question whether the language was a mere assertion or something more, were then taken, in Sledge *v.* Scott, 56 Ala. 207 (1876), as involving this consequence, that on such a matter of opinion no witness, even the purchaser, could speak; this was, of course, a mere juggle on the word "opinion," and the absurd and unheard-of consequence was reached that a *buyer could not testify* that "*he relied on the* seller's *representations* as to soundness, and would not have made the purchase but for the representations"; on the same theory similar evidence was rejected in Baker *v.* Trotter, 73 Ala. 281 (1892).

(2) At the same time a parallel line of decisions, dealing with cases of illegal transfers and other acts, took the course of excluding evidence by one person, however familiar with the transaction, of the *intention of any other person*, on the ground that "a witness can only depose to such facts as are within his own knowledge," and the intention of another person, "however strongly he might be justified in *believing* to be as stated, he could not *know*," *i. e.* the requirement of a Knowledge-Qualification is wanting: 1843, Planters', etc., Bank *v.* Borland, 5 Ala. 546 (testimony of an alleged fraudulent grantor as to the grantee's fraudulent intention); 1845, Peake *v.* Stout, 8 Ala. 647 (same); 1846, Whetstone *v.* Bank, 9 Ala. 886 (testimony of one party to an alleged illegal contract as to the other's intention); 1860, Clement *v.* Cureton, 36 Ala. 121, 124 (the motive of another person in selling a slave to a third person); 1877, Sternan *v.* Marx, 58 Ala. 609 (that another person would not have paid for goods taken); 1886, Adams *v.* Thornton, 82 Ala. 263, 3 So. 20 (the reason why an assignment was made); 1895, Bailey *v.* State, 107 Ala. 151, 18 So. 234 (by A, that the defendant knew of a fact); 1896, Gunter *v.* State, 111 Ala. 23, 20 So. 652 (by an eyewitness, whether a shooting was accidental); 1904, Bell *v.* State, 140 Ala. 57, 37 So. 281 (P.'s opinion of defendant's state of mind, excluded); 1906, Delaney *v.* State, 148 Ala. 586, 42 So. 815 (by a witness, that the deceased declarant "knew he was going to die," excluded); 1906, Richardson *v.* State, 145 Ala. 46, 41 So. 82 (tracing a manslayer by hounds; on re-direct examination, "Why did the dogs leave the trail?" was not allowed, on the present ground; this is an edifying example of the dogged consistency with which this rule of superfine wisdom is here applied; presumably the dogs should have been X-rayed to ascertain their motives; inasmuch as the dogs here were named respectively "Rock" and "Rye," it might well have been inferred that they left the trail on a still hunt); 1910, Louisville & N. R. Co. *v.* Perkins, 165 Ala. 471, 51 So. 870 (whether a third person knew the suit was pending, excluded); 1911, Councill *v.* Mayhew, 172 Ala. 295, 55 So. 314 (whether a supposed insane person knew what he was doing when he signed checks, allowed on cross-examination; prior cases not cited); 1919, Spurlock *v.* State, 17 Ala. App. 109, 82 So. 557 ("He appeared to know about the silver," excluded); 1921, Cooper *v.* State, 206 Ala. 294, 89 So. 494 (murder; that the wife "turned to help her sister," allowed); *Contra:* 1873, Ray *v.* State, 50 Ala. 107 (where the defendant admitted having the stolen article, and the witness was allowed to answer whether he "supposed" the defendant was jesting when he made the admission).

(3) It will be observed that in par. (1) the cases deal with the statement of a witness, usually a party to a warranty-contract, as to his own reliance or similar mental attitude, while in par. (2) they deal with one person's statement about another person's mental attitude in general; there come next a line of cases to which the *decisions* in par. (2) are applied as precedents to the class of *situations* of par. (1) (representations, warranties, etc.), while a *reason* is given which differs totally from that in either of the above groups; *i. e.* there is laid down a general principle that no person may testify to his *own mental attitude* (motive, design, emotion), on the ground that "secret, uncommunicated motives of their own conduct" are "insusceptible of contradiction"; this is really on principle a disqualification on account of Interest; and indeed most of the decisions confine the rule to the parties to a case; that this principle was a new one appears from the fact that in Peake *v.* Stout, 1845, *supra*,

par. (2), the witness' statement of his own intention was admitted; the subsequent rulings are: 1875, Oxford Co. *v.* Spradley, 51 Ala. 176 (a note given for alleged illegal purposes; the defendant's testimony as to his intention or purpose was ruled out in the following language which is so curious that it deserves recording: "It would embarrass the jury to do so [find as to the intention], if he simply told them what was his intention"); 1878, Herring *v.* Skaggs, 62 Ala. 187 (whether the buyer would have taken a safe, had he known the truth); 1881, Wheless *v.* Rhodes, 70 Ala. 420 (to which claim the witness intended to apply a payment); 1882, Burns *v.* Campbell, 71 Ala. 291 (whether a mortgagee approved a seizure); Alexander *v.* Alexander, 71 Ala. 299 (whether the grantor intended to deliver a deed); Burke *v.* State, 71 Ala. 382 ("a prisoner cannot state his own uncommunicated belief, motive, or intention"; here an assault case); Whizenant *v.* State, 71 Ala. 384 (same principle); 1883, Wilson *v.* State, 73 Ala. 527, 532 (whether a complainant in seduction yielded in reliance upon a promise of marriage); 1884, McCormick *v.* Joseph, 77 Ala. 240 (testimony by a seller that he would not have sold had he known of the insolvency of the buyer); 1885, Alabama F. Co. *v.* Reynolds, 79 Ala. 506 (warranty-representations; Sledge *v.* Scott, Baker *v.* Trotter, McCormick *v.* Joseph, followed); 1888, Sharpe *v.* Hall, 86 Ala. 115, 5 So. 497 (the intention of a draughtsman as to making the document a will or a deed); 1893, Hinds *v.* Keith, 13 U. S. App. 222, 226, 6 C. C. A. 231, 57 Fed. 10 (creditor's good faith in purchasing from debtor); 1895, Dean *v.* State, 105 Ala. 21, 17 So. 28; Ellis *v.* State, 105 Ala. 72, 17 So. 119; Dent *v.* State, 105 Ala. 14, 17 So. 94; 1898, Manchester F. A. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759 (by one giving consent for a transfer, as to who he thought the assignee was); 1901, Fitzpatrick *v.* Brigman, 130 Ala. 450, 30 So. 500 (grantor's testimony to his intent in delivering a deed); 1903, Holmes *v.* State, 136 Ala. 80, 34 So. 180 (by a defendant, what he was going to do with a pistol); 1904, Gregory *v.* State, 140 Ala. 16, 37 So. 259 (like Holmes *v.* State); 1905, Barnewell *v.* Stephens, 142 Ala. 609, 38 So. 662 (excluding a witness' testimony to his "wish"); 1905, Sprouse *v.* Story, 144 Ala. 542, 42 So. 23 (forcible entry; to the defendant, "How came you to go into the house on the premises in dispute?" excluded; this is a farcical game); 1906, Smith *v.* State 145 Ala. 17, 40 So. 957 (homicide; to the defendant, by his counsel: "For what purpose did you have the pistol, etc.?" excluded; no authority cited); 1908, Patterson *v.* State, 156 Ala. 62, 47 So. 52 (like Holmes *v.* State); 1913, 'ex parte' Woodward, 181 Ala. 97, 61 So. 295 (rule considered, in connection with the statute for 'prima facie' evidence of intent to sell liquor); 1914, Brooks *v.* State, 185 Ala. 1, 64 So. 295 (assault with intent to rape; prosecutrix' motive in delaying to prosecute, not admissible); 1915, Moton *v.* State, 13 Ala. App. 43, 69 So. 235 (to a defendant witness, "Why did you leave home?"); 1916, Patton *v.* State, 197 Ala. 180, 72 So. 401 (murder; defendant's reason for taking a path, etc., excluded); 1921, Nickerson *v.* State, 205 Ala. 684, 88 So. 905 (murder; defendant testified that he went to the place of the homicide to do business with a third person V.; the question, "What was it [the business]?" held improper; such muzzling is too absurd for any rational tribunal to sanction); 1921, Lakey *v.* State, 206 Ala. 180, 89 So. 605 (a murder; to the sheriff, "your feeling isn't such as would cause you to bias your testimony"). In some of the above excluding cases, *e. g.* Sharpe *v.* Hall (par. 3), the testimony was of course improper under the Parol Evidence rule, according to which the whole question of intention is irrelevant, without regard to mode or proof; but the above doctrine expressly treats it as relevant and merely excludes a particular mode of proof.

(4) In later years, the practical disadvantages of these exclusions have apparently led to some sort of a conceded exception for testimony to *one's own state of mind*, resting on no particular principle and not precisely defined: 1894, Johnson *v.* State, 102 Ala. 1, 16 So. 99 (explanation of a witness' assertion of ignorance of a matter, "I did not want to talk about it," admitted); Anderson *v.* State, 104 Ala. 83, 16 So. 108 (similar); 1899, Linehan *v.* State, 120 Ala. 293, 25 So. 6 (manslaughter; defendant may be cross-examined as to his purpose and motive); 1899, Williams *v.* State, 123 Ala. 39, 26 So. 521 (admissible on rebuttal to explain a witness' self-contradiction or an accused's relevant act); 1904, Dimmick P. Co. *v.* Wood, 139 Ala. 282, 35 So. 885 (loss of service of the plaintiff's son, hired without the plaintiff's consent by the defendant; "state whether you consented," to the plaintiff, held allowable); 1904, Dorlan *v.* Westervitch, 140 Ala. 283, 37 So. 382 (a claimant resting on adverse possession; "whether you have been claiming to own," allowed); 1905, Carwile *v.* State, 148 Ala. 576, 39 So. 220 (an impeached witness may explain why he made certain statements); 1906, Reeder *v.* Huffman, 148 Ala. 472, 41 So. 177 (constable's failure to execute a writ; to a witness, "Would you have told the constable, etc., if he had inquired?" excluded; no authority cited); 1906, Lawrence *v.* Doe, 144 Ala. 524, 41 So. 612 (adverse possession by defendant; to the defendant, "Why did you not pay the taxes?" excluded; this rule is certainly a successful device for suppressing the truth); 1906, Western Union T. Co. *v.* Long, 148 Ala. 202, 41 So. 965 ("Why did you not give the telegram to your brother?" excluded); 1908, Patterson *v.* State, 156 Ala. 62, 47 So. 52 (like Linehan *v.* State); 1920, Kinsey *v.* State, 204 Ala. 180, 85 So. 519 (to an accused, objecting to a confession as not voluntary, "Were you afraid of S?", held admissible).

§ 1967. **Same: Rules of Substantive Law, distinguished (Dedication, Fraudulent Transfer, Will, Ballot, Crime, and the like).** The substantive law may declare the intent of a person to be immaterial; in that case, testimony to his intent, from himself or from any one else, will be excluded, but not by virtue of the Opinion rule or of any other rule of evidence. For example, in considering whether land has become a *highway by dedication* of the owner, his intention to dedicate may be proper to regard; while, on the other hand, if his outward conduct has amounted to a dedication, a secret intention to the contrary may not be allowed to affect the result.[1]

The fraudulent intent of an *insolvent debtor transferring his property* is usually material, under the law of the subject; but the fraudulent intent of the assignee is usually not material, because the transfer will under the usual statute be set aside if only the assignee had notice of the insolvency, and whether or not he intended to defraud creditors.[2] Whether it is an essential element of a *crime* that a guilty intent or some other specific intent should exist, or whether the doing of a given act is alone sufficient, depends on the law of crimes; for in many statutory offences no specific intent is essential.[3] There are many other situations in which under the substantive law a state of mind may or may not be a part of the issue, — the mental state of a *testator* with reference to insanity or undue influence; in an action for *deceit*, the plaintiff's reliance upon the defendant's representations; in an action for a *broker's commission*, the purchaser's persuasion by the plaintiff's efforts as broker.[4] Whether or not the motive, reason, or other state of mind, may be proved, is in all these not a question of Evidence-law (*ante*, § 2).

§ 1967. [1] 1884, Indianapolis *v.* Kingsbury, 101 Ind. 213 (secret intention not to dedicate a way is immaterial, where the conduct amounts to a dedication).

So too for an act of *adverse possession:* 1905, Murphy *v.* Com., 187 Mass. 361, 73 N. E. 524 (a claimant going upon the land claimed; "the secret and undisclosed intention of the witness was immaterial").

Compare here the 'res gestæ' rules (*ante*, § 1778).

[2] 1871–72, Hathaway *v.* Brown, 18 Minn. 423 (fraudulent transfer; the assignee's notice, but not his intention, being held alone material, the question was held irrelevant).

[3] 1910, Magon *v.* U. S., 9th C. C. A., 248 Fed. 201 (placing in the mails matter tending to incite to murder; questions as to defendant's intent, excluded, the intent being immaterial); 1879, Halsted *v.* State, 41 N. J. L. 553; 1907, State *v.* Simmons, 143 N. C. 613, 56 S. E. 701 (carrying a concealed weapon).

[4] *Eng.* 1874, Mansell *v.* Clements, L. R. 9 C. P. 139 (the question being whether an agent had been the cause of a sale and thus earned his commission, the inquiry put to the purchaser was held proper: "Would you, if you had not gone to the plaintiff's office and got the card, have purchased the house?"); *U. S.* 1918, Flowers *v.* Bush & Witherspoon Co., 5th C. C. A., 254 Fed. 519 (contract for sale of cotton for future delivery; question as to individual intent of one party only, excluded); 1921, Minneapolis S. & M. Co. *v.* Yeggy, 69 Colo. 313, 194 Pac. 362 (agent's commission; whether the buyer was influenced by plaintiff to decide to buy, allowed); 1920, Fisher *v.* Skidmore Land Co., 189 Ia. 833, 179 N. W. 152 (broker's commission on land-sale; purchaser's testimony that he was "ready, able, and willing to buy," admitted); 1920, Sapulpa R. Co. *v.* Cedar Rapids Oil Co., 190 Ia. 892, 179 N. W. 168 (breach of contract; defendant's testimony to his intent in waiving rights when sending a check, excluded, with much futile learning); 1920, Boyle *v.* Rider, 136 Md. 286, 110 Atl. 524 (liability of trustee on a contract; promisee's expression of his intention to hold trustee personally, not admitted; his undisclosed intention being immaterial); 1906, Anderson *v.* Metrop. Stock Exchange, 191 Mass. 117 77 N. E. 706 (statutory recovery for stock gambling; the defendant's manager's private intent, held immaterial); 1911, Aldrich *v.* Island E. T. & T. Co., 62 Wash. 173, 113 Pac. 264 (malicious prosecution; magistrate's reasons for discharging the plaintiff, excluded).

The Parol Evidence rule (*post*, § 2400), which is in truth a doctrine of substantive law and involves the constitution of legal acts, sometimes raises questions of this sort. Whether a *testator* intended to place a certain clause in his will (*post*, § 2471), whether a *voter* intended to vote for the person whose name is on his ballot (*post*, § 2421), and the like, depends upon whether the actor's intention is to be allowed in substantive law to control the legal effect of his act. If it is, then testimony to that intent is receivable; if not, then inadmissible; but the exclusion has nothing to do with the Opinion rule or any other rule of evidence.

§ 1968. **Same: Declarations of Intent, distinguished (as involving a Verbal Act or a Hearsay Exception).** Supposing one's intent or other state of mind to be material under the substantive law, the question arises whether the person's extrajudicial declarations are receivable under an Exception to the Hearsay Rule (Statements of a Mental Condition), already dealt with (*ante*, § 1714). So, also, such declarations of intent may sometimes be receivable, apart from any exception to the Hearsay rule, so far as they are offered not as assertions, but as conduct qualifying or explaining other equivocal conduct which has to be interpreted; such utterances are receivable as Verbal Acts (*ante*, §§ 1772–1786).[1]

§ 1969. (2) **Testimony to the Meaning of a Conversation or Other Utterance ("Impression" or "Understanding" conveyed by Language).** The Opinion rule is sometimes argued to exclude a witness' statement as to the *effect of a conversation* or the *meaning intended* to be conveyed, because that meaning or impression or effect is merely an inference from the observed data of the occasion, *i. e.* the words used, and these he should reproduce to the jury without his inferences.[1]

§ 1968. [1] The following case will illustrate the frequent superficial resemblance between such a case and some of the preceding ones, as regards the mere form of the question or answer: 1895, Swerdferger *v.* Hopkins, 67 Vt. 136, 31 Atl. 153 (a former possessor said that he "understood" his line to run in a certain place; here his belief was treated as amounting to a claim).

§ 1969. [1] *Excluded: Ala.* 1899, Fields *v.* Copeland, 121 Ala. 644, 26 So. 491 (whether the parties disputed or agreed in a conversation); 1899, Baker *v.* State, 122 Ala. 1, 26 So. 194 (that a person had "made arrangements" for his crop); *Ark.* 1910, Bercher *v.* Gunter, 95 Ark. 155, 128 S. W. 1036 (understanding as to the effect of a sub-contract, excluded); *Cal.* 1894, Whitmore *v.* Ainsworth, — Cal. —, 38 Pac. 196 (that A had a paper which he wanted the witness to sign); *D. C.* 1892, U. S. *v.* Cross, 20 D. C. 376 (whether defendant's threats "amounted to anything," *i. e.* were seriously meant); *Ga.* 1873, Peterson *v.* State, 47 Ga. 524, 528 (the impression, made by the defendant's confession, that deceased was attacking him); *Ill.* 1879, Hewitt *v.* Clark, 91 Ill. 608 (effect of a conversation); 1911, Harrison *v.* Thackaberry, 248 Ill. 512, 94 N. E. 172 (whether a letter from a creditor to a debtor was a consent to an extension of time on the note: the creditor not allowed to testify to his intent in writing it); *Ind.* 1859, Williams *v.* Dewitt, 12 Ind. 309, 311 (one who had given the facts as to an arbitration, not allowed to state his understanding whether the parties made a settlement); 1901, Diehl *v.* State, 157 Ind. 549, 62 N. E. 51 (witness' "understanding" as to defendant's representations of his relation to a woman, excluded); *Ia.* 1892, State *v.* Brown, 86 Ia. 121, 124, 53 N. W. 92 (the witness' understanding of what A said); 1903, Plano Mfg. Co. *v.* Kautenberger, 121 Ia. 213, 96 N. W. 743 (that defendant "fully understood" the terms of a settlement); *Kan.* 1876, Shepard *v.* Pratt, 16 Kan. 211 (effect of a conversation); 1872, Atchison *v.* King, 9 Kan. 556 (same); 1873, Da Lee *v.* Blackburn, 11 Kan. 202 (same); *Me.* 1843, Whitman *v.* Freese, 23 Me. 187, *semble* ("what place he supposed the defendant meant" by words used in forming a contract alleged to be illegal); *Md.* 1819, Burt *v.*

The answer to this argument is that already set forth (*ante*, § 1962). It ought not to be necessary to point out that what is unsaid in words may yet be conveyed with equal clearness and positiveness. "You cram these words into mine ears, against the stomach of my sense." The Opinion rule cannot avail to eliminate irony and innuendo from human language. Common experience forbids us to assume that at every time and from every person mere words are a complete index of the meaning which the hearer knew to accompany them: [2]

1881, SMITH, J., in *Fiske* v. *Gowing*, 61 N. H. 432 (effect of a conversation): "It rarely happens that two persons are able to give precisely the same account of a conversation. Their narration will differ more or less according to their intelligence, their interest in the subject-matter, their opportunities for hearing, their prejudices for or against the parties, the lapse of time since the conversation occurred, and a variety of other circumstances. Emphasis thrown upon the wrong word might convey a meaning different from that originally intended. Often the manner in which a remark is made, and the conduct and appearance of the party, may have much to do in producing the understanding that was received, much of which it is difficult and sometimes impossible for a witness to describe."

§ 1970. Same: Rule of Testimonial Knowledge (excluding "Impression" or "Belief") distinguished.

(1) If a witness' "impression" or "belief" of what

Gwinn, 4 H. & J. 509, 517, *semble* (where the witness "understood and presumed" that certain money was retained by a co-transactor for a certain purpose); *Mass.* 1850, Ives *v.* Hamlin, 5 Cush. 535 (effect of conversation); *Minn.* 1895, Peerless Mfg. Co. *v.* Gates, 61 Minn. 124, 63 N. W. 260 (whether the defendant agreed to do a thing and did do it, was excluded; but, whether a witness had authority to sell, was admitted); *Miss.* 1905, State *v.* Wertz, 191 Mo. 569, 90 S. W. 838 (rape; whether the witness "understood" from what the prosecutrix said and did, that she had been raped, excluded); *N. H.* 1844, Braley *v.* Braley, 16 N. H. 431 (when the words have been given, the witness cannot state what meaning was intended); 1844, Hibbard *v.* Russell, 16 N. H. 417 (same); 1850, Hoitt *v.* Moulton, 21 N. H. 588 (same); 1859, State *v.* Flanders, 38 N. H. 333 (same); *N. Y.* 1823, Cutler *v.* Carpenter, 1 Cow. 82 (belief as to the unexpressed meaning in a conversation); 1887, People *v.* Sharp, 107 N. Y. 461, 14 N. E. 319 (the witness, an alderman, was given a roll of bills, said by the donor to be for election expenses, but the witness "supposed it was for the Broadway road," *i. e.* the franchise alleged to have been procured by bribery; excluded; an indefensible ruling); *Oh.* 1854, Crowell *v.* Bank, 3 Oh. St. 412 (understanding of what was meant; this opinion, often cited, is particularly full of fallacies); *Vt.* 1895, Norton *v.* Parsons, 67 Vt. 526, 32 Atl. 481, *semble* (the meaning of defendant in a conversation involving an admission).

In Goodman *v.* Kennedy, 10 Nebr. 274, 4 N. W. 987 (1880), an "understanding" as to when title passed was declared improper, apparently as involving opinion upon matter of law.

The truth is that in some of the above rulings, while the Opinion rule is the ostensible weapon of exclusion, the real objection in the mind of the Court is the Completeness rule (*post*, § 2102), *i. e.* the principle that the evidence must furnish the substance or the entirety of the words used.

[2] *Accord:* 1903, Shafer *v.* Hausman, 139 Ala. 237, 35 So. 691 (whether "the agreement" was as specified); 1894, Garrett *v.* Tel. Co., 92 Ia. 449, 452, 58 N. W. 1064, 60 N. W. 644 (whether there was an understanding that a thing should be done; a contract being in issue); 1909, Blossi *v.* Chicago & N. W. R. Co., 144 Ia. 697, 123 N. W. 360 (fraudulent release by an alien; the releasee's testimony that he believed the releasor to understand the provisions, admitted); 1895, State *v.* Earnest, 56 Kan. 31, 42 Pac. 359 (who was referred to in a conversation); 1873, Atwood *v.* Cornwall, 28 Mich. 336, 339 (a statement "that he understood C. to admit the fact is not given as an expression of opinion but as a fact, and is the only way in which conversations can often be proven"); 1895, Walker *v.* R. Co., 104 Mich. 606, 62 N. W. 1032 (that a person had "instructed" another to act); 1895, Woodworth *v.* Thompson, 44 Nebr. 311, 62 N. W. 450 (that the opponent "agreed" to a contract); 1905, Union Hosiery Co. *v.* Hodgson, 72 N. H. 427, 57 Atl. 384 (joint purchase of coal; the "understanding" of one of the purchasers as to the ownership, admitted).

Of course an *opponent's admissions*, on cross-examination, as to his "understanding" ought to be received: 1897, De Graw *v.* Emory, 113 Mich. 672, 72 N. W. 4.

he speaks of appears to have been based, *not on personal observation*, but on a mere guess or upon rumor, he may be excluded, as not qualified by knowledge (*ante*, § 658). (2) If a witness, though speaking from personal observation, has only an *indistinct recollection*, so that he can venture no more than an "impression" or "belief," this is on principle no objection to his testifying to the best of his memory or impression; though some Courts do not concede it (*ante*, § 728). But it is clear that the propriety of excluding an "impression" on either of these grounds above-named is no excuse for excluding it because of the Opinion rule.

§ 1971. **Same: Rules of Substantive Law, distinguished; (*a*) Understanding of a Party to a Contract; (*b*) Intention in Libel or Slander; (*c*) Parol Evidence Rule.** One source of confusion which may have caused some of the exclusionary rulings in the preceding sections has been that facts of a similar sort are often *immaterial with reference to the issues of the case*, as determined by principles of substantive law. Here the 'factum probandum' has no place in the case, and hence no testimony, however good, on that point is desired (*ante*, § 2).[1]

(*a*) *Contract: "Understanding" of a Party or the Parties.* By the modern law of contract, the mere state of mind of the parties — with reference to a "meeting of minds" — is not the essential object of inquiry.[2] The terms of the promise-act, then, are to be determined by an external, not an internal standard, *i. e.* by the sense or significance of its words as reasonably understood by the promisee. Hence neither the particular "understanding" of the promisor, nor the particular "understanding" of the promisee, is necessarily the test of the sense to be accepted and enforced by the law; the promisee's "understanding," if not a reasonable one, may equally be rejected. Nevertheless, for two reasons it is usually necessary to inquire what the "understanding" of each party was; first, because it may appear that both gave the same sense to the words, and thus no conflict will exist and the common sense may be accepted and enforced; and, secondly, because, if there *is* a conflict, the different senses must be examined. It thus appears that we must discriminate between *enforcing* the private "understanding" of one party, and *receiving evidence* of such a private "understanding." Rulings of exclusion will usually or often mean in reality, not that the evidence should not be listened to, but that the private "understanding" will not be enforced; and practically this may in a given instance be a correct enough result.[3]

§ 1971 [1] The following citations are merely illustrative.

[2] Harriman, Contracts, 2d ed., § 2466:

[3] Compare here the cases cited *post*, § 2466: *Eng.* 1844, Bonfield *v.* Smith, 12 M. & W. 403 (debt for goods sold; plea, that the defendant's firm was the real buyer; a question to plaintiff "With whom did you 'deal?" was rejected, because it amounted to asking "With whom did you *believe* you dealt?", and the fact that would make the persons liable as partners would not be the customer's belief, but the general holding themselves out by the parties as partners); *U. S.: Ga.* 1895, Slater *v.* D. S. & H. Co., 94 Ga. 687, 21 S. E. 715 (letter written by a debtor, alleged to involve a new promise; the writer's testimony as to his meaning, excluded) *Ia.* 1897, First Nat'l Bank *v.* Booth, 102 Ia. 333, 71 N. W. 238 (whether the promisee understood the promisor's language, excluded); 1902, Sheldon *v.* Bigelow, 118 Ia. 586, 92 N. W. 701 (whether R. was going to assume firm

(*b*) *Intention of one Charged with Libel or Slander.* When utterances are alleged to have been defamatory, the fundamental notion of defamation — a spreading of false information among the community — requires us to take the standpoint of the community, or of the particular hearers or readers, in determining whether such a charge was published, *i. e.* made known to them. A number of corollaries result from this; and, in particular, it follows (1) that the *intention* or secret meaning *of the defendant* in using the words is not to be considered; since the question is what his hearers or readers were reasonably caused to understand, and not what he intended;[4] and (2) that the private *understanding of an individual hearer* (as distinguished from the ordinary sense of the words) cannot in theory be offered, until it is first shown that some circumstance was known to him which reasonably gave the words a special meaning.[5]

debts, excluded); *Mass.* 1878, Paine *v.* Boston, 124 Mass. 486, 490 (interpretation of a city council's vote as a settlement of a disputed claim; the motives and reasons of the members, *semble*, immaterial); 1905, Farnum *v.* Whitman, 187 Mass. 381, 73 N. E. 473 (wagering contract for wheat; the intent of one party only, held immaterial); *Mich.* 1904, Downing *v.* Buck, 135 Mich. 636, 98 N. W. 388 (brokerage); *N. H.* 1868, Delano *v.* Goodwin, 48 N. H. 206 (showing that even in matters of contract the understanding of one party may be evidential towards the main issue of the effect which his conduct produced upon the mind of the other party); *N. Y.* 1828, Murray *v.* Bethune, 1 Wend. 196 (the mere private understanding of one party to a contract is immaterial and cannot be testified to); 1872, Waugh *v.* Fielding, 48 N. Y. 681 (opinion by a vendor as to his intention with reference to representations made to the vendee, excluded); 1874, Tracy *v.* McManus, 58 N. Y. 257 (by one charged as a copartner, explaining his motive and purpose in doing acts which were capable of construction as acts of partnership, admitted); 1907, Trombly *v.* Seligman, 191 N. Y. 400, 84 N. E. 280 (sale of materials for a house; plaintiff's understanding as to who was the buyer, held immaterial); *Vt.* 1895, Wheeler *v.* Campbell, 68 Vt. 98, 34, Atl. 35 (understanding admissible, when it siginifies the the agreement as accepted by both parties).

Of course the "understanding" of one *not a party* to the contract would usually be immaterial: 1874, Nichols *v.* Ore Co., 56 N. Y. 618 (by one doing work for plaintiff, as to whether he supposed the work was to be paid for by defendant or by X; excluded).

[4] *Can.* 1916, Clarke *v.* Stewart, 32 D. L. R. 366, Alta. (slander; "Did you mean the plaintiff when you used those words?" asked on discovery, held not proper, defendant's actual intent being immaterial). *U. S.* 1866, Bullard *v.* Lambert, 40 Ala. 205, 209; 1888, Republican Publ. Co. *v.* Miner, 12 Colo. 85, 20 Pac. 345; 1907, Ladwig *v.* Heyer, 136 Ia. 196, 113 N. W. 767; 1837, Allensworth *v.* Coleman, 5 Dana Ky. 315; 1896 Provost *v.* Brueck, 110 Mich. 136, 67 N. W. 1114; 1902, Davis *v.* Hamilton, 88 Mich. 64, 92 N. W. 512; 1908, Harms *v.* Proehl, 104 Minn. 303, 116 N. W. 587.

[5] *Eng.* 1848, Daines *v.* Hartley, 3 Exch. 200; *Can.* 1903, Green *v.* Miller, 33 Can. Sup. 193; 1908. Moran *v.* O'Regan, 38 N. Br. 399 (hearer's opinion what "thief" meant, excluded; Landry, J., diss., correctly on the facts); *U. S.* 1898, Hearne *v.* De Young, 119 Cal. 670, 52 Pac. 150; 1855, Hawks *v.* Patton, 18 Ga. 52; 1906, Goldborough *v.* Orem, 103 Md. 671, 64 Atl. 36; Callahan *v.* Ingram, 122 Mo. 355, 375, 26 S. W. 1020; 1907, Julian *v.* Kansas City S. Co., 209 Mo. 35, 107 S. W. 496 (most sensible opinion on the subject, per Valliant, J.; Graves and Lamm, JJ., diss.); 1913, Peak *v.* Taubman, 251 Mo. 390, 158 S. W. 656 (approving Julian *v.* Kansas City S. Co., Graves, J., diss.); 1910 U. S. *v.* Ocampo, 18 P. I. 1, 45; 1912, Worcester *v.* Ocampo, 22 P. I. 42, 63, 86 (Johnson, J., admitting opinion as to the identity of the person meant: "The issue in a libel case concerns not only the sense of the publication, but in a measure its effect upon a reader acquainted with the person referred to"); 1846, Morgan *v.* Livingston, 2 Rich. S. C. 573, 582.

Some confusion, however, has been caused by the citation (Best on Evidence, § 512) of Daines *v.* Hartley, *supra*, as "a good illustration of the real nature" of the Opinion rule; yet this is precisely what it is not; it has nothing to do with the Opinion rule, and the judges' language does not so treat it; the same confusion is found in the following cases: 1887, Gribble *v.* Pioneer-Press Co., 37 Minn. 277; 1900, Soloman *v.* American Merc. Exch., 93 Me. 436, 45 Atl. 510.

The following ruling should be noted: 1908, Brinsfield *v.* Howeth, 107 Md. 278, 68 Atl. 566 (slander; the defendant had said that he had had a chance to "strap" the plaintiff;

(c) The *Parol Evidence (Integration) Rule*, which is a rule of substantive law, constantly excludes various facts affecting the meaning, intention, usage, sense, or understanding of parties engaged in consummating a legal act (*post*, §§ 2400–2478). For this exclusion the Opinion rule is not responsible.

§ 1972. **Same: Rule of Explaining the Meaning of an Admission or Contradiction, distinguished.** It has already been seen (*ante*, §§ 1044, 1058) that the impeaching force of a party's apparent admission, or of a witness' apparently inconsistent statement, lies in the self-contradictory states of mind which it discloses, and that thus his credit may be restored by an explanation which shows that there was no inconsistency. This explanation may often be made by showing that words were used in a sense different from that claimed by the opponent, or that a different state of facts was in mind at the time of the utterance; and the Opinion rule should not interpose any bar.[1]

7. Sundry Topics

§ 1974. **Corporal Appearances of Persons and Things ("looking" Sad, Ill, and the like; Intoxication, Age, etc.).** The Opinion rule is often sought to be applied to forbid compendious descriptions of the *appearances externally indicating internal states*, — for example, whether a person "looked" sick or sad or angry. There is no more reason in this class of cases than in the preceding one for the Opinion rule to exclude the testimony.[1] The exclusionary

a witness was asked if he knew the meaning of "strap" in the neighborhood when used of a female, and answered that he did, and that it meant "to have intercourse"; the local meaning was held a proper thing to prove, but this mode of proving it was held improper; the quiddities of the Court's reasoning are not worth setting out here; it is a good example of the anachronistic Cokianism which has now become nauseous, and naturally excites popular distrust of Courts).

§ **1972.** [1] *E. g.* 1872, Mickey *v.* Ins. Co., 35 Ia. 181 (explaining the understanding and intention of a party in using language offered against him as an admission; here an affidavit of loss by an insured); and cases cited *ante*, §§ 1044, 1059.

§ **1974.** [1] From the ensuing cases, distinguish those involving the question of Testimonial Qualifications, whether a *layman* is *experientially* or otherwise *qualified* to speak of the existence or appearances of an illness (*ante*, §§ 568, 689); in the following citations the testimony was *admitted*, except as otherwise noted:

Alabama: 1859, Barker *v.* Coleman, 35 Ala. 225 (looked sick); 1859, Blackman *v.* Johnson, 35 Ala. 255 (same); 1861, Fountain *v.* Brown, 38 Ala. 75 (same); 1863, Raisler *v.* Springer, 38 Ala. 705 (insulting manner); 1875, Gassenheimer *v.* State, 52 Ala. 317 ("looked excited," excluded); 1878, South & N. Ala. R. Co. *v.* McLendon, 63 Ala. 275 ("looked bad," "was not able to use her arm"); 1885, State *v.* Houston, 78 Ala. 578, 585 ("he looked" so-and-so, admitted; "he impressed me with the belief of" so-and-so, excluded); 1885, Carney *v.* State, 79 Ala. 17 (acted towards a woman "as a suitor" and "as a lover," excluded); 1886, Jenkins *v.* State, 82 Ala. 28, 2 So. 150 ("appeared like he was mad," *i. e.* angry); 1895, Miller *v.* State, 107 Ala. 40, 19 So. 37 (same); 1894, White *v.* State, 103 Ala. 72, 16 So. 63 ("talked with his usual intelligence"); 1895, Burton *v.* State, 107 Ala. 108, 18 So. 285 ("looked paler than common"); 1897, Thornton *v.* State, 113 Ala. 43, 21 So. 356 ("looked frightened"); 1898, Fuller *v.* State, 117 Ala. 36, 23 So. 688 (appearance of wound); 1898, Orr *v.* State, 117 Ala. 69, 23 So. 696 (appearance of cartridge); 1899, Evans *v.* State, 120 Ala. 269, 25 So. 175 (appearance of wounds); 1899, Terry *v.* State, 120 Ala. 286, 25 So. 176 (same); 1899, Hollis *v.* State, 123 Ala. 74, 26 So. 231 (by one searching for property, that he did not find it concealed, excluded); 1900, Birmingham R. & E. Co. *v.* Franscomb, 124 Ala. 621, 27 So. 508 ("seemed to be very weak"); 1900, Higginbotham *v.* State, — Ala. —, 29 So. 410 (sundry statements passed upon); 1903, Hainsworth *v.* State, 136 Ala. 13, 34 So. 203 (facial appearance of defendant, as indicating malice against deceased, admitted; repudiating Gassenheimer *v.* State); 1903, Smith *v.* State, 137 Ala. 22, 34 So. 396, (that tracks looked like those of a person run-

rulings perhaps here abound particularly in absurdities and quibbles, — highly fit for cynical amusement, were not the names of Justice and Truth

ning and walking); 1903, Stevens *v.* State, 138 Ala. 71, 35 So. 122 (position of an assailant, as shown by the wound); 1905, Tagert *v.* State, 143 Ala. 88, 39 So. 293 (that a person appeared angry or surprised, allowable); 1905, Dillard *v.* State, — Ala. —, 39 So. 584 ("looked like a bottle of wine," allowed); 1906, Sims *v.* State, 146 Ala. 109, 41 So. 413 ("seemed excited and looked like she had been crying," allowed).

Arkansas: 1848, Beebe *v.* DeBaun, 8 Ark. 520, 571 (whether a response was in a jocular or serious manner, excluded); 1921, Prewitt *v.* State, 150 Ark. 279, 234 S. W. 35 (homicide; by a doctor, as to defendant's appearance at the time of the killing, allowed, citing the above text with approval).

California: 1897, People *v.* Vehorn, 116 Cal. 503, 48 Pac. 495 (intoxicated); 1911, People *v.* Wong Loung, 159 Cal. 520, 114 Pac. 829 (that the accused was pale, nervous, etc., allowed).

Columbia (Dist.): 1892, U. S. *v.* Cross, 20 D. C. 376 (threats in an angry or a playful manner).

Connecticut: 1905, Spencer's Appeal, 77 Conn. 638, 60 Atl. 289 (whether a testator spoke affectionately or otherwise); 1905, Nichols *v.* Wentz, 78 Conn. 429, 62 Atl. 610 (whether E. did or said anything indicating an attempt at coercion of a testator, allowed); 1911, Atwood *v.* Atwood, 84 Conn. 169, 79 Atl. 59 (that a grantor was "in a condition to know nothing really," etc., allowed; liberal opinion by Wheeler, J.).

Florida: 1903, Fields *v.* State, 46 Fla. 84, 35 So. 185 (whether the deceased appeared angry).

Georgia: 1860, Choice *v.* State, 31 Ga. 467 (Lumpkin, J., receiving testimony that a person seemed to be drunk: "Really, no other rule is practical. If the witness must be confined to a simple narration of facts, how the person leered or grinned, how he winked his eyes or squinted, how he wagged his head, etc., all of which drunken men do, you shut out not only the ordinary but the best mode of obtaining truth"); 1874, Ross *v.* R. Co., 53 Ga. 369 (same); 1905, Roberts *v.* State, 123 Ga. 146, 51 S. E. 374 ("appeared to be excited," etc., allowed); 1909, Georgia R. & E. Co. *v.* Gilleland, 133 Ga. 621, 66 S. E. 944 (that the plaintiff appeared "more stupid after the injury than before" [!], allowed); 1913, Lanier *v.* State, 141 Ga. 17, 80 S. E. 5 (that by the marks on a child's body the cause of death appeared to be smothering, allowed).

Illinois: 1897, West Chicago St. R. Co. *v.* Fishman, 169 Ill. 196, 48 N. E. 447 (whether a person was ill, whether he "answered right"); 1902, Chicago & E. I .R. Co. *v.* Randolph, 199 Ill. 126, 65 N. E. 142 (by a lay witness, that a person appeared to be "suffering," "weak," "sore," "in pain," etc.); 1904, Illinois C. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 (whether cracks in boiler-bolts appeared old, allowed); 1909, People *v.* Davidson, 240 Ill. 191, 88 N. E. 565 (a witness to appearance as evidence of age must first "describe the appearance," etc.; this is needless); 1910, Louth *v.* Chicago U. T. Co., 244 Ill. 244, 91 N. E. 341 (see citation *ante*, § 1721, n. 1).

Indiana: 1887, Louisville N. A. & C. R. Co. *v.* Wood, 113 Ind. 551, 14 N. E. 572, 16 N. E. 197 ("looked worse").

Iowa: 1877, State *v.* Huxford, 47 Ia. 17 (intoxicated); 1884, State *v.* Shelton, 64 Ia. 338, 20 N. W. 459 (angry); 1885, Parsons *v.* Parsons, 66 Ia. 757, 21 N. W. 570, 24 N. W. 564 ("acted childishly"); 1892, State *v.* Brown, 86 Ia. 121, 123, 53 N. W. 92 (that the defendant "kept company" with the prosecutrix, allowed; but that he treated her "very affectionately," excluded; this marks the lowest depths of quibbling); 1895, Bever *v.* Spangler, 93 Ia. 576, 61 N. W. 1080 (personal appearance); 1897, McDonald *v.* Franchere, 102 Ia. 496, 71 N. W. 427 ("appeared to be worried"); 1898, Childs *v.* Muckler, 105 Ia. 279, 75 N. W. 100 (that a woman was nice-looking); 1899, Bailey *v.* Centreville, 108 Ia. 20, 78 N. W. 831 (that a person "looked bad" and could scarcely walk); 1899, State *v.* Reinheimer, 109 Ia. 624, 80 N. W. 669 (that a woman was pregnant, excluded, from a non-expert); 1900, Bizer *v.* Bizer, 110 Ia. 248, 81 N. W. 465 (that parties seen on a bed seemed to be having sexual intercourse); 1900, Stewart *v.* Anderson, 111 Ia. 329, 82 N. W. 770 (that a babe appeared to be newborn); 1902, Reininghaus *v.* Merchants' L. Ass'n, 116 Ia. 364, 89 N. W. 1113 (whether a person was "sick," "stronger," etc.); 1903, State *v.* McKnight, 119 Ia. 79, 93 N. W. 63 (testimony to such appearances of health, etc., other than sanity, need not state beforehand the data); 1903, State *v.* Cather, 121 Ia. 106, 96 N. W. 722 (that he was intoxicated, and how far he was affected by the intoxication); 1903, Plano Mfg. Co. *v.* Kautenberger, 121 Ia. 213, 96 N. W. 743 (that defendant "appeared to be satisfied" with a settlement); 1905, Rothrock *v.* Cedar Rapids, 128 Ia. 252, 103 N. W. 475 (whether snow appeared as if a person had fallen, allowed); 1905, Kuhlman *v.* Wieben, 129 Ia. 188, 105 N. W. 445 (intoxicated; allowed); 1906, Kesselring *v.* Hummer, 130 Ia. 145, 106 N. W. 401 (seduction; one who had seen the parties often in company was asked how they acted, and answered, "They acted like lovers"; held properly excluded; here again a peddling-out of machine-made law, not fit for even the bargain-counter of Justice; this ruling rivals that of State *v.* Brown *supra*, and shows no improvement of

involved in their consideration. One may wonder how long these solemn farces will be perpetuated in our law.

attitude in the fourteen years' interval); 1909, Greenway *v.* Taylor Co., 144 Ia. 332, 122 N. W. 943 (by a physician, whether the plaintiff had suffered pain, or was so injured as probably to cause pain, allowed); 1915, Weber *v.* Chicago R. I. & P. R. Co., 175 Ia. 358, 151 N. W. 852 (whether railway spikes appeared to have been pulled, allowed); 1916, Eveleth's Will, 177 Ia. 716, 157 N. W. 257 (whether a testator appeared to be under constraint, allowed).

Kansas: 1886, State *v.* Baldwin, 36 Kan. 9, 12 Pac. 318 ("in good spirits"; "showed a good deal of fear"); 1899, Handley *v.* R. Co., 61 Kan. 237, 59 Pac. 271 (that another person was "watching the boy," excluded).

Kentucky: 1901, Campbell *v.* Fidelity & C. Co., 109 Ky. 661, 60 S. W. 492 (intoxicated).

Louisiana: 1898, State *v.* Marceaux, 50 La. An. 1137, 24 So. 611 (that a person looked as though he had not slept); 1905, State *v.* Hopper, 114 La. 557, 38 So. 452 (whether the accused looked scared, etc., allowed); 1920, State *v.* Coll, 146 La. 597, 83 So. 844 (whether defendant was "angry").

Maine: 1878, Stacy *v.* Publishing Co., 68 Me. 289 (intoxicated): 1872, Parker *v.* Steamboat Co., 109 Me. 451 (that a person is "worse," "not able to do so much work").

Maryland: 1910, Fletcher *v.* Dixon, 113 Md. 101, 77 Atl. 326 (how a person's nervousness showed itself, allowed).

Massachusetts: 1897, Burt *v.* Burt, 168 Mass. 204, 46 N. E. 622 (that a person is intoxicated; also, by one who is skilled, that a person is under the influence of morphine); 1898, Edwards *v.* Worcester, 172 Mass. 104, 51 N. E. 447 (intoxicated); 1900, O'Neil *v.* Hanscom, 175 Mass. 313, 56 N. E. 587 (that a person looked "sick," "invalid," etc.); 1905, Wolfe *v.* N. B. Cordage Co., 189 Mass. 591, 76 N. E. 222 (visual difference between iron and steel; not allowed).

Michigan: 1878, Brownell *v.* People, 38 Mich. 735 (personal qualities); 1890, Cook *v.* Ins. Co., 84 Mich. 20, 47 N. W. 568 (intoxicated); 1896, Will *v.* Mendon, 108 Mich. 251, 66 N. W. 58 (unable to move a limb); 1901, People *v.* Dowd, 127 Mich. 140, 86 N. W. 546 (that a person was "envious," excluded); 1904, Comstock *v.* Georgetown, 137 Mich. 541, 100 N. W. 788 (whether a patient "flinched," etc., at the touch, excluded); 1905, McCormick *v.* Detroit G. H. & M. R. Co., 141 Mich. 17, 104 N. W. 390 (whether a patient appeared to be feigning illness, excluded); 1911, Merrill *v.* Leisenring, 166 Mich. 219, 131 N. W. 538 (whether "he was devoted to his wife and children," allowed); 1912, Marshall *v.* Wabash R. Co., 171 Mich. 180, 137 N. W. 89 (whether the plaintiff was able to simulate, or was simulating, the injury alleged; rule not easily to be gathered; the obstructive effect of the Opinion rule, and the delicate anxiety of some Courts to preserve each form of its puerilities, are notable in this opinion).

Minnesota: 1893, McKillop *v.* R. Co., 53 Minn. 532, 534, 55 N. W. 739 (intoxicated); 1897, Manahan *v.* Halloran, 66 Minn. 483, 69 N. W. 619 (that a person appeared to be afraid of some one, admissible, but that he appeared to be afraid of a particular person, inadmissible; as to which it might have been added that tweedledum differs from tweedledee); 1898, Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121 (that a person appeared pale, in suffering); 1902, Isherwood *v.* Lumber Co., 87 Minn. 388, 92 N. W. 230 (that a person appeared to be in pain); 1904, Clarke *v.* Phila. & R. C. & I. Co., 92 Minn. 418, 100 N. W. 231 (intoxication, excluded on the facts).

Mississippi: 1901, Magouirk *v.* Tel. Co., 79 Miss. 632, 31 So. 206 (habits of an employee as to intoxication; witness' personal knowledge allowed).

Missouri: 1877, State *v.* Dearing 65 Mo. 533 (intoxicated); 1884, State *v.* Ramsey, 82 Mo. 137 (intoxicated; "looked scared"); 1886, State *v.* Parker, 89 Mo. 393 (that weeds looked as though a person had kneeled on them); 1888, State *v.* Parker, 96 Mo. 393, 9 S. W. 728 (in general); 1890, State *v.* Buchler, 103 Mo. 206, 15 S. W. 331 (expressions of face); 1895, State *v.* David, 131 Mo. 380, 33 S. W. 28 (that a person had cramps and seemed in agony); 1916, State *v.* Evans, 267 Mo. 163, 183 S. W. 1059 (seduction; that defendant "treated her like a sweetheart," not allowed).

Montana: 1900, State *v.* Lucey, 24 Mont. 295, 61 Pac. 994 (that a defendant when arrested "turned right away, as though he was about to be devoured"); 1903, State *v.* Tighe, 27 Mont. 327, 71 Pac. 3 (that a person "seemed to be scared"); 1906, State *v.* Trueman, 34 Mont. 249, 85 Pac. 1024 (intoxication; allowed); 1910, State *v.* Vanella, 40 Mont. 326, 106 Pac. 364 ("nervous," allowed).

New Hampshire: 1857, Spear *v.* Richardson, 34 N. H. 428 (diseased appearance of a horse); 1864, Low *v.* Railroad, 46 N. H. 24 (sulky and frightened appearance of a horse); 1869, Taylor *v.* Railway, 48 N. H. 309 (appearance of lameness).

New Jersey: 1868, Castner *v.* Sliker, 33 N. J. L. 97 (intoxication).

New Mexico: 1914, State *v.* Cooley, 19 N. M. 91, 140 Pac. 1111 (murder; whether deceased and defendant appeared friendly or otherwise, allowed).

New York: 1829, King *v.* Root, 4 Wend. 129 (intoxicated); 1856, People *v.* Eastwood, 14 N. Y. 563 (same); 1897, Felska *v.* R. Co., 152 N. Y. 339, 46 N. E. 613 (same); 1902, People *v.* Smith, 172 N. Y. 210, 64 N. E. 814 (whether

In rulings upon testimony as to *age* or *race*, the distinction must be kept in mind between the question of Relevancy whether appearances are a sound basis (for a witness or for the jury) for inferring to age or race (*ante*, §§ 167, 222, 660), and the genuine Opinion-rule question, *i. e.* whether the witness should merely state the data of appearances, instead of giving his inference.[2]

a person's conduct "seemed to be natural and genuine," not allowed).

North Carolina: 1893, State *v.* Edwards, 112 N. C. 901, 910, 17 S. E. 521 (appeared "mad or in fun"); 1896, Sherrill *v.* Tel. Co. 117 N. C. 352, 23 S. E. 277 (mental anguish through failure to deliver a telegram announcing a child's illness; plaintiff's sister, living with him, was allowed to testify to his seeming "melancholy" and "severe mental anguish"); 1921, State *v.* Skeen, 182 N. C. 844, 109 S. E. 71 (that a shoe looked as if left unlaced for several days, allowed).

Oklahoma: 1912, Cole *v.* District Board, 32 Okl. 692, 123 Pac. 426 (opinion as to negro race, admitted); 1918, Collins *v.* State, 15 Okl. Cr. 96, 175 Pac. 124 (intoxication).

Oregon: 1895, State *v.* Brown, 28 Or. 147, 41 Pac. 1042 (intoxication); 1898, First Nat'l Bank *v.* Fire Ass'n, 33 Or. 172, 53 Pac. 8 (whether a fire burned in a natural way or appeared to be assisted by some peculiarly inflammable matter; whether it would have spread, etc., as it did, without such assistance).

Pennsylvania: 1855, Leckey *v.* Bloser, 24 Pa. 404 ("whether the conduct of the parties evinced a mutual attachment," excluded); 1907, Com. *v.* Eyler, 217 Pa. 512, 66 Atl. 746 (intoxication; allowed).

South Carolina: 1889, State *v.* James, 31 S. C. 233, 9 S. E. 844 (whether the relations of persons were "friendly"); 1899, State *v.* Davis, 55 S. C. 339, 33 S. E. 449 (whether a gun seemed to have been recently fired); 1900, State *v.* Taylor, 57 S. C. 483, 35 S. E. 729 (whether a call was like that of one in distress); 1911, Miller *v.* Hamilton B. S. Co., 89 S. C. 530, 72 S. E. 397 (whether a person was under the influence of a drug, admitted).

South Dakota: 1908, Palmer *v.* Schurz, 22 S. D. 283, 117 N. W. 150 (intoxication).

Texas: 1859, Reynolds *v.* Dechaums, 24 Tex. 175 (intoxicated); 1920, Hewey *v.* State, — Tex. Cr. App. —, 220 S. W. 1106 ("was angry"); 1920, Haag *v.* State, 87 Tex. Cr. 604, 223 S. W. 472 (extent of intoxication).

Utah: Fritz *v.* Tel. Co., 25 Utah 263, 71 Pac. 209 (that a person appeared "disgusted," etc. allowed); 1909, Miller's Estate, 36 Utah 228, 102 Pac. 996 (that the testator's wife was "bitter," "agitated," etc., allowed; a perusal of this opinion will convince almost any one that the Opinion rule has gone to seed).

Vermont: 1885, Knight *v.* Smythe, 57 Vt. 530 (whether a person seemed in pain); 1888, State *v.* Ward, 61 Vt. 153, 17 Atl. 483 (a horse's tired appearance); 1896, Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 285 (whether a plaintiff appeared to be feigning, admissible, *semble*); 1898, State *v.* Marsh, 70 Vt. 288, 40 Atl. 836 (that a man and a woman were intimate); 1898, Wilkins *v.* Metcalf, 71 Vt. 103, 41 Atl. 1035 (bastardy; whether there was "something not right" between plaintiff and defendant; held not improperly excluded on the facts); 1913, State *v.* Pierce, 87 Vt. 144, 88 Atl. 740 (physician's misdemeanor in failing to report known or suspected cases of communicable disease, here, diptheria; the membrane having been shown to an expert witness, he was allowed to answer whether the diphtheritic symptom "would be apparent to an ordinary practicing physician"); 1918, State *v.* Felch, 92 Vt. 477, 105 Atl. 23 (murder of husband; wife's "expression of face and eyes" when looking at paramour, admitted).

Washington: 1897, State *v.* Dolan, 17 Wash. 499, 50 Pac. 472 (intoxicated); 1910, State *v.* George, 58 Wash. 681, 109 Pac. 114 (whether two persons appeared to care for each other, allowed).

West Virginia: 1897, State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813 (whether marks on the deceased looked like finger-marks, etc., excluded; Brannon, J., diss.)

Wisconsin: 1896, Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800 (health appearances); 1900, Werner *v.* R. Co., 105 Wis. 300, 81 N. W. 416 (that a person appeared to be suffering pain).

Wyoming: 1903, Horn *v.* State, 12 Wyo. 80, 73 Pac. 705 (defendant's sincerity of manner in making a confession); 1916, Mortimore *v.* State, 24 Wyo. 452, 161 Pac. 766 (homicide; that the accused "seemed to be happy," allowed).

[2] 1873, Marshall *v.* State, 49 Ala. 21 (liquor selling to a minor; whether the witness would not have taken the person for over 21; excluded); 1825, Morse *v.* State, 6 Conn. 13 (opinion of age; admitted); 1864, Nave's Adm'r *v.* Williams, 22 Ind. 371, *semble* (opinion of race from color; admitted, for expert); 1885, Louisville N. A. & C. R. Co. *v.* Falvey, 104 Ind. 423, 3 N. E. 389, 4 N. E. 908 (age; admitted); 1895, State *v.* Grubb, 55 Kan. 678, 41 Pac. 951 (age; admissible, after describing the person, and, *semble*, only when the person is not present; but the latter limitation is unsound for experts or for those who have had personal acquaintances with the person); 1883, Com. *v.* O'Brien, 134 Mass. 200 (age; admitted); 1889, Elsner *v.* Supreme Lodge, 98 Mo. 645, 11 S. W. 991 (age; admitted); 1867, State *v.* Smith, Phillips N. C. 303 (age; ad-

So, also, whether a *child's resemblance to a man* is evidence of the latter's *paternity* (*ante*, § 166), is distinct from the question of the Opinion rule, whether an opinion as to that resemblance is receivable (*post*, § 1977).

§ 1975. **Medical and Surgical Matters; Health and Disease.** Testimony to the actual condition of health (for example, the existence of a disease or wound) differs from testimony to the preceding class of topics in that it concerns the internal actuality and not the external appearance. This difference is important with reference to the experiential qualifications of the witness, in that for the former a medical expert will usually be required (*ante*, § 568). But, assuming the witness qualified, there can seldom be any difference between the two classes of topics as regards the application of the Opinion rule; the exclusion of an opinion can rarely be justified. Nevertheless there often appears a special perversity in requiring the minutest analysis of the observer's data, instead of accepting his net conclusions.[1]

mitted, for an expert); 1897, State *v.* Robinson 32 Or. 43, 48 Pac. 357 (age of a person in court; excluded, the witness having no special knowledge).

§ 1975. [1] It is sometimes difficult to distinguish between rulings in the preceding section, the present one, and the next one: see also the rulings as to safety, care, prudence, and the like (*ante*, § 1951); *Federal:* 1918, McLean Medicine Co. *v.* U. S., 8th C. C. A., 253 Fed. 694 (violation of U. S. St. 1906, June 30, Food and Drugs Act; whether "a drug composed according to the formula used by defendant . . . would be effective," allowed if signifying "a general agreement of medical opinion," but not the witness' individual opinion); *Alabama:* 1900, Littleton *v.* State, 128 Ala. 31, 29 So. 390 (that a woman was in a family way, allowed); 1914, Central of Georgia R. Co. *v.* Stephenson, 189 Ala. 553, 66 So. 495 ("My hand gets stiff yet," allowed; some day what merry laughter there will be among our brethren of posterity at the thought that such a question could ever have been soberly discussed by men of great parts!); *Florida:* 1905, Hampton *v.* State, 50 Fla. 55, 39 So. 421 (how recently a wound had been made, allowed); *Georgia:* 1874, Southern Life Ins. Co. *v.* Wilkinson, 53 Ga. 546 (disease; admissible when data are stated); *Idaho:* 1921, State *v.* Ramirez, 33 Ida. 803, 199 Pac. 376 (a physician allowed to testify that stains were of blood and dirt mixed); *Indiana:* 1885, Carthage Turnpike Co. *v.* Andrews, 102 Ind. 142, 1 N. E. 364 (health in general, admissible); 1906, Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755 (the effect of increase of drinking upon the testator, allowed); *Iowa:* 1868, State *v.* Vincent, 24 Ia. 576 (change of features after death, as making identification impossible, excluded); 1881, Ferguson *v.* Davis Co., 57 Ia. 605, 10 N. W. 906 (whether ribs were fractured, allowed); 1901, Long *v.* Ins. Co., 113 Ia. 259, 85 N. W. 24 (significance of powder stains, etc., allowed); 1904, Boyer *v.* Chicago, R. I. & R. P. Co., 123 Ia. 248, 98 N. W. 764 (whether a mare was with foal, allowed); 1919, State *v.* Vaughn, 187 Ia. 146, 173 N. W. 917 (rape; by a doctor, whether the intercourse was willing, not allowed); 1920, Dolan *v.* Henry, 189 Ia. 104, 177 N. W. 712 (delirious; allowed); 1921, Young *v.* Mandis, 191 Ia. 1328, 184 N. W. 302 (whether an injury "is liable to be permanent," not allowed, from the plaintiff himself); *Kansas:* 1887, Broquet *v.* Tripp, 36 Kan. 704, 14 Pac. 227 (disease, admissible); 1896, State *v.* Asbell, 57 Kan. 398, 46 Pac. 770 (characteristics of a near wound as to powder-marks, etc., admitted); *Kentucky:* 1898, Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986 (whether a wound was made by a certain kind of shot and gun, admitted); *Michigan:* 1885, People *v.* Hare, 57 Mich. 513, 24 N. W. 843 (qualities of injuries, etc., admitted); 1906, McDonald *v.* City El. R. Co., 144 Mich. 379, 108 N. W. 85 (how much a man's ability to labor was reduced, allowed, for a physician); 1921, Norris *v.* Elmdale Elev. Co., 216 Mich. 548, 185 N. W. 696 (injured employee; plaintiff's testimony to "decrease of ability to do carpenter work," allowed); *Missouri:* 1874, Reid *v.* Ins. Co., 58 Mo. 425 (by a doctor, whether person was in good health, excluded); *Nebraska*; 1921, Fellers *v.* Howe, — Nebr. —, 184 N. W. 122 (to physicians, what would be the effect on the physical and nervous health of a maiden of 40, after a 20 years' courtship, of a breach of promise of marriage, held proper, on certain conditions; why not let some expert be called to estimate the effect on delays of justice by wasting a Supreme Court's time on such barren law points); *New York:* 1868, Kennedy *v.* People, 39 N. Y. 257 (the force necessary to break a skull, admitted); 1875, Linsday *v.* People, 63 N. Y. 152 (whether a wound was recent, allowed); 1891, People *v.* Fish, 125 N. Y. 136, 26 N. E. 319 (the force necessary to drive an iron instrument into the

§ 1976. **Probability and Possibility; Capacity and Tendency; Cause and Effect.** A large class of cases, embracing statements as to the probability or the possibility of an event, the capacity or tendency of an act or a machine, the cause or the effect of a fact, may fairly be grouped together, because the reason why the Opinion rule is urged against them is in general that the thing to which the witness testifies is not anything which he has observed, but is a quantity which lies in estimate only and is the result of a balancing of concrete data. This is no sufficient reason for excluding such statements; because it must almost always be impossible for a witness to reproduce in words absolutely all the detailed data which enter into his estimate, and there can be no danger in receiving such an estimate from a competent witness.[1] All that can be said of the rulings is that probably some of them, in

bone, allowed); *North Carolina:* 1868, State *v.* Harris, 63 N. C. 3 (that a burn was received after death, allowed); 1870, Horton *v.* Green, 64 N. C. 66 (that the disease of an animal was of long standing, allowed); *Oregon:* 1917, State *v.* Morris, 83 Or. 429, 163 Pac. 567 (murder; whether a death was self inflicted, not allowed); 1921, Yarborough *v.* Carlson, 102 Or. 422, 202 Pac. 739 (whether an injury would be permanent, allowed); *Pennsylvania:* 1874, O'Mara *v.* Com., 75 Pa. 428 (quantity of blood that probably would flow, allowed); *South Carolina:* 1840, Seibles *v.* Blackhead, 1 McMull. 56 (unsoundness of slave, allowed); *Tennessee:* 1859, Norton *v.* Moore, 3 Head 480 (disease, allowed); 1877, Garrison *v.* Blanton, 48 Tex. 301 (existence of a stupor, allowed).

For other rulings on medical topics, see also the citations in the next section.

§ 1976. [1] Compare the cases cited under § 1951, *ante*, and § 1978, *post;* and also those cited *ante*, § 664 (negative knowledge); in the following citations the testimony was *admitted*, unless otherwise expressly noted:

ENGLAND: 1912, Mason's Case, 7 Cr. App. 67 (whether death was caused by wounds not self-inflicted, allowed).

IRELAND: 1867, M'Fadden *v.* Murdock, 1 Ir. C. L. 211 (probable general loss in handling goods in retail quantities; particular loss as explainable by the nature of the trade).

UNITED STATES: *Federal:* 1895, Chicago St. P. & K. C. R. Co. *v.* Chambers, 15 C. C. A. 327, 68 Fed. 148 (whether a headlight was visible); 1897, Bram *v.* U. S., 168 U. S. 532, 18 Sup. 182 (of a medical man, whether a person striking another in a certain relative position with an axe, would necessarily be spattered with blood); 1898, Baltimore & O. R. Co. *v.* Hellenthal, 13 C. C. A. 414, 88 Fed. 116 (that a crossing was in plain unobstructed view); 1898, Andersen *v.* U. S., 170 U. S. 481, 18 Sup. 689 (whether a certain view could be had from a ship's deck); 1899, Chicago Great W. R. Co. *v.* Price, 38 C. C. A. 239, 97 Fed. 423 (whether a rough track was liable to throw out a link-pin); 1900, Denver & R. G. R. Co. *v.* Roller, 41 C. C. A. 22, 100 Fed. 738 (whether a present physical condition was caused by an injury); 1900, Southern Pacific Co. *v.* Hall, 41 C. C. A. 50, 100 Fed. 760 (effect of use of artificial limb on capacity to labor); 1912, M'Intyre *v.* Modern Woodmen, C. C. A., 200 Fed. 1 (a physician's opinion as to the cause of death, founded on facts testified to by other physicians, must be based on their supposed facts only, and not on their inferences from facts; a piece of quibbling of the sort which accounts for the medical profession's attitude towards the legal profession — a sorrowful and amazed disgust); 1916, Chicago Railways Co. *v.* Kramer, 7th C. C. A., 234 Fed. 245 (Chicago *v.* Didier followed, where there was "no conflict as to the manner of the injury"); 1921, U. S. *v.* Boston C. C. & N. Y. Canal Co., 1st C. C. A., 271 Fed. 877, 886 (probable future business of a canal, excluded; this ruling touches the top-notch as an exhibit of the practical nonsense of the Opinion rule).

Alabama: 1854, Gibson *v.* Hatchett, 24 Ala. 206 (possibility of seeing a thing from a given point); 1858, Montgomery *v.* Taylor, 33 Ala. 133 (capacity of a wall to withstand flow of water); 1875, Bennett *v.* State, 52 Ala. 370 (whether a co-lodger could have left the room without witness' knowledge, excluded); 1877, Mobile Life Ins. Co. *v.* Walker, 58 Ala. 294 (cause of death); 1880, Blackman *v.* Collier, 65 Ala. 312 (capacity of machinery); 1882, Seals *v.* Edmondson, 71 Ala. 515 (combustibility of cotton); 1888, Sharp *v.* Hall, 86 Ala. 110, 5 So. 497 (tendency of an overflow to cause illness); 1893, McVay *v.* State, 100 Ala. 110, 113, 14 So. 862 (whether a person could have heard certain words); 1893, Alabama G. S. R. Co. *v.* Linn, 103 Ala. 134, 139, 15 So. 508 (whether a train could have been stopped after a certain time); 1895, Simon *v.* State, 108 Ala. 27, 18 So. 731 (a blow as the cause of death); 1900, Littleton *v.* State, 128 Ala. 31, 29 So. 390 (what kind of instrument caused a wound); 1903, Kansas C. M. & B. R. Co. *v.* Weeks, 135 Ala. 614, 34 So. 16 (whether a train could be seen); 1904, Kroell *v.* State,

the final result of the litigation in hand, have done less actual harm to justice than others have done.

139 Ala. 1, 36 So. 1025 (whether a quick succession of shots could have been fired by the same person, allowed); 1904, Sims v. State, 139 Ala. 74, 36 So. 138 (that a wound was fatal, allowed); 1904, Dixon v. State, 139 Ala. 104, 36 So. 784 (whether defendant's physical condition was such that he could have travelled, killed G., etc., allowed); 1904, Nickles v. State, — Ala. —, 37 So. 312 (whether there was time to return from a place, not allowed); 1904, Southern R. Co. v. Bonner, 141 Ala. 517, 37 So. 702 (how far a headlight could have been seen, allowed); 1906, Foley v. Pioneer M. & M. Co., 144 Ala. 178, 40 So. 273 (cause of death, allowed); 1907, Dupree v. State, 148 Ala. 620, 42 So. 1004 (whether it was possible to break a lock in a certain way, not allowed). 1913, Republic Iron & S. Co. v. Passafume, 181 Ala. 463, 61 So. 327 (whether a man could have been seen from a certain point, not allowed); 1914, Birmingham E. & B. R. Co. v. Williams, 190 Ala. 53, 66 So. 653 (cutting a fire hose; whether the building would otherwise have been saved, allowed; this is indeed a Daniel come to judgment, in comparison with other rulings; let us hope that more and more this common sense will be given sway); 1916, Lusk v. Britton, 198 Ala. 245, 73 So. 492 (cause of pain after a fall, allowed); 1918, Supreme Lodge v. Gustin, 202 Ala. 246, 80 So. 84 (whether an electrical apparatus was the proximate cause of a death, allowed); 1920, Standard Cooperage Co. v. Dearborn, 204 Ala. 553, 86 So. 537 ("Was the narrowness of that plank what caused you to slip?", not allowed; this might serve as a standing example of the artificial silliness of the Opinion rule); 1920, Lundy v. State, 17 Ala. App. 454, 85 So. 819 (cause of death, allowed); 1922, Central of Ga. R. Co. v. Robertson — Ala. —, 91 So. 459 ("what in your judgment caused that rail to break?" not allowed).

Arkansas: 1908, Kansas C. S. R. Co. v. Henrie, 87 Ark. 443, 112 S. W. 967 (whether a coupling if in good repair would have operated properly, allowed).

California: 1870, Grigsby v. Water Co., 40 Cal. 405 (whether backwater would be caused by a dam); 1884, Bland v. R. Co., 65 Cal. 627, 4 Pac. 672 (physical injury as the effect of an accident); 1896, Tate v. Fratt, 112 Cal. 613, 44 Pac. 1061 (which of two buildings was apparently first constructed); 1896, People v. Worden, 113 Cal. 569, 45 Pac. 844 (whether a track obstruction would have been seen, excluded); 1897, People v. Hill, 116 Cal. 562, 48 Pac. 711 (probable position of an assailant, as indicated by the wound's location, excluded); 1897, People v. Baldwin, 117 Cal. 244, 49 Pac. 186 (whether the appearances of a rape could have resulted from a conceded situation of the defendant); 1898, People v. Milner, 122 Cal. 171, 54 Pac. 833 (probable position of a gun, excluded); 1899, People v. Valliere, 123 Cal. 576, 56 Pac. 433 (whether a weapon could kill a man); 1899, People v. Farley, 124 Cal. 594, 57 Pac. 571 (by a surgeon, that the deceased's arm must have been by his side, and that he could not have been standing up, excluded); 1903, Kahn v. Triest-Rosenberg Co., 139 Cal. 340, 73 Pac. 164 (whether a danger could have been detected; exclusion held proper on the facts); 1909, Perkins v. Sunset Tel. & T. Co., 155 Cal. 712, 103 Pac. 190 (whether a fall or a blow could have caused certain injuries, allowed); 1913, Foley v. Northern Cal. P. Co., 165 Cal. 103, 130 Pac. 1183 ("What was the cause of his death?" allowed); 1918, Lernley v. Doak Gas Engine Co., 40 Cal. App. 146, 180 Pac. 671 (cause of a fly-wheel breaking, allowed).

Colorado: 1895, Colorado M. & I. Co. v. Rees, 21 Colo. 435, 42 Pac. 42 (whether the light sufficed for showing whether an elevator was in place); 1915, Bulger v. People, 60 Colo. 165, 151 Pac. 937 (effect of a bullet in the head, to produce insanity; not decided).

Columbia (District): 1881, Guiteau's Trial, I, 265 ("Was that wound a mortal wound, and was it the cause of the death of President Garfield?" "In my judgment it was a mortal wound, and was the cause of the death of President Garfield").

Connecticut: 1875, Clinton v. Howard, 42 Conn. 294 (tendency of a pile of stones to frighten horses).

Florida: 1902, Jones v. State, 44 Fla. 74, 32 So. 793 (necessary position of the person shooting, excluded); 1904, Clemons v. State, 48 Fla. 9, 37 So. 647 (whether a wound could have been caused by a fist, allowed).

Georgia: 1878, Everett v. State, 62 Ga. 71 (whether a wound was the cause of death; whether it could have been self-inflicted); 1895, Georgia R. & B. Co. v. Hicks, 95 Ga. 301, 22 S. E. 613 (the probable effect of the fall of a piece of iron pipe in injuring a person holding it); 1900, Perry v. State, 110 Ga. 234, 36 S. E. 781 (that a weapon was likely to produce death); 1904, Central of Ga. R. Co. v. Goodwin, 120 Ga. 83, 47 S. E. 641 (whether a man could work at a place without seeing a certain thing, excluded); 1904, Moran v. State, 120 Ga. 846, 48 S. E. 324 (whether a weapon was one likely to produce death, the weapon being in court, excluded); 1909, Pride v. State, 133 Ga. 438, 66 S. E. 259 (whether the witness could have seen a person in a certain position, allowed).

Illinois: 1892, Chicago M. & S. P. R. Co. v. O'Sullivan, 143 Ill. 48, 57, 32 N. E. 398 (whether the deceased could have seen the

It should be added that Courts sometimes misapply the Opinion rule to enforce the doctrine of Torts that a recovery for future *personal injuries*

engine, allowable in discretion); 1897, Chatsworth *v.* Rowe, 166 Ill. 114, 46 N. E. 763 (cause of a corporal injury); 1897, Brink's Express Co. *v.* Kinnare, 168 Ill. 643, 48 N. E. 446 (whether a driver could have stopped in time to avoid injury, excluded); 1900, Hellyer *v.* People, 186 Ill. 550, 58 N. E. 245 (whether death by blow from railroad train could be caused without producing other injuries, not allowed); 1901, Chicago & A. R. Co. *v.* Lewondowski, 190 Ill. 301, 60 N. E. 497 (whether a person could live after being struck by a locomotive at a certain speed, not allowed); 1904, Illinois C. R. Co. *v.* Smith, 208 Ill. 608, 70 N. E. 628 (to a physician, whether the twisting of the plaintiff's foot had been caused by an even or an uneven surface, held improper, chiefly on the ground that it asked what "did cause," not what "might have caused"; this is a good example of that legal quibbling which creates for the law of trials a disrespect in the minds of competent physicians); 1907, Chicago *v.* Didier, 227 Ill. 571, 81 N. E. 698 (whether the injury was produced by the alleged cause, and not merely could or might have been, allowed; cases reviewed); 1907, Chicago Union T. Co. *v.* Ertrachter, 228 Ill. 114, 81 N. E. 816 (Chicago *v.* Didier followed); 1907, Chicago Union Traction Co. *v.* Roberts, 229 Ill. 481, 82 N. E. 401 (a question, on hypothetical data, whether the medical expert would believe the plaintiff's "present condition was due to traumatism or other causes," allowed; Dunn, J.: "It is entirely immaterial whether the witness testified that the injury *was* the cause of the condition, or that the injury was sufficient to cause the condition or *might* have caused it. . . . The question may be asked in either form"; Chicago *v.* Didier, *supra*, followed; Illinois C. R. Co. *v.* Smith, *supra*, distinguished; this seemed to mark a definite and wholesome abandonment of the quibbling rule emphasized in Ill. C. R. Co. *v.* Smith and in the decisions of certain other States); 1908, Shaughnessy *v.* Holt, 236 Ill. 485, 86 N. E. 256 (personal injury; Didier and Roberts cases followed); 1908, People *v.* Hagenow, 236 Ill. 514, 86 N. E. 370 (abortion; similar ruling); 1912, Schlauder *v.* Chicago & S. T. Co., 253 Ill. 154, 97 N. E. 233 (whether the plaintiff was permanently injured "as a result of that accident," held improper, there being a dispute as to the fact of injury by the defendant and as to the cause of her present condition; purporting to follow Chicago *v.* Didier); 1913, Lyons *v.* Chicago City R. Co., 258 Ill. 75, 101 N. E. 211 (a physician's opinion, as to the cause of a bloodshot eye, etc., that "he might have a fracture of the anterior fossa," held inadmissible; this is a strange reaction to over-strictness; such cautious statements are unavoidable for honest medical witnesses); 1913, People *v.* Schultz, 260 Ill. 35, 102 N. E. 1045 (opinion that specific inflamed condition resulted from a rape, excluded; another of those rulings which make the medical profession jeer at the law; what had become of the Roberts Case, *supra*?); 1916, Fellows-Kimbrough *v.* Chicago City R. Co., 272 Ill. 71, 111 N. E. 499 (hypothetical state of facts, with the question "What *was* the cause of the neurasthenia and the tumor?" and the answer, "The tumor resulted from the bruise," held improper; citing Ill. C. R. Co. *v.* Smith, Keefe *v.* Armour & Co., and People *v.* Schultz; distinguishing Schlauder *v.* Chicago & S. T. Co. and Chicago *v.* Didier on the ground that they apply only where "there is no dispute as to the manner and cause of the injury, and no dispute that there was an injury sustained by reason of the acts"; unsound; if there is no dispute as to the cause, why take testimony on the point; Chicago U. T. Co. *v.* Ertrachter not cited; the error arises from a misquotation of Chicago *v.* Didier, beginning in Schlauder *v.* T. Co.: the Didier opinion allowed such a question "where there is no dispute as to the *manner* of the injury," which makes a tenable distinction); 1917, Heineke *v.* Chicago R. Co., 279 Ill. 210, 116 N. E. 761 (personal injury; whether "that might have been caused by an accident or otherwise," to a physician, held allowable; there being "no dispute as to the manner of the injury or the cause thereof"; following Fellows-Kimbrough *v.* Chicago C. R. Co.); 1919, Hanrahan *v.* Chicago, 289 Ill. 400, 124 N. E. 547 (whether a later malady "was caused by" the original injury, allowed where the fact, manner and cause of the original injury are undisputed; following the language and the distinction of Fellows-Kimbrough *v.* R. Co., which now becomes the new starting-point); 1920, International Coal & Mining Co. *v.* Industrial Commission, 293 Ill. 524, 127 N. E. 703 (that an injury would be permanent, excluded); 1920, Davis *v.* Michigan Central R. Co., 294 Ill. 355, 128 N. E. 539 (the couplers would not have coupled if plaintiff had not kicked, etc., allowed); 1922, Walsh *v.* Chicago R. Co., 303 Ill. 339, 135 N. E. 709 (whether "the hernia *was caused* by an injury to the abdomen," allowed because the answer "did not in any way specify whether the hernia was caused by *this* accident or by *some other* accident"; this delectable addition to the menu of quiddities on this subject in this State is novel and deserves patronage).

Indiana: 1868, Indianapolis *v.* Huffer, 30 Ind. 237 (capacity of a sewer); 1882, Bennett *v.* Needham, 83 Ind. 568 (whether a ditch would injure public health); 1893, Davidson *v.* State, 135 Ind. 254, 261, 34 N. E. 972 (whether a wound would produce death);

must include only the certain or fairly *probable*, but not the merely *possible*, consequences; so that the judge instead of covering the subject by an in-

1899, Rains *v.* State, 152 Ind. 69, 52 N. E. 450 (whether a pistol could injure at a certain distance, excluded).

Iowa: 1868, State *v.* Vincent, 24 Ia. 570, 576 (impossibility of identifying a severed human head on account of physical changes, excluded); 1871, State *v.* Morphy, 33 Ia. 272 (blow as the cause of death); 1871, State *v.* Porter, 34 Ia. 133 (same); 1875, Moreland *v.* Mitchell Co., 40 Ia. 401 (likelihood of horses being frightened); 1876, Cooper *v.* Central R. Co., 44 Ia. 141 (effect of a locomotive in striking a cow); 1876, Hughes *v.* Muscatine Co., 44 Ia. 676 (cause of a bridge falling, excluded); 1879, Kline *v.* R. Co., 50 Ia. 569 (effect of an injury as to disability to work, excluded; but actual ability to work, allowed); 1882, Allen *v.* R. Co., 57 Ia. 623, 11 N. W. 614 (probable life of timber); 1883, Yahn *v.* Ottumwa, 60 Ia. 432, 15 N. W. 257 (cause of horse's fright); 1885, Moore *v.* R. Co., 65 Ia. 508, 22 N. W. 650 (ability to perform work, excluded); 1885, Whitsett *v.* R. Co., 67 Ia. 154, 25 N. W. 104 (effect of a sudden increase of speed); 1885, State *v.* Cross, 68 Ia. 192, 26 N. W. 62 (effect of a shot on flesh); 1886, State *v.* Hackett, 70 Ia. 451, 30 N. W. 742 (effect of fits, excluded); 1887, Forcheimer *v.* Stewart, 73 Ia. 218, 32 N. W. 665, 35 N. W. 148 (whether hams would endure transportation); 1887, State *v.* Rainsbarger, 74 Ia. 204, 37 N. W. 153 (cause of wounds, excluded); 1895, State *v.* Seymore, 94 Ia. 699, 63 N. W. 661 (cause of a wound); 1899, Brownfield *v.* R. Co., 107 Ia. 254, 77 N. W. 1038 (whether a broken axle might have derailed a train); 1900, State *v.* Peterson, 111 Ia. 647, 82 N. W. 329 (whether intercourse against a woman's consent was possible, excluded); 1901, Trott *v.* R. Co., 115 Ia. 80, 86 N. W. 33 (whether an injury could have been received with blocked switches); 1903, Sachra *v.* Manilla, 120 Ia. 562, 95 N. W. 198 (probable or possible cause of a corporal injury); 1905, Rietveld *v.* Wabash R. Co., 129 Ia. 249, 105 N. W. 515 (whether a railroad track could be seen, allowed); 1906, Martin *v.* Des Moines E. L. Co., 131 Ia. 724, 106 N. W. 359 (death of an employee in an electric light plant; the defendant claimed that heart disease caused death; a question to an expert, whether the deceased "received an electrical shock before he fell," was held improper; this ruling reaches an extreme of artificial aridity of law; such decisions show the need of a spiritual irrigation-law, for re-distributing the fountains of Justice); 1906, Kesselring *v.* Hummer, 130 Ia. 145, 106 N. W. 501 (State *v.* Peterson, *supra*, followed; whether conception would be probable upon first intercourse, excluded); 1909, Gray *v.* Chicago R. I. & P. R. Co., 143 Ia. 268, 121 N. W. 1097 (whether a person could be seen, allowed); 1912, Sever *v.* Minneapolis & St. L. R. Co., 156 Ia. 664, 137 N. W. 937 (physician's opinion as to the probable cause of an injury, excluded; the opinion shows an inclination to admit, but feels bound by many precedents to exclude; it states: "Having *so many times* announced the rule for this State, . . . we do not feel like changing it at this time, thus introducing confusion in the cases"; for rules of evidence, the celebrated sentiment of Erskine should rather be accepted: "No precedents can sanction injustice; if they could, every human right would long ago have been extinct upon the earth"; the precise kind of ruling above, common enough in other States also, is one of the most frequent obstructions to truth that the Opinion rule has ever produced; the "confusion in the cases," which the Court fears, is nothing like as fearsome as the obfuscation and unreason which such a rule fixes into the law); 1913, Estes *v.* Chicago B. & Q. R. Co., 159 Ia. 666, 141 N. W. 49 (cause of a river-bar, allowed); 1913, State *v.* Wilson, 157 Ia. 698, 146 N. W. 337 (whether a wounded person could have walked, etc., allowed); 1914, State *v.* Hessenius 165 Ia. 415, 146 N. W. 58 ("What in your opinion caused the death?" allowed); 1915, State *v.* Gindice, 170 Ia. 731, 153 N. W. 336 (whether a wound might have been inflicted by a razor, etc., allowed, there being no eye witnesses); 1918, Brier *v.* Chicago R. I. & P. R. Co., 183 Ia. 1212, 168 N. W. 539 (whether a wound caused pain, allowed).

Kansas: 1888, Ball *v.* Hardesty, 38 Kan. 542 16 Pac. 808 (whether backwater was caused by the defendant's act); 1889, State *v.* Jones, 41 Kan. 309, 21 Pac. 265 (indications of a gunshot wound as to the probable distance of the assailant); 1898, Erb *v.* Popritz, 59 Kan. 264, 52 Pac. 871 (whether a derailment was the result of a defective track; excluded); 1905, Sun. Ins Office *v.* Western W. M. Co., 72 Kan. 41, 82 Pac. 513 (whether wet wool was capable of spontaneous combustion, allowed); 1912, State *v.* Buck, 88 Kan. 114, 127 Pac. 631 ("an opinion upon the cause of death . . . is admissible").

Kentucky: 1920, Midkiff *v.* Carter, 188 Ky. 339, 222 S. W. 92 (that a ditch was not "practicable," from non-experts, excluded).

Louisiana: 1898, State *v.* Fontenot, 50 La. An. 537, 23 So. 634 (whether cuts in clothing showed deceased's position, excluded); 1901, State *v.* Breaux, 104 La. 540, 29 So. 222 (how a wound could have been inflicted); 1919, State *v.* Sharp, 145 La. 891, 83 So. 181 (that location etc., of wound showed suicide to have been impossible, allowed).

Maine: 1835, Cottrill *v.* Myrick, 12 Me. 230 (whether fish would ascend a stream); 1851, State *v.* Smith, 32 Me. 370 (cause of death); 1857, State *v.* Knight, 43 Me. 130 (kind of weapon causing a wound; whether a wound

struction to the jury as to the measure of recovery, excludes from evidence a physician's opinion expressed in terms of possibility only. This attempt

could have been self-inflicted with the right hand); 1876, Holden *v.* Mfg. Co., 65 Me. 216 (whether certain logging operations were possible, excluded); 1885, Powers *v.* Mitchell, 77 Me. 369 (effect of blows).

Maryland: 1873, Davis *v.* State, 38 Md. 38 (whether an accidental fall might have caused the injury); 1885, Williams *v.* State, 64 Md. 392, 1 Atl. 887 (effect of a wound); 1889, Baltimore Turnpike *v.* State, 71 Md. 584, 18 Atl. 884 (whether a wagon would frighten horses, excluded; here the witness had not seen the wagon and was asked hypothetically); 1898, Baltimore C. P. R. Co. *v.* Cooney, 87 Md. 261, 39 Atl. 859 (whether a person could ride in a certain way on a car); 1900, Baltimore City P. R. Co. *v.* Tanner, 90 Md. 315, 45 Atl. 188 (whether the plaintiff's deafness was the natural and probable result of the accident); 1909, Consolidated G. E. L. & P. Co. *v.* State, 109 Md. 186, 72 Atl. 651 (whether a lineman could know of danger in wires, excluded; another backward turn given to the Wheel of the Law).

Massachusetts: 1851, New England Glass Co. *v.* Lovell, 7 Cush. 321 (whether goods could have been lost out of a vessel's hold, if stowed there, excluded); 1852, Cook *v.* Castner, 9 Cush. 274 (whether a timber could have been taken off without seeing the decay beneath); 1856, Com. *v.* Cooley, 6 Gray 352, 354 (by a bystander, who heard nothing, whether he was likely to hear anything if said, excluded); 1856, Robinson *v.* R. Co., 7 Gray 93, 96 (as to the only feasible approach to a place, excluded); 1860, Seaver *v.* R. Co., 14 Gray 471 (derailment accident); 1861, Parsons *v.* Ins. Co., 16 Gray 467 (cause of a leak); 1876, Com. *v.* Piper, 120 Mass. 190 (effect of blows on the body); 1896, Com. *v.* Flynn, 165 Mass. 153, 42 N. E. 562 (whether a person could have been seen); 1897, Tremblay *v.* M. R. C. Co., 169 Mass. 284, 47 N. E. 1010 (whether an arch would have fallen under certain conditions); 1899, Knight *v.* Overman W. Co., 174 Mass. 455, 54 N. E. 890 (whether a strain was produced on a pulley); 1900, Welch *v.* R. Co., 176 Mass. 393, 57 N. E. 668 (how far a voice could be heard in a storm, excluded); 1902, Lawlor *v.* Wolff, 180 Mass. 448, 62 N. E. 973 (possibility of rape against consent, excluded); 1904, Baxter *v.* Gormley, 186 Mass. 168, 71 N. E. 575 (by a complainant in bastardy, that the defendant was the father of her child, allowed); 1905, Gones *v.* New Bedford Co., 187 Mass. 124, 72 N. E. 840 (whether one's hand could be caught in a gear, if covered, allowed); 1906, Erickson *v.* American S. & W. Co., 193 Mass. 119, 78 N. E. 761 (cause of bursting of a steam-pipe, allowed); 1918, Duggan *v.* Bay State St. R. Co., 230 Mass. 370, 119 N. E. 757 (personal injury; "what would you say was the cause of the accident," excluded); 1919, Morrissey *v.* Connecticut Valley St. R. Co., 233 Mass. 554, 124 N. E. 435 (how far the sound of a street-car could be heard on a particular night, held "not necessarily incompetent").

Michigan: 1871, Gilbert *v.* Kennedy, 22 Mich. 136 (cattle-feeding; estimated growth in weight of cattle); 1874, People *v.* Morrigan, 29 Mich. 7 (whether a theft could have been committed in a certain way, excluded); 1875, People *v.* Clark, 33 Mich. 119 (physical possibility of sexual intercourse); 1876, Underwood *v.* Waldron, 33 Mich. 233 (action of water upon mortar in a wall, under certain circumstances); 1878, Brownell *v.* People, 38 Mich. 735 (effect of a pistol shot at certain distances, excluded); 1885, People *v.* Hare, 57 Mich. 512, 24 N. W. 843 ("What caused the wound," disallowed, but "What might have caused it" was declared proper; because "what did cause it was the real question for the jury"; in other words, the more useful, the less admissible); 1886, People *v.* Sessions, 58 Mich. 597, 26 N. W. 291 (cause of death or injury); 1897, Bettys *v.* Denver Tp., 115 Mich. 228, 73 N. W. 138 (effect of loosening brace-timbers); 1902, Furbush *v.* Maryland C. Co., 131 Mich. 234, 91 N. W. 135 (whether a body could have fallen, etc., not allowed); 1885, Geveke *v.* G. R. & I. R. Co., 57 Mich. 277, 24 N. W. 675 (what caused a horse's fright, allowed); 1894, McCullough *v.* R. Co., 101 Mich. 234, 59 N. W. 618 (same); 1905, Foster *v.* East Jordan L. Co., 141 Mich. 316, 104 N. W. 617 (what caused a horse's fright, allowed); 1909, Potter *v.* Grand Trunk W. R. Co., 157 Mich. 216, 121 N. W. 808 (possibility of emission of sparks, allowed); 1914, People *v.* Macgregor, 178 Mich. 436, 144 N. W. 869 (whether arsenic was the cause of a death, allowed); 1917, Tonn *v.* Michigan C. R. Co., 195 Mich. 645, 162 N. W. 272 (that a properly equipped engine would not throw sparks, etc., allowed).

Minnesota: 1875, Hathaway *v.* Brown, 22 Minn. 214 (whether a conversation could have been had between two other persons in the same room, without the witness knowing it, excluded); 1881, Krippner *v.* Bieble, 28 Minn. 139, 9 N. W. 671 (probable spread of a stubble fire); 1885, Davidson *v.* R. Co., 34 Minn. 55, 24 N. W. 324 (probable size and effect of locomotive sparks); 1893, Watson *v.* R. Co., 53 Minn. 551, 554, 55 N. W. 742 (within what distance a car could be stopped); 1897, Hamberg *v.* Ins. Co., 68 Minn. 335, 71 N. W. 388 (whether a fire could have occurred without certain results, excluded); 1897, Donnelly *v.* R. Co., 70 Minn. 278, 73 N. W. 157 (cause of certain ailments, or their possible cause); 1897, Joyce *v.* R. Co., 70 Minn. 339, 73 N. W.

to control the course of expert testimony is of course unreasonable in itself. But its unsoundness becomes the more notable when the same Court is

158 (same); 1899, Fonda *v.* R. Co., 77 Minn. 336, 79 N. W. 1043 (whether a team would have been seen from a certain point, admitted; "Hathaway *v.* Brown . . . seems to have become generally ignored by the Bar"); 1902, Akin *v.* St. Croix L. Co., 88 Minn. 119, 92 N. W. 537 (cause of an overflow of water, excluded).

Missouri: 1895, State *v.* Gates, 130 Mo. 351, 32 S. W. 971 (whether the defendant could have put an article in the room during witness' absence, excluded); 1899, State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315 (how far one could walk with a bullet through his heart); 1899, Olsen *v.* R. Co., 152 Mo. 426, 54 S. W. 470 (how far a gong could be heard); 1904, Wood *v.* Metropolitan St. R. Co., 181 Mo. 433, 81 S. W. 152 (whether an injury was the cause of a disease, allowed; good opinion by Gantt, P. J.); 1904, Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26 (similar); 1905, Taylor *v.* Grand Ave. R. Co., 185 Mo. 239, 84 S. W. 873 (whether certain injuries "might, could, or would result in paralysis," allowed, but not whether, in the particular patient as examined by the physician, the injuries *were* the cause of paralysis; this quibble is justified by the following refined distinction: "To the trained legal mind there is a very essential difference between permitting an expert to give an opinion and permitting him to draw a conclusion"; to which it may be said that if the "trained legal mind" signifies one which has been infected by the rabies of such quibbling, then the community now urgently needs a Pasteur process which shall stay the ravages of such an affliction in the profession); 1905, Glasgow *v.* Metropolitan St. R. Co., 191 Mo. 347, 89 S. W. 915 (corporal injury; "it was competent for the learned witnesses to state what cause or causes *might* produce such a result, . . . but it was incompetent for them to say that in this case the plaintiff's condition *was* in their opinion the result of the alleged fall," and then a long critique on the tweedledum and tweedledee of this distinction; it is singular that learned judges become so absorbed in the wild fancies of the Opinion rule that their common sense is buried for the purposes of justice); 1907, Smart *v.* Kansas City, 208 Mo. 162, 105 S. W. 709 (whether a fall did cause a necessity for amputation, and not merely was a sufficient cause, therefore, improper); 1911, State *v.* Hyde, 234 Mo. 200, 136 S. W. 316 (murder by poison; "what that man died from," excluded; another of these absurd and unpractical muzzlings of experts); 1911, McAnany *v.* Henrici, 238 Mo. 103, 141 S. W. 633 (whether a crack in a molding must have existed, not allowed; an old-fashioned opinion, typical of hundreds, which resemble a stern practical judicial determination to get at the actual facts as much as a child's game of "muggins" resembles the destiny-directing diplomacy of Bismarck); 1915, Thorp *v.* Metropolitan St. R. Co., — Mo. —, 177 S. W. 851 (whether a fall might have produced the injury, allowed); 1915, Deiner *v.* Sutermeister, 266 Mo. 505, 178 S. W. 757 (whether a blow could have caused insanity, allowed); 1921, Mahany *v.* Kansas C. R. Co., 286 Mo. 601, 228 S. W. 821 (whether a limp would be permanent; "possible" result, excluded); 1922, Maloney *v.* United Railways Co., — Mo. —, 237 S. W. 509 (by a physician, whether certain acts could have produced certain physical conditions, allowed, but not whether they did produce them).

Montana: 1899, Bramlett *v.* Flick, 23 Mont. 95, 57 Pac. 869 (whether a skilled surveyor could locate a claim by a certain description, excluded); 1919, Kelley *v.* John R. Daily Co., 56 Mont. 63, 181 Pac. 326 (medical expert, as to cause of illness allowed).

Nebraska: 1877, Curry *v.* State, 5 Nebr. 417 (probable result of personal injuries); 1895, Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245 (cause of death); 1898, Missouri P. R. Co. *v.* Fox, 56 Nebr. 746, 77 N. W. 130 (how a wound could have been inflicted, excluded); 1903, Fruit Dispatch Co. *v.* Murray, — Nebr. —, 96 N. W. 83 (effect of shipping decayed with sound fruit); 1905, Horst *v.* Lewis, 71 Nebr. 365, 103 N. W. 460 (whether wounds were sufficient to cause death, allowed); 1914, Clawson *v.* State, 96 Nebr. 499, 148 N. W. 524 (by a doctor, whether a wound could have been made as described by the defendant, allowed; three judges diss.); 1915, Neal *v.* Missouri Pac. R. Co., 98 Nebr. 460, 153 N. W. 492 (where a fire started, excluded).

Nevada: 1882, McLeod *v.* Lee, 17 Nev. 122, 28 N. W. 124 (a dam as the cause of an overflow); 1903, State *v.* Buralli, 27 Nev. 41, 71 Pac. 532 (probable position of assailant from appearance of wound); 1915, McLeod *v.* Miller & Lux, 40 Nev. 447, 153 Pac. 566, 167 Pac. 27 (cause of damage to land, excluded).

New Hampshire: 1854, Patterson *v.* Colebrook, 29 N. H. 101 (cause of an accident, excluded); 1896, Folsom *v.* R. Co., 68 N. H. 454, 38 Atl. 209 (likelihood of a train frightening a horse in a certain position); 1900, Parent *v.* Nashua Mfg. Co., 70 N. H. 199, 47 Atl. 261 (cause of a loom accident; excluded, the data not having been proved); 1902, State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38 (probable force and number of blows as inferred from bodily appearance).

New Jersey: 1855, Cook *v.* State, 24 N. J. L. 852 (feasibility of a rape under certain circumstances, excluded); 1863, Read *v.* Barker, 30 N. J. 379 (capacity of a mill); 1868, Castner *v.* Sliker, 33 N. J. 97 (cause of an

found ruling, in another line of precedents, that the physician may express an opinion as to what *might* have caused an injury, but not as to what *did*

injury); 1895, New Jersey Traction Co. *v.* Brabban, 57 N. J. 691, 32 Atl. 217 (possibility of standing by the aid of an artificial leg, excluded; yet expert evidence of the feasibility of working at a trade was declared proper).

New Mexico: 1905, Miera *v.* Terr., 13 N. M. 192, 81 Pac. 586 (that a wound was not self-inflicted, allowed).

New York: 1840, Mayor *v.* Pentz, 24 Wend. 673 (whether a fire would have destroyed a building if it had not been blown up, excluded); 1854, Woodin *v.* People, 1 Park, Cr. C. 466 (whether a rape could in certain conditions be committed, excluded); 1865, Walsh *v.* Ins. Co., 32 N. Y. 443 (cause of a ship's loss); 1873, Van Zandt *v.* Ins. Co., 55 N. Y. 179 (whether a suicide should be attributed to melancholia); 1874, Eggler *v.* People, 56 N. Y. 642 (whether a particular wound was the cause of death); 1890, Young *v.* Johnson, 123 N. Y. 232, 25 N. E. 363 (first intercourse and possibilities of pregnancy); 1899, Cole *v.* Fall Brook, C. Co., 159 N. Y. 59, 53 N. E. 670 (what symptoms would ordinarily and necessarily accompany an injury); 1899, Parish *v.* Baird, 160 N. Y. 302, 54 N. E. 724 (whether flagstones could be broken in a certain way, excluded); 1901, Peck *v.* R. Co., 165 N. Y. 347, 59 N. E. 206 (whether sparks capable of setting fire could be thrown a certain distance, etc.); 1901, People *v.* Schmidt, 168 N. Y. 568, 61 N. E. 907 (whether a blow could have caused an injury); 1905, Schutz *v.* Union R. Co., 181 N. Y. 33, 73 N. E. 491 (cause of a derailment, excluded; whether a car could leave the track if properly laid, etc., not allowed); 1910, People *v.* Fiorentino, 197 N. Y. 560, 91 N. E. 195 (to a defendant, on an issue of self-defence; "Why is your coat cut and there are no cuts on your body?" allowed; sensible opinion); 1911, McRorie *v.* Monroe, 203 N. Y. 426, 96 N. E. 724 (capacity of a vehicle to make a turn in a certain space, allowed); 1914, Marx *v.* Ontario B. H. & A. Co., 211 N. Y. 33, 105 N. E. 97 ("Did this blow cause the injuries?" not allowed).

North Carolina: 1851, State *v.* Clark, 12 Ired. 152 (how a wound had been made); 1886, State *v.* Morgan, 95 N. C. 642 (possibility of other modes of killing, as indicated by certain appearances); 1900, Burney *v.* Allen, 127 N. C. 476, 37 S. E. 501 (whether the testator could have seen the witnesses signing); 1901, State *v.* McDowell, 129 N. C. 523, 39 S. E. 840 (whether it was light enough to recognize deceased); 1903, Cogdell *v.* R. Co., 132 N. C. 852, 44 S. E. 618 (whether a plank could have borne a man, excluded); 1903, State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625 (cause of a wound); 1903, Summerlin *v.* R. Co., 133 N. C. 550, 45 S. E. 898 (where an injury could have been caused by a certain fall, excluded on the facts); 1911, Deppe *v.* Atlantic C. L. R. Co. 154 N. C. 523, 70 S. E. 622 (whether steam pipes were the cause of a fire, not allowed).

North Dakota: 1896, Tullis *v.* Rankin, 6 N. D. 44, 68 N. W. 187 (malpractice; cause of the condition of the limb); 1903, Balding *v.* Andrews, 12 N. D. 267, 96 N. W. 305 ("the fire must have come that way," excluded); 1904, Meehan *v.* Great Northern R. Co., 13 N. D. 432, 101 N. W. 183 (cause of a coupling's breaking, not allowed); 1920, Larson *v.* Russell, — N. D. —, 176, N. W. 998 (personal injury in the nature of spinal neurosis; to a medical expert, "Has it been your experience in many of these cases that if there was a verdict for the plaintiff the party recovered and would walk?", allowed).

Ohio: 1850, Stewart *v.* State, 19 Oh. 302, 307 (whether there was time enough for an assailed person to get out of the way); 1877, Insurance Co. *v.* Tobin, 32 Oh. St. 91 (possibility of loss of vessel in a certain way); 1897, Pittsburg C. C. & St. L. R. Co. *v.* Sheppard, 56 Oh. St. 68, 46 N. E. 61 (effectiveness of the hammer-test as a means of detecting breaks in car-wheels).

Oklahoma: 1899, Boston *v.* Hewitt, 8 Okl. 401, 58 Pac. 619 (effect of filling a well with stone); 1913, Miller *v.* State, 9 Okl. Cr. 255 131 Pac. 717 (that death was caused by strangulation, allowed).

Oregon: 1873, State *v.* Glass, 5 Or. 79 (cause of death); 1882, State *v.* Anderson, 10 Or. 455 (probability of an accidental shooting in a company of hunters, excluded); 1898, State *v.* Barrett, 33 Or. 194, 54, Pac. 807 (probable position of a body, excluded); 1906, State *v.* White, 48 Or. 416, 87 Pac. 137 (what caused an injured man's condition, allowed).

Pennsylvania: 1839, Wilt *v.* Vickers, 8 Watts, 228 (whether an injury would probably heal); 1849, Detweiler *v.* Groff, 10 Pa. St. 376 (possibility of working a mill with a certain height of water); 1865, Pennsylvania R. Co. *v.* Henderson, 51 Pa. 321 (length of probable useful survival of deceased father); 1869, Sorg *v.* Congregation, 63 Pa. 161 (cause of the fall of a wall); 1876, Continental Ins. Co. *v.* Delpeuch, 82 Pa. 236 (action of water currents); 1893, Com. *v.* Crossmire, 156 Pa. 304, 309, 27 Atl. 40 (cause of death).

Rhode Island: 1898, McGeary *v.* R. Co., 21 R. I. 76, 41 Atl. 1007 (whether a witness was in a position to be able to hear signals, excluded).

South Carolina: 1900, State *v.* Taylor, 57 S. C. 483, 35 S. E. 729 (whether a cry of distress could have been heard, excluded); 1903, Stembridge *v.* Southern R. Co., 65 S. C. 440, 43 S. E. 968 (whether an injury would probably affect other parts of the body); 1903, State *v.* Johnson, 66 S. C. 23, 44 S. E.

cause it. In other words, possibility, as affecting *consequences*, is tabooed, and only actuality is to be accepted; but possibility, as affecting *causes*, is sanctioned, while actuality is tabooed.

58 (whether wounds could have been caused in a certain way); 1903, Riser *v.* Southern R. Co., 67 S. C. 419, 46 S. E. 47 (whether a certain shock produced a certain injury, excluded); 1905, Biggers *v.* Catawba P. Co., 72 S. C. 264, 51 S. E. 882 (whether the danger could have been avoided, etc., allowed); 1906, Nickles *v.* Seaboard A. L. R. Co., 74 S. C. 102, 54 S. E. 254, 255 (cause of a derailment, excluded); 1906, Fitzgerald *v.* Langley Mfg. Co., 74 S. C. 232, 54 S. E. 373 (cause of the shifting of a pulley-belt, excluded); 1911, Hand *v.* Catawba Power Co., 90 S. C. 281, 73 S. E. 186 (that a dam caused destruction of water-power, allowed).

South Dakota: 1900, Olson *v.* R. Co., 12 S. D. 326, 81 N. W. 634 (whether a pin could have been pulled without injury, excluded); 1905, Klingaman *v.* Fish & H. Co., 19 S. D. 139, 102 N. W. 601 (how long an injured condition would continue, allowed).

Tennessee: 1835, Burns *v.* Welch, 8 Yerg. 119 (capacity of saw-mill); 1903, Cumberland T. & T. Co. *v.* Dooley, 110 Tenn. 104, 72 S. W. 457 (whether a fire could have been controlled but for an explosion, not allowed); 1914, Cumberland Tel. & Tel. Co. *v.* Peacher Mill Co., 129 Tenn. 374, 164 S. W. 1145 (whether a fire was "probably due to the lightning," etc., not allowed for an electrical expert; whether a certain cause "*could or might* produce the condition" is allowable, but not whether it "probably *did*"; and so the Law again slams the door in the face of Science).

Texas: 1870, Shelton *v.* State, 34 Tex. 666 (cause of death); 1889, Fort Worth & D. C. R. Co. *v.* Thompson, 75 Tex. 503, 12 S. W. 742 (cause of a derailment); 1908, Metropolitan Life Ins. Co. *v.* Wagner, 50 Tex. Civ. App. 233, 109 S. W. 1120 (whether a wound was self-inflicted, excluded, but whether it was made with a pen-knife, admitted; another case of tweedledum and tweedledee); 1912, Freeman *v.* Grashel, — Tex. Civ. App. —, 145 S. W. 695 (whether a floor depression was due to uneven rolling of wheels, allowed).

Vermont: 1846, Clifford *v.* Richardson, 18 Vt. 626 (probable amount of work done by a mill); 1862, Fairchild *v.* Bascomb, 35 Vt. 407 (effect of disease); 1868, Cavendish *v.* Troy, 41 Vt. 107 (possibility of a fact having occurred without coming to the witness' knowledge); 1885, Carpenter *v.* Corinth, 58 Vt. 216 (mode in which a bit could have broken, excluded); 1886, Bemis *v.* Bishop, 58 Vt. 640 (sufficiency of a machine for work); 1884, Johnson *v.* R. Co., 56 Vt. 708 (capacity to labor); 1898, State *v.* Nookes, 70 Vt. 247, 40 Atl. 249 (whether an infant's skull could be fractured by hand-pressure); 1899, Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57 (whether it was feasible to make a road to get certain timber); 1917, Baldwin *v.* Gaines, 92 Vt. 61, 102 Atl. 338 (whether a leg-injury would be produced in a certain way, allowed).

Virginia: 1902, Norfolk R. & L. Co. *v.* Corletto, 100 Va. 355, 41 S. E. 740 (within what distance a street car could be stopped); 1904, Norfolk R. & L. Co. *v.* Spratley, 103 Va. 379, 49 S. E. 502 (probable effect of a corporal injury, allowed); 1911, Johnson *v.* Com., 111 Va. 877, 69 S. E. 1104 (what force caused an abrasion, allowed); 1916, Virginian R. Co. *v.* Bell, 118 Va. 492, 87 S. E. 570 (whether a blow would suffice to cause a fracture, not allowed).

Washington: 1892, Robinson *v.* Marino, 3 Wash. 435, 28 Pac. 752 (cause of a wound); 1913, Patrick *v.* Smith, 75 Wash. 407, 134 Pac. 1076 (cause of depletion of well-water).

West Virginia: 1891, Bowen *v.* Huntington, 35 W. Va. 693, 14 S. E. 217 (cause of an injury); 1914, State *v.* Wilson, 74 W. Va. 772, 83 S. E. 44 (what would be the physical effect of a nervous shock, allowed).

Wisconsin: 1849, Luning *v.* State, 1 Chand. 183 (effect of floods on health of neighborhood, excluded); 1864, Curtis *v.* R. Co., 18 Wis. 315 (effect of weather on fruit, etc.); 1866, Blair *v.* R. Co., 20 Wis. 262 (probable falling off of business patronage); 1870, Whitney *v.* R. Co., 27 Wis. 344 (liability of wool waste to spontaneous combustion); 1872, Leopold *v.* Van Kirk, 29 Wis. 555 (cause of goods deteriorating); 1874, Montgomery *v.* Scott, 34 Wis. 344 (effect of a wound upon health); 1875, Oleson *v.* Tolford, 37 Wis. 331 (probability of a stage-coach tipping over, excluded); 1875, Brabbits *v.* R. Co., 38 Wis. 293 (effect of a leaky throttle-valve); 1879, Wylie *v.* Wausau, 48 Wis. 507, 4 N. W. 682 (like Blair *v.* R. Co.); 1880, Salvo *v.* Duncan, 49 Wis. 157, 4 N. W. 1074 (possibility of performing a contract); 1882, Bierbach *v.* Rubber Co., 54 Wis. 212, 11 N. W. 514 (like Blair *v.* R. Co.); 1882, Noonan *v.* State, 55 Wis. 260, 12 N. W. 379 (rape as the cause of certain symptoms, excluded); 1884, Boyle *v.* State, 61 Wis. 447, 21 N. W. 289 (cause of death, as gathered from an examination of body); 1885, Rhinehart *v.* Whitehead, 64 Wis. 44, 24 N. W. 401 (effect of a wound); 1893, Vosbury *v.* Putney, 86 Wis. 278, 280, 26 N. W. 480 (cause of a corporal injury, in action for battery); 1897, Maitland *v.* Paper Co., 97 Wis. 476, 72 N. W. 1124 (cause of explosion of glass, excluded); 1904, Lyon *v.* Grand Rapids, 121 Wis. 609, 99 N. W. 311 (cause of a disease, allowed); 1904, Hallum *v.* Omro, 122 Wis. 337, 99 N. W. 1051

This is only one of the many instances in which the subtle mental twistings produced by the Opinion rule have reduced this part of the law to a congeries of non-sense which is comparable to the incantations of medieval sorcerers and sullies the name of Reason.

§ 1977. **Measure of Distance, Time, Speed, Size, Weight, Direction, Form, Identity, and the Like.** The Opinion rule has been used as a bludgeon against every conceivable sort of testimony, even against such simple statements as estimates of distance, time, size, identity, and the like. Fortunately, however, such attempts have been usually unsuccessful in that class of cases. The categories of the concededly unimpeachable subjects are variously stated by various judges; merely a more liberal tendency appears in some Courts than in others:[1]

1865, BELLOWS, J., in *Whittier* v. *Franklin*, 46 N. H. 24: "[The opinions admitted] are formed from minute peculiarities of form, shape, color, sound, etc., that cannot be described in human language, so as to convey any accurate impression of the object, and, therefore, unless opinions are received there must be a failure of evidence. When the facts and peculiarities upon which the opinion is formed can be stated and described, they must be, and it is then for the jury and not the witness to form an opinion."

1875, FOSTER, C. J., in *Hardy* v. *Merrill*, 56 N. H. 241: "All concede the admissibility of the opinions of non-professional men upon a great variety of unscientific questions arising every day and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention."

1886, JOHNSTON, J., in *State* v. *Baldwin*, 36 Kan. 10, 12 Pac. 318: "Facts which are made up of a great variety of circumstances and a combination of appearances which from the infirmity of language cannot properly be described; . . . in this category may be placed matters involving magnitude or quantities, portions of time, space, motion, gravitation, value, and such as relate to the condition or appearance of persons or things."

The principal categories may be thus roughly classified:

Distance or *Size*, of a person, place, or thing;[2]

(that injuries "were liable to be permanent," allowed).

Wyoming: 1899, Ross *v.* State, 8 Wyo. 351, 57 Pac. 924 (whether a weapon would have been seen, had there been one).

§ 1977. [1] Other less comprehensive but often-quoted summaries are these: 1864, Bellows, J., in Low *v.* Railroad, 45 N. H. 383 ("size, weight, distance, speed, identity, sound, and the like"); 1875, Endicott, J., in Com. *v.* Sturtivant, 117 Mass. 122: ("Any one's opinion is receivable on a question of identity as applied to persons, things, animals, or handwriting, and in regard to size, color, weight of objects, and in estimating time and distances").

[2] In all the following citations of this and other cases in this Section the testimony was *admitted*, unless it is otherwise expressly noted:

Distance and Size: Ala. 1903, Rollings *v.* State, 136 Ala. 126, 34 So. 348 (that persons were near enough to hear abusive language); *Cal.* 1907, People *v.* Helm, 152 Cal. 532, 93 Pac. 99 (width of a bicycle track, allowed); *Ga.* 1900, Central of G. R. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299 (to what distance a railroad train would throw a person struck while on the track, not allowed for non-experts); *La.* 1905, State *v.* Voorhies, 115 La. 200, 38 So. 964 (how far the gun was from the deceased, allowed); *Mass.* 1863, Hovey *v.* Sawyer, 5 All. 554 (highest part of a hill, excluded); *Mich.* 1895, Walker *v.* R. Co., 104 Mich. 606, 62 N. W. 1032 (height); *Mont.* 1922, Jenkins *v.* Kitsen, — Mont. —, 205 Pac. 243 (cattle; opinion excluded, because not based on personal knowledge); *Nebr.* 1905, Turley *v.* State, 74 Nebr. 471, 104 N. W. 934 (com-

Time or *Temperature* of an occurrence or place;[3]
Direction of a sound, blow, or movement;[4]
Speed of an animal or vehicle;[5]
Identity of a person or thing.[6]

parative size of boot-tracks, allowed); *R. I.* 1917, State *v.* Deslovers, 40 R. I. 89, 100 Atl. 64 (murder; height and weight of deceased); *Vt.* 1873, Fulsome *v.* Concord, 46 Vt. 140 (whether a road was wide enough for two vehicles to pass).

[3] *Time and Temperature: Ala.* 1853, Campbell *v.* State, 23 Ala. 68 (time of day); *Ia.* 1895, Brown *v.* R. Co., 94 Ia. 309, 62 N. W. 737 (dark); *Wis.* 1864, Curtis *v.* R. Co., 18 Wis. 315 (temperature); 1872, Leopold *v.* Van Kirk, 29 Wis. 554 (same).

[4] *Direction* (compare the cases cited *ante*, § 660): *Fed.* 1886, Hopt *v.* Utah, 120 U. S. 436, 7 Sup. 614 (direction of a blow delivered upon the body); *Ala.* 1886, McKee *v.* State, 82 Ala. 38, 2 So. 451 (direction of the blow causing a wound, excluded); *Cal.* 1895, People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697 (that a pistol-shot sounded as though fired inside a building; the direction of a bullet); 1900, People *v.* Clarke, 130 Cal. 642, 63 Pac. 138 (whether shots sounded from in or out of a house); *Dak.* 1882, Territory *v.* Egan, 3 Dak. 127, 13 N. W. 568 (direction of the blow causing a wound, excluded); *Fla.* 1917, Kersey *v.* State, 73 Fla. 832, 74 So. 983 (direction of a gunshot, allowed; distinguishing prior cases); *Ind. Terr.* 1904, Wilson *v.* U. S., 5 Ind. Terr. 610, 82 S. W. 924 (position of an arm when wounded; excluded); *Mass.* 1875, Com. *v.* Sturtivant, 117 Mass. 122 (direction of blood causing a stain, excluded); *Miss.* 1880, Dillard *v.* State, 58 Miss. 387 (indications in blood-marks on clothes as to position of assailant, excluded); *N. H.* 1866, State *v.* Shinborn, 46 N. H. 497 502 (direction of a sound); *N. M.* 1905, Miera *v.* Terr., 13 N. M. 192, 81 Pac. 586 (that the victim shot must have been sitting down, allowed); *N. Y.* 1868, Kennedy *v.* People, 39 N. Y. 257 (direction of a blow delivered upon the body, admitted; position of the body when struck, excluded); *N. C.* 1873, State *v.* Jones, 68 N. C. 443, *semble* (direction of a shot); *Oh.* 1849, Steamboat Clipper *v.* Logan, 18 Oh. 394 (direction of a blow by a colliding vessel); *S. C.* 1895, State *v.* Sullivan, 43 S. C. 205, 21 S. E. 4 (place of an assailant as shown by the wound); *Tex.* 1859, Cooper *v.* State, 23 Tex. 335 (that the assailant was not on a level with the deceased, excluded).

[5] *Speed* (compare the citations *ante*, § 571): *Ala.* 1895, Alabama G. S. R. Co. *v.* Hall, 105 Ala. 599, 17 So. 176 (train); 1903, Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489, 37 So. 166 ("it looked very fast," allowed); *Conn.* 1902, Nesbit *v.* Crosby, 74 Conn. 554, 51 Atl. 550 (question as to the speed of a horse, judged by the sound, allowed); *Ill.* 1898, Illinois C. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521 (that a train was running fast); 1899, Overtoom *v.* R. Co. 181 Ill. 323, 54 N. E. 898 (same); 1904, Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28 (of a street car, allowed); 1904, Chicago City R. Co. *v.* Matthieson, 212 Ill. 292, 72 N. E. 443 (that a horse "ran fast and was wild," allowed); 1906, Chicago City R. Co. *v.* McDonough, 221 Ill. 69, 77 N. E. 577 (that a car was going "at full speed," allowed); *Ind.* 1886, Louisville N. A. & C. R. Co. *v.* Jones, 108 Ind. 565, 9 N. E. 476 (train); 1888, Evansville & T. H. R. Co. *v.* Crist, 116 Ind. 457, 19 N. E. 310 (train); *Mich.* 1920, Luttenton *v.* Detroit J. & C. R. Co., 209 Mich. 20, 176 N. W. 558 (street car); *Or.* 1915, Macchi *v.* Portland R. L. & P. Co., 76 Or 215, 148 Pac. 72 (that cars were going "faster than cars ordinarily ran in P.," allowed; two pages of an opinion wasted on this topic); *Ut.* 1895, Chipman *v.* R. Co., 12 Utah 68, 41 Pac. 562 (train); *Wash.* 1906, Cook *v.* Stimson M. Co., 41 Wash. 314, 83 Pac. 419 (speed of a train, excluded); *Wis.* 1884, Hoppe *v.* R. Co., 61 Wis. 369, 21 N. W. 227 (train).

[6] *Identity* (compare also the cases involving identity in other aspects, *ante*, §§ 149, 413, 571, 660):

ENGLAND: 1874, R. *v.* Castro (Tichborne Case), charge of Cockburn, C. J. II, 124 (a question as to whether the defendant was Tichborne, excluded, so far as the witness proposed, not merely to speak of the apparent sameness of appearance with the person he knew, but of the general fact of individual identity on the whole of the case).

UNITED STATES: *Federal:* 1896, Templeton *v.* Luckett, 21 C. C. A. 325, 75 Fed. 254 (one who knew the person in question and had examined a deed and the rolls of a military company where the name appeared in different spellings, not allowed to declare his belief of the identity of name); *Alabama:* 1877, Walker *v.* State, 58 Ala. 395 (of parcels of wheat); 1882, Whizenant *v.* State, 71 Ala. 383, 384 (that a description of stolen oxen corresponded with oxen seen, excluded); 1882, Beale *v.* Posey, 72 Ala. 332 (of a person, by a mode of walking); 1895, Chilton *v.* State, 105 Ala. 98, 16 So. 797 (that a person's description tallied, excluded); 1897, Newell *v.* State, 115 Ala. 54, 22 So. 572 (of buttons); 1898, Terry *v.* State, 118 Ala. 79, 23 So. 776 (of foot-tracks, excluded); 1900, Morris *v.* State, 124 Ala. 44, 27 So. 336 (of shoe-tracks); 1906, DuBose *v.* State, 148 Ala. 560, 42 So. 862 (that certain tracks were the defendant's, excluded); 1911, Pope *v.* State, 174 Ala. 63, 57 So. 245 (whether a mule would have made track similar to another

As to Identity, attention is called to the analysis of this type of inference (*ante*, §§ 410–416); in the particular subject of *foot marks* (*ante*, § 413 *b*) some of the exclusionary rulings here noted will thus be better understood.

track observed, allowed; three judges diss.); *California* 1897, : People *v.* Lovren, 119 Cal. 88, 51 Pac. 22 (of the texture and quality of cloth); 1906, People *v.* Gray, 148 Cal. 507, 83 Pac. 707 (that a person's description tallied, excluded on the facts); *Colorado:* 1897, Askew *v.* People, 23 Colo. 446, 48 Pac. 524 (of a brand or a part of one); *Florida:* 1898, Roberson *v.* State, 40 Fla. 509, 24 So. 474 (of a person); 1904, Alford *v.* State, 47 Fla. 1, 36 So. 436 (buggy-tracks); 1905, Jordan *v.* State, 50 Fla. 94, 39 So. 155 (person); 1908, Johnson *v.* State, 55 Fla. 46, 46 So. 155 (mark in sand and made by spur-leather); *Georgia:* 1882, Wiggins *v.* Henson, 68 Ga. 819; *Illinois:* 1888, Watt *v.* People, 126 Ill. 29, 18 N. E. 340 (of hairs); 1890, Ogden *v.* Illinois, 134 Ill. 599, 25 N. E. 755 (of a voice); 1911, People *v.* Jenning's, 252 Ill. 534, 96 N. E. 1077 (experts admitted to interpret fingerprints by the science of dactylos copy); *Indiana:* 1901, Keith *v.* State, 157 Ind. 376, 61 N. E. 716 (of a corpse); 1908, Craig *v.* State, 171 Ind. 317, 86 N. E. 397 (identity of an assailant); *Iowa:* 1880, State *v.* Moelchen, 53 Ia. 310, 312, 5 N. W. 186 (of shoe-tracks); 1897, State *v.* Millmeier, 102 Ia. 692, 72 N. W. 275 (of footprints); 1909, State *v.* Whitbeck, 145 Ia. 29, 123 N. W. 982 (similarity of hair, by a non-expert, allowed, one of the kinds of hair not being at hand); *Kansas:* 1874, State *v.* Folwell, 14 Kan. 110 (wagon); 1915, State *v.* Cole, 93 Kan. 819, 150 Pac. 233 (shoeprints and hoofprints); *Kentucky:* 1835, Gentry *v.* McMinnis, 3 Dana 383; 1895, Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337 (personal resemblance, excluded); *Louisiana:* 1905, State *v.* Hopper, 114 La. 557, 38 So. 452 (shoes); 1906, State *v.* Graham, 116 La. 779, 41 So. 90 (of shoe-tracks); *Massachusetts:* 1862 Eddy *v.* Gray, 4 All. 438 (personal resemblance, excluded; though it does not appear that the persons compared were both in court); 1869, Com. *v.* Pope, 103 Mass. 440 (of footprints); 1897, Com. *v.* Crowley, 167 Mass. 434, 45 N. E. 766 ("How do you know it was C. that struck you?", allowed); 1897, Com. *v.* Kennedy 170 Mass. 18, 48 N. E. 770 (of a person buying poison); *Michigan:* 1900, People *v.* Gotshall, 123 Mich. 474, 82 N. W. 274 (that a person was "about the same size and height "as defendant inadmissible); *Mississippi:* 1920, Herring *v.* State, 122 Miss. 647, 84 So. 699 (murder; opinion to identity of foot-tracks, admissible, if the witnesses have made a comparison and can specify any peculiarity; cases collected); *Missouri:* 1895, State *v.* Powers, 130 Mo. 475, 32 S. W. 984 (of persons); *Nebraska:* 1901, Russell *v* State, 62 Nebr. 512, 87 N. W. 344 (of horse-tracks; excluded); 1902, Russell *v.* State, 66 Nebr. 497, 92 N. W. 751 (of horse-tracks, admitted); *New Hampshire:* 1866, State *v.* Shinborn, 46 N. H. 502, *semble* (of a voice); *New Jersey:* 1905, State *v.* Miller, 71 N. J. L. 527, 60 Atl. 202 (spots on clothing); *New Mexico:* 1915, State *v.* Ancheta, 20 N. M. 19, 145 Pac. 1086 (of footprints); *New York:* 1878, King *v.* R. Co., 72 N. Y. 608 (of a piece of iron); *North Carolina:* 1839, Beverly *v.* Williams, 4 Dev. & B. 237; 1880, State *v.* Reitz, 83 N. C. 636 (of footprints); 1918, State *v.* Spencer, 176 N. C. 709, 97 S. E. 155 (shoe-tracks); *Pennsylvania*; 1874, Udderzook *v.* Com., 76 Pa. 342, 353 (of a person); 1898, Com. *v.* Farrell, 187 Pa. 408, 41 Atl. 382 (whether two pocketbooks were mended by the same person, excluded); *South Carolina:* 1899, State *v.* Davis, 55 S. C. 339, 33 S. E. 449 (that of shoe-marks as corresponding with certain shoes); *Tennessee:* 1874, Woodward *v.* State, 4 Baxt. 324 (of a person); *Texas:* here there is a pretty body of law about testimony *identifying by foot-tracks;* it is as curious and as interesting as some of the quaint rituals of the Aztec priesthood; they can perhaps be better appreciated in the light of the comments *ante*, § 415; the following opinions collect some of the cases: 1904, Parker *v.* State, 46 Tex. Cr. 461, 80 S. W. 1008 (similarity of boot-tracks, excluded, but here because the witness had not sufficiently observed, on the principle of § 660, *ante*); 1906, Porch *v.* State, 50 Tex. Cr. 335, 99 S. W. 102; 1916, Hampton *v.* State, 78 Tex. Cr. 639, 183 S. W. 887 (murder 23 years previously; testimony to identity of foot-tracks seen and measured 23 years before, admitted); 1919, Mueller *v.* State, 85 Tex. Cr. App. 346, 215 S. W. 93 (identity of tracks made by cattle-thieves; opinion of observers, admitted; prior rulings explained); 1921, McClain *v.* State, 89 Tex. Cr. 48, 229 S. W. 550 (larceny of cattle; as to identity of horse-tracks "something more must appear than a casual observation or comparison"); *Washington:* 1897, State *v.* Cushing, 17 Wash. 544, 50 Pac. 512 (correspondence of holes in the deceased's body and clothing); 1905, State *v.* Rutledge, 37 Wash. 523, 79 Pac. 1123 (police officer's identification of defendants from a description by the person robbed, excluded); *Wisconsin:* Knoll *v.* State, 55 Wis. 252, 12 N. W. 369 (of two specimens of hair as coming from the same person, excluded); 1905, Roszczyniala *v.* State, 125 Wis. 414, 104 N. W. 113 (accused).

For other principles affecting testimony to *identify a person*, see *ante*, §§ 167, 413, 660.

For the presumption from *identity of name*, see *post*, § 2529.

For the use of *personal resemblances* as evidence of *paternity*, see *ante*, §§ 166, 1154.

§ 1978. **Miscellaneous Topics of Testimony.** Further classification of the cases arising under the Opinion rule would be unpractical.[1] It may be sug-

§ 1978. [1] In the following citations the testimony was admitted, unless it is otherwise expressly noted:

ENGLAND: 1821, Redford *v.* Birley, 1 State Tr. N. S. 1071, 1134, 1171 (battery in dispersing a seditious assembly; whether the mob in the witness' judgment endangered the public tranquillity).

UNITED STATES: *Federal:* 1898, Kiesel *v.* Ins. Office, 31 C. C. A. 515, 88 Fed. 243 (whether a burning roof was standing, not improperly excluded in discretion); 1898, Fireman's Ins. Co. *v.* Mohlmann, 33 C. C. A. 347, 91 Fed. 85 (whether a building overloaded fell before it was burned, excluded); 1899, Golden Reward M. Co. *v.* Buxton M. Co., 38 C. C. A. 228, 97 Fed. 413 (character of ore mined); 1918, Erie R. Co. *v.* Linnekogel, 20 C. C. A., 248 Fed. 389 (that two cars met with a "violent crash," allowed); *Alabama:* 1848, Rembert *v.* Brown, 14 Ala. 360 (how much corn per month was needed for a plantation); 1876, Smith *v.* State, 55 Ala. 11 (the charge was of selling to a person of "known intemperate habits," and the witness was allowed to testify only to "intemperate habits"); 1877, Campbell *v.* Gilbert, 57 Ala. 568 (whether a guano benefited a crop); 1895, Louisville & N. R. Co. *v.* Binion, 107 Ala. 645, 18 So. 75 (whether a stuck brake goes off violently); 1895, Miller *v.* State, 107 Ala. 40, 19 So. 37 (that a pistol must be "very close" for the powder to scorch); 1896, Shrimpton Co. *v.* Brice, 109 Ala. 640, 20 So. 10 (debt on account; "Is that account correct?", held proper); 1898, Wager L. Co. *v.* Sullivan L. Co., 120 Ala. 558, 24 So. 949 (whether timber was "merchantable," allowed, but not whether it was "fit to go on the market"); 1905, Baker *v.* Cotney, 142 Ala. 566, 38 So. 130 (how much cotton a tract produced, allowed); *Arkansas:* 1910, Miller *v.* State, 94 Ark. 538, 128 S. W. 353 (whether hairs were human, allowed); *California:* 1896, Callan *v.* Bull, 113 Cal. 593, 45 Pac. 1017 (strength of resistance of timber); *Connecticut:* 1898, Irving *v.* Shethar, 71 Conn. 434, 42 Atl. 258 (cited *ante*, § 1918); *Florida:* 1918, Hicks *v.* State, 75 Fla. 311, 78 So. 270 (when a person is wounded by a pistol, "just describe . . . the sound that you heard." objected to as calling for opinion; allowed; is it not a piece of lamentable incredible futility in a system of Evidence that such an objection should be seriously considered?); *Georgia:* Code 1895, § 5285, Rev. C. 1910, § 5874, P. C. § 1047 ("Where the question under examination and to be decided by the jury is one of opinion, any witness may swear to his opinion or belief, giving his reasons therefor; but if the issue is as to the existence of a fact, the opinions of witnesses, generally, are inadmissible"); Code 1895, § 5287, Rev. C. 1910, § 5876, P. C. § 1048 ("The opinions of experts on any question of science, skill, trade, or like questions, are always admissible; and such opinions may be given on the facts as produced by other witnesses"); 1881, Augusta & L. R. Co. *v.* Dorsey, 68 Ga. 237 (Code section construed generally); 1876, Wynne *v.* State, 56 Ga. 113, 118 (whether cartridges had been punctured before firing); 1915, Shiver *v.* Tift, 143 Ga. 791, 85 S. E. 1031 (whether a horse was nervous or roadworthy, allowed); *Illinois:* 1915, Mahlstedt *v.* Ideal Lighting Co., 271 Ill. 154, 110 N. E. 795 (death by an explosion of a gasoline machine; how gasoline might have got into the cellar, allowed); *Indiana:* 1882, Bennett *v.* Needham, 83 Ind. 568 (area to be benefited by a ditch); 1883, Mills *v.* Winter, 94 Ind. 332 (whether a person was of fickle temper); 1900, Green *v.* State, 154 Ind. 655, 57 N. E. 637 (quantity and quality of moon's light); *Iowa:* 1848, Thomas *v.* Isett, 1 G. Greene 472 (injury to credit by seizure of goods, excluded); 1870, Crawford *v.* Wolf, 29 Ia. 567, 573 (profits on a contract, allowed); 1881, Parkhurst *v.* Masteller, 57 Ia. 476, 10 N. W. 864 (whether hay was burning, excluded); 1897, Gould *v.* Schermer, 101 Ia. 582, 70 N. W. 697 (whether a horse blind in one eye was likely to shy, excluded); 1898, McMahon *v.* Dubuque, 107 Ia. 62, 77 N. W. 517 (that a house was in good repair, excluded); 1902, Hollenbeck *v.* Marion, 116 Ia. 69, 89 N. W. 210 (that water was foul and nasty) *Kansas:* 1889, State *v.* Jones, 41 Kan. 312 (distance at which shot scatters); 1905, Atchison, T. & S. F. R. Co. *v.* Watson, 71 Kan. 696, 81 Pac. 499 (usual shrinkage of cattle-weight in transit, allowed); *Kentucky:* 1869, St. Louis M. Life Ins. Co. *v.* Graves, 6 Bush 290 (that no sane man in a Christian country would commit suicide, excluded); 1878, Claxton's Adm'r *v.* R. Co., 13 Ky. 643 (quality of iron); 1895, Com. *v.* Tate, — Ky. —, 33 S. W. 405 (net result of accounts); *Louisiana:* 1903, State *v.* Williams, 111 La. 205, 35 So. 521 (that a place was a "gambling-house," etc.); *Maine:* 1876, State *v.* Watson, 65 Me. 74 (whether a fire would probably spread in certain ways, excluded); 1900, Boothby *v.* Lacasse, 94 Me. 392, 47 Atl. 916 (course of a fire: expert testimony excluded); 1903, Caven *v.* Bodwell G. Co., 97 Me. 381, 54 Atl. 851 (tensile strength of wire cables; a non-expert excluded on the facts); *Maryland:* 1912, Cecil Paper Co. *v.* Nesbitt, 117 Md. 59, 83 Atl. 254 (usual conduct of mules, excluded); *Massachusetts:* 1870, Com. *v.* Choate, 105 Mass. 457 (that two broken pieces of stick formed originally one piece); 1872, Jordan *v.* Osgood, 109 Mass. 459, 464 (net amount of stock on hand as gathered from account-books); 1873, Com. *v.* Dowdican, 114 Mass.

gested that the use of these rulings as definite and inflexible precedents would indicate a misunderstanding of their effect. They merely illustrate the application of the general principle to the facts of a given case, and their employment as permanent, unvarying rules ignores the true significance of the general principle. The following passage will sufficiently illustrate the orthodox mode of applying the principle to a new instance:

1875, PARDEE, J., in *Clinton* v. *Howard*, 42 Conn. 294 (admitting the testimony of a skilled witness as to whether a certain pile of stones would make horses shy): "It would be difficult, if not impossible, to embody in words, so as to be fully understood by the triers, a description of all the appearances which make a particular pile of stones a source of terror to gentle horses, unaccustomed to the sight of such an object. The fright is the result of a combination of form, color, and relative position, which would elude the effort of any witness clearly and fully to describe. Knowledge of the reasons why one object arouses the instinct of fear in a horse and another does not, and why the pile of stones should be put in one class or the other, is not presumptively within the knowledge of all jurors."

257 (that the contents of a tumbler looked like whiskey); 1895, Connelly *v.* Woolen Co., 163 Mass. 156, 39 N. E. 787 (machinery); 1898, Flynn *v.* B. E. L. Co., 171 Mass. 395, 50 N. E. 937 (mode of stringing electric wires from poles across trees; expert not needed); *Michigan:* 1886, Passmore *v.* Passmore Estate, 60 Mich. 468, 27 N. W. 601 (whether detached and pasted leaves in a note-book belonged there originally, excluded); 1900, People *v.* Jones, 124 Mich. 177, 82 N. W. 806 (that tools produced in court were burglars' tools); *Minnesota:* 1886, Peck *v.* Small, 35 Minn. 466 (influence of a person in the community, excluded); 1897, Lane *v.* Agric. Soc., 67 Minn. 65, 69 N. W. 463 (effect of "track-bolting" in a running horse; purpose of using blinkers); 1905, State *v.* Olson, 95 Minn. 104, 103 N. W. 727 (whether a liquor was intoxicating, allowed); *Missouri:* 1873, Eyerman *v.* Sheehan, 52 Mo. 223 (depth of a quantity of stone); *Mississippi:* 1905, Earp *v.* State, — Miss. —, 38 So. 288 (that the insane do not kill for money, not allowed); *Nebraska:* 1900, Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28 (importance to a newspaper of reputation for solvency, stability, etc.); *New Hampshire:* 1899, Little *v.* Head & D. Co., 69 N. H. 494, 43 Atl. 619 (sufficiency of a hook to sustain a weight); *New Jersey:* 1898, Bergen Co. T. Co. *v.* Bliss, 62 N. J. L. 410, 41 Atl. 837 (how an accident occurred, excluded); *New York:* 1878, King *v.* R. Co., 72 N. Y. 608 (whether a piece of iron was cracked; allowed for experts, refused for others); 1879, People *v.* Manke, 78 N. Y. 611 (whether a paper looked like wadding shot from a gun; undecided); 1884, People *v.* Muller, 96 N. Y. 411 (whether a picture was obscene, excluded); 1888, Collins *v.* R. Co., 109 N. Y. 243, 247, 16 N. E. 50 (which of two engines emitted the more sparks): 1890, Van Wycklen *v.* Brooklyn, 118 N. Y. 428, 24 N. E. 179 (tapping of a creek by pipes, excluded); 1896, Witmark *v.* R. Co., 149 N. Y. 393, 44 N. E. 78 (stating the results of an arithmetical calculation that could have been made by the Court, held not improper); 1897, Flandreau *v.* Ellsworth, 151 N. Y. 473, 45 N. E. 853 (tonnage of the hull of a barge); *North Carolina:* 1859, State *v.* Jacobs, 6 Jones L. 286 (African descent); 1904, Willis *v.* W. U. Tel. Co., — N. C. —, 48 S. E. 538 (how much anguish, etc., he suffered from non-receipt of a telegram, not allowed); *Ohio:* 1873, Stambaugh *v.* Smith, 23 Oh. St. 594 (existence of coal seams); *Oregon:* 1907, State *v.* Remington, 50 Or. 99, 91 Pac. 473 (size of a hole which a rifle would make, allowed); *Pennsylvania:* 1839, Reed *v.* Dick, 8 Watts 481 (whether a cable was sound); 1898, Fifth Mut. B. Soc. *v.* Holt, 184 Pa. 572, 39 Atl. 293 (by a secretary of a society whether it had not always recognized a person as owner of stock, excluded); *South Dakota:* 1904, Brady *v.* Shirley, 18 S. D. 608, 101 N. W. 886 (whether a colt was sired by a particular horse, allowed); *Texas:* 1891, Radam *v.* Microbe Destroyer Co., 81 Tex. 131 (whether a trademark-imitation was calculated to deceive, excluded); 1906, Leatherman *v.* State, 49 Tex. Cr. 485, 95 S. W. 504 (indictment for vagrancy as a professional gambler; whether he was a professional gambler, excluded); *Vermont:* 1873, Bates *v.* Sharon, 45 Vt. 481 (indications of a road, as to being washed out); 1889, Brown *v.* Doubleday, 61 Vt. 524, 17 Atl. 135 (shrinkage of bark; excluded on the facts); 1895, State *v.* Bradley, 61 Vt. 465, 32 Atl. 240 (whether a stain was of blood); 1898, Morse *v.* Bruce's Est., 70 Vt. 378, 40 Atl. 1034 (certain arithmetical reckonings, excluded as superfluous); 1899, Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57 (counting rings in a tree-trunk before the jury, allowed for an expert); *West Virginia:* 1883, Welch *v.* Ins. Co., 23 W. Va. 305 (combustible peculiarities of wool, excluded); *Wisconsin,* 1876, Wood *v.* R. Co., 40 Wis. 582 (whereabouts in a building a fire began, excluded).

Topic III: OPINION RULE AS APPLIED TO TESTIMONY TO MORAL CHARACTER AND PROFESSIONAL SKILL

CHAPTER LXVII.

§ 1980. **Introductory.** In 1798, at the trial of the ardent young Irish gentleman, O'Connor, on the charge of breach of parole, a galaxy of personages famous in history were called to testify to the honor and uprightness of the accused. One after another, Erskine, Fox, Sheridan, and Grattan were admitted to the box, to express their personal belief in the integrity of their friend.[1] In 1803, at the trial of Captain Despard, one of the witnesses to character was the battle-scarred veteran of the seas, Lord Nelson, who, on behalf of an old messmate, testified, not to any reputation, but to his own belief founded on long personal intimacy.[2]

To-day this is changed. By a rule which is almost universal (in American courts, at least), the personal knowledge and belief of the witness to character is rigorously excluded, and the community-reputation is all that will be listened to. The policy of the change is highly questionable, but its consideration may be deferred for a moment. It is necessary first to examine the history of this change and the effects it has left upon the law of to-day.

Looking at the cases first in England and then in the United States, it will be convenient to take up separately the cases of a *defendant's* character and a *witness'* character.

§ 1980. [1] 1798, O'Connor's Trial, 27 How. St. Tr. 39 (Thomas Erskine: "I feel myself not only entitled but bound upon my oath to say, in the face of God and my country, as a British gentleman, which is the best thing any man can be, that he is incapable in my judgment, of acting with treachery or duplicity to any man, but most of all to those for whom he professes friendship and regard"), 42 (Charles James Fox), 45 (Richard Brinsley Sheridan), 50 (Henry Grattan), 50 (Lord John Russell).

[2] 1803, Despard's Trial, 28 How. St. Tr. 460 (Vice-Admiral Lord Viscount Nelson: "We went on the Spanish Main together, we slept many nights together in our clothes upon the ground, we have measured the height of the enemy's wall together; . . . I formed the highest opinion of Colonel Despard"), 461 (testimony of Sir Evan Nepean: "You will state your opinion of him from your own knowledge of him; that opinion I understand to be a good one, so far as you have known him?" "Yes").

1. History and Present State of the Law

a. ENGLAND

§ 1981. **Accused's Moral Character.** *a.* That the original and unquestioned practice called for and allowed the witness' own belief, founded merely on personal intimacy, as to the trait of character in question, and did not insist on or necessarily ask for the community's reputation, is clear from the following passages:

1699, *Trial of Cowper, Marson, Stephens, and Rogers*, 13 How. St. Tr. 1180 ff.; murder. Sir *T. Lane:* "I never knew him [Cowper] discover any ill-nature in his temper; I think he cannot be suspected of this or any other act of barbarity." Mr. *Cox:* "I have lived by him eight or nine years; . . . of all men that I know, he would be the last man that I should suspect of such a fact as this is; I believe nothing in the world could move him to entertain the least thought of so foul an act. . . . I have known Mr. Marson a long time, and had always a good opinion of him; I do not believe 5000*l.* would tempt him to do such a fact." Major *Lane:* "My Lord, I have known Mr. Marson ever since he was two years old, and never saw him but a civilized man in my life; he was well bred up among us, and I never saw him given to debauchery in all my life."

1794, *Thomas Hardy's Trial*, 24 How. St. Tr. 999; *John Stevenson* sworn: "How long have you known Mr. Hardy?" "About eight or nine years, as near as I can recollect." "What character has Mr. Hardy borne during the eight or nine years you have known him?" "I have always esteemed him as a man of a mild, peaceable disposition." "Have you known him well during that time?" "Yes; . . . he always behaved with great uprightness as far as I had occasion to observe him, and I always esteemed him a man of a peaceable, mild disposition; and as to moral character, I know no man that goes beyond him." "Has that been his general character?" "It has been as far as I ever knew; I never heard anything to the contrary." *Alexander Gredd* sworn; he knew Mr. H. intimately: "Has he been a peaceable, orderly man?" "As far as ever I saw." "Have you known him well during this time?" "Yes, as a neighbor constantly." "Is this his general character?" "It is, as far as I ever heard."

1808, *Alexander Davison's Trial*, 31 How. St. Tr. 186; fraud in public accounts; Lord *Moira* sworn: "Had your lordship [as general-in-command, Mr. D. being commissary-general] an opportunity of observing his public conduct?" "His conduct was clear and punctual, answering every expectation I had formed, strictly delicate in refusing emoluments which he might well have claimed." "From your lordship's general knowledge of his conduct, is he a person whom your lordship would think capable of committing a fraud?" "Certainly not." [After an interruption on another point.] Lord ELLENBOROUGH: "The correct inquiry is as to the general character of the accused, and whether the witness thinks him likely to be guilty of the offense charged in the indictment." Sir *Andrew Hammond* sworn; Lord ELLENBOROUGH: "From your knowledge of Mr. Davison's character and conduct, do you think him capable of committing a fraud?" "I should have thought him the last man in the world that would have attempted anything of the kind, or even to have been a cause of it." Mr. *James Davidson* sworn: "From all that you have observed of him [Mr. D.] and all that you have known and heard of him, what is your opinion of his general character?" "You say 'known and heard;' all that I have *known* of him is that he has been an honest man, an honest dealer with me as a merchant." "From what you have *heard* in the world at large, what is your opinion of him?" "There are a variety of reports concerning Mr. Davison; those I know only as the world knows; but as to his dealings with me, I always found him an honorable and honest man."

1831, Lord TENTERDEN, C. J., in *R.* v. *Cobbett*, 2 State Tr. N. S. 789, 873: "The proper

inquiry for a gentleman who has known Mr. C. many years is as to his general character, not as to any individual or particular acts. . . . You may ask persons who have been acquainted with you what their opinion is of your character and your views on subjects connected with this publication;" then witnesses testify, *e. g.*, "I have known him personally for five years, and I think him quite the reverse of a man likely to incite the laborers to outrage."

The constant practice in the State Trials illustrates this, in the earlier centuries [1] as well as in the 1800s.[2]

A few features of this orthodox practice may now be noticed.

b. The only doubt was as to whether the witness must stop with the specification of abstract qualities, or could go on to speak specifically as to the defendant's likelihood to commit the crime in question; *i. e.* whether, instead of merely asking, "Is he to your knowledge a man of peaceable disposition?" the further inquiry was allowable, "Is he in your judgment a man likely to have raised a disturbance or committed an act of violence?" The latter form of question, as involving an opinion on the merits, was excluded in 1794, in these words:

1794, EYRE, L. C. J., in *Hardy's Trial, supra:* "I have often heard it put, and often heard it objected to. It is certainly not a strictly regular question. You are to ask his general character, and from thence the jury are to conclude whether a man of such a character would commit such an offense. At the same time, in justice to the question, I must say I have known it asked a hundred times; I have very often objected to it myself."

On the other hand, in 1808, throughout Davison's Trial (*supra*), Lord Ellenborough sanctioned that form of question, under the following ruling: "The

§ 1981. [1] 1685, Fernley's Trial, 11 How. St. Tr. 406, 435; 1696, Sir John Freind's Trial, 13 How. St. Tr. 40, 41, 42, 43; 1696, Lowick's Trial, 13 How. St. Tr. 291, 299; 1696, Butler's Trial, 13 How. St. Tr. 1260, 1261; 1702, Swendsen's Trial, 14 How. St. Tr. 589, 590; 1704, Denew's Trial, 14 How. St. Tr. 931, 932; 1710, Willis' Trial, 15 How. St. Tr. 630, 638; 1729, Huggins' Trial, 17 How. St. Tr. 349–354; Acton's Trial, 17 How. St. Tr. 500; 1741, Captain Goodere's Trial, 17 How. St. Tr. 1061–1063; White's Trial, 17 How. St. Tr. 1088; 1753, Murphy's Trial, 19 How. St. Tr. 725; 1758, Barnard's Trial, 19 How. St. Tr. 833, 834, 835, 837, 838, 840, 841; 1754, Canning's Trial, 19 How. St. Tr. 467, 504, 591; 1773, Fabrigas *v.* Mostyn, 20 How. St. Tr. 94; 1775, Fowke's Trial, 20 How. St. Tr. 1184; 1780, Anon., McNally's Evidence, 323; 1783, Dean of St. Asaph's Trial, 21 How. St. Tr. 932, 933; 1783, Bembridge's Trial, 22 How. St. Tr. 66, 67; 1798, Sheares' Trial, 27 How. St. Tr. 323, 362; Byrne's Trial, 27 How. St. Tr. 504.

[2] 1802, Wall's Trial, 28 How. St. Tr. 137; 1802, Macfarlane's Trial, 28 How. St. Tr. 305; 1803, Hedge's Trial, 28 How. St. Tr. 1402, 1403; Kearney's Trial, 28 How. St. Tr. 745; Byrne's Trial, 28 How. St. Tr. 830; Killen's Trial, 28 How. St. Tr. 1037, 1038; Doran's Trial, 28 How. St. Tr. 1067; Donnelly's Trial, 28 How. St. Tr. 1091; McIntosh's Trial, 28 How. St. Tr. 1236, 1237; Keenan's Trial, 28 How. St. Tr. 1264; Redmond's Trial, 28 How. St. Tr. 1306, 1307; 1804, Cobbett's Trial, 29 How. St. Tr. 45, 46; 1805, Picton's Trial, 30 How. St. Tr. 259; 1807, Draper's Trial, 30 How. St. Tr. 1017–1022; 1817, Turner's Trial, 32 How. St. Tr. 1058; Weightman's Trial, 32 How. St. Tr. 1382; 1839, R. *v.* Collins, 3 State Tr. N. S. 1149, 1170, 1174; R. *v.* Lovett, 3 State Tr. 1177, 1185; 1839, R. *v.* Frost, 4 State Tr. 85, 214, 370; 1843, R. *v.* O'Connor, 4 State Tr. 935, 1161 ("From your knowledge of me for eight years, do you think I would do anything calculated to lead to a breach of the peace through any pecuniary motive?"); 1848, R. *v.* Fussell, 6 State Tr. 723, 759; 1848, R. *v.* Duffy, 7 State Tr. 795, 928; 1848, R. *v.* Dowling, 7 State Tr. 382, 454; 1848, R. *v.* O'Donnell, 7 State Tr. 637, 698 ("What in your opinion is his character for peacefulness and good behavior?" "I have always believed him to be a peaceful and well-behaved man").

correct inquiry is as to the general character of the accused, and whether the witness thinks him likely to be guilty of the offense charged in the information." The truth is that Lord Ellenborough's form of question had always been an orthodox one, and it was only towards the end of the century that the unfounded doubt arose.[3]

c. The doctrine that *particular acts* could not be spoken of had very early been enunciated for testimony to a witness' character,[4] but was not then fully established for testimony to a defendant's character,[5] especially for testimony detailing his good deeds (as the above quotations show),[6] and it is the judicial endeavor to enforce this prohibition that has sometimes been misunderstood as directed to the present subject, — with which, of course, it has nothing to do.[7]

d. The hesitation, if any, was as to receiving reputation, and not as to personal knowledge, — as is seen clearly in the quotation from O'Connor's Trial,[8] and is discernible also in Hardy's and Hedge's Trials.[9] The witness constantly spoke from personal knowledge alone, and often (though less frequently) from personal knowledge plus reputation; but to speak from reputation alone is regarded in the 1700s as improper.[10] On this point the law afterwards changed and allowed reputation alone; [11] but the earlier practice thus shows that it was only reputation, and not personal acquaintance, that could be attended by any suspicion of its orthodoxy.

e. The term "character" was normally applied to the actual qualities, and not to the community's estimate of these qualities,[12] as the preceding quotations show. Moreover, the term "*general* character" while it was sometimes applied to the latter, to distinguish it from the former when spoken of at the same time (as in Hardy's Trial, quoted *supra*), was also and commonly applied to the former alone, — especially either to make the second distinction (in *b*, *supra*), or to distinguish (as in *c*, *supra*) the "general" traits themselves from the "particular" acts instancing them. This latter meaning (*i. e.* general disposition as opposed to the inadmissible particular acts showing it)

[3] As the following cases show: 1683, Ward's Trial, 9 How. St. Tr. 299, 330 (perjury; "Do you think he would forswear himself?"); 1696. Butler's Trial, 13 How. St. Tr. 1260, 1261 ("Whether you think she would be guilty of such a forgery?" "I cannot believe she would"); 1704, Denew's Trial, 14 How. St. Tr. 931, 932 (murder; to defendant's witness: "Do you think he would have been guilty of an assassination?" "No, indeed I do not"); 1723, Bishop Atterbury's Trial, 16 How. St. Tr. 323, 572 (Alexander Pope, then engaged on his Odyssey translation, was called to give the accused a good character and was asked "whether he suspected the Bishop was engaged in such matters as were laid to his charge"); 1783, Dean of St. Asaph's Trial, 21 How. St. Tr. 932 ("Do you think him likely to be a man to stir up sedition?" "Far from it; I think him one of the first that would quell it"); 1798, O'Connor's Trial, 28 How. St. Tr. 39, 42 (quoted *supra*); 1831, R. *v.* Cobbett, 2 State Tr. N. S. 789, 876 (testimony that the defendant was not "likely to incite the laborers to outrage").

[4] *Ante*, §§ 979, 987.

[5] *Ante*, § 194.

[6] *Ante*, § 195.

[7] Compare the quotations next ensuing, *supra*.

[8] Quoted *post*, § 1982.

[9] Quoted *ante*, this section.

[10] On this point, compare also the quotation *post*, § 1982, for witness' character.

[11] *Ante*, § 1610.

[12] This should be clearly realized. Whatever ambiguities the phrase "general character" had, "character" meant just what it seems to mean. Compare what is said as to this distinction, *ante*, § 1608.

seems to have been the original and natural source of the phrase and the orthodox application of it. This point, important in clearing up obscurities, is made evident by the following passage: [13]

1722, *Layer's Trial*, 16 How. St. Tr. 246; various discreditable facts being offered to discredit a witness, he was stopped, on objection. L. C. J. PRATT (to counsel): "Mr. Hungerford, you know what the rule of practice and evidence is, when objections are made to credit and reputation of the witness; you cannot charge him with particular offenses. For if that were to be allowed, it would be impossible for a man to defend himself. You are not to examine to the *particular facts* to charge the reputation of any witness, but only *in general* you are to ask what his *character and reputation* is. . . . You know, if there be any objection to him, to his *general character*, he can answer them; but if objections are grounded on *particular charges* of his being a base, an infamous, and an ill man, not having any notice of this, it is impossible for him to defend himself." [14]

When it is remembered that up to this time nobody questioned the propriety of calling for personal knowledge as to actual character, it will easily be seen that "*general* character" could usually mean only one thing, viz.: the general or abstract trait as distinguished from particular instances of it.

We are now in a position to understand the remark of Lord Ellenborough, C. J., in Jones' Trial: [15] "It is reputation; it is not what a person knows." This was called forth by the persistent attempt of counsel to bring out particular facts showing honesty, in violation of the above rule. The remark is easily interpreted in that sense in the light of the same judge's clear opinion and practice in Davison's Trial,[16] in the preceding year, when he freely allowed the witnesses to speak from personal knowledge only, and distinctly sanctioned the question "whether he thinks him likely to be guilty of the offence charged," and there used the term "general character" simply as distinguished from particular acts. But the isolated phrase above in Jones' Trial somehow caught the attention of later treatise-writers, and, being misunderstood, has proved a great stumbling-block; for example, in the argument of counsel in R. *v.* Rowton,[17] where Mr. Taylor truly said: "There is only one judicial authority to exclude individual opinion, and that is what Lord Ellenborough said in R. *v.* Jones"; and that, he might have added, was really no authority if rightly understood.

f. The practice and the rule in England to the middle of the 1800s are thus plain. The statements of the early and classical writers (all writing from experience at the bar) are equally clear when we understand the usage of the term "character" in this connection.[18] That personal belief, estimate, opinion, or knowledge — under whatever name — was proper and unques-

[13] Italics are used to elucidate the emphasis.

[14] So also: 1780, Maskall's Trial, 21 How. St. Tr. 667; 1817, R. *v.* Watson, 2 Stark. 149; 1831, R. *v.* Cobbett, 2 State Tr. N. S. 789, 875.

[15] 31 How. St. Tr. 310 (1809).

[16] Quoted *supra*, in this section.

[17] *Post*, § 1982.

[18] 1801, Peake, Evidence, 2d ed., 8; 1802, McNally, Evidence, 324; 1814, Phillipps, Evidence, 1st ed., 72, 108; 1824, Starkie, Evidence, 1st ed., II, 366.

tionable testimony to character seems clear enough as the law and the practice throughout this whole period.

g. In 1865 came the decision in R. *v.* Rowton,[19] surprising the profession,[20] and ignoring the long record of precedents.[21] The effect of R. *v.* Rowton is to exclude testimony founded exclusively on personal knowledge, and to require the question in form to be directed to reputation alone. The ruling, it seems, has been seldom acted on in practice.[20]

§ 1982. **Witness' Character.** There was in thought and in legal rule, under the original and orthodox practice, no different attitude towards proof of a *witness' character*. The witness to such character, as the following quotations illustrate, constantly, if not usually, spoke from a personal acquaintance; reputation was often, if not commonly, ignored:

1692, *Duke of Norfolk's Divorce Suit*, 12 How. St. Tr. 899, 919: "Witnesses produced to the credit of Rowland Owen [witness]; *Edward Sylvester* saith: He hath known Rowland Owen three or four years, and he hath trusted him in business, and he hath ever been very faithful; he hath trusted him in stores to the king, and he might have embezzled, but ever found him honest, and he hath had three or four thousand pounds' worth of goods that he might have embezzled, and hath had opportunities of doing ill things, but he never did; he hath trusted him with everything he hath; he hath had more than twenty pounds embezzled by others, but he never embezzled a halfpenny." [1]

1722, *Layer's Trial*, 16 How. St. Tr. 253; *Counsel:* "Is he a man as may be believed, even upon his oath, or not?" *Witness:* "I must tell you that I found him in so many mistakes about his own wife that, by God, I would not take his word for a halfpenny." *Counsel:* "Go on, but don't swear 'by God' any more."

[19] Leigh & C. 520, 10 Cox Cr. 25, with two judges dissenting.

[20] See the remarks of Mr. J. Stephen, in his Digest of Evidence, 3d ed., Note XXV.

[21] The opinion of Cockburn, C. J., for the majority, does not cite a single precedent in its favor or discuss the question of policy, and even admits that "the strict rule is often exceeded in practice," and the conclusion seems to have been reached in a doctrinaire fashion, by attributing a supposed meaning to "character," which, as above shown, it does not have. The completeness of the historical misunderstanding in the mind of the learned but dogmatic Chief Justice may be judged from his following statement, which should be compared with the preceding list of citations: "No one has ever heard the question, 'What is the tendency and disposition of the prisoner's mind?' put directly." The Chief Justice's citation of Phillipps on Evidence seems to show that he reached his conclusion solely on that authority, the frailty of which may be seen in a few words. In the first edition, of 1814, at p. 72, was the following passage, quite consistent with the law as explained above: "In trials for felony the prisoner is always permitted to call witnesses to his general character"; repeated in substance up to the 3d edition; then, in the 4th, in 1820, comes the following insertion: "What, then, is evidence of general character? One medium of proof is by showing how the person stands in general estimation; proof that he is reputed to be honest is evidence of his character for honesty, and the species of evidence most commonly resorted to in such inquiries. It frequently occurs that witnesses, after speaking to the general opinion of the prisoner's character, state their personal experience of his honesty; and this statement is admitted, rather from favor to the prisoner, than strictly as evidence of general character." This passage is made more emphatic in later editions, ending with the 10th (I, 507) in 1852. But not a single authority was vouchsafed for the above passage until in 1824, in the 6th edition, R. *v.* Jones, the single misleading utterance, above explained, was referred to; and, in spite of the score of instances in the 1800s alone, no other citation was made, nor could be, indeed, to justify that passage. Thus, curiously and unfortunately enough, the law of England as repeatedly declared for two centuries was overturned by a passage invented and inserted by a text-writer without the citation of a single precedent.

§ 1982. [1] Earlier precedents in the same century are: 1664, Turner's Trial, 6 How. St. Tr. 565, 607; 1680, Earl of Stafford's Trial, 7 How. St. Tr. 1293, 1457.

1725, *Lord Chancellor Macclesfield's Trial*, 16 How. St. Tr. 1239; *Common Serjeant:* "We desire that Mr. Price may give your Lordships an account of what he knows of the character of Mr. Cothingham and how long he hath known him." Mr. *Price:* "My lords, I have known him upwards of twenty years; I never knew anybody say anything amiss of him. . . . I know no man in his place behaved himself better than he hath done." *Common Serjeant:* "We desire to ask not only to what Mr. Price's opinion is, but to what is the opinion of others, as to his general character." Mr. *Price:* "I believe, if you ask his character of an hundred people, ninety of them will give him rather a greater character."

1798, *O'Connor's Trial*, 27 How. St. Tr. 32; Mr. *Dallas:* "Does your lordship [the witness, Earl of Moira] know a person of the name of Dutton, a quartermaster in the artillery?" "I have heard of him, I do not know him." "Does your lordship know what is his general character?" "Mr. *Garrow:* "His lorsdhip says that all he knows of Dutton's character is from hearing. . . . The constant practice, where character has been inquired into, has been to put the question thus: Are you acquainted with such a person? From your acquaintance with him, what is his general character? But I never heard that when a witness says, 'I do not know the person, but have heard of him,' that then it was asked, 'What have you heard of his reputation?'" Mr. *Dallas:* "I admit that hearsay would not be evidence of any particular fact. But . . . I take it to be perfectly clear that it is no objection in this case, to an account of character, to say that it amounts only to hearsay; because when one man gives the character of another, it must be that which he has heard from others, for it extends beyond his own knowledge, and the question is generally put to an extent beyond his own knowledge." Mr. Justice BULLER: "Did you ever hear that asked when the witness said he knew nothing about the person?" Mr. Justice HEATH: "It must be founded in personal knowledge." Mr. Justice LAWRENCE: "'The question is always put in this way: 'Do you know the witness? Yes. Then, what do you know of him?'" Mr. *Dallas:* "It is my duty to acquiesce."

This was the established practice of the 1700s[2] as well as of the 180[illegible] Some things are clear from these precedents:

a. The terms "character" and "general character" are used more or les[illegible] flexibly, but do *not* have an orthodox meaning of "reputation." What ha[illegible]

[2] 1742, Annesley's Trial, 17 How. St. Tr. 1132; 1744, Earl of Anglesea's Trial, 18 How. St. Tr. 273; 1754, Canning's Trial, 19 How. St. Tr. 589, 595; 1797, Carty's Trial, 26 How. St. Tr. 900; 1798, Bond's Trial, 27 How. St. Tr. 580, 584, 586, 588.

[3] 1802, Wall's Trial, 28 How. St. Tr. 142; 1802, R. *v.* Taylor, cited in McNally, Evidence, 261, per Buller, J. ("swearing that from what they had observed in his conversation and manners they would not believe him on oath"); 1802, Mawson *v.* Hartsink, 4 Esp. 102, Lord Kenyon, C. J. ("He was asked as to his knowledge of L., and whether he would believe him on oath"); 1804, Carlos *v.* Brook, 10 Ves. Jr. 49, Lord Eldon, L. C. ("whether he would believe that man upon his oath"); 1805, R. *v.* Rudge, Peake Add. Cas. 232, Lawrence, J. ("by general evidence of persons who were acquainted with him as to their belief of his credibility on oath"); 1806, McDonough's Trial, 30 How. St. Tr. 20; The Threshers' Trials, 30 How. St. Tr. 214; 1805, Picton's Trial, 30 How. St. Tr. 259; 1813, Plumer, V. C., in Watmore *v.* Dickinson, 2 Ves. & B. 265 ("The only proper question as Mr. Cooke ha[illegible] observed, is whether the witness is worthy of belief upon his oath"); 1814, Anon., 8 Ves. & B. 93 (an affidavit discrediting by particul[illegible] facts was taken off the file; Eldon, L. C[illegible] "You may ask, whether the witness is to b[illegible] believed upon his oath; which is the course at law, not going to particular facts"); 1817, R. *v.* Watson, 2 Stark. 154, 32 How. St. Tr. 495 (Abbott, J.: "The usual question put for the purpose of discrediting the testimony of a witness is, 'Would you believe that witness upon his oath?'" Bayley, J.: "The witnesses may state that he is not a man to be believed upon his oath"); 1817, R. *v.* Clark, 2 Stark. 241, Holroyd, J. (after discrediting evidence of imprisonment, the superintendent of the House of Refuge was allowed to speak to the witness' good character while there); 1817, Sharp *v.* Scoging, Holt N. P. 541, Gibbs, C. J. ("When you endeavor to destroy the credit of a witness, you are permitted to call other witnesses who know him, and to ask them this general question, Would you believe such a man upon his oath? . . . As no man is to

been said (*ante*, § 1981, *c*), applies equally to the terms as here used. Moreover, reputation alone, as O'Connor's Trial shows, was not regarded as sufficient; personal knowledge was the fundamental requirement.[4]

b. The only doubt was whether, since credibility was the important thing in a witness, the attack could be made upon his "general character" — *i. e.* his qualities as a man generally — or only upon the specific trait of credibility. Towards the end of the 1700s, the opinion grew up that this "general character" (*i. e.* as a whole) had nothing to do with his credibility, and that the testimony must be specifically directed to the latter quality only.[5] But a compromise was finally reached, and the witness was allowed to employ his knowledge of this "general" character, and to lay it before the Court with reference specifically to credibility, *i. e.* to say whether he would believe the other upon oath.[6] The important thing here is that it was assumed that the witness spoke from personal knowledge, and the controversy was simply whether the statement of his experience should deal with the man's good or bad qualities as a whole, or with only the specific quality of credibility upon oath.

We are now in a position to understand the language of the classical treati writers of the early 1800s. In Phillipps' passage, for instance,[7] so often cited in this country, he used "general character," *not* in the sense of "repu tion," but of general traits or qualities as distinguished from par-

be permitted destroy a witness' character without having grounds to state why he thinks him unworthy of credit, you may ask him his means of knowledge and his reasons of disbelief"); 1820, Thistlewood's Trial, 33 How. St. Tr. 812; Davidson's Trial, 33 How. St. Tr. 1440, 1441; 1824, May v. Brown, 3 B. & C. 126, Bayley, J. ("When the credit of a witness is objected to, general evidence that he is not to be believed on oath is admissible; but specific evidence of that at some period he had committed a particular crime is not admissible"); 1830, R. v. Bispham, 4 C. & P. 392, Garrow, B. (repudiating the suggestion that a character-witness must have heard the impeached witness examined on oath at least once: "You have known him three years; have you such a knowledge of his general character and conduct that you can conscientiously say that, from what you know of him, it is impossible to place the least reliance on the truth of any statement that he may make?" "Yes"); 1833, R. v. Hemp, 5 C. & P. 468, Denman, L. C. J. (the question "whether from having heard Mr. J. give false evidence on the trial of a former cause, he considered that his testimony could be relied on," was excluded, and the question allowed: "From what you know of the general character of Mr. J., would you believe him on oath?"); 1833, R. v. Nicholls, 5 C. & P. 606, Parke, J. (whether the witnesses in question were "of very bad character" and whether "he would believe those persons on their oaths"; allowed); 1843, R. v. Tissington, 1 Cox Cr. 48, Abinger, C. B., *semble*; 1848, R. v. Duffy, 7 State Tr. N. S. 795, 897.

[4] The following passages show this as the historical starting-point: 1684, Rosewell's Trial, 10 How. St. Tr. 147, 230 ("Do you know this of your own knowledge? For we must not hear evidence to take away people's reputation by hearsay"); 1686, Lord Delamere's Trial, 11 How. St. Tr. 509, 570 ("It is not what the town says, but what can be proved, that we must take for evidence").

[5] 1794, Rowan's Trial, 22 How. St. Tr. 1065 (objected to and withdrawn); see particularly the language in Carlos v. Brook, Watmore v. Dickinson, *ante*, and the cases immediately thereafter, in which the quality of credibility is made the essential requirement of the testimony. This subject has been already more particularly examined *ante*, § 922.

[6] This form appears as early as 1794, per Buller, J., in De la Motte's Trial, 21 How. St. Tr. 811; and later in Mawson v. Hartsink, Watson's Trial, R. v. Bispham, and R. v. Hemp. It does not seem to have become usual till after 1830.

[7] 1814, Phillipps, Evidence, 1st ed., 109: "The regular mode is to inquire whether they have the means of knowing the former witness' general character, and whether from such knowledge they would believe him on his oath [citing Rookwood's Trial and Mawson v. Hartsink]."

ticular acts and from the specific quality of credibility. This is shown by a collation of the statements of other writers of the time.[8] They had two important rules in mind: (1) that you cannot give evidence of particular acts, and (2) that (as just pointed out) you cannot against a witness speak of his general qualities unless you follow it up with the specific quality of credibility; and it was in trying to make this plain that they employed the term "general character"; any meaning of "reputation," as distinguished from personal knowledge, was far from their minds, and would have been repudiated.

d. In modern practice, the ruling in R. *v.* Rowton [9] seems not to have been regarded as affecting testimony to a witness' character, and the orthodox and traditional use of personal knowledge still obtains, both in practice [10] and in law.[11]

b. United States

In the United States the orthodox rule has been widely departed from, in both branches; though the tendency is just the opposite of that in England, *i. e.* the departure is more marked in the case of a witness' character.

§ 1983. **Moral Character of Accused, of Complainant in Rape, of Deceased in Homicide, and the like.** In the application of the rule to a party (or quasi-party) in a criminal case, the matter has not received adjudication as generally as might be supposed; but so far as decisions have dealt with it, reputation is in the majority of jurisdictions made the exclusive mode of proof.[1] Apparently the result has been reached by accepting the analogy of

[8] 1806, Evans, Notes to Pothier, 1st ed., II, 260 ("It is an established rule that witnesses examined with a view to discredit the testimony of others cannot be admitted to depose to particular facts of criminality, but can only express their general opinion whether the party is or is not entitled to be believed upon his oath"); 1824, Starkie, Evidence, 1st ed., I, 145, 146 ("The credit of a witness may be impeached . . . by general evidence that he is not worthy to be believed upon oath, but no evidence can be given of particular collateral facts. . . . The proper question to be put to a witness for the purpose of impeaching the general character of another witness is, whether he could believe him upon his oath?"). If Starkie's passage had been used rather than Phillipps', American Courts would hardly have been led into the maze of varying rulings which they now have.

[9] Cited *ante*, § 1981.

[10] 1883, Stephen, Hist. Crim. Law, I, 437: "[The witness] may, however, be impeached by witnesses who will swear in general terms that he is not worthy of credit on oath."

[11] 1867, R. *v.* Brown, 10 Cox Cr. 453, before five judges; the question whether the witnesses "would believe the witnesses for the prosecution upon their oaths," was held proper, R. *v.* Rowton not being held to exclude it; Kelly, C. B.: "The practice now called in question has existed for centuries, and all of us have knowledge of it so far as our experience goes. The question reserved as to it ought not therefore to be argued at all." The argument, based on R. *v.* Rowton and Phillips *v.* Kingfield, *post*, was specifically directed against any use of the witness' personal opinion. Martin, B., however, while rejecting the argument emphatically, quoted as accurate a passage from Taylor on Evidence, § 1324, declaring the regular mode of question to be, "Whether he knows his general reputation, what that reputation is, and whether from such knowledge he would believe him on his oath." This was not the form used in the case in hand; and yet the failure of Martin, B., to perceive any distinction detracts greatly from the force of the ruling.

§ 1983. [1] In the following list are also included cases dealing with the moral character of a *complainant in rape* and a *deceased in homicide;* the distinction being practicable between moral traits of all such persons, on the one hand, and the moral trait of veracity in a witness, on the other hand: there should of course be no distinction in principle. Where not otherwise noted, the character involved in

the settled notion as to witness' character; and the reasons are therefore to be sought under the latter head

the following rulings is that of an accused: *Alabama:* 1885, Jackson *v.* State, 78 Ala 472 (personal knowledge excluded); 1888, Hussey *v.* State, 87 Ala. 133, 6 So. 400 (same); 1889, Holmes *v.* State, 88 Ala. 26, 29, 7 So. 193 (excluded where the witness had known the defendant for only two years and not intimately); 1889, Moulton *v.* State, 88 Ala. 116, 118, 6 So. 758 (only reputation admissible); 1921, Latikos *v.* State, 17 Ala. App. 592, 88 So. 45 (defendant's character not provable by witness' personal opinion); 1921, Lambert *v.* State, 205 Ala. 547, 88 So. 847 (murder; witness' personal knowledge of deceased's character for violence, not admissible); *Arkansas:* 1921, Trotter *v.* State, 148 Ark. 466, 231 S. W. 177 (manslaughter; witness' opinion, based on reputation of deceased's character for violence, excluded, because only reputation was relevant to show defendant's state of mind); *California:* 1879, People *v.* Casey, 53 Cal. 361 (testimony of long personal acquaintance; "during that time his character has always been that of a quiet, peaceable citizen; I never knew of his having any other difficulty"; this was referred to by the Court as "not the most satisfactory method of proving a previous good reputation"); 1893, People *v.* Samonset, 97 Cal. 448, 450, 32 Pac. 520 ("chaste character" of prosecutrix in seduction proved by one who had "never known of any improper conduct on her part"); 1897, People *v.* Wade, 118 Cal. 672, 50 Pac. 842 (chaste character of seduction-prosecutrix; personal opinion of the head of a family in which she lived, received); 1904, People *v.* Tibbs, 143 Cal. 100, 76 Pac. 904 (People *v.* Wade approved); *Connecticut:* 1820, Hosmer, C. J., in Stowe *v.* Converse, 3 Conn. 343 (to rebut a charge of infidelity, admitting a "uniform profession, conduct, and conversation from his youth up"); 1866, State *v.* Jerome, 33 Conn. 265, 269 (the defendant's character for chastity being in issue, questions were allowed as to the extent of the witness' personal acquaintance with the defendant, inasmuch as "there must be a great difference between the opinion of a next-door neighbor and that of a distant acquaintance"); *Delaware:* 1900, State *v.* Briscoe, 3 Penn. Del. 7 50 Atl. 271 (larceny; personal knowledge of defendant's character, based on business dealings, excluded); *Georgia:* 1853, Stamper *v.* Griffin, 12 Ga. 453, 456 (personal knowledge used; no question raised); *Illinois:* 1882, Hirschman *v.* People, 101 Ill. 568, 574 (personal knowledge excluded); 1905, People *v.* Sullivan, 218 Ill. 419, 75 N. E. 1005 (disbarment; a statement signed by numerous judges that the respondent "was never fined, rebuked, or censured" by any of them, and that his "professional character was never assailed to their knowledge," held to relate only to the "personal knowledge or personal belief of the signers," and to be therefore inadmissible); *Indiana:* 1891, Bowlus *v.* State, 130 Ind. 227, 230, 28 N. E. 1115 (in showing the deceased's character, as affecting the issue of self-defence, personal knowledge of the defendant is a proper source); *Iowa:* 1885, State *v.* Sterrett, 68 Ia. 76, 78, 25 N. W. 936 (personal knowledge allowed); 1885, State *v.* Cross, 68 Ia. 180, 185, 26 N. W. 62 (same); 1905, State *v.* Richards, 126 Ia. 497, 102 N. W. 439 (State *v.* Sterrett, followed); 1915, State *v.* Rowell, 172 Ia. 208, 154 N. W. 488 (opinion of immoral quality of supposed acts of accused, excluded); *Kansas:* 1906, State *v.* Simmons, 74 Kan. 799, 88 Pac. 57 (personal opinion inadmissible; certain forms of expression passed upon); 1908, State *v.* Tawney, 78 Kan. 855, 99 Pac. 268 ("Do you know his character, etc.?" held proper, the term being presumably used for "reputation"); 1909, Spain *v.* Rakestraw, 79 Kan. 758, 101 Pac. 466 (self-defence to a battery; witness to plaintiff's character as a quarrelsome man; rule of State *v.* Johnson, *post*, § 1985, applied, but with liberality); *Kentucky:* 1916, McLain *v.* Com., 171 Ky. 373, 188 S. W. 377 (deceased's violent character in homicide; defendant may show "by persons intimately acquainted with him to the effect that that was his nature"); *Massachusetts:* 1850, Com. *v.* Webster, Mass., Bemis' Rep. 241 ("individual and personal opinion," inadmissible); 1876, Com. *v.* O'Brien, 118 Mass. 345 (quoting R. *v.* Rowton, Eng., but expressing no choice between the two rules); 1891, Day *v.* Ross, 154 Mass. 13, 27 N. E. 676, *semble* (personal knowledge excluded); *Michigan:* 1900, People *v.* Turney, 124 Mich. 542, 83 N. W. 273 (personal knowledge excluded); 1904, People *v.* Albers, 137 Mich. 678, 100 N. W. 908 (personal knowledge, excluded; People *v.* Turney not cited); *Minnesota:* 1876, State *v.* Lee, 22 Minn. 407, 409 (personal knowledge admitted; quoted *post*, § 1987); *Nebraska:* 1894, Berneker *v.* State, 40 Nebr. 810, 815, 59 N. W. 372 (defendant's honest character, not provable by personal knowledge); 1897, Golder *v.* Lund, 50 Nebr. 867, 70 N. W. 397 (plaintiff's character for peaceableness, excluded); *Nevada:* 1880, State *v.* Pearce, 15 Nev. 188, 190 (personal knowledge of the defendant's good character, excluded); *New Mexico:* 1918, State *v.* Sedillo, 24 N. M. 549, 174 Pac. 985 (murder; personal opinion, as a sole basis for testimony to reputation of deceased, rejected); *New York:* 1830, People *v.* Mather, 4 Wend. 258 (obscure); 1880, Mayer *v.* People, 80 N. Y. 377 (testimony to actual good conduct admitted; no question raised); 1888, People *v.*

§ 1984. **Character for Care, Competence, or Professional Skill, as Party or Witness.** In civil cases, orthodox principle has seldom been abandoned in rulings upon the character qualities usually in issue, — the competence of an employee as to carefulness, the professional competence of a physician as to skill, the mental capacity of a testator as to sanity, and the like, — in short, the non-moral traits of character, as distinguished from the moral traits of peaceableness, honesty, chastity, and general goodness, which usually come into question for a defendant in a criminal case. As to the former class of traits, the orthodox rule in England was there followed, and personal knowledge and opinion was admitted.[1] In the United

Greenwall, 108 N. Y. 302, 15 N. E. 404 (same); 1907, People *v.* Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718 (defendant in homicide; "the personal knowledge and belief of the witness must be excluded"); *North Carolina:* 1827, Pierce *v.* Myrick, 1 Dev. 345, 346 (evidence held receivable of the "general good character, and orderly deportment" of a slave); 1855, Bottoms *v.* Kent, 3 Jones L. 160 (Pearson, J.: "Proof by the individual opinion of witnesses, formed from an observation of particular acts, which necessarily lets in the history of a person's whole life-time," is therefore objectionable; but, *semble*, is admissible on testamentary issues concerning undue influence, etc.); *Ohio:* 1860, Gandolfo *v.* State, 11 Oh. St. 114 (Question: "From your knowledge of the defendant, what is his character for peace and quietness? By 'character,' I mean what the man *is*, not what people say about him"; held proper; except that the witness could not be asked for an opinion not found on cources "common to those acquainted with" the person; quoted *post*, § 1987,; 1875, Marts *v.* State, 26 Oh. St. 162, 168 (character of the murdered person; admitted); 1907, State *v.* Dickerson, 77 Oh. 34, 82 N. E. 969 (Gandolfo *v.* State approved; "the accused is not confined to his reputation for a certain trait . . . but may by those most intimate with him during a course of years spread before the jury his real self"); *Pennsylvania:* 1855, Zitzer *v.* Merkel, 24 Pa. 408 (of the daughter, in an action for seduction; personal knowledge excluded); *Washington:* 1909, State *v.* Hosey, 54 Wash. 309, 103 Pac. 12 (rape under age; defendant's character proved by opinion based on personal knowledge, expressly declared admissible; Dunbar, J.: "reputation such as was proved under the old rule was only what a certain given number of people thought about a man, and was but an enlargement in numbers of what one man thought or knew about him; and there seems to be no good reason why the opinion and knowledge of the one man should be excluded because he is not able to duplicate that opinion by giving the names of others who have expressed their opinion as to his reputation"; but the Court's opinion is open to criticism in that it reaches this result by deduction from the rule that reputation may consist in not having heard anything against the man; personal opinion is distinct from that (*ante*, § 1614), and the decision should have recognized the distinction); *Wisconsin:* 1879, Dufresne *v.* Weise, 46 Wis. 290, 297, 1 N. W. 59 (in showing character as affecting damages for defamation, personal knowledge is admissible).

As to a *deceased's character*, in a homicide charge, it is to be noted that his *actual character* as evidence of his probable aggression, offered under § 63, *ante*, ought to be provable by personal knowledge, as in Bowlus *v.* State, Ind., *supra;* but his *reputed character*, as evidence of the defendant's reasonable apprehension, under § 266, *ante*, could be proved only by reputation: 1899, State *v.* Shadwell, 22 Mont. 559, 57 Pac. 281.

The question, "Do you believe that the defendant (or, a man of his character) would be likely to commit an act of the kind here charged?" which was usual in the early orthodox English practice (as seen *ante*, § 1981, par. *b*, n. 3, and § 59, n. 2), would be equally forbidden by the American Opinion rule as above accepted; a few cases showing this are cited *ante*, § 59, n. 3.

§ 1984. [1] 1807, R. *v.* Williamson, 8 C. & P. 635, Ellenborough, L. C. J. (women, to the skill of a midwife who had attended them); 1831, R. *v.* Long, Old Bailey, before Bayley, B., Pelham's Chronicles of Crime, ed. 1891, II, 217, 227 (quoted *ante*, § 221); 1844, Greville *v.* Chapman, 5 Q. B. 738 (here the action was for libel in charging the plaintiff with dishonorable conduct in betting against his own horse and then withdrawing him; the witness, who had testified that no rule of the Jockey Club forbade this conduct, was allowed to explain that a person doing this would still be regarded as lacking in honor and would probably be expelled from the Club); 1848, R. *v.* Whitehead, 3 C. & K. 202, Maule, J. (a patient who had been treated for cancer, to his physician's competence). In Ramadge *v.* Ryan, 9 Bing. 333 (1832) where the defendant had praised T., a physician who refused to consult with the plaintiff, a quack

States there has been comparatively little departure from the orthodox rule. Personal knowledge, as the foundation of testimony to *sanity*, has everywhere been held admissible, though (for lay witnesses) only after a long controversy and with certain local qualifications of rule.[2] Testimony of the same sort to *carefulness* or *negligence* of disposition (when in issue or evidential as to an employee or a party) has also usually been received.[3]

physician, a physician-witness B. was not allowed to state whether T. had "honorably and faithfully discharged his duty to the medical profession" as alleged by the defendant; the Court's reason was that such an answer would depend entirely on the temper of each witness; but the real reason seems to be that it was not the witness' individual standard, but the general professional standard which alone was of consequence. In Bremer *v.* Freeman (1857), 10 Moo. P. C. 306, 362, Lord Wensleydale, referring to the difficulty of weighing the conflicting testimony of certain experts to foreign law, remarked that "a proper sense of professional delicacy precludes them from giving evidence as to the merits of each other."

[2] This has already been examined *ante*, §§ 1933-1938.

[3] Compare with the following the cases cited *ante*, §§ 199, 208 (particular acts), and § 1621 (reputation): *U. S.* 1896, Crane Co. *v.* Columbus C. Co., 20 C. C. A. 233, 73 Fed. 984 (whether workmen were men of experience or skill, allowed); 1905, Southern Pac. Co. *v.* Hetzer, 135 Fed. 272, 277, 68 C. C. A. 26, *semble* (fellow-servant's character, admissible); *Ala.* 1905, First Nat'l Bank *v.* Chandler, 144 Ala. 286, 39 So. 822 (whether an employee was "a wide-awake, attentive boy," allowed); 1920, Jackson *v.* Vaughn, 204 Ala. 543, 86 So. 469; *Conn.* 1921, Kelly *v.* Waterbury, 96 Conn. 494, 114 Atl. 530 (death by automobile; whether the driver "gave evidence of being an inexperienced driver," not allowed); 1921, Richmond *v.* Norwich, 96 Conn. 582, 115 Atl. 11 (injury by rifle shot from a guard stationed by defendant in war-time at the reservoir; personal opinion as to the guard's traits, held admissible; quotation *supra*, § 1986); *Ga.* 1896, Columbus & R. R. Co. *v.* Christian, 97 Ga. 56, 25 S. E. 411 ("such general character [of an incompetent employee knowingly employed] must rest largely upon the opinions of witnesses, based upon their observation of the conduct of the individual, and upon the impressions formed upon their minds by reports of other persons"); 1907, Moore *v.* Dozier, 128 Ga. 90, S. E. 110 (custody of child; that the mother was "an unfit person to rear the children," not allowed); *Ia.* 1893, Butler *v.* R. Co., 87 Ia. 206, 210, 54 N. W. 208 (whether an engineer was skilled, excluded); *Kan.* 1895, Cherokee P. C. & M. Co. *v.* Dickson, 55 Kan. 62, 39 Pac. 691 (inadmissible; yet it was held admissible to speak of "the general manner in which he did his work" and "wherein his work differed from that of a skilful miner"); 1911, Saunders *v.* Atchison T. & S. F. R. Co., 86 Kan. 56, 119 Pac. 552 (competence and skilfulness of an engineer, allowed); *Ky.* 1911, Mayfield Lumber Co. *v.* Lewis Adm'r, 142 Ky. 727, 135 S. W. 420 (driver's incompetence; excluded; no authority cited); *Mass.* 1855, Baldwin *v.* R. Co., 4 Gray 333 (negligent character of the plaintiff's driver; provable by one having personal knowledge); 1861, Gahagan *v.* R. Co., 1 All. 190 (a flagman shown to be "careful, attentive, and temperate," by "witnesses who had seen his conduct and could testify to the facts which they had observed"); 1894, McGuerty *v.* Hale, 161 Mass. 51, 36 N. E. 682 (that an employee was careful, able, etc., allowed); *Mich.* 1896, Lewis *v.* Emery, 108 Mich. 641, 66 N. W. 569 (whether a person was a competent workman, admitted); *Minn.* 1900, Nutzmann *v.* Ins. Co., 78 Minn. 504, 81 N. W. 518 (the skill and experience needed to operate a hydraulic elevator; allowed); *Mo.* 1896, Boettger *v.* Iron Co., 136 Mo. 531, 38 S. W. 298 (whether an employee was competent; excluded); 1898, Langston *v.* R. Co., 147 Mo. 457, 48 S. W. 835 (manager's opinion of employee's competency, excluded); *Okla.* 1919, Federal Oil & Gas Co. *v.* Campbell, 65 Okl. 49, 183 Pac. 894 (whether a fellow-servant was competent for the work assigned, not allowed; the opinion does not discriminate between this question and that of § 1951 *ante*; the authorities quoted deal with the question of § 1951 and not with the present one); *Pa.* 1860, Frazier *v.* R. Co., 38 Pa. 104, 111 (negligence of the defendant in knowingly employing a careless servant; defendant's officer's personal estimation of the servant as a careful man, admitted); 1874, Hays *v.* Millar, 77 Pa. 239, *semble* (where a carrier's selection of competent servants is material to the issue, their competency and skill may be shown by persons well acquainted with them, and cannot be shown by reputation); *S. Car.* 1902, Hicks *v.* R. Co., 63 S. C. 559, 41 S. E. 753 (competency of an engineer; witness' opinion excluded); *Tex.* 1888, Houston & T. C. R. Co. *v.* Patton, — Tex. —, 9 S. W. 175 (fellow-servant's testimony to an engineer's careless character, admitted); 1898, Galveston H. & S. A. R. Co. *v.* Davis, 92 Tex. 372, 48 S. W. 570 (engineer's incompetence; opinion of railroad man knowing him, admitted); *Utah:* 1899, Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295 (fellow-servant's incompe-

Testimony to *professional skill*, concerning either party or witness, when furnished by professional persons qualified to know, is also generally regarded as receivable.[4]

Distinguish (1) testimony to the quality or significance of a *particular act* (*ante*, § 1949); for example, to the propriety or due care of a specific act of a surgeon or employee under certain circumstances, as contrasted with the general competence of the surgeon or employee performing it; both sorts of testimony should be received; but the objection of the Opinion rule has a different force in the two cases; (2) *conduct of other persons* as circumstantial evidence of skill, reasonableness, etc. (*ante*, § 461).

§ 1985. **Witness' Moral Character.** Here the departure from the orthodox rule has been almost complete; in nearly all of the jurisdictions, reputa-

tence; personal opinion excluded); *W. Va.* 1905, Purkey *v.* Southern C. & T. Co., 57 W. Va. 595, 50 S. E. 755 (opinion as to the competency of a mine-boss, excluded).

[4] Compare with the following the cases in the sections cited in note 3, *supra*; *Ala.* 1847, Tullis *v.* Kidd, 12 Ala. 650 (competency of a physician, allowed); 1903, Birmingham R. & E. Co. *v.* Ellard, 135 Ala. 433, 33 So. 276 (opinion of one expert as to another's skill, excluded; the ruling gives confused reasons); *Col.* (*Dist.*): 1881, Guiteau's Trial, D. C., II, 1421 (Mr. Reed, for the defendant: "I submit that one expert cannot go upon the stand and swear that another expert is a fool"; the Court: "There is no legal objection, but as a matter of expediency it is not generally to be encouraged, I think"; compare Lord Wensleydale's remark, quoted *ante*, § 1984); *Conn.* 1917, Gray *v.* Mossman, 91 Conn. 430, 99 Atl. 1062 (defamation; plea, privilege of a military report; character desirable in a military officer, testified to by military experts); *Ill.* 1905, Cleveland *v.* Martin, 218 Ill. 73, 75 N. E. 772 (injunction by medical author to restrain the publication of a book as not equal to contract and as likely to damage the plaintiff's repute; the opinions of medical men as to the probable or actual injury to repute by the publication were admitted); *Ia.* 1883, State *v.* Maynes, 61 Ia. 120, 15 N. W. 864 (qualifications of another expert witness, allowed); 1896, Kuen *v.* Upmier, 98 Ia. 393, 67 N. W. 374 (whether another person was able to speak English, admitted); 1898, Lacy *v.* Kossuth Co., 106 Ia. 16, 75 N. W. 689 (incompetency of a physician, under statute "mere individual opinion," excluded); *Ky.* 1901, Clark *v.* Com., 111 Ky. 443, 63 S. W. 740 (abortion; the operation being bunglingly done, and the issue being whether it had been done by the deceased herself, or by the defendant, testimony as to the defendant's skill, by those who had personal knowledge of his conduct of cases, was held admissible); *La.* 1832, Brabo *v.* Martin, 5 La. 177 (qualifications of another expert, excluded, as confusing the issues); *Mich.* 1882, Mason *v.* Phelps, 48 Mich. 131, 11 N. W. 413 (qualifications of another expert witness, allowed); 1897, People *v.* Holmes, 111 Mich. 364, 69 N. W. 501 (similar); 1908, Alexander *v.* Mud Lake L. Co., 153 Mich. 70, 116 N. W. 539 (wages; testimony to plaintiff's competency, admitted); 1921, Wood *v.* Vroman, 215 Mich. 449, 184 N. W. 520 (malpractice; testimony "whether the treatment prescribed evidenced the exercise of such skill and knowledge" as is required, allowed); *Minn.* 1899, Martin *v.* Courtney, 75 Minn. 255, 77 N. W. 813 (malpractice; testimony to a medical witness' competency on doctrines of a certain school of treatment, admissible); *Mo.* 1889, Thompson *v.* Ish, 99 Mo. 106, 12 S. W. 510 (expert witness' qualifications as a physician, allowed to be proved by another physician who knew him personally); *N. H.* 1855, Leighton *v.* Sargent, 31 N. H. 119, 132 (malpractice; whether the defendant had more than ordinary skill, excluded); *Pa.* 1876, Laros *v.* Com. 84 Pa. 208 (the qualifications of another expert witness, allowed; "If I have seen a workman doing his work frequently, and know his skill myself surely, if I myself am a judge of such work, I can testify to his skill"); *Wash.* 1909, Johnson *v.* Coughren, 55 Wash. 125, 104 Pac. 170 (injury by a blast; opinions as to the "competency and fitness of F. to perform his duties as a powder-man," excluded; Chadwick, J., diss.; the entire foregoing list of authorities is ignored).

Of course, this might not justify asking one expert as to the *value* of another expert witness' opinion: 1862, Haverhill L. & F. Ass'n *v.* Cronin, 4 All. Mass. 163; nor asking one witness as to the *truth* of another's testimony: 1869, Holliman *v.* Cabanne, 43 Mo. 569; and cases cited *ante*, § 787.

Testimony based on personal knowledge of an *animal's disposition* is receivable: 1875, Sydleman *v.* Beckwith, 43 Conn. 11 (horse). *Contra:* 1900, Hayes *v.* Smith, 62 Oh. 161, 56 N. E. 879, *semble* (keeping a dangerous dog; witness' opinion to his peaceableness, held inadmissible).

tion appears as the sole source of proof. It has already been seen (*ante*, §§ 1981, 1982) that in England the use of reputation was at first heterodox, and only late in time became established as permissible. But in the United States we find the Courts starting very early with the opposite assumption, *i. e.* that reputation is not only a permissible, but the orthodox and exclusive, mode of proof. Thus, historically, in our Courts, the anomalous and variant forms of the rule as to witness' character are due to an effort to reconcile the traditional and orthodox question as to personal belief with this supposed principle that reputation alone was the proper source of proof.

(1) But, first, how did they come to accept this supposed principle? With the long series of English precedents, calling for personal belief directly and clearly, how did the notion of reputation as the exclusive source find its way into our practice? The exact course of the change is obscure; but the influences were chiefly two. (*a*) The first American treatise on Evidence, appearing in 1810, by Chief Justice Swift of Connecticut, explicitly laid down the unqualified rule that reputation alone is the admissible source, and that the witness' "private opinion" was inadmissible.[1] There is some reason for believing that his language does not mean all it appears to;[2] but at any rate it served as authority for many early American Courts. (*b*) In the phrase of Phillipps ("whether he knows the general character of the witness, and from such knowledge would believe him on oath"), already quoted and explained (*ante*, § 1983), the word "character" came to be understood, by some obscure process, as meaning exclusively "reputation," and not the person's actual qualities; and thus the foundation was laid for the notion that reputation was the essential and fundamental thing.[3] By these influences a great body of precedents was early created, the effect of which was to establish the notion that reputation was the fundamental source of proof. Of the two influences (Swift's book and the misunderstood English passage), the difference was in time rather than in degree. The early Courts (before the appearance and vogue of Phillipps' treatise, say, before 1820) that did not

§ 1985. [1] 1810, Swift, Evidence, 143: "A witness called to impeach or support the general character of another [witness] is not to speak of his private opinion or of particular facts in his own knowledge; but he must speak of the common reputation among his neighbors and acquaintances. The only proper questions to be put to him are, whether he knows the general character of the witness intended to be impeached, in point of truth, among his neighbors; and what that character is, whether good or bad? The witness may be inquired of as to the means and opportunity he has of knowing the character of the witness impeached, — as, how long he has known him, how near he lives to him, and whether his character has been a subject of general conversation; but his testimony must be founded on the common repute and understanding of his acquaintance as to his truth, and not as to honesty or punctuality. In England, [citing 4 Esp. 162], the first question is, whether the witness impeaching has the means of knowing the general character of the other witness? and from such knowledge of his general character, whether he would believe him on oath?"

[2] (1) The witness' personal knowledge of the other is evidently assumed to exist; (2) On p. 141, personal belief as to a defendant's character is evidently allowed; (3) The real point of difference, in Swift's mind, between English practice and that of his own country, was as to the kind of character, *i. e.* general qualities, or veracity only.

[3] Thus, Greenleaf (§ 461), in a passage almost identical with this, substitutes "reputation" for "character." But it is worth noting that Mr. J. Story, in Gass *v.* Stinson, 2 Sumn. 610, *infra*, n. 14, did not make this mistake.

know of Swift's book seem to have allowed personal knowledge freely, as in England; [4] but the Phillipps passage in due time brought around many, and the Greenleaf utterance,[5] together with the then existing body of precedents, account for the more modern Courts.

(2) But the matter has been complicated by the traditional use of the question, "Would you believe the person on oath?" This, as our Courts could not help seeing in all the precedents and text-books, was the perfectly accepted form of the English common law; and the problem which they had to face was, to reconcile this with the notion, otherwise established in their minds, that reputation was the essential and sole source of proof. This problem was solved in various ways. There are at least five different types of solutions, — more than one of them, indeed, being often found in the rulings of the same Court.

(*a*) One solution squarely excludes any such question as inconsistent with the principle that reputation is the sole source. A minority of the Courts take this radical step.[6]

(*b*) Another takes the opposite extreme, *i. e.* preserves the common-law tradition, and distinctly allows the personal belief of the witness to be used. This is early and rare.[7]

(*c*) Still another solution is to require the witness to say whether he knows the "character" or "reputation" of the other witness, and then to allow the question, "Knowing that character (or, reputation), would you believe him on oath?" This preliminary clause was supposed to be a traditional part of the question as used in the original English practice, the authority of Professor Greenleaf [8] serving as the basis of this notion. Yet it is entirely erroneous, as the already quoted English precedents show; for the traditional English question asked directly for the witness' personal belief; and the preliminary clause (historically later in time), when there was one, asked for "character" and not "reputation." [9] This form of solution, however simple, evades the issue; for it does not require the witness to say whether his personal experience, or his knowledge of the reputation, is to be the ground of his belief; the preliminary clause is formally necessary, but the real issue of principle is left unsettled.[10] A hybrid form, more nearly

[4] *E. g.* the opinion of Mr. J. Wright, in Ohio (Seely *v.* Blair, *post*).

[5] In 1842.

[6] *E. g.* Connecticut, Iowa, Maine, Massachusetts, the later North Carolina rulings.

[7] *E. g.* the early Ohio cases, some early South Carolina cases, early Illinois cases.

[8] § 461.

[9] As late as 1836 and 1837, Mr. J. Story, in Wood *v.* Mann and Gass *v.* Stinson, 2 Sumn. 32, 610, cited *infra*, states the English practice as asking directly for belief on oath, without the preliminary clause; he understood the English practice better than Professor Greenleaf; for it must be remembered, as explained *ante*, § 1982, that the fundamental notion of the English rule after 1800 was to get at the specific quality of credibility by asking for belief on oath; and thus the preliminary clause, used after 1830, was not required, but merely permitted to those who wished to bring to bear the impeached person's character as a whole; moreover, its presence, as above explained, was not due to any importance of getting at reputation, but to the supposed irrelevancy of general disposition unassociated with a reference to the trait of credibility.

[10] *E. g.* Georgia, Virginia, several Federal rulings.

approaching the next one as an expression of principle, is "*From* such knowledge [of reputation], would you believe him on oath?" thus more or less explicitly basing the belief on the reputation alone; no theory, however, being vouchsafed.[11]

(*d*) A peculiar and original solution is to insist upon one of these preliminary clauses, "Knowing his reputation [or, From such knowledge], would you believe him on oath?" and to harmonize this with the reputation-principle by distinctly excluding any element of personal knowledge, and by treating this expression of personal belief as a mere mode of measuring the quality of the reputation and of better expressing to the jury the exact degree of the community's positiveness of opinion on the subject.[12] This solution, though it is forced and fantastic, and though historically it is due merely to the necessity of reconciling fixed precedent with an invented principle, has at least the merit of facing the question and solving it rationally; and it is probably the real basis of most of the rulings adopting the form just described, under (*c*), as hybrid.

(*e*) There are sub-varieties of (*c*) and (*d*) in jurisdictions where character for veracity only (not general good or bad character) is usable for or against a witness; *i. e.* the preliminary clause in such jurisdictions calls for a knowledge of the reputation for veracity specially, not of reputation for general character.[13]

Just which of these solutions is the accepted law of a given jurisdiction to-day is not always easy to say;[14] a careful collation of the precedents,

[11] *E. g.* the later Illinois cases, the later New York cases, New Hampshire, Pennsylvania; this is perhaps the most frequent form of all.

[12] 1875, Per Curiam, in Hillis *v.* Wylie, 26 Oh. St. 576: "To say that the reputation of the witness is 'bad' gives but imperfect information; 'bad' is a relative term, and the inquiry at once arises in the mind, 'How bad is it?' Is his reputation so bad that he ought not to be believed under oath? The mode of inquiry allowed is only a means of ascertaining what the reputation of the witness for truth really is. The object of the testimony is not to introduce as evidence the opinion of the impeaching witness as to the truthfulness of the witness against whom he testifies, but to enable the jury to ascertain the true character of his reputation for truth as the impeaching witness understands it, and thereby enable them to determine the extent to which it ought to discredit the witness. The question would be the same in effect if the witness were asked if the reputation of the witness in question were such as to go to his discredit when under oath." This reasoning seems to have been first advanced by Ruffin, C. J., in 1834, Downey *v.* Murphy, 1 Dev. & B. 85; other clear phrasings of it are found in opinions by Cowen, J., in People *v.* Rector, 19 Wend. 579 (1838), and Campbell, J., in Hamilton *v.* People, 29 Mich. 185 (1874).

[13] In number these jurisdictions far exceed the others; yet the form in (*c*) and (*d*), calling for general character only, must be treated as the original, from which these are variations, because the clause, when used in English practice, called for general character only, as already noticed (*ante*, § 1982).

[14] The precedents are as follows:
Federal: 1836, U. S. *v.* White, 5 Cr. C. C. 38, 42 (belief on oath, founded on reputation); 1836, Story, J., in Wood *v.* Mann, 2 Sumner 32 ("The general interrogatory only, whether he [the proposed witness] would believe the other on his oath (which is the usual form of putting the interrogatory in England, and differs widely from that in which it is usually put in America)" is alone usually allowed, *i. e.* no examination to particular facts); 1837, Story, J., in Gass *v.* Stinson, 2 Sumner 610 ("When the examination is to general credit, the course in England is to ask the question of the witnesses whether they would believe the party, sought to be discredited, upon his oath. With us the more usual course is to discredit the party by an inquiry what his general reputation for truth is, whether it is good or whether it is bad"); 1840, McLean, J., in U. S. *v.* Vansickle, 2 McLean 221 ("the

even in the light of the principles and tendencies above mentioned, often leaves us in doubt, — an unfortunate result, in a matter so easily capable of an exact and uniform rule.

witness cannot advert to particular facts, or to his personal knowledge, of the character of the individual impeached"; but he may say, from knowing the reputation, whether he would believe on oath); 1851, Wayne, J. (the others not touching the point), in Gaines *v.* Relf, 12 How. 554 (he is to state the reputation, and "whether from that reputation he would believe him upon his oath"); 1859, Teese *v.* Huntington, 23 id. 2, 13 ("he is not required to speak from his own knowledge of the acts and transactions from which the character of the witness has been derived, nor indeed is he allowed to do so"); 1919, Held *v.* U. S., 5th C. C. A., 260 Fed. 932 ("From your knowledge of his general reputation for truth and veracity, would you believe him on oath?" allowed);

Alabama: 1839, McCutchen *v.* McCutchen, 9 Port. 655 ("he must know the general estimation in which he is held by his neighbors"); 1846, Sorrelle *v.* Craig, 9 Ala. 539 (general reputation, followed by personal belief, from the reputation, upon oath); 1848, Hadjo *v.* Gooden, 13 Ala. 721 (same); 1853, Dave *v.* State, 22 Ala. 23, 38 ("individual opinions" in general excluded; but "an exception to this rule sometimes obtains" in impeaching other witnesses); 1854, Martin *v.* Martin, 25 Ala. 211 ("personal knowledge of the witness' unworthiness," held improper); 1856, Ward *v.* State, 28 Ala. 63 (like Hadjo *v.* Gooden); 1860, Mose *v.* State, 36 Ala. 211, 220, 230 (personal opinion of the witness, based on personal acquaintance, excluded); 1866, Bullard *v.* Lambert, 40 Ala. 210, *semble* (like Sorrelle *v.* Craig); 1874, Artope *v.* Goodall, 53 Ala. 318, 325 (the "general character," what it is, and then the belief on oath founded upon it; and the second element may be fulfilled by saying that he has not a bad reputation; here the evidence was in rebuttal); 1889, Smith *v.* State, 88 Ala. 76, 7 So. 52 (he cannot even consider facts personally known to him); 1896, Crawford *v.* State, 112 Ala. 1, 21 So. 214 (belief on oath, founded on reputation); 1898, McAlpine *v.* State, 117 Ala. 93, 23 So. 130 (estimate based partly on reputation, partly on personal knowledge, excluded); 1907, Mitchell *v.* State, 148 Ala. 618, 42 So. 1014 (like Crawford *v.* State);

Arkansas: 1855, Pleasant *v.* State, 15 Ark. 624, 650, 653 ("his own opinion . . . founded on general reputation," admissible); 1874, Snow *v.* Grace, 29 Ark. 131, 136 (belief on oath, based on reputation, admitted, with some hesitation); Majors *v.* State, 29 Ark. 112 (similar evidence received); 1888, Hudspeth *v.* State, 50 Ark. 534, 543, 9 S. W. 1 (same);

California: 1859, Stevens *v.* Irwin, 12 Cal. 306, 308 (belief on oath, admissible, as justified by long practice; here the witness had already spoken as to reputation, but this was not referred to as essential); 1868, People *v.* Tyler, 35 Cal. 553 (belief on oath must be founded on reputation, but need not exclude the element of personal knowledge); C. C. P. 1872, § 2051 (quoted *ante*, § 987); 1878, People *v.* Methvin, 53 Cal. 68 (belief on oath must exclude the element of personal knowledge); 1880, People *v.* Ramirez, 56 Cal. 533, 538 (approving People *v.* Methvin); 1897, Wise *v.* Wakefield, 118 Cal. 107, 50 Pac. 310 (belief based on reputation, admissible; not affected by C. C. P. § 2051);

Connecticut: 1856, State *v.* Randolph, 24 Conn. 363, 367 (Ellsworth, J., stating the customary question in that court to be, 'Is the character of the witness for truth on a par with that of mankind in general?', as distinguished from the English form, 'What is his general character?', 'Would you believe him under oath?': "Our rule . . . does not leave anything to the mere inference of the impeaching witness whether he would or would not believe the witness under oath");

Delaware: 1851, Robinson *v.* Burton, 5 Harringt. 335, 339 ("general report," "followed by the witness' own judgment as to the effect of such general reputation");

Florida: 1866, Long *v.* State, 11 Fla. 295, 297 (personal knowledge, received); 1878, Robinson *v.* State, 16 Fla. 835, 840 (belief founded upon reputation, admitted); 1906, Maloy *v.* State, 52 Fla. 101, 41 So. 791 (personal opinion, excluded);

Georgia: 1855, Stokes *v.* State, 18 Ga. 17, 37 (general character, followed by opinion as to belief on oath); 1858, Smithwick *v.* Evans, 24 Ga. 463 (same); 1888, Flemister *v.* State, 81 Ga. 768, 771, 8 S. E. 443, *semble* (personal knowledge, admissible); 1896, Savannah F. & W. R. Co. *v.* Wideman, 99 Ga. 245, 25 S. E. 400 ("individual opinion," excluded); Code, 1895, § 5293, Rev. C. 1910, § 5882, P. C. § 1053 (the question is to seek knowledge of general character, what it is, and "if, from that character, he would believe him on oath"; otherwise, "the opinions of single individuals" are excluded); 1904, Taylor *v.* State, 121 Ga. 348, 49 S. E. 303 (belief on oath, not founded on a knowledge of general character, excluded);

Illinois: 1849, Frye *v.* Bank, 11 Ill. 367, 378 (reputation, followed by opinion as to belief on oath); 1858, Eason *v.* Chapman, 21 Ill. 33 (same ruling; the personal opinion of the witness declared admissible, and apparently supposed to be founded on personal knowledge; Breese, J., diss.); 1859, Crabtree *v.* Kile, 21

2. Policy of the Rule

§ 1986. **Policy of the Exclusionary Rule, repudiated.** Looking back now at the orthodox practice of the common law, and contrasting it with the

Ill. 183 (personal belief stated to be — evidently relying on Greenleaf — the English peculiarity; no notice taken of the preceding cases, the opinion being by another judge); 1860, Cook *v.* Hunt, 24 Ill. 535, 545, 550 (knowledge of reputation is essential); 1861, Crabtree *v.* Hagenbaugh, 25 Ill. 238 (the form stated as in Frye *v.* Bank; by the same judge as in the preceding case); 1871, Foulk *v.* Eckert, 61 Ill. 318, 320 (personal opinion, improper); 1882, Massey *v.* Bank, 104 Ill. 327, 334 (the form in Frye *v.* Bank sanctioned, but the opinion required to be based solely on the reputation, and the question "Would you believe, etc., in a case where he was personally interested?", held improper, by a petty quibble); 1884, Bank *v.* Keeler, 109 Ill. 385, 390 (preceding doctrine affirmed; personal belief held not an essential part of the testimony); 1887, Spies *v.* People, 122 Ill. 1, 208, 12 N. E. 865 ("The unwillingness to believe under oath must follow from and be based upon two facts; first, the fact that the witness knows the reputation for truth and veracity among the man's neighbors; second, the fact that such reputation is bad"); 1893, Gifford *v.* People, 148 Ill. 173, 176, 35 N. E. 754 (personal knowledge, excluded; reputation is the only proper inquiry);

Indiana: 1873, Indianapolis P. & C. R. Co. *v.* Anthony, 43 Ind. 183, 193 (reputation, followed by belief on oath; obscure);

Iowa: 1848, Carter *v.* Cavenaugh, 1 Greene 171, 177 (reputation only; following Swift's Treatise and Phillips *v.* Kingfield, Me., in reasoning); 1882, State *v.* Egan, 59 Ia. 636, 13 N. W. 730 (same; interpreting "character," in C. C. § 3649, as meaning "reputation"); 1907, State *v.* Blackburn, — Ia. —, 110 N. W. 275 (rape under age; "Do you know her general moral character in the neighborhood?" referring to the prosecuting witness, held an improper form of question);

Kansas: 1888, State *v.* Johnson, 40 Kan. 266, 269 (belief, founded on reputation, not on personal knowledge, admissible);

Kentucky: 1819, Mobley *v.* Hamit, 1 A. K. Marsh. 591 (general character to be used as the basis of the witness' inference to credibility); 1857, Thurman *v.* Virgin, 18 B. Monr. 792, *semble* (same); 1859, Henderson *v.* Haynes, 2 Metc. 342, 348 (reputation alone mentioned); 1869, Young *v.* Com., 6 Bush 316 (same);

Louisiana: 1843, Stanton *v.* Parker, 5 Rob. 108 (belief on oath admissible, provided it is based on knowledge of "character," "standing," "reputation"); 1851, Paradise *v.* Ins. Co., 6 La. An. 596, 598 (reputation, followed by belief on oath, admissible); 1852, State *v.* Parker, 7 La. An. 83, 85 (belief on oath, based on "vices and general bad character," received); 1892, State *v.* Christian, 44 La. An. 950, 952, 11 So. 589 (belief on oath, based on reputation, admitted; following Paradise *v.* Ins. Co.);

Maine: 1841, Phillips *v.* Kingfield, 19 Me. 375 (reputation only);

Maryland: 1868, Knight *v.* House, 29 Md. 198 ("the practise in Maryland, we believe, has always been in conformity with the ancient English rule," which is approved; but the form thus approved is the personal belief founded on reputation, and the belief is said to "test the extent or degree of badness of the general reputation"; so that the rule is really of the fourth sort, *supra*);

Massachusetts: 1819, Bates *v.* Barber, 4 Cush. 110 ("What was the reputation for truth and veracity of the person impeached, — that is, what was his character in this respect by report; what was said in regard to it; this was the proper inquiry, and the only proper inquiry"); 1866, Com. *v.* Lawler, 12 All. 586, *semble* (personal belief excluded); 1908, Hunneman *v.* Phelps, 199 Mass. 15, 85 N. E. 169 (excluded); 1909, Eastman *v.* Boston Elev. R. Co., 200 Mass. 412, 86 N. E. 793 ("Would you believe her on oath?" excluded, even after a statement as to knowing the reputation);

Michigan: 1856, Webber *v.* Hanke, 4 Mich. 198 (reputation only; following Phillips *v.* Kingfield, Me.); 1874, Hamilton *v.* People, 29 Mich. 173, 185 (repudiating the former opinion as *obiter*, and allowing the witness to be asked whether he would believe the other on oath, this opinion "not left to depend on any basis but the reputation for truth and veracity"); 1875, Keator *v.* People, 32 Mich. 486 (same; here held proper on the direct as well as on the cross-examination);

Minnesota: 1872, Rudsdill *v.* Slingerland, 18 Minn. 380, 383 (belief on oath, admitted, following a statement of reputation);

Mississippi: 1885, French *v.* Sale, 63 Miss. 386, 393 (belief on oath, founded on knowledge of reputation, admitted); 1901, Benson *v.* State, 79 Minn. 538, 31 So. 200 (witness' personal belief excluded; the opinion, a net of fine-spun logical cobwebs, is an example of the judicial tendency to award new trials for the sake of irrelevant trifles);

Missouri: 1850, Day *v.* State, 13 Mo. 425 (belief on oath, founded on "general character," admitted, without objection); 1883, State *v.* King, 83 id. 555 (personal opinion excluded); 1903, State *v.* Boyd, 178 Mo. 2, 76 S. W. 979 (same);

New Hampshire: 1838, State *v.* Howard, 9

modern change of rule, effected in so many jurisdictions by such a curious misunderstanding of precedents, what is to be said of the reason and policy of the rule? Was the earlier practice sounder and better?

N. H. 486 (the proper inquiries are, first, as to general reputation for truth, and, next, "from what you know of that reputation, etc., would you believe him under oath as quick as you would men in general?"); 1850, Hoitt *v.* Moulton, 21 N. H. 592 (same); 1860, Kelley *v.* Proctor, 41 N. H. 139, 145 (same);

New Jersey: 1869, King *v.* Ruckman, 20 N. J. Eq. 316, 357 (reputation only; "saying that the witness, from what he knew of his reputation, would not believe him on oath, is not sufficient"); 1900, State *v.* Polhemus, 65 N. J. L. 387, 47 Atl. 470 (personal belief, allowable only when based on reputation);

New York: 1818, Troup *v.* Sherwood, 3 John. Ch. 558, Kent. Ch. (personal knowledge excluded); 1829, Fulton Bank *v.* Benedict, 1 Hall Sup. 493, 499, 505, 533, 558, per Oakley, J. (personal knowledge alone, improper; but if preceded by inquiry as to "general character," the impeaching witness' belief on oath may be used "to fix the extent and nature of the general bad character imputed"); 1837, Marcy Sen., in Bakeman *v.* Rose, 18 Wend. 151 (says that "in this State the form prescribed by Swift is, I believe, most commonly adopted," but that there had been no judicial decision of the question, and prefers himself Lord Ellenborough's form in Mawson *v.* Hartsink; apparently using "character" as distinct from reputation); 1838, Cowen, J., in People *v.* Abbot, 19 Wend. 199 (approves the form used in R. *v.* Bispham, but upon the theory of (*d*) *supra*); 1838, Cowen, J., in People *v.* Rector, 19 Wend. 579 (cited *supra*, note 12); 1839, People *v.* Davis, 21 Wend. 309, 315, *semble* (the witness knew the other witness and his associates but had never heard his veracity-character spoken of; he was allowed nevertheless to say whether he would believe him on oath; following the form given by Phillipps and Starkie); 1842, Johnson *v.* People, 3 Hill 178 (belief on oath admitted, founded on knowledge of "general-character" or of veracity-character); 1856, Stacy *v.* Graham, 14 N. Y. 492, 501 (in supporting a witness, character, admissions by the opponent "that he held the witness in estimation as an honest and worthy man" were received; no authorities cited; Wright, J., diss.); 1864, Wehrkamp *v.* Willet, 4 Abb. App. 548 (Wright, J.: "The only proper inquiry . . . was as to her general moral character and her public reputation as a truthful or untruthful woman"); 1874, Foster *v.* Newbrough, 58 N. Y. 482 (whether from the plaintiff's general reputation for truth and veracity they would believe him on oath, held, improperly rejected); 1877, Adams *v.* Ins. Co., 70 N. Y. 166, 170 (a witness held competent to speak as to his belief on oath of one whom he had known for 10 years, whose associates he had known, and whose character he had heard questioned, though he did not know "from the speech of the people" what that character was); 1895, Carlson *v.* Winterson, 147 N. Y. 652, 723, 42 N. E. 347, *semble* (belief, founded on reputation, admissible, on the theory (*d*), *supra*);

North Carolina: 1829, State *v.* Boswell, 2 Dev. 211 (the question, "whether he would believe the other upon his oath," is proper; but it must first be learned whether his opinion is founded on "the general moral character of the witness as known among his neighbors and acquaintances," and if it rests on "particular facts," it cannot be received); 1834, Downey *v.* Murphy, 1 Dev. & B. 84 (belief on oath allowed, on theory (*d*), *supra*); 1843, State *v.* O'Neale, 3 Ired. 88 ("an estimation by the witness himself "of the other's character, improper); State *v.* Parks, 3 Ired. 297, *semble* (the witness must first show a knowledge of the general reputation, and may then say whether he personally would believe on oath); 1856, Hooper *v.* Moore, 3 Jones L. 428 (the additional question, whether he would believe the other upon oath, excluded; "the great objection to the [English] rule is that the impeaching witness is called upon to do that which belongs exclusively to the jury," since his statement is "an opinion or conclusion"; repudiating State *v.* Boswell, and approving Phillips *v.* Kingfield, Me.); 1878, State *v.* Caveness, 78 N. C. 486 (following Hooper *v.* Moore);

Ohio: 1834, Seely *v.* Blair, Wright 685 (personal knowledge sufficient, and mere knowledge of reputation alone not sufficient); 1834, Wilson *v.* Runyon, Wright 652 (same); 1851, Bucklin *v.* State, 20 Oh. 18 (overruling the prior cases and excluding personal knowledge; chiefly on the authority of Starkie and Greenleaf); 1853, French *v.* Millard, 2 Oh. St. 44, 50 (same); 1854, Craig *v.* State, 5 Oh. St. 607 (same); 1875, Hillis *v.* Wylie, 26 Oh. St. 576 (reputation, followed by opinion as to belief on oath, admitted, on theory (*d*); quoted *supra*, note 12);

Oregon: Laws 1920, § 863 (the opponent may show "that his moral character is such as to render him unworthy of belief");

Pennsylvania: 1817, Kimmel *v.* Kimmel, 3 S. & R. 336 (personal knowledge excluded); 1824, Wike *v.* Lightner, 11 S. & R. 199 (personal belief "not objectionable, provided the belief was founded on the witness' knowledge of his general character [reputation]," since personal belief alone might be founded on "knowledge of a particular fact"); 1864, Bogle *v.* Kreitzer, 46 Pa. 465, 470 (knowledge of the other witness, and of his reputation for truth; then personal belief on oath,

(*a*) So far as concerns abstract principle, the Opinion rule has of course been usually invoked as the theoretical support of the modern practice:

1841, SHEPLEY, J., in *Phillips* v. *Kingfield*, 19 Me. 378: "The opinions of a witness are not legal testimony except in special cases, — such, for example, as experts in some profession or art, those of the witnesses to a will, and, in our practice, opinions on the value of property."

And yet the principle of that rule is amply satisfied by the orthodox type of testimony; *i. e.* the test (*ante*, § 1918) whether the witness can adequately detail to the jury the data on which his summary estimate rests and from which his inference is drawn. The fact is, of course, that here he is doubly unable by any possibility to do so; for even if he could in memory recall and in language rehearse every incident and act indicative of character, the law

founded on reputation); 1867, Lyman *v.* City, 56 Pa. 488, 502, *semble* (belief on oath, founded on knowledge of reputation);
Philippine Isl.: C. C. P. 1901, § 342 (like Cal. C. C. P. § 2051);
Porto Rico: Rev. St. & C. 1911, §§ 1526, 6276 (like Cal. C. C. P. § 2051);
South Carolina: 1819, Kitchen *v.* Tyson, 3 Murph. 314 (the plaintiff was allowed "to introduce witnesses to prove that the defendant was a man not of credit, and unworthy of belief when upon oath"); 1833, Anon., 1 Hill 256 ("he merely answers as to general reputation, and upon that gives his own opinion"); 1839, State *v.* Ford, 3 Strobh. 521 ("Dill's character was attacked by the prisoner; but ten out of fourteen witnesses swore that they would believe him"); 1860, Wardlaw, J., in Chapman *v.* Cooley, 12 Rich. 661 ("the belief of the community, and not of the individual testifying," is the testimony desired); 1892, State *v.* Turner, 36 S. C. 539, 15 S. E. 602 (belief on oath, founded on knowledge of reputation); 1896, State *v.* Murphy, 48 S. C. 1, 7, 25 S. E. 43 ("from his general reputation he would not believe him on his oath," allowed); 1898, Sweet *v.* Gilmore, 52 S. C. 530, 30 S. E. 395 ("general character," followed by belief on oath);
Tennessee: 1820, Gardenhire *v.* Parks, 2 Yerg. 23 ("men of bad character, and could not be believed upon oath," allowed); 1846, Ford *v.* Ford, 7 Humph. 92, 100 (the trial judge laid down the traditional English rule; but the Supreme Court, after citing Greenleaf, declared the opinion of the witness, as to believing the other on oath, admissible only so far as founded on reputation); 1858, Gilliam *v.* State, 1 Head 38 (admitting belief on oath, founded on reputation); 1879, Merriman *v.* State, 3 Lea 393, 394 (belief on oath, founded on reputation);
Texas: 1859, Roon *v.* Weathered, 23 Tex. 675, 686 (belief founded on reputation, admitted, on theory (*d*), *supra*); 1864, Ayres *v.* Duprey, 27 Tex. 593, 599 (same); 1879, Johnson *v.* Brown, 51 Tex. 65, 77 (same);
Utah: 1898, State *v.* Marks, 16 Utah 204, 51 Pac. 1089 (belief on oath, from reputation);
Vermont: 1854, Powers *v.* Leach, 26 Vt. 279 (personal belief excluded; no authority or reason given); 1858, Willard *v.* Goodenough, 30 Vt. 396 (same; "if we were now called on to institute a rule on the subject, instead of administering and applying an old one, we might not have much difficulty in copying the rule of the English and some of the American Courts"; but the long-settled usage was held to be conclusive);
Virginia: 1849, Uhl *v.* Com., 6 Gr[illegible] 708 (the general reputation for tru[illegible] he witness' opinion whether he [illegible]eve on oath, but this may be founded [illegible]neral moral reputation as well as on reputation for truth); 1882, Langhorne *v.* Com., 76 Va. 1022, *semble* (the witness' own knowledge of the other, excluded);
Washington: 1896, State *v.* Miles, 15 Wash. 534, 46 Pac. 1047 (reputation only, not belief on oath); 1900, State *v.* Coates, 22 Wash. 601, 61 Pac. 726 (belief on oath, excluded); 1918, State *v.* Hooker, 99 Wash. 661, 170 Pac. 374 (testimony that "from their knowledge of that reputation they would not believe him on oath," held admissible; citing the above text with approval and repudiating State *v.* Coates and State *v.* Miles, *supra*);
Wisconsin: 1854, Wilson *v.* State, 3 Wis. 798 (belief founded "upon general reputation, and upon that only," admissible, as "the conviction produced upon him by the common reputation").

So far is the notion carried that one of its logical but unpractical consequences has occasionally been laid down, namely, that the speaker to reputation *need not be acquainted personally* with the other witness: 1892, State *v.* Turner, 36 S. C. 540, 15 S. E. 602; a conclusion which even Cockburn, C. J., in R. *v.* Rowton, *supra*, § 1981, would not accept.

Distinguish the propriety of *testing* a reputation-witness *on cross-examination* by asking him what misconduct he knows or has heard of (*ante*, § 1111).

explicitly forbids him (*ante*, § 979) to detail particular acts; so that there is nothing left but to state summarily the general trait. Never was the Opinion rule more misapplied than to exclude the present class of testimony:

1858, CATON, C. J., in *Eason* v. *Chapman*, 21 Ill. 35 (after pointing out that persons may have a bad name for truthfulness, and yet "from their daily walk and conversation in other respects, none would doubt their truthfulness when solemnly called to testify in a court of justice"): "Yet it would be impossible to detail all the minutiæ of the circumstances which would inspire that confidence so as to impart their full and just impression to the jury. . . . Hence witnesses, who must be always impressed with these indescribable circumstances if they exist, have always been allowed to express the opinion whether they would or not believe the impeached witness under oath."

1876, BERRY, J., in *State* v. *Lee*, 22 Minn. 410: "But evidence of the disposition of a person, by one who knows such disposition from personal observation, is not evidence of opinion in any objectionable sense. It is evidence of a fact, — just as much evidence of a fact as is evidence of the disposition of a horse." [1]

(*b*) So far as practical policy and utility is concerned, there ought to be no hesitation between reputation and personal knowledge and belief. A perusal of the records of State trials will show how natural, straightforward, and useful was this method of asking after belief founded on personal experience and intimacy. Put any one of us on trial for a false charge, and ask him whether he would not rather invoke in his vindication, as Lord Kenyon said, "the warm, affectionate testimony" [2] of those few whose long intimacy and trust has made them ready to demonstrate their faith to the jury, than any amount of colorless assertions about reputation. Take the place of a jury-man, and speculate whether he is helped more by the witnesses whose personal intimacy gives to their belief a first and highest value, or by those who merely repeat a form of words in which the term "reputation" occurs.[3] Look at it from the point of view of the prosecution, and apply the principle in such a case as R. *v.* Rowton,[4] and then decide whether the witness who was there excluded was not, if believed, worth more than forty opposing witnesses testifying to that intangible, untestable creation called "reputation." The Anglo-American rules of evidence have occasionally taken some curious twistings in

§ 1986. [1] So also Campbell, J., in Hamilton v. People, 29 Mich. 186 (1874), calls this "a fallacious objection."

[2] 1794, Lord Kenyon, C. J., in R. v. Thelwall, McNally, Evidence, 323 ("An affectionate and warm evidence of character, when collected together, should make a strong impression in favor of a prisoner").

[3] Take for example the following kind of testimony: 1860, Gandolfo v. State, 11 Oh. St. 116 (an apprentice was tried for murder; and his master testified: "He is the most quiet, peaceable boy I ever saw or had; . . . none ever knew him to give an uncivil answer to any one in the shop, in the 8 years he worked there, either to those above or below him; if I spoke roughly to him, it would bring tears to his eyes, but no retort; . . . he was the pet of the shop from his uniform kindness of disposition").

The opinion in People v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718 (1907) attempts to answer the above argument.

[4] 1865, Leigh & C. 520, 10 Cox Cr. 25 (indecent assault upon a boy; the witness for the prosecution was asked, "What is the defendant's general character for decency and morality of conduct?", and answered: "I know nothing of the neighborhood's opinion, because I was only a boy at school when I knew him; but my own opinion and the opinion of my brothers who were also pupils of his is that his character is that of a man capable of the grossest indecency and the most flagrant immorality").

the course of their development; but they have never done anything so curious in the way of shutting out evidential light as when they decided to exclude the person who knows as much as humanly can be known about the character of another, and have still admitted the secondhand, irresponsible product of multiplied guesses and gossip which we term "reputation." [5]

Many judges have come to the rescue of the traditional and orthodox class of testimony in passages of force and clearness which ought to avail for persuasion:

1865, *R.* v. *Rowton*, Leigh & C. 520, 532, 539. ERLE, C. J.: "Disposition cannot be ascertained directly; it is only to be ascertained by the opinion formed concerning the man; which must be founded either on personal experience or on the expression of opinion by others, whose opinion again ought to be founded on their personal experience. . . . I think that each source of evidence is admissible. You may give in evidence the general rumor prevalent in the prisoner's neighborhood, and, according to my experience, you may have also the personal judgment of those who are capable of forming a more real, substantial, guiding opinion than that which is to be gathered from general rumor. I never saw a witness examined to character without an inquiry being made into his personal means of knowledge of that character. The evidence goes to the jury depending entirely upon the personal experience of the witness who has offered his testimony. Suppose a witness to character were to say: 'This man has been in my employ for twenty years; I have had experience of his conduct; but I have never heard a human being express an opinion of him in my life; for my own part, I have always regarded him with the highest esteem and respect, and have had abundant experience that he is one of the worthiest men in the world.' The principle the Lord Chief Justice has laid down would exclude this evidence, and that is the point where I differ from him. To my mind, personal experience gives cogency to the evidence; whereas such a statement as 'I have heard some persons speak well of him,' or 'I have heard general report in favor of the prisoner,' has a very slight effect in comparison." WILLES, J.: "I apprehend that the man's disposition is the principal matter to be inquired into, and that his reputation is merely accessory, and admissible only as evidence of disposition. . . . The judgment of the particular witness is superior in quality and value to mere rumor. Numerous cases may be put in which a man may have no general character — in the sense of any reputation or rumor about him — at all, and yet may have a good disposition. For instance, he may be of a shy, retiring disposition, and known only to a few; or again, he may be a person of the vilest character and disposition, and yet only his intimates may be able to testify that this is the case. One man may deserve that character [reputation] without having acquired it, which another man may have acquired without deserving it. In such cases the value of the judgment of a man's intimates upon his character becomes manifest. In ordinary life, when we want to know the character of a servant, we apply to his master. A servant may be known to none but members of his master's family; so the character of a child is known only to its parents and teachers, and the character of a man of business to those with whom he deals. . . . According to the experience of mankind, one would ordinarily rely rather on the information and judgment of a man's intimates than on general report; and why not in a court of law? . . . The evidence in this particular case was of a very peculiar character, because the prisoner was charged with an offence which would not only be committed in secret if it were committed

[5] This is well put by Mr. Taylor, arguing in R. *v.* Rowton, at p. 525: "Reputation is only the repetition of the judgment of others. There is no rule of law that, to make evidence of reputation admissible, it must be founded on the judgment of a definite number. If, then, the judgment of ten or a less number of men is admissible under the name of reputation, how can the judgment of one only, that is, how can the estimate of disposition formed by one man only — or, in other words, individual opinion — be excluded?"

at all, but would be likely to be kept secret by the persons who were subjected to it. Such being the case, in order to ascertain the prisoner's character for morality and decency, the persons of whom you would inquire would be those who had been within reach of his influence, — persons who would not be likely to communicate his conduct to the neighborhood or to one another."

1876, 1883, Sir *James Stephen*, Digest of Evidence, note XXV, History of the Criminal Law, I, 450: "One consequence of the view of the subject taken in that case [of R. *v.* Rowton] is that a witness may with perfect truth swear that a man, who to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty, if he has had the good luck to conceal his crimes from his neighbors. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and according to R. *v.* Rowton the reputation is the important matter. The case is seldom if ever acted on in practice. The question always put to a witness to character is, What is the prisoner's character for honesty, morality, or humanity?, as the case may be; nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction.[6] . . . The case expressly decides that if a man gains a reputation for honesty or morality by the grossest hypocrisy, he is entitled to give evidence of it, which evidence cannot be contradicted by people who know the truth."

1876, BERRY, J., in *State* v. *Lee*, 22 Minn. 409: "As it is the *fact* of disposition which is important and material, there can be no reason why this fact may not be proved by any witness who knows what it is. There is certainly no reason why general repute is any better or more satisfactory evidence of disposition than the testimony of one who knows what the disposition is from his own personal observation. . . . Whether the witness knows what he pretends to know in regard to the disposition of a person in question, whether his opportunities for acquiring such knowledge have been sufficient, or his ability to acquire it has been competent, are matters which there is no practical difficulty in testing, either upon a preliminary or cross-examination, or both."

1921, WHEELER, C. J., in *Richmond* v. *Norwich*, 96 Conn. 582, 115 Atl. 11: Character . . . might be proved in three possible ways: (1) The estimate in which the individual is held in the community; that is, his general reputation as to the trait in question. (2) The opinion as to this trait of those who have known the individual and had the opportunity to know whether he possessed this trait or not. (3) The acts of the individual under somewhat similar circumstances from which his character as to this trait may be inferred. The evidence of general repute affords the basis for an inference as to the actual character; whether it be the entire character or a single trait of character. Method 1 is generally recognized as an established method of proving character. Method 2 is permitted in some jurisdictions, but in most it is denied. Whether or not one was of quick temper will require proof of a mental characteristic, and this is the proof of a fact. No one knows so well about this fact as he who has known the person and had the opportunity to determine it. How much more convincing is such evidence than that of a witness who testifies to the general repute of this person as to this mental characteristic? His testimony is based upon hearsay, and quite likely rumor and gossip. If mental characteristic is a fact, there is no valid reason why this fact may not be proved by any witness who knows what it is. Personal observation and personal knowledge are a more trustworthy reliance than general reputation. We think the decisions to which we have referred, and others to which we need not refer, require the admission of evidence of character from those who know."[7]

[6] For a good illustration of this futility of trying to make the straightforward lay mind comprehend the limits of this perverse artificial rule of law, see the testimony in Kehoe's Trial (Molly Maguires), Pa., 1876, West's Rep. 145–165.

[7] A powerful argument against the rule may be found in Mr. William Johnston's Arguments (Cincinnati, Clarke & Co., 1887), p. 104.

TOPIC IV: OPINION RULE AS APPLIED TO HANDWRITING-EVIDENCE

CHAPTER LXVIII.

A. HISTORY OF HANDWRITING-EVIDENCE

§ 1991. **Original Meaning and Rule for "Comparison of Handwriting."** (1) In proving a document or a signature to have been written, two distinct kinds of evidence offer themselves: first, testimony by a person who saw the

act of writing, or some circumstance leading up or pointing back to that act; secondly, evidence of the kind of handwriting. The difference is that in any and all ways of the second mode there is involved the establishment of a personal type or character of writing, and an estimate, based on comparison, that the disputed writing belongs to the type; and this is so whether we employ witnesses who know that type and examine the disputed writing, or whether the jury is given the means of knowing the type and making the examination. By the first mode we are not in any way concerned with the character of the person's writing; the witness testifies directly to seeing the act done, just as he would testify to seeing a blow struck. By the second mode, there is always an inference from the type to the genuineness of the disputed instance.[1] It is obvious how wide the difference is.

Now the first and most important point of legal history here is that, at a certain stage of our law, all of the ways of proving handwriting by its type, while not entirely repudiated, were greatly discountenanced and strictly limited in their use. For instance, a paper being offered as written by X, A's testimony that he saw X actually write it would be always received; but A's testimony that he had often seen X write and that this was X's writing would not be received.

The next point of importance is that the term "comparison of hands" (or, in the older phrase, "similitude of hands") was indiscriminately applied to all of the modes of proving by type, *i. e.* to any way of proving except by one who had seen the very document in the act of being written. What we find is the gradual admission, one after another, of various modes of this sort. But they were all at first known by the general phrase "similitude" or "comparison of hands;" and when that phrase was used, it covered even the testimony of one who had seen X write and thus knew his hand.

Thirdly, with reference to the limited use of these modes, we find (*a*) that the only kind of witness who could be heard was one who had seen X write; no other sort of knowledge was orthodox; (*b*) that such testimony was conceded to be proper in civil causes only (and perhaps in petty causes alone, *i. e.* causes under forty shillings in amount); and that though (at the stage when these questions arise, the era of the Restoration and the Revolution), the Crown was endeavoring to extend its use, this extension was strenuously opposed and was evidently against orthodox practice.

These features are sufficiently illustrated by the following passages from the trials of the late 1600s:

1683, *Algernon Sidney's Trial*, 9 How. St. Tr. 851, 864: "Mr. Sheppard sworn. *Att'y-Gen.:* Pray, will you look upon these writings [shewing the libel]. Are you acquainted with Colonel Sidney's hand? *Sheppard:* Yes, my lord. *Att'y-Gen.:* Is that his handwriting? *Sheppard:* Yes, sir; I believe so. I believe all these sheets to be his hand. *Att'y-Gen.:* How come you to be acquainted with his hand? *Sheppard:* I have seen him write

§ 1991. [1] This distinction has already been examined under Relevancy (*ante*, § 383).

the indorsement upon several bills of exchange. Col. *Sidney:* My lord, I desire you would please to consider this, that similitude of hands can be no evidence. L. C. J. JEFFERIES: Reserve yourself until anon, and make all the advantageous remarks you can. . . . *Sidney:* Now, my lord, I am not to give an account of these papers; I do not think they are before you, for there is nothing but the similitude of hands offered for proof. The similitude of hands is nothing; we know that bonds will be counterfeited, so that no man shall know his own hand." Remarks [2] by Sir *John Hawles*, Solicitor-General under William III: "The evidence was, proving the book produced to be Col. Sidney's writing, because the hand was like what some of the witnesses had seen him write; an evidence never permitted in a criminal case before. The case of the Lady Carre [3] was well cited by Col. Sidney, against whom there was an indictment information of perjury, in which it was resolved that comparison of hands was no evidence in any criminal prosecution."

1688, *Trial of the Seven Bishops*, 12 How. St. Tr. 466; several witnesses were offered, most of whom had not seen the Bishops write, but had only had correspondence; after their testimony, which was very hesitating, Serj. *Levinz:* "My lord, before this paper is read, we hope you will let us be heard to it. For what is all the proof that they have given of this paper? They have a proof by comparison of hands, which in a criminal case ought not to be received. . . . For them to come to prove hands only by those that saw letters, but never saw the persons write, this I hope will not amount to so much as comparison of hands. . . . It is an easy matter for any man's hand to be counterfeited; that they sure will agree, for frequent daily experience shows how easily it may be done; is it not easy then to cut any man down in the world by proving it like his hand? And proving that likeness by comparing it with something that he hath formerly seen? This strikes mighty deep. The honestest man in the world, and the most innocent, may be destroyed, and yet no fault to be found in the jury or in the judges." . . . *Sol.-Gen.* (opposing): "It is a wonderful thing, they say, that such evidence should be offered, but truly, my lord, it is a much stranger thing to hear Mr. Serjeant Pemberton say it was never done before. . . . [In Sidney's case] there was no person that swore he saw him write it; there was nothing proved but similitude of hands to make the jury believe it his handwriting." . . . Mr. J. HOLLOWAY: "In civil matters we do go upon slight proof, such as the comparison of hands, for proving a deed, or a witness' name; but in criminal matters we ought to be more strict and require positive and substantial proof." The judges being divided (Powell and Holloway, JJ., against, and Allybone, J., and Wright, L. C. J., in favor, the difference turning on the fact that the case was a criminal one), the evidence was not considered.

1691, *Trial of Sir R. Grahme* (Lord Preston), 12 How. St. Tr. 736: L. C. J. HOLT (to jury): "Mr. Townesend says he has seen my lord write several times and does believe the writing to be in his hand; and to the same purpose says Bland." Lord *Preston:* "I hope your lordship will please to observe to the jury that this is only a proof of similitude of hands; nobody see me write them."

1695, *R.* v. *Crosby*, 12 Mod. 72: "At this trial several treasonable papers were produced, which they swore they believed to be the handwriting of the prisoner; and on this a question arose whether comparison of hands were sufficient; and *per* CURIAM [L. C. J. Holt], it is not sufficient for the original foundation of an attainder, but may be well used as a circumstantial and confirming evidence, if the fact be otherwise fully proved; as in my lord Preston's case, his attempting to go with them into France, and principally where they were found on his person. But here, since they were found elsewhere, to convict on a similitude of hands was to run into the error of Colonel Sidney's case." [4]

[2] Ib. 1003.

[3] 1 Sid. 418.

[4] See also: 1684, Hayes' Trial, 10 How. St. Tr. 312–314; 1723, Bishop Atterbury's Trial, 16 How. St. Tr. 546. For other illustrations, from the general literature of the time, of the then meaning of the phrase, see the note of the learned compilers of Adolphus and Ellis' Reports, vol. 5, p. 752.

These passages illustrate, then, (1) that the term "similitude" or "comparison of hands" covered *all modes of proving handwriting* (in the strict sense, *i. e.* every way in which the type of writing was the source of belief); (2) that the orthodox use of such proof was confined at least to *civil causes;*[5] (3) that the only accepted mode of such proof was by those who had *seen the person write.* We have now to notice a gradual expansion of the limits of the doctrines under (2) and (3); and first of (2):

(2) We first find the doctrine that in *criminal cases* proof by "similitude of hands" is admissible if the disputed paper was found in the accused's possession; in such a case of 'prima facie' authorship, this doubtful kind of evidence was acceptable as "circumstantial and confirming evidence," in Lord Holt's language.[6] This form of the rule begins before 1700,[7] and becomes common in the trials of the next century, and even as late as 1802 we find Mr. McNally writing:

> 1802, Mr. *T. McNally*, Evidence, 403: "But though mere comparison of handwriting be not evidence on an indictment or information, yet papers found in the custody of the defendant and the writing thereof proved to be in his hand by persons who have *seen* him write, is sufficient *preliminary* evidence to entitle the counsel for the Crown to have them read."[8]

This modification in its broad form (confining this kind of proof in criminal cases to corroborative purposes only) was embodied in the treatises of the 1700s.[9] But by the end of the century the limitation had disappeared

[5] There can be little doubt that the use was not limited to petty causes, but was common in civil causes generally, particularly in the proof of witnesses' signatures to wills, deeds, etc.; for example: 1693, Bath and Mountague's Case, 3 Ch. Cas. 55, 58, 80; 1695, Blurton *v.* Toon, Skinner 639.

[6] 1695, Crosby's Case, *supra.* It is perfectly clear, however, that this admission of it as "confirmatory" only was not genuinely an innovation upon the practice in criminal cases; but merely settled within the above limits the hitherto doubtful orthodoxy of such evidence in criminal cases. It had been used all through the 1600's: 1645, Lord Macguire's Trial, 4 How. St. Tr. 653, 685; 1660, Harrison's Trial, 5 How. St. Tr. 1010, 1021; Scroop's Trial, 5 How. St. Tr. 1034, 1042; Carew's Trial, 5 How. St. Tr. 1048, 1051; Scot's Trial, 5 How. St. Tr. 1058, 1062; Jones' Trial, 5 How. St. Tr. 1072, 1073; 1662, Sir Henry Vane's Trial, 6 How. St. Tr. 119, 149; 1663, Twyn's Trial, 6 How. St. Tr. 513, 524; 1678, Coleman's Trial, 7 How. St. Tr. 1, 22, 34; Ireland's Trial, 7 How. St. Tr. 79, 118; 1679, Whitebread's Trial, 7 How. St. Tr. 311, 335.

[7] The settlement of it with these limits was probably due to the belief that the act of 1689 (quoted *post*, § 1992), reversing Sidney's attainder, was intended as a legislative disparagement of this use in criminal cases.

[8] 1688, Serj. Pemberton, in Seven Bishops' Trial, *supra*, for the defence, distinguishing Sidney's Case: "My lord, that case differs from this 'toto coelo'; the writing was found in his possession, in his study; there was the proof that nailed him," a distinction not at the former time put forward. Compare also: 1684, Hayes' Trial, 10 How. St. Tr. 312–313; 1696, Sir John Fenwick's Trial, 13 How St.. Tr. 625–627; 1719, Mathews' Trial, 15 How. St. Tr. 1323, 1375; 1722, Layer's Trial, 16 How. St. Tr. 199, 205; 1758, R. *v.* Hensey, 1 Burr. 644.

[9] 1726, Gilbert, Evidence, 53 ("The proof of false swearing to an affidavit or answer may be further illustrated by the comparison of hands, which possibly may be evidence in concurrence with other proof that out of the answer itself evince the identity of the person. But that the comparison of hands only should be a proof in a criminal prosecution was never law but only in the time of King James, and the distinction has ever been taken that the comparison of hands is evidence in civil and not in criminal cases. The reason why the comparison of hands is allowed to be evidence in civil matters is because men are distinguished by their handwriting as well as by their faces, for it is very seldom that the shape of their letters agree any more than the shapes of their bodies; therefore, a comparison of hands serves

entirely, and we find Mr. McNally able to say, in 1802, as the result of the latest rulings: [10]

"In proving the handwriting of a defendant, there is no legal distinction between that which is legal evidence in a civil action and that which is legal evidence in a criminal prosecution." [11]

(3) Taking up now the other limiting doctrine already mentioned, we find that here, too, an expansion was taking place. The orthodox witness had been one who had *seen the person write*. This was the only clear and accepted foundation for the witness' knowledge of the hand. In the Bishops' Trial, Serj. Levinz, in defence, had argued: "For them to come to prove hands only by those that saw letters, but never saw the persons write, this I hope will not amount to so much as a comparison of hands." Nevertheless, the Crown lawyers had already begun and incessantly kept up the practice of offering witnesses who had an inferior knowledge, based on specimens seen by them and somehow *known to them as genuine otherwise than by seeing them written;* for example, one who had bought a bill indorsed by the person and had afterwards demanded and received payment of it from him, — a kind of witness perfectly acceptable to-day (*ante,* § 699). In the Seven Bishops' Trial, for example, all but one of the witnesses had apparently this sort of knowledge only, and this circumstance probably weighed much with the judges who were for rejection. Although in Crown cases of the 1700s the judges were able to force in this sort of testimony (especially where the papers were found in the accused's custody),[12] yet the acceptance of such a witness was distinctly a new thing, a loose practice, and an expansion of the orthodox requirements:

1696, *R.* v. *Culpepper,* Skinner 673: "Then they produced a witness to swear to the contents of another letter [of Sir Francis Wythens]; which was denied, he never having seen Sir Francis write, but deposed that it was the same hand with the letter produced. 'Non allocatur'; for, per HOLT, C. J., . . . here the witness cannot prove a letter written, for he never had seen Sir Francis write, wherefore it was disallowed."

The great case of Lord Ferrers *v.* Shirley, in 1731,[13] stamped this new doctrine as orthodox. For the rest of the century, however, it seems to keep a secondary place; it is usable only in case of "necessity," *i. e.* when witnesses

for a distinction in civil commerce, for the likeness does induce a presumption that they are the same. But in criminal prosecutions the presumption is in favor of the defendant, therefore, when comparison of hands is the only evidence in a criminal prosecution, there is no more than one presumption against another, which weighs nothing"); 1767, Buller, Trials at Nisi Prius, 236.

[10] Evidence, 417.

[11] The first cases accepting this, the conceded rule of to-day, seem to have been: 1781, De La Motte's Trial, 21 How. St. Tr. 810; 1792, R. *v.* Tandy, K. B. Ire., McNally's Evidence, 409.

[12] *E. g.* Layer's Trial, *supra;* Grahme's Trial, *supra.*

[13] Fitzgibbon, 195, a clerk of Earl Ferrers had received or seen several letters, which one C. (whose signature was in question) had purported to write; "The counsel insisted that in all cases where a witness would swear to the handwriting, he must be able to say that he saw such person write"; the witness was rejected, but only because he could not show that the letters were really C.'s; Page, J., wanted to confine the use of such witnesses to cases of necessity, as where the person in question was abroad; but Raymond, C. J., would not concede any such limitation. The case is quoted in full, *ante,* § 699.

who have seen the person write cannot be had.[14] By the beginning of the 1800s this class of testimony takes its place on an equal footing with the older kind,[15] but its distinctly modern and parvenu character may be perceived from the following well-known passage of Lord Eldon's:

1803, ELDON, L. C., in *Eagleton* v. *Kingston*, 8 Ves. 473: "When I first came into the profession, the rule as to handwriting in Westminster Hall in all the Courts was this. You called a witness, and asked whether he had ever seen the party write. If he said he had, whether more or less frequently, that was enough to introduce the further question, whether he believed the paper to be his handwriting. . . . Or you might ask a witness who had not seen him write for a length of time, if you could not get a witness of a subsequent date. . . . This rule was laid down with so much clearness that till very lately I never heard of evidence in Westminster Hall of comparison of handwriting by those who had never seen the party write." [16]

§ 1992. **Enlargement of the Rule; Modern Change of Meaning.** The result at this point was that the opposition to proof by "comparison of hands" had been forced to give way, and that the use of such proof had been enlarged with reference to the kind of case — civil and criminal — in which it could be used, and the sources of the witness' knowledge which would be recognized as sufficient. But the old stigma remained, and the old literature discountenancing it was still perused. Thus, when now still other varieties of it were attempted to be availed of, it came about that the argument against them was that they involved "comparison of hands" and were thus unlawful. The attitude of mind was: "Yes, to be sure, you may bring a witness who saw X write, or even received letters which X treated as genuine, or had old records in his possession purporting to be signed by X; that is well enough; *that* is not comparison of hands, but this that you are offering *is* comparison of hands, which has from of old been unlawful."

In other words, we now come to a stage in which "comparison of hands" received a *new and restricted sense*, and was in this sense used to cut off the introduction of new varieties of testimony. It was now applied to all wit-

[14] 1767, Buller, Trials at Nisi Prius, 236: "The reason why the comparison of hands is allowed to be evidence is because men are distinguished by their handwriting as well as by their faces. In general cases the witness should have gained his knowledge from having seen the party write; but under some circumstances that is not necessary, as where the handwriting to be proved is of a person residing abroad, one who has frequently received letters from him in a course of correspondence would be admitted to prove it, though he had never seen him write. So where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write." As late as 1798, Sheares' Trial, 27 How. St. Tr. 323, the old notion is found.

[15] In early American cases we find instances of failure to recognize the new sort; the judge regards testimony as inadmissible when based on anything less than seeing the person write: Huger, J., in Cantey *v.* Platt, 2 McCord 260 (1822); Tilghman, C. J., in Vickroy *v.* Skelley, 14 S. & R. 373 (1826). Yet as early as 1819 Mr. J. Duncan accepted the newer mode, in Com. *v.* Smith, 6 S. & R. 571. In Louisiana the old restriction, receiving only a witness who had seen the very document signed, persisted as late as 1812, under the first Civil Code: Sauve *v.* Dawson, 2 Mart. 202, yet experts were by the same Code received. The past of the law in this respect is often ignored, as where it is said, in Bennett *v.* Mathewes, 5 S. C. 482 (1874), that this sort of testimony "has never been questioned."

The rules for this class of testimony have been already examined in detail, *ante*, §§ 699–708.

[16] So also in Wade *v.* Broughton, 3 Ves. & B. 172 (1814).

nesses who had *no previous knowledge* of the hand, but were *shown specimens in court* and asked to compare them with the disputed writing. This change of meaning in the phrase is the key to the confusing sources of the early 1800s.[1] The following passages will illustrate it; the second one, of Mr. J. Buller, is the most striking, because in his own book of fifteen years before [2] he had used the phrase in the old sense:

1770, YATES, J., in *Brookbard* v. *Woodley*, Peake N. P. 20; rejecting old register-entries offered as standards: "I do not know any case where comparison of hands has been allowed to be evidence at all. . . . Where a witness has seen the party write, . . . that is evidence. But where it is merely opinion on similitude of the writing collected from barely comparing them, the jury may compare them as well as anybody else."

1781, BULLER, J., to the jury, in *De la Motte's Trial*, 21 How. St. Tr. 810: "The counsel on the part of the prisoner have first objected that similitude of handwriting is no evidence. They certainly are right in that argument; but the objection does not apply to this case. Similitude of handwriting is where a paper is produced not sworn to by anybody that has ever seen him write or has any knowledge of his hand, but the inference is made that it is his handwriting because it is like some other which is so. But that is not the evidence which has been offered to you respecting any one of the papers which you have heard read; they have all been proved by persons who were acquainted with his handwriting. They speak not from the similitude of the writing only, but from their knowledge of his handwriting, having seen the prisoner write before. That, gentlemen, is the only evidence which can be given of handwriting, except it happens that there be a person who saw the prisoner actually write the papers."

1792, *R.* v. *Tandy*, Ire., McNally's Evidence, 409; prosecution for sending a challenge to Mr. Toler. Mr. Toler testified: "I have seen him write, and received letters from him." Counsel for defendant argued that "as the evidence offered was merely upon comparison of hands, without any previous ground to show that it was sent by Mr. Tandy to Mr. Toler, it could not be read. . . . From the reversal of Algernon Sidney's attainder to the present case, in criminal prosecutions comparison of handwriting is not evidence." BOYD, J.: "This is not comparison of hands. Mr. Toler says he knows the handwriting." [3]

To understand the new meaning of the phrase, it is necessary to look back at the scope of the early use of "similitude of hands" and see how far it included juxtaposition by the witness 'coram judicio.'

The first thing to note is that it was not the process of juxtaposition by the witness that was reprobated, but the use of such testimony at all. Remembering that the early restricted practice in civil cases was confined to witnesses who had seen the person write, we here find that no discrimination was made between the different ways in which he might give his testimony, *i. e.* he could either merely look at the disputed writing and give his opinion upon it, or better still (they thought) bring in the other writing he had seen made and juxtapose it, and even show it to the Court and jury, — which last, indeed, had been the practice from time immemorial for authenticating

§ 1992. [1] In an anonymous treatise on High Treason, dated 1793, and published with the edition of 1873 of Kelyng's Crown Cases, is one of the latest instances of the old sense of the words (p. 149).

[2] Quoted *ante*, § 1991, note 14.

[3] This change of meaning was observed by Mr. Starkie, with his usual acumen and accuracy: 1824, Starkie, Evidence, II, 515; so also (1849) Mr. Best, Evidence, § 248.

seals.[4] In other words, when they did allow proof by "similitude of hands" at all, they made no special discrimination against juxtaposition in court; it was all "similitude of hands," equally good or equally bad. Thus, Serjeant Levinz said, arguing for the Seven Bishops, in 1688, and conceding what he felt obliged to:[5]

"Your lordship knows that in every petty cause where it depends upon comparison of hands, they used to bring some of the party's handwriting which may be sworn to to be the party's own hand, and then it is to be compared in court with what is endeavored to be proved; and upon comparing them together in court the jury may look upon it and see if it be right. In such manner of proofs by comparison of hands the usage is that the witness is first asked, concerning the writing he produces, Did you see this writ by the defendant whose hand they would prove? If he answers, Yes, I did, then should the jury, upon comparison of what the witness swears to with the paper that is to be proved, judge whether those hands be so like as to induce them to believe that the same person writ both."

1729, *Hales' Trial*, 17 How. St. Tr. 273; forgery of a promissory note. *Counsel:* "Mr. Lincoln, those receipts which you produced, did Mr. Kinnersley actually write them?" Mr. *Lincoln:* "I saw him write them all." *Counsel:* "Shew them to the jury." REYNOLDS, J.: "Gentlemen of the jury, in that book you will find some receipts wrote by Mr. Kinnersley, which Mr. Lincoln swears are his hand."[6]

In short, the struggle that was then going on was against "similitude of hands" in general, and, later, against witnesses who had merely received correspondence; and where there were witnesses who had seen the person write, they were either competent or incompetent, and no objection was founded merely on their bringing the specimens into court.[7]

[4] 1889, Bresslau, Handbuch der Urkundenlehre, I, 489, 547; 1898, Déclareuil, Les preuves judiciaires dans le droit français du V^e^ au VIII^e^ siècle, Nouv. revue hist. de droit fr. et étr., vol. 22, p. 759; 1900, Thayer, Cases on Evidence, 2d ed., note, p. 710; 1895, Pollock and Maitland, Hist. of English Law, II, 222.

[5] 12 How. St. Tr. 297.

[6] 1684, Hayes' Trial, 10 How. St. Tr. 312, 313; 1693, Bath and Mountague's Case, 3 Ch. Cas. 55, 58, 80 (validity of a deed; the judges refer in their opinions to the "multitudes of instruments that were produced in Court" to prove genuineness by comparison); 1700, Feilding's Trial, 13 How. St. Tr. 1353, 1359, 1367; 1714, Carbone *v.* Cotton, Viner's Abr., "Evidence," T, b, 48, 11; 1723, Atterbury's Trial, 16 How. St. Tr. 547; 1731, Ferrers *v.* Shirley, cited *ante*, § 1991; 1781, De la Motte's Trial, 21 How. St. Tr. 675, 782.

[7] This seems to be the explanation of the much discussed and much misunderstood act reversing Algernon Sidney's attainder, which ran as follows: 1 W. & M. 24 (1689), printed in 9 How. St. Tr. 996; Act for annulling and making void the attainder of Algernon Sidney, Esq.: "Whereas . . . there being at that time produced a paper found in the closet of said Algernon, supposed to be his handwriting, which was not proved by the testimony of any one witness to be written by him, but the jury was directed to believe it by comparing with it other writings of the said Algernon," the attainder is reversed. This recital is apparently incorrect, according to the printed report of the trial, since no writings appear to have been brought *in* and juxtaposed as standards. But the fact is that, according to the law at the time of the Act, any use of "similitude of hands," as already explained, was unlawful in criminal cases; and, when the legislature wished to repudiate the proceedings at that trial, it was perfectly natural for them, whether by inadvertence or otherwise, to use the phrase "comparing it with other writings," because either and any mode of proof by "similitude" was bad. Conversely, if it had been good, it would have been equally good whether the witnesses brought in or did not bring in the specimens he had seen written. Perhaps the phrase of the Act "not proved by the testimony of any one witness to be written by him" is the best proof, for those who are familiar with the language of the State Trials. That phrase, as often there used, means only one thing, namely, the lack of any witness who saw the actual writing of the disputed document; and the Act contrasts that kind of a witness with a witness who judges merely by the style of writing. Finally, the Legislature could hardly have used the phrase by inadvertence, because in the testimony set forth, ib. p. 989, it appears that the Legislature had received freshly and accurately an account of just what evidence was offered, and it did *not* include the juxtaposition of specimens.

§ 1993. **State of the Law by the 1800s; (I) Classes of Witnesses.** What we have, then, as the 1800s came in (the time when reasons and principles for the rules of Evidence began much to be thought about) is (1) the acceptance of witnesses who had seen the person write; (2) the acceptance of witnesses who had received writings subsequently treated by him as genuine or who had had the custody of ancient documents of the same persons; (3) the permission, for such persons, equally of merely examining the disputed writing and of bringing into court the specimens they knew and juxtaposing them; (4) the exclusion of any other mode of testimony under the condemnatory phrase "comparison of hands." The other kinds of witnesses that were thus excluded would be (*a*) an ordinary witness who knew nothing about the handwriting but merely juxtaposed specimens and compared; (*b*) the same testimony by one skilled in handwriting generally.

(*a*) Now the former was of course barred absolutely by the Opinion rule, well expounded in this connection in the following passage:

> 1770, YATES, J., in *Brookbard* v. *Woodley*, Peake N. P. 21, note: "Where it is merely opinion on similitude of the writing collected from barely comparing them, the jury may compare them as well as anybody else, and any two people may think differently."

It was because, when the judges stopped to think, this Opinion rule clearly excluded the ordinary witness who spoke only from juxtaposition, that they began to see that logically it also effected the exclusion of the opinion of *any lay witness whatever*, so far as based on a comparison in court. Hence we find that even witnesses of the sort (2) above, who had seen the person write or had received letters or possessed old records, were now for the first time denied the old orthodox process (*ante*, § 1992), of juxtaposing documents in court. But this came about slowly. For witnesses who had seen the person write, it was enforced in 1801 in Garrells *v.* Alexander,[1] though in some American jurisdictions the old practice survived.[2] For witnesses who testified through having long had the custody of ancient documents, the prohibition was longer in being applied. Doe *v.* Tarver, in 1824,[3] maintained the old practice; and it does not seem ever to have been expressly outlawed.[4] Whether it would be regarded as lawful to-day cannot be told; though it is certainly anomalous, because obnoxious to the Opinion rule.

(*b*) The other kind of testimony thus excluded was that of *experts speaking from juxtaposition*. This it was now strenuously sought to introduce. It is no matter of surprise that the judges instinctively hesitated; for the idea of expertism in handwriting was then a novel one.[5] But the significant circum-

§ 1993. [1] 4 Esp. 37, Kenyon, L. C. J.

[2] The authorities are collected *post*, § 2005.

Of course so far as the inspection of the standard, known to the witness to be genuine, is necessary by way of *refreshing recollection*, its use is legitimate. To this extent, but to this only, its propriety is still recognized: 1816, Burr *v.* Harper, Holt N. P. 420. But the opinion in Burr *v.* Harper reads like an afterthought intended to justify existing practice. The authorities are collected *post*, § 2007.

[3] Ry. & Moo. 143, Abbott, C. J.

[4] The authorities are collected *post*, § 2006.

[5] It seemed objectionable even to the most progressive thinkers: Life of Sir S. Romilly, 3d ed., II, 105 (1809; debate on the conduct of the Duke of York; "they agreed to receive this most dangerous species of evidence, . . .

stance is that those who tried to use this kind of testimony were obliged to strive to remove from it the stigma of being "comparison of hands." Thus:

1802, Mr. *Garrow*, in *R.* v. *Cator*, 4 Esp. 117, contending for the admission of expert testimony: "I come now, then, to see what comparison of handwriting is. I call somebody out of the crowd; I show him a paper of Mr. Cator's handwriting, and say 'that is a paper of Mr. Cator's handwriting,' he not being a man of skill; then I show him the libel, and do the same by the jury. Half of them may think it is Mr. Cator's handwriting, and half may think it is not. . . . [Thus, in the present case] I am not contending for a comparison of handwriting; I am referring to the skill and judgment of a person with respect to whom the jury are to judge."

They failed for a long time to introduce the new kind of testimony, and the Legislature had finally to step in with its aid.[6] But the result of the discussion was that the stigmatized "comparison of hands" now obtained definitely the narrow meaning just illustrated; it covered the testimony of all witnesses whose knowledge was acquired solely by examination of specimens for the purpose of the trial; it no longer applied to witnesses who had gained a knowledge by seeing the person write or by receiving correspondence or the like. When a judge now refused to accept a witness because "comparison of hands is not evidence," he meant to exclude any person, either skilled or unskilled, who was not of the last two classes and who was shown, either in court or before trial, specimens as a standard of whose genuineness he had no personal knowledge;[7] and he also meant (by the end

a comparison of hands"); this hesitation is found at a much later time, in Murphy *v.* Hagermann, Wright 297 (1833).

The earliest introduction of expert testimony in this country seems to have been under the first Civil Code of Louisiana: 1812, Sauve *v.* Dawson, 2 Mart. 202.

In the Ecclesiastical Courts the practice had been well known: 1809, Beaumont *v.* Perkins, 1 Phill. Eccl. 78, Sir J. Nicholl; 1822, Saph *v.* Atkinson, 1 Add. 214 (the same judge); though in 1824, in Robson *v.* Rocke, 2 Add. 86, he made a singular 'volte-face,' and uttered nearly opposite declarations as to the common law, the Prerogative Court practice, and his own opinion of the value of such evidence.

[6] In 1792, Lord Kenyon, C. J., in Goodtitle d. Revett *v.* Braham, 4 T. R. 497, had refused to recognize the objection of "comparison of hands" when made against an expert who had studied specimens of the handwriting. Lord Kenyon's supposed recantation in Carey *v.* Pitt, Peake Add. Cas. 131 (1797), apparently refers to testimony that a writing appears to be feigned (on mere inspection of it and nothing else), and not to comparison of hands by an expert, as claimed in R. *v.* Cator by counsel and assented to by Hotham, B.; and this is the construction put on this ruling by his contemporary, Peake (Evidence, 74). Nevertheless Lord Kenyon seems to have been in the meantime of an opposite opinion, for in 1793, Stanger *v.* Searle, 1 Esp. 14, he excluded an expert's testimony on this ground. For the next generation a series of rulings availed to exclude such testimony: 1802, R. *v.* Cator, 4 Esp. 117, Hotham, B.; 1803, Lord Eldon, L. C., in Eagleton *v.* Coventry, 8 Ves. 474 ("That evidence was admitted by Lord Kenyon in one case. It was first introduced by Mr. Justice Buller. . . . [But] these latter cases appear to have brought the law back to the state in which it stood twenty-five years ago"); 1814, the same judge, in Wade *v.* Broughton, 3 Ves. & B. 172; 1829, Clermont *v.* Tullidge, 4 C. & P. 1, Lord Tenterden, C. J.; 1830, Griffith *v.* Williams, 1 C. & J. 47 (Exchequer). In 1836, in Doe dem. Mudd *v.* Suckermore, 5 A. & E. 710, where the whole subject was reasoned out, a division of opinion prevented a settlement of the law, Coleridge and Patteson being for absolute exclusion, and Lord Denman, C. J., and Williams, J., being for admission under restrictions. In 1843, Fitzwalter Peerage Case 10 Cl. & F. 193, expert comparison was excluded. In 1845, in R. *v.* Shepherd, 1 Cox Cr. 237, Erle, J., declared such testimony admissible to prove, but not to disprove genuineness. Finally in 1854, came the Common Law Procedure Act, 17 & 18 Vict. c. 125, § 27, which admitted it with the proper restrictions.

[7] This is the modern sense, of course. Thus, 1819, Duncan, J., in Com. *v.* Smith, 6 S. & R. 571: "Comparison of handwriting is when

of the half century) the process of juxtaposition in court even by one who had a personal knowledge of the hand. In other words, the "comparison" in the old sense was the mental process of comparing the remembered type with the disputed instance; the "comparison" in the new sense is the manual juxtaposition of specimens to form a notion of the type, or to see if the type tallies with the disputed writing.

It was not, however, until Doe dem. Mudd *v.* Suckermore, in 1836,[8] that any real threshing-out of reasons came. At the first part of the century the explanation rests largely on instinct; the judges had already, almost within a generation, allowed great additions in this mode of proof, by enlarging the class of those who could testify at all, and by removing the limitation to civil cases; and they set themselves against any further enlargement of the class.

§ 1994. **State of the Law by the 1800s: (II) Submission of Specimens to the Jury.** There is, of course, a sole remaining way of attempting to prove the genuineness of handwriting, namely, without asking the opinion of any witness, to lay before the jury some specimens of the writing of the person in question.

It has already been seen (*ante*, § 1992) that in the early practice there was no objection to the jury's examination purely as such. The witness who had seen the person write (or, later, had received papers or possessed old documents learned to be genuine) might bring the writing in, if he had it, and the jury would incidentally look at it. Thus the stigma of "comparison of hands" was not applicable to the fact of the jury's examination as such; the struggle was against the use of a certain kind of witness, not against what he did if admitted. There were towards the end of the 1700s only two kinds of witnesses — those who had seen the person write, and those who had held correspondence or possessed ancient documents — and it seems entirely clear[1] that not only could these witnesses bring in and compare the specimens they had, but the specimens could be laid before the jury for their inspection.

But now the controversy over expert testimony by juxtaposition was in full array; the new and narrow sense of the stigmatized "comparison of hands" naturally associated itself with any and every process of "comparison" or manual juxtaposition; and doubts about the propriety of the time-honored inspection by the jury thus arose. They had never arisen before, simply because the only witnesses who could be used at all were persons who had already a personal knowledge of the hand and were thus otherwise competent, and to whom juxtaposition in court was not essential, while for the new kind of witness, the expert, it was the essential source of

other witnesses prove a paper to be the handwriting of a party, and the witness is desired to take the two papers in his hand, compare them, and say whether they are or are not the same writing. There the witness collects all his knowledge from comparison only; he knows nothing of himself, he has not seen the party write, nor held any correspondence with him."

[8] 5 A. & E. 710, cited *supra*, note 6.

§ 1994. [1] As illustrated in the passages *ante*, § 1992.

knowledge; and thus the stigma began to be attached to the process itself as well as to the witness who had to depend upon it. And now, as often happens in our law, the doubts which owed their source to a mere confusion of precedents began to have reasons supplied 'ex post facto.' It was suggested that inspection ("comparison") by juries who could not read was absurd; and other and real objections, with which we need not at this moment concern ourselves, were later searched out.[2] But the old tradition, hitherto unquestioned, that the jury could always have specimens for comparison, was for a long time too strong. Lord Kenyon's remarks in Allesbrook *v.* Roach,[3] in 1795, illustrate the judicial state of mind:

"Some judges have doubted the policy of that rule of evidence respecting the allowing of the jury to judge by comparison of hands, because often at a distance from the metropolis the jury are composed of illiterate men, incapable of drawing proper conclusions from such evidence. For my part, I have always been inclined to admit it, and shall do so in this case."[4]

It is possible that the old practice of handing to the jury all specimens brought in by witnesses who had seen the person write persisted for some time into the 1800s;[5] in 1836 the counsel in Waddington *v.* Cousins[6] argues as if it had continued; and in 1830, in Allport *v.* Meek,[7] Lord Tenterden would apparently have allowed it if the specimens had been properly authenticated.[8] But the Court of Exchequer, in 1830,[9] and the King's Bench, in 1836,[10] after canvassing the whole subject from the point of view of policy, put a limitation upon the practice (confining it to documents already in the case), which remained the law,[11] until the Common Law Procedure Act of

[2] They are considered *post*, § 2001.

[3] 1 Esp. 352.

[4] Singularly enough, Lord Kenyon had already himself once excluded jury-comparison on this very ground of illiteracy: 1791, Macferson *v.* Thoytes, Peake 20. In 1797 he seems still wavering; for in Da Costa *v.* Pym, Peake N. P. 144, he disapproved of comparison by the jury, yet "the jury, nevertheless, compared the different signatures"; *i. e.*, the old tradition was too much for his scruples.

[5] Certainly into the first decade: 1805, Mr. Justice Johnson's Trial, 29 How. St. Tr. 487; 1806, Roe *v.* Rawlings, 7 East 279, 282, note.

[6] 7 C. & P. 595.

[7] 4 id. 267.

[8] Compare Lord Denman, C. J. (1836), in 5 A. & E. 751, who says: "My brother Parke has informed me that at Nisi Prius he has felt himself bound to permit them [the jury] to see the documents on which the witness judged" when they were in court.

The tradition of allowing jury-comparison was in some places perpetuated in this country, as appears in the following passages, the first of which also illustrates the old sense of the phrase as well as the custody-limitation mentioned *ante:* 1792, Addison, P. J., in Pennsylvania *v.* McKee, Add. 35 ("Comparison of hands, or proof by witnesses acquainted with the handwriting, is proper proof to be left to a jury, especially where, as in the present case, the writing is found in the possession of the party"); 1814, Parker, C. J., in Homer *v.* Wallis, 11 Mass. 312 ("Whatever doubts there may now be in England as to this species of evidence — for in former times it was holden admissible and has never yet to our knowledge been absolutely settled otherwise — we have no doubt that it has become by long and invariable usage in this State competent evidence here"); so also in Connecticut (*post*, § 2016).

[9] Griffith *v.* Williams, 1 C. & J. 47.

[10] Doe *v.* Newton, 1 Nev. & P. 1. There were also individual rulings: 1831, Solita *v.* Yarrow, 1 Moo. & Rob. 133, Lord Tenterden C. J.; 1831, R. *v.* Morgan, 1 Moo. & Rob. 134 Bolland, B.; 1836, Bromage *v.* Price, 7 C. & P. 548, Littledale, J.; 1836, Waddington *v.* Cousins, 7 C. & P. 595, Lord Denman, C. J. (after Doe *v.* Newton).

[11] 1836, Lord Denman, C. J., in Doe dem. Mudd. *v.* Suckermore, 5 A. & E. 750; 1841, Hughes *v.* Rogers, 8 M. & W. 123 (apparently treating the matter as not settled); 1845, Ovenston *v.* Wilson, 2 C. & K. 1; R. *v.* Shepherd, 1 Cox Cr. 237, Erle, J.; 1852, R. *v.* Taylor, 6 Cox Cr. 58, Wightman, J.; 1855, Doe *v.* Wilson, 10 Moore P. C. 529 (trial held before the Act of 1854).

1854 speedily reverted to the early tradition, and substituted its more satisfactory rule.

Thus the phrase "comparison of hands," by the first half of the century might mean either juxtaposition by a witness or juxtaposition for the perusal of the jury; the former being not allowed at all, even for experts, and the latter after a time suffering a marked limitation of use. But what seems certain is that, so far as juxtaposition for the jury was discountenanced, not because of the real difficulties involved in it (confusion of issues, and the like), but by the stigma of the phrase "comparison of hands," this was due to its modern association by confusion with that modern sense of "comparison of hands" (juxtaposition) as applied to expert witnesses. The stigma of that phrase attached properly to a kind of witness — in the beginning to a large class, at the end to a small class — but it had originally no reference to the mere process of juxtaposition.

If the foregoing exposition has been clear, we may understand (1) that the classes of witnesses who may testify to handwriting have increased in number by successive enlargements; (2) that the whole meaning of "comparison of hands" has changed; (3) that the mere process of juxtaposition 'coram judicio,' whether for witness or for jury, was historically orthodox and unquestionable; and (4) that the opposite fates at common law of juxtaposition by experts and juxtaposition by jury — exclusion for the former, but limited sanction for the latter — were due simply to the fact that the former had never been attempted till the 1800s and was merely prevented from coming into existence, while the latter had always existed and was thus able to survive the attempts on its life.

B. GENERAL THEORY

§ 1996. **Classes of Handwriting-Evidence, discriminated.** In order to have precisely in mind the scope of the ensuing rulings, and their relation to those already examined elsewhere, a brief re-survey of the various modes of evidencing handwriting is necessary.

At the outset, testimony directly to the *act of inscribing* the disputed writing may be disposed of as not concerning the present subject; it does not differ from direct testimony to the doing of any other act. So also *circumstantial evidence* appropriate to proving any other act is without the present purview, — for example, the fact that the person had expressed an intention to sign the writing, or that he left a room and the signed writing was found in the room (*post*, § 2131). These involve no special principle peculiar to handwriting-evidence.

What is peculiar to that subject is the use of a *type* or general style or standard *of handwriting*, as indicating that a particular disputed writing was or was not made by the person possessing the general style of handwriting. This use may be made by two general kinds of evidence, one testimonial, the

other circumstantial. (1) We resort to *testimonial* evidence when we ask a witness, who possesses a knowledge of a certain type of handwriting, to say whether the disputed document is in that type of handwriting. (2) We resort to *circumstantial* evidence when we furnish the jury directly with a knowledge of the type, so that they may apply it for themselves, and, in order to prove that type to the jury, produce sundry specimens as a basis for learning the character of the type or standard.

(1) When *testimonial evidence* is used, then, the only preliminary requirement is that the witness shall appear qualified, *i. e.* sufficiently acquainted by personal observation with the type of handwriting which he is to apply to the disputed writing. The natural requirements for this purpose, broadly speaking, would be two, namely, he must have seen specimens which were genuinely those of the person whose handwriting he claims to know, and those specimens must have been numerous and representative enough to furnish an adequate basis of judgment; and these requirements show their effect from time to time in the rules of law.

The actual grouping of the kinds of witnesses thus available has been made on the lines of the first requirement, namely, according to the *mode in which the witness knows the genuineness of the specimens seen by him.* (*a*) He may know this 'ex visu scriptionis,' *i.e.* by having *seen* the person in the *act of writing something;* this leads to rules of qualification already examined (*ante*, §§ 694–698). (*b*) Or he may know this 'ex scriptis olim visis,' *i. e.* by having had before him writings *known to him in some other way* (*e. g.* through receiving payment from the purporting writer) to be genuinely those of the person in question; this also leads to rules of qualification, already examined (*ante*, §§ 699–707). (*c*) Or, finally, he may not know their genuineness at all, but may offer his opinion *hypothetically on specimens now shown to him* ('ex scriptis nunc visis'), and their genuineness will be *otherwise proved by the party* offering him; the common case of this sort is that of the expert who is shown alleged specimens in court.

Now, for this last class of witness, it is obvious that by studying the specimens he may become as well qualified as the other classes of witnesses who had seen specimens elsewhere; so that no further obstacle arises as regards the principle of Testimonial Qualifications. But a difficulty arises in another field. In the first place, the *Opinion rule* would ordinarily forbid such testimony (*ante*, § 1918), because the specimens are in court and the jury can obtain no special assistance from the opinion of a layman no better skilled than themselves. In the next place, the specimens have still to be *proved genuine*, and this proof (on the principle of § 1904, *ante*) may be objectionable because of multiplicity and confusion of issues. Thus, this third class of witness ('ex scriptis nunc visis') cannot properly be received until these objections are somehow disposed of.

The consideration of this sort of testimony falls therefore under the present part of the subject; the simpler cases of the other two classes ('ex visu scrip-

tionis,' 'ex scriptis nunc visis') having been already dealt with in the appropriate place (*ante*, §§ 694–707). The theory of the present class of testimony — the witness being either a layman or an expert in handwriting — is dealt with in the ensuing sections (§§ 1997–2000); the state of the rulings in the various jurisdictions, with the detailed questions that arise, is then examined (§§ 2003–2015).

(2) When *circumstantial evidence* is used, the process is to furnish the jury directly with the type or standard of handwriting, by offering specimens exhibiting the person's style. Here, first of all, questions of *Relevancy* arise. The specimens, to afford a fairly trustworthy inference, must of course be genuine, and they must also be numerous and representative enough to serve as an adequate basis for inference to the general style.[1] But, furthermore, the process of proving their genuineness may result (as in the case of the expert's use of them) in a multiplicity and *confusion of issues* and may thus be objectionable on that score (*ante*, § 1904). Finally, the jury's inability to read, or some other characteristic peculiar to juries, may furnish a special objection. Thus the use of specimens submitted directly to the jury does not involve the Opinion rule, and might in theory be disposed of under the doctrines of Relevancy (*ante*, § 383). But the coincidence of some of the objections with those urged (as noted above) against expert testimony, and the importance of discriminating the state of the law applicable to the two kinds of evidence, render it necessary to consider under one head the rulings on both subjects. The theory of submitting specimens directly to the jury is therefore here examined (*post*, §§ 2001, 2002), together with the state of the rulings in the various jurisdictions (§§ 2016–2021).

Theory of (1) Lay and (2) Expert Testimony based on Specimens Nunc Visis

§ 1997. **Opinion Rule: Lay Witnesses excluded, Experts alone admitted.** The effect of the application of the Opinion rule (*ante*, § 1918) is at once to exclude the testimony of lay witnesses. Where specimens are brought into court, there is no need of any opinion based on them except from persons skilled in handwriting; for the jury can judge as well as any other laymen; moreover, they would always have to be brought into court, where the witness does not have personal knowledge of their genuineness, because their genuineness would have there to be proved by other witnesses:[1]

1836, DENMAN, L. C. J., in *Doe dem. Mudd* v. *Suckermore*, 5 A. & E. 749: "If the proved document and the controverted are both in court, and the witness speaks to their resemblance or difference from immediate observation, he seems to perform a task for the jury which every one of them, even though illiterate, might as well perform for himself. But if he is a person of some skill (however low in degree and however generally shared with him), he does what possibly the jury may be incompetent to do."

§ 1996. [1] This principle of Relevancy has already been briefly noticed, without citing the authorities, *ante*, § 383.

§ 1997. [1] 1917, O'Connor's Estate, 101 Nebr. 617, 164 N. W. 570 (approving the text above).

1837, WESTON, C. J., in *Page* v. *Homans*, 14 Me. 482: "In the case under consideration the witness had no previous knowledge. He was called upon to exercise his judgment upon a comparison then to be made. What light could he afford upon the point in controversy? He possessed no peculiar skill. It must have been more satisfactory to the jury to see with their own eyes than to ask the aid of his. He could only state how the evidence impressed his mind; the same evidence was before the jury; and it was their duty to determine its force and effect."

§ 1998. **Testimonial Knowledge Rule: (*a*) Objection based on the supposed Inferiority of an Expert's Opinion.** Though the Opinion rule, then, would admit expert testimony, yet there is further urged an objection resting mainly on the instinctive aversion of the earlier judges to a novel method of testimony — an objection which, the more explicitly it is framed, the weaker its legitimate influence appears; namely, the objection that the opinion of a handwriting-expert is in general inferior to that of an ordinary person who has seen the party write or has corresponded with him.[1] There was a time when the scientific aspects of such testimony did not commend themselves even to great judges, who were at first found to distrust it in all its novel forms:

1836, COLERIDGE, J., in *Doe dem. Mudd* v. *Suckermore*, 5 A. & E. 705: "The test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but to the general character of the writing, which is impressed on it as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore itself permanent. And we best acquire a knowledge of this character by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence; either supposition giving reason to believe that he writes at the time not constrainedly, but in his natural manner. . . . Assuming that no dispute exists as to the genuineness of the standard or the fairness with which it has been selected, [still] such a comparison leads to no inference as to the general character of the handwriting."

This objection has often been answered:

1806, Mr. *W. D. Evans*, Notes to Pothier, II, 159 (No. 16, § VI): "But where, in point of reason, is the objection to a proof by comparison of hands, as founded upon an inspection at the trial? It will surely be admitted that the real object is the investigation of truth, and by the indiscriminate rejection of a means of establishing the truth, which in many instances must be more convincing than the evidence actually received, there is a frequent risk of the failure of justice. Every danger which may result from the case of forgery must operate at least with equal force when the deception is aided by the comparison being made, not with the immediate object of the senses, where the erroneous impressions of one person may be corrected by the more accurate inspection of another, but with the traces in the memory, the errors and imperfections of which are beyond the reach of scrutiny. What is the common evidence of knowledge but an act of comparison, — a comparison of the object presented to the sight with the object imprinted by memory in the mind, with the image and copy of the supposed reality? And when the comparison

§ 1998. [1] How advanced a degree of scientific study has been reached in dealing with handwriting may be seen from the following treatises: 1910, Albert S. Osborn, "Questioned Documents" (Rochester, N. Y.); the same, 1922, "The Problem of Proof, especially as exemplified in Disputed Document Cases."

Full recognition of this scientific aspect is given in the following modern opinions: 1919, Boyd *v.* Gosser, 78 Fla. 64, 70, 82 So. 758 (contract for sale of realty); 1918, Baird *v.* Shaffer, 101 Kan. 585, 168 Pac. 836 (will); 1914, People *v.* Storrs, 207 N. Y. 147, 100 N. E. 730.

is made, not with this imperfect and fallacious copy, but with an undisputed original, applied with the skill and experience of persons habitually devoted to similar inquiries, it is deemed not only a matter of technical caution, but an essential point of constitutional liberty, to reject the assistance which it may naturally be expected to afford. An expert of the most accurate talents, comparing the characters of the admitted writing of an individual through a continued series of years with the character of a disputed piece, cannot be heard to offer his opinion; whilst the knowledge and familiarity that the mind may be supposed to have acquired from the previous perusal of those very writings or even from the casual inspection of a single act is received and acted upon without objection."

1886, DICKINSON, J., in *Morrison* v. *Porter*, 35 Minn. 426, 29 N. W. 54: "In such cases [of acquaintance by seeing the person write or by correspondence] the conception of the handwriting retained in the mind of the witness becomes a standard for comparison, by reference to which his opinion is formed and given in evidence. It would seem that a standard generally not less satisfactory, and very often much more satisfactory, is afforded by the opportunity for examining side by side the writing in dispute and other writings of unquestioned authenticity."

§ 1999. **Same: (*b*) Objection based on Unfair Selection of Specimens.** Still further, in determining whether the witness' sources of knowledge or opinion are adequate, it has to be considered, whether the specimens taken as indicating the type of writing are fair ones. An objection based on this ground was one of the principal ones urged against the employment of expert testimony 'ex scriptis nunc visis,' as distinguished from ordinary testimony 'ex visu scriptionis' or 'ex scriptis olim visis.' Thus:

1816, DALLAS, J., in *Burr* v. *Harper*, Holt N. P. 421: "Comparison of handwriting has been rejected upon two grounds: . . . 2. That the specimens may be unfairly selected, calculated to serve the party producing them, and therefore not exhibiting a fair example of the general character of the handwriting."

1836, COLERIDGE, J., in *Doe dem. Mudd* v. *Suckermore*, 5 A. & E. 708: "A conviction of forgery might pass on the opinion which a single witness might form, founded solely on the examination of signatures or a single signature presented to him the night before by a prosecutor, who need not be called as a witness on the trial to explain when and where such specimen had been procured or from how many selected, the prisoner on the other hand being wholly unprepared to enter into this explanation. It is no answer to this to say that a similar result might follow upon the evidence of a witness who had seen the prisoner write but once. That is an extreme case upon a principle unobjectionable in itself; . . . here the danger is in the principle itself."

This argument has been one of the two leading arguments mentioned in almost every judicial discussion of the subject. How is it to be disposed of?

(1) First, it is pointed out that the possibility is exactly the same in the case of other handwriting-testimony and indeed of all testimony whatever, *i.e.* the party offering a witness may, if there was a choice, have avoided those whom he knew would speak unfavorably and have taken the one who would help his cause; yet this possibility has never been considered a ground for excluding testimony:

1831, DAGGETT, J., in *Lyon* v. *Lyman*, 9 Conn. 61: "It is said by Starkie that an unfair selection of specimens may be made for the purpose of comparison. It is not suggested, however, that any advantage would thereby be given to one party over the other. . . . The same objection lies against the introduction of witnesses who are to testify to their

knowledge of the handwriting. In both cases proof may be expected favorable to the party introducing it; and it will always be selected with that view."

(2) This argument is sometimes further disposed of by establishing a limitation to avoid it, namely, by allowing the expert to use only *documents conceded to be genuine* and thus making unfair selection impossible:

1836, WILLIAMS, J., in *Doe dem. Mudd* v. *Suckermore*, 5 A. & E. 726: "Supposing, however, for the present purpose that it is [the objection is applicable], I cannot perceive how it can be affirmed that this was a partial selection by those who wished to use the papers. The selection was not depending upon their power merely. The whole was subject to the answer of the witness. The papers produced might all have been admitted to be of his handwriting, or one half, or any other portion of them, or all, might have been denied."[1]

(3) Another method of disposing of this argument is to limit the documents usable by the expert to those which are *already otherwise in the case* as a part of the pleadings or the other evidence. The effect of this is to determine the selection usually by the chance requirements of the litigation and not to leave it to a prejudiced choice from all sources.[2]

As between these three solutions, the first is the sensible and practical one. It is the part of prudence to avoid adding to the complicated rules of evidence, especially for the mere sake of avoiding a possible danger.

§ 2000. **Principle of Confusion of Issues.** The qualification of every handwriting-witness, testifying from a type or standard already fixed in his mind, rests on the assumption that the specimens taken by him as forming the type were genuine (*ante*, § 1996). Now the sort of witness, the expert in handwriting ('ex scriptis nunc visis'), with whom we are here concerned, has himself no knowledge of the specimens' genuineness; his testimony will be based hypothetically on the assumption of their genuineness; their genuineness must therefore be otherwise established (for example, by other witnesses), in order that his testimony may be receivable. It is just here that the second great and common objection has arisen, invoking the principle of confusion of issues (*ante*, §§ 1904, 1906), namely, that this additional proof of genuineness would so complicate and confuse the issues as to be undesirable, and that therefore the expert's testimony, to which it is the essential foundation, must fall with it:

1836, COLERIDGE, J., in *Doe dem. Mudd* v. *Suckermore*, 5 A. & E. 706: "If the points which I have just supposed to be conceded [genuineness of specimens and fairness of selection] be brought into question, other and most serious objections arise to this mode of proof. If the genuineness be disputed, a collateral issue is raised, and that upon every paper used as a standard, — an issue, too, in which the proof may be exactly of the same nature as that used in the principal cause, namely, mere comparison; with the additional disadvantages that the former standard is not produced, and that the opposing party can avail himself of no counter-proof. . . . If the fairness with which the standard has been selected

§ 1999. [1] See also, as instances of this answer: 1863, Wilder, J., in Calkins v. State, 14 Oh. St. 227; 1836, Denman, L. C. J., in Doe v. Suckermore, 5 A. & E. 726.

[2] Illustrated in the following opinions: 1831, Bolland, B., in R. v. Morgan, 1 Moo. & R. 134; 1878, Hand, J., in Miles v. Loomis, 75 N. Y. 296.

is disputed, this again must lead to a collateral inquiry, in which the parties meet on unequal terms if no notice has been given (and none is required by our law), and which must tend to distract the jury, if notice be given, and the discussion on the circumstances under which each specimen was written be fully gone into. It must always be borne in mind, in considering the rule of the English law on this subject, that it has reference to a trial by jury, and that we have no provisions for limiting the standard of comparison or regulating the manner of conducting the inquiry; both of which, it seems, have been found necessary where such a mode of proof has been admitted." [1]

In observing how this argument is to be disposed of, it must be remembered that there are three conceivable ways of supplying the fact of genuineness, on the hypothesis of which the expert forms his opinion: (1) By *testimony directed to the jury's* consideration, like all ordinary evidence, — the jury, on retiring, to consider the witness' opinion if the hypothesis of genuineness is proved and to ignore it, like other hypothetical testimony (*ante*, § 672), if the hypothesis is not proved; (2) By *testimony directed to the judge*, in the nature of proof preliminary to the admission of any piece of evidence (*post*, § 1550) and calling for the judge's decision only; (3) By an *admission of the opponent* in the pleadings or for the purpose of the trial.

(1) It will be observed, then, that the objections of Mr. Justice Coleridge assume that the first of these modes is the only one either possible or proper, and upon that assumption the objection is a strong one. It is not a conclusive one, because it proceeds on the old fallacy, so common in our law of evidence, that for the sake of avoiding a possible danger, or a harm likely to appear on one occasion in ten, a real and present good is to be rejected in every instance whatever.[2] It is, nevertheless, this argument which has chiefly availed with those Courts which reject entirely the expert comparison of hands. On the other hand, no Court has found it necessary to go so far as to deny the objection entirely; for by resorting to one of the other two above modes of evidencing genuineness, the objection is avoided and yet the benefit of the expert testimony retained. To these we may now turn:

(2) The only solution at once judicious and practical lies in choosing the *second* mode of evidencing genuineness, *i. e. proving it to the judge*. Here the evidence in question takes its true scientific place, namely, as evidence bearing on the admissibility of testimony, and is thus addressed to the judge (*post*, § 2550). By this mode the jury are not confused by a multiplicity of collateral issues, because the issues are not submitted to them. Thus at once the objection is obviated and the benefit of expert testimony is retained. The argument of Mr. Justice Coleridge that "the English law has no provisions for regulating the manner of conducting the inquiry" illustrates that perverse disposition of the Anglo-American judge — the despair of the jurist — to tie his own hands in the administration of justice, — to deny himself, by a submission to self-created bonds, that power of helping the good and pre-

§ 2000. [1] So also Patteson, J., ib. 732; 1828, Jackson *v.* Phillips, 9 Cow. 112.

[2] See the answers to this objection in these opinions: Daggett, J., in Lyon *v.* Lyman, 9 Conn. 62 (1831); Wilder, J., in Calkins *v.* State, 14 Oh. St. 227 (1863).

venting the bad which an untechnical common sense would never hesitate to exercise. The enlightened procedure on this subject is that which had subsequently to be introduced in England by the statute of 1854, that which the Court of Massachusetts had already adopted from the beginning, and that which now prevails by statute in many of our jurisdictions, namely, the method of addressing all evidence of genuineness to the judge and of leaving the control of its length, its quality, and its effect to the trial judge's discretion:

1902, REMICK, J., in *University of Illinois* v. *Spalding*, 71 N. H. 163, 51 Atl. 731: "The third objection — that to permit comparison with specimens not otherwise in evidence, and admitted for the mere purpose of comparison, would introduce collateral issues, and confuse and distract the jury — is, when applied to specimens neither admitted by the parties nor found by the Court to be genuine, firmly grounded in reason and authority. The whole doctrine of comparison presupposes the existence of genuine standards. Comparison of a disputed signature in issue with disputed specimens would not be comparison, in any proper sense. When the identity of anything is fully and certainly established, you may compare other things with it which are doubtful, to ascertain whether they belong to the same class or not; but, when both are doubtful and uncertain, comparison is not only useless as to any certain result, but clearly dangerous, and more likely to bewilder than to instruct a jury. If disputed signatures were admissible for the purpose of comparison, a collateral inquiry would be raised as to each standard; and the proof upon this inquiry would be comparison again, which would only lead to an endless series of issues, each more unsatisfactory than the first, and the case would thus be filled with issues aside from the real question before the jury. . . . The true rule is that, when a writing in issue is claimed on the one hand and denied on the other to be the writing of a particular person, any other writing may be admitted in evidence for the mere purpose of comparison with the writing in dispute, whether the latter is susceptible of or supported by direct proof or not; but, before any such writing shall be admissible for such purpose, its genuineness must be found as a preliminary fact by the presiding judge, upon clear and undoubted evidence. This involves, indeed, a marked departure from the common law. It does away with the common-law limitation of comparison to standards otherwise in the case, and hence with its exceptions, and the controversy and confusion which have grown out of them. . . . In some States, as already shown, legislation has been deemed essential to bring about such changes; but in others, as we have also shown, the same result has been accomplished by judicial action. As the common-law rule was based primarily upon the assumed incapacity of jurors to make intelligent comparison, such judicial action would seem warranted under the power to adapt the common law to new conditions. The value of comparison as a method of proof being now generally conceded, juries being no longer too ignorant to derive benefit from that source, and the danger of spurious specimens and the objections to collateral issues being fully met by requiring the genuineness of the standard to be determined as a preliminary fact by the trial judge, there remains, it would seem, no satisfactory reason for the odd limitations and exceptions. And it is fair to assume that, had no statute been enacted, the common law of England, adjusting itself to changed conditions, would now accord with the rule we have announced. Such a tendency was indicated by the discussion and decision in [Doe d.] Mudd *v.* Suckermore, which was so soon followed by the act of Parliament referred to. In any event, the essential principle of the common law is preserved, and the dangers and objections against which it was aimed met, by requiring the genuineness of the standard to be found by the Court as a preliminary fact, upon clear and positive testimony."

(3) The *third* mode of establishing genuineness is also effective in obviating the objection in question, *i. e.* that of using only *documents conceded by*

the opponent to be genuine; for thus there is no necessity for further evidence of genuineness.

1886, DICKINSON, J., in *Morrison* v. *Porter*, 35 Minn. 425, 29 N. W. 54: "When the writings presented are admitted to be genuine, so that collateral issues are not likely to arise, nor the adverse party to be surprised by evidence which he is unable to meet, these objections seem to us to be insufficient as reasons for excluding the evidence."

It is obvious that this solution is not as desirable a solution as the one just considered, for it limits seriously the documents to be used, and may sometimes leave none at all available. But this limitation coincides with one of those proposed (*ante*, § 1999, par. 2) for obviating the argument from the possibility of unfair selection; and this result — the disposition of the two great objections by a single expedient — has given a specious plausibility to the claims of this limitation.

(4) There is still another limitation (preferred by some Courts) which equally obviates the general objection of confusion of issues; though, like the one just mentioned, it does so only at the expense of unnecessarily shutting out good sources of testimony; namely, the limitation of the standard-specimens to *documents already otherwise in the case* under the pleadings or evidence.[3] It is here assumed that the jury is to determine the genuineness (*i.e.* it is not given to the judge for preliminary decision); and the reason for fixing this particular limitation is that, as the question of the documents' genuineness would in any event call for the production of evidence on that point, their use as the basis of expert testimony does not introduce any issues (and therefore any confusion or delay) which are not otherwise incident to the case. This limitation also possesses, equally with the preceding, the advantage of coinciding with one of the methods of overcoming the argument from unfair selection (*ante*, § 1999, par. 3), and thus, by a single expedient or rule, disposes of the two leading objections.

The foregoing expedients comprise all that are possible in principle or recognized in rulings; and it is obvious that each one has its own reasons, more or less satisfactory in themselves.[4] But the same rules have in some Courts been adopted and applied without a due appreciation of their reasons. Hence, while we ought to find the various judicial attitudes comprised in four sorts, depending on the above four solutions (namely, (a) total exclusion, (b) no limitation except the judge's discretion, (c) limitation to documents admitted genuine, (d) limitation to documents otherwise in the case), there are also found, in some Courts, rules involving a combination, more or less arbitrary and irrational, of the third and fourth of the above rules; thus, in one jurisdiction the limitation is (e) to documents otherwise in the case *and* ad-

[3] 1878, Hand, J., in Miles *v.* Loomis, 75 N. Y. 296 "This limitation, it must be conceded, is not very philosophical or logically satisfactory, but is justified by the necessity of the case, and at all events answers the objection of collateral issues."

[4] In the Second Report of the Common Law Practice Commission for 1853, p. 25, the various reasons are fully stated and answered.

mitted to be genuine; in another, (f) to documents *either* otherwise in the case, *or* admitted to be genuine; and in another, (g) to documents otherwise in the case, if admitted genuine, and to documents not in the case, if admitted genuine, *i. e.* the same rule in effect as (c) above. The additional varieties, however, so far as any reason can be found or imagined for them, all hark back to the objections above examined and the expedients noted as meeting those objections.

(3) Theory of Jury's Perusal of Specimens

§ 2001. **Foregoing Principles Applied.** When specimens are offered to the jury to form a standard for the character of the person's handwriting, we are dealing not with testimonial evidence, but with circumstantial evidence, and the first question to be considered is that of Relevancy. It has already been seen (*ante*, § 1996) that the objection of unfairness of selection may be raised from this point of view. It has also been seen (§ 1996), that from the point of view of Relevancy, the specimens must be genuine, and thus, proof of genuineness becoming essential, the objection of confusion by Confusion of Issues again arises here. In short, the two leading objections which have just been examined for expert comparison (§§ 1999, 2000), are again available as against jury-comparison. It follows that the same expedients may be resorted to, in avoiding these objections.

There is, however, a difference of attractiveness as between the second and the third expedients (*ante*, § 2000, pars. 3, 4). The first expedient — putting the matter in the hands of the judge — is of course, here as before, the best, and is the one introduced by the English statute of 1854. But, as between the second and the third — the limitation to documents admitted genuine and the limitation to documents otherwise in the case — the third is the more natural one, since it is obviously impossible to keep the jury from considering all documents otherwise in the case and incidentally using them for light upon the handwriting issue. This consideration, indeed, was so strong with the judges in the decisive case of Doe *v.* Newton that they sanctioned jury-comparison to that extent, in spite of a belief that such comparison was against good policy.[1]

The important thing to note, however, is that there *may conceivably be* one rule for jury-comparison of specimens and a *different rule for expert-testimony* based on specimens. This result may be reached, as it was in England, on the score of controlling precedents; and it may also be reached, though not so easily, on the ground of expediency. In fact, such a divergence of rules, however undesirable and unnecessary, does exist in many jurisdictions,

§ 2001. [1] 1836, Doe *v.* Newton, 1 Nev. & P. 1; Denman, L. C. J., accounted for the exception in favor of documents otherwise in the case by suggesting (for the first time) that "the real ground is that comparison in such a case is unavoidable. . . . No human power can prevent the jury from forming some opinion, . . . and consequently when the mind of the jury must be so employed, it is better for the Court to enter into the consideration."

and hence the precedents on the two questions have to be considered separately.[2]

§ 2002. **Jury's Inability to Read.** When in the history of jury-comparison (*ante*, § 1994) the propriety of it began to be argued about, the first opposing reason that came up for consideration was that the jury frequently could not read writing and hence it was useless to submit writings to them:[1]

1791, Lord KENYON, C. J., in *MacFerson* v. *Thoytes*, Peake N. P. 20: "Comparison of hands is no evidence. If it were so, the situation of a jury who could neither read nor write would be a strange one; for it is impossible for such a jury to compare the handwriting."

This reason, by the time of Doe *v.* Newton,[2] was no longer considered sufficient to exclude such comparison; and in this country it was almost unanimously repudiated,[3] — not on the sensible reason that it was unsound, but for the reason, more satisfying to national pride, that juries here could seldom be reproached with it. So far as its soundness on precedent is concerned, the circumstance is certainly suspicious that the reason did not come to be mentioned (*ante*, § 1994) until a modern period when juries were even more likely than ever before to be able to read, and that so powerful a reason did not avail in all departments of proof to keep written evidence from the jury. So far as soundness of principle is concerned, it was not creditable to eminent judges to argue that, because some juries could not read and thus could not compare, therefore juries that could read and could compare should not be allowed to compare. There is a solemn absurdity in such a 'non sequitur.'

C. PRESENT STATE OF THE LAW UPON THE ABOVE KINDS OF EVIDENCE

§ 2003. **In general.** After thus examining the history of handwriting-testimony, and the theory and policy applicable from the point of view of principle, we are in a position to consider the present state of the law in the various jurisdictions, on the general question and upon the minor details that arise. The attempt is here made to keep separate the two questions of an expert's testimony as based on handwriting-specimens and of the jury's examination of such specimens. Yet the broad and loose phrase "comparison of hands" has sometimes done service for both, in the utterances of

[2] 1870, Nott, J., in Medway *v.* U. S., 6 Ct. of Cl. 428: "The admission of this letter in evidence [to the jury for comparison] is not to be confounded with that practice . . . of allowing witnesses to testify as to handwriting whose knowledge is but opinion, resting on comparison alone. It comes in under a different rule, resting upon a distinct principle . . . [that] comparison of handwriting may be made by Courts and juries without the intervention of witnesses, if," etc.

§ 2002. [1] *Accord:* 1770, Brookbard *v.* Woodley, Peake N. P. 21, note, Yates, J.; 1803, Eagleton *v.* Kingston, 8 Ves. 475, Eldon, L. C.; 1821, Burr *v.* Harper, Holt N. P. 421, Dallas, C. J. It was, however, disapproved on other occasions: 1795, Allesbrook *v.* Roach, 1 Esp. 352, Kenyon, L. C. J.; 1836, Williams, J., in Doe *v.* Suckermore, 5 A. & E. 723.

[2] 1836.

[3] *E. g.:* 1812, Tilghman, C. J., in McCorkle *v.* Binns, 5 Binney Pa. 348; 1828, Savage, C. J., in Jackson *v.* Phillips, 9 Cow. N. Y. 112; 1831, Daggett, J., in Lyon *v.* Lyman, 9 Conn. 62; 1836, Shaw, C. J., in Moody *v.* Rowell, 17 Pick. Mass. 490; 1863, Wilder, J., in Calkins *v.* State, 14 Oh. St. 227. But it was treated as a valid reason in an early Virginia case: 1829, Rowt *v.* Kile, 1 Leigh 216.

Courts, and it is thus not always easy to say whether the rule of a given Court is intended for the former only or for the latter only or for both.

(1) Lay Testimony based on Specimens Nunc Visis

§ 2004. **Excluded in general by the Opinion Rule.** The effect of the Opinion rule, as already noted (*ante*, § 1997), is of course to exclude comparison of specimens before the Court by a *lay-witness* in general.[1]

An exception which "proves the rule" is the case of a layman who has seen a disputed document, *now lost*, but *did not then know the author* of it, and is now asked to compare a specimen of proved authorship and say whether the lost document was in the same hand. Here the reason of the Opinion rule falls away; for the jury cannot examine for themselves the lost document, and hence the lay witness can add some information not otherwise accessible; hence, his opinion, based on comparison, should be allowed.[2]

§ 2005. **Old Exception for Witnesses ex visu scriptionis or ex scriptis olim visis.** It has been already noted (*ante*, § 1993) that the traditional practice, down to the 1800s, made no discrimination against the use of the specimens in court; and that thus, wherever a lay-witness was to speak from having already seen the person write or from correspondence, he could originally (and it was sometimes urged, he must) bring the documents into court, and he might then use them in testifying. The perception in England that the Opinion rule prevented this [1] did not always avail with American Courts to destroy the old tradition. Accordingly there occur a number of rulings perpetuating it, either as a direct local survival of the tradition, or by the improper application of early precedents elsewhere. These rulings must be regarded as anomalous.[2]

§ 2004. [1] 1864, R. *v.* Wilbain, 9 Cox Cr. 448 (police-inspector's testimony of comparison between an anonymous letter and writings found in defendant's possession, excluded); 1886, Mixer *v.* Bennett, 70 Ia. 331, 30 N. W. 587 (under Code § 3655); 1910, Murphy *v.* Murphy, 146 Ia. 255, 125 N. W. 191 (but this ruling is erroneous on the facts, for the reason stated *ante*, § 697, n. 4); 1849, Smith *v.* Walton, 8 Gill Md. 86; 1867, Niller *v.* Johnson, 27 Md. 13; 1837, Page *v.* Homans, 14 Me. 478; 1860, Woodman *v.* Dana, 52 Me. 13; 1899, Lowe *v.* Dorsett, 125 N. C. 301, 34 S. E. 442; 1904, Groff *v.* Groff, 209 Pa. 603, 59 Atl. 65; 1852, Kinney *v.* Flynn, 2 R. I. 319, 327.

This is also implied in most of the statutes noted *post*, § 2008.

[2] *Accord:* 1889, Hammond *v.* Wolf, 78 Ia. 227 (attorney testifying to a note, now lost, and formerly placed in his hands for collection); 1891, Sankey *v.* Cook, 82 Ia. 125 (an expert who had once seen a contract now lost; here excluded, solely because the specimen used as a standard was not properly proved genuine); 1910, Murphy *v.* Murphy, 146 Ia. 255, 125 N. W. 191 (cited more fully *ante*, § 697, n. 4).

Whether a *lost disputed document* may be proved by handwriting-testimony is considered *ante*, §§ 697, 1185.

§ 2005. [1] In England, Garrells *v.* Alexander (1801, Kenyon, L. C. J., 4 Esp. 37) probably effected ultimately the change; though for some time afterwards the Bar seems to have clung to the tradition.

[2] 1886, Vinton *v.* Peck, 14 Mich. 292; 1860, Woodman *v.* Dana, 52 Me. 11; 1880, Worth *v.* McConnell, 42 Mich. 475, 4 N. W. 198; 1878, State *v.* Clinton, 67 Mo. 385.

In *Pennsylvania*, in Bank *v.* Jacobs, 1 Pa. 180 (1829), comparison was allowed, according to the old doctrine, for those already knowing the writing; but this was repudiated in Travis *v.* Brown, 43 Pa. 9 (1862), which represents the accepted rule.

In *South Carolina* the decisions all allowed non-experts to compare until Weaver *v.* Whilden, in 1890 (cited *post*, § 2008), which, in

§ 2006. **Same: Old Exception for Ancient Documents.** Another part of this exception due to the survival of the tradition of the 1800s (*ante*, § 1993) prevails for comparison made in court by the *possessor of ancient documents*. Such a person is qualified to speak as to that handwriting (*ante*, § 704), and, by the traditional practice, might bring them into court and compare them with the disputed writing. The Opinion rule should exclude this kind of comparison as well as the preceding one; but the tradition persisted in this respect, and may be said to be still the law.[1]

§ 2007. **Refreshing Memory by Perusing Specimens.** There seems no reason why, on principle, one who comes to court with a knowledge of handwriting (by having seen the act of writing or by having had correspondence or by having possessed old documents) should not be allowed to refresh his memory (*ante*, § 758) by a perusal in court of the specimens forming the foundation of his knowledge. The doctrine seems, so far as its original promulgation is concerned, to have arisen in consequence of the attempt of the Bar to perpetuate the old tradition (overthrown by Garrells *v.* Alexander), allowing comparison in court by a layman knowing the handwriting (*ante*, § 2005).[1] On principle, if this perusal was desired, not as in itself the foundation for the opinion, but as a means of refreshing the memory of an opinion already formed, it could be permitted so far as it served that end:

apparently intending to maintain the rule, left the matter doubtful.

In *Tennessee* such comparison was perhaps allowable: *post*, § 2008.

In the *Federal Courts*, in Smith *v.* Fenner, 1 Gall. 175 (1812), Mr. J. Story allowed this; so also are the following: 1805, Hopkins *v.* Simmons, 1 Cr. C. C. 250; 1833, U. S. *v.* Larned, 4 Cr. C. C. 312. But Strother *v.* Lucas, 6 Pet. 766 (1832), finally placed the Court against it.

In *West Virginia* apparently this comparison is allowed for one who has personal knowledge of the writing: 1874, Clay *v.* Robinson, 7 W. Va. 359, 10 W. Va. 53; and later rulings in § 2008, *post*.

§ 2006. [1] *England:* 1824, Doe *v.* Tarver, R. & Moo. 143, Abbott, C. J. (allowed). In R. *v.* Barber, 1 C. & K. 436 (1884), it does not appear why the testimony was rejected. In 1836, Doe *v.* Suckermore, 5 A. & E. 717, *passim*, all the judges seemed to concede the exception; and in 1847, Doe *v.* Davies, 10 Q. B. 314, a witness produced an old register and compared it. In 1806, Roe *v.* Rawlings, 7 East 282, and 1811, Morewood *v.* Wood, 14 East 328, ancient documents were used, but whether by witnesses or not does not appear. From rulings, not elsewhere reported, mentioned by Mr. Phillipps (I, 492, note) and Mr. Starkie (II, 517, note), the usage prior to the above later cases seems to have been without uniformity.

United States: The exception was recognized in the following cases: 1849, Smith *v.* Walton, 8 Gill Md. 86; 1820, State *v.* Allen, 1 Hawks N. C. 9, *semble*; 1911, Nicholson *v.* Eureka L. Co., 156 N. C. 59, 72 S. E. 86 (not confining the rule to experts); 1874, Clay *v.* Robinson, 7 W. Va. 359, 10 id. 53.

Judges constantly mention 'obiter' an exception in favor of "ancient documents," but it is impossible to be certain whether they are referring solely to the laying of such documents *before the jury* (a use undoubtedly established; *post*, § 2017), or also to their use by the witness who brings them as the foundation of his knowledge. Moreover, it is impossible to tell whether they mean also, by this broad phrase, to sanction the examination of ancient documents by experts, in jurisdictions where *expert* comparison is otherwise limited or rejected; in Doe *v.* Suckermore, however, expert use is evidently sanctioned.

It should be added that in some jurisdictions the old tradition is misunderstood, and is expressly said to mean that ancient documents may be compared in court by *experts*; this is right enough on principle, but it is not, as represented, the old doctrine, for the old doctrine made no limitation to experts; 1887, Williams *v.* Conger, 125 U. S. 413, 8 Sup. 933; 1878, State *v.* Clinton, 67 Mo. 384; 1849, West *v.* State, 22 N. J. L. 241.

§ 2007. [1] In *England* this practice was allowed in the following cases: 1816, Burr *v.* Harper, Holt N. P. 420; 1845, R. *v.* Shepherd, 1 Cox Cr. 237. In Doe *v.* Suckermore, A. & E. 724, 752 (1836), contrary opinions were expressed by the judges as to the propriety of the ruling in Burr *v.* Harper; Williams, J., and Patteson, J., respectively approving and disapproving it.

1828, COALTER, J., in *Redford's Adm'r* v. *Peggy*, 6 Rand. 326, 345: "There can be no doubt, I presume, that if a witness knows he is about to be examined as to handwriting, and has frequently seen the party write, and has in his possession papers that he saw him write, and looks at them so as to refresh his memory as to the character and manner of writing, and then deposes, that this would not destroy his testimony. A witness is called on to identify a man he had before known, but, before he sees him, he looks at a picture which he recognizes to be a likeness, which recalls the features and expression of countenance, and notwithstanding alterations by age, etc., he testifies to his identity; [this is allowable]."

That by way of refreshing memory such inspection is allowable seems clearly the law to-day in the United States.[2]

(2) Expert Testimony based on Specimens Nunc Visis

§ 2008. **Whether admissible at all; and, if so, for what Classes of Writings.** The decisions and the statutes in the various jurisdictions exhibit a great variety of rules; even within the same jurisdiction there is often obscurity and inconsistency.[1] The types of possible rules have already been summarized

[2] *United States:* The practice was approved in the following cases: 1860, Clark *v.* Wyatt, 15 Ind. 272, *semble;* 1885, Thomas *v.* State, 103 Ind. 419, 431, 2 N. E. 803; 1849, Smith *v.* Walton, 8 Gill Md. 85; 1886, National Bank *v.* Armstrong, 66 Md. 115, 6 Atl. 584 (here the signature was used on cross-examination, and was one not in the case but already admitted by the party to be genuine); 1856, McNair *v.* Com., 26 Pa. 390 (provided there is a genuine refreshment of memory, otherwise not; so far as this case allows a mere comparison irrespective of memory refreshment, it is overruled by Travis *v.* Brown, *post*, § 2008; but on the present point the decision seems still to be law). In Redford *v.* Peggy, quoted *supra*, two of the three judges held the testimony still admissible though the witness declared that without such refreshment he could not have identified the writing; but these two would apparently have excluded the witness had his comparison produced no actual refreshment but formed in itself the sole basis of his testimony.

§ 2008. [1] To avoid repetition, the statutes are placed *post*, § 2016, where the jury's use of specimens is dealt with; the statutes usually regulate the two modes in the same enactment; the decisions in § 2016 should also be compared:

ENGLAND and CANADA: The rulings at common law have been placed *ante*, §§ 1993, 1994, in considering the history; the statutes and rulings thereunder are placed *post*, § 2016, in dealing with the jury's use of specimens.

UNITED STATES: *Federal:* It was not easy to learn the exact rule before the statute of 1913, even if we assume that the modern Supreme Court decisions on jury-comparison (*post*, § 2016) are to be taken as applicable to expert comparison: 1832, Strother *v.* Lucas, 6 Pet. 766 (excluding comparison by a non-expert); 1851, Gaines *v.* Relf, 12 How. 472, 530, *semble* (comparison of hands held properly made, under the Louisiana statute); 1870, Rogers *v.* Ritter, 12 Wall. 321 (question left undecided); 1855, U. S. *v.* Darnaud, 3 Wall. Jr. 181 (allowed for documents admitted or proved genuine and, *semble*, otherwise in the case); 1870, Medway *v.* U. S., 6 Ct. of Cl. 428 (comparison by experts not allowed); 1886, U. S. *v.* McMillan, 29 Fed. 247 (documents at least must be admitted genuine); 1888, U. S. *v.* Mathias, 36 Fed. 893 (documents must be otherwise in the case and admitted genuine); 1893, Hickory *v.* U. S., 151 U. S. 303, 305, 14 Sup. 334 (Moore *v.* U. S. cited, but no rule laid down); 1894, Richardson *v.* Green, 9 C. C. A. 565, 61 Fed. 423, 15 U. S. App. 488, 507 (applying the Oregon statute); 1897, National Accid. Soc. *v.* Spiro, 24 C. C. A. 334, 78 Fed. 775 ("probably" expert testimony is inadmissible); 1904, Withaup *v.* U. S., 127 Fed. 530, 535, 62 C. C. A. 328 (comparison allowable "if a paper is in evidence in the case for some other purpose, and is admitted or satisfactorily proven to be" genuine, or if a paper is filed by a party and is part of the record of which the Court takes judicial notice; this is said to be "clearly established" (?) as the "common-law rule"; here, four papers in a former case were excluded, and two recognizances in the case at bar were admitted); St. 1913 (quoted *post*, § 2016);

Alabama: In an early case it was said that testimony by "comparison of hands" was not allowable at all, though the witness here offered was not an expert: 1843, State *v.* Givens, 5 Ala. 754; but whether expert comparison is now recognized is uncertain: 1882, Moon's Adm'r *v.* Crowder, 72 Ala. 88 (apparently confining expert comparison to "writings of unquestioned genuineness" in the case); 1891, Gibson *v.*

(*ante*, § 2000); and the rule in each jurisdiction is either one of those stated or else some qualified variety of one of the chief forms.

Trowbridge, 96 Ala. 357, 361, 11 So. 365 (excluded entirely); 1898, Curtis *v.* State, 118 Ala. 125, 24 So. 111 (excluded on the facts); 1905, Campbell *v.* Bates, 143 Ala. 338, 39 So. 144 (Gibson *v.* Trowbridge F. Co. followed); 1907, Griffin *v.* Working Woman's H. Ass'n, 151 Ala. 597, 44 So. 605 (papers otherwise in the case and conceded or proved genuine may be used);

California: Expert comparison is allowed by the statute cited *post*, § 2016; 1880, Cartery's Estate, 56 Cal. 470, 474 (doubted whether expert comparison could be made with specimens on which the testator had not "acted or been charged" and which had not "been admitted or treated as genuine" by the opponents; this ignores the last clause of C. C. P. § 1944);

Colorado: Expert comparison is allowed by the statute cited *post*, § 2016;

Columbia (Dist): 1894, Keyser *v.* Pickrell, 4 D. C. App. 198, 206 (expert testimony allowed; no limitations named);

Florida: Expert comparison is allowed by the statute cited *post*, § 2016;

Georgia: Expert comparison seems not to be sanctioned by the statute cited *post*, § 2016: 1886, Smith *v.* State, 77 Ga. 705, 711, *semble* (expert testimony to other letters proved genuine, admissible); 1906, Patton *v.* Bank, 124 Ga. 965, 53 S. E. 664 (note; comparison with other signatures admitted genuine and in evidence, allowed);

Idaho: 1900, Bane *v.* Gwinn, 7 Ida. 439, 63 Pac. 634 (allowable for only such papers as are "in the cases for other purposes, and such as are admitted to be genuine," "except in very exceptional cases"; no authority cited); 1914, State *v.* Bogris, 26 Ida. 587, 144 Pac. 789 (larceny of a pay-check; Bane *v.* Gwinn followed; but the opinion intimates that documents proven genuine may also be admissible);

Illinois: The use of expert comparison was at first rejected altogether: 1846, Pate *v.* People, 8 Ill. 664, *semble:* but the rulings about submitting specimens to the jury (*post*, § 2016) seem to have been taken as authorities in the present connection, and expert comparison became allowable, though under what conditions no one could say exactly, until the statute of 1915; 1892, Riggs *v.* Powell, 142 Ill. 453, 456, 32 N. E. 482 ("comparing an alleged signature with a genuine one," excluded; citing Putnam *v.* Wadley, Board *v.* Misenheimer, Ill.); 1892, Rogers *v.* Tyley, 144 Ill. 652, 665, 32 N. E. 393 (admissible if "properly in evidence in the case for other purposes"; yet, in the next sentence, if "admitted to be genuine, already in the case"; citing Brobston *v.* Cahill; ignoring Riggs *v.* Powell; perhaps to be distinguished from it because the one was filed at Springfield, Nov. 2, 1892, the other at Ottawa, Oct. 31, 1892); 1893, Himrod *v.* Gilman, 147 Ill. 293, 295, 300, 35 N. E. 373 (genuineness of notes secured by a trust deed; "it seems to be well settled in this State" that comparison cannot be made "with an admitted genuine signature to papers or documents not in evidence in the cause and which are collateral to the issue"; an expert's comparison with a trust-deed signature was here held proper; the preceding two cases are not cited in either briefs or opinion); 1897, Greenbaum *v.* Bornhofen, 167 Ill. 640, 645, 47 N. E. 857 (expert's testimony, founded on "papers offered in evidence," admitted; no question raised); St. 1915 (quoted *post*, § 2016);

Indiana: Here the use of documents seems to have been at first confined to those which are admitted to be genuine, whether they are otherwise in the case or not: 1870, Chance *v.* Gravel Road Co., 32 Ind. 474; 1873, Burdick *v.* Hunt, 43 Ind. 386; at this stage came: 1877, Jones *v.* State, 60 Ind. 241 (requiring also that the documents be otherwise in the case); but it is not followed on that point: 1879, Forgey *v.* Bank, 66 Ind. 124; 1881, Hazzard *v.* Vickery, 78 Ind. 64; 1881, Shorb *v.* Kinzie, 80 Ind. 502; 1889, Walker *v.* Steele, 121 Ind. 440, 22 N. E. 142, 23 N. E. 271; but at this stage the rule was enlarged by allowing the use of papers either already in the case or admitted genuine; the line of cases beginning some distance back: 1874, Huston *v.* Schindler, 46 Ind. 38, 43, *semble* (papers admitted genuine or in the case, usable); 1884, Shorb *v.* Kinzie, 100 Ind. 429; 1890, White S. M. Co. *v.* Gordon, 104 Ind. 495, 496, 24 N. E. 1053; 1895, McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 340; 1895, Tucker *v.* Hyatt, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872 (an affidavit for change of venue, and a verified plea); then in 1913 came a statute, cited *post*, § 2016;

Iowa: Expert comparison is allowed by the statute cited *post*, § 2016; documents admitted to be genuine may be used, though the Code does not say so: 1888, Riordan *v.* Guggerty, 74 Ia. 691, 39 N. W. 107;

Kansas: Expert comparison was at first permitted when the standard-documents were otherwise in the case, and when, though not otherwise in the case, they were admitted to be genuine: 1872, Macomber *v.* Scott, 10 Kan. 339; but the rule is now uncertain: 1898, Gilmore *v.* Swisher, 59 Kan. 172, 52 Pac. 426 (conveyance in fraud of creditors; to prove the genuineness of a material admission of the debtor's, proof by comparison of specimens was limited to specimens conceded to be genuine, the disputed document being only incidentally material; the Court disclaims any "attempt to declare a definite rule on the subject"(!));

§ 2009. **Unfair Selection of Specimens.** In jurisdictions where any documents proved genuine may be used, the question often arises whether the

Kentucky: Expert comparison was at first entirely excluded, so far as it involved an opinion of the writing based on speciments studied: 1852, Hawkins *v.* Grimes, 13 B. Monr. 261; 1885, Fee *v.* Taylor, 83 Ky. 263; but the statute, cited *post*, § 2016, now permits it: 1903, Storey *v.* Bank, — Ky. —, 72 S. W. 318 (comparison by expert of specimens not otherwise in the case, allowed, under C. C. P. § 604 as amended; Fee *v.* Taylor repudiated as obsolete); 1907, Pulliam *v.* Sells, 124 Ky. 310, 99 S. W. 289 (comparison allowed with signatures admitted by opponent on the stand to be genuine);

Louisiana: Expert comparison is allowed by the statute cited *post*, § 2016: 1812, Sauve *v.* Dawson, 2 Mart. 202 (allowable, under the old Civil Code); 1835, Plicque *v.* La Branche, 9 La. 560, 562 (allowable under C. C. P. § 325); 1853, Whitney *v.* Bunnell, 8 La. An. 429 (same); 1866, McDonogh's Succession, 18 La. An. 419, 445 (same); 1869, Huddleston *v.* Coyle, 21 La. An. 148 (same); 1869, Leonard's Succession, 21 La. An. 523 (same).

For *olographic* wills, a special line of authorities exists: Civ. C. § 1655 (must be proved by two witnesses "who must attest that they recognize the testament as being entirely written, dated, and signed in the testator's handwriting, and as having often seen him write and sign during his lifetime"; for the last clause, Act 119, p. 168, 1896, substituted this: "The judge shall interrogate the witnesses under oath touching their knowledge of the testator's handwriting and signature, and shall satisfy himself that they are familiar therewith"); 1871, Roth's Succession, 31 La. Ann. 320 (expert testimony admissible in corroboration of the two witnesses speaking from personal knowledge); 1913, White's Succession, 132 La. 890, 61 So. 860 (rule of Roth's Case followed);

Maine: The expert may use any documents admitted or proved to be genuine: 1860, Woodman *v.* Dana, 52 Me. 13; 1888, State *v.* Thompson, 80 Me. 201, 13 Atl. 892;

Maryland: Expert comparison was at first excluded entirely: 1873, Tome *v.* R. Co., 39 Md. 89 (Alvey, J., diss.); 1881, Herrick *v.* Swomley, 56 Md. 459 (as bound by the preceding case); but it is now permitted by the statute cited *post*, § 2016;

Massachusetts: Expert comparison is allowed for any documents admitted or clearly proved to be genuine; the authorities for jury-comparison in § 2016, *post*, are also to be taken as applying here: 1836, Moody *v.* Rowell, 17 Pick. 490; 1874, Demerritt *v.* Randall, 116 Mass. 331;

Michigan: Experts may compare documents already in the case: 1866, Vinton *v.* Peck, 14 Mich. 287;

Minnesota: Experts may compare documents otherwise in the case, and documents not otherwise in the case but admitted to be genuine: 1886, Morrison *v.* Porter, 35 Minn. 425, 29 N. W. 54; 1912, Cochran *v.* Stein, 118 Minn. 323, 136 N. W. 1037 (Morrison *v.* Porter approved);

Mississippi: Experts may compare documents otherwise in the case, and documents not otherwise in the case but admitted to be genuine: 1874, Wilson *v.* Beauchamp, 50 Miss. 32;

Missouri: Experts may compare documents otherwise in the case, if admitted genuine, and documents not otherwise in the case but admitted genuine, — in short, any documents admitted to be genuine: 1870, State *v.* Scott, 45 Mo. 304 (adding to the first class *supra*, "or clearly proved genuine"); 1878, State *v.* Clinton, 67 Mo. 385; 1880, State *v.* Tompkins, 71 Mo. 616; 1884, Springer *v.* Hall, 83 Mo. 697; but in Rose *v.* First Nat'l Bank, 91 Mo. 401, 3 S. W. 876 (1886), documents not in the case, yet "conceded to be genuine," were rejected by a misunderstanding of State *v.* Clinton and the succeeding cases; finally came the statutory rule cited *post*, § 2016; 1917, Weber *v.* Strobel, — Mo. —, 194 S. W. 272 (will statute applied to admit experts);

Montana: Experts might compare documents otherwise in the case and admitted or clearly proved to be genuine: 1878, Davis *v.* Fredericks, 3 Mont. 262, *semble;* but the statute cited *post*, § 2016, now regulates the use;

Nebraska: Expert comparison is permitted by the statute cited *post*, § 2016;

New Hampshire: Experts may compare any documents proved to be genuine: 1873, State *v.* Hastings, 53 N. H. 460; 1877, Carter *v.* Jackson, 58 N. H. 157; which apparently displace the old limitations of Bowman *v.* Sanborn, 25 N. H. 110 (1852); 1902, University of Illinois *v.* Spalding, 71 N. H. 163, 51 Atl. 731 (quoted *ante*, § 2000);

New Jersey: Experts at first could not testify at all from a study of specimens: 1849, West *v.* State, 22 N. J. L. 241 (except for ancient documents; *ante*, § 2006); until the enactment of the statute cited *post*, § 2016; applied in Mutual Ben. Life Ins. Co. *v.* Brown, 30 N. J. Eq. 201 (1878);

New York: Here, at first, testimony by the study of specimens was unconditionally excluded: 1809, Jackson *v.* Van Dusen, 5 John. 155, *semble;* 1828, Jackson *v.* Phillips, 9 Cow. 112; 1843, Wilson *v.* Kirkland, 5 Hill 182; but later it was allowed for experts when based upon documents otherwise in the case: 1878, Miles *v.* Loomis, 75 N. Y. 292; 1880, Hynes *v.* McDermott, 82 N. Y. 49; the enlarging statutes of 1880 and 1888, and their peculiar interpretation, are dealt with *post*, § 2016;

North Carolina: The state of the law was not

specimen is a fair one, for example, when it was written in court by the party offering it, and whether it is material that it is an opponent or a hostile

easy to determine, until the statute of 1913, cited *post*, § 2016: 1840, Pope *v.* Askew, 1 Ired. 16, 19 ("Testimony as to handwriting, founded on what is properly termed comparison in hands, seems to be now generally exploded"; citing Doe *v.* Suckermore; but the witness here was not an expert); 1856, Otey *v.* Hoyt, 3 Jones L. 409, *semble* (comparison not allowed for any one); 1877, Yates *v.* Yates, 76 N. C. 149, *semble* (allowed for documents otherwise in the case and admitted genuine); 1881, McLeod *v.* Bullard, 84 N. C. 529 (a deed was claimed to have been signed while drunk, and a comparison was allowed, with documents otherwise in the case, to show the difference between that and the normal signature); 1891, Tunstall *v.* Cobb, 109 N. C. 320, 14 S. E. 28 (allowed for documents otherwise in the case and admitted genuine, and for documents not otherwise in the case if admitted genuine); 1892, Croom *v.* Sugg, 110 N. C. 259, 14 S. E. 748 (action on defendant's testatrix's bond; defendant allowed to use the will's signature, as one admitted genuine); 1893, State *v.* De Graff, 113 N. C. 688, 693, 18 S. E. 507 (Tunstall *v.* Cobb approved); 1896, State *v.* Noe, 119 N. C. 849, 25 S. E. 812 (allowed where genuineness "is not denied or cannot be denied"; here allowed for a bond for appearance of the defendant); 1914, Boyd *v.* Leatherwood, 165 N. C. 614, 81 S. E. 1025 (Tunstall *v.* Cobb followed);

Ohio: Here expert comparison was first allowed for documents otherwise in the case and admitted genuine, any broader limits being left for future settlement: 1850, Hicks *v.* Person, 19 Oh. 441; later, it was allowed also for all documents otherwise in the case, and also for those not in the case if admitted to be genuine or if clearly proved genuine by witnesses speaking "directly and positively": 1863, Calkins *v.* State, 14 Oh. St. 222; 1869, Bragg *v.* Colwell, 19 Oh. 407; 1876, Pavey *v.* Pavey, 30 Oh. 602; 1880, Koons *v.* State, 36 Oh. 199; 1887, Bell *v.* Brewster, 44 Oh. 696, 10 N. E. 679;

Oklahoma: 1900, Archer *v.* U. S., 9 Okl. 569, 60 Pac. 268 (expert may testify upon specimens "admitted or proven to be genuine"; but the proof of genuineness cannot itself be made by comparison with other standards);

Oregon: Expert comparison is allowed by the statute cited *post*, § 2016; applied in these cases: 1896, Osmun *v.* Winters, 30 Or. 177, 46 Pac. 780; Munkers *v.* Ins. Co., 30 Or. 211, 46 Pac. 850; 1897, State *v.* Tice, 30 Or. 457, 48 Pac. 367 (allowing the comparison of no other documents than those admitted or treated as genuine).

Pennsylvania: The following decisions exhibit the checkered history of the rule: 1824, Lodge *v.* Phipher, 11 S. & R. 335 (partly because the witness was not an expert, the proposal to compare writings, here of S. with a paper purporting to be written by P., to show S. to be the real writer, was declared to be valueless); 1829, Bank *v.* Jacobs, 1 Pa. 180 (here comparison was allowed by one who already knew the handwriting, but not by an expert who had no previous knowledge of it; following Lodge *v.* Phipher, but proceeding upon rather impalpable grounds; note that at this time and in this case comparison by the jury was accepted as proper); 1856, McNair *v.* Com., 26 Pa. St. 390, *semble* (mentions expert comparison as proper; no reference to the preceding rulings); 1862, Travis *v.* Brown, 43 Pa. 9 (follows Bank *v.* Jacobs as to experts, but also repudiates comparison even by those familiar with the writing; the McNair case is not mentioned, but probably would be regarded as overruled on these points); 1868, Haycock *v.* Greup, 57 Pa. 441 (excludes all comparison by witnesses); 1876, Aumick *v.* Mitchell, 82 Pa. 211 (same); 1880, Berryhill *v.* Kirchner, 96 Pa. 492 (same); 1884, Foster *v.* Collner, 107 Pa. 313 (same); 1893, Rockey's Estate, 155 Pa. 453, 456, 26 Atl. 656 ("mere experts" are not to compare); since these decisions the statute of 1895, cited *post*, § 2016, controls the matter;

Rhode Island: The judicial rule excluded expert comparison: 1833, Avery's Trial, Newport, R. I., Hildreth's Rep. 41 (before Eddy, C. J., Brayton and Durfee, JJ.; comparison of hands by a writing-master, not allowed, to prove a letter written by the defendant); 1852, Kinney *v.* Flynn, 2 R. I. 319, 326, *semble* (comparison by experts inadmissible); but it is now allowed by the statute cited *post*, § 2016; 1907, Taber *v.* New York P. & B. R. Co., 28 R. I. 287, 67 Atl. 8 (statute applied);

South Carolina: Here the rule is a mixture; for the qualification as to "corroboration," see the note under Pennsylvania, *post*, § 2016); 1841, Bird *v.* Miller, 1 McMull, 124 (admitting comparison by any one, as confirmatory proof; yet here the witness had knowledge of the handwriting); 1874, Bennett *v.* Mathewes, 5 S. C. 478 (permitting comparison, as confirmatory proof, in doubtful cases, of specimens admitted genuine; the witnesses were put forward as experts, but nothing was said as to this); 1882, Benedict *v.* Flanagan, 18 S. C. 506 (following Bennett *v.* Mathewes, and further settling that the witness need not be an expert, and the trial judge is to determine, subject to review, what is a "doubtful case"); 1890, Weaver *v.* Whilden, 33 S. C. 190, 11 S. E. 686 (same; yet certain non-experts were here excluded "because not familiar with handwriting"; this would have been a proper enough limitation; but the trial judge, whose ruling was affirmed, had, in sustaining an objection that they were not experts, excluded them as not "having any familiarity with handwritings" apparently an expression synonymous with "experts"; query, what does the case decide?);

witness who writes it. But the rulings of this sort have almost all been made for documents offered under jury-comparison, and the principle and the policy are the same in both instances (*post*, § 2018).

§ 2010. **Photographic Copies as Specimens.** Here the question is, again, in effect, whether the photographic copies afford a fair ground of inference as to the peculiarities of the handwriting in question. That they are sufficient for this seems to be conceded (and properly) by the weight of authority. However, inasmuch as they are only copies, the documentary rule requires the production of the originals, if they are available; when they are not available, the use of photographic copies should usually be permissible.

The various questions that here arise have been, for convenience of distinction from other questions as to photographs, dealt with together (*ante*, § 797). The use of *press-copies* is noticed *post*, § 2019.

§ 2011. **Studying the Specimens In or Out of Court.** Must the specimens be used in court only? The answer to this question depends on the principle involved:

(1) First, since a *cross-examination* to the grounds of the expert's conclusions (*post*, § 2015) will usually be desired, the specimens must be in court

South Dakota: 1906, McClellan's Estate, 20 S. D. 498, 107 N. W. 681 (expert comparison of photographic reproductions of certain papers with "proved signatures," held not improper on the facts);

Tennessee: The state of the law was for some time uncertain: in 1870, Clark *v.* Rhodes, 2 Heisk. 207, documents not in the case, laid before witnesses not said to be experts, were rejected; in 1872, Kannon *v.* Galloway, 2 Baxt. 232, witnesses, not said to be experts, were allowed to compare documents in the case; in 1889 a statute was passed, cited *post*, § 2016, similar to that of 1884 in New York; its interpretation is dealt with under New York and under Tennessee, in § 2016, *post*;

Texas: The state of the law is uncertain: in 1866, Hanley *v.* Gandy, 28 Tex. 211, comparison by witnesses was entirely excluded; but in 1885, Kennedy *v.* Upshaw, 64 Tex. 420, a rule was adopted permitting it, apparently, where the specimens were otherwise in the case and admitted to be genuine; in 1887, Smyth *v.* Caswell, 67 Tex. 572, 4 S. W. 848, the first of these limitations was relaxed for a specimen introduced by the opponent and admitted genuine; Wagoner *v.* Ruply, 69 Tex. 703, 7 S. W. 80 (1888), is a confused opinion, apparently to the same effect; in 1894, Jester *v.* Steiner, 86 Tex. 415, 420, 25 S. W. 411, a specimen not sufficiently shown genuine was excluded; 1915, Cowboy State Bank & T. Co. *v.* Roy, — Tex. Civ. App. —, 174 S. W. 647;

Utah: 1887, Durnell *v.* Sowden, 5 Utah 216, 222, 14 Pac. 334 (the opinion is obscure, but seems to allow comparison by experts of all documents admitted or proved genuine); 1892, Tucker *v.* Kellogg, 8 Utah 11, 13 (expert may use specimens admitted genuine if otherwise in the case; the opinion, however, in other places omits the proviso);

Vermont: Expert use seems to have been conceded with the jury's use; finally, it was settled by State *v.* La Vigne, 39 Vt. 236 (1867), that it is proper for documents either admitted genuine or proved genuine by evidence "clear, positive, and direct"; compare the later rulings for jury-comparison, *post*, § 2016;

Virginia: The rule seems not yet settled: 1829, Rowt's Adm'x *v.* Kile's Adm'r, 1 Leigh 216 (referred to by one judge as a question not yet settled);

Washington: 1896, Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142 (allowed; no limits fixed);

West Virginia: 1874, Clay *v.* Robinson, 7 W. Va. 359, new trial, *s. v.* Clay *v.* Alderson's Adm'r, 10 W. Va. 53 (the rule adopted seems to be that (1) admitted writings may be employed for comparison, certainly if in the case, and apparently also if not; (2) ancient writings may be so used; (3) writings which are the source of a witness' handwriting-knowledge may be used by him in confirmation); 1888, State *v.* Koontz, 31 W. Va. 129, 5 S. E. 328 (the above decisions were approved; yet an expert was apparently allowed to testify that certain letters in a signature were feigned); 1903, Tower *v.* Whip, 53 W. Va. 158, 44 S. E. 179 (opinion based on comparison with four pleas filed in the case by the defendant, and purporting to be signed by him, admitted);

Wisconsin: Expert use is allowed by the statute cited *post*, § 2016.

for that purpose at that time; as also, at the proper time, for the purpose of *proving genuineness*, if that is necessary. No one can doubt this much.[1]

(2) Next, if the purpose of the *expert's study* and formation of opinion be considered, it is preposterous to expect him invariably to obtain by a brief inspection on the stand the necessary data for an opinion. Close measurements, detailed enlargement, and other expedients of the expert, may often require not only a length of time but a quantity of apparatus and a certain degree of seclusion. For this reason the opportunity of extrajudicial study is often indispensable.[2] Nevertheless, to prevent alteration or other fraud, it would be entirely proper to allow stated times for inspection in the presence of the opponent. But this latter restriction is needed only for the disputed writing and would be wholly impracticable for the standard specimens.[3]

(3) Where the expert has made a comparative study before the trial and the *disputed writing* is *lost* when the trial occurs, the opponent is deprived of the fullest opportunity of cross-examination; but this should not in itself exclude the testimony, unless there is clear fault, in the party offering the expert, as to the loss.[4]

§ 2012. **Qualifications of the Expert as to Skill.** Here we are not dealing with the ordinary doctrine of Experiential Qualifications (*ante*, § 570), for any one whatever (provided only he can read writing) is competent to form an opinion as to character of handwriting; the main question there is whether he is qualified by his grounds of knowledge of the handwriting in question (*ante*, § 693). But the Opinion rule declares it useless to listen to the views of an ordinary or lay witness when based merely on the inspection of specimens which the jury, having them at hand, can judge as well as he (*ante*, § 1997); hence, an "expert" under the Opinion rule, signifies one who by a study of or experience with writings is able to afford the tribunal a special assistance.

The determination of this skill must of course depend on the discretion of the trial Court as applied to the circumstances of each case.[1] Various forms of test have been offered; no test should be regarded as absolute.[2] Instances

§ 2011. [1] 1869, Tyler *v.* Todd, 36 Conn. 222; 1880, Hynes *v.* McDermott, 82 N. Y. 49.

[2] Compare the suggestions in Hagan, Disputed Handwriting (1894), p. 34, and in Osborn, Questioned Documents (1910), *passim*.

[3] 1878, Miles *v.* Loomis, 75 N. Y. 292, apparently not to be regarded as overruled by Hynes *v.* McDermott, *supra;* but if so, then erroneously. In Doe *v.* Suckermore, 5 A. & E. 748, Denman, L. C. J., discussed the relative value of inspection before and inspection at the trial; his statement, at p. 751, that the fact of inspection 'post litem motam' does not exclude the testimony, is of course unquestioned law; but the partisanship of experts hired 'ad litem' has long been a subject of grave concern to judges (*ante*, § 563).

[4] In the few rulings on this point, it has been held, without taking the above distinction, merely that the loss of the disputed writing does not 'ipso facto' exclude the testimony of the expert; 1879, Abbott *v.* Coleman, 22 Kan. 252; 1866, State *v.* Shinborn, 46 N. H. 502. Compare § 1185, *ante* (testifying to a lost original), and Arbon *v.* Fussell, Eng., *post*, § 2016.

§ 2012. [1] 1879, Forgey *v.* Bank, 66 Ind. 125.

[2] 1836, Denman, L. C. J., in Doe *v.* Suckermore, 5 A. & E. 749 ("The witness must be conversant with handwriting, — a banker, a printer, the officer of a court of justice, . . . to be entitled to any degree of authority"); 1882, Moon's Adm'r *v.* Crowder, 72 Ala. 88 ("accustomed to and skilled in the matter of handwritings, genuine and spurious"); 1878, Hand, J., in Miles *v.* Loomis, 75 N. Y. 298 ("engaged in occupations in which it was their duty to scrutinize handwritings and detect forgeries, and had acquired more or less skill by practice"). Compare the suggestions in Hagan, Disputed Handwriting (1894), p. 30;

of the exclusion or admission of such witnesses are of no proper service as precedents.[3]

Special considerations arise where the detection of counterfeit *bank-notes* is in question,[4] and also in other cases not purely concerning handwriting.[5] Under the principle of Preferred Testimony it has long been the law (*ante*, § 1339) that the officers of an issuing bank are not required to be called to testify as to the genuineness of notes purporting to be those of that bank.

§ 2013. **"Admitted or Proved Genuine."** Where documents are admitted to use by an expert under the statutory limitation that they must be "admitted or proved genuine," questions arise as to the mode in which the admission must be made, or the sufficiency of the proof, or the proper part of the tribunal — judge or jury — to whom the evidence must be addressed. These questions are the same for both expert-use and jury-use (*post*, § 2016).

§ 2014. **Rules applicable to both Experts and Lay-Witnesses; (*a*) Giving the Grounds of Belief.** On direct examination, the witness may[1] and, if required, must point out his grounds for belief in the identity of the

Osborn, Questioned Documents (1910), The Problem of Proof (1922).

[3] The following cases involve such rulings: *Eng.* 1894, R. *v.* Silverlock, 2 Q. B. 766, 768, 771 (the expert need not be a professional one nor a person who has obtained the experience in his ordinary business); *U. S. Ala.* 1896, Birmingham Nat'l Bank *v.* Bradley, 108 Ala. 205, 19 So. 791 (cashier of a bank, admitted on the facts); *Cal.* 1875, Goldstein *v.* Black, 50 Cal. 464; *Colo.* 1896, Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013 (a bank-bookkeeper accustomed to examine checks as to their genuineness, admitted); 1916, Hee Fat *v.* Wong Kwai, 23 Haw. 328 (a Chinese clerk and a Chinese butcher, held not qualified as experts in Chinese handwriting); 1919, Kamahalo *v.* Coelho, 24 Haw. 689, 695 (a lawyer specializing in the study of signatures, admitted); *Ia.* 1884, Winch *v.* Norman, 65 Ia. 187, 21 N. W. 511; 1887, Eisfield *v.* Dill, 71 Ia. 445, 32 N. W. 420; 1897, Christman *v.* Pearson, 100 Ia. 634, 69 N. W. 1055 (the witness need not make a living by judging handwriting); *Kan.* 1884, Ort *v.* Fowler, 31 Kan. 485, 2 Pac. 580; *Me.* 1851, Sweetser *v.* Lowell, 33 Me. 450; *Mo.* 1895, State *v.* David, 131 Mo. 380, 33 S. W. 28 (one skilled in clerical pursuits, admitted); *Nev.* 1904, State *v.* Burns, 27 Nev. 289, 74 Pac. 983 (bank teller); *N. H.* 1919, State *v.* Killeen, 79 N. H. 201, 107 Atl. 601 (written orders for liquor; a witness admitted whose work it had been to examine delivery orders each day); *N. J.* 1897, Wheeler & W. M. Co. *v.* Buckhout, 60 N. J. L. 102, 36 Atl. 772 (a county clerk, admitted; scientific study of chirography not necessary); *N. C.* 1877, Yates *v.* Yates, 76 N. C. 145, 149; 1893, State *v.* De Graff, 113 N. C. 688, 693, 18 S. E. 507; 1896, Kornegay *v.* Kornegay, 117 N. C. 242, 23 S. E. 257 (registrar of deeds, admitted); 1905, Abernethy *v.* Yount, 138 N. C. 337, 50 S. E. 696 (clerk of court); *P. I.* 1912, Dirilo *v.* Roperes, 22 P. I. 246; 1913, U. S. *v.* Kosel, 24 P. I. 594, 604; *W. Va.* 1919, Johnston *v.* Bee, 84 W. Va. 532, 100 S. E. 486 (bank officials, admitted).

[4] It must be remembered that the following rulings deal with the question whether a person can add to the jury's knowledge about papers before them; whether a witness is competent to form an opinion about papers, etc., *not in court*, is the ordinary question of Experiential Qualifications, and is treated *ante*, § 570; rulings on the present point are as follows: 1860, May *v.* Dorsett, 30 Ga. 118 (bank-officer admitted as to counterfeit money); 1873, Atwood *v.* Cornwall, 28 Mich. 339 (bankers generally admissible as to treasury-notes); 1867, Payson *v.* Everett, 12 Minn. 219 (counterfeit bank notes, witness excluded on the facts); 1864, Dubois *v.* Baker, 30 N. Y. 361 (erasures in notes, etc.; bank-officer admitted).

[5] 1866, Vinton *v.* Peck, 14 Mich. 287 (kind of ink; a writing-master and bookkeeper held competent); and cases cited *ante*, § 570.

§ 2014. [1] 1852, Keith *v.* Lothrop, 10 Cush. Mass. 457 (on direct examination); 1917, O'Connor's Estate, 101 Nebr. 617, 164 N. W. 570 (forged will; approving the text above); 1885, Langley *v.* Wadsworth, 99 N. Y. 63, 1 N. E. 106 (an expert's reasons for his opinions on different specimens of handwriting; excluded in the trial Court's discretion). Compare the suggestions in Hagan, Disputed Handwriting (1894), p. 127; Osborn, Questioned Documents (1910) *passim*, The Problem of Proof (1922).

That a mere "belief," or testimony that one writing "looks like" the other, is admissible and need not be more positive, is noticed *ante*, § 658.

handwriting, on the principle already considered (*ante*, § 655). Without such a reënforcement of testimony the opinions of experts would usually involve little more than a counting of the numbers on either side. The progress of modern chirographic science makes it all the more possible, as well as desirable, to discriminate between witnesses according to the convincingness of the reasons that may be given by them for their conclusions.

§ 2015. **Same: (*b*) Modes of Testing the Opinion on Cross-Examination.** With reference to the principle involved, there are two distinct modes of testing by showing specimens on cross-examination: (1) where it can be done *without special proof of the genuineness* of the testing specimens; (2) where it can be done only *with special* proof of that.

(1) The first sort of testing has of course a limited range in the choice of specimens. There are several feasible methods. For instance, the counsel denying the genuineness of the main writing in issue may in court imitate the signature in dispute and ask the opposing witness whether it does not look equally like the alleged signer's writing; or he may take a signature admitted genuine or already in the case, and endeavor to have the opposing witness deny its genuineness. Or, as in Griffits *v.* Ivery, *infra*, the counsel may put before several witnesses successively, who have all sworn positively against his contention, another signature (without regard to its genuineness), and by exhibiting their hopeless disagreement about it, show an apparent bias or corruption as the source of their former unanimity. Or, as in Murphy's Case and Caldwell's Case, the counsel may put any signature (without regard to its genuineness) before the witness and test his judgment by obtaining successive different opinions from him within a few moments. Or the counsel may substitute, after an interval, one signature for another already testified to and thus get the witness to express the same opinion, with the same reasons, upon concededly different specimens. Where any of these expedients is available and useful, there is no objection of any kind on principle.

1915, *John Adye Curran, K. C.*, Reminiscences, p. 17: "A schoolmaster was tried before a jury in Maryborough, on a charge of writing a threatening letter. The evidence as to the handwriting was very conclusive. An expert from Dublin, the late Mr. Power, then manager of the National Bank, Mountmellick, and afterwards in College Green, and the District Inspector, all three, swore positively as to the identity of the writing in the threatening letter with a writing admittedly in the handwriting of the prisoner. The case for the defence seemed very hopeless. I need not say that my father in his address to the jury referred to the observation of Judge Keogh to the effect that 'he would not hang a dog on the evidence of an expert.' While he was speaking, knowing that our handwriting was very similar, I wrote my full name, 'John Adye Curran,' three times on a sheet of note paper, and when he had concluded, asked him to write his name alternately after mine. This was done in the presence of Molloy. Mr. Power was then recalled, and having admitted that he was principally expert in signatures, having regard to his position in the Bank, he was asked if he could distinguish the handwriting in the six names on the sheet of paper. He requested some time to consider and consult with the other experts, and the Chief Baron agreed, and adjourned the Court for an hour. At the end of that time each of the three experts was

recalled. Each differed one with the other, but *not one was correct*. Molloy was sworn as to the order in which the names had been written, and the prisoner was triumphantly acquitted."

(2) But when the testing-signature is one whose genuineness is not admitted or (because it is not otherwise in the case) must be specially proved or disproved, a new element is introduced. The various expedients here available are the same (except that the choice of specimens is broader) as those above noted; with this difference, that where the object of the counsel (whether alleging or denying genuineness for the main writing in issue) is to induce the opposing witness to affirm the genuineness of a false specimen (*e. g.* one just written by the counsel himself), or to deny the genuineness of an authentic specimen, this expedient is not possible in any form, unless the counsel is allowed specially to disprove or prove its genuineness. Now this necessity of specially producing testimony as to the specimens' genuineness brings into play the whole argument of multiplicity of issues as otherwise applicable against the ordinary use of specimens (*ante*, § 2000). There is perhaps also a certain possibility of surprise and of unfairness of selection (*ante*, § 1999).[1]

There are thus two solutions possible.[2] The *first* is to accept as valid these

§ 2015. [1] The following opinion states the arguments: 1861, Dixon, C. J., in Pierce *v.* Northey, 14 Wis. 12.

[2] The rulings are as follows: ENGLAND and IRELAND: In two Irish cases it was held that the witness could not be impeached by showing to her other documents, not in the case, and getting her to make contrary admissions, the reason being that by allowing it there would result indirectly a comparison of specimens by the jury: 1841, R. *v.* Murphy, A. M. & O. (Ir.) 207, Pennefather, C. J.; 1842, R. *v.* Caldwell, A. M. & O. 324, Perrin, J., and Richards, B.; in the latter case the Court went slightly farther in allowing the discrediting questions; Mr. Keatinge showed the prosecutrix, after she had denied the genuineness of four letters alleged to have been written to her by the defendant, two other letters (not in the case), which she admitted to be in her own writing; he then asked her, Was not the handwriting in the letters she had admitted like the handwriting in the four letters she had denied; and in particular, Was there not a similarity between the words "my dearest"? The witness first said there was "no similarity," then that there was "a similarity," and in fact "a great similarity"; this course of examination was objected to; Mr. Keatinge argued, "I have a right to do this. Her manner of denying them is very important for the jury. She said first there was no similarity, — now a great similarity; she may be obliged to go on to admit the four letters to be her handwriting"; the Court ended by allowing the questions as to different passages, provided they were pointed at, not read aloud, and thus the indirect effect of a comparison of the documents before the jury was prevented. In England, in Griffits *v.* Ivery, 11 A. & E. 322 (Q. B., 1840), the Court declined to allow the testing of the opposing witnesses by asking their opinions about another signature, not in the case, so as to show their disagreement and hence untrustworthiness; the reason for rejection being that in effect such testing introduces the general inconveniences of proof of specimens prohibited by Doe *v.* Newton (*ante*, § 2000); but a contrary position had already been taken in 1839 by Parke, B. (as cited in 11 A. & E. 124); and in 1840, in Young *v.* Honner, 2 Moo. & Rob. 536, the Court of Exchequer refused to follow Griffits *v.* Ivery, and when a witness, who testified that the defendant's signature was always written "R. W. Honner," was shown a document signed "Robert Honner" and admitted it to be genuine, they allowed him to be asked whether he would then stand by his original statement; the Court thought that as here the genuineness was admitted, the collateral-issue difficulty did not arise; yet in Griffits *v.* Ivery no issue of genuineness was raised; the specimen was used merely to show that the witnesses could not agree.

UNITED STATES: *Alabama:* 1868, Kirksey *v.* Kirksey, 41 Ala. 636 (cannot test by specimens); 1893, First Nat'l Bank, *v.* Allen, 100 Ala. 476, 489, 14 So. 335 (plaintiff suing for money paid out by his bank on forged checks, allowed to be asked, as a test, to point out the forged from the genuine); 1907, Griffin *v.* Working Women's H. Ass'n, 151 Ala. 597, 44 So. 605 (witness speaking from knowledge of former writings, allowed to be cross-examined to identity of features between the document in

arguments of surprise, of danger of unfair selection, and of confusion of issues, and to follow, in obviating them, the limitations already adopted, in the

issue and the former writing; the opinion need not have noticed this point, for the objection was baseless; Dowdell, J., diss., only as to the former writing being introduced in evidence, but that was a mere formal matter);
California: 1881, Neal *v.* Neal, 58 Cal. 287 (a defendant denying his signature to a document, allowed to be questioned as to the genuineness of his signature to another document, already in the case for comparison);
Connecticut: 1869, Tyler *v.* Todd, 36 Conn. 222 (cannot test by asking an opinion as to a signature not proved genuine); 1902, Brown *v.* Woodward, 75 Conn. 254, 53 Atl. 112 (testing a witness, who denies his signature to a note, by submitting to him other specimens, held not improper on the facts);
Florida: 1905, Wooldridge *v.* State, 49 Fla. 137, 38 So. 3 (a witness to handwriting, not an expert, not allowed to be tested by other specimens; apparently an over-strict ruling; no authority cited);
Illinois: 1874, Melvin *v.* Hodges, 71 Ill. 424 (obscure; allows testing by asking an opinion as to other signatures); 1882, Massey *v.* Farmers' Bank, 104 Ill. 332 (cannot test by asking the witness to pick out genuine signatures from others);
Indiana: 1885, Thomas *v.* State, 103 Ind. 439, 2 N. E. 808, *semble* (may test by asking for an opinion on other specimens already in the case); 1890, White S. M. Co. *v.* Gordon, 104 Ind. 495, 24 N. E. 1053 (testing on cross-examination may be made with the same documents as are provable in chief); 1895, McDonald *v.* McDonald, 142 Ind. 55, 41, N. E. 340 (same); 1895, Tucker *v.* Hyatt, 144 Ind. 635, 42 N. E. 1047 (same);
Iowa: 1892, Bruner *v.* Wade, 84 Ia. 698, 51 N. W. 251 (an expert was tested with other signatures; the exclusion of a question as to their nearer resemblance than the disputed signature, held not harmful where it was never evidenced that they were genuine); 1894, Browning *v.* Gosnell, 91 Ia. 448, 456, 59 N. W. 340 (testing an expert by offering genuine mingled with spurious signatures, allowed on cross-examination);
Kansas: 1894, Gaunt *v.* Harkness, 53 Kan. 405, 409, 36 Pac. 739 (testing an expert by fabricated signatures not otherwise in the case, improper);
Kentucky: 1889, Andrews *v.* Hayden's Adm'r, 88 Ky. 455, 459, 11 S. W. 428 (testing by spurious signatures mingled with genuine ones, excluded, as "deceiving the minds of honest men"; this is absurd, for the result showed that perhaps the disputed signature was also a forgery "deceiving the minds of honest men");
Maine: 1837, Page *v.* Holmans, 14 Me. 482, *semble* (allowing the contradiction of handwriting-witnesses by calling a person whose name had been submitted to the former in several specimens, and denying or affirming the genuineness of those of which the witness had affirmed or denied the genuineness);
Massachusetts: 1905, Jacobs *v.* Boston El. R.Co., 188 Mass. 245, 74 N. E. 349 (a witness allowed to be asked on cross-examination to make a sample signature; the precise point of the ruling is however not ascertainable from the opinion);
Michigan: 1880, Howard *v.* Patrick, 43 Mich. 128, 5 N. W. 84 (testing by asking as to genuine and false documents not in the case; excluded); 1888, Harvester Co. *v.* Miller, 72 Mich. 272, 40 N. W. 429 (testing by showing a third person's writing, if already in the case, and asking whether it is that of the person in question; allowed); 1904, Taylor *v.* Taylor's Estate, 138 Mich. 658, 101 N. W. 832 (showing a signature only; the witness' insistence on seeing the whole of the document, held proper);
Missouri: 1886, Rose *v.* First Nat'l Bank, 91 Mo. 401, 3 S. W. 876 (testing by documents not already in the case; excluded);
New York: 1856, Van Wyck *v.* McIntosh, 14 N. Y. 439, 443 (testing by submitting other notes, not in the case, to experts denying the disputed writing's genuineness and also that of the specimens submitted, and then offering to prove the specimens to have been admitted genuine; excluded, as involving collateral issues and therefore improper for contradiction, under the principle of § 1002, *ante*); 1892, People *v.* Murphy, 135 N. Y. 455, 32 N. E. 138 (testing as in Griffits *v.* Ivery, Eng., was allowed; but a demonstration of error by showing that opinions as to genuineness or spuriousness of the test-specimens were wrong was excluded); 1903, Hoag *v.* Wright, 174 N. Y. 36, 66 N. E. 579 (quoted *supra;* testing an expert witness to genuineness, by showing him other signatures, and then by their obvious condition or by other testimony proving these to be spurious, allowed; here the expert was on a second trial allowed to be asked whether he had not on a former trial committed such an error); 1905, People *v.* Patrick, 182 N. Y. 131, 74 N. E. 843 (testing an expert by proof of his mistakes as to selected signatures; Hoag *v.* Wright approved; but the trial Court's refusal here to allow the tests was held distinguishable, and in any event harmless error);
North Carolina: 1915, Fourth National Bank *v.* McArthur, 168 N. C. 48, 84 S. E. 39 (forged indorsements by M.; false imitations of M.'s signature were shown to witnesses to genuineness, to test the value of their opinion on cross-examination, known as the "cat-hole test," held improper, except for experts; the Opinion strangely misconceives the language of the present treatise, in citing it in favor of the ruling; enough here to note that further reflection has emphasized the writer's view that

jurisdiction in hand, for the ordinary use of specimens (*ante*, § 2008), *i. e.* to limit the use to specimens admitted genuine, to specimens already in the case, or the like. The *second* is to deny that these arguments, whatever their force as applied to the ordinary use of specimens, can here avail to cut off this method of testing opinions on cross-examination. That the latter is the better course seems clear. The reason is that the deprivation of this weapon for the cross-examiner is a loss so serious as to outweigh the inconveniences of its sanction. When, for example, the witness has sworn positively that the disputed signature is genuine, and then, on examining a new signature submitted to him, he declares with equal positiveness that it is a forgery and perhaps points out the (to him) unmistakable marks of difference, the testimony of a single unimpeachable witness that he saw the supposed forgery written by the person bearing that name disposes at once of the trustworthiness of the first witness and the certainty of his conclusion. In many other similar ways a single test of this sort will serve to demolish the most solid fabric of handwriting-testimony. There should be no limitations whatever on the power of employing these tests.

The following passages illustrate both the orthodoxy and the efficacy of such a practice:

1723, *Bishop Atterbury's Trial*, 16 How. St. Tr. 571; treasonable letters imputed to the defendant were claimed by him to be forgeries; experts were asked as to the genuineness of the seals on the letters, especially whether certain impressions were from the same seal; for one of them, "several impressions of a seal or seals were put into his hand, to try his skill; but a doubt arising as to the method of putting the matter to a proper trial," the House voted that it should be done only under proper conditions; and accordingly it was ordered that "two of the clerks do forthwith withdraw, and that a person to be appointed by the Bishop do in their presence, from one or more seal or seals, such as he shall think fit, take impressions in wax of one or more sorts, to be provided by the clerks; that the impressions be numbered; and that the clerks write down in paper from what seal and in what manner every impression was taken, and deliver such paper in at the table, sealed up, making oath that the same is true; and that the seal or seals from which such impressions shall be made shall be detained by one of the clerks till called for by the House; and that the clerks and the person so to be appointed by the prisoner be sworn to secrecy and not

to exclude this method of testing is to repudiate practical sense; the Opinion in the case in hand misapplies N. C. St. 1913, c. 52, to this use of tests);

Pennsylvania: 1904, Groff *v.* Groff, 209 Pa. 603, 59 Atl. 65 (alleged forgery of a note; non-expert witnesses testifying from knowledge of the handwriting, allowed to be tested by signatures shown through slits in envelopes and the witnesses' mistakes allowed to be proved; on the facts, the showing of the signature alone was held proper);

Tennessee: 1842, Fogg *v.* Dennis, 3 Humph. 48 (testing by showing other signatures; forbidden);

Texas: 1879, Brown *v.* Chenoweth, 51 Tex. 477 (testing by showing other signatures; allowed; here they were upon documents already in the case);

Vermont: 1904, Wilmington S. Bank *v.* Waste, 76 Vt. 331, 57 Atl. 241 (cross-examination by testing with specimens "conceded or proved to be genuine," allowable);

West Virginia: 1914, First National Bank *v.* Barker, 75 W. Va. 244, S. E. 898 (testing a non-expert witness, on cross-examination, by false specimens mixed with genuine ones, not allowed; a pity that this Court could not take the sensible side in this issue).

Compare the general principle for testing a witness' skill (*ante*, § 991).

Compare also the various methods illustrated in Questioned Documents, by Albert H. Osborn (Rochester, 1910) and The Problem of Proof (1922). All methods having scientific value ought to be freely allowed by law.

to disclose to any person whatsoever anything which shall pass in that transaction, till after the paper so delivered in shall be opened"; which being done, "Mr. Rollins [the expert] was called in, and the said impressions were put into his hands, to make the best judgment thereupon he could"; he retired for awhile; "then Mr. Rollins was called in and acquainted the House 'that he had viewed the impressions of seals before delivered to him in the House, and conceived they were taken from two cast seals from one original.' And the papers delivered in sealed up being read, it appeared that he had formed a right judgment thereon."

1903, *Per* CURIAM, in *Hoag* v. *Wright*, 174 N. Y. 36, 66 N. E. 579 (permitting the witness to be shown spurious signatures as a test): "It tended to cast doubt upon the credibility of the witness and his skill as an expert. It suggested the question whether, if the witness was at fault as to the spurious signatures, he was not at fault as to the signatures in question. It made a direct attack upon the value of his opinion. . . . Owing to the dangerous nature of expert evidence, and the necessity of testing it in the most thorough manner in order to prevent injustice, we are disposed to go farther, and to hold that, where a witness makes a mistake in his effort to distinguish spurious from genuine signatures, and he does not acknowledge his error, it may be shown by other testimony. The test sought to be applied in this case was one of the most practical and conclusive that can be employed to determine whether the witness is really an expert or not. It bears not only upon his competency to express an opinion, but upon the value of his opinion when expressed. . . . The good sense of the trial judge will confine it within proper bounds, and prevent an unnecessary consumption of time. It is better to take a little time to see whether the opinion of the witness is worth anything, rather than to hazard life, liberty, or property upon an opinion that is worth nothing. The evils and injustice arising from the use and abuse of opinion evidence in relation to handwriting are so grave that we feel compelled to depart from our own precedents to some extent, and to establish further safeguards for the protection of the public. As the hostility of witnesses to a party may be shown as an independent fact, although it protracts the trial by introducing a new issue, so, as we think, the incompetency of a professed expert may be shown in the same way and for the same reason; that is, because it demonstrates that testimony, otherwise persuasive, cannot be relied upon."

The decisions are in a hopeless state of confusion, and represent every variety of rule, from complete prohibition to entire freedom of use; nor is there usually any attempt to reason out the result on principle.

3. Jury's Perusal of Specimens

§ 2016. **Whether allowable at all; and, if so, for what Classes of Writings.** The decisions and the statutes represent a great variety of rules; and even within the same jurisdiction there is often obscurity and inconsistency. The types of possible rules have already been summarized (*ante*, § 2000); the rule in each jurisdiction is either one of those there stated or else some qualified variety of one of the chief forms.[1]

§ 2016. [1] The rulings cited *ante*, § 2008, for expert use of specimens, should also be compared, as sometimes implying something upon the present subject; the statutes covering both subjects have been placed here, to avoid repetition:

ENGLAND: The English rule is now settled by statute (the common-law rule has been examined *ante*, § 1994): 1854, Common Law Procedure Act, 17 & 18 Vict. c. 125, § 27 ("Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the

genuineness, or otherwise, of the writing in dispute"; this was confined by ib. § 104, to courts of civil jurisdiction in England; but extended by St. 1865, 28 & 29 Vict. c. 18, §§ 1, 8, to criminal courts); it follows under this statute that it is immaterial whether the documents are already in the case or not: 1858, Birch *v.* Ridgway, 1 F. & F. 270, Pollock, C. B., consulting the other judges; 1860, Cresswell *v.* Jackson, 2 id. 24, Pollock, C. B.; 1864, Cresswell *v.* Jackson, 4 id. 1, 5 (as bearing on the authenticity of disputed codicils, documents in the handwriting of the supposed forger were received); 1865, Corbett *v.* Kilminster, ib. 490, Martin, B. (where the witness wrote the evidential writing while in the box). The following is perhaps erroneous; compare § 2011 par. (3), *ante*; 1862, Arbon *v.* Fussell, 3 F. & F. 152 (where the disputed document is lost, comparison of specimens cannot be resorted to).

CANADA: *Dom.* R. S. 1906, c. 145, Evid. Act. § 8 (like Eng. St. 1854, c. 125, § 27); *Alta.* St. 1910, 2d sess., Evidence Act, c. 3, § 54 (like Eng. St. 1854, c. 125, § 27); *Br. C.* Rev. St. 1911, c. 78, § 48 (like Eng. St. 1854, 125, § 27); *N. Br.* Consol. St. 1903, c. 127, § 20 (like Eng. St. 1854, c. 125, § 27); 1880, R. *v.* Tower, 20 N. Br. 168, 205, 219 (R.'s signature of an invoice, held provable by a comparison with his signature on a bill of exchange as prior indorser to the defendant, the defendant's indorsement being an admission of genuineness; Weldon, J., diss.); 1888, Vye *v.* Alexander, 28 N. Br. 89, 94 (jury entitled to see signatures of the defendant written since litigation begun, the defendant having testified, when shown them, that he had not changed his signature); 1889, Alexander *v.* Vye, 16 Can. Sup. 501 (foregoing case affirmed); 1890, Halifax Bkg. Co. *v.* Smith, 29 N. Br. 462, 473, 475, 481, 485 (comparison by a layman with a genuine document not produced, held not improper, the witness being otherwise qualified through business transactions; opinions obscure); *Newf.* Consol. St. 1916, c. 91, § 21 (like Eng. St. 1854, c. 125, § 27); *N. Sc.* Rev. St. 1900, c. 163, § 33 (like Eng. St. 1854, c. 125, § 27); 1897, R. *v.* Dixon, 29 N. Sc. 462 (threatening letter; another letter, conceded genuine, allowed to be used by the jury, under the statute; two judges diss. on various grounds); *Ont.* Rev. St. 1914, c. 76, § 52 (like Eng. St. 1854, c. 125, § 27); 1902, Thompson *v.* Thompson, 4 Ont. L. R. 442 (under the statute, judge or jury may make comparison even though no expert has done so); *P. E. I.* St. 1889, c. 9, § 20 (like Eng. St. 1854, c. 125 § 27); *Que.* 1918, Pratte *v.* Voisard, 44 D. L. R. 157, Can. S. C. (forged will specimens admitted to be genuine, allowed to be used, and opinions of experts in handwriting received, under Que. Civ. C. §§ 1204, 1205, 1224 prior rulings explained); *Sask.* R. S. 1920, c. 44, Evidence Act. § 41 (like Eng. St. 1854, c. 125, § 27); *Yukon:* Consol. Ord. 1914, c. 30, § 33 (like Eng. St. 1854, c. 125, § 27).

UNITED STATES: *Federal:* It was not easy to state the exact limits of the Federal rule before the 1913 statute: 1804, Macubbin *v.* Lovell, 1 Cr. C. C. 184 (comparison not allowed with a note in another case on which the opponent had confessed judgment); 1812, Smith *v.* Fenner, 1 Gall. 175 (deeds not in evidence were allowed to be shown by a witness; Story, J., said that this was not "comparison of hands"; yet of course it was, even in the modern sense); 1832, Strother *v.* Lucas, 6 Pet. 766 (comparison excluded, *semble*); 1870, Rogers *v.* Ritter, 12 Wall. 321 (question left undecided); 1870, Medway *v.* U. S., 6 Ct. of Cl. 428 (allowed for documents otherwise in the case and proved or admitted genuine, and, *semble*, also where the disputed document has so recently come to the party's notice that he cannot obtain testimonial evidence of the handwriting); 1881, U. S. *v.* Jones, 10 Fed. 470 (allowed for documents otherwise in the case and, *semble*, admitted or proved genuine); 1875, Moore *v.* U. S., 91 U. S. 270 (allowed for documents otherwise in the case and admitted genuine); 1887, Williams *v.* Conger, 125 U. S. 413, 8 Sup. 933 (allowed for documents otherwise in the case and admitted or proved genuine); 1893, Holmes *v.* Goldsmith, 147 U. S. 150, 163, 13 Sup. 288 (comparison allowed according to the Oregon statute); 1893, Hickory *v.* U. S., 151 U. S. 303, 305, 14 Sup. 334 (Moore *v.* U. S. cited, but no rule laid down); 1897, National Acc. Soc. *v.* Spiro, 24 C. C. A. 334, 78 Fed. 775 ("admittedly genuine signatures already in evidence for other purposes" may be used); 1899, Smith *v.* New Orleans C. & B. Co., 35 C. C. A. 646, 93 Fed. 899 (to prove the signature of a Spanish colonial-secretary of Louisiana, other signatures of his, to documents unconnected with the case, were admitted); 1899, U. S. *v.* Ortiz, 176 U. S. 422, 20 Sup. 466 (signatures on ancient Mexican official documents, never before questioned as genuine, but not otherwise in the case, admitted; no authorities cited); 1904, Withaup *v.* U. S., 127 Fed. 530, 535, 62 C. C. A. 328 ("where a comparison is permissible, it may be made by the Court and jury, with or without the aid of expert witnesses"; cited more fully *ante*, § 2008); 1908, Barnes *v.* U. S., 5th C. C. A., 166 Fed. 113 (Williams *v.* Conger followed); 1911, U. S. *v.* North, D. C. Or., 184 Fed. 151 (rule of Williams *v.* Conger applied, to exclude a document not otherwise in the case); St. 1913, 62d Cong. 3d sess., c. 79, Feb. 26, Code § 1363. ("In any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness"); 1915, Short *v.* U. S. 8th C. C. A., 221 Fed. 248 (white slave traffic Act; an envelope not otherwise in the case admitted for comparison

under St. Feb. 26, 1913); 1917, Bowers *v.* U. S. 9th C. C. A. 244 Fed. 641 (using the mails to defraud; sundry documents, proved genuine, received as specimens for comparison under St. 1913, Feb. 26); 1920, Smythe *v.* New Providence, 3d C. C. A, 263 Fed. 481 (ancient bonds, signed by commissioners; the signatures of the commissioners to their oaths of office, admitted under St. Feb. 26, 1913, c. 79).

Alabama: A long line of precedents adopted the rule that documents otherwise in the case, and those only, may be used; afterwards a statute enlarged the rule liberally: 1841, Little *v.* Beazley, 2 Ala. 703; 1843, State *v.* Givens, 5 Ala. 754; 1852, Crist *v.* State, 21 Ala. 145; 1857, Bishop *v.* State, 30 Ala. 41; 1867, Kirksey *v.* Kirksey, 41 Ala. 636; 1877, Bestor *v.* Roberts, 58 Ala. 333; 1878, Williams *v.* State, 61 Ala. 39; 1887, Snider *v.* Burks, 84 Ala. 56, 4 So. 225, nevertheless the following occurred: 1882, Moon's Adm'r *v.* Crowder, 72 Ala. 88 (apparently confining the use of writings in the case to those "of unquestioned genuineness"); 1905, Washington *v.* State, 143 Ala. 62, 39 So. 388; 1906, Bolton *v.* State, 146 Ala. 691, 40 So. 409 (forgery of a check; other specimens, not otherwise in the case and not shown genuine, excluded); 1907, Griffin *v.* Working Women's H. Ass'n, 151 Ala. 597, 44 So. 605 (papers otherwise in the case and admitted or proved genuine may be used); St. 1915, Mar. 6, No. 90, p. 134 ("comparison of a disputed writing with any writing admitted to be genuine or proven to the reasonable satisfaction of the Court to be genuine shall in civil and criminal cases be permitted to be made by witnesses who are qualified as experts or being familiar with the handwriting of the person whose handwriting is in question and such writings, and the evidence of witnesses respecting the same may be submitted to the Court or jury trying the case as evidence of the genuineness or otherwise of the writings in dispute"); 1916, King *v.* State, 15 Ala. App. 67, 72 So. 552 (larceny; specimens not compared by witnesses may not be submitted to the jury, under St. 1915, Mar. 6); 1920, Chisolm *v.* State, 204 Ala. 69, 85 So. 462 (certain specimens excluded, for lack of preliminary evidence of genuineness, under St. 1915, Mar. 6).

Arizona: Rev. St. 1913, Civ. C. § 1741 (like the English statute; applicable to civil and criminal cases).

Arkansas: The rule of documents otherwise in the case is adopted: 1877, Miller *v.* Jones, 32 Ark. 343.

California: C. C. P. 1872, § 1870, par. 9 (evidence may be given of "the opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein"); § 1944 ("Evidence respecting the handwriting may also be given by a comparison made by the witness or by the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge"); 1900, People *v.* Storke, 128 Cal. 486, 70 Pac. 1090 (libel; letters admitted to be G.'s, shown to an expert for the defendant as evidence that G. and not the defendant wrote the libel, were required to be shown also to the jury); 1906, Castor *v.* Bernstein, 2 Cal. App. 703, 84 Pac. 244 (breach of contract assigned to plaintiff; plea, release; the assignment offered by the plaintiff was allowed to be used by the defendant for the jury's inspection in determining the genuineness of the release, without any further evidence; Cooper, J., diss.).

Colorado: St. 1893, p. 264, § 1 Comp. L. 1921, § 6538 ("Comparison of a disputed writing, with any writing proved to the satisfaction of the Court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute"); 1880, Wilber *v.* Eicholtz, 5 Colo. 140, 243 (comparison allowed for a plea verified by affidavit and for an affidavit of merits, these papers being "in the cause"); 1896, Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013 (a defendant denying a signature, required to write; admitted as an exception to the ordinary limitation to documents already in the case or proved genuine).

Columbia (District): 1894, Keyser *v.* Pickrell, 4 D. C. App. 198, 204, 210 (papers already otherwise in the cause and papers conceded to be genuine, admitted).

Connecticut: Any documents may be used which are first either proved or admitted to be genuine: 1831, Lyon *v.* Lyman, 9 Conn. 60 (establishing the rule after contradictory precedents on the circuits, and approving State *v.* Brunson, 1791, 1 Root 307, which probably deals with a different point: but State *v.* Nettleton, 1791, 1 Root 308, decides what the former case is said to decide); 1869, Tyler *v.* Todd, 36 Conn. 222.

Delaware: Rev. St. 1915, § 4230 (like the English statute).

Florida: Rev. G. S. 1919, § 2739 ("Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the jury, or to the Court in case of a trial by the Court, as evidence of the genuineness, or otherwise, of the writing in dispute"); 1905, Wooldridge *v.* State, 49 Fla. 137, 38 So. 3 (forging of school warrants; Rev. St. 1892, § 1121, held applicable to criminal cases; under this statute, specimens of the forger's writing, and not merely of that of the person whose name is forged, are admissible; repudiating the doctrine of Peck *v.* Callaghan, N. Y.).

Georgia: The rule of documents otherwise in the case was at first adopted: 1854, Doe *v.*

Roe, 16 Ga. 525; 1866, Boggus *v.* State, 34 id. 278, *semble;* but the Code has since then established different limits: Rev. C. 1910, § 5836 ("Other writings, proved or acknowledged to be genuine, may be admitted in evidence for the purposes of comparison by the jury. Such other new papers, when intended to be introduced, shall be submitted to the opposite party before he announces himself ready for trial"); 1877, Thomas *v.* State, 59 Ga. 784 (statute applied to receive a specimen extrajudicially acknowledged genuine); 1895, McVicker *v.* Conkle, 96 Ga. 595, 24 S. E. 23 (specimen's genuineness must be proved); 1898, Axson *v.* Belt, 103 Ga. 578, 30 S. E. 262 (plea filed by defendant in another case and bearing a signature; not admitted, because not shown to have been submitted to defendant before trial); 1904, Vizard *v.* Moody, 119 Ga. 918, 47 S. E. 348 (other specimens, including that of an affidavit to the plea, admitted).

Hawaii: Rev. L. 1915, § 2623 (like Eng. St. 1854).

Idaho: 1900, Bane *v.* Gwinn, 7 Ida. 439, 63 Pac. 634 (cited *ante*, § 2008); 1905, State *v.* Seymour, 10 Ida. 699, 79 Pac. 825 (Bane *v.* Gwinn followed).

Illinois: The use of specimens by the jury was for some time forbidden altogether: 1846, Pate *v.* People, 8 Ill. 664, *semble:* 1859, Jumpertz *v.* People, 21 Ill. 407; 1865, Kernin *v.* Hill 37 Ill. 209; 1866, Putnam *v.* Wadley, 40 Ill. 346, 349 (an instruction that proof "cannot be made by comparison with other signatures," held correct; no authority cited); then the rule of using "documents otherwise in the case" was adopted: 1872, Brobston *v.* Cahill, 64 Ill. 358: but thereafter ensued uncertainty: 1892, Rogers *v.* Tyler, 144 Ill. 652, 665, 32 N. E. 393 (admissible if admitted genuine and otherwise in the case); 1897, Greenbaum *v.* Bornhofen, 167 Ill. 640, 645, 47 N. E. 857 (papers "properly in evidence in the case," allowed to be considered by the chancellor; citing Brobston *v.* Cahill; compare the citations under Illinois, *ante*, § 2008, for an expert's use); 1911, Stitzel *v.* Miller, 250 Ill. 72, 95 N. E. 53 (the plaintiff bank was indorsee of a note payable to H. M. and signed by D. C. M. deceased; in an action of assumpsit, D. C. M.'s administrator denied the genuineness of the maker's signature; and offered to show that the signature was a traced facsimile of the signatures on two other notes purporting to be by D. C. M., neither of which was otherwise in the case; held that the usual limitations did not apply, this not being similarity of a specific person's type of hand, but identity of writing irrespective of the writer); then came a statute: St. 1915, June 23, p. 440 ("1. In all courts of the State it shall be lawful to prove handwriting by comparison made by the witness or jury with writings properly in the files or records of the case, admitted in evidence or treated as genuine or admitted to be genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the court. 2. Before a standard of writing shall be admitted in evidence by the court for comparison such notice thereof as under all the circumstances of the case is reasonable shall first be given to the opposite party or his attorney. 3. A reasonable opportunity to examine such proposed standard shall on motion duly made be accorded the opposite party, his attorney and witnesses, prior to the introduction in evidence of such standards and the court may, in its discretion, impound the same with the clerk of the court for that purpose"); 1920, Waggoner *v.* Clark, 293 Ill. 256, 127 N. E. 436 (title through an ancient deed containing an alteration in account-book of the grantor, admitted to evidence handwriting, under St. June 23, 1915); 1922, People *v.* Clark, 301 Ill. 428, 134 N. E. 95 (receiving stolen property; St. 1915, p. 440, applies to criminal cases, but specimens so exhibited cannot be taken to the jury room).

Indiana: The documents used, it was at first said, must be not only otherwise in the case, but also admitted to be genuine: 1870, Chance *v.* Gravel Road Co., 32 Ind. 474; 1874, Huston *v.* Schindler, 46 Ind. 38, 41 (papers admitted genuine, but not in the case, excluded); 1877, Jones *v.* State, 60 Ind. 241; 1884, Shorb *v.* Kinzie, 100 Ind. 429; but later rulings seem to be satisfied if the writings are either already in the case or admitted genuine: 1895, Tucker *v.* Hyatt, 144 Ind. 635, 41 N. E. 1047; 1895, Bowen *v.* Jones, 13 Ind. App. 193, 41 N. E. 400 (where, however, the language of the Court applies to writings admitted genuine only if already in the case); 1911, Williams *v.* State, 175, Ind. 93, 93 N. E. 448 (forgery; Tucker *v.* Hyatt followed); Burns' Ann. St. 1914, § 528*a* (wherever "the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses or by the jury, court, or officer conducting such proceedings, to prove or disprove such genuineness"); 1914, Kahn *v.* State, 182 Ind. 1, 105 N. E. 385 (documents "in the case, which the party is estopped to deny, and such others as are admitted to be genuine," are alone admissible); 1919, Plymouth Sav. & L. Ass'n *v.* Kassing, — Ind. App. —, 125 N. E. 488 (the statute applied to sundry specimens).

Iowa: Code 1897, § 4620, Comp. Code § 7327 ("Evidence respecting handwriting may be given by experts, by comparison, or by comparison by the jury, with writings of the same person which are proved to be genuine"); the following rulings apply the statute: 1864, Morris *v.* Sargent, 18 Ia. 97; 1871, Borland *v.* Walrath, 33 Ia. 132; 1883, Wilson *v.* Irish, 62 Ia. 263, 17 N. W. 511; 1887, State *v.* Calkins, 73 Ia. 128, 34 N. W. 777 (signature in a hotel-register, allowed to be compared with signature to a note); 1888, Riordan *v.* Guggerty, 74 Ia. 691, 39 N. W. 107; 1894, State *v.* Farrington, 90 Ia. 673, 679, 57 N. W. 606 (genuine specimens, "wherever found," are admissible: here,

a hotel-register and a check); 1901, Coppock *v.* Lampkin, 114 Ia. 664, 87 N. W. 665, *semble* (writings of A. not otherwise in the cause, not receivable under Code § 4620, to prove that A. wrote a disputed document claimed by the opponent to be written by B.; citing Peck *v.* Callaghan, N. Y., and ignoring the later rulings); rulings interpreting the word "proved," and specifying the improper modes of proof, are dealt with *post*, § 2020.

Kansas: The use of documents is permitted when they are otherwise in the case, and when, though not otherwise in the case, they are admitted to be genuine; but the later cases also admit proved documents: 1872, Macomber *v.* Scott, 10 Kan. 339; 1876, Joseph *v.* National Bank, 17 Kan. 260; 1879, Abbott *v.* Coleman, 22 Kan. 252; 1884, Ort *v.* Fowler, 31 Kan. 485, 2 Pac. 580; 1891, Holmberg *v.* Johnson, 45 Kan. 197, 25 Pac. 575 (papers "admitted or proved to be genuine," receivable); 1901, State *v.* Stegman, 62 Kan. 476, 63 Pac. 746 (specimens "must either be admitted to be genuine" or "at least clearly proved to be genuine"); 1904, State *v.* Ryno, 68 Kan. 348, 74 Pac. 1114 (State *v.* Stegman followed).

Kentucky: At first, comparison by the jury was forbidden: 1833, Woodward *v.* Spiller, 1 Dana 180; but it was then allowed, for documents otherwise in the case and clearly proved genuine: 1847, McAllister *v.* McAllister, 7 B. Monr. 270; 1885, Fee *v.* Taylor, 83 Ky. 262; then a lengthy statute entered to make improvements: Stats. 1915, § 1649, C. C. P. 1895, § 604 (in any proceeding whatever, "upon a dispute as to the genuineness of the handwriting of a person, other handwritings of such person, though not in the case for any other purpose, may be introduced for the purpose of comparison by witnesses with the writing in dispute; and such writings, and the testimony of witnesses respecting them, may be submitted to the Court or jury as evidence concerning the genuineness of the writing in dispute; provided that (1) the genuineness of such writings shall be proved, to the satisfaction of the judge, by other than opinion evidence; (2) it must be proved, to the satisfaction of the judge, that they were written before any controversy arose as to the genuineness of the writing in dispute, and that no fraud was practised in their selection; (3) a party proposing to introduce such writings must give reasonable notice of his intention to the opposite party or his attorney, with reasonable opportunity to examine them before the commencement of the trial; (4) the judge may limit the number of such writings; (5) an error of the judge shall be subject to revision and correction in the same manner as if the error had been committed by the Court"); 1897, Froman *v.* Com., — Ky. —, 42 S. W. 728 (an affidavit certified by a lawful officer, held properly used); 1899, Bogard *v.* Johnstone, — Ky. —, 53 S. W. 651 (specimens excluded because of no notice under the statute); 1902, Birchett *v.* Bank, 113 Ky. 135, 67 S. W. 371 (notice held sufficient, on the facts); 1907, Howard *v.* Creech, — Ky. —, 101 S. W. 974 (statute applied).

Louisiana: Comparison was allowed by the first Code: 1812, Sauve *v.* Dawson, 2 Mart. 202, *semble;* 1835, Plicque *v.* La Branche, 9 La. 560, 562, *semble;* the modern statutes are as follows: Rev. Civ. C. 1920, § 2245 ("If the party [to a private act] disavow the signature, or the heirs or other representatives declare that they do not know it, it must be proved by witnesses or comparison, as in other cases"); C. Pr. 1900, § 325 (signature of private act denied must be proved "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 and sign his name. But the proof by witnesses shall not exclude the proof by experts or by a comparison of the writing, as established by the Civil Code"); see the statutes quoted *ante*, § 2008; applied in the following: 1866, McDonogh's Succession, 18 La. An. 419, 445, 448; 1869, Huddleston *v.* Coyle, 21 La. An. 148; 1869, Leonard's Succession, 21 La. An. 523; 1871, State *v.* Fritz, 23 La. An. 56 (the jury may be given documents otherwise in the case and proved genuine); 1902, State *v.* Batson, 108 La. 479, 32 So. 478 (documents "otherwise irrelevant and which have not been admitted in evidence," held not receivable; in criminal cases C. P. § 325, and C. C. § 2245, do not apply); 1916, Lefort's Succession, 139 La. 51, 71 So. 215 (expert testimony to the handwriting of an olographic will is receivable under Civ. C. § 1655 as amended by St. 1896, No. 119, providing for two witnesses, etc., quoted *post*, § 2051); St. 1918, July 9, No. 166 (criminal cases; like the English statute).

Maine: The jury may use any documents admitted or proved to be genuine: 1858, Chandler *v.* LeBarron, 45 Me. 534; 1860, Woodman *v.* Dana, 52 Me. 13; 1888, State *v.* Thompson, 80 Me. 194.

Maryland: Comparison by the jury was at first excluded entirely: 1873, Tome *v.* R. Co., 39 Md. 93 (here the standard-signatures were presented in photographic enlargement; but the decision was put on the general principle); but it is now allowed by statute: Ann. Code 1914, Art. 35, § 7 (like the English statute); 1916, Murdock *v.* Taylor, 128 Md. 633, 98 Atl. 149 (promissory note; letter signed by payor admitted for comparison).

Massachusetts: The jury may obtain a standard from any documents either proved or admitted to be genuine; it may be added that the rule in this jurisdiction best represents the early tradition continuing the English usage of the last century; the arguments and doubts raised in Doe *v.* Suckermore, which left so noticeable an impression on the decisions in most other jurisdictions, never affected the

result thus early reached in this State: 1813, Hall *v.* Huse, 10 Mass. 39; 1814, Homer *v.* Wallis, 11 Mass. 312; 1820, Salem Bank *v.* Gloucester Bank, 17 Mass. 526; 1836, Moody *v.* Rowell, 17 Pick. 490 (Shaw, C. J.); 1838, Richardson *v.* Newcomb, 21 Pick. 317; 1848, Com. *v.* Eastman, 1 Cush. 217; the further decisions, dealing with the proper mode of proving genuineness, are noted *post*, § 2020.

Michigan: The jury could examine only documents otherwise in the case: 1866, Vinton *v.* Peck, 14 Mich. 287; 1874, Van Sickle *v.* People, 29 Mich. 64; 1876, Foster's Will, 34 Mich. 26; 1879, First Nat'l Bank *v.* Robert, 41 Mich. 711, 3 N. W. 199; 1887, People *v.* Parker, 67 Mich. 222, 224, 34 N. W. 720; and it would also seem that their genuineness must clearly appear before comparison can be allowed: 1874, Van Sickle *v.* People, 29 Mich. 65, where mere possession and ownership of a diary was held not sufficient to establish the defendant's authorship; 1906, People *v.* Tollefson, 145 Mich. 449, 108 N. W. 751 (forgery; hotel register, admitted for comparing accused's signature, no proper objection being made); 1907, Brown *v.* Evans, 149 Mich. 429, 112 N. W. 1079 (comparison with an affidavit on file in the case, allowed); then a statute introduced a liberal rule: Comp. L. 1915, § 12359 ("Whenever in any suit or proceeding in any of the courts of this state, it shall be necessary or proper to prove the signature or the handwriting of any person, it shall be competent to introduce in evidence for the purpose of comparison, any specimen or specimens of the handwriting or signature of such person, admitted or proved to the satisfaction of the court to be genuine, whether or not the paper on which such handwriting or signature appears is one admissible in evidence or connected with the case or not: *Provided:* That if such paper is not one admissible in evidence for some other purpose, or connected with the case, it shall not be admissible in evidence for the purpose of comparison unless it was made before the controversy arose concerning which such suit or proceeding was brought"); 1920, People *v.* Sturman, 209 Mich. 284, 176 N. W. 397 (whether under Comp. L. 1915, § 12539, the defendant's signature written at the trial, in the name of his alleged alias, was admissible for submission to an expert's opinion as to identity of handwriting not decided).

Minnesota: The jury may examine documents already in the case, and documents not otherwise in the case but admitted genuine: 1886, Morrison *v.* Porter, 35 Minn. 425, 29 N. W. 54; 1915, State *v.* Lurken, 129 Minn. 402, 152 N. W. 769 (forgery of a bank check; the defendant offered three other checks bearing his signature identified by his wife; held not admissible because not "clearly proved to be genuine"; purporting to follow Morrison *v.* Porter and to admit documents not in the case and not conceded to be genuine, provided they are clearly proved genuine; but this is not the rule of Morrison *v.* Porter, and the opinion apparently confuses the doctrine of § 2000, par. (2) *ante*, with that of § 2020, *post*).

Mississippi: The jury may examine documents otherwise in the case, and documents not otherwise in the case but admitted genuine: 1874, Wilson *v.* Beauchamp, 50 Miss. 32; 1876, Garvin *v.* State, 52 Miss. 209 (adding "or proved genuine").

Missouri: Here the jury, as at first held, might compare documents otherwise in the case, if admitted genuine, and documents not otherwise in the case, but admitted genuine, — in short, any documents admitted genuine: 1870, State *v.* Scott, 45 Mo. 304, *semble* (adding to the first class "or clearly proved genuine"); 1878, State *v.* Clinton, 67 Mo. 385 (following Greenleaf, Evidence, § 581); 1884, Springer *v.* Hall, 83 Mo. 697; 1880, State *v.* Tompkins, 71 Mo. 616; but the effect appeared, in the ensuing rulings, of the misunderstanding of State *v.* Clinton shown in Rose *v.* Bank, mentioned *ante*, § 2008, under Missouri, and new and uncertain limits were for a while declared: 1893, State *v.* Minton, 116 Mo. 605, 614, 22 S. W. 808 (only when conceded genuine or otherwise in the case); 1896, State *v.* Thompson, 132 Mo. 301, 34 S. W. 31 (same); 1896, Geer *v.* M. L. & M. Co., 134 Mo. 85, 34 S. W. 1099 (only documents admitted genuine and in the case); finally a statute came to enlarge and settle the rule: St. 1895, R. S. 1919, § 5438 (like Eng. St. 1854, c. 125, § 7); 1898, State *v.* Goddard, 146 Mo. 177, 48 S. W. 82 (under the statute; checks said to be payable by deceased's wife to defendant; defendant allowed to offer, in proving them forgeries, other writings of deceased); 1907, State *v.* Stark, 202 Mo. 210, 100 S. W. 642 (Rev. St. 1899, § 4679 applied, on an issue of a forged deed).

Montana: Rev. C. 1921, § 10531, par. 9 (like Cal. C. C. P. § 1870); § 10592 (like id. § 1944); 1897, Baxter *v.* Hamilton, 20 Mont. 327, 51 Pac. 265 (statute applied to evidence offered after its enactment on the trial of a suit begun before).

Nebraska: The jury might examine any documents admitted or proved to be genuine: 1881, Huff *v.* Nims, 11 Nebr. 365, 9 N. W. 548; but by statute the following provision is made: Rev. St. 1922, § 8854 ("Evidence respecting handwriting may be given by comparisons made, by experts or by the jury, with writings of the same person which are proved to be genuine"); under the statute the writings need not be otherwise in the case: 1891, Grand Island Banking Co. *v.* Shoemaker, 31 Nebr. 134, 47 N. W. 696, *semble* (approving Huff *v.* Nims); 1892, Capital National Bank *v.* Williams, 35 Nebr. 410, 53 N. W. 202, *semble*; 1896, First Nat'l Bank *v.* Carson, 48 Nebr. 763, 67 N. W. 779.

New Hampshire: Here the peculiar rule first obtained that where the specimens were

already in the case admitted genuine, comparison was unconditionally allowed; but where the specimens were offered for the special purpose, there must first be testimony from some one knowing the hand: 1852, Bowman *v.* Sanborn. 25 N. H. 110, interpreting Myers *v.* Toscan, 3 N. H. 47 (in which it was not clear whether specimens might be proved or were usable only when admitted by the opponent); 1860, Reed *v.* Spaulding, 42 N. H. 121; 1866, State *v.* Shinborn, 46 N. H. 503; but later the English statutory rule was judicially substituted for that above, the proof of the genuineness being for the jury: 1873, State *v.* Hastings, 53 N. H. 460; 1877, Carter *v.* Jackson, 58 N. H. 157; 1902, University of Illinois *v.* Spalding, 71 N. H. 163, 51 Atl. 731 (rule laid down in the English statute, adopted as a result of common-law principles and in consequence of the conflict of prior rulings in this State; quoted *ante*, § 2000).

New Jersey: The jury might not compare any specimens: 1849, West *v.* State, 22 N. J. L. 241; until the enactment of the statute: Comp. St. 1910, Evid. § 20 (English form; with the added proviso that specimens offered by a party to disprove the genuineness of his hand must be shown "to have been written before any dispute arose as to the genuineness of the signature or writing in controversy"); applied: 1878, Mutual Ben. Life Ins. Co. *v.* Brown, 30 N. J. Eq. 201; 1908, State *v.* Skillman, 76 N. J. L. 474, 70 Atl. 83 (writings otherwise in the case admitted).

New Mexico: St. 1917, Mar. 12, c. 64 (in any proceeding where genuineness of handwriting is involved, "any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses or by the jury, court, or officer conducting such proceedings, to prove or disprove such genuineness"; provided that the Court exclude writings tending to "degrade, humiliate, or incriminate" the person, in respect to matters not material, etc., etc.; and provided that specimens of the defendant "must have been written before any controversy arose as to the genuineness of the writing in dispute");

New York: Comparison of specimens was at first unconditionally excluded: 1809, Jackson *v.* Van Dusen, 5 John. 155, *semble;* 1828, Jackson *v.* Phillips, 9 Cow. 112; it had been in some cases left undecided: 1801, Titford *v.* Knott, Kent, J., 2 John. Cas. 214; 1816 Osgood *v.* Dewey, 13 John. 239; but in later rulings comparison was allowed to be employed by the jury for documents otherwise in the case: 1856, Van Wyck *v.* McIntosh, 14 N. Y. 439; 1864, Dubois *v.* Baker, 30 N. Y. 361; 1872, Randolph *v.* Loughlin, 48 N. Y. 459; 1878, Miles *v.* Loomis, 75 N. Y. 292; then came an enlarging statute: Laws 1880, c. 36, § 1, Laws 1888, c. 555 ("Comparison of a disputed writing, with any writing proved to the satisfaction of the Court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute"); § 2, but by St. 1909, c. 65, inserted as C. C. P. § 961*d*, now C. P. A. 1920, § 332 (amendment of 1888; same for the first eighteen words; then "handwriting of any person claimed on the trial to have made or executed the disputed instrument or writing, shall be permitted and submitted to the Court and jury in like manner"); the first statute, authorizing a comparison of "a disputed writing with any writing proved . . . to be genuine" received an astounding construction in 1884 (Peck *v.* Callaghan, 95 N. Y. 73) when the Court refused to admit genuine specimens of the alleged forger of a document in order to prove it his forgery; thus (1) the words "*any* writing" were made meaningless, and (2) the statute was made to help all forgers and to handicap their victims; compare the contrary rulings in England and Missouri; perverse legal thinking could hardly go further; and in 1888 (c. 555) the Legislature was obliged again to correct the Court; whether the authenticity of the "disputed writing" of this statute must be the main issue of the case (as a will, deed, or the like), or the statute applies to every writing in the case whose authenticity is material, could hardly cause any doubt, especially to persons not ignorant of the history of the subject; yet the invitation was issued to litigants to raise the point, as the Court declared itself unwilling to settle it lightly and unaided by the Bar: 1892, People *v.* Murphy, 135 N. Y. 453, 32 N. E. 138; this doubt it then settled: 1901, People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286 (the disputed writing, to be proved by specimens, need not be a main document in issue, either at common law or under the statute, but may be merely an evidential one; repudiating the contrary 'obiter dictum' in Peck *v.* Callaghan); 1902, People *v.* Tuck, 170 N. Y. 203, 63 N. E. 281 (papers proved to be genuine, allowed to be used as standards for a letter in B.'s name alleged to have been forged by defendant); under this statute, it must appear that the writing was admitted below as deemed genuine by the Court, not merely as alleged to be genuine: 1895, People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066.

North Carolina: The following rulings left the law difficult to determine, before the statute: 1853, Outlaw *v.* Hurdle, 1 Jones L. 165; 1856, Otey *v.* Hoyt, 3 Jones L. 410, *semble* (excluded even for documents otherwise in the case); 1872, State *v.* Woodruff, 67 N. C. 91 (following Outlaw *v.* Hurdle); 1877, Yates *v.* Yates, 76 N. C. 149, *semble* (allowed for documents otherwise in the case and admitted genuine); 1887, Tuttle *v.* Rainey, 98 N. C. 514, 4 S. E. 475; 1888, Fuller *v.* Fox, 101 N. C. 120, 7 S. E. 589; 1891, Tunstall *v.* Cobb, 109 N. C. 320,

14 S. E. 28 (excluded entirely, following Pope *v.* Askew, *ante*, § 2008); 1902, Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887 (Tunstall *v.* Cobb followed); the following singular ruling seems to belong here: 1896, Riley *v.* Hall, 119 N. C. 406, 26 S. E. 47 (a deed said to contain an erasure or a forgery cannot, if its genuineness is in issue, be submitted to the jury, the question being solely one of expert opinion); 1906, Shelton's Will, 143 N. C. 218, 55 S. E. 705 (Fuller *v.* Fox followed); 1908, Martin *v.* Knight, 147 N. C. 564, 61 S. E. 447 (execution of a note and a duebill, the contents being by M. and the signature purporting to be by F.; documents allowed to be shown to the jury, the witnesses explaining the grounds for their opinion as to similarity or difference; able opinion by Connor, J.); then in 1913 came a statute, Con. St. 1919, § 1784 (like Eng. St. 1854, c. 125, § 27); 1914, Boyd *v.* Leatherwood, 165 N. C. 614, 81 S. E. 1025 (no document not used as a basis of some witness' testimony can be submitted to the jury); 1921, Newton *v.* Newton, 182 N. C. 54, 108 S. E. 336 (defendant's written admission; her signature being disputed, the trial judge allowed a witness to compare it with one conceded to be genuine, but refused to let the jury compare it; held error on the latter point, under Con. St. 1919, § 1784).

North Dakota: Here the rule has been left undecided: 1890, Dakota *v.* O'Hare, 1 N. D. 43; 1910, Cochrane *v.* National Elev. Co., 20 N. D. 169, 127 N. W. 725 (specimen conceded genuine, admitted).

Ohio: Here no distinction is taken between the expert's and the jury's use of specimens, and the same rule is laid down for both: *ante*, § 2008.

Oregon: Laws 1920, § 727, par. 9 (like Cal. C. C. P. § 1870); § 788 (like Cal. § 1944, inserting, after "witness," "skilled in such matters," and omitting "or proved to be genuine, etc."); statute applied: 1896, Osmun *v.* Winters, 30 Or. 177, 46 Pac. 780; Munkers *v.* Ins. Co., 30 Or. 211, 46 Pac. 850.

Pennsylvania: Here, as in Massachusetts, the old tradition of free comparison survived; but it was yoked with the rule that there must first be preliminary corroborative evidence,—an old qualification peculiar to the use of all handwriting-evidence in criminal cases (*ante*, § 1991), and already at this time abandoned in England; 1812, McCorkle *v.* Binns, 5 Binney 348, Tilghman, C. J. (here it is required that other evidence shall first be given in support; but this is founded on a statement of Peake's, and Peake was not referring specially to this "comparison of hands," but to the general evidence formerly known as such, and in that respect his qualification was already abandoned elsewhere); 1823, Farmers' Bank *v.* Whitehill, 10 S. & R. 111, Duncan, J. (here many English names of the 1700s are cited for the admission of "similitude of hands," and its rejection is said to be "recent doctrine" at Westminster, — which was true, but the judge is unaware of the different senses employed for that phrase; here, also, it is said that there must first be other corroborative evidence given); 1829, Bank *v.* Jacobs, 1 Pa. 180 (here other corroborative testimony was regarded as indispensable; and the writings usable are intimated to be such as are admitted genuine or were seen by a witness to be written); 1834, Callan *v.* Gaylord, 3 Watts 321 (here also other preliminary proof of some sort is required; but nothing is said as to the degree of proof of the standard's genuineness; one witness' testimony was taken as sufficient); 1840, Baker *v.* Haines, 6 Whart. 291 (here the question is fully discussed and settled; there must be preliminary evidence in support; and the writings used must be thus tested: "Strict proof of the genuine or test paper should first be given; no reasonable doubt should remain on that point; and nothing short of evidence of a person who saw him write the paper, or an admission of being genuine, or evidence of equal certainty, should be received for that purpose"); 1848, Depue *v.* Place, 7 Pa. St. 428 (here no general rule was stated, but the standards were held not sufficiently proved); 1862, Travis *v.* Brown, 43 Pa. St. 9 (the whole subject discussed and cleared up; the jury may compare, after other preliminary evidence, other "well authenticated writings," "established by the most satisfactory evidence"); 1868, Haycock *v.* Greup, 57 Pa. 441 (affirms the rule of Travis *v.* Brown, and excludes the evidence in hand because no preliminary evidence had been offered for which comparison of hands was to serve as corroborative); 1876, Aumick *v.* Mitchell, 82 Pa. 211 (same rule, and same reason for rejection); 1880, Berryhill *v.* Kirchner, 96 Pa. 492 (same rule); 1884, Foster *v.* Collner, 107 Pa. 313 (same rule); 1893, Rockey's Estate, 155 Pa. 456, 26 Atl. 656 (same rule); at this point a statute intervened, probably on account of the uncertainty of the rule for experts (*ante*, § 2008), but it cannot be said to improve on the English form of statute: St. 1895, May 15, as amended by St. 1913, June 6, § 1, Dig. 1920, § 10356 ("Where there is a question as to any writing, the opinions of the following persons shall be deemed to be relevant: (a) The opinion of any person acquainted with the handwriting of the supposed writer. (b) The opinion of those who have had special experience with or who have pursued special studies relating to documents, handwriting, and alterations thereof who are herein called experts); ib. § 2, Dig. § 10357 ("It shall be competent for experts in giving their testimony under the provisions of this act, to make comparison of documents and comparison of disputed handwriting with any documents or writing admitted to be genuine, or proven to the satisfaction of the judge to be genuine, and the evidence of such experts respecting the same shall be submitted to the jury as

evidence of the genuineness or otherwise of the writing in dispute"); ib. § 3, Dig. § 10358 ("It shall be competent for experts in formulating their opinions to the Court and jury to place the genuine and disputed signatures or writings in juxtaposition and to draw the attention of the jury thereto; and it shall furthermore be competent for counsel to require of an expert a statement of the principles on which he has based his work, the details of his work, and his opinion that the results are important to the point at issue, or the reasoning, analysis, and investigation by which he has arrived at his opinion"); ib. § 4, Dig. § 10359 ("The opinions of the witnesses to handwriting being submitted as competent testimony to the jury, the final determination as to whether any particular handwriting is genuine or simulated shall remain, as heretofore, a question for the jury on all the evidence submitted"); 1904, Groff *v.* Groff, 209 Pa. 603, 59 Atl. 65 (statute applied, to allow comparisons for jury and experts); 1917, Seaman *v.* Husband, 256 Pa. 571, 100 Atl. 941 (will; comparison with admittedly genuine writings, allowed).

Philippine Isl.: C. C. P. 1901, § 298, par. 9 (like Cal. C. C. P. § 1870); § 327 (like Cal. C. C. P. §§1944, 1945, substituting "made by the Court" for "made by the witness or the jury").

Porto Rico: Rev. St. & C. 1911, § 1403, par. 7 (like Cal. C. C. P. § 1870, par. 9); § 1459 (like Cal. C. C. P. § 1944).

Rhode Island: Gen. L. 1909, c. 292, § 47 (like Eng. St. 1854).

South Carolina: Here the rule is peculiar, flavoring of the former Pennsylvania doctrine: 1823, Boman *v.* Plunkett, McCord 518 (receiving documents admitted genuine, in aid of "doubtful proof"); 1841, Bird *v.* Miller, 1 McMull. 124 (approving Boman *v.* Plunkett, but not accurate in the understanding of its doctrine); 1874, Bennett *v.* Mathewes, 5 S. C. 478 (following the limitations of Boman *v.* Plunkett); 1882, Benedict *v.* Mathewes, 18 S. C. 506 (same; adding that the trial judge is to determine, subject to review, what is a "doubtful case").

South Dakota: 1904, State *v.* Coleman, 17 S. D. 594, 98 N. W. 175 (whether writings proved or admitted genuine may be used, though not otherwise evidence in the case; not decided); 1905, Mississippi L. & C. Co. *v.* Kelly, 19 S. D. 577, 104 N. W. 265 (a writing "admitted or proved" genuine is admissible, though not otherwise in the case).

Tennessee: In 1870, Clark *v.* Rhodes, 2 Heisk. 207, documents not in the case were rejected; in 1872, Kannon *v.* Galloway, 2 Baxt. 231, documents not in the case went to the jury by consent; in 1873, Wright *v.* Hessey, 3 Baxt. 44, Clark *v.* Rhodes was followed; in 1889, a statute (Act Feb. 26, now Code 1916, § 5560) was passed, similar to that of 1880 in New York (quoted *supra*); its interpretation, for the case of documents of an alleged forger offered to prove a writing a forgery, was made to conform to that of the New York statute, Peck *v.* Callaghan, N. Y., *supra*, being followed; 1890, Franklin *v.* Franklin, 90 Tenn. 50, 16 S. W. 557; Powers *v.* McKenzie, 90 Tenn. 179, 16 S. W. 559; but it does not appear that the error has been corrected, as it was in New York, by another statute.

Texas: The state of the law was uncertain, owing to the failure to observe precedents: 1866, Hanley *v.* Gandy, 28 Tex. 211 (comparison of hands excluded entirely); 1877, Eborn *v.* Zimpelman, 47 Tex. 518 (without reference to local precedents, comparison was apparently regarded as allowable, with the single limitation that the specimens must be either admitted to be or clearly proved to be genuine); 1885, Kennedy *v.* Upshaw, 64 Tex. 420 (not citing Eborn *v.* Zimpelman; comparison allowed, apparently for such specimens only as were already in the case and admitted genuine); 1885, Matlock *v.* Glover, 63 Tex. 236 (comparison refused, without naming reason or precedent); 1887, Smyth *v.* Caswell, 67 Tex. 572, 4 S. W. 848 (the first limitation of Kennedy *v.* Upshaw was relaxed where the specimen was introduced by the opponent and admitted genuine); 1888, Wagoner *v.* Ruply, 69 Tex. 703, 7 S. W. 80 (a confused opinion apparently to the same effect); the following statute is doubtless supposed to have cleared up the law in criminal cases: Rev. C. Cr. P. 1911, § 814 ("It is competent in every case to give evidence of handwriting by comparison, made by experts or by the jury; but proof by comparison only shall not be sufficient to establish the handwriting of a witness who denies his signature under oath"); 1904, Mahon *v.* State, 46 Tex. Cr. 234, 79 S. W. 28 (perjury in an affidavit; to identify the defendant as the signer, an application for witness-process, signed by him, was admitted for the jury's inspection, wihout calling experts; loose opinion, citing only two of the above cases); 1908, Wade *v.* Galveston H. & S. A. R. Co., — Tex. Civ. App. —, 110 S. W. 84 (Kennedy *v.* Upshaw followed); 1920, Williams *v.* State, 86 Tex. Cr. App. 640, 218 S. W. 750 (forgery; expert testimony based on comparison, admitted under the above C. Cr. P. § 814, held not sufficient here to establish the forgery, under the second clause of the statute).

Utah: 1887, Durnell *v.* Sowden, 5 Utah 222, 14 Pac. 334 (opinion obscure); 1892, Tucker *v.* Kellogg, 8 Utah 11, 13, 28 Pac. 870 *semble* (comparison allowed for specimens admitted genuine, if otherwise in the case); 1906, State *v.* McBride, 30 Utah 422, 85 Pac. 440 (rule of Tucker *v.* Kellogg accepted).

Vermont: Here the rule is of the same type as in Massachusetts and Pennsylvania: 1803, Rich *v.* Trimble, 2 Tyler 349 (the Court refused to employ "comparison of handwriting" when it did not appear that the signer's deposition was not available; the phrase is prob-

§ 2017. **Ancient Documents.** It has been noticed, in examining the history of the rule (*ante*, § 1994), that by the early practice no limitation was imposed against the exhibition of specimens to the jury. When, in the series of rulings culminating in Doe *v.* Newton (*ante*, § 1994), the limitation was established that exhibition to the jury was confined to specimens otherwise in the case, an exception was reserved for ancient writings, which, if properly authenticated, could be so used whether otherwise in the case or not. In Doe *v.* Newton, and later opinions, a reason has been found in "the necessity of the case," — the necessity lying in this, that where the disputed writing is alleged to be that of a person as to whose handwriting living witnesses are or may be assumed to be unavailable, and as to whom there are not therefore other specimens in the case that can be proved by such witnesses, a resort to any available standards whatever must be permitted. This exception is undoubted law to-day, whatever the limitations may be as to the use of ordinary specimens by the jury.[1]

ably used in the older sense); 1833, Gifford *v.* Ford, 5 Vt. 535 (comparison was allowed, the specimen here being admitted genuine); 1849, Adams *v.* Field, 21 Vt. 264 (settled that comparison is allowable of all documents, provided only that their genuineness is admitted or is proved by "clear, direct, and positive testimony"); 1867, State *v.* LaVigne, 39 Vt. 234 (same); 1870, State *v.* Horn, 43 Vt. 20, 23 (allowed for specimens admitted or "directly and very clearly" proved genuine); 1887, Rowell *v.* Fuller, 59 Vt. 692, 10 Atl. 853 (same); 1909, State *v.* Kent, 83 Vt. 28, 74 Atl. 389 (writings not otherwise in the case, but "admitted or proved to be genuine," may be used; here, capital letters carved on wood, etc.).

Virginia: 1828, Gardner's Adm'r *v.* Vidal, 6 Rand. 106 (question expressly reserved); 1829, Rowt's Adm'x *v.* Kile's Adm'r, 1 Leigh 216 (except where no living witnesses to handwriting can be had, comparison by the jury is entirely excluded); 1904, Johnson *v.* Com., 102 Va. 927, 46 S. E. 789 (forgery of wife's will; specimens of defendant's and wife's writing, proved to be genuine, admitted).

Washington: 1896, Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142 (specimens admitted; no limits fixed).

West Virginia: 1874, Clay *v.* Robinson, 7 W. Va. 359, new trial *s. v.* Clay *v.* Alderson's Adm'r, 10 W. Va. 53 (the opinion is obscure, but seems to allow comparison (1) for all writings admitted genuine, (2) for ancient writings, (3) for writings used in explanation by a witness for whom they have served as the basis of knowledge of handwriting); 1886, State *v.* Henderson, 29 W. Va. 158, 1 S. E. 225 (witnesses were allowed to show, by writing on papers, how the person in question wrote the letter L in a peculiar manner, distinguishing this from comparison of specimens); 1888, State *v.* Koontz, 31 W. Va. 129, 5 S. E. 328 (the foregoing cases were approved, and the writing for the jury of a letter M by the prosecuting witness, whose name was alleged to have been forged, was held improper); St.1907, c. 39, p. 224, Code 1914, § 4877 (in any civil or criminal proceeding "any writing proved to the satisfaction of the judge to be genuine may be used with or without the testimony of witnesses for the purpose of making a comparison with a disputed writing as evidence of the genuineness or otherwise of such disputed writing").

Wisconsin: 1861, Pierce *v.* Northey, 14 Wis. 9, 13 (question was discussed, but expressly reserved); 1873, Hazelton *v.* Union Bank, 32 Wis. 47 (rule adopted that comparison of specimens should be allowed only where the documents were already in the case and were "clearly proved" genuine, or where they were ancient and living witnesses could not be had); then a statute interposed; Stats. 1919, § 4189 *a* ("Comparison of a disputed writing with any writing proved to the satisfaction of the Court to be the genuine handwriting of any person claimed on the trial to have made or executed the disputed instrument or writing shall be permitted to be made by witnesses, and such writings and the evidence respecting them may be submitted to the Court or jury").

§ 2017. [1] *England:* 1806, Roe *v.* Rawlings, 7 East 282; 1811, Morewood *v.* Wood, 14 East 328; 1830, Doe *v.* Newton, 1 Nev. & P. 6, per Coleridge, J.; 1836, Doe *v.* Suckermore, 5 A. & E. 710, *passim; Canada:* 1872, Thompson *v.* Bennett, 22 U. C. C. P. 393, 405, per Gywnne J.; *United States:* 1899, U. S. *v.* Ortiz, 176 U. S. 422, 20 Sup. 466 (cited *ante*, § 2016); Cal. C. C. P. 1872, § 1945 ("Where a writing is more than thirty years old, the comparisons may be made with writings purporting to be genuine, and generally respected and acted upon as such

§ 2018. **Unfair Selection of Specimens.** In those jurisdictions where the use of specimens is freely allowed, for expert or for jury, and no artificial and rigid rules are laid down to obviate the supposed danger of unfair selection, the objection based on unfair selection remains open to be decided for each case or class of cases. What canons are there for determining when a specimen is to be rejected on this ground?

(1) To take the commonest case, Is it proper to receive a specimen *written at the trial by a party* alleging that he is or is not the writer and offering such a specimen on his own behalf as a standard for judgment? This is plainly sufficient where the party does not volunteer it but the judge orders him to write his name.[1] Otherwise, the prevailing rule has been to exclude such specimens absolutely.[2] After all, however, the more sensible plan is to leave it to the judge in each instance to decide whether the specimen is manifestly unfair.[3]

(2) A different case is presented, however, where the *opponent* chooses to demand and offer such a specimen; he is the one who suffers by any unfairness, and if he chooses to take the risk, certainly the other party cannot object.[4]

by persons having an interest in knowing the fact"; this is a distortion of the principle, borrowing partly from the rules of §§ 701, 1297, *ante*); 1860, Clark *v.* Wyatt, 15 Ind. 272; 1847, McAllister *v.* McAllister, 7 B. Monr. Ky. 270; Mont. Rev. C. 1921, § 10593 (like Cal. C. C. P. § 1945); Or. Laws 1920, § 789 (like Cal. C. C. P. § 1945, substituting "twenty" for "thirty"); P. I. C. C. P. 1901, § 327 (like Cal. C. C. P. §§ 1944, 1945); P. R. Rev. St. & C. 1911, § 1460 (like Cal. C. C. P. § 1945); 1822, Cantey *v.* Platt, 2 McCord S. C. 260; 1906, McCreary *v.* Coggeshall, 74 S. C. 42, 53 S. E. 978 (an ancient letter; comparison with ancient official records by the same alleged author, admitted); 1829, Rowt. *v.* Kile, 1 Leigh Va. 216 (cited *ante*, § 2016); 1874, Clay *v.* Robinson 7 W. Va. 359, 10 W. Va. 53; 1873, Hazleton *v.* Bank, 32 Wis. 47.

§ 2018. [1] *Eng.* 1705, Osbourne *v.* Hosier, 6 Mod. 167, Holt. L. C. J.; 1829, Williams' Case, 1 Lew. Cr. C. 137, Bayley, B.; 1865, Corbett *v.* Kilminster, 4 F. & F. 400, Martin, B.; *U. S.* 1901, People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286 (specimens written by a defendant when under suspicion of the crime, but voluntarily, at the request of the prosecuting attorney, held admissible against him).

Whether the *witness may refuse*, if the writing would *tend to criminate him*, is noticed *post*, § 2264).

[2] *Eng.* 1793, Stanger *v.* Searle, 1 Esp. 14, Kenyon, L. C. J.; *U. S.* 1898, Williams *v.* State, 61 Ala. 39; 1921, People *v.* Rosenbaum, 299 Ill. 93, 132 N. E. 433 (forgery; defendant's offer to write the forged name in court for comparison with the forged instrument by the court, rejected, as capable of fabrication; unsound, because it might nevertheless have revealed unconcealable evidence of identity, and secondly, because this slight boon could do no harm, the evidence being so obviously open to discredit); 1858, Chandler *v.* LeBarron, 45 Me. 534, *semble;* 1879, First Nat'l Bank *v.* Robert, 41 Mich. 711; 1920, People *v.* Sturman, 209 Mich. 284, 176 N. W. 397 (defendant's signature written at the trial; cited more fully *ante*, § 2016); N. J. Comp. St. 1910, Evidence § 20 (quoted *ante*, § 2016); 1897, McGlasson *v.* State, 37 Tex. Cr. 628, 40 S. W. 503 (forgery of K.'s name; held improper to let the jury consider a specimen written by K., for the prosecution, during trial and after being shown the disputed signature); 1902, Whittle *v.* State, 43 Tex. Cr. 468, 66 S. W. 771 (forgery; specimen written at the trial by the person whose name was alleged to be forged, excluded); 1894, Hickory *v.* U. S., 151 U. S. 303, 307, 14 Sup. 334 (specimen made by the party in court on the same day to disprove genuineness, excluded).

In a decision upon a trial taking place before the Act of 1854 such a specimen was rejected as not a writing already in the case: 1855, Doe *v.* Wilson, 10 Moore P. C. 529.

[3] 1872, King *v.* Donahue, 110 Mass. 155; 1879, Com. *v.* Allen, 128 id. 50.

[4] 1722, Layer's Trial, 16 How. St. Tr. 192 (the witness said she would know certain papers by her private mark; she was required to make it for the Court, to test her knowledge of it); 1887, U. S. *v.* Mullaney, 32 Fed. 370 (cross-examination of a defendant, testifying in denial of certain signature by requiring him to write the names for exhibition to the jury, held proper); 1896, Bradford *v.*

(3) Specimens written *out of court* but *after controversy* begun may equally be subject to suspicion, and the judge may refuse to let the writer use them on his own behalf.[5]

(4) No other circumstances call for any settled rule.[6]

§ 2019. **Photographic Copies as Specimens; Press-Copies.** The use of *photographic-copies* as specimens is subject to certain necessary distinctions already elsewhere considered in connection with photographs in general (*ante*, § 797).[1] *Letter-press copies* might under some circumstances be usable as well as the originals, or in default of them.[2]

§ 2020. **Specimens "Proved" Genuine; Mode of Proof.** In those jurisdictions in which free comparison is permitted of specimens "proved" genuine, the question arises whether the proof of genuineness is to be determined by the *Court* or by the *jury*. Having regard to the general principle (*post*, § 2550) and to the argument from confusion of issues (*ante*, § 2000), the only proper solution is the former. In this way at once free choice of specimens is obtained and yet all inconvenience from confusion of issues before the jury is avoided. This is the result almost unanimously

People, 22 Colo. 157, 43 Pac. 1013 (defendant required to write; cited *ante*, § 2016); 1893, Smith *v.* King, 62 Conn. 515, 521, 26 Atl. 1059 (writing in Court, when demanded by opponent, allowable); 1858, Chandler *v.* LeBarron, 45 Me. 534; 1881, Huff *v.* Nims, 11 Nebr. 365, 9 N. W. 548; 1880, Sanderson *v.* Osgood, 52 Vt. 312.

Whether the *witness may refuse*, on the ground of *self-crimination*, is noticed *post*, § 2264.

Whether a *change of signature* evidences consciousness of guilt, is noticed *ante*, § 278.

[5] 1894, Hickory *v.* E. S., 151 U. S. 303, 14 Sup. 334 (excluding handwriting specially prepared); 1880, Sanderson *v.* Osgood, 52 Vt. 312 (admitting specimens written either before controversy or afterwards, if in the usual course of business and under unsuspicious circumstances); 1884, Shorb *v.* Kinzie, 100 In. 429, 433 (signed answer under oath in the same cause, not usable by the signing party as a specimen); 1880, Singer Mfg. Co. *v.* McFarland, 53 Ia. 541, 5 N. W. 739 (signature in pleadings, admitted); 1898, Weidman *v.* Symes, 116 Mich. 619, 74 N. W. 1008 (notes written after time of note in dispute, excluded); 1884, Springer *v.* Hall, 83 Mo. 698 (the party's signature to a pleading, where his own witness uses it, excluded); N. J. Comp. St. 1910, Evidence § 20 (cited *ante*, § 2016); 1909, State *v.* Barris, 78 N. J. L. 14, 73 Atl. 248 (under Gen. St. 1896, quoted *ante*, § 2016, the limitation excluding specimens made after controversy does not apply to specimens not offered by the party in whose hand they are, and in particular not to the State using a forgee's specimens; furthermore, specimens made by the alleged forger after the date of the document in issue are admissible); 1906, Greenwald *v.* Ford, 21 S. D. 28, 109 N. W. 516 (checks; a signature made since the time of the signature in dispute is not thereby inadmissible, unless "manufactured since the controversy arose, for the purpose of comparison, by one having a motive to fabricate").

[6] 1902, Phœnix Nat'l Bank *v.* Taylor, 113 Ky. 61, 67 S. W. 27 (specimens signed by mark may not be compared with a script signature); 1902, Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500 (slander; a specimen of the defendant's handwriting, containing political utterances calculated to prejudice his position, held inadmissible where other specimens were available); 1902, University of Illinois, *v.* Spalding, 71 N. H. 163, 51 Atl. 731 (specimens made after the date of the disputed document, but not after controversy nor otherwise open to suspicion, held admissible); 1892, Mutual Life Ins. Co. *v.* Suiter, 131 N. Y. 557, 29 N. E. 822 (the mere age of the specimens should not exclude them; compare § 695, *ante*); 1897, Redding *v.* Redding's Est., 69 Vt. 500, 38 Atl. 230 (same).

§ 2019. [1] For expert illustration by *blackboard diagrams* and the like, see *ante*, § 791.

[2] *Press-copies* of handwriting were rejected as standards in the following cases: 1885, Spottiswood *v.* Weir, 66 Cal. 525, 528, 6 Pac. 38; 1848, Com. *v.* Eastman, 1 Cush. 217. In Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525 (1889), traced copies were considered, but no decision rendered, the exclusion below being immaterial on the facts.

For the use of an early copy to show *alterations since made* in the original, see *ante*, § 1226, note 7.

accepted.[1] Several statutory enactments, following that of England, make similar provision.[2]

As to the mode of proving this genuineness, it is usually said that it may not be made by again resorting to expert testimony based on comparison; and thus the usual mode would be by witnesses speaking 'ex visu scriptionis' or 'ex scriptis olim visis' (*ante*, § 1996, §§ 694, 699). Yet possession of the documents, or any other mode (*post*, § 2131) appropriate for evidencing their execution (apart from handwriting-evidence), would equally be proper. It is often said that the proof must be "clear" or "positive," and this requirement, left to the discretion of the trial judge to administer, seems all that is desirable.[3]

§ 2020. [1] *For the judge:* 1874, Com. *v.* Coe, 115 Mass. 505; 1882, Costello *v.* Crowell, 133 Mass. 354; 1885, Costelo *v.* Crowell, 139 Mass. 590, 2 N. E. 698; 1888, State *v.* Thompson, 80 Me. 194, 197, 13 Atl. 892; 1862, Travis *v.* Brown, 43 Pa. 9; 1867, State *v.* La Vigne, 39 Vt. 235; 1887, Rowell *v.* Fuller, 59 Vt. 692, 10 Atl. 853; *for the jury:* 1873, State *v.* Hastings, 53 N. H. 460; 1877, Carter *v.* Jackson, 58 N. H. 157.

In Massachusetts it is however maintained, in accordance with the heterodox views of that Court in analogous questions (*ante*, § 861, *post*, § 2550), that the trial Court's ruling admitting proved specimens is *provisional only*, and that the jury may in criminal cases further reconsider and may reject the specimens as not genuine: 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127.

[2] Cited *ante*, § 2016; the following rulings apply them: 1859, Cooper *v.* Dawson, 1 F. & F. 550 (letter "proved" genuine to the judge's satisfaction); 1867, Reid *v.* Warner, 17 Low. Can. 489.

[3] The rulings are as follows: *Federal:* 1917, Dean *v.* U. S., 5th C. C. A., 246 Fed. 568 (altering a postal money-order; proof of genuineness of specimens may be circumstantial; here the possession of a memorandum book); *Georgia:* 1895, McVicker *v.* Conkle, 96 Ga. 584, 595, 24 S. E. 23 (attested writing offered as standard, not sufficiently "proved" by proving the attesting witness' signature; see *ante*, §§ 1511, 1513); 1896, Little *v.* Rogers, 99 Ga. 95, 24 S. E. 856 (evidence of genuineness of the standards may be circumstantial as well as testimonial; here the finding of the notes among the deceased's papers was held sufficient); 1900, McCombs *v.* State, 109 Ga. 496, 34 S. E. 1021 (possession of papers by accused, not sufficient evidence of their genuineness as standards); *Indiana:* 1919, Plymouth Sav. & L. Ass'n *v.* Kassing, — Ind. App. —, 125 N. E. 488 (proof of specimen's genuineness may be by the party's admissions, by witness who saw them written or heard them acknowledged, or by the party's recognition in acting on them, but not by expert testimony); *Iowa:* 1855, Hyde *v.* Woolfolk, 1 Ia. 159 (proof by persons familiar with handwriting, excluded; the proof must be "positive"); 1884, Winch *v.* Norman, 65 Ia. 188, 21 N. W. 511 (proof by comparison of hands, excluded); 1891, Sankey *v.* Cook, 82 Ia. 125, 47 N. W. 1077 (testimony by one who did not see the specimen written, excluded); 1900, Renner *v.* Thornburg, 111 Ia. 515, 82 N. W. 950, *semble* (proof by persons familiar with his hand, excluded); *New York:* 1890, McKay *v.* Lasher, 121 N. Y. 477, 482, 24 N. E. 711 (mode of proof depends "upon the general rules of evidence applicable," "the only condition" being the satisfaction of the judge); 1901, People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286 (under the statute, the Court may use any kind of evidence admissible at common law, *i. e.* any but expert testimony based itself on other specimens; the degree of persuasion must be in criminal cases beyond a reasonable doubt; the jury also must afterwards be satisfied of their genuineness before using them); 1921, Turnure *v.* Breitung, Sup. App. Div., 186 N. Y. Suppl. 620 (issue whether B. signed a draft as acceptor in favor of H., or B.'s name was forged by H.; specimen B. signatures shown to be genuinely by B., and specimen H. signatures shown to be genuinely by H., and specimen B. signatures shown to be not by B., but believed by an expert after comparison to be by H., were admitted to be used by the expert as the basis of his testimony, under C. C. P. § 961 *d*; held, that the third class of specimens could not be used, their authorship not having been "proved by common-law evidence, and a collateral issue being raised; unsound, for (1) "common-law evidence" is not inherently the best, for the common-law rules were based on a crude conception of the science of graphology, and (2) the issue was not more collateral for the third than for the first and the second classes of specimens); *Oklahoma:* 1900, Archer *v.* U. S., 9 Okl. 569, 60 Pac. 268 (proof by expert comparison of hands, inadmissible); *Pennsylvania:* 1848, Depue *v.* Place, 7 Pa. 430 (rejecting twenty specimens some of which the

§ 2021. **Specimens "Admitted" to be Genuine.** In those jurisdictions in which the use of specimens is limited, in part or solely, to those "admitted" to be genuine, questions of further detail occasionally arise. It is enough to notice that the admission must of course be the opponent's, not the witness',[1] and that only the true judicial admission — *i. e.* a concession made in the pleadings, or during the trial, or for the purpose of the trial (*post*, § 2588) — will suffice,[2] not the quasi-admission, *i. e.* an inconsistent extrajudicial statement of claim (*ante*, § 1048).[3]

D. Sundry Expert Testimony to Genuineness other than by Knowledge of Handwriting-Type (Decipherment, Alterations, Ink, Spelling, and the like)

§ 2023. **In general.** There remains a class of topics which may conveniently be dealt with here together, some involving a question of prin-

witness had seen signed and others not, the witness being unable to separate the two sorts); *Utah:* 1906, State *v.* McBride, 30 Utah, 422, 85 Pac. 440 (testimony of the prosecutrix based only on the defendant's oral admissions of authorship, without other evidence, held insufficient; Straup, J., diss., and correctly, because the present question was strictly not involved, but that of § 699, *ante*); *Vermont:* 1908, State *v.* Ryder, 80 Vt. 422, 68 Atl. 652 (proof by persons familiar with the handwriting, sufficient); *Washington:* 1918, State *v.* McGuff, 104 Wash. 501, 177 Pac. 316 (forgery of a check; the bank's signature-file held not properly proved genuine as a specimen).

In *Massachusetts*, there have been stages of doctrine; with reference to the principle that the genuineness must be "proved," it was at first said that the testimony of no person who had not seen the document written would suffice: 1836, Shaw, C. J., in Moody *v.* Rowell, 17 Pick. 490; and it has also been said that testimony by one who merely knew the handwriting and knew it from correspondence only would not suffice: 1871, McKeone *v.* Barnes, 108 Mass. 346 (the witness had only received the specimens in answer to her letters); but the general tendency has been, while excluding testimony merely from knowledge of handwriting, to lay down no fixed rules but only a general canon as to the quality of the evidence; 1848, Com. *v.* Eastman, 1 Cush. 217 ("clear and undoubted proof, that is, either by direct evidence of the signature or by some equivalent evidence," excluding specimens proved merely from a knowledge of the handwriting); 1856, Ward *v.* Fuller, 7 Gray 178; 1859, Bacon *v.* Williams, 13 Gray 527; 1874, Com. *v.* Coe, 115 Mass. 503; 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (the "equivalent evidence" which may serve instead of "direct evidence" may be circumstantial, and must merely not be opinion testimony resting solely on "comparison with another standard or with an exemplar in his own mind"; here, certain sale-slips were held sufficiently proved); 1909, Newton Centre Trust Co. *v.* Stuart, 201 Mass. 288, 87 N. E. 630 (under the circumstances, the trial Court's refusal to pass upon certain specimens offered as standards, because their genuineness was disputed, held improper; the specimen need not be evidenced by persons who saw them written, but may be evidenced by extrajudicial admissions).

§ 2021. [1] 1881, Shorb *v.* Kinzie, 80 Ind. 502; 1906, Stark *v.* Burke, 131 Ia. 684, 109 N. W. 206 (the witness' "admission" of genuineness is not the party's, so as to entitle the document to be treated as one conceded to be genuine).

[2] 1877, Jones *v.* State, 60 Ind. 241; 1905, Frank *v.* Berry, 128 Ia. 223, 103 N. W. 358 (defendant's own signed answer in the cause, admitted, since a statute required every pleading to be signed by himself or his attorney).

Contra: 1906, State *v.* Branton, 49 Or. 86, 87 Pac. 535 (letters orally admitted by the defendant to be his, in conversation with a witness, were apparently held admissible, under a statute receiving writings "admitted or treated as genuine").

[3] Other points ruled upon are as follows: 1855, Hyde *v.* Woolfolk, 1 Ia. 161 (rejecting an acknowledgment of a deed recorded, because the grantor does not necessarily acknowledge the handwriting of the signature as his); 1869, Bragg *v.* Colwell, 19 Oh. St. 407 (admitting the making of a note is not necessarily to admit the genuineness of the signature).

In Hughes *v.* Rogers, 8 M. & W. 123 (1841), when the witness denied the handwriting to be his, other witnesses to prove its genuineness were rejected, regard being had to the rule against contradicting on an immaterial point.

ciples, others attended by no reason for raising a question other than early rulings creating a doubt. The principles most commonly involved are those of the Opinion rule, permitting expert aid whenever it can add to the tribunal's light upon the subject, and of the Knowledge rule (*ante*, § 659), that a witness' data of knowledge must be such as to afford sound data for inference and imply something more than a mere guess.

Throughout the various topics, however, so far as expert testimony is involved, we have to reckon with the comparative novelty which certain forms of such testimony possessed before the middle of the 1800s, and the consequent predisposition of judges of the time to reject the pretensions of many such witnesses to throw useful light on the subject, and in particular of witnesses skilled in handwriting and the like.[1] This disinclination, and not any difficulty of pure principle, will account for some of the following questions, which would hardly have been raised for the first time to-day.

§ 2024. **Ink, Paper, Spelling, and the Like.** The qualities of the *ink* or *paper* or *type* of a document are proper indicia to consider in investigating the genuineness or the age of a document,[1] and expert testimony may be employed to aid in this.[2] Identification by *spelling* (on the analogies of the rules for handwriting) may be made either by a witness who knows

§ 2023. [1] On the modern scientific aspects of all the following topics, practical observations of the greatest value will be found in the two works of Albert S. Osborn: Questioned Documents (Rochester, N. Y., 1910); The Problem of Proof (1922).

§ 2024. [1] 1917, Grant *v.* Jack, 116 Me. 342, 102 Atl. 38 (sending a threatening letter in typewriting; comparison of typewriting specimens, to show authorship by the defendant who had a particular machine, allowed); 1822, Furber *v.* Hilliard, 2 N. H. 482, *semble* (type, paper, etc.); 1898, Porell *v.* Cavanaugh, 69 N. H. 364, 41 Atl. 860 (difference of inks of two signatures to a document, as indicating different times of signing, admitted); 1864, Dubois *v.* Baker, 30 N. Y. 361; 1812, McCorkle *v.* Binns, 5 Binney, Pa. 348 (type, paper, etc.); 1909, State *v.* Kent, 83 Vt. 28, 74 Atl. 389 (peculiar method of using a period in punctuation, admitted).

So also the *style of penmanship* as being of a different epoch: 1839, Tracy Peerage Case, 10 Cl. & F. 161, 176.

[2] *Eng.* 1718, Masters *v.* Masters, 1 P. Wms. 421; 1801, M'Guire's Case, 2 East Pl. Cr. 1002 (ink, paper, etc.).

U. S. Fed. 1893, Owen *v.* Mining Co., 9 C. C. A. 338, 61 Fed. 6, 13 U. S. App. 248, 270 (expert opinion as to a Mexican printed document, based on paper, ink, and type, admitted); *Ind.* 1851, Johnson *v.* State, 2 Ind. 654 (appearance of a bank-bill); 1858, Jones *v.* State, 11 Ind. 360, (same); *Kan.* 1905, Huber Mfg. Co. *v.* Claudel, 71 Kan. 441, 80 Pac. 960 (typewritten and typesigned letters to defendant from plaintiff; agent of defendant allowed to identify them, without specifying reasons; "there might have been" some peculiarity in the typewriting); *Mich.* 1866, Vinton *v.* Peck, 14 Mich. 287; *Miss.* 1859, Jones *v.* Finch, 37 Miss. 468; *N. J.* 1893, Levy *v.* Rust, — N. J. Eq. —, 49 Atl. 1017 (genuineness of seven receipts; typewriting marks considered as evidence of forgery); *N. Y.* 1912, People *v.* Storrs, 207 N. Y. 147, 100 N. E. 730 (forgery of a typewritten document; to evidence the defendant's authorship, a specimen, typewritten on the defendant's machine, but otherwise irrelevant, was received; not as coming literally under C. C. P. § 961 *d*, but as governed by the principle of mechanical traces, *ante*, § 148); *Ut.* 1906, State *v.* Freshwater, 30 Utah 442, 85 Pac. 447 (marks left by a defective typewriter).

The following case suggests one reason why the law lags behind science: 1915, People *v.* Risley, 214 N. Y. 75, 108 N. E. 200 (forgery in typewriting; to identify the defendant's machine as the writer, evidence was offered and received of the occurrence of thirteen different defects of type appearing in the letters of the alleged forgery and also in the defendant's machine; then testimony of a mathematician to the probability of this precise combination of defects occurring in any other machine was excluded, Seabury, J., diss.; the opinions must be read to be appreciated).

the usage of the person in question or by specimens produced and authenticated.[3]

§ 2025. **Deciphering Illegible Writings.** One skilled in writings may be called to assist in deciphering a writing illegible or uncertain to the ordinary observation.[1]

§ 2026. **Imitations, Forgeries.** That any doubt should be raised as to the possibility of an expert forming an opinion, by mere inspection of a disputed signature, as to its being an imitation or forgery — in the old phrase, a "feigned hand" — would perhaps seem incredible to-day to the handwriting expert, with his powerful aids of microscope and photograph.[1] Even before

[3] *Eng.* 1728, Hales' Trial, 17 How. St. Tr. 173 (the habitual use of a form of promissory note, the use of capitals, etc., admitted to disprove genuineness); 1799, Norman *v.* Morrell, 4 Ves. 770 (letters used to show a peculiar style of figure made by a testatrix and thus decipher an ambiguous figure in a will); 1850, Brookes *v.* Tichborne, 5 Exch. 929 (Parke, B.: "It was hardly disputed that if a habit of the plaintiff so to spell the word was proved, it was some evidence against the plaintiff to show that he wrote the libel. Indeed, we think that proposition cannot be disputed, the value of such evidence depending on the degree of peculiarity in the mode of spelling, and the number of occasions in which the plaintiff had used it"); 1864, Cresswell *v.* Jackson, 4 F. & F. 1, 5 (as bearing on the genuineness of codicils, a habit in the supposed forger of misspelling as in the codicils, admitted); 1888, Parnell Commission's Proceedings, 55th day, Times' Rep., pt. 14, p. 252 (Pigott's fabrication of the criminal letters alleged to have been written by Mr. Parnell was detected in part by his misspelling "hesitency" and by a skilful cross-examination founded on this; quoted *ante*, § 1368); *Can.* 1909, R. *v.* Law, 19 Man. 259 (anonymous libels; comparison with admittedly genuine specimens as to style of expression, etc., held allowable, for experts, but not for the jury alone without experts; this qualification is unsound); 1886, Scott *v.* Crerar, 11 Ont. 541, 14 Ont. App. 152 (cited more fully *ante*, § 87); *U. S.* 1816, Osgood *v.* Dewey, 13 Johns, N. Y. 239 (habit of spelling, admitted); 1840, Brown *v.* Kimball, 25 Wend. N. Y. 259, 261, 272 (a deed dated 1770, on a printed form ending "Commonwealth aforesaid," the land being in Massachusetts; evidence that Massachusetts was always described in deeds up to 1780 as a "Province" or "State," but not a "Commonwealth," used to show that the deed was a later forgery).

Compare the cases cited *ante*, § 87 (skill in composition, etc.), and *ante*, § 99. On all the above points, compare also the citations *ante*, § 570.

§ 2025. [1] *Eng.* 1718, Masters *v.* Masters, 1 P. Wms. 425 (experts summoned in chancery to decipher a scarcely legible will); 1838, R. *v.* Williams, 8 C. & P. 434 (expert evidence as to the decipherment of pencil-marks not now visible on the paper); *U. S.* Cal. C. C. P. 1872, § 1863 ("When the characters in which an instrument is written are difficult to be deciphered, or the language of the instrument is not understood by the Court, the evidence of persons skilled in deciphering the characters or who understand the language, is admissible to declare the characters or the meaning of the language"); 1851, Stone *v.* Hubbard, 7 Cush. Mass. 597; 1892, Kux *v.* Bank, 93 Mich. 511, 513, 53 N. W. 828 (whether a bank-book figure was 4 or 1, allowed); 1854, Hardin *v.* Ho-yo-po nubby, 27 Miss. 568, 583 (meaning of red and black ink-marks, etc., in an official map, not allowed to be explained by an expert, partly because any legal effect of such marks could better appear from other entries, etc.); Mont. Rev. C. 1921, § 10524 (like Cal. C. C. P. § 1863); 1843, Sheldon *v.* Benham, 4 Hill N. Y. 131; 1891, Dresler *v.* Hard, 127 N. Y. 238, 27 N. E. 823 (whether a word read "Jany" or "July," allowed); Or. Laws 1920, § 720 (like Cal. C. C. P. § 1863); P. I. C. C. P. 1901, § 292 (like Cal. C. C. P. § 1863); 1910, State *v.* Sysinger, 25 S. D. 110, 125 N. W. 879; 1878, Beach *v.* O'Riley, 14 W. Va. 58; 1898, State *v.* Wetherell, 70 Vt. 274, 40 Atl. 728 (defendant sent to the prosecutrix a magazine with certain words and letters marked; decipherment of the message by an expert, allowed).

Contra: 1903, In re Hopkins, 172 N. Y. 360, 65 N. E. 173 (whether cancellation marks on a testator's signature were made by him; expert testimony not allowed, under Laws 1880, c. 36, § 1, cited *ante*, § 2016; unsound).

The cases cited *ante*, § 1955, as to *expert interpretation* of *technical usage or of ciphers*, should be compared; there is no difference of principle. The parol-evidence rule (*post*, § 2461) may also be involved. For testimony to an *illiterate's mark*, see *ante*, § 693, n. 2, § 1321.

§ 2026. [1] Compare Hagan, Disputed Handwriting (1894), p. 89; Osborn, Questioned Documents (1910), *passim*; The Problem of Proof (1922).

these aids became common, the scientific study of the subject had made such trustworthy opinions possible. Nevertheless, there was a time of legal doubt; there were contrary rulings in England in the early part of the 1800s;[2] and the controversy left its mark on our own precedents. To-day, of course, there is no room for difference of opinion, even where the aids of microscope and enlarged photograph are not employed.[3]

§ 2027. **Erasures, Alterations, Time of Writing.** Probably as an echo of the early controversy just noticed, the question has also seriously been considered whether an expert may testify as to the existence or time of erasures, alterations, or interpolations. Such testimony is often not to be distinguished practically from testimony deciphering illegible writing (*ante*, § 2025), which has uniformly been held proper. There is, at any rate, no scintilla of reason for doubt.[1]

[2] *Admitted:* 1723, Bishop Atterbury's Trial, 16 How. St. Tr. 574, 581 (whether a seal could be counterfeited so as not to be detected); 1792, Goodtitle d. Revett *v.* Braham, 4 T. R. 497, Kenyon, L. C. J. (who apparently recanted in Carey *v.* Pitt, Peake Add. Cas 131; see note 6, § 1993, *ante*); 1802, R. *v.* Cator, 4 Esp. 117; 1845, R. *v.* Shepherd, 1 Cox Cr. 237, Erle, J.

Excluded: 1822, Gurney *v.* Langlands, 5 B. & Ald. 330 (a new trial was refused for rejecting such evidence, but its inadmissibility was not affirmed); 1829, Clermont *v.* Tullidge 4 C. & P. 1, Tenterden, L. C. J., *semble*.

As late as 1836, Denman, L. C. J., said, in Doe *v.* Suckermore, 5 A. & E. 751: "I do not indeed understand how such evidence could be rejected, if a witness should swear that his habits gave him the requisite skill; but I do not think that either Court or jury would believe him, or place the least reliance on his opinions; practically, therefore, this chapter may be considered as expunged from the book of evidence." So too the following: 1852, R. *v.* Coleman, 6 Cox Cr. 163 (whether the names of a drawer, an indorser, and an acceptor were written by the same person, excluded; "it eventually comes to a mere comparison of handwriting").

[3] *Admitted: Federal:* 1893, Holmes *v.* Goldsmith, 147 U. S. 150, 163, 13 Sup. 288 (whether a person's handwriting indicated inability to imitate, etc., allowed on the facts); 1907, Rinker *v.* U. S., 151 Fed. 755, 760, C. C. A. (whether the hand was genuine or disguised); *Connecticut:* 1831, Lyon *v.* Lyman, 9 Conn. 60; 1905, McGarry *v.* Healey, 78 Conn. 365, 62 Atl. 671 (whether a disguised hand would show the original characteristics, etc.); *Illinois:* 1911, Stitzel *v.* Miller, 250 Ill. 72, 95 N. E. 53 (identity of traced signatures, allowed; cited more fully *ante*, § 2016, n. 1); *Indiana:* Burns Annot. St. 1914, § 2114; ("Persons of skill may be called to testify to the genuineness of a note, bill, draft, or certificate of deposit, or other instrument of writing"); *Maine;* 1837, Page *v.* Homans, 14 Me. 478 (whether exact imitation is possible); *Massachusetts:* 1850, Com. *v.* Webster, 5 Cush. 301; 1836, Moody *v.* Rowell, 17 Pick. 490; *New Hampshire:* 1844, Robertson *v.* Stark, 15 N. H. 113, *semble; New York:* 1888, Ludlow *v.* Warshing, 108 N. Y. 520, 522, 15 N. E. 532; *Pennsylvania:* 1862, Travis *v.* Brown, 43 Pa. 9 (cited *post*, § 2027); *Utah:* 1899, State *v.* Webb, 18 Utah 441, 56 Pac. 159 (larceny of cattle; title claimed by the defendant under two bills of sale signed by different persons; expert testimony that the two signatures were made by the same person, admitted); *Wisconsin:* 1905, Colbert *v.* State, 125 Wis. 423, 104 N. W. 61 (whether a specimen is in normal handwriting).

The ruling in Neall *v.* U. S., 56 C. C. A. 31, 118 Fed. 699 (1902), that a person qualified by knowledge of A.'s writing, but not an expert in handwriting, may not testify whether a signature of B.'s name, charged to be a forgery of B.'s name by A., was written by A., is unsound; compare § 693, *ante*.

Distinguish the following: 1872, Kowing *v.* Manly, 49 N. Y. 203 (evidence that a writing was not simulated was rejected merely because of irrelevancy); 1902, Hopkins' Will, 172 N. Y. 360, 65 N. E. 173 (expert testimony to identity of authorship of a will-signature and of perpendicular marks of cancellation across the signature, held inadmissible); 1900, State *v.* Moore, 52 La. An. 603, 605, 26 So. 1001 (whether a forged letter could have been written in 20 minutes, excluded).

Distinguish also the principle of *preferred testimony;* on an issue of counterfeit banknotes, the officers of the issuing bank are not required to be called (*ante*, § 1339).

§ 2027. [1] *Admitted: Eng.* 1799, Norman *v.* Morrell, 4 Ves. Jr. 770 (alteration); *U. S. Ala.* 1899, Tally *v.* Cross, 124 Ala. 567, 26 So. 912 (whether two papers were written at the same time); *Ill.* 1846, Pate *v.* People, 8

Ill. 664 (erasure); 1896, Rass *v.* Sebastian, 160 Ill. 604, 43 N. E. 708 (time of alteration); *Ind.* 1862, Black *v.* Dale, 18 Ind. 334 (alteration); *Ia.* 1913, Putnam *v.* Hamilton, 159 Ia. 702, 140 N. W. 886 (age of the document); *Ky.* 1852, Hawkins *v.* Grimes, 13 B. Monr. 261 (erasure); 1885, Fee *v.* Taylor, 83 Ky. 263 (erasure); *Mass.* 1850, Com. *v.* Webster, 5 Cush. 301 (instrument used in alteration); *Mich.* 1886, Vinton *v.* Peck, 14 Mich. 287 (alteration before or after execution); 1883, Ives *v.* Leonard, 50 Mich. 298, 15 N. W. 463 (alteration); *Miss.* 1855, Moye *v.* Herndon, 30 Miss. 118 (alteration); *N. Y.* 1864, Dubois *v.* Baker, 30 N. Y. 361 (erasure, before or after execution); *Pa.* 1859, Fulton *v.* Hood, 34 Pa. 370 (whether a concluding sentence was written at the same time as the body of the writing; preliminary evidence, as in comparison of specimens, *ante*, § 2016, Pennsylvania, was assumed necessary; no previous rulings in this State were cited; the following cases in this State keep the same qualification); 1862, Travis *v.* Brown, 43 Pa. 9 (whether a hand is feigned); 1874, Ballentine *v.* White, 77 Pa. 26 (whether an alteration was made at the time of execution); 1879, Shaffer *v.* Clark, 90 Pa. 94 (whether the body and the signature of a writing were in the same hand); *Vt.* 1892, Stevenson *v.* Gunning's Estate, 64 Vt. 601, 25 Atl. 697 (whether a figure had been altered, allowable; but here the witness was not qualified); *Wash.* 1911, State *v.* Smalls, 63 Wash. 172, 115 Pac. 82 (whether words were written at different times, allowed).

Excluded: 1863, Jewett *v.* Draper, 6 All. Mass. 36 (that certain words were interpolated).

In Missouri, Swan *v.* Polk, 7 Mo. 237 (1841), excluded such testimony; but in Wagner *v.* Jacoby, 26 Mo. 531 (1858), this decision was erroneously taken to exclude only the opinion of non-experts, and the use of expert testimony in such cases was declared permissible; non-expert testimony alone being properly excluded; *accord*, 1880, State *v.* Tompkins, 71 Mo. 617; 1881, State *v.* Owen, 73 Mo. 441.

For a case in which under special circumstances a non-expert was allowed to say whether there had been an erasure, see Yeates *v.* Waugh, 1 Jones L. N. C. 483.

TITLE V: SYNTHETIC (OR, QUANTITATIVE) RULES

CHAPTER LXIX.

SUB-TITLE I: NUMBER OF WITNESSES REQUIRED; CORROBORATION REQUIRED

A. RULES DEPENDING ON THE KIND OF ISSUE

1. Criminal Cases

2. Civil Cases

B. RULES DEPENDING ON THE KIND OF WITNESS

§ 2030. **General Scope of Synthetic or Quantitative Rules.** Some of the Auxiliary Probative Rules of Evidence (*ante*, § 1171) operate by requiring, in specified situations, that a certain quantity of evidential material be provided. This or that piece of evidence, admissible in itself so far as all the foregoing rules are concerned, is declared to be insufficient unless joined sooner or later with other pieces of evidence. It is conditionally admissible; but its admissibility will prove of no avail, because, before the jury is allowed to retire and consider it, all the evidence on that point will be rejected unless the remaining evidential elements have been supplied. Regarded as requiring more than a single piece of admissible evidence, these rules may be termed Quantitative; regarded as requiring various pieces of evidence to be associated in presentation, in order that any one of them may ultimately be of service, these rules may be termed Synthetic.

(1) These rules thus differ in *operation* essentially from the preceding four groups of Auxiliary Rules. In particular, they differ from the Preferential Rules, in that the latter require that a certain kind of evidence shall be used before any other can be resorted to (*ante*, §§ 1177, 1285), and are thus both more stringent, in obliging the party first to show that the preferred evidence is unavailable, and more lenient, in not making the preferred evidence indispensable.

(2) The *policy* leading to these Synthetic rules differs, therefore, from the policy leading to the other groups of rules, in that here the supposed defect or danger lies in the likelihood of too little evidence being presented, in certain situations, and in the desirability of curing the defect by requiring other evidence to be associated with it in those situations. The propriety of a given rule will thus depend upon the course of our experience, in these special situations, as to the kind of evidence usually offered, as to its usual treatment by juries, and as to the expediency and possibility of annulling the danger by requiring additional evidence to be associated.

(3) In one aspect, this type of rule seems not to be truly one of *Admissibility* (*ante*, §§ 3, 11), but a rule of the Burden of Producing Evidence (*post*, § 2487); because it receives evidence which is concededly admissible as to each piece, and merely declares that it shall not alone be sufficient to entitle the party to go to the jury on that point. The truth is that these rules have two distinct aspects, each a genuine one. As between the opposing parties, the question has constantly to be decided which one is bearing the duty of producing evidence, *i. e.* which one may be dismissed by the Court, as a matter of law, because he has not fulfilled this duty. The determination of this question as between the parties involves a distinct department of the

law of Evidence, answering the question, By Whom must the Evidence be Produced? (*post*, Book II, §§ 2483–2489). But, assuming that this duty has been duly determined, and that it is now upon the plaintiff, the question arises whether there are any specific rules by which he is affected in fulfilling that duty. So far as there are any, they become for him rules of Admissibility, in a broad but real sense. Their effect is to subject his evidence, not only to the ordinary tests of admissibility for each piece of evidence, but also to a synthetic test for a given mass of evidence; so that, although each piece might ordinarily be admissible absolutely, it is here admissible only conditionally, *i. e.* subject to being rejected if the whole mass of evidence required by the synthetic rule is not ultimately presented. The effect is that in preparation for trial the rule has to be kept in mind that not only must each piece of evidence be in itself admissible, but it must further be associated with other pieces in order not to be ultimately rejected. For example, if by such a rule two witnesses are required to prove a certain act, then not only must a given witness be qualified in general, but his testimony, unless further joined with that of another, will still ultimately be held insufficient. Thus the rule, though in one aspect merely a rule as to the party's duty to produce sufficient evidence, for going to the jury (*post*, § 2487), is in another aspect a rule of admissibility, in the sense that evidence declared insufficient by a rule of law is in effect rejected and the party's case is left a blank so far as evidence upon that point is concerned.

(4) The rules may be distinguished (though not for purposes of practical arrangement) as either *negative* or *positive* in form. *Negative* rules are those which declare a given quantity to be insufficient. *Positive* rules are those which declare a given quantity necessary, *i. e.* declare all other evidence, lacking the specific kind, insufficient. The difference is this: Suppose that evidential elements A, B, C, D, and E are appropriate and admissible for the fact to be proved; a Negative rule declares that A alone or B alone is insufficient; a Positive rule declares that any combination is insufficient unless it contains D. For example, if at cards it should be provided that a hand made up merely of plain cards of spades alone should never win, this would be a negative rule; and if it should be provided that a knave of some suit must be present in any winning hand, this would be a positive rule. Yet though in form the one is negative and the other is positive, both prescribe a quantity of evidence, or, in other words, require one piece of evidence to be synthesized with others in order to suffice. Of the ensuing groups of rules, the first sort (Required Numbers of Witnesses, or, Corroboration) is negative, *i. e.* one witness alone is not sufficient; the second sort (Required Eye-Witnesses) is positive, *i. e.* for certain issues a specific kind of witness must always be present; the third sort (Completeness) is positive, *i. e.* the whole of a document or an oral utterance must be given; and the fourth sort (Authentication) is in some instances negative and in some instances positive; *e. g.* a rule declaring that the presence of a purporting private signature on a

document is alone insufficient to evidence its genuineness, but that the presence of a purporting official seal is sufficient, is a negative rule; while a rule requiring custody, age, and possession, for a document not otherwise authenticated, is a positive rule.

(5) The various Synthetic rules may best be classified for practical purposes under four heads: the first and second concern testimonial evidence only; the third concerns all kinds of evidence whatsoever, as well as all material forming a part of the issue itself; the fourth concerns circumstantial evidence only.

First, there are rules as to the *Number of Witnesses* required, or, as to required *Corroboration* of a particular witness; the question throughout being whether a single witness is in certain situations sufficient, and if not, what other evidence will suffice therewith (§§ 2036–2074).

Secondly, there are rules as to the *Kind of Witness* required; the question here being whether for certain issues a certain kind of witness must always be present among the general mass of evidence; practically, the only kind of necessary witness recognized in our law is the eye-witness (§§ 2077–2091).

Thirdly, there is a rule of *Verbal Completeness*, *i. e.* that the whole of a document or of an oral utterance must be offered, in order that any part of it may be received (§§ 2094–2125).

Fourthly, in the *Authentication* of documents or chattels (*i. e.* proving their genuineness, or due execution), there are rules which declare certain kinds of circumstantial evidence to be insufficient or necessary (§§ 2129–2169).

Sub-title I: Number of Witnesses Required; Corroboration Required

§ 2032. **History of Rules of Number.**[1] It is well known that in the civil law of Continental Europe, the great rival of the English common law, its process of proof rested fundamentally on a numerical system, — commonly termed, in its flourishing days, the system of "legal proofs." By that system, a single witness to a fact was in general not sufficient; for the majority of issues or material facts, two witnesses sufficed; specific numbers of witnesses were in certain cases required; and in some regions, and for some purposes, the weight to be given to each witness' testimony was measured and represented in numerical values, even by counting halves and quarters of a witness; and this system continued in force down to the Napoleonic period, — in most countries, into the 1800s.

In the English common-law institution of jury trial, on the other hand, it was completely otherwise. At common law, there was but a single instance, and that a borrowed and modern one, of almost accidental and of anomalous

§ 2032. [1] The ensuing history was originally printed in the Harvard Law Review, 1901, XV. 83. An interesting contribution to the subject is found in Mr. John Marshall Gest's article on The Responsive Answer in Equity, read before the Pennsylvania Bar Association, June, 1904, and reprinted in the American Law Register, LII, 537.

origin (the rule in perjury), in which a numerical rule existed; what little else there is to-day of that sort has come into our system either by express statutes (all but one dating since 1800), or by the filtration of civil-law rules through the court of chancery, or by local judicial invention. The reason of this contrast, and of our successful resistance to the civil-law rules, and the causes of our freedom from a principle of evidence now generally acknowledged to be unsound and futile, form a history worth examining.

1. It has been doubted whether the Roman law in its prime (that is, before 300 A. D.) proceeded upon a numerical system in its treatment of witnesses.[2] But it is clear that by the time of the Emperor Constantine, and also in the later codification of the Emperor Justinian, which served as a sufficient foundation for the Continental civil law, the Roman law had adopted the general rule that one witness alone was insufficient upon any material point.[3] This rule later came to be adopted in the Continental civil law, founded in part on the Roman law.[4]

But, long before this, it had become a part of the canon or ecclesiastical law, which for much of its material was accustomed to draw upon the Roman law. The ecclesiastical law developed the numerical principle freely, and elaborated many specific rules as to the number of witnesses necessary in various situations; against a cardinal, for example, twelve or perhaps forty-four witnesses were required. It is enough to note that its general and fundamental rule was that a single witness was in no case sufficient.[5] In the Church's

[2] "The canonists erroneously supposed that the [orthodox] Roman jurists understood the maxim 'testis unus testis nullus' in the sense that a single witness did not suffice for proof. It was Constantine who first laid down the arbitrary rule that one witness did not suffice; and the canon law accepted the principle with the more respect because it was sanctioned in Deuteronomy" (Glasson, Histoire du droit et des institutions de la France, VI, 543; 1895).

[3] Digesta, xxii, 5, 12 (Ulpian; "Ubi numerus testium non adiicitur, etiam duo sufficiunt; pluralis enim elocutio duorum numero contenta est"); Codex, iv, 20, 4 (A. D. 283; "solam testationem prolatam, nec aliis legitimis adminiculis causa approbata, nullius esse momenti certum est"); Codex, iv, 9, § 1 (A. D. 334; "Simili modo sanximus ut unius testimonium nemo judicum in quocunque causa facile patiatur admitti. Et nunc manifeste sancimus ut unius omnino testis responsio non audiatur, etiamsi præclare curiæ honore præfulgeat").

[4] This later Continental law had no direct influence on our own law, and need not be further noticed.

Its tenor in the 1700s and earlier may be seen in Mascardus and other contemporary authors, and in Bonnier, Traité des Preuves, 1888, 5th ed., §§ 293, 432; Pothier, ed. 1821, Procédure Civile, pt. 1, c. iii. A short account of the system in its final form is given in the Edinburgh Review, October, 1845, p. 328.

Its history may be found in the following works: 1882, Esmein, Histoire de la procédure criminelle en France, 260, 266 (transl. Simpson; Continental Legal History Series, Vol. V, 1913, pp. 57, 516, 620); 1900, Pertile, Storia del diritto italiano, 2d ed., vol. VI, pt. 1, p. 386 (b. V, c. VIII, Sect. 1); 1917, S. Messina, La prova per testimoni nel processo penale del medio evo (1912, Lucchini's Rivista Penale, vol. 76, p. 511); G. Salvioli, Le prove legali secondo la dottrina piu antica (1916, Rivista giuridica d'Italia, vol. II); G. Salvioli, Note per la storia del procedimento criminale (1918, Accademia di scienze morale e politiche della Società Reale di Napoli; c. ii, "Moral Certainty of Proof in Early Medieval Law"; c. iii, "'Legal Proofs' in the early Italian Practice"; c. iv, "The Theory of Presumptions"; c. v, "The Theory of Common Repute in Canon Law").

[5] *Ante*, 1400, Corpus Juris Canonici, Decret. Greg. lib. ii, tit. xx, de testibus, c. 23 ("licet quædam sint causæ, quæ plures quam duos exigant testes, nulla est tamen causa, quæ unius tantum testimonio, quamvis legitimo, rationabiliter terminetur"); see also ib. c. 28, c. 4 (quoting the Bible); Decret. pars ii, causa iv, qu. ii and iii, c. iv, § 26, reproducing Ulpian; 1552, Reformatio Legum [Angliæ] Ecclesiasticarum, tit. de testibus, c. 40 ("Testes

system, however, this rule received an additional sanction, over and above the mere precedent of Roman law, from the law of God as revealed in Holy Writ; for passages in the Bible, both in Old and New Testaments, were confidently appealed to as justifying and requiring this rule by Divine command;[6] and this sanction sufficed to give to the numerical system of the ecclesiastical law an overbearing momentum and a sacred orthodoxy which must be considered in order to appreciate the force against which in due time the common-law judges had to struggle. The ecclesiastical Court's procedure, developing rapidly after the 1200s, exercised the dominant influence for several centuries (*post*, § 2252) in shaping the procedure, both civil and criminal, of the temporal courts in all the kingdoms of western Europe.

The truth was, however, that at this time of the Papal Decretals, and long after the end of the Middle Ages, the rule precisely accorded with the testimonial notions of the time. It was not, in its spirit, an invention of the ecclesiastical lawyers, nor yet a mere continuance of Roman precedent; it was a natural reflection of the fixed popular probative notions of the time, — notions which prevailed as well in the sturdy, self-centred island of England as on the Continent at large. The prevalence and meaning of this underlying notion must now be examined.

2. Civilization, needless to say, almost began over again with the invasion and settlement of southern and western Europe by the Gothic hordes in the 400s and 500s. Primitive notions prevailed once more, and the slow process of development had to be repeated, — repeated for the law as well as for other departments of life. Much Roman law remained in the South, and a large body of it was received in a mass in Germany in the 1500s; but this affected chiefly specific rules; the popular and general instinctive legal notions had to grow once more out of primitive into advanced forms. Now

singulares nihil probant"); 1713, Gibson, Codex Jur. Eccl. Angl. 1054 ("In the spiritual court, they admit no proof but by two witnesses at least; in the temporal court, one witness, in many cases, is judged sufficient"); 1726, Ayliffe, Parergon, 541, 544 ("Though regularly single witnesses make no proof according to the civil and canon law, nor yet so much as half proof by these laws," yet there are exceptions; in criminal causes, no exception is named except for a confession); 1738, Oughton, Ordo Judiciorum, tit. 83, p. 127 ("Jura dicunt, quod regulariter duo testes sufficiunt").

For the modern ecclesiastical law, as keeping up these rules, see Hinschius (1897), System d. katholischen Kirchenrechts, pt. vi, pp. 101, 108, § 364; Bishop Onderdonk's Trial (1845), Appleton's ed., 227, 242, 277; Droste, Canonical Procedure, tr. Messmer (1887), p. 106. In the revised Canon law of the Catholic Church they appear in the following canons: Codex Juris Canonici Pii X, 1917, Can. 1791, § 1 ("Unius testis depositio plenam fidem non facit, nisi sit testis qualificatus qui deponat de rebus ex officio gestis"); § 2 ("Si sub juramenti fide duæ vel tres personæ, omni exceptione majores, sibi firmiter cohærentes, de aliqua re vel facto in judicio testificentur de scientia propria, sufficiens probatio habetur; nisi" etc.)

[6] Deut. xvii, 6: ["The murderer shall be put to death]; but at the mouth of one witness [only] he shall not be put to death"; ib. xix, 15: "For any iniquity . . . at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established"; Numb. xxxv, 30 (like Deut. xvii, 6); Matt. xviii, 16: ["If thy brother trespass against thee, and reject thy complaint,] then take with thee one or two more, that in the mouth of two or three witnesses every word may be established"; II Cor. xiii, 1 (similar); I Tim. v, 19; Hebr. x, 28 (allusions to the foregoing ideas); John viii, 17: "It is also written in your law that the testimony of two men is true."

one of the universal and marked primitive notions is that of the oath as a formal act, mechanically and 'ipso facto' efficacious (like the ordeal and the trial by battle), and quantitative in its nature. This notion is merely one particular phase of the entire system of formalism inherent in the stage of intellectual development at which our Germanic ancestors were in that epoch. It is a matter of the whole spirit of the times, not of a particular or local belief; and since the history with which we are now concerned is that of the growth and change of a radical and epochal conception, not easy to reproduce in our modern imaginations, it may be worth while (for obtaining a starting point) to remind ourselves of its inherent and pervasive nature by the following passage of acute analysis:

1885, Professor *Andreas Heusler*, Institutions of Germanic Private Law, I, 45, 49, 52:[7] "From the side of spiritual and moral development, the legal life of every civilized people exhibits itself in a movement through three stages; these may be termed the divinational, the formal, and the intellectual stages. . . . The transition from one stage to the other does not occur abruptly and immediately; thus, for example, the judgments of God, in the form known to history, as well as the oath itself, are institutions which, in their deepest sense, belong to the first stage, but have been adopted in the second stage, that of legal formalism. . . . By 'legal formalism' I mean that condition of legal thought in which the sensibly perceivable is accepted as the only or at least the dominant element producing legal effects, and the inward circumstances of a spiritual sort — dispositions, volitions, purposes, and the like — are excluded or forced into the background. In this larger sense the term 'formalism' is ordinarily not taken; we are apt rather by that term to mean merely the notion that transactions which are to have legal significance must have a prescribed form, *i. e.* a certain mode of utterance or action which is alien to the speech or doing of ordinary life. This external aspect of 'formalism' is, however, only the half of that which I here include by that name; the other half is what may be called the inward formalism, and it consists in this, that the substantial effect, the intrinsic value of the incidents of legal life, is estimated by (as it were) stencils fixed by law. Thus, for example, we contrast the formal and the rational theory of proof, and under the former we class the rule that for full proof a single witness does not suffice, but that two credible witnesses are necessary. Where lies the formalism here? This rule has nothing to do with 'form' in the narrow sense noted above; the real element of formalism in it is that (by reason of long experience with the untrustworthiness of witnesses) a rule of thumb has been made, which denies to the judge his free discretion in the estimation of testimony and lays down a fixed law, not trusting to the often deceptive valuation of each man's credibility, character, and the like, but finding its security in the external mark of numbers. And so, in general, we may properly use the term 'formalism' of the law to express that tendency which excludes from consideration inward qualities, motives, volitions, and the like, and founds legal rules on external phenomena. . . . The formalism of Germanic procedure lays the fullest stress on the parties' acts, and at the same time confines these to prescribed formalities. The summons is given by the one party to the other; the detailed steps of the proceeding, even to the judgment, are brought forth in formal manner by the demands of the parties; the judgment is itself primarily only a determination as to which party has the privilege of making proof, and the proof itself is effectuated either by the oath, the most formal method conceivable, and eventually by the 'judicium dei'. One may thus perceive how hateful and obnoxious to the Germanic clansman were the innovations which the procedure of the

[7] This great thinker, to be compared with Professor Brunner, in the value of his contributions to legal history, later became Chief Justice of the Swiss Court at Basel.

royal courts introduced and sought also to bring into the popular courts, how unwillingly he suffered the mode of proof by inquisition [jury], and how he chose rather to avoid the royal court and obstinately to suffer the consequences of contumacy than to submit himself to a procedure in which the tribunal's discretion had free play in the valuation of proof."

The same formalistic conception of law in general and of proof in particular has been plainly described, in its present application to the oath, by Professor Brunner, that greatest of Germanists: [8]

"[The domination of formalism and the narrow limits of judicial freedom of judgment were the marked features of Germanic procedure.] It was not to the Court, and with the object of persuading the Court, that proof was furnished, but to the opponent, and with regard to the persuasion or belief of the whole body. The general principle [of formalism] included the proof-procedure; here, too, was the judicial discretion replaced by the compulsion of form. Thus the proof was not submitted to the judge's valuation, but was prescribed once for all by rules which must be fulfilled before the proof tested by them could be regarded as efficacious. These rules consisted of forms, in which the proof-result must manifest itself or (so to speak) crystallize itself, while proof-material available informally or in other forms remains disregarded. . . . The formalism of the party's oath exhibits itself above all in the feature that the oath is 'staffed'; for the opponent of the swearer, holding in his hand a staff, pronounces to the latter the oath-formula, which contains the allegation presented for decision. The swearer is obliged to repeat word for word this 'staffed' formula, while touching the staff and calling upon God. A single error of word defaulted him. . . . [So also for proof by witnesses.] There was no questioning of them. The witnesses had to swear, word for word, to the allegation presented for decision. The probative force of the witnesses' doings lay exclusively in the oath-form of their utterance. Only by an error in this form (it would seem) could the witnesses be ineffective. . . . Apart from peculiarities of special tribal laws, the controversy was decided as soon as the witnesses had sworn their oath according to the necessary formalities. If the opponent of their party was unwilling to let it rest here, he had (by some customs) a single means of overthrowing the witnesses, . . . [namely,] a duel with the impeached witnesses settled the result of the controversy."

The oath, then, in the Germanic epoch is but a single product of the pervading formalistic conception of procedure and of proof. All through the Saxon and Norman times, the oath is a verbal formula, which, if successfully performed without immediate disaster, is conceded to be efficacious 'per se,' and irrespective of personal credit.

It follows, too, since the performance of this act is in itself efficacious, that the multiple performance of it, if persons can be obtained who will achieve this, must multiply its probative value proportionately. This numerical conception is inherent in the general formalism of it. Thus, again, all through these times, the oath is for greater causes sworn by greater numbers, sometimes six-handed, or twelve-handed, or twenty-four-handed; that is, a degree of greater certainty is thought to be attained, not by analyzing the significance of each oath in itself and relatively to the person, but by increasing the number of the oaths. An oath was one oath; and though as between persons of inferior and superior rank certain differences were sometimes recognized,

[8] Die Entstehung der Schwurgerichte, ed. 1872, 48, 53.

yet in general and between persons of the same rank one oath was equal to any other oath, with no distinctions based on their testimonial equipment for the case in hand. In short, whatever varieties of probative situations present themselves, the only expedient that suggests itself seems to be some change in the number of oaths.[9]

Little by little, to be sure, a newer idea develops. Numerous oaths may be required to overcome certain strong masses of (what we should now call) presumptive evidence. The classes of cases in which oaths are allowed operative force 'per se' are diminished. Most important of all, witnesses may be examined briefly before being allowed to take the oath, and witnesses showing a total lack of knowledge may not be allowed to swear;[10] and of a piece with this comes the separate examination of witnesses swearing on the same side, for a conflict in their stories when separately examined resulted in discrediting their oaths. Even in this latter expedient the feebleness of the new reasoning process is seen, in that the oaths appear (at any rate when taken before the judges and not before a jury) merely to fail as formal acts, and little attempt is made to decide upon the witnesses' relative personal credit. Finally, the spread of jury trial must have helped gradually to develop the more rational spirit of investigation of facts and to outlaw the more marked features of primitive formalism. But these steps of progress in popular conceptions of the nature of proof are only slow and gradual, — much more so than one might suppose. The merely superstitious and extreme notion of a witness' oath dies out; but the mechanical, quantitative, formal conception persists for many centuries.

Its purely quantitative and ponderative nature may be seen in the treatment of opposing witnesses' contradictions:

Professor *J. B. Thayer*, Preliminary Treatise on Evidence, 23: "We read [in a case of 'cui in vita,' in 1308], that they were at issue 'issint cesti qui mieulx prove mieulx av.' and the tenant proves by sixteen men, etc., and the demandant by twelve; and because the tenant's proof '"fuit greindr" than the demandant's, it was awarded,' etc. If we take Fitzherbert's account to be accurate, it might appear that the twelve men on each side cancelled each other and left a total of four to the credit of the tenant, a result which left his proof the better."[11]

[9] The rules here summarily referred to may be found in Brunner, *ubi supra*, c. iii; Brunner, Deutsche Rechtsgeschichte, II, 387, 397; Thayer, Preliminary Treatise on Evidence, 17–34; Lea, Superstition and Force, 4th ed., 21–100; Declareuil, Les preuves judiciaires dans le droit franc du 5me au 8me siècle (Nouv. revue hist. de droit fr. et étr., 1899, p. 188); Glasson, *ubi supra*, III, 462, 485, 487.

[10] Yet even here the innovation made little direct change in the formal effectiveness of the oath: Brunner, Schwurgerichte, 67, 68, 85, 198.

[11] See also Thayer, *ubi supra*, 22, 98, 99; and the citations *ante*, § 1837.

The case above cited by Thayer is now to be found in Maitland's edition of the Year Books, Vol. I (Selden Soc. Pub., Vol. XVII), 2 Ed. II, 1308, No. 54, p. 111 ("And because Tibald's proof was better and greater," says one text; but another says, "was proved by more"). An example of 1312 A. D. is seen in Cressy *v.* Siward, Y. B. 5 Edw. I, Easter, No. 55, p. 121 (Bolland's ed., Selden Soc. Pub. vol. XXXIII, 1916), where in a plea of serfdom the defendant objects to the tender of H. as a witness "because he is alone and the testimony of a single person is as the testimony of no one."

It is surprising to us to-day to note how long this conception of the oath (*i. e.* of a single testimonial assertion) persisted.[12] What is material to our purpose is that as a popular notion and instinctive mental attitude it was still in almost full force in the 1500s, at the time when the conflict of the common law and the ecclesiastical system came upon the stage. The vital force of this quantitative idea of a witness' testimony is seen pressing to the surface in abundant casual instances down into the 1700s;[13] and it is only here and there that a protest is raised against its fallacy.[14] It is probable, indeed, that the long delay in abolishing the disqualification of witnesses by interest (*ante*, § 575), and the popularity of those rules till the end of the 1700s, was due to a lurking feeling that an oath-assertion, merely as such, of anybody whatever was (if once admitted) at least good for something, — counted for one as testimony.[15] Only by a slow and comparatively recent development came the rational notion of analyzing and valuing testimony other than by numbers. Even to-day, among juries in some places, there is no doubt a mere counting of oaths or witnesses.[16]

Impossible as it may be to note in any precise epoch the parting of the ways, and to put ourselves back fully into the mental condition of the former days, the living force of the old numerical conception as late as the 1500s and 1600s cannot be doubted. It appears plainly enough even on the dead printed pages of the State Trials; and its nature has been very well phrased by Sir James Stephen, in the following passage:

1883, Sir *James Stephen*, History of the Criminal Law, I, 400: "The opinion of the time [before 1700] seems to have been that, if a man came and swore to anything whatever, he ought to be believed, unless he was directly contradicted. . . . The juries seem to have thought (as they very often still think) that a direct unqualified oath by an eye-

[12] "All our old collections of customary law emulate each other in reminding us that a single witness cannot suffice, but that proof is made as soon as two at least are found to testify to the same effect. Curiously enough, this bizarre system was accepted by our jurists, down to the Revolution, without the least protest" (Glasson, *ubi supra*, 543).

[13] 1560, Thorne *v.* Rolff, Dyer 185 *a* (in a case where two witnesses of a husband's death were on one side and none on the other side, the old maxim is sanctioned, 'qui melius probat, melius habet'); 1571, Duke of Norfolk's Trial, Jardine's Crim. Tr. I, 178 (Richard Candish was sworn and testified to treasonable words of the accused, "when the Duke gave him reproachful words of discredit"; upon which Serjeant Barham interjected, "He is sworn, there needeth no more proving"); 1633, Massinger, in "A New Way to Pay Old Debts," act 5, sc. 1 (Sir Giles Overreach; "Besides, I know thou art a public notary, and such stand in law for a dozen witnesses"); 1683, L. C. J. Pemberton, in Lord Russell's Trial, 9 How. St. Tr. 577, 618 ("If you cannot contradict them by testimony, it will be taken to be a proof"); 1715, Parker, C. J., in R. *v.* Muscot, 10 Mod. 192 ("a credible and probable witness shall turn the scale in favor of either party"); 1736, Lord Hardwicke, C. J., in R. *v.* Nunez, Lee cas. T. Hardwicke, 266 ("One witness is not sufficient to convict a man of perjury, unless there were very strong circumstances; because one man's oath is as good as another's").

On the general fact, see Holdsworth, History of the English Law, vol. I, 3d ed. 1922, p. 302.

[14] See the remarks of Sir John Hawles, Solicitor-General (about 1700), in 8 How. St. Tr. 741.

[15] *Ante* 1726, Chief Baron Gilbert, Evidence, 139: "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."

[16] Compare the measures taken in the French Code d'Instruction Criminelle of 1808 to educate juries out of this attitude: Esmein, *ubi supra*, 545.

or ear-witness has, so to speak, a mechanical value, and must be believed unless it is distinctly contradicted. . . . If the Court regarded a man as a 'good' (*i. e.* a competent) 'witness,' the jury seem to have believed him as a matter of course, unless he was contradicted; though there are a few exceptions. . . . The most remarkable illustration of these remarks is to be found in the trial of the five Jesuits. . . . [Chief Justice Scroggs says:] 'Mr. Fenwick says to all this, "Here is nothing against us but talking and swearing." But, for that, he hath been told (if it were possible for him to learn) that all testimony is but talking and swearing; for all things, all men's lives and fortunes, are determined by an oath, and an oath is by talking, by kissing the Book, and calling God to witness to the truth of what is said.' . . . Scroggs was right as to what it [the practice of juries] actually was, and to a certain extent still is. It is true that juries do attach extraordinary importance to the dead weight of an oath."

3. There was, therefore (and this is at once the sum of the foregoing and the key to the ensuing history), in the English common-law courts of the 1500s, nothing at all of repugnance to the numerical system already fully accepted in the ecclesiastical law. The same popular probative notion there prevailed among judges, juries, and counsellors as on the Continent. They were equally prepared and accustomed to weigh testimonies by numbers, and therefore would see nothing fallacious in a rule declaring one witness not enough, and requiring specified numbers of witnesses.

And this was a period when the recognition of such a rule was in fact frequently demanded of the common-law Courts. It was a time when the conflict between the ecclesiastical and the common-law Courts was at its last and perhaps its crucial stage, — a conflict important in other respects to the rules of Evidence.[17] The methods of the ecclesiastical Courts had formed those of the Continental lay Courts during the preceding two centuries. They were now forming those of the Courts of chancery and of admiralty. The ecclesiastical lawyers were a distinguished and powerful body; their influence was notably felt in politics and in political trials. There was no way of yet knowing whether their system and not the common law system might ultimately preponderate in the shaping of English jurisprudence.[18] When their rule declaring one witness insufficient was appealed to, the appeal had behind it the force of presumption due to the prestige of a great system, orthodox on the Continent, and not unequal in its rivalry in England. Add to this, the immense force of the invocation of the law of God, of the Scriptures sanctioning the rule of the Church's law and protecting the innocent against condemnation by single witnesses.

Such was the attempt now repeatedly made to fix upon jury trials at common law the fundamental rule of the ecclesiastical law; and it is apparent, from the utterances recorded as late as the early 1600s, that there was then no certainty that the attempt would not succeed:

[17] Compare the history of the rule against self-crimination (*post*, § 2250).

[18] See Professor F.W. Maitland's enlightening essay, English Law and the Renaissance (1901).

1637, *Bishop of Lincoln's Trial*, 3 How. St. Tr. 769, 786; COTTINGTON, L. C.: "It is not always necessary in this Court to have a truth proved by two or three witnesses; men will be wary in bribery; . . . and 'singularis testis' many times shall move and induce me verily to believe an act done, when more proofs are shunned." [19]

The traditional practice of the common-law Courts, at the time of this attempt, is revealed definitely in the controversy over certain prohibitions issued by them forbidding the ecclesiastical Courts to take cognizance of matters temporal (*i. e.* not matrimonial nor testamentary). It is not clear that the former specifically acted on the ground of the latter's employing an improper rule of Evidence; they apparently disputed the jurisdiction, not the mode of proof. But it seems to be conceded by the ecclesiastics that the common-law judges in practice asked for no more than one witness. These had as yet probably not had the issue forced upon them in their own courts; but their orthodox practice is clear; they never required a number of witnesses before the jury:

1605, *Bancroft's Articuli Cleri*, and the *Judge's Answers*, 2 Co. Inst. 599, 608; 2 How. St. Tr. 131, 143. "*Objection* [by the Clergy]: There is a new devised suggestion in the temporall Courts commonly received and allowed, whereby they may at their will and pleasure draw any cause whatsoever from the ecclesiasticall Court; for example, many prohibitions have lately come forth upon this suggestion, that the laws ecclesiasticall do require two witnesses, where the common law accepteth of one, and [that] therefore it is 'contra legem terræ' for the ecclesiasticall judge to insist upon two witnesses to prove his cause." *Answer* [by the Judges]: "If the question be upon payment or setting out of tithes, or upon the proofe of a legacy or marriage, or such like incidence [of strictly ecclesiastical jurisdiction], we are to leave it to the tryall of their law, though the party have but one witness; but where the matter is not determinable in the ecclesiastical court, there lyeth a prohibition, either upon or without such a surmise." [20]

It is about this time that the indications occur (in the passages above quoted) of a judicial and legislative inclination to yield to the ecclesiastical principle, and of a general attempt to carry into the common-law courts the fundamental rule that a single witness was not sufficient.[21]

[19] See also: 1620, Lord Bacon's Trial, 2 How. St. Tr. 1087, 1093; 1622, Adams *v.* Canon, Dyer 53 *b* (quoted *ante*, § 1364); 1623, R. *v.* Newton, Dyer 99 *b*, note; 1632, Sherfield's Trial, 3 How. St. Tr. 519, 542, 545; 1640, Strafford's Trial, 3 How. St. Tr. 1427, 1445, 1450; many other scattered instances might be found. The statutory rule for treason was said to have been enacted in direct imitation of the ecclesiastical law: *post*, § 2036. The civil-law rules actually obtained force in Scotland: 1705, Green's Trial, 14 How. St. Tr. 1199, 1235.

[20] The following are instances of prohibitions arising in this controversy: 1607, Chadron *v.* Harris, Noy 12 (plea, payment of legacy; prohibition not granted); 1611, Robert's Case, 12 Co. 65, Cro. Jac. 269 (mere surmise in advance, not sufficient to secure a prohibition); 1629, Warner *v.* Barret, Hetley 87 (plea of 'plene administravit'; prohibition apparently granted); 1688, Richardson *v.* Disbrow, 1 Ventr. 291 (legacy; prohibition issued); 1691, Shotter *v.* Friend, 3 Mod. 238 (payment of legacy; prohibition issuable); 1698, Breedon *v.* Gill, 1 Ld. Raym. 219, 221 (issuable for a legacy, but not for revocation of oral will).

[21] During the 1500s and 1600s the statutes also exhibit the pervasiveness of the numerical notions: 1558, St. 1 Eliz. c. 1, § 27 ("two sufficient witnesses" required for offences under this act against heresy and foreign church authority); 1597, St. 39 Eliz. c. 20, § 10 ("two sufficient witnesses" required for offences in cloth-making); § 7 (for certain offences, the pillory is provided, "being lawfully convicted by the verdict of twelve men and two sufficient witnesses"); 1627, 13 Car. I, c. 2 (for violations of the Sunday law, "two

4. But the attempt failed — and failed absolutely. After the middle of the 1600s there never was any doubt that the common law of England in jury trials rejected entirely the numerical system of counting witnesses and of requiring specific numbers.[22] The only exception to this — the case of perjury — "proves the rule," because it was not established until the early 1700s (*post*, § 2040), when the rejection of the numerical system had been already definitely accomplished.

5. What, then, was the reason why the common-law Court, in their system of evidence for jury trials, declined to number witnesses like the ecclesiastical Court, and to lay down the rule that a single witness was insufficient?

Briefly, the different nature of the tribunal. The situation which would call for such a rule simply did not exist for the common-law judge. The case of having merely one witness could not arise; for the jurymen *were already witnesses* to themselves, as well as triers. It is unnecessary here to do more than recall that vital circumstance which has in so many ways affected the history of our rules of Evidence, namely, that the jury, until at least the early 1700s, were in legal theory entitled to avail themselves of information contributed personally by themselves and obtained independently of the witnesses produced in court; and that during the 1500s and 1600s this joint quality of witnesses and jurors still obtained practically

or more witnesses" or the party's confession, are to suffice before the magistrates); 1688, 1 W. & M. c. 18, §§ 14, 19; 1691, 3 & 4 W. & M. c. 11, § 5. In 1736-37, a statute was enacted to prevent smuggling (Cobbett's Parl. Hist. IX, 1229, Campbell's Lives of the Chancellors, VI, 149) penalizing the bearing of arms in companies of three or more when travelling, "on proof by two witnesses that their intention was to assist" in smuggling.

[22] There is a foreshadowing of it in the previous century: 1551, Reniger *v.* Fogossa, Plowd. 1, 8, 12 (where the Court's opinion was for the defendant, without reasons given; but the defendant had argued that one witness sufficed in jury trials); Plowden published in 1578, and the case's significance dates from that time. But no positive deliverance seems to come till after the middle of the 1600s: 1662, Tong's Trial, 6 How. St. Tr. 226, Kelyng ("at common law, one witness is sufficient to a jury"); then Sir Matthew Hale and L.C.J. Holt, quoted *post*, emphasize this before the end of the century. Thereafter the matter is assumed on all hands: 1806, L.C. Erskine, in Clifford *v.* Brooke, 13 Ves. Jr. 131, 134 (the law of one witness' sufficiency "is uniform in principle and practice, with the single exception of the case of perjury").

In the American colonies the notion is seen surviving somewhat later than in England: *Conn.* 1672, Conn. Revision, p. 69 ("It is ordered by this Court that no person for any fact committed shall be put to death without the testimony of two or three witnesses, or that which is equivalent thereunto"; this is still the law in Connecticut; *post*, § 2044, n. 1); *Mass.* 1641, Mass. Body of Liberties (Whitmore's ed.) § 47 ("No man shall be put to death without the testimony of two or three witnesses or that which is equivalent thereto"; repeated in Revisions of 1660 and 1672, "Witnesses"); 1660, Mass. Revised Laws and Liberties, "Innkeepers," § 13 (offences against the liquor-laws are to be determined by magistrate's view or constable's affirmation "and one sufficient witness, with circumstances concurring, or two witnesses, or confession of the party"; repeated in revision of 1672, "Innkeepers"); *Pa.* 1664, Duke of York's Laws, Eastman's Courts and Lawyers of Pennsylvania, 1922, I, 40 (like Mass. Body of Liberties); 1682, Great Body of the Laws, c. 36, in Eastman, *ubi supra*, 76 ("There shall be two credible witnesses in all cases, in order to judgement"); 1692, Proprietor *v.* Keith, Pa. Col. Cas. 117, 139, 141 (libel; the defendant's printing was evidenced by the finding of the printing-frame in his house; the jury retired, but came back to ask "whether the law did not require two evidences to find a man guilty"; c. 36 of the Body of Laws provided that "there shall be two credible witnesses in all cases in order to judgement"; Counsel Lloyd then read a passage "out of a law book, that they were to find it by evidences, or on their own knowledge, or otherwise; now, says D. Lloyd, this 'otherwise' is the frame which you have, which is evidence sufficient"; but the jury disagreed, some of them thinking the evidence insufficient).

for a more or less considerable part of their evidential material.[23] The situation was, therefore, radically different for the common-law judge and the ecclesiastical judge. The former need not and could not measure the witnesses that appeared before him. He could not declare one insufficient and two or more necessary, for this was not all the evidence. There was always, besides the witnesses produced in court, an indefinite and supplementary quantity of evidence existing in the breasts of the jurors. There were (as Fortescue says) twelve other witnesses besides the one produced before the bar; and, as to the extent of the evidential contribution of these others, the judge did not know and had no right to know what it amounted to. It was therefore impossible and preposterous for him to attempt to declare insufficient and to reject the one or more witnesses produced in court. The jury might still go out and find a verdict upon no witnesses (of the ordinary kind) at all. Judicial rules of number would thus be wholly vain and out of place.

Such was the logical and necessary answer to any attempt to introduce the numerical system in jury trials. This had been Fortescue's reasoning in the 1400s; and this was the answer of the judges in the late 1600s, when the question was forced upon them:

Circa 1460, Sir *John* FORTESCUE, L. C., in his *De Laudibus Legum Angliæ*, c. 33: "*Prince:* 'But, my good chancellor, though the method [of trial by jury] whereby the laws of England sift out the truth in matters which are at issue highly pleases me; yet there rests one doubt with me, whether it be not repugnant to Scripture. . . . Our Saviour, speaking of offences and forgiving one another, among other things delivers himself thus: "If thy brother will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established." Now if in the mouth of two or three witnesses God will establish every word, why do we look for the truth in dubious cases from the evidence of more than two or three witnesses? No one can lay better or other foundation than our Lord hath laid. This is what in some measure makes me hesitate concerning the proceedings according to the laws of England in matters of proof; wherefore I desire your answer to this objection.' *Chancellor:* 'The laws of England, sir, do not contradict these passages of Scripture for which you seem to be so concerned; though they pursue a method somewhat different in coming at and discovering the truth. . . . If the testimony of two be true, 'a fortiori' the testimony of twelve ought rather to be presumed to be so. The rule of law says "the more always contains in it that which is less."[24] . . . [The law of England] never decides a cause *only* by witnesses, when it can be decided by a jury of twelve men, the best and most effectual method for the trial of the truth, and in which respect no other laws can compare with it.' . . . *Prince:* 'I am convinced that the laws of England eminently excel, beyond the laws of all other countries, in the case you have been now endeavoring to explain. And yet I have heard that some of my ancestors, kings of England, have been so far from being pleased with those laws that they have been industrious to introduce and make the civil laws a part of the constitution, in prejudice of the common law. This makes me wonder what they could intend or be at by such behavior.'"

1696, *Vaughan's Trial*, 13 How. St. Tr. 485, 535, treason upon the high seas;[25] it was

[23] This fact has been fully noticed *ante*, §§1364, 1800; the demonstration has been made in Thayer's Preliminary Treatise on Evidence, 137–170.

[24] Here he names the instances of "trial" by witnesses without jury, in admiralty, etc.

[25] Apparently the statute under which this trial was had, substituting the jury trial for trial by the civil law, was passed chiefly for the very purpose of avoiding the latter's numerical rules; see the preamble to St. 27 H. VIII, c. 4 (1535); St. 28 H. VIII, c. 15; Hawkins, Pl. Cr., b. I, c. 37, § 3; c. 31, § 12.

argued that the admiralty trial under the civil law was the proper one. L. C. J. HOLT: "There needs not two witnesses to prove him a subject [of the King]; . . . Our trials by juries are of such consideration in our law that we allow their determination to be best and most advantageous to the subject; and therefore less evidence is required than by the civil law. So said Fortesque in his commendation of the laws of England." Dr. *Oldish:* "Because the jury are witnesses in reality, according to the laws of England, being presumed to be 'ex vicineto'; but when it is on the high and open seas, they are not then presumed to be 'ex vicineto', and so must be instructed according to the rules of the civil law by witnesses." [26]

That this was the actual and only reason for rejecting the numerical system is further to be seen in the circumstance that wherever the common law *had* preserved a "trial by witnesses," *i. e.* a determination by oaths made directly before the Court without the intervention of a jury, there the numerical system was found in force, — not in an elaborate form, but in its fundamental notion that one witness alone was not sufficient. "The laws of England," said Sir John Fortescue, "likewise affirm," with the civil law, "that a less number than two witnesses shall not be admitted as sufficient" in cases where a jury is not used. This was, indeed, the accepted tradition for "trial by witnesses" made directly to the Court in the manner of the civil and ecclesiastical law. There has been some difference of opinion as to the kinds of issue in which this was the proper mode of trial; [27] but there seems to be no doubt that whenever it was the proper mode, the witnesses must be at least two in number.[28] Moreover, when the classical commentators refer to the rule for this mode of trial, they expressly point out as the reason for the distinction the fact that the jurors are themselves also witnesses.[29]

This reason, then, — the different nature of the jury as a tribunal, — was the reason for the failure of the numerical system to find a place in our common-law rules of Evidence.[30]

[26] See also the arguments of Brook and Atkins, in Reniger *v.* Fogossa (1551), Plowd. 1, 12; Sir Matthew Hale (*ante* 1680), History of the Common Law, c. 12.

Burke, with his usual acumen, pointed out this feature of the history in his disquisition on Evidence, in the Report on Warren Hastings' Trial, in 1794 (31 Parl. Hist. 330).

[27] See Thayer, Preliminary Treatise on Evidence, 17–24; Best, Evidence, §§ 612–614.

[28] *Ante* 1726, Gilbert, Evidence, 151 (stating as an exception the case of a bastard's mother charging the father); Best, *ubi supra*; 1807, Wambaugh *v.* Schenck, 1 Penningt. 229, *semble* (dower; trial by witnesses before the Court without jury).

[29] 1629, Coke upon Littleton, 6 *b* ("It is to be knowne that when a trial is by witnesses, regularly the affirmative ought to be proved by two or three witnesses, as to prove a summons of the tenant, or the challenge of a juror, and the like. But when the trial is by verdict of twelve men, there the judgment is not given upon witnesses or other kind of evidence, but upon the verdict, and upon such evidence as is given to the jury they give their verdict"); 1726, Gilbert, Evidence, 151 ("for one man's affirming is but equal to another's denying, and where there is no jury to discern of the credibility of the witnesses, there can be no distinction made; . . . that must be left to the determination of the neighborhood").

[30] Remarkable light is thrown on this, the inherent incompatibility of the jury system and the numerical system, by the debates in the French Constitutional Assembly of 1791, on the proposal to introduce trial by jury; the arguments turned on this very point, and in consequence the numerical rules were abolished (Esmein, Hist. de la procédure criminelle, 431, 433, 437, 510). In 1804, when trial by jury arose for reconsideration in the Council of State, the same arguments recurred.

6. It remains only to ask why this question did not come up for practical settlement earlier than the 1600s? Why was not the contrast between the ecclesiastical system and the common-law system forced to an issue before that comparatively late period in the history of jury trial? The jury had been in general use for at least three hundred years, and the ecclesiastical courts had had an even longer career in England. Why had not the attempt been earlier made to introduce the witness-rules of the latter into the procedure of the former?

The answer is, simply, that there had before then been no witnesses to whom the ecclesiastical rules could be claimed to apply. It is perfectly well established that the extensive and habitual use of witnesses, in the modern sense, does not appear until the 1500s;[31] and it may be supposed that all through the 1500s the increase of importance in the witnesses' function, and the relative quantity of the information supplied by them as compared with that supplied by the jurors' own knowledge, was but of slow and gradual growth. In the previous history of the jury, and until this period of 1500–1650, there would be no suggestion of an analogy to the situation in the civil-law courts; or, if the suggestion were made (as by Fortescue in the 1400s), it would be answered that there *were* in the jurors themselves more than the needed number of witnesses. But as the function of the jurors became more sensibly and markedly that of mere triers, or judges of fact, proceeding chiefly upon the evidence of witnesses in the modern sense, the analogy of the situation to that of the ordinary civil-law judge would be fully perceived, and the propriety of applying the numerical system to the testimony upon which the jury now chiefly depended could fairly be claimed. This situation did not sensibly exist before the 1600s; and it was therefore not until that century that the question came to be pressed for practical solution.

In the matter of time, one more interesting consideration remains to note. If the change of the earlier conditions of jury trial had come about more rapidly, if before the 1500s the jurors had ceased to be also witnesses, and had come to decide chiefly upon the testimony of produced witnesses, the numerical system might after all have been grafted into our body of evidence-rules. The jury would then have been mere judges of fact, obliged to depend upon others' testimony and to weigh accurately its worth, while the popular quantitative conception of testimony would still have been in full force; there would thus have been every reason to expect the enforcement for juries of the general notions of testimony which were still in vogue among the common-law judges and the people at large. This is, to be sure, only one of those contingencies which can easily be reconstructed in imagination;[32] but it illus-

[31] This has been already noted *ante*, § 1364; it is fully expounded by the jury's historian (Thayer, Preliminary Treatise, 122–132).

[32] That this possibility, however imaginary, is by no means fanciful, may be seen from Professor Brunner's account of the fate that did befall in France, when one of the forms of jury trial — 'the enquête par turbe,' consisting of ten men — came, in the course of its history, into competition, with the ecclesiastical

trates at any rate the radical extent to which our common-law rules of Evidence have been fundamentally affected by the nature of the jury tribunal and by the condition in which its steps of historical progress happened to place it at a given period.

7. There did come into our law, however, sooner or later, a few specific rules of the numerical sort, all of them being of the simple type that declares a single witness insufficient and requires additionally either a second witness or corroborating circumstances. Some of these — namely, the Chancery rule requiring two witnesses to overcome a denial on oath, the rule requiring two witnesses to a will of personalty, and the rule requiring two witnesses to a cause for divorce — existed only in the practice of the ecclesiastical courts or that of chancery founded upon it; and wherever they came over into American common-law courts, they were direct borrowings. Others, namely, the rule requiring an accomplice or a complainant in rape, or the like, to be corroborated, are either express statutory inventions or plain judicial creations; in either case modern innovations, as well as local in the United States, and not a part of the inherited common law. There remain two specific rules — the rule in treason and the rule in perjury — which do come down to us as inheritances; and though these also are in strictness not common-law rules, the one being statutory in origin, and the other an indirect grafting from the ecclesiastical law, yet their roots go some distance back in our law, and their history can be understood only in the light of the general survey just made of the history of the numerical system. The growth of these two rules may better be examined later in treating of their present scope.

§ 2033. **Policy of the Numerical System.** The numerical system of requirements dominated for many ages the law of Continental Europe. Though its domination may be attributed historically to its harmony with merely primitive notions and to a system lacking jury trial, still its wide prevalence, even into modern times, entitles it to respectful consideration, and obliges us to ask whether anything can be said in favor of it as a system, or in favor

system: Schwurgerichte, ed. 1872, p. 393: "The 'enquête par turbe' occupied a wholly exceptional position in relation to the principles which dominated French proof methods after the 1300s. The contrast between them lay in this, that in other cases [than trial by 'enquête'] two witnesses sufficed to prove a fact [to the judge]. These two, however, were examined individually, while the 'turbe' gave their verdict with a single utterance. . . . A way was therefore sought to bring this institution, now become alien, into harmony with the prevailing doctrine of proof. The 'turbe' was now treated, for purposes of procedure, as a single person, and the verdict of the 'turbe' was considered as equivalent to the assertion of a single witness. But since proof by witnesses, according to the well-known ecclesiastical rule required at least two concurrent witnesses, it was prescribed, in 1498, by the Ordinance of Blois, art. 3, that for proving a custom [the chief issue for which the 'turbe' was used], two agreeing verdicts of 'turbes' should be necessary. . . . Whereas formerly the saying ran, 'A "turbe" is equivalent to two witnesses,' henceforward it went, 'A "turbe" is equivalent to but one witness.' Each 'turbe' consulted by itself and gave a separate verdict; to effect proof, both 'turbes' must agree. . . . After this change, the 'enquête par turbes' survived some two centuries, though preserving only slight practical importance. . . . By tit. 13, art. 1, of the Civil Ordinance of 1667, the 'enquête par turbes' was abolished; and thus disappeared from French legal life the proof-method in which had been longest preserved the form of French 'enquête' nearest related to the jury."

of specific rules resting on its principle. The circumstance, too, that by modern statutes many such rules have been introduced into our own law, and are still in force in many jurisdictions, makes it for us a living question, and not merely a subject of academic or historical interest.

(1) As for the system in gross — a highly developed body of rules in which for varying situations a varying number of witnesses are required and the value of every witness' testimony is reducible to definite numerical units or halves or quarters, — for such a system nobody at the present day finds anything to be said. The probative value of a witness' assertion is utterly incapable of being measured by arithmetic. All the considerations which operate to discredit testimony (*ante*, §§ 875–1144) affect it in such varying ways for different witnesses that the net trustworthiness of each one's testimony is not to be estimated, either in itself or in reference to others' testimony, by any uniform numerical standard. Probative effects are too elusive and intangible for that. The personal element behind the assertion is the vital one, and is too multifarious to be measured by rule. "Testimony," as Boyle well said, "is like the shot of a long-bow, which owes its efficacy to the force of the shooter; argument [*i. e.* circumstantial inference] is like the shot of a cross-bow, equally forcible whether discharged by a giant or a dwarf." [1] The cross-bow notion of testimony — the notion that one man's shot is as forceful as any other man's — can find no defenders to-day.[2]

(2) But there may be, here and there, specific numerical rules which may have something to say for themselves; and the question thus arises whether we are to go to the extreme of repudiation, and lay down the proposition that no such rules can be sound, — that there is no virtue in any rule based on mere numbers or on technical corroboration. Practically, for us, this reduces itself to the question whether a rule declaring a single witness insufficient can in any event be a sound one. Nowhere to-day, in our law, is any other rule, based on the numerical principle, contended for; but this specific rule does find wide acceptance in many instances and jurisdictions. Even though in specific situations a rule of that sort may seem useful, still there must first be settled the larger and general question whether such a rule can ever be a wise one. If the numerical principle as a whole is based on a fallacy, a bygone conception of testimony, then can any rule based on mere numbers be justified?

The argument in favor of the utility of such a rule — declaring a single witness insufficient — has nowhere been better put than in the following passage, from a notable trial:

§ 2033. [1] Quoted in 8 How. St. Tr. 1041.

[2] For a scathing criticism of the system of "half-proofs," as it continued in some Continental countries as late as 1850, see Dr. Francis Lieber's Civil Liberty and Self-Government, App. III.

For the point of view of modern 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), *passim*.

1683, *Algernon Sidney's Apologia*, 9 How. St. Tr. 916, 927 (arguing against the rule then obtaining that the two treason witnesses might testify to different overt acts): "I must ever insist upon the law of God given by the hand of Moses, confirmed by Christ and his Apostles, whereby two witnesses are necessarily required to every word and every matter. . . . The reason of this is not because two or more evil men may not be found — as appears by the story of Susanna; but because it is hard for two or more so to agree upon all circumstances relating unto a lye as not to thwart one another. And whosoever admits of two testifying several things done or said in several times or places conducing — as is said of late — unto the same ends, destroys the reason of that law, takes away all the defence that the most innocent men can have for their lives, and opens a wide gate for perjury by taking away all possibility of discovering it."

The argument in answer has more than once been set forth by eminent thinkers on the law of Evidence. It is in brief this: Conceding the occasional dangers of trusting a single witness, a curative rule requiring two witnesses, or formal corroboration of a single witness, is not sufficiently efficacious to overcome the new dangers and disadvantages which are thereby introduced:

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. VI, c. I, § 1 (Bowring's ed., vol. VII, p. 521): "And after all, what is it worth? In the multitude of counsellors, says the proverb, there is safety; in the multitude of witnesses there may be some sort of safety, but nothing more: it is by weight, full as much as by tale, that witnesses are to be judged. 'Pondere, non numero.' From numbers (the particulars of the case out of the question) no just conclusion can be formed. Nothing can be weaker than the best security that can be derived from numbers. In many cases, a single witness, by the simplicity and clearness of his narrative, by the probability and consistency of the incidents he relates, by their agreement with other matters of fact too notorious to stand in need of testimony, — a single witness (especially if situation and character be taken into account) will be enough to stamp conviction on the most reluctant mind. In other instances, a cloud of witnesses, though all were to the same fact, will be found wanting in the balance. There is no man conversant with the business of the bar, whose experience has not presented him with instances of dozens of witnesses opposed to each other in the same cause, line against line, and whose testimony has been of such a nature, that (howsoever it may have been in regard to mendacity) falsehood must have been on one side or the other. . . . I do not mean to insinuate (it would be absurdity to insinuate) that the requisition of a second witness adds nothing to the security against perjury. No doubt but that, the greater the number of witnesses you require, the greater the security against perjury. All I contend for is, that that security (be it greater or less) is not so necessary as that you should pay so great a price for it as you do pay, and must pay, by the licence you thereby grant to commit the crime in the presence and with the aid of any *one*. 'Reason,' says Montesquieu, 'requires two witnesses: because a witness who affirms, and a party accused who denies, makes assertion against assertion, and it requires a third to turn the scale,' — this, by way of proof of the proposition immediately preceding: — 'The laws which cause a man to perish upon the deposition of a single witness, are fatal to liberty.' This observation, short as it is, teems with errors. . . . 'Fatal to liberty?' What means *liberty?* What can be concluded from a proposition, one of the terms of which is so vague? What my own meaning is, I know; and I hope the reader knows it too. *Security* is the political blessing I have in view; security as against malefactors, on one hand, security as against the instruments of government, on the other. Security, in both these branches of it, is the benefit, the making due provision for which, in the case in question, is the object of these inquiries. Where two witnesses have been required, the principle of determination is obvious enough: it has been the fear of giving birth to the conviction and punishment of innocent persons,

if in each case the testimony of a single witness were held sufficient. Engrossed by the view of this danger, the attention has overlooked the so much greater danger on the other side. . . . The giving security to the innocent, is the object and final cause of this ill-considered scruple. Of what description of the innocent? Of those, and those alone, to whom, by false testimony, it might happen to be subjected to prosecution in a court of justice. On the other hand, those to whom, in consequence of the licence granted by this same rule, it might happen, and (if the rule were universally known) could not but happen, to suffer the same or worse punishment at the hands of malefactors, are altogether overlooked. The innocent who scarcely present themselves by so much as scores or dozens, engross the whole attention, and pass for the whole world. The innocent who ought to have presented themselves by millions, are overlooked, and left out of the account."

1806, Mr. *W. D. Evans*, Notes to Pothier, II, 231 (commenting also on the saying that a law allowing one witness alone is "fatal to liberty"): "It might perhaps be said with greater justice that the absolute and indiscriminate exclusion of a single witness in every capital case would, if not fatal, at least be dangerous to security, — as the opportunity of a solitary situation would enable a miscreant to perpetrate a robbery or a rape with impunity, however respectable the character of the person who suffered the violence, and however assured by previous knowledge of the identity of the defendant. The supposed equality between the denial of the accused and the testimony of the witness is merely fanciful, unless it can be asserted that there is an equal inducement to make a false accusation for the purpose of destroying an individual with whom there is no previous animosity, and to deny the commission of a crime for which a party is justly liable to undergo punishment, — between (as I have seen it observed in a publication of Mr. Christian) a person who by his falsehood has everything to lose and nothing to gain, and one who has everything to gain and nothing to lose."

1849, Mr. *W. M. Best*, Evidence, §§ 597–601: "Those who take the civil-law view contend that it is dangerous to allow a tribunal to act on the testimony of a single witness, since by this means any person, even the most vile, can swear away the liberty, honour, or life of any one else; they insist on the undoubted truth, that the chance of discrepancy between the statements of two false witnesses, when examined apart, is a powerful protection to the party attacked. . . . Now we are by no means prepared to deny that under a system where the decision of all questions of law and fact is intrusted to a single judge, or in a country where the standard of truth among the population is very low, such a rule may be a valuable security against the abuse of power and the risk of perjury; but it is far otherwise where a high standard of truth prevails, and facts are tried by a jury directed and assisted by a judge. Add to this, that the anomaly of acting on the testimony of one person is more apparent than real; for the decision does not proceed solely on the story told by the witness, but on the moral conviction of its truth, based on its intrinsic probability and his manner of giving his evidence. And there are few cases in which the decision rests even on these circumstances alone; they are usually corroborated by the presumption arising from the absence of counter-proof or explanation, and in criminal cases by the demeanour of the accused while on his trial. . . . Still, however, on the trial of certain accusations, which are peculiarly liable to be made the instruments of persecution, oppression, or fraud, and in certain cases of preappointed evidence (where parties about to do a deliberate act may fairly be required to provide themselves with any reasonable number of witnesses, in order to give facility to proof of that act), the law may with advantage relax its general rule, and exact a higher degree of assurance than could be derived from the testimony of a single witness. Cases, too, must now and then, though extremely seldom, occur, in which the grossest injustice is done by giving credence to the story of a single witness. . . . On the other hand, however, as the requiring a plurality of witnesses clearly imposes an obstacle to the administration of justice, especially where the act to be proved is of a casual nature, — above all, where, being in violation of law, as much clandestinity as possible would be observed, — it ought not to be required without strong and just reason.

Its evils are these: 1. It offers a premium to crime and dishonesty: by telling the murderer and felon that they may exercise their trade, and the knave that he may practise his fraud, with impunity, in the presence of any one person; and the unprincipled man that he may safely violate any engagement, however solemn, contracted under similar circumstances. 2. Artificial rules of this kind hold out a temptation to the subornation of perjury, in order to obtain the means of complying with them. 3. They produce a mischievous effect on the tribunal, by their natural tendency to react on the human mind; and they thus create a system of mechanical decision, dependent on the number of proofs, and regardless of their weight. . . . On the whole, we trust our readers will agree with us in thinking that any attempt to lay down a *universal* rule on this subject which shall be applicable to all countries, ages, and causes, is ridiculous; and that, although so far as this country is concerned, the general rule of the common law — that judicial decisions should proceed on the intelligence and credit, and not on the number of the witnesses examined or documents produced in evidence — is a just one, there are cases where, from motives of public policy, it has been wisely ordained otherwise." [3]

What we must conclude, then, is that our whole presumption should be against any specific rule requiring a number of witnesses, or corroboration of a single witness; that such arbitrary measurements are likely to be of little real efficacy and to introduce disadvantages greater than those which they purport to avoid; and that therefore any such rule, when advanced for a specific issue — for example, treason or perjury — or for a specific witness — for example, an accomplice or a rape-complainant — must justify itself by experience as overwhelmingly useful and efficacious.

The readiness of the modern American professional mind to cling to rules formally requiring corroboration is due mainly to the natural desire to protect the litigants from the unrestrained and inexperienced mental processes of the jury. But the true way to afford this protection is to empower the judge to comment on the testimony. Restore to general practice this time-honored and orthodox function of the judge (*post*, § 2551), and there will be neither need nor demand for the abstract mechanical rules of number or of corroboration.

§ 2034. **General Principle; One Witness may Suffice; An Uncontradicted Witness need not be Believed.** The common law, then, in repudiating the numerical system, lays down four general principles:

(1) *Credibility does not depend on numbers* of witnesses.[1] Therefore:

[3] When Napoleon abolished for the Rhine province the number-rules of the civil law, he stigmatized their weakness in this epigram: "Thus one honorable man by his testimony could not prove a single rascal guilty; though two rascals by their testimony could prove an honorable man guilty" (Bonnier, Traité des Preuves, ed. 1888, § 293). "The Turkish Law rigidly holds every person to prove all the facts of his case by two Turkish witnesses, which makes the dealing (with a view of dispute) extremely difficult. . . . Nay, a merchant [of England] there will directly hire a Turk to swear the fact of which he knows nothing; which the Turk doth out of faith he hath in the merchant's veracity; and the merchant is very safe in it, for, without two Turks to testify, he cannot be accused of the subornation. This is not, as here [in England], accounted [by the English merchants] a villanous subornation, but an ease under an oppression, and a lawful means of coming into a just right" (Roger North's Life of Sir Dudley North, 1744, p. 46).

§ 2034. [1] This is the underlying principle for all the ensuing citations.

It comes to light again in the doctrine about the jury's measure of proof by *preponderance of evidence* (post, § 2498).

(2) In general, the testimony of a *single witness*, no matter what the issue or who the person, *may legally suffice as evidence upon which the jury may found a verdict.*[2]

(3) Conversely, the *mere assertion of any witness* does not of itself need to be believed, *even though he is unimpeached* in any manner; because to require such belief would be to give a quantitative and impersonal measure to testimony:[3]

[2] The English authorities have already been given in § 2032, *ante*; that the principle is rarely mentioned does not affect its actual acceptance. *United States: Codes: Cal.* C. C. P. 1872, § 1844 ("The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact except perjury and treason"); *Mont.* Rev. C. 1921, § 10505; *P. R.* Rev. St. & C. 1911, § 1386 (like Cal. C. C. P. § 1844); *Or.* Laws 1920, § 702 (like Cal. C. C. P. § 1844, adding a third exception for "usage"); *Judicial Opinions:* 1889, Fengar *v.* Brown, 57 Conn. 60, 17 Atl. 321 ("If the jury believe the statement of a witness, there is no rule of law forbidding them to found their verdict upon it, though the witness stands alone and his testimony is opposed to that of others"); 1909, Catchings *v.* State, 6 Ga. App. 790, 65 S. E. 815; 1910, Hudgins *v.* State, 7 Ga. App. 785, 68 S. E. 336 (two witnesses against one); 1904, St. Louis & O. R. Co. *v.* Union T. & S. Bank, 209 Ill. 457, 70 N. E. 651; 1904, Indianapolis St. R. Co. *v.* Johnson, 163 Ind. 518, 72 N. E. 571 ("The preponderance of evidence does not depend upon the number of witnesses"; citing cases); 1915, Vivian Collieries Co. *v.* Cahall, 184 Ind. 473, 110 N. E. 672 (numerical theory repudiated); 1868, Callanan *v.* Shaw, 24 Ia. 440, 444 (quoted *supra*); 1909, State *v.* Blount, 124 La. 202, 50 So. 12 (murder); 1909, Nutting *v.* Watson, 84 Nebr. 464, 121 N. W. 582 (horse); 1911, Marzulli *v.* Metropolitan L. Ins. Co., 81 N. J. L. 166, 78 Atl. 1051; 1866, Gould *v.* Safford, 39 Vt. 498, 505.

The following codes state the general principle in broader form; *Alaska:* Comp. L. 1913, § 1505 (like Or. Laws 1920, § 868); *Cal.* C. C. P. 1872, § 2061, par. 2 (the Court is to instruct the jury "that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds"); *Ga.* Rev. C. 1910, § 5732 (the tribunal "may also consider the number of witnesses, though the preponderance is not necessarily with the greatest number"); *Mont.* Rev. C. 1921, § 10672, par. 2 (like Cal. C. C. P. § 2061); *Or.* Laws 1920, § 868 (like Cal. C. C. P. § 2061).

In Quebec, where the French Civil Code is the basis of law, the numerical principle is repudiated; 1921, Montreal Tramways Co. *v.* Sofio, 62 D. L. R. 454, Que.

In *Porto Rico*, where the Spanish Civil Code is the basis, the numerical principle is repudiated; *P. R.* Rev. St. C. 1911, § 1530 (like Cal. C. C. P. § 2061); 1914, Rosado *v.* Ponce R. & L. Co., 20 P. R. 528, 536 (statute applied).

In the *Philippine Islands*, the rule requiring two witnesses, if it was ever in force, was abandoned by the time of American jurisdiction: 1902, U. S. *v.* Cabe, 1 P. I. 265 (murder; the fact that "only one witness testified" to the killing, held not an obstacle to conviction under the circumstances); 1903, U. S. *v.* Dacotan, 1 P. I. 669 (robbery); 1905, U. S. *v.* Santiago, 4 P. I. 438 (robbery); 1910, U. S. *v.* Sy Quingco, 16 P. I. 416 (opium offence); 1911, U. S. *v.* Mondejar, 19 P. I. 158 (robbery); 1912, Moncada *v.* Cajuigan, 21 P. I. 184; 1915, U. S. *v.* Claro, 32 P. I. 413, 421; 1916, U. S. *v.* Lopez Quim Quinco, 33 P. I. 239; 1917, U. S. *v.* Olais, 36 P. I. 828 (assault).

In some jurisdictions is found occasionally a statement that one witness suffices *if not contradicted;* for example, 1897, Southwest Va. M. L. Co. *v.* Chase, 95 Va. 50, 27 S. E. 826; but this is merely a piece of careless heterodoxy.

There is a peculiar and absurd quibble in *Wisconsin*, used to clarify the jury's mind in instructing them as to the preponderance of proof (*post*, § 2498): 1905, Garske *v.* Ridgeville, 123 Wis. 503, 102 N. W. 22 (the trial Court charged that the preponderance "is not to be determined by the number of witnesses on either side, or by the number of witnesses on any particular material point"; this is held erroneous, by weird logic).

The following dispatch illustrates the possibilities of the numerical principle:

"Fort Worth, Texas, March 22 (Houston Post Special).—'I tells you dem thousand poun's of witness am too much for mah case,' said Jack Bell, charged with aggravated assault, to which he had pleaded not guilty Saturday when he was confronted with three of the State witnesses, whose combined weight was over a thousand pounds. 'I figgured mah case was purty stout, but it sho looks weak ter me, boss. Jes change dat plea to guilty,' Jack said as he viewed the preponderance of the evidence. The three witnesses were three negro women weighing over 300 pounds each. The negro was fined $25 and costs."

[3] 1899, Lee Sing Far *v.* U. S., 35 C. C. A. 327, 94 Fed. 834, 839 (collecting authorities); 1920, Fire Ass'n of Philadelphia *v.* Mechlowitz,

1868, BECK, J., in *Callahan* v. *Shaw*, 24 Ia. 441, 444 (disapproving an instruction "that no important fact can be proved without at least the testimony of one credible and unimpeached witness"): "It is impossible, from the nature of things, for the law to provide rules which shall determine the quantity or amount of evidence necessary to establish a fact in judicial proceedings. There can be devised no standard — no unit of measurement, whereby we may determine just what measure of evidence shall be required to prove a fact in issue. To say that one credible witness is necessary, is a very unsatisfactory and indefinite rule indeed. As a matter of fact, evidence can usually be brought before a jury only through the medium of human testimony; there must, of necessity, be a witness, or one standing in that position, through whom the fact can be brought to the mind of a court or jury. . . . There must be, then, in most cases, to establish a fact, a witness, whether that fact be important or unimportant. But this rule gives no measure for the quantity of evidence, for knowledge, intelligence, qualities of memory, and all other attributes that make up ability, together with those moral qualities which constitute credibility, are most unequally united in men, so that one possessing all the attributes of ability and credibility in the highest degree, and so known to the tribunal before whom he testifies, would, in his evidence, outweigh an indefinite number of witnesses who possess the same attributes in the lowest degree. It is also true, that a witness, in order to prove a fact by his evidence, must be credible — he must be such a witness as will be entitled to receive the belief, the faith of others. But here again, from the very nature of the case, there are indefinite degrees in this character we call credibility. One may possess it in the highest degree, another in the lowest. It follows, therefore, that when evidence is weighed, to determine whether a fact has been proven thereby, all the qualities going to make up what is termed ability and credibility to a witness must be fully considered in order to arrive at a truth. And who should so weigh and consider these qualities? Most evidently the jury. The Court cannot discharge this duty for them, because the very opinion which they may form upon these questions of ability and credibility in truth determines their finding. . . . If the witness, from want of intelligence, or from any other cause, is incompetent under the rules of law, the Court will not permit him to testify; but when the evidence of the witness is before the jury, all questions of credibility are for them, and for them alone."

1901, MARSHALL, J., in *Bourda* v. *Jones*, 110 Wis. 52, 85 N. W. 671: "It is not infrequently supposed that a sworn statement is necessarily proof, and that, if uncontradicted, it establishes the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts — testimony which no sensible man can believe—goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit thereon, cannot be disregarded."

(4) As a corollary of the first proposition, *all rules requiring two witnesses*, or a *corroboration of one witness*, are exceptions to the general principle.

2 C. C. A., 266 Fed. 322; 1904, Bradley *v.* Gorham, 77 Conn. 211, 58 Atl. 689; 1906, Alexander *v.* Blackman, 26 D. C. App. 541, 544; 1904, Hauser *v.* People, 210 Ill. 253, 71 N. E. 416; 1905, Chicago Union T. Co. *v.* O'Brien, 219 Ill. 303, 76 N. E. 341 (there is no presumption "that an unimpeached witness has testified truly, and such instructions infringe upon the province of the jury to determine the credibility of the witnesses"); 1915, People *v.* Davis, 269 Ill. 256, 110 N. E. 9; 1909, Arnd *v.* Aylesworth, 145 Ia. 185, 123 N. W. 1000; 1921, McDonald *v.* Yellow Taxicab Co., 192 Ia. 1183, 184 N. W. 291 (automobile injury); 1908, Lindenbaum *v.* N. Y. N. H. & H. R. Co., 197 Mass. 314, 84 N. E. 129; 1908, Bearse *v.* Mabie, 198 Mass. 451, 84 N. E. 1015; 1917, Nydes *v.* Royal Neighbors, 256 Pa. 381, 100 Atl. 944.

This loose and futile but not uncommon heresy that an unimpeached or uncontradicted witness must be believed is illustrated in the following opinions: 1905, Keene *v.* Behan, 40 Wash. 505, 82 Pac. 884; 1908, Larson *v.* Glos, 235 Ill. 584, 85 N. E. 925 (with some variation).

Still less is there any *presumption* that a *contradicted* witness speaks truthfully: 1908, State *v.* Halverson, 103 Minn. 265, 114 N. W. 957 (good opinion by Elliott, J.).

For further notice of the fallacy that an uncontradicted witness must be believed, see *ante*, § 1012, *post*, § 2498.

To these exceptions we now come. In classifying them, the main distinction seems to depend upon whether the rule applies to a certain charge or *issue* (*i. e.* to any and every witness produced to prove that issue), or to a certain *kind of witness* (*i. e.* to that kind of witness only, and to no others, irrespective of the issue, or to no others upon the same issue). Accordingly, under one group (A) fall the rules affecting the charge or issue of *treason*, *perjury*, sundry *crimes*, *chancery causes*, *wills*, and sundry *civil causes* (*post*, §§ 2036–2054); and under another group (B) fall the rules affecting an *accomplice*, *a complainant* in *rape*, *bastardy*, *seduction*, and the like, a *defendant* in *divorce*, and sundry other kinds of witnesses (*post*, §§ 2056–2074).

A. Rules of Number depending on the Kind of Issue

1. Criminal Cases

§ 2036. **Treason**; (*a*) **History of the Rule.** It is clear enough that the rule requiring two witnesses to prove a charge of treason was not a common-law rule, but had its beginning in the statutes of the 1500s.[1] Sir Edward Coke at one time ventured to advance the contrary assertion,[2] but his pretended authorities do not bear him out, and his utterances on this point appear by the circumstances to be of not the slightest weight.[3] There was no instance, before the 1600s, of a rule that the testimony of a single witness called before a jury at common law should be insufficient, — as the history already examined (§ 2032) amply indicates.

The rule begins, then, with the statutes of the 1500s; and the chief interest of its history lies in the controversy over the supposed repeal of the first statute, and in the true apportionment between the political parties of the blame of maintaining this repeal.

§ 2036. [1] 1535, Bishop Fisher's Trial, 1 How. St. Tr. 395, 401; 1762, Foster, Crown Law, 233 ("It hath been generally agreed, and I think upon just grounds (though Lord Coke hath advanced a contrary doctrine), that at common law one witness was sufficient in the case of treason as well as in every other capital case").

[2] 1629, Coke, 3 Inst. 26 ("It seemeth by the ancient common law one accuser or witnesse was not sufficient to convict any person of high treason; . . . and that two witnesses be required appeareth by our books, and I remember no authority in our books to the contrary").

[3] Coke's vacillation in legal tenets, when the interests of partisanship pressed, has often been observed upon other points (an instance is noted *post*, § 2550), and the present is merely one more instance of his untrustworthiness. In 1603, in Raleigh's Trial (2 How. St. Tr. 15, 16; quoted *ante*, § 1364), Coke as the King's Attorney-General, and on his way to be Chief Justice, had maintained that two witnesses in treason were unnecessary; his violent insistence upon Cobham's testimony, during his colloquy with Raleigh, supplied a notorious instance of unbridled forensic brutality and coarseness. But some years later, in 1629, when Coke had fallen from the favor of his royal master and was in opposition, as a champion of popular liberties, he printed his Third Institute, and inserted in it a directly contrary assertion (above quoted); making no allusion to his own former doctrine nor to the repeated judicial decisions since 1555, and citing palpably irrelevant passages in support of his novel proposition. "I have great respect," said Lord Redesdale (Banbury Peerage Case, 1810, App. to LeMarchant's Gardner Peerage Case, 437), "for the memory of Lord Coke, but he was too fond . . . of telling untruths to support his own opinions." Professor W. S. Holdsworth has some comments on these charges against Coke of intentional misrepresentation of history, in the essay, "The Influence of Coke on the Development of English Law" (International Congress of Historical Studies, London, 1913, ed. Vinogradoff, p. 297).

(1) The first statutory provision was that of Edward VI (1547 and 1552), by which two witnesses were declared necessary.[4] The immediate circumstances leading to this step were probably the extreme methods used in some of the political trials with which the reign of Henry VIII had just closed.[5] The law of treason had been by this monarch, as never before, wrested to his own personal and despotic ends; and (as Sir James Stephen has acutely remarked in another connection [6]) the dominant legislator class, who might not have cared how many a humble subject was unfairly convicted of petty thievery, were well alive to the possibilities of treason law, if the rapid turn of the political wheel should chance to bring them underneath; and they probably were moved by the thought of self-protection against the future.[7] As an expedient for this purpose, it was natural that they should seek aid in a rule of numbers. The numerical conception of testimony was then still an instinctive one among all; the ecclesiastical rules of that sort lay plainly in sight, in the spiritual practice; and a rule of numbers was perhaps not only the natural, but to them the only conceivable expedient for providing this protection. That this was in fact the source of the rule was at any rate the tradition as handed down a century later:

1680, *Lord Stafford's Case*, T. Raym. 408: "Upon this occasion my lord Chancellor in the Lords' House was pleased to communicate a notion concerning the reason of two witnesses in treason, which [reason] he said was not very familiar, he believed, and it was this: Anciently, all or most of the judges were churchmen or ecclesiastical persons, and by the canon law now and then in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses, . . . and anciently heresy was treason; and from thence the parliament thought fit to appoint that two witnesses ought to be for proof of high treason."

(2) But the reactionary times of Mary's reign arrived shortly; and the following statute, the foundation of two hundred years' controversy, was immediately passed:

1554, St. 1 & 2 P. & M. c. 10, § 7; all trials for treason hereafter had "shall be had and used only according to the due order and course of the common laws of this realm and not otherwise."

[4] 1547, St. 1 Edw. VI, c. 12, § 22 (no person is to be indicted or arraigned for treason, petty treason, or misprision, "unless the same offender or offenders be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same"); 1552, St. 5 & 6 Edw. VI, c. 11, § 12 (no person is to be indicted or arraigned for treason, "unless the same offender or offenders be thereof accused by two lawful accusers, which said accusers at the time of the arraignment of the party so accused, if they be then living, shall be brought in person before the party so accused and avow and maintain what they have to say against the said party . . . unless the said party arraigned shall willingly without violence confess the same").

[5] Professor Willis-Bund (State Trials for Treason, 1879, vol. I, Introd. xxxix) thinks that this statute "was probably the result of such cases as the Marquis of Exeter's and the Earl of Surrey's." For another explanation, not essentially different, see Rastel's Statutes, 102, as quoted in 1 How. St. Tr. 520, and Bishop Burnet, arguing in the House of Lords, in 13 How. St. Tr. 537, 752 (quoted *ante*, § 1364).

[6] History of the Criminal Law, I, 226 (quoted *ante*, § 1845).

[7] Notice that they did not extend the provision to Ireland, where these considerations did not apply: 1795, Jackson's Trial, 25 How. St. Tr. 783, 851, 872; 1798, Sheare's Trial, 26 How. St. Tr. 255, 377.

What was the effect of this statute? It did not expressly repeal the statutes of Edward; but if the due order and course of trials included the modes of proof at a trial, then the new rule of proof introduced by the former statute now fell away, and the common-law practice, which made no requirement of number, was restored. Such was the judicial construction now put upon the new act. Whether it was the correct one need not here be considered in detail. Arguments of various sorts have been advanced; [8] the most significant one to the contrary, perhaps, is that the very next statute, Chapter 11, in the same session,[9] expressly restored the old evidence-rule (of one witness) for petty treason committed by forging the coin of the realm, and that the Legislature would have used similar express words in Chapter 10, had they intended the same thing.

On the whole, it may be supposed that the Legislature did intend in Chapter 10 to strike hard at treason, and to annul the recent innovation by which two witnesses were required. But the important thing is that this was the judicial construction of the statute of Mary from the very first, — beginning within a year after its enactment, and continuing for a century.[10] This was afterwards forgotten, during the political ascendency of the Whigs, after the Revolution of 1688 and during the early 1700s, when every reminiscence of the Stuarts was a dark one and all the doings of their times were anathematized. The trials of Sir Walter Raleigh in 1603, and of other noted victims of that time, were after the Revolution regarded by many as instances of unfair and corrupt political oppression by the Stuart judges. But time has vindicated the judges from such charges.[11] Whatever they were or did, they were not in this respect either unscrupulous or corrupt, and they did not distort the law for the pleasure of James or Charles. They merely applied, as in duty bound, the traditional and long-established construction of the statute

[8] The arguments may be found in the following places: 1716, Hawkins, Pl. Cr. II, c. 46, § 2; 1762, Foster, Crown Law, 237 (arguing forcibly for the view that there was no repeal); 1803, East, Pleas of the Crown, I, 128.

[9] 1554, St. 1 & 2 P. & M. c. 11, § 3 (all trials for offences connected with the coin of the realm may be tried "by such like evidence and in such manner and form as has been used and accustomed within the realm at any time before the first year of Edward the Sixth"); c. 10, § 12 (similar); 1697, St. 8 & 9 W. III, c. 26, § 7 (similar); these were applied, as needing only one witness, in the following cases: 1725, R. *v.* Anstruther, T. Jones 233 (impairing the coin); 1748, R. *v.* Gahagan, 1 Leach Cr. L., 4th ed. 42 (similar).

[10] 1555, Anon., Dyer, 132 *a*, 134 *a* ("The intent of the Statute 1 & 2 P. & M. c. 10, was to remove the two accusers and two witnesses"; approved by the judges; perhaps the same case as the following): 1556, Anon., Brooke's Abridgment, "Corone," 219 (at a conference of all the justices, it was agreed that "for no treason under St. 25 Edw. III, was there need of accusers at the trial, because it is enacted by the statute of 2 M. c. 10, that all trials for treason shall be held according to the common law only and not otherwise, and the common trial of the common law is by jury and by witnesses and by no accusers"; otherwise for treason charged under the same act of 2 M., "according to an article contained in the said statute at the end thereof"); 1586, Abington's Trial, 1 How. St. Tr. 1141, 1148; 1651, Love's Trial, 5 How. St. Tr. 43. Some additional cases reaching the same result, but bearing only on the history of the Hearsay rule, have been cited *ante*, § 1364; the same statute of Edward had provided for confronting the accused with the two witnesses, and thus its repeal came into question also in that connection. So also in the history of confession law (*ante*, § 818) the same construction is found.

[11] Professor Willis-Bund, in his State Trials for Treason, cited *supra*, has demonstrated this for procedure in general and the substantive law of treason.

of Mary, — a construction plainly laid down by the entire body of justices from the earliest moment after its enactment. Moreover, this construction was not even a mark of the Tudor and Stuart régimes as a whole. It continued under the Commonwealth, in the very heat of the passion of overthrow and reform. In the meanwhile, a single statute requiring two witnesses for a specific kind of treason had been passed, under a Tudor monarch;[12] but during the whole of the century, from 1554 to 1659, under Tudor, Stuart, and Cromwell alike, the construction of the statute of Mary was uniform. The hostile judgment of the dominant party of the Revolution was merely a political dogma.

(3) Before the end of the first half of the 1600s, however, had come Coke's Third Institute, in which he now advanced the view that the statute of Mary had *not* repealed the statutes of Edward.[13] His reasoning is apparently that the word "trial" in the statute meant merely the mode of decision, *i. e.* by a jury, as contrasted with a decision by judges hearing witnesses without a jury. To be sure, the word "trial" bore then that distinction;[14] but it is a forced meaning to put upon it in the statute, since nobody had ever thought of "trying" treason by witnesses to a judge without a jury (which is what the "otherwise" of the statute would mean, according to Coke). Moreover, Coke's dictum on this particular point was valueless, for the reasons already noticed.[15] Nevertheless, his utterance in the Third Institute, like every other printed utterance of that man of prodigious learning, counted for a great deal. Professional opinion began to change, at any rate, not long after this time.

The change must have been matured before the Restoration of Charles II in 1660; for immediately upon the Restoration, and in the very first year of it, in spite of all the power of the restorers and of their bitter and dominating purpose to punish the death of Charles I, and in spite of the large grist of traitors upon whom to sate their appetite for revenge, the whole aspect of affairs changes. Foremost comes the statute of 1661, the first treason act passed after the Restoration, in which the rule of two witnesses is deliberately established for all treasons defined by that act.[16] Next, but equally significant, came the judicial overthrow of the century-long construction of the statute of Mary. It was now affirmed by the Courts, and assumed and practised when not expressly affirmed, that the statute of Mary had *not* repealed

[12] 1558, St. 1 Eliz. c. 1, § 37 (no person is to be arraigned for treason under this act, "unless there be two sufficient witnesses" produced if living and in the realm). The St. 13 Eliz. c. 1, has sometimes been said to make a similar provision; but this is a misunderstanding of it.

[13] 1629, Coke, 3 Inst. 26 ("for that act of 1 & 2 P. & M. extends only to trials by the verdict of twelve men 'de vicineto' . . . and the evidence of witnesses to the jury is no part of the trial, for by law the trial in that case is not by witnesses, but by the verdict of twelve men, and so a manifest diversity between the evidence to a jury and a tryall by jury").

[14] *Ante*, § 2032; Thayer, Preliminary Treatise, 17–24.

[15] *Supra*, note 3.

[16] 1661, St. 13 Car. II, c. 1, § 1 (for treasons under this section, persons must be "legally convicted thereof upon the oaths of two lawful and credible witnesses, upon trial, or otherwise convicted or attainted by due course of law"); § 5 (no persons shall be convicted of the treasons in this act unless accused "by the testimony and deposition of two lawful and credible witnesses upon oath," produced face to face, etc., as in St. 5 & 6 Edw. VI, *supra*).

the statute of Edward; so that two witnesses were now to be required for treasons at large. The remarkable thing is that this decision was reached, for the first instance, in the very year of Charles' restoration, and in the trial of the regicides themselves, against whom the greatest license of judicial harshness might have been expected;[17] and it was repeated and maintained on all other occasions during the remaining years which fate had allotted to the Stuart family under Charles II and James II.[18]

Here again is laid bare the fallacy of the Whig dogma of the 1700s,[19] that all the evil judicial practices occurred under the Stuarts, while all the reforms came in with the Revolution. The reform in this instance came with the very first moment of the Stuart Restoration. Dangerous and unwholesome as was undoubtedly the reinstatement of this worthless family, the judges of the time must be redeemed from the reproach of an unscrupulous and tyrannous application of the law. On the contrary, it was through them that the change began. It is merely another instance out of several, in which we are to date the improvements of trial procedure from the Restoration, and not from the Revolution.[20] Policy, no doubt, as well as a real growth of sentiment, and a sagacious perception of the wisdom of maintaining the restored power by abandoning the excesses of the earlier Stuarts,

[17] May, 1660, Regicides' Case, Kel. 9 (it was assumed that the law for two witnesses was in force).

[18] Dec. 1662, Tong's Case, Kel. 22 (though some of the judges believed that there had been a repeal, yet "they all agreed that *if* the law for two witnesses be in force," it was to be interpreted in a certain way; but at page 49, Kelyng expresses his own opinion in favor of the repeal; this was not later than 1671, the year of his death); 1679, Whitebread's Trial, 7 How. St. Tr. 405; 1680, Lord Castlemaine's Trial, 7 How. St. Tr. 1111; 1680, Lord Stafford's Trial, T. Raym. 407, 7 How. St. Tr. 1293, 1527. The same result on this point is seen in the interpretation of the statute (already noticed) against treason by false coining: 1673, R. *v.* Acklandby, 3 Keb. 68 (clipping the coin; two judges apparently differed in opinion); 1684, Anon., T. Jones, 233 (clipping the coin; at a conference of the judges it was resolved that by the statute of 1 & 2 M. "one witness is sufficient, for that restores the trial at common law for such case, which was altered generally for all cases of treason by 1 Edw. VI and 5 & 6 Edw. VI, which required two witnesses where one was sufficient by the common law"). Lord Hale, writing some time before 1680, utters inconsistent views: Hale, Pl. Cr. *I*, 300 (after examining the *pros* and *cons*, he ends: "thus the reasons stand on both sides, and though these [for repeal] seem to be stronger than the former," yet it is safest to err on the side of mercy); II, 286 (the early statute "is not altered by the statute of 1 & 2 P. & M.," citing Coke).

[19] One example, from many, may suffice: "The truth is that up to the period of the Revolution of 1688, our criminal trials are a disgrace to the national annals" (Forsyth, Hortensius the Advocate, 3d ed., 331).

[20] It is indeed fairly presumable that the direct foundation of the reforms which ensued at the Restoration was laid by the destructive work of the Commonwealth lawyers in tearing away the traditions of the earlier régime. Mr. Robinson's learned account (1869; Juridical Society Papers, III, 567; now reprinted in Select Essays in Anglo-American Legal History, vol. I, 1907; Ass'n of American Law Schools) of "Anticipations under the Commonwealth of Changes in the Law" exhibits the materials for this conclusion. "The goodness," he says, "of the laws of Charles II. as contrasted with the badness of his government, has drawn a compliment from Blackstone, epigrams from Burke and Fox, and a paradox from Buckle. An enquiry into the source of these laws may show that the paradox is unreal, the epigrams unfounded, the compliment due to the Republicans; that they, in redressing grievances which from the time of James I and Bacon had been fostering rebellion, forestalled the law-reformers, not of the Restoration only, but of our own age." Similar evidence will be found in the learned essay of Professor Edward Jenks, "The Constitutional Experiments of the Commonwealth" (1890), pp. 54, 82.

Compare the history of the registration system (*ante*, § 1650), of the allowance of witnesses to an accused (*ante*, § 575), and of the self-crimination privilege (*post*, § 2550).

furnished in part the motives. But the fact remains, and deserves to be recorded.

(4) The ensuing legislation of William III, after the Revolution,[21] established the law, by continuing in a general statute that which the Restoration had instituted, partly by statute and partly by judicial action, a generation before. From the beginning of the 1700s there has never been any doubt or vacillation upon the rule that two witnesses at least are required upon a charge of treason.[22]

§ 2037. **Same: (*b*) Policy of the Rule.** The object of the rule requiring two witnesses in treason is plain enough. It is, as Sir William Blackstone said, to "secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages." [1] But is the rule fitted to accomplish this concededly desirable purpose? On this point Mr. Best's suggestions seem to present the correct view:

1849, Mr. *W. M. Best*, Evidence, §§ 616–619: "The reason for requiring two witnesses in high treason and misprision of treason — unquestionably that which influenced the framers of the modern statutes on the subject, whatever may have been the motives of those of the earlier ones — is the peculiar nature of these offences, and the facility with which prosecutions for them may be converted into engines of abuse and oppression. For although treason, when clearly proved, is a crime of the deepest dye, and deservedly visited with the severest punishment, yet it is one so difficult to define — the line between treasonable conduct and justifiable resistance to the encroachments of power, or even the abuse of constitutional liberty, is often so indistinct; the position of the accused is so perilous, struggling against the whole power and formidable prerogatives of the Crown — that it is the imperative duty of every free State to guard, with the most scrupulous jealousy, against the possibility of such prosecutions being made the means of ruining political opponents. . . . The principle of 7 & 8 Will. III, c. 3, requiring two witnesses in treason, has, however, been severely attacked. Bishop Burnet, speaking of that statute shortly after it was passed, said the design of it seemed to be to make men as safe in all treasonable conspiracies and practices as possible. . . . [Benthain observes] that after the passing of this statute, 'a minister might correspond (as so many ministers were then actually corresponding) with the exiled king by single emissaries, and be safe.' . . . All this reasoning, however, is more specious than sound. It seems based, in some degree

[21] 1696, St. 7 W. III, c. 3, § 2 (no person shall be indicted or tried for high treason working corruption of blood, or misprision, "but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to the one and the other of them to another overt act of the same treason," unless the accused "shall willingly, without violence, in open court confess the same, or stand mute or refuse to plead"); c. 7 (the foregoing provision is not to extend to counterfeiting the coin).

[22] There has, however, been some change as to the scope of the treason to which the rule applied: 1800, St. 40 Geo. III, c. 93 (in trials for treason by killing or doing bodily harm to the King, the trial may be "upon the like evidence as if such person or persons stood charged with murder"); 1821, St. 1 & 2 Geo. IV, c. 24 (extends the St. 7 W. III to Ireland, compare note 7, *ante*); 1842, St. 5 & 6 Vict. c. 51 (similar to St. 40 Geo. III); 1848, St. 11 & 12 Vict. c. 12, § 4 (in trials for compassing death or bodily harm to the King, etc., no conviction is to be had for this so far as expressed by "open or advised speaking," unless "upon his own confession in open court, or unless the words so spoken shall be proved by two credible witnesses"). Compare, also, the statutes *ante*, note 9, as to treason by false coining.

A special form obtains in *Canada:* Crim. Code, R. S. 1906, c. 146, § 1002 (no person shall be convicted "upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused").

§ 2037. [1] Commentaries, III, 358.

at least, on the false principle that has been examined in the Introduction to this work, and which is to be found more or less in every part of Bentham's Treatise on Judicial Evidence, viz., that the indiscreet passiveness of the law is as great an evil as its corrupt or misdirected action; and consequently that the erroneous conviction and punishment of an innocent, a violent, or even a seditious man, for the offence of treason, works the same amount of mischief as the escape of a traitor from justice, and no more. . . . By the law as it stands, persons sometimes escape with a conviction for felony or sedition whose conduct, considered with technical accuracy, amounts to treason. But, on the other hand, those who are innocent of that terrible crime lie under no dread of being falsely accused of it; and when a conviction for treason does take place, it is on such unquestionable proof that the blow descends on the disaffected portion of society with a moral weight, increased a hundred-fold by the moderation of the Executive in less aggravated cases."

The true solution seems to depend on the relative proportion, in experience, of two elements, namely, the likelihood of false accusations, as compared with the harm of a guilty person's escape. When the former (relatively to the specific crime) is large, and the latter (relatively to the specific crime) is small, then the two-witness rule may be justified as being often effective, and seldom harmful when not effective. Now for treason this relation does seem to exist. In times of bitter political division, the dominant political party has the strongest motive and the amplest means of securing false testimony, to rid itself of its opponents; while the harm of a real traitor escaping judicial punishment is relatively small, because treason, when it is confined to a few individuals, can never really endanger the State, and, when it represents a widespread opinion in the community, there will be ample array of witnesses to prove its acts. The rule of two witnesses, then, seems to rest on justifiable grounds of policy.

§ 2038. **Same: (*c*) Details of the Rule.** (1) The requirement of an *overt act* (*ante*, § 367*b*) is one of substantive law, and is therefore beyond the present purview. But a question arises as to the scope of the rule of Evidence, with reference to the tenor of the required witnesses' testimony. Is it enough if there is one witness to one overt act and another to a different overt act, or must both witnesses *speak to the same overt act?*

The former view was established as orthodox, in applying the original statute of Edward;[1] and it was expressly confirmed in the enactment of 1696.[2] But, having regard to the virtue and operation of the rule, as maintained by Sidney,[3] this seems an erroneous view; for the opportunity of

§ 2038.[1] 1649, Lilburne's Trial, 4 How. St. Tr. 1269, 1401; 1660, Regicides' Case, Kel. 9 ("If two witnesses prove two several acts tending to the compassing the King's death, the treason is proved by two witnesses as the law in case of treason requireth"); 1680, Earl of Stafford's Trial, 7 How St. Tr. 1293, 1527; 1681, Colledge's Trial, 8 How. St. Tr. 549, 620; 1696, Sir John Freind's Trial, 13 How. St. Tr. 1, 131; 1696, Vaughan's Trial, 13 How. St. Tr. 485, 535.

[2] St. 7 Wm. III, c. 3, § 2 (quoted *ante*, § 2036, note 21); § 4 ("If two or more distinct treasons of divers heads or kind shall be alleged in one bill of indictment, one witness produced to prove one of the said treasons and another witness produced to prove another of the said treasons shall not be deemed or taken to be two witnesses to the same treason within the meaning of this act"); 1867, R. *v.* McCafferty, 10 Cox Cr. 603 (statute applied).

[3] *Ante*, § 2036.

detecting the falsity of the testimony, by sequestering the two witnesses (*ante*, § 1838) and exposing their variance in details, is wholly destroyed by permitting them to speak to different acts. It is true that the difficulty of obtaining testimony to genuine treason would be thereby greatly increased; but, as already noted (*ante*, § 2037) the very object of the rule is to protect those who are innocent of treason; therefore, if the rule is to be maintained at all, regard should chiefly be had to the interests of those for whose protection it is established. Accordingly, the constitutional provisions adopting the rule for this country have everywhere and properly required that the two witnesses shall testify to the same overt act.[4]

(2) The two witnesses are not necessary for any fact to be proved *other than the overt act*.[5] In particular, two witnesses are not necessary for an *extrajudicial confession* offered as part of the evidence.[6] The infra-judicial confession ("in open court") is virtually a plea of guilty;[7] and for this no witnesses are needed, not only by the statute's express terms, but because an act done in court, before the judge, in the nature of a pleading, never needs witnesses.

(3) The rule of two witnesses means, by reason of the general principle (*ante*, § 2030, par. 3), that they must be effective witnesses, *i. e.* they must *both be believed by the jury*.[8] A rule requiring a certain quantity of evidence is binding upon the jurors as well as upon the judge; they are not to convict

[4] These are given in the next section; the Federal clause was applied in the following cases: 1795, U. S. *v.* Mitchell, Wharton's State Trials, 176, 183; 1799, Charge of Iredell, J., to Grand Jury, Wharton's St. Tr. 480 (the rule in England "has always appeared to be contrary to the true intention of the law which made two witnesses necessary"); 1799, U. S. *v.* Fries, Wharton's St. Tr. 482, 585, 594; 1807, U. S. *v.* Burr, 4 Cr. 473, 525; 1904, U. S. *v.* DeLos Reyes, 3 P. I. 349.

[5] 1762, Foster, Crown Law, 240; 1803, East, Pleas of the Crown, I, 130.

[6] 1781, Respublica *v.* M'Carty, 2 Dall. 86 (undecided); 1799, U. S. *v.* Fries, Whart. St. Tr. 482, 586, 594 (Peters, J., does not require this; but Iredell, J., does). The above conclusion seems unquestionable. Under the English practice, an extrajudicial confession might serve as one of the overt acts (*ante*, § 818); but then, by the English rule (*supra*), a single witness sufficed. In the United States, if an extrajudicial confession had to have two witnesses, it could only be because it was an overt act, but then no other overt act would be needed, which is inconsistent with the United States doctrine that such a confession cannot serve as an overt act. If by the substantive law, the overt act must be independent of such a confession, then by the Constitution the two witnesses are required only for the overt act.

For the *sufficiency* of an extrajudicial confession, see *post*, § 2071.

[7] It can hardly be [illegible] t, apart from the express words of t[illegible], the *confession* which is to dispense with [illegible]wo-witness rule must be practically a *plea of guilty;* the English cases and the history of the phrase "in open court" have been given *ante*, § 818; the American authority is scanty: 1781, Respublica *v.* M'Carty, 2 Dall. 86 (apparently not decided; the words "in open court" not being in the Pennsylvania statute; yet here the confession was in fact so made); 1787, Madison's Journal of the Constitutional Convention, Scott's ed. II, 568 ("Mr. L. Martin moved to insert after 'conviction, etc.,' 'or on confession in open court'; and on the question, the negative States thinking the words superfluous, it was agreed to," by a vote of 7 to 3); 1799, U. S. *v.* Fries, Whart. St. Tr. 482, 586, 594 (confession before a committing magistrate is not sufficient); 1903, U. S. *v.* Magtibay, 2 P. I. 703 (treason; defendant's testimony held not a confession under U. S. St. 1902, Mar. 8, § 9).

[8] 1680, Lord Castlemaine's Trial, 7 How. St. Tr. 1067 (L. C. J. Scroggs: "If two witnesses are produced both speaking materially to the thing, the one is believed and the other not, whether upon these two witnesses the jury can find a person guilty, or no? I am of opinion it is but one witness"; Mr. J. Raymond: "I never heard any man question it. If the law says there must be two witnesses produced, it says they must both be believed").

unless in their judgment the required amount exists. If the testimony of one is rejected by the jury upon consideration, there remains but one witness, — less than the rule requires.

(4) Each of the witnesses must testify to the *whole* of the overt act; [9] or, if it is separable, there must be two witnesses to each part of the overt act. The rule seems not to have suffered any dilution like that which occurred to the perjury rule (*post*, § 2042).

It was once ruled, before the Hearsay rule had been established (*ante*, § 1364), that one witness directly to an act and another witness to the *hearsay statement* of the first, were sufficient; but this was soon repudiated,[10] and would of course never again be proposed.

(5) The order of evidence is in general left to the determination of the trial Court (*ante*, §§ 1867, 1870). No specific regulation exists for the order of the evidence required by the treason-rule, and the *overt act* need therefore not be evidenced *before the other evidence* is offered.[11]

§ 2039. **Same**: (*d*) **Constitutional Sanctions.** The statutory rule of two witnesses in treason appealed to the founders of our government as one of the few doctrines of Evidence entitled to be guaranteed against legislative change.[1] A provision of this sort is found in the Federal Constitution and in most of our State Constitutions, as well as in some of the statutes.[2] This does not mean, however, that the rule is in itself one of the most important, or that its principle is fundamental in our system. It signifies merely that, since treason involves an opposition to the dominant political influences, a rule which could be changed or abolished at pleasure by the dominant political party in the Legislature might be virtually no rule at all for such cases.

[9] 1919, U. S. *v.* Robinson, D. C. S. D. N. Y., 259 Fed. 685 (Learned Hand, J.: "It is necessary to produce two direct witnesses to the *whole* overt act. It may be possible to piece bits together of the overt act; but, if so, each bit must have the support of two oaths; on that, I say nothing").

[10] 1572, Lord Lumley's Case, cited Coke, 3 Inst. 25 (repudiating Thomas' Case, 1553); 1680, Hale, Pl. Cr. II, 286; 1716, Hawkins, Pl. Cr. II, c. 25, § 139.

[11] 1807, Burr's Trial, Robertson's Rep. I, 460, 469 (the overt acts need not first be proved, before evidence of intent, etc., is offered; lucid opinion by Marshall, C. J.).

Distinguish the question whether *other overt acts* than those named in the indictment may be received as *evidence of intent;* this is entirely proper under the general principle of circumstantial evidence (*ante*, § 369).

§ 2039. [1] 1787, Madison's Journal of the Federal Convention, Scott's ed., II, 564, 566 ("It was then moved to insert, after 'two witnesses' the words 'to the same overt act.' Dr. Franklin 'wished this amendment to take place. Prosecutions for treason were generally virulent, and perjury too easily made use of against innocence.' Mr. Wilson: 'Much may be said on both sides. Treason may sometimes be practised in such a manner as to render proof extremely difficult, — as in a traitorous correspondence with an enemy.' On the question," the vote was 8 to 3 for the amendment).

[2] The following provisions are substantially identical, except where otherwise noted; the date and clauses are those of the Constitution, unless otherwise noted: U. S. Const. Art. III, § 3 ("No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court"); St. 1916, Code § 4137 (rule applied to trials in the Philippine Islands "by any tribunal, civil or military"); *Ala.* 1901, I, 18; *Ariz.* Rev. St. 1913, P. C. § 1043; 1910, I, 28; *Ark.* 1874, II, 14 Dig. 1919, § 2321; *Cal.* 1879, I, 20; C. C. P. 1872, § 1968 ("two witnesses to the same overt act" are required); P. C. § 1103 (no conviction "unless upon the testimony of two witnesses to the same overt act, or upon confession in open court"); *Colo.* 1876, II, 9; *Conn.* 1875, IX,

§ 2040. **Perjury: (*a*) History of the Rule.** By the end of the 1600s it was decisively settled (*ante*, § 2032) that the ecclesiastical rules about numbers of witnesses were not to be adopted into the common law. It was after that time that there arose the single common-law exception to the doctrine that one witness alone may suffice in every case, namely, the rule that one witness, without corroborating circumstances, does not suffice on a charge of perjury. Yet even this rule was an indirect borrowing from the civil law.

First of all, it is fairly clear that there was no such rule of common law until towards the first half of the 1700s.[1] That the quantitative conception of an oath still prevailed at that time has been already noticed (*ante*, § 2032), and in this respect the acceptance of the rule is not strange. But why should an exceptional step have been taken at that epoch for perjury trials, which

4; *Del.* Const. 1897, Art. VI, § 3; *Fla.* 1887, Decl. of Rights, 23; Rev. G. S. 1919, § 6082 (like the Constitution, but requires "two lawful witnesses"); *Ga.* 1877, I, 1, par. 2; Rev. C. 1910, § 6383; § 5742 (two witnesses, but not one and corroborating circumstances); P. C. 1910, § 1017 (two witnesses); *Ida.* 1899, I, 5; Comp. St. 1919, § 7972 (like Cal. C. C. P. § 1968); *Ill.* Rev. St. 1874, c. 38, § 264 ("by two or more witnesses, or voluntary confession in open court"); *Ind.* 1851, I, 29; Burns' Ann. St. 1914, § 2123; *Ia.* 1857, I, 16; Code 1897, § 4726, Comp. C. 1919, § 8542; *Kan.* 1859, Bill of R. 13; *Ky.* 1891, 229; *La.* 1921, XIX, 3 (inadvertently omitting "or"); *Me.* 1819, I, 12; Rev. St. 1916, c. 119, § 2 (misprision of treason must be proved by two witnesses or confession in open court; but one witness may prove one act, and another another one of the same species of treason); *Mass.* Gen. L. 1920, c. 264, § 4 (requires two "witnesses to the same overt act of treason" unless on confession in open court); *Mich.* C. 1908, II, 21; *Minn.* 1857, I, 9; *Miss.* 1890, III, 10; Code 1906, § 1388; *Mo.* 1875, II, 13; Rev. St. 1919, § 4028; *Mont.* 1889, III, 9; Rev. C. 1921, § 11978; § 10608 (like Cal. C. C. P. § 1968); *Nebr.* 1875, I, 14; Rev. St. 1921, § 10143 (same; furthermore, for offences of surrendering military posts, etc., or setting on foot a military expedition against any of the U. S., etc., "two credible witnesses," or confession in open court, are necessary); *Nev.* 1864, I, 19, Rev. L. 1912, § 6308; *N. J.* 1844, I, 14; *N. Mex.* 1911, Art. II, § 16; *N. D.* 1889, I, 19; Comp. L. 1913, § 10839, § 9447; *Oh.* Gen. Code Ann. 1921, § 13673 (treason provable only by confession in open court or by "the testimony of two credible witnesses to the same overt act laid in the indictment"; "two credible witnesses" also necessary for misprision of treason or unauthorized military expedition); *Okl.* 1907, II, 16; *Or.* 1859, I, 24; Laws 1920, §801 (like Cal. C. C. P. § 1968); *Pa.* St. 1860, Mar. 31, § 1, Dig. 1920, §8051, ("on confession in open court or on the testimony of two witnesses to the same overt act"); *P. I.* U. S. St. 1916, Aug. 29, c. 416, § 3, 39 Stats. 546 (quoted *supra*, under Fed.); *R. I.* Gen. L. 1909, c. 341, § 3 (no conviction for treason, except by "testimony of two lawful witnesses to the same overt act for which he shall then be on trial, unless he shall in open court confess the same"); *S. C.* 1895, I, 22; *S. D.* 1889, VI, § 25; *Tenn.* Shannon's Code 1916, § 6628 ("two sufficient witnesses, or by confession in open court"); *Tex.* 1876, I, 22; Rev. C. Cr. P. 1911, §§ 15, 803; *Utah*, 1895, I, 19 (omitting the confession clause); Comp. L. 1917, § 8984; *Va.* Code 1919, § 4389 (punishable if proved by "two witnesses to the same overt act or by confession in court"); *Vt.* Gen. L. 1917, § 6787 (requires "testimony equivalent to two witnesses to the same overt act," or confession in open court); *Wash.* 1889, I, 27, R. & B. Code § 2317; *W. Va.* 1872, II, 6; *Wis.* 1848, I, 10; *Wyo.* 1889, I, 26.

§ 2040. [1] The following seem to be the earliest cases: 1693, R. *v.* Fanshaw, Skinn. 327 ("There being but the oath of the prosecutor, and so oath against oath, the defendant was acquitted"); 1714, Parker, C. J., in R. *v.* Muscot, 10 Mod. 192): "There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent, and therefore a credible and probable witness shall turn the scale in favor of either party. But in the former, presumption is ever to be made in favor of innocence, and the oath of the party will have a regard paid to it until disproved. Therefore, to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant; for else there is only oath against oath"; this was said in charging a jury, and no precedent was cited); 1736, R. *v.* Nunez, Lee cas. t. Hardw. 265 (Lord Hardwicke, C. J. ["One witness is not sufficient] unless there were very strong circumstances; because one man's oath is as good as another's"); 1745, R. *v.* Broughton, 2 Str. 1229.

was not taken, either before or after, for any other kind of common-law trials? The causes that answer this question are scarcely to be mistaken, and they were two; one may be called a mechanical, the other a moral cause.

(1) The first of these lay in the important circumstance that in 1640, towards the end of Charles the First's reign, the Court of Star Chamber had been abolished [2] and its jurisdiction transferred to the King's Bench. Now the proceedings of the Star Chamber Court, being presided over by the Lord Chancellor, had always been conducted according to the ecclesiastical or civil law, by following or adopting its methods, much as did the Court of Chancery; and, in particular, the ecclesiastical rule of two witnesses obtained therein.[3] Furthermore, the crime of perjury, though also cognizable as a statutory crime in the ordinary criminal courts, was practically dealt with almost exclusively in the Star Chamber.[4] Hence, on the one hand, there was little or no occasion for any question to arise before 1640 as to proof of perjury in a common-law court; while, on the other hand, after the transfer of jurisdiction at that date, the canon-law notions of proof peculiar to perjury were likely to pass over and be adopted as a whole in the subsequent common-law practice. There was, therefore, by this change of mechanism, a tradition prepared, by the middle of the 1600s, for an exceptional doctrine to be established for proof of perjury; and by the end of the 1600s (as exhibited in the cases above cited) such a doctrine was making its appearance.

(2) But why did not the corrective consideration, already noted (*ante*, § 2032) which applied to prevent such a numerical rule in other common-law trials, apply here also, namely, the consideration that the jurors were themselves twelve witnesses, as being capable of and entitled to contribute information of their own? In the first place, the living strength of this consideration had by the beginning of the 1700s substantially disappeared,[5] and in this must probably be sought the real explanation why the perjury rule was able to obtain a firm footing. In other words, the quantitative notion of an oath was still popular enough, while the corrective notion — that of the jury as witnesses — had practically disappeared, and thus the way was open. Furthermore, a charge of perjury was the one case where a plausible inducement for such a rule was presented; because in all other criminal cases the accused could not testify, and thus one oath for the prosecution was in any case something as against nothing; but on a charge of perjury the accused's oath was always in effect in evidence, and thus, if but one witness was offered,

[2] St. 16 Car. I, c. 10.

[3] *Ante* 1635, Hudson, Treatise of the Star Chamber, 223, in Hargrave's Collectanea Juridica, vol. II ("they always require indifferent witnesses' clear proof, not by relation, and double testimony, or that which amounteth to double testimony").

[4] 1596, Damport *v.* Sympson, Cro. El. 520 ("Until the statute of 3 H.VII, c. 1, which gives power to examine and punish perjuries in the Star Chamber, there was not any punishment for any false oath of any witness at the common law"); 1883, Sir J. Stephen, History of the Criminal Law, III, 245 ("The present law upon the subject . . . originated entirely, as far as I can judge, in decisions by the Court of Star Chamber"); 1903, Leadam's Select Cases in the Star Chamber, Seld. Soc. Pub., vol. XVI, p. cxxxv, p. 102, note 17. Hudson, *ubi supra*, p. 71, says that perjury was "usually punished" there.

[5] *Ante*, § 1800; Thayer, Preliminary Treatise, 174.

there would be merely (as Chief Justice Parker said) oath against oath. Thus, in a perjury case, the quantitative theory of testimony would present itself with the greatest force. Such seems to be the course of thought which made possible the tardy introduction of this rule.

It found a permanent place, however, in the common law; for, in spite of a perception of its incongruity with modern ideas, and of an occasional hesitation, the rule, persisting through the 1700s, was fully confirmed in England in the 1800s.[6]

§ 2041. **Same**: (*b*) **Policy of the Rule.** The rule is in its nature now incongruous in our system. The quantitative theory of testimony, if consistently applied, should enforce a similar rule for every criminal charge, now that the accused is competent to testify. "Oath against oath," as a reason for the rule, is quite indefensible.[1]

But there may be reasons of policy, founded on experience (*ante*, § 2033, par. 2) sufficient to justify its maintenance:

1849, Mr. *W. M. Best*, Evidence, §§ 605–606: "The reason usually assigned in our books for requiring two witnesses in perjury — viz., that the evidence of the accused having been given on oath, when nothing beyond the testimony of a single witness is produced to falsify it, there is nothing but oath against oath — is by no means satisfactory. All oaths are not of equal value; for the credibility of the statement of a witness depends quite as much on his deportment when giving it, and the probability of his story, as on the fact of it being deposed to on oath; and, as is justly remarked by Sir W. D. Evans, the motives for falsehood in the original testimony or deposition may be much stronger with reference to the event on the one side than the motives for a false accusation of perjury on the other. . . . The foundations of this rule, we apprehend, lie much deeper. The legislator dealing with the offence of perjury has to determine the relative weight of conflicting duties. Measured merely by its religious or moral enormity, perjury, always a grievous, would in many cases be the greatest of crimes, and as such be deserving of the severest punishment which the law could inflict. But when we consider the very peculiar nature of this offence, and that every person who appears as a witness in a court of justice is liable to be accused of it by those against whom his evidence tells, who are frequently the basest and most unprincipled of mankind; and when we remember how powerless are the best rules of municipal law without the coöperation of society to enforce them,— we shall see that the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges of having borne false testimony, is far paramount to that of giving even perjury its deserts. To repress that crime, prevention is better than cure; and the law of England relies, for this purpose, on the means provided for detecting and exposing the crime at the moment of commission, — such as publicity, cross-examination, the aid of a jury, etc.; and on the infliction of a severe, though not excessive punishment,

[6] 1831, R. *v.* Mudie, 1 Moo. & Rob. 128 (perjury in swearing to an insolvent schedule by omitting certain debtors; the debtors testified each to the existence of his own debt; Lord Tenterden thought it "difficult to give any other evidence," and said that on conviction a new trial might be moved; but there was an acquittal); 1839, R. *v.* Gardiner, 8 C. & P. 737 (rule applied); 1840, R. *v.* Virrier, 12 A. & E. 317, 324 (rule applied); 1842, R. *v.* Parker, Car. & M. 639, 646, Tindal, C. J. (similar to R. *v.* Mudie; rule applied); 1913, Gaskell's Case, 8 Cr. App. 103 (rule applied).

§ 2041. [1] The rule was forcefully opposed in the following debate: 1828, Feb. 29, Mr. G. Lamb, Speech on the Courts of Common Law, Hans. Parl. Deb., 2d ser., XVIII, 867 ("The difficulty of convicting in cases of perjury is one of the great blots in the law, both civil and criminal," etc.). Mr. Wm. A. Purrington has pungently commented on "The Frequency of Perjury" (Columbia Law Review, VIII, 67; 1908).

wherever the commission of the crime has been clearly proved. But in order to carry out the great objects above mentioned, our law gives witnesses the privilege of refusing to answer questions which tend to criminate, or to expose them to penalty or forfeiture; it allows no action to be brought against a witness, for words written or spoken in the course of his evidence; and it throws every fence round a person accused of perjury. Besides, great precision is required in the indictment; the strictest proof is exacted of what the accused swore; and, lastly, the testimony of at least two witnesses must be forthcoming to prove its falsity. The result accordingly is that in England little difficulty, comparatively speaking, is found in obtaining voluntary evidence for the purposes of justice; and although many persons may escape the punishment awarded by law to perjury, instances of erroneous convictions for it are unknown, and the threat of an indictment for perjury is treated by honest and upright witnesses as a 'brutum fulmen.'"

This result, if tested by the canon already laid down for the rule in treason (*ante*, § 2037), may be correct; though in the end all depends upon local experience. If there is a relatively greater likelihood of false accusation of perjury (on the part of defeated litigants seeking to revenge themselves), and if there is, relatively to the interests of litigants in general, less harm in the escape of a guilty perjurer than in that of other criminals, then the rule justifies its existence.

In modern times cogent reasons have been given for believing that the rule has outlived its usefulness:

1921, HALLAM, J., in *State* v. *Storey*, 148 Minn. 398, 182 N. W. 613: "The question is a new one in this State, and we are at liberty to choose the rule which appeals to us as being most consonant with reason. Notwithstanding the high authority above cited, we are of the opinion that the rule laid down is out of harmony with our system of jurisprudence. In our opinion it is one of the rules of the common law inapplicable to our situation and 'inconsistent with our circumstances,' and hence not to be followed. We find ourselves unable to approve the doctrine that perjury is a more heinous crime than murder, or that one charged with perjury should have greater immunity than one charged with murder. Suppose, for example, the only eyewitness to a murder should testify that the accused is not the man who committed the crime, and yet the circumstantial evidence of guilt is so strong that the jury convicts of first degree murder. With what consistency can it be said that a quality of testimony which will justify a court in condemning a defendant to life imprisonment, or, in some jurisdictions, to be hanged, is insufficient to sustain a conviction of the falsifier of the crime of perjury for which he may suffer a penalty of a short term of imprisonment? The lightness with which (we are pained to say) the oath of a witness is too often treated, does not warrant us in making conviction of the crime of perjury most difficult of all crimes of which State courts have jurisdiction. We hold that perjury may be proved by circumstantial evidence if proof is made beyond reasonable doubt, as in the case of other crimes."

§ 2042. **Same: (c) A Single Witness, if Corroborated, Suffices.** A feature of the rule is now to be noticed which vitally distinguishes this and most of the following rules from the treason-rule, namely, the feature that a *single witness suffices if corroborated.* The other and corroborating evidence will of course usually be furnished in some shape through another witness, and thus there come to be two witnesses. But the corroborating evidence might conceivably come without another witness, for example, through the inspec-

tion of the accused's person (*ante*, § 1150). But the corroboration is asked merely to confirm the single witness' testimony and to induce the belief of it; so that when the corroboration has been furnished and the witness is believed, the verdict ultimately is founded upon the single witness' assertion. Or, put in another way, the treason rule requires two witnesses to the same fact; the perjury rule requires only one witness to the fact, and merely provides a means of reaching a belief in his testimony. This rule, then, while requiring a specific quantity of evidence, does not rest exclusively on the antiquated numerical or quantitative conception of testimony. It proceeds in part on the modern rational theory that an oath-assertion varies infinitely in its quality and significance, and that a single person's assertion, if made under specified conditions of credibility, may suffice to produce complete persuasion.

(1) This aspect of the rule — as requiring merely a *single witness*, if duly corroborated — has been fully recognized in modern times. It is said [1] that Lord Tenterden maintained two witnesses to the same fact to be necessary, and such an understanding perhaps prevailed with other judges at one time.[2] But it has been since repudiated in England;[3] and it is now everywhere conceded in this country that a single witness, somehow corroborated, suffices.[4]

(2) As to the *nature of the corroboration*, no detailed rule seems to have

§ 2042. [1] 1836, Coleridge, J., in R. *v.* Champney, 2 Lew. Cr. C. 258; 1854, Lord Broughan, in Jordan *v.* Money, 5 H. L. C. 185, 232.

[2] 1827, State *v.* Howard, 4 McC. 159 (no authority cited).

[3] 1854, Lord Broughan, *ubi supra;* 1859, R. *v.* Braithwaite, 8 Cox Cr. 254, 444, 1 F. & F. 638, 640 ("that rule is now exploded"); 1860, R. *v.* Towey, 8 Cox Cr. 328; St. 1911, 1 & 2 Geo. V, c. 6, § 13 (no person to be convicted of perjury, or subornation thereof, "solely upon the evidence of one witness as to the falsity of any statement alleged to be false").

Can. R. S. 1906, c. 146, Crim. C. § 1002 (like the treason rule, quoted *ante*, § 2036).

[4] Besides the following statutes and cases, the cases cited *post* assume the same principle: *Ariz.* Rev. St. 1913, P. C. § 1043 (perjury must be proved by "two witnesses, or one witness and corroborating circumstances"); *Cal.* C. C. P. 1872, § 1968 (perjury and treason must be proved "by more than one witness; treason, by the testimony of two witnesses to the same overt act; and perjury, by the testimony of two witnesses, or one witness and corroborating circumstances"); St. 1903, c. 532 (adds a new P. C. § 1103*a*, like the last clause of C. C. P. 1872, § 1968, *supra*); *Ga.* Rev. C. 1910, § 5742 (two witnesses, or one and corroborating circumstances); *Ida.* Comp. St. 1919, § 7972 (like Cal. C. C. P. § 1968); *Ill.* 1885, Mackin *v.* People, 115 Ill. 312, 329, 3 N. E. 222; *Mo.* 1892, State *v.* Blize, 111 Mo. 464, 469, 20 S. W. 210; *Mont.* Rev. C. 1921, § 10608 (like Cal. C. C. P. § 1968); *N. M.* 1898, Terr. *v.* Williams, 9 N. M. 400, 54 Pac. 232; *Or.* Laws 1920, § 801 (like Cal. C. C. P. § 1968); *Tex.* Rev. C. Cr. P. 1911, § 806 (no conviction "except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence as to the falsity of the defendant's statement under oath, or upon his own confession in open court"); 1893, Meeks *v.* State, 32 Tex. Cr. 420, 422, 24 S. W. 98; 1906, Cleveland *v.* State, 50 Tex. Cr. 6, 95 S. W. 521 (the witness must be a "credible" one); 1922, Wooten *v.* State, — Tex. Cr. —, 237 S. W. 920 (an accomplice is not a credible witness); *Utah:* Comp. L. 1917, § 8848 ("Perjury must be proved by the testimony of two witnesses, or one witness and corroborating circumstances").

Not decided: 1921, State *v.* Storey, 148 Minn. 398, 182 N. W. 613 ("whether the direct testimony of one witness without more will sustain conviction," not decided).

For the nature of *corroboration in general*, 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), § 367.

been laid down, nor ought to be laid down.[5] The jury should be instructed not to convict unless the testimony of the principal witness has been so corroborated that they believe it to be true beyond a reasonable doubt.

(3) The rule of course applies only to the proof of the *fact alleged as falsely sworn*, and therefore a corroboration as to the act of swearing and the words

[5] ENGLAND: 1834, R. *v.* Mayhew, 6 C. & P. 315 ("even a letter [not on oath] . . . would be sufficient to make it unnecessary to have a second witness"); 1841, R. *v.* Yates, Car. & M. 132, 139 ("evidence confirmatory of that one witness in some slight particulars only," not sufficient); 1842, R. *v.* Parker, Car. & M. 639, 646 (there must be "some documentary evidence or some admission or some circumstances to supply the place of a second witness"); 1852, R. *v.* Boulter, 2 Den. Cr. C. 3966, 5 Cox Cr. 543, 16 Jur. 135 (no general rule laid down; "there must be something in the case to induce the jury to believe one rather than the other"; here, entries made at the time by the single witness, held insufficient; "it is corroborating him by himself"); 1859, R. *v.* Webster, 1 F. & F. 515 (memorandum made at the time by the single witness, held sufficient); 1859, R. *v.* Braithwaite, 1 F. & F. 638, 8 Cox Cr. 254, 444 (no corroboration, on the facts); 1860, R. *v.* Towey, 8 Cox Cr. 328 (oral admissions, held sufficient corroboration); 1865, R. *v.* Shaw, 10 Cox Cr. 66, 72 (Erle, C. J.: "What degree of corroborative evidence is requisite must be a matter for the opinion of the tribunal that tries the case, which must see that it deserves the title of corroborative evidence; any attempt to define the degree of corroborative evidence necessary would be illusory").

CANADA: 1914, R. *v.* Nash, 17 D. L. R. 725, Alta. (perjury; corroboration found, under Cr. C. § 1002; Stuart, J., diss.).

UNITED STATES: *Federal:* 1912, Allen *v.* U. S., C. C. A., 194 Fed. 664 (an instruction requiring two witnesses or one witness with corroborative circumstances, held erroneously refused; nature of corroboration discussed); *California:* 1900, People *v.* Rodley, 131 Cal. 240, 63 Pac. 351 (instructions held correct); 1903, People *v.* Parent, 139 Cal. 600, 73 Pac. 423 (statute applied); 1906, People *v.* Chadwick, 4 Cal. App. 63, 87 Pac. 384 (instruction construed); *Delaware:* 1902, State *v.* Fahey, 3 Del. 594, 54 Atl. 690 (rule applied); *Columbia (Dist.):* 1905, Cook *v.* U. S., 26 D. C. App. 427; *Florida:* 1922, Ward *v.* State, — Fla. —, 91 So. 189 (corroboration found); *Georgia:* 1876, Ransone *v.* Christian, 56 Ga. 351, 356 (need not amount to the testimony of a second witness); *Illinois:* 1902, Hereford *v.* People, 197 Ill. 222, 64 N. E. 310 (rule applied); *Indiana:* 1866, Hendricks *v.* State, 25 Ind. 493 (need not be "equivalent to the positive testimony of one witness"); 1916, Hann *v.* State, 185 Ind. 56, 119 N. E. 304; *Iowa:* 1866, State *v.* Raymond, 20 Ia. 582, 587 ("it must be at least strongly corroborative" and "must be by independent circumstances"); *Kentucky:* 1902, Williams *v.* Com., 13 Ky. 652, 68 S. W. 871 (rule applied); 1892, Com. *v.* Davies, 92 Ky. 460, 18 S. W. 10 (rule applied); 1905, Goslin *v.* Com., 121 Ky. 698, 90 S. W. 223 (rule applied); 1907, Stamper *v.* Com., — Ky. —, 100 S. W. 286 (rule applied); 1913, Partin *v.* Com., 154 Ky. 701, 159 S. W. 542 (form of instruction declared); *Massachusetts:* 1848, Com. *v.* Parker, 2 Cush. 212, 223 (there must "be established, by independent evidence, strong corroborating circumstances, of such a character as clearly to turn the scale"); *Mississippi:* 1901, Whittle *v.* State, 79 Miss. 327, 30 So. 722 (rule applied); *Missouri:* 1874, State *v.* Heed, 57 Mo. 252, 254 (it must be "at least strongly corroborative"); 1903, State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116 (rule applied); 1904, State *v.* Hunter, 181 Mo. 316, 80 S. W. 955 (State *v.* Heed followed); *New York:* 1826, Woodbeck *v.* Keller, 6 Cow. 119, 121 (it need not be "tantamount to another witness," but it must be "strongly corroborative" of the single witness); 1921, People *v.* Henry, Sup. App. Div. 187 N. Y. Suppl. 673; *North Carolina:* 1827, State *v.* Molier, 1 Dev. L. 263, 265 ("some other independent evidence is necessary"); *Ohio:* 1859, Crusen *v.* State, 10 Oh. St. 258, 269 (need not be "of sufficient force to equal the positive testimony of another witness"); *Porto Rico:* 1906, U. S. *v.* Lozano, 7 P. I. 142 (one witness not sufficient); *Pennsylvania:* 1879, Williams *v.* Com., 91 Pa. 493, 501 (if "any material circumstances be proved" in confirmation, it suffices); *South Carolina:* 1819, State *v.* Hayward, 1 Nott & McC. 546, 548 ("some other independent evidence" is necessary); *South Dakota:* 1907, State *v.* Pratt, 21 S. D. 305, 112 N. W. 152 (citing cases); *Texas:* 1875, State *v.* Buie, 43 Tex. 532, 535 (corroboration, under the Code, must be of the material facts); *Washington:* 1905, State *v.* Rutledge, 37 Wash. 523, 79 Pac. 1123 (the corroboration need not be "of equal weight" to another witness).

It has very sensibly been held that if the *defendant himself* takes the stand, his manner as a witness may sufficiently supply the corroboration, of which the jury alone judges; so that here the rule virtually falls away: 1884, State *v.* Miller, 24 W. Va. 802, 807.

sworn is not called for.[6] Moreover, the corroboration is required for the perjured fact as a whole, and not to every detail or constituent part of it.[7] But as to each separate assignment of fact in the indictment (whether or not in the same count) the rule applies independently.[8]

(4) The rule has usually been held to apply even in *civil causes* where the proof of perjury becomes necessary.[9]

(5) The rule should not apply necessarily to a charge of *subornation of perjury*, because the act of subornation does not involve the theory of oath against oath, and the perjury may be evidenced by the perjured witness himself, whose present testimony is thus not opposed to the testimony for the prosecution.[10]

(6) In at least one State, the rule has been in effect repudiated, by holding that *circumstantial evidence suffices, i. e.* that not even one witness is needed to the main fact of falsity, that this main fact's falsity may be sufficiently evidenced by inference from circumstances, and that no one of these circumstances need be evidenced by any particular number of witnesses.[11]

[6] *Accord:* 1887, U. S. *v.* Thompson, 31 Fed. 331, C. C. (subornation of perjury; the perjurer's testimony need not be corroborated); 1906, Boren *v.* U. S., 144 Fed. 801, C. C. A., *semble* (subornation of perjury; the rule does not apply); 1903, Stone *v.* State 118 Ga. 705, 45 S. E. 630 (the perjurer testifying to the fact of subornation, on a charge of subornation, need not be corroborated, but the rule of corroboration applies to the perjury itself); 1864, State *v.* Wood, 17 Ia. 18; 1847, Com. *v.* Pollard, 12 Metc. Mass. 225, 227; 1901, State *v.* Renswick, 85 Minn. 19, 88 N. W. 22 (subornation; the corroboration of the actual perjury need not extend to the fact of the defendant's inducement); 1819, State *v.* Hayward, 1 Nott & McC. S. C. 546, 548.

Contra: 1869, People *v.* Evans, 40 N. Y. 1 (subornation of perjury; the testimony of the perjurer, testifying to both perjury and subornation, required to be corroborated; the opinion proceeds upon the rule as to accomplices, *post*, § 2056); 1827, State *v.* Howard, 4 McC. S. C. 159 (to prove "the facts sworn to").

[7] *Eng.* 1848, Patteson, J., in R. *v.* Roberts, 2 C. & K. 607, 614 ("There need not be two witnesses to prove every fact necessary to make out an assignment of perjury. If the false swearing be that two persons were together at a certain time, and the assignment of perjury that they were not together at that time, evidence by one witness that at the time named the one was at London, and by another witness that the other was at York, would be sufficient proof"); *Can.* 1913, R. *v.* Curry, N. Sc., 12 D. L. R. 13; *U. S.* 1916, Goins *v.* Com., 167 Ky. 603, 181 S. W. 184 (if the false oath involves two facts, one witness to each suffices; "they corroborate each other in the fact that the accused swore falsely"); 1922, State *v.* Cerfoglio, — Nev. —, 205 Pac. 791 (perjury as to sale of liquor; careful opinion by Coleman, J.); 1902, State *v.* Courtright, 66 Oh. 35, 63 N. E. 590 (the subject of the corroborated witness' testimony must be the main fact forming the subject of the perjury).

[8] *Can.* 1916, R. *v.* Peterson, 31 D. & L. R. 295, Alta. (perjury; corroboration required "for each separate assignment of fact in the indictment"; citing the above text with approval); *U. S.* 1921, Pressley *v.* State, — Ala. App. —, 88 So. 291; 1890, Marvin *v.* State, 53 Ark. 395, 398, 14 S. W. 87; 1920, Yarbrough *v.* State, 79 Fla. 256, 83 So. 873 (larceny; falsity of defendant's oath to non-possession; rule applied); 1879, Williams *v.* Com., 91 Pa. 493, 501.

[9] 1849, Spruil *v.* Cooper, 16 Ala. 791 (slander for charging with perjury): 1851, Laughran *v.* Kelly, 8 Cush. Mass. 199, 202 (action on the case for garnishee's false statement under oath); 1826, Woodbeck *v.* Keller, 6 Cow. N. Y. 119 (slander for charging with perjury); 1828, Coulter *v.* Stewart, 2 Yerg. Tenn. 225 (slander by charging perjury). *Contra:* 1876, Rice *v.* Coolidge, 121 Mass. 393, 397 (action for subornation of perjury; the perjury rule is "applicable only to criminal proceedings"; Laughran *v.* Kelly not cited).

[10] Cases cited *supra*, n. 6, and *post*, § 2060, n. 1 (rule for accomplices); 1913, State *v.* Richardson, 248 Mo. 563, 154 S. W. 735 (subornation; the rule is here not applicable to proof of the perjury; cases collected).

[11] 1921, State *v.* Storey, 148 Minn. 398, 182 N. W. 613 (quoted *ante*, § 2041 in text; here the perjury as to the identity of the person selling liquor was held sufficiently evidenced circumstantially).

§ 2043. **Same: (*d*) Exception for Self-Contradictory Oaths.** Suppose that the accused has sworn contraries on two different occasions; does the rule still require a corroborated witness, when as against the oath charged in the indictment is produced the other oath to the contrary?

Perhaps the two contraries are reconcilable, or perhaps the accused's knowledge of the falsity on the one occasion does not of itself appear from the contrary oath. But it is not a question whether additional corroborative evidence *may* be needed. The question is whether it is invariably needed, as a rule, even when the nature of the fact sworn to makes it perfectly clear that the falsity must have been stated knowingly. Furthermore, the difficulty of framing an indictment (arising from the uncertainty whether the one or the other assertion should be alleged false) has nothing to do with the rule of evidence; for it may be impossible to allege which of the two is false, while it may still be an incontrovertible fact that the accused has in either the one or the other assertion spoken with knowing falsity. Is it then not proper, without more, to allow the jury, merely by comparing the assertions, to determine that one of them was perjured? The question is practically the same even where the second assertion was not under oath; for the nature of the fact asserted remains the same, and the comparison may equally suffice to convince the jury.

It seems clear that the rule here suffers an exception, and that by mere comparison the jury may determine the falsity. The purpose of the rule is to protect the accused from the false testimony of a single witness swearing against him; here no attempt is made to condemn him upon the credit of another person; the rule's protection is not needed; and the rule should fall with its reason:

1840, WAYNE, J., in *U. S.* v. *Wood*, 14 Pet. 430, 437, 440: "If it be true, then (and it is so) that the rule of a single witness being insufficient to prove perjury rests upon the law of a presumptive equality of credit between persons, or upon what Starkie terms the apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against that of another, [it follows that we may] satisfy the equal claim to belief, or remove the apprehension, by concurring written proofs which existed and are proved to have been in the knowledge of the person charged with the perjury when it was committed, especially if the written proofs came from himself and are facts which he must have known because they were his own acts, — and the reason for the rule ceases. . . . In what cases, then, will the rule not apply? or, in what cases may a living witness to the 'corpus delicti' of a defendant be dispensed with and documentary or written testimony be relied upon to convict? We answer, to all such where a person is charged with a perjury directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent; in cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath, the oath only being proved to have been taken; in cases where a party is charged with taking an oath contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters relating to the fact sworn to, or by other written testimony existing and being found in the possession of a defendant and which has been treated by him as containing the evidence of the fact recited in it." [1]

§ 2043. [1] So also a good statement in the Reporters' note to 5 B. & Ald. 939 (1822).

This conclusion has been usually accepted, and may be regarded as the orthodox one, presumably for the case of a contradictory *statement not under oath*,[2] and certainly for that of a contradictory *oath*.[3]

§ 2044. **Sundry Crimes, under Statutes.** In a few jurisdictions, a requirement of number has been introduced by statute for certain additional crimes.[1]

[2] 1840, U. S. *v.* Wood, 14 Pet. 430, 437, 441 (false oath to cost of imported goods; the invoice-book and letters of the defendant, held sufficient to prove the perjury; Thompson, J., diss.; quoted *supra*). *Contra*: 1904, State *v.* Hunter, 181 Mo. 316, 80 S. W. 955; 1854, Dodge *v.* State, 24 N. J. L. 455, 461 *semble* (cited *infra*); 1889, State *v.* Buckley, 18 Or. 228, 22 Pac. 838; 1917, Paytes *v.* State, 137 Tenn. 129, 191 S. W. 975.

[3] *Accord: Eng.* 1764, Anon., cited 5 B. & Ald. 931, 939 (per Lord Mansfield, C. J., Wilmot, Aston, and Yates, JJ.); 1774, R. *v.* Dane, cited ib. 939, *semble* (per Chambre, J.); 1822, R. *v.* Knill, cited ib. 929 ("the jury might infer the motive from the circumstances"); 1822, R. *v.* Harris, ib. 926, 932 (counsel for defendant conceded that the contradiction of oaths "might have been sufficient alone for the jury to have convicted the defendant of perjury"); 1823, R. *v.* Jackson, 1 Lew. Cr. C. 270, *semble* (if the jury believe one of the oaths false); *Can.* 1921, R. *v.* Brewer, 60 D. L. R. 558, Alta. *semble* (if the jury believe that the oath charged is false); *U. S. Fed.* 1840, U. S. *v.* Wood, 14 Pet. 430, 437 (quoted *supra*); *Cal.* P. C. 1872, § 118*a* (perjury in false affidavit of intended testimony; the affiant's subsequent testimony "contrary to any of the matters in such affidavit" to be 'prima facie' evidence of falsity).

Contra: Eng. 1838, R. *v.* Wheatland, 8 C. & P. 238, Gurney, B. (contradiction of oaths, alone not sufficient, and confirmatory evidence required; but here the difficulty turned on the indictment); 1839, R. *v.* Gaynor, 1 Cr. & D. 142, 147 (Ireland; Torrens, J., thought this sufficient; but the judges afterwards unanimously decided to the contrary); 1844, R. *v.* Hughes, 1 C. & K. 519, 527, per Tindal, C. J. (merely to "prove the two contradictory statements and leave it there" is not enough); *U. S.* 1916, People *v.* McClintic, 193 Mich. 589, 160 N. W. 461; 1854, Dodge *v.* State, 24 N. J. L. 455, 461 (such evidence "in connection with the testimony of one other witness" suffices); 1920, People *v.* Glass, Sup. App. Div., 181 N. Y. Suppl. 547 (perjury charged in a statement on cross-examination contradicting statements on direct examination and before a magistrate; citing neither U. S. *v.* Wood nor any of the above cases in accord with it); 1906, Billingsley *v.* State, 49 Tex. Cr. 620, 95 S. W. 520 (there must be other evidence than the contradictory oath); 1876, Schwartz *v.* Com., 27 Gratt. Va. 1025 (leading opinion, by Staples, J.).

The following peculiar case also is sound: 1902, People *v.* Doody, 172 N. Y. 165, 64 N. E. 807 (perjury in falsely testifying that he did not remember certain criminal acts; no direct testimony from witnesses as to the accused's memory being possible, the rule was held not applicable, and proof by comparison with his repeated prior testimony asserting and admitting the acts was held sufficient).

Compare Pigott's perjury in the Parnell case (quoted *ante*, § 1260).

A New York statute of 1906 (c. 324, amending Penal Code, § 101*a*), Consol. L. 1909, Penal, § 1627, seems to touch this point (in perjury, the falsity shall be presumptively established by proof of the defendant's contrary testimony under oath "in any other written testimony, declaration, deposition, certificate, affidavit, or other writing by him subscribed").

§ 2044. [1] ENGLAND: 1885, St. 48 & 49 Vict. c. 69, § 2 (procuring for prostitution or seduction; no conviction to be had on the evidence "of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused"); § 3 (so also for procuring defilement by fraud, etc.).

CANADA: *Dom.* R. S. 1906, c. 146, Crim. C. § 1002 (the treason rule, quoted *ante*, § 2036, applied to forgery, fraudulent marriage, seduction, and kindred offences specified); *Alta.* 1916, R. *v.* Peterson, 31 D. L. R. 295 (forgery; corroboration held to be lacking); *Man.* 1915, R. *v.* Rabinovitch, 21 D. L. R. 600, (secret commissions; the accomplice's evidence held corroborated); *Ont.* 1906, R. *v.* Daun, 12 Ont. L. R. 227, 231 (rule of Dom. Crim. Code, § 684, *supra*, applied, in a charge of seduction); *Sask.* 1914, R. *v.* Scheller, 16 D. L. R. 462 (forgery; Can. Cr. C. § 1002 applied).

UNITED STATES: *Arizona:* Rev. St. 1913, P. C. § 1050 (false pretences; if the pretence is not in writing by defendant, it must be proved "by the testimony of two witnesses, or that of one witness and corroborating circumstances," except on a charge of marrying or obtaining money or property by personation);

California: P. C. 1872, § 1110 (certain kinds of cheating by false pretences; if the alleged pretence was merely "in language unaccompanied by a false token or writing" then there must be either a written memorandum signed by defendant, or two witnesses, or "one witness and corroborating circumstances"); St. 1905, c. 532 (amends P. C. 1872, § 1110, as to the crimes covered);

These crimes include *sexual offences* (as in England and Canada), *forgery* and *false pretences* (as in Canada and Idaho), *capital offences* in general (in Connecticut), and miscellaneous offences. Each measure has doubtless a special local history and reason.

The propriety of such rules will depend somewhat on local conditions, and may perhaps be adequately tested by the canon already stated (*ante*, § 2037). Most of these statutes have probably been based upon some single local instance of hardship, and not upon any general survey of experience in the class of crimes dealt with. They may contain suggestions worth considering,

Connecticut: Gen. St. 1918, § 6633 (no person is to be convicted of any capital crime "without the testimony of at least two witnesses, or that which is equivalent thereto"); 1881, State *v.* Smith, 49 Conn. 376, 384 (the two witnesses are not required for every important fact; what is the "equivalent" of the witnesses is entirely for the jury); 1905, State *v.* Marx, 78 Conn. 18, 60 Atl. 690 (the trial Court need not define the meaning of "equivalent thereto," under the above statute); 1905, State *v.* Kelly, 77 Conn. 266, 58 Atl. 705; 1905, State *v.* Bailey, 79 Conn. 589, 65 Atl. 951; 1908, State *v.* Washelesky, 81 Conn. 22, 70 Atl. 63 (State *v.* Smith followed); 1914, State *v.* Wakefield, 88 Conn. 164, 90 Atl. 230 (rule adhered to);

Idaho: Comp. St. 1919, § 8956 (false pretences; unless there be a writing in defendant's hand, there can be no conviction "unless the pretence be proven by the testimony of two witnesses, or that of one witness, and corroborating circumstances"; not applicable to personation to obtain marriage or receive money or property);

Indiana: Burns' Ann. St. 1914, § 2114 ("Three witnesses at least shall be required to prove the fact of genuineness" of a note, bill, etc., or "other instrument of writing, except in case of larceny"; but "the single evidence of the cashier of the bank purporting to have issued the same" suffices);

Kansas: Gen. St. 1915, § 8137 (persons of skill may testify to the genuineness of a bill or other writing; "but three witnesses at least shall be required to prove the fact, except [that] in case of a larceny thereof the single evidence of the president, cashier, or teller of the bank purporting to have issued the same, or the maker thereof, may be received as sufficient"); 1883, State *v.* Foster, 30 Kan. 365, 367, 2 Pac. 628 (statutory requirement for number applies only when expert witnesses are used; not, as here, to a cashier testifying to a draft of his own bank);

Kentucky: Stats. 1915, § 1594 (no one is to be convicted of offences under the election-law "upon the testimony of a single witness, unless sustained by strong corroborating circumstances"); 1895, Com. *v.* Hart, 98 Ky. 7, 32 S.W. 138 (applying the statute);

Massachusetts: Gen. L. 1920, c. 272, § 11 (enticing for prostitution, fornication, etc.; one witness alone is not sufficient, unless "corroborated in a material particular");

Minnesota: Gen. St. 1913, § 4060 (committal of infant to State training school; charges must be proven "by the testimony of at least two disinterested witnesses");

Montana: Rev. C. 1921, § 11987 (false pretences; like Cal. P. C. § 1110);

Nevada: Rev. L. 1912, § 7179 (like Cal. P. C. § 1110);

New Jersey: 1903, State *v.* Kenilworth, 69 N. J. L. 114, 54 Atl. 244 (construing St. 1888, p. 249, requiring the oath of one or more "credible" witnesses to convict of palmistry);

North Dakota: Comp. L. 1913, § 10842 (like Cal. P. C. § 1110);

Oklahoma: Comp. St. 1921, § 1807 (a threat, not in writing, to publish a libel, and the "character of libellous matter," must be proved "by at least two witnesses, or by one witness and corroborating circumstances"); § 2702 (like Cal. P. C. § 1110);

Porto Rico: Rev. St. & C. 1911, § 6284 (certain kinds of cheating by false pretences; like Cal. P. C. § 1110);

South Carolina: Crim. L. 1922, § 189 (breach of a verbal contract for land-lease is punishable by fine or imprisonment; "the contract herein referred to, if verbal, shall be witnessed by at least two disinterested witnesses"); § 184 (contracts of personal service; "if verbal, they must be witnessed by at least two disinterested witnesses, not related by blood or marriage within the sixth degree to either party"); 1901, State *v.* Easterlin, 61 S.C. 74, 39 S.E. 250 (brother of a party, held disinterested, under the statute);

South Dakota: Rev. C. 1919, § 4883 (like Cal. P. C. § 1110, but this does not apply to the offences of false personation to secure marriage or money or property);

Utah: Comp. L. 1917, § 8991 (like Cal. P. C. § 1110); § 1923 (offences against dairy and food law; to prove identity of sample analysed, the "testimony of said two witnesses as above shall be sufficient," *i.e.* of the sender and the receiver of the sample).

For other statutes requiring corroboration of a specific *kind of witness* (rape-complainant, children, Chinese, etc.), see *post*, §§ 2056–2066.

but on the whole they are likely to be of little service. A capable judiciary, and an effective jury system (both depending upon a conscientious citizenship and a sound condition of politics), are in the end the only real safeguards of an innocent man.

Compare here the similar rules *post*, §§ 2061, 2066, also applicable in criminal cases, but resting upon the *kind of witness*, and not primarily upon the kind of offence; those rules nevertheless are sometimes limited to trials for specific offences.

2. Civil Cases

§ 2045. **Civil Cases: Rules derived from the Ecclesiastical Law.** The rule of the later Roman law, and of its successors, the Continental civil law and the Canon law, required at least two witnesses to prove any fact (*ante*, § 2032). Whatever detailed additional rules of number existed on the Continent, and in the earlier English canon law as administered in the spiritual Courts, the later ecclesiastical law in England seems to have been satisfied in general with the simple rule of two witnesses for all classes of cases.[1] In the final form, as it appears when the rulings of those Courts begin to be published (that is, by the end of the 1700s), the rule is still further attenuated, and requires only one witness with corroborating circumstances.[2] The further definition of the notion of corroboration seems seldom to have been formulated into rules,[3] and was carried out in each case according to the discretion of the judge.

But in the meantime this rule of the ecclesiastical law had been exercising an influence, direct and indirect, upon English law outside of the narrow jurisdiction of the ecclesiastical Courts. In the first place, its methods of procedure and proof had been adopted by the Chancellors, who, being originally ecclesiastics, were trained in the civil and canon law, and made its practice the basis of that of the Court of Chancery.[4] These rules, there enforced, became an integral part of the common law as distinguished from the canon law. In the next place, the jurisdiction of the ecclesiastical Courts was exclusive over some subjects — matrimonial and testamentary — and thus certain rules became associated with certain classes of litigation. Thus, the ecclesiastical rule in some subjects came later to be incorporated into the ordinary (or "common") system of law in one of two ways; namely, either a statute imitated or adopted the ecclesiastical rule, or, when the ecclesiastical Courts were abolished and their jurisdiction transferred to the ordinary Courts,

§ 2045. [1] The authorities have been noted *ante*, § 2032, par. 1.

[2] 1790, Crompton *v.* Butler, 1 Hagg. Cons. 460, 463 (rule applied to an action for defamation; one witness each to separate utterances, held sufficient); 1792, Hutchins *v.* Denziloe, ib. 181, 182 ("the ordinary rule of the ecclesiastical law" requires two witnesses, or one with corroborating circumstances; here applied to a prosecution for quarrelling in church).

[3] 1847, Dr. Lushington, in Simmons *v.* Simmons, 1 Rob. Eccl. 566, 575 ("evidence to mere probability, not applying to the act, cannot be received as corroborative"; treating the fact of A.'s intercourse with M., before A.'s marriage to B., as evidence making probable his adulterous intercourse with her after marriage, but not as corroboration to the act itself).

[4] Langdell, Summary of Equity Pleading, § 46.

their rule of proof was followed as well as their rules of substantive law. Of the former mode — statutory adoption — at least one instance (that of nuncupative wills) occurred during the existence of the ecclesiastical Courts; but the remainder were created by the very statutes transferring the ecclesiastical jurisdiction, for it was natural in one and the same enactment to deal with both the jurisdiction and the rules of law to be transferred. Of the latter mode — judicial adoption of precedent — it would seem that there ought to have been no instances at all; because the legislative transfer of jurisdiction, with a confirmation of established substantive rules, would still leave a common-law Court free (in the absence of express legislation) to follow in its newly acquired matters of jurisdiction all its traditional rules of proof, in particular the rule requiring no more than one witness. This was indeed the result wherever the question was expressly forced upon the attention of those Courts.[5] Yet in one or two subjects — for example, the rule about a respondent's confession in divorce (*post*, § 2067) — there was a general assumption that the rule of evidence came over with the jurisdiction and the rules of substantive law.

Thus, in several instances (now to be examined), a rule of number originating in the ecclesiastical Court and not indigenous to the common law, has become a part of our law, either by filtration through the Court of chancery or the Court of probate, or by express statutory confirmation or imitation. On the other hand, it remains true that except in these ways no rule of number pure and simple — *i. e.* no rule declaring insufficient a single witness, irrespective of kind — has found a footing in the common law for civil cases.

§ 2046. **Same: Divorce Cause denied.** The ecclesiastical rule (*post*, § 2067) requiring corroboration for the *confession* of a divorce-*respondent*, applied solely to the confessing testimony of the respondent, and had no application to that of the complainant, nor to the number of witnesses produced by the complainant. Nevertheless, the general rule of the ecclesiastical Courts, that *one witness alone* was *insufficient* for any claim, was equally applicable to a *petition for divorce*, and was so construed.[1] The two rules, it will thus be perceived, were entirely independent of each other, — the present rule for the complainant resting on the general principle of canon law everywhere accepted, and the other rule, for confessions (*post*, § 2067), having its origin in local English ecclesiastical law. The former, therefore, would disappear entirely, in the common-law Courts, with the entire ecclesiastical

[5] Robinson *v.* Robinson, 1 Sw. & Tr. 362, *post*, § 2067 (divorce confession); Gould *v.* Safford, 39 Vt. 498, *post*, § 2050 (nuncupative will).

§ 2046. [1] These cases deal with adultery only; but the rule seems to have applied to all causes for divorce: *Eng.* 1795, Donellan *v.* Donellan, 2 Hagg. Eccl. (Suppl.) 144; 1832, Kenrick *v.* Kenrick, 4 Hagg. Cons. 114, 136; 1844, Evans *v.* Evans, 1 Rob. Eccl. 165, 175 (one witness alone is insufficient, as general principle of canon law); 1847, Simmons *v.* Simmons, ib. 566, 569, 577.

In *Porto Rico* the canon-law rule appears to be in force: 1903, Ortiz *v.* Rodriguez, 4 P. R. 51 (two witnesses held "to constitute sufficient evidence," on objection that "one single witness testifying to his own knowledge of the fact is not enough"); 1903, Fortuno *v.* Ferreras, 4 P. R. 214 (the two witnesses here held not "sufficiently explicit and circumstantial"); 1904, Loaiza *v.* Caballero, 6 P. R. 117 (two witnesses sufficient).

principle (*ante*, § 2045) about numbers of witnesses. The latter would also, it is true, disappear as a matter of precedent; but a special policy (*post*, § 2068) sufficed to preserve it.

Accordingly, it seems clear that, so far as the testimony for the complainant in divorce is concerned, no common-law principle requires that a second witness or corroborating circumstances be brought, either to support *ordinary* testimony or to support the *complainant's* own testimony.[2]

One or two Courts, however, have judicially introduced a rule, not prescribing (like the ecclesiastical rule) that any one witness is insufficient, but merely that the testimony of the *complainant* alone,[3] or of a *particeps criminis* alone,[4] without corroboration, is insufficient; and in several other jurisdictions a similar provision has been made by statute.[5]

Other statutes provide generally that the testimony of "*the parties*" alone

[2] *Can.* 1921, Cesale *v.* Cesale, 57 D. L. R. 614, N. Sc. (divorce for adultery; petitioner's testimony may suffice without corroboration; English rulings reviewed); *U. S.* 1920, Sweet *v.* Sweet, 119 Me. 81, 109 Atl. 379 (Robbins *v.* Robbins, Mass., followed); 1868, Robbins *v.* Robbins, 100 Mass. 150 ("the rule . . . is merely a general rule of practice, and not an inflexible rule of law; . . . there is no law to prevent the finding of a fact upon the testimony of a party whose credibility and good faith are satisfactorily established"); 1878, Flattery *v.* Flattery, 88 Pa. 27 ("the law has made the libellant a competent witness; whether credible, was a question for the jury and not for the Court"); 1891, Lee *v.* Lee, 3 Wash. 236, 237, 28 Pac. 355.

[3] *England:* 1915, Joseph *v.* Joseph, Prob. 122 (desertion by husband; to find a second desertion relied upon, "the uncorroborated evidence of the woman" is not enough). *Arkansas:* 1919, Wood *v.* Wood, 140 Ark. 361, 215 S. W. 681 (rule not applied to a petition for temporary alimony); *Columbia (Dist.)*: 1904, Lenoir *v.* Lenoir, 24 D. C. App. 160, 165 (cited *post*, § 2067, n. 10); *New Hampshire:* 1842, Kimball *v.* Kimball, 13 N. H. 222, 225 ("or, if no other persons have knowledge respecting the facts In the case, there must be evidence that the libellant sustains a good general character"; compare the rule for corroboration of witnesses, *ante*, § 1104); *New Jersey:* 1870, Woodworth *v.* Woodworth, 21 N. J. Eq. 251 (the plaintiff's testimony alone is insufficient); Reid *v.* Reid, 21 N. J. Eq. 331, 333; 1871, Palmer *v.* Palmer, 22 N. J. Eq. 88, 90; 1889, McShane *v.* McShane, 45 N. J. Eq. 341, 19 Atl. 465; 1890, Costill *v.* Costill, 47 N. J. Eq. 346, 350, 21 Atl. 35; 1901, Moak *v.* Moak, — N. J. Eq. —, 48 Atl. 394; 1901, Garcin *v.* Garcin, 62 N. J. Eq. 189, 50 Atl. 71; 1902, Grover *v.* Grover, 63 N. J. Eq. 771, 50 Atl. 1051 (for all causes of divorce); 1904, Cotter *v.* Cotter, — N. J. Eq. —, 58 Atl. 73; 1905, Sabin *v.* Sabin, — N. J. Eq. —, 59 Atl. 627; 1905, Hunt *v.* Hunt, — N. J. Eq. —, 59 Atl. 642; 1905, Wood *v.* Wood, — N. J. Eq. —, 62 Atl. 429; 1905, Kline *v.* Kline, — N. J. Eq. —, 61 Atl. 160 (desertion); 1907, Foote *v.* Foote, 71 N. J. Eq. 273, 65 Atl. 205 (desertion); 1908, Topfer *v.* Topfer, — N. J. Eq. —, 68 Atl. 1071 (desertion); 1916, Hague *v.* Hague, 85 N. J. Eq. 537, 96 Atl. 579 (desertion); 1918, Rogers *v.* Rogers, 89 N. J. Eq. 1, 104 Atl. 32 (pointing out that the rule here is not of statutory origin, and noting an error in the syllabus to Foote *v.* Foote, *supra*); 1920, Lasker *v.* Lasker, 91 N. J. Eq. 352, 110 Atl. 27 (desertion); 1920, Stieglitz *v.* Stieglitz, 92 N. J. Eq. 292, 112 Atl. 310; 1920, Meek *v.* Meek, 92 N. J. Eq. 23, 112 Atl. 409; 1921, Foster *v.* Foster, — N. J. L. —, 114 Atl. 333.

[4] 1823, Best *v.* Best, unreported, quoted in Poynter, Marr & Div. 198; 1845, Emmons *v.* Emmons, Walker Ch. (Mich.) 532, 534; 1855, Simons *v.* Simons, 13 Tex. 468, 4714, *semble*.

Such rules are therefore in theory really of the sort examined *post*, § 2066.

[5] *Colorado:* Comp. St. 1921, § 5597 (residence in Colorado of an applicant for divorce must be proved by "at least one credible witness other than the plaintiff," except for divorce for adultery or cruelty done within the State); *Iowa:* Comp. Code 1919, § 6622 ("no divorce shall be granted on the testimony of the plaintiff alone"); *Maryland:* Annot. Code 1914, Art. 34, § 4 (in proceedings for divorce no decree shall 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"); *Kentucky:* Stats. 1915, § 2119 (quoted *post*, § 2067); 1901, Barnett *v.* Barnett, — Ky. —, 64 S. W. 844 (statute applied); *Wisconsin:* Circuit Court Rule 28, under Stats. 1919, § 2348; *Contra: Indiana:* Burns Ann. St. 1914, § 1077 (divorce; defendant's denial under oath "shall not render necessary any further or other proof" than if he had not denied).

shall not suffice; these, being aimed chiefly at the use of *respondents' confessions*, are placed *post*, § 2067; but they are usually construed as including the testimony of the complainant.[6]

§ 2047. **Same: (2) Chancery Bill denied by Defendant's Oath.** The Court of Chancery, in all classes of cases, followed directly the ecclesiastical rule that two witnesses were required to prove any material fact as the foundation of a decree. This rule seems not to appear in the reports until the end of the 1600s,[1] nearly two centuries after the Chancery system had begun to be an organized competitor of the common-law Courts. But it is not to be doubted that the rule was followed from the beginning. Probably the direct and simple form of the ecclesiastical rule was in the beginning unchanged; but in later development there came alterations both in the scope of the rule and in the reasons given for it.

(1) The scope of the rule, as it comes into the modern law, is confined to cases where the defendant by his sworn answer has *directly denied on oath* the allegation of the bill. In other words, the rule does not apply in all cases other than where the allegation is admitted to be true. In Chancery, a mere failure to deny did not (as at common law) amount to a judicial admission; unless a defendant expressly admitted the allegation, or unless he was in contempt for refusing to answer at all and the bill was ordered to be taken 'pro confesso,' the plaintiff must still prove his allegations.[2] Accordingly, it

[6] *Arizona:* 1921, Lundy *v.* Lundy, — Ariz. —, 202 Pac. 809 (divorce; under Civ. C. 1913, § 3861, amending the prior text, the corroboration of the petitioner's testimony may be furnished by the respondent's admissions; Flanigan, J., diss.); *California:* 1871, Evans *v.* Evans, 41 Cal. 103 ("It would be impossible to lay down any general rule as to the degree of corroboration which will be requisite"); 1874, Matthai *v.* Matthai, 49 Cal. 90, 94; 1891, Cooper *v.* Cooper, 88 Cal. 45, 48, 25 Pac. 1062; 1892, Venzke *v.* Venzke, 94 Cal. 225, 29 Pac. 499; 1894, Wolff *v.* Wolff, 102 Cal. 433, 437, 36 Pac. 767, 1037; 1897, Smith *v.* Smith, 119 Cal. 183, 48 Pac. 730; 1898, Andrews *v.* Andrews, 120 Cal. 186, 52 Pac. 208 (nature of corroboration, defined); 1905, Avery *v.* Avery, 148 Cal. 239, 82 Pac. 967 (similar); *Idaho:* 1908, Bell *v.* Bell, 15 Ida. 7, 96 Pac. 196; 1917, Donaldson *v.* Donaldson, 31 Ida. 180, 170 Pac. 94 (divorce for cruelty; Rev. C. § 2661 applied); 1919, Piatt *v.* Piatt, 32 Ida. 407, 184 Pac. 470 (failing to cite Bell *v.* Bell, *supra*); *Iowa:* 1916, Leonard *v.* Leonard, 174 Ia. 734, 156 N. W. 803 (statute applied); 1921, Anderson *v.* Anderson, 191 Ia. 497, 181 N. W. 241 (statute applied); *Maryland:* 1880, LeBrun *v.* LeBrun, 55 Md. 496, 503 ("mere declarations of either of the parties" not sufficient); *Minnesota:* 1900, Westphal *v.* Westphal, 81 Minn. 242, 83 N. W. 988 (statute applied); *Ohio:* 1833, Hansel *v.* Hansel, Wright 212 (under statute); *N. Dakota:* 1916, Thompson *v.* Thompson, 162 N. D. 255, 156 N. W. 492 (statute applied).

Contra: 1901, Rosecrance *v.* Rosecrance, 127 Mich. 322, 86 N. W. 809 (under Comp. St. § 8652, a divorce may be decreed on the testimony of complainant alone, the statute referring only to confessional declarations).

Whether under such statutes a respondent's confession, which would of itself be insufficient under § 2067 *post*, may serve as *sufficient corroboration* for the present purpose, is a petty quibble upon which different views have been expressed, — affirmatively, in Smith *v.* Smith, Cal. *supra*, and Lundy *v.* Lundy, Ariz., *post*, § 2067; and negatively, in Scarborough *v.* Scarborough, Ark., cited *post*, § 2067; Piatt *v.* Piatt, Ida., *supra*; 1916, Garrett *v.* Garrett, 86 N. J. Eq. 293, 98 Atl. 848.

For the requirement of corroboration for *detectives*, *prostitutes*, and persons of *loose character* in divorce cases, see *post*, § 2066.

§ 2047. [1] The following are early cases: 1679, Wakelin *v.* Walthal, 2 Ch. Cas. 8; 1682, Hobbs *v.* Norton, 1 Vern. 136; 1683, Alam *v.* Jourdan, 1 Vern. 161; 1692, Christ College *v.* Widdrington, 2 Vern. 283; 1693, Bath and Mountague's Case, 3 Ch. Cas. 53, 123 (per Lord Keeper Somers).

On all of the ensuing points, compare the learned article of Mr. (now Judge) Gest, "The Responsive Answer in Equity," cited *ante*, § 2032, note 1.

[2] Langdell, Summary of Equity Pleading, §§ 84, 137.

would seem that in the intermediate case, *i. e.* where the defendant answered, and yet neither expressly admitted nor expressly denied the allegation under oath, and also even where he denied but in an answer not under oath, the allegation must be proved, and yet needed not two witnesses:

1778, THURLOW, L. C., in *Pember* v. *Mathers*, 1 Bro. Ch. C. 52: "I take the rule to be that, where the defendant in express terms negatives the allegations of the bill, and the evidence is only one person affirming what has been so negatived, there the Court will neither make a decree nor send it to a trial at law. Where the Court does not send it to a trial at law, it orders the answer to be read in evidence, and sends it to the Court of law only to find the consequences. Because the Court of equity has such a rule, therefore it refers to a court of law what a court of equity should do; this was done by the House of Lords in Lord Milton's case.[3] The original rule stands on great authorities; so does the manner of liquidating it; I do not see great reason in either."

(2) This rule, like the general rule of the ecclesiastical Courts (*ante*, § 2045), thinned out, in the course of modern development, into a rule requiring merely *one witness with corroborating circumstances:*

1837, Mr. *R. N. Gresley*, Evidence in Equity, 4: "Some corroboration is required, — the testimony of a second witness, or any circumstances which may give a turn to the balance; the corroboration, however, has sometimes been so extremely slight that . . . there can be little doubt that this circumstance [of the defendant being interested] has a considerable weight."

As a current rule of Chancery practice, it is not within the present purview.[4]

(3) The *theory of the rule* was originally no other than that of the eccle-

[3] Brown's P. C., V, 313, 8vo ed.

[4] See Gresley, Evidence in Equity, pp. 4, 156; Greenleaf, Evidence, I, § 260, III, § 289; Note to first American edition of Brown's Chancery Cases, I, 53, Pember *v.* Mathers; Daniell, Pleading and Practice in Chancery, I, 843 ff., Gould's sixth American edition; Story, Equity Jurisdiction, II, § 1528.

The rule has been *applied* in the following cases: CANADA: 1853, Boulton *v.* Robinson, 4 Grant U. C. 109, 123; 1873, Powell *v.* Lea, 20 Grant U. C. 621; 1879, Moberly *v.* Brooks, 27 Grant U. C. 270, 278.

UNITED STATES: *Federal:* 1812, Russell *v.* Clark, 7 Cr. 63, 92; 1815, Clark *v.* Van Riemsdyk, 9 Cr. 152, 160; 1881, Vigel *v.* Hopp, 104 U. S. 441; 1885, Conly *v.* Nailor, 118 U. S. 127, 6 Sup. 1001; 1892, Monroe Cattle Co. *v.* Becker, 147 U. S. 47, 13 Sup. 217; 1903, Jacobs *v.* Van Sickle, 127 Fed. 62, 61 C. C. A. 598; 1919, Demarest *v.* Winchester Repeating Arms Co., U. S. D. C. Conn., 257 Fed. 162 (nor does the plaintiff's express waiver of verification of the defendant's answer deprive a verified answer of the effect given by the rule; here applied to an application for temporary injunction, following Clements *v.* Moore, 6 Wall. 299); whether the rule is any longer in force since the Federal Equity Rules of 1912 (198 Fed. xix), which make no requirement for verifying an answer by oath, is an interesting question: 1919, Watts *v.* Crabb, 9th C. C. A., 257 Fed. 717 (not decided); *Alabama:* 1847, Moyler *v.* Moyler, 11 Ala. 620, 628; *Columbia (Dist.):* 1906, Northwest E. I. Co. *v.* Campbell, 28 D. C. App. 483, 493; *Florida:* 1903, Pinney *v.* Pinney, 46 Fla. 559, 35 So. 95; 1904, Parken *v.* Safford, 48 Fla. 290, 37 So. 567; 1917, Farrell *v.* Forest Inv. Co., 73 Fla. 191, 74 So. 216; *New Jersey:* 1904, Evans *v.* Evans, — N. J. Eq. —, 59 Atl. 564; *Pennsylvania:* 1847, Brawdy *v.* Brawdy, 7 Pa. St. 157, 159; 1883, Juniata Bldg. Ass'n *v.* Hertzel, 103 Pa. 507, 514; 1884, Phillips *v.* Meily, 106 Pa. 536, 544; 1887, Sylvius *v.* Kosek, 117 Pa. 67, 76, 11 Atl. 392; 1904, McGary *v.* McDermott, 207 Pa. 620, 57 Atl. 46; *Tennessee:* 1791, Humphreys *v.* Blevins, 1 Overt. 177, 179; 1901, Bennett *v.* Ins. Co., 107 Tenn. 371, 64 S. W. 758 (rule not applied to a bill to annul an insurance policy on the ground of fraud); *Vermont:* 1906, Phelps *v.* Root, 78 Vt. 493, 63 Atl. 941 (but here the rule is emasculated by declaring that "circumstantial evidence may take the place of the testimony of one *or both* witnesses, if of equal weight and credibility").

The rule has been *repudiated* in the following cases and statutes: *Ga.* Rev. C. 1910, § 4547; *La.* 1902, Rush *v.* Landers, 107 La. 549, 32 So. 95; 1904, Thibodeaux *v.* Thibo-

siastical Courts, namely, that two witnesses are required to prove any fact. But in later times the rule was explained, though still in the quantitative conception of testimony (*ante*, § 2032), on the theory that the answer of the defendant on oath was *equivalent to one witness* in his favor, and that therefore this offset the single witness for the plaintiff and made another necessary:

1837, Mr. *R. N. Gresley*, Evidence in Equity, 4: "Where a material fact was directly put in issue by the answer, the Courts of equity followed the maxim of the civil law, 'responsio unius non omnino audiatur,' and required the evidence of two witnesses as the foundation for a decree. But of late years the rule has been referred more closely to the equitable principle on which it is grounded, namely, the equal right to credit which a defendant may claim when his oath, 'positively, clearly, and precisely given,' and consequently subjecting him to the penalties of perjury, is opposed to the oath of a single witness." [5]

Such an explanation could have occurred as a natural one only after the rule had come to be restricted to the case of an answer on oath. But it was in any event inconsistent with the fundamental theory of an answer in chancery. The answer, so far as it is capable of being treated as evidence, is merely an admission extracted from the defendant on compulsion, and hence is available for the plaintiff only, if he cares to use it. Since the rule of parties' disqualification (*ante*, § 575) applied equally in chancery, the answer, on principle, is not testimony in the defendant's own favor.[6] The modern explanation of the rule, therefore, needlessly obscures its origin and rests upon a false theory of chancery pleading. This was long ago pointed out:

1838, Lord Brougham, in *Attwood* v. *Small*, 6 Cl. & F. 232, 297: "It is said that you must have recourse to the answer . . . [because of a rule that if the defendant denies on oath] you must have more than one witness, or some circumstances more than one witness, in order to rebut that denial. But I take it that the denial is *not* read as evidence in the cause, and the Court does *not* use it as evidence; it is rather considered as a general denial in the nature of a plea of not guilty, — a sort of general issue which puts the plaintiff to the proof in a particular way."

(4) The *policy* of the rule has perhaps something to be said for it, because of the practice of the Chancery court to act without sight of the witnesses and (practically) without cross-examination — in short, without the usual accompaniments of a jury trial.[7] But the question may be pressed more

deaux, 112 La. 906, 36 So. 800 (apparently qualifying Rush *v.* Landers); *Miss.* Code 1906, § 586, Hem. § 346 ("The rule . . is abolished" where the bill is sworn to); *Mo.* 1875, Cornet *v.* Bertelsmann, 61 Mo. 118, 125; *N. J.* Comp. St. 1910, Evidence § 6 (quoted *ante*, § 488); *Oh.* Gen. Code Ann. 1921, § 11359 (verified pleading shall not make "other or greater proof necessary" for the opponent); *Pa.* St. 1913, May 28, Dig. 1920, § 17233 (the rule of two witnesses etc. "is hereby abolished"; saving the requirements for reforming or overthrowing a written instrument); Thomas *v.* Herring, 244 Pa. 550, 91 Atl. 500 (noticing the statute); *W. Va.* Code 1914, c. 125, § 59; and cases cited in Mr. Gest's article *supra*, note 1.

For its application to a *corporation-defendant*, see the following case: 1901, Kane *v.* Ins. Co., 199 Pa. 198, 205, 48 Atl. 989.

For the rule that the *whole of a responsive answer* must be read, see *post*, § 2123.

[5] This theory is found as early as Gilbert (*ante* 1726), Evidence, 152. It was early made popular in the United States by Marshall and Story.

[6] Laugdell, *ubi supra*, §§ 68, 78, 83, 126.

[7] For a good examination of its policy, see Evans, Notes to Pothier, II, 235 (1806).

closely, why *should* the Chancery court deprive itself of these aids, and thus be obliged to rely on a rule of thumb for the determination of a rational investigation? Mr. Bentham's irony has forever pilloried the delinquencies in this respect of the traditional methods of the Court of Chancery:

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. VI, c. I, § 1 (Bowring's ed., Vol. VII, p. 530): "Where the defendant contradicts the witness, it [Equity] counts testimonies, without weighing them. . . . The ground on which this arrangement is placed by the account given of it in the books, is curious enough: 'Here is oath against oath; therefore nothing is to be done.' The judge who should allege this contrariety as a reason for doing nothing, would recognize himself unfit for his office. *Injured suitor:* 'To weigh testimony against testimony in a jury-box is the business, the everyday's business, of the same sort of man whose business it is, when behind a counter, to weigh lead or brass against bread or candles. What then? Is the task too hard for you? Do you sink under it? Such imbecility, is it the fruit of all your science? Sue, then, for a place in the jury-box; and learn your business from bakers and tallow-chandlers.' *Lord Chancellor:* 'It is not but that, if I were at liberty, I could weigh testimony against testimony as well as any tallow-chandler; but the mode of inquiry which I am bound and content to conform to, does not allow me to weigh evidence. Where truth is at all doubtful, equity is altogether unfit for the discovery of it. This we are all sensible of; accordingly, as often as evidence is worth weighing, we send it to the tallow-chandlers; they have a method of their own, which it does not suit the purpose of equity to follow. . . . Equity receives evidence in a scientific way — a way which was designed, not for the discovery of truth, but for better purposes.'"

§ 2048. **Same: (3) Wills of Personalty, in the Ecclesiastical Court; Wills in Pennsylvania.** (*a*) The secular jurisdiction of the ecclesiastical Courts was settled (after the first early struggles) to include (mainly) matters matrimonial and testamentary.[1] But the common-law Courts would not concede that this jurisdiction extended to the determination of land-titles. The practical result was that a judgment of the ecclesiastical Court could not validate a title depending on a will of land, and virtually their testamentary jurisdiction was confined to *wills of personalty*. Within this jurisdiction they applied of course the ecclesiastical rule requiring at least two witnesses:

1640, SWINBURNE, J., Wills, pt. I, § 9: "[By the Roman law] it must be proved forsooth by seven witnesses. Wherefore with good reason was this excesse reformed first by the ecclesiasticall law, which did reduce the number of seven witnesses to three (the parochiall minister being one) and in some cases two; and then by the general [ecclesiasticall] custom of this realm,[2] which distinctly requireth no more witnesses than two, so they be free from any just cause of exception. . . . So we are no further tyed than to the observation of those requisites that be necessary 'jure gentium,' which requireth but two witnesses. . . . [A man,] if he will, he may procure the witnesses to subscribe their names to the testament; . . . but no man is tyed to the observation of these cautels." [3]

18—, *Edward Sugden*, Letters to a Man of Property, 99 (as quoted in William Kitchiner's The Pleasure of Making a Will, 1822, p. 12): "I am somewhat unwilling to give you any instructions for making your Will, without the assistance of your professional Adviser. It

§ 2048. [1] Makower, Constitutional History of the Church of England (Sonnenschein's ed.), 1895, pp. 417, 451.

[2] This author deals with the ecclesiastical law, and his "custom of the realm" means the English ecclesiastical custom.

[3] So also ib. pt. IV, § 21.

is quite shocking to reflect upon the litigation which has been occasioned by men making their own Wills. . . . If your estate consists of what is called personalty, as Money — Goods — Leasehold Estates, and the like, You may make your Will yourself without any witnesses; and any two persons who know your handwriting, may, after your death, prove it. But it is better to have two [subscribing] Witnesses, in order that the execution of the Will may be proved without difficulty."

Thus, down to the time of the abolition of the ecclesiastical prerogative Courts (in England, in 1857,[4] and in this country, at earlier dates), a will of personalty must be proved by two witnesses.[5]

As it happened, however, this rule, ever since 1678, had been in two important respects less stringent than the rule for proving wills in the common-law courts, namely, the witnesses need not have subscribed the will's execution (*ante*, § 1290) and the number required to be called was less than the number required to have attested a will of realty (*post*, §§ 2426, 2456). Postponing for a moment the consideration of the difference for wills of realty, it is enough to note that, with the statutory assimilation of the attesting-witness requirement for personalty and realty alike (*ante*, §§ 1290, 1310), and the abolition of the ecclesiastical Courts, their rule disappeared,[6] apparently everywhere except in one of our own State jurisdictions.

(*b*) In *Pennsylvania*, an early statute perpetuated the rule of the ecclesiastical Courts, and extended it to both kinds of wills.[7] In the application of this statute, the modern doctrine of the English ecclesiastical law (*supra*, par. *a*, and *ante*, § 2405), that corroborating circumstances might supply the place of a second witness directly to the act of execution, was here also carried out.[8] It is enough to note that the practical difference between this

[4] St. 20 & 21 Vict. c. 77, c. 85.

[5] 1696, Twaites *v.* Smith, 1 P. Wms. 10 (will of personalty; two of the witnesses, children of the residuary legatee, being incompetent by the canon law, "the common-law judges agreed with the civilians that these two children were not to be allowed as witnesses [by the canon law, which applied to such wills]; therefore the will failed for want of proof, one witness being by the civil law as no witness"); 1826, Brett *v.* Brett, 3 Add. 210, 224 (the requirement is merely of an affidavit to the signature "by two persons"; or if there is one attesting witness, then the affidavit of one other person); 1832, Theakston *v.* Marson, 1 Hagg. Cons. 290, 313 ("evidence of one witness, unsupported by any circumstances," does not make "legal proof of a testamentary act"; this because "by the general law of these Courts one witness does not make full proof"; here applied to a will's execution); 1842, Mackenzie *v.* Yeo, 3 Curt. Eccl. 125, 133, 145, 150 (rule applied to a will's execution).

[6] In South Carolina, Tennessee, and Virginia, a similar rule once existed, either by statute or by judicial adoption of the ecclesiastical rule in probate Courts (*infra*, note 8); but the modern statutes seem to have assimilated all will-proof under the common-law rule.

[7] Pa. St. 1833, Dig. 1920, Decedents' Estates, § 8308 (Act of 1705; a will "shall be proved by the oaths or affirmations of two or more competent witnesses"); § 6, Dig. § 8312 (bequests to a body politic or for religious or charitable uses; the will shall be "attested by two credible and at the same time disinterested witnesses"). In the "Great Body of the Laws" of 1682 (Eastman, Courts and Lawyers of Pennsylvania, 1922, I, 77) a clause had provided for "all wills in writing attested by two sufficient witnesses"; but the subsequent practice seems to show that "attested" here meant "proved," and not "subscribed."

[8] The detailed questions need not be here further noticed; with the Pennsylvania rulings are here placed the early rulings in the other States once having a similar practice:

Pennsylvania: 1788, Lewis *v.* Maris, 1 Dall. 278 (under the act of 1705; "two or more credible witnesses"); 1791, Walmesley *v.* Read, 1 Yeates 87 (same); 1803, Eyster *v.* Young, 3 Yeates 511, 514 ("circumstances may supply the want of one witness, where they go directly to the immediate act of disposition"); 1820, Hock *v.* Hock, 6 S. & R.

rule and that now obtaining in the other jurisdictions for attesting witnesses (*ante*, §§ 1290, 1302) is that by the present one the entire elements of a valid execution must be *proved* twofold, *i. e.* either by two witnesses each testifying to all the elements, or by one witness to all and by circumstances sufficient alone to evidence all, while by the other rule the specified number of attesters need merely be *called*, whether or not they prove anything by their testimony.

§ 2049. **Same: Wills of Realty at Common Law, and Statutory Attested Wills, distinguished from the Preceding.** The establishment of wills of realty, falling as it did within the jurisdiction of the common-law Courts, was regulated by their rules of evidence. Hence, at common law, a will of realty, even after the statute of Henry VIII requiring it to be in writing, could be sufficiently proved by a single witness; the common law having no

47 ("each must make proof complete in itself," where they testify to circumstantial evidence, and not to the fact of execution); 1820, Miller *v.* Carothers, S. & R. 215, 223 (one attesting witness deceased after taking oath before the register, and one witness to handwriting, sufficient); 1827, Reynolds *v.* Reynolds, 16 S. & R. 82, 86 (discussing the question, Who is a "complete" witness?); 1836, Mullen *v.* M'Kelvy, 5 Watts 399 (when there are but two witnesses, the testimony of each must be such as would be sufficient to submit to the jury were only one required); 1844, Jones *v.* Murphy, 8 W. & S. 275, 295 (circumstances may supply the place of one witness); 1851, Shinkle *v.* Crock, 17 Pa. St. 159 (competency of witness to mark); 1868, Carson's Appeal, 59 Pa. 493, 498 (one complete witness, and another whose testimony is completed by circumstances, sufficient; here the element thus supplied was the identity of the document); 1874, Derr *v.* Greenwalt, 76 Pa. 239, 253 (approving Hock *v.* Hock, and applying it); 1884, Combs' Appeal, 105 Pa. 155; 1893, Simrell's Estate, 154 Pa. 604, 26 Atl. 599; 1899, McKenna *v.* McMichael, 189 Pa. 440, 42 Atl. 14; 1906, Michell *v.* Low, 213 Pa. 526, 63 Atl. 246; 1906, Fallon's Estate, 214 Pa. 584, 63 Atl. 889; 1913, Rhoads' Estate, 241 Pa. 38, 88 Atl. 71 (statute held not satisfied because each witness did not separately depose to all the facts, following Hock *v.* Hock); 1918, Morrish *v.* Morrish, 262 Pa. 192, 105 Atl. 83 (only the material allegations need be so sustained); 1919, McClure *v.* Redman, 263 Pa. 405, 107 Atl. 25 (testatrix wrote part of her signature, then stopped, and Mrs. O. guided her hand in re-writing an entire signature; Mrs. O. signed as attesting witness; held, that other witnesses to testatrix' handwriting might suffice for the second required witness, but that they must be qualified independently of the will-signatures); 1922, Lawman's Estate, — Pa. —, 116 Atl. 538.

South Carolina: 1821, Sampson *v.* White, 1 McC. 74 (the rule is satisfied proof of the handwriting of subscribing witnesses, if they cannot be had in person); 1821, White *v.* Helmes, 1 McC. 430, 437 (wills must be proved by two witnesses, but not necessarily to the direct fact of execution; here one testified to that, and others to handwriting, etc.).

Tennessee: 1834, Suggett *v.* Kitchell, 6 Yerg. 425, 428 (will of personalty, usually by two witnesses; one witness to execution, and another to a plan to make a will, here held insufficient); 1850, Moore *v.* Steele, 10 Humph. 562 (two witnesses required for a will of personalty; preceding case approved); 1850, Jones *v.* Arterburn, 11 Humph. 97, 101 (preceding cases approved; "facts and circumstances" may be equivalent to the testimony of one witness; handwriting of one subscribing witness alone, not sufficient; if witnesses' handwriting is unavailable, two witnesses to testator's are required); 1860, Johnson *v.* Fry, 1 Coldw. 101, 102 (will of personalty; testimony by one to execution and by another to handwriting only, insufficient; unless, *semble*, the will were holographic or evidence of his acknowledgment of it were added); 1872, Morris *v.* Swaney, 7 Heisk. 591, 596 (will of lands; "one fact may be proven by one witness, and other facts and corroborating circumstances may be proven by other witnesses"; this is loose and unsound).

Virginia: 1828, Redford *v.* Peggy, 6 Rand. 316, 326, 339, 344, 347 (wills of personalty must be proved by two witnesses; except, per Green and Cabell, JJ., an ograph will, for which by analogy of the statute for wills of realty one witness suffices); 1834, Worsham *v.* Worsham, 5 Leigh 589, 596 (preceding case over-ruled; one witness sufficient for will of personalty; the decision proceeds upon local practice).

Where one witness recollects nothing or becomes incompetent, but has attested, his *attestation* should be *equivalent to one witness;* as to this, and as to the facts imported by an attestation, the authorities have already been examined *ante*, §§ 1315, 1316, 1511.

rule requiring two witnesses (*ante*, § 2032, *post*, § 2426). But in 1678, the Statute of Frauds added for such wills the requirement of attestation by at least three witnesses.[1] The question therefore arises whether any requirement of quantity or number was thereby introduced into the rules of Evidence. The result reached by the Courts was perfectly plain and settled; but, to appreciate it, three sorts of legal requirements must be distinguished:

(1) In the first place, the *validity of the will*, as to its formalities of execution, was affected. The act of execution, after the Statute, must include the act of signing by three witnesses; without their coöperation, the will is void. Here is no matter of evidence, but of substantive law (*post*, § 2455).

(2) Among the kinds of witnesses who might be qualified to speak to the execution, the *attesting witnesses* were (after the Statute) to be *preferred before all others*. This came, not by express direction of the Statute, but by the general principle of the common law that an attesting witness must be called (or shown unavailable) before any other can be resorted to (*ante*, § 1290). The Statute merely provided the attesting witness for wills; the common-law principle of evidence, thus applying, required him to be used.[2] Here is now a rule of Evidence; but it is merely a rule of preference between kinds of witnesses; it is not a rule of numbers.

But, furthermore, this rule of preference may also provide *how many* of these preferred witnesses shall be *called*. Such a further rule will of itself say nothing as to the proof supplied by these witnesses; for example, it might require that each and all be called, but not that each and all should prove respectively the entire elements of due execution. Now the common-law Courts never required that more than one be even called. It is true that the chancery Court (probably under the influence of its ecclesiastical rule) did at some periods require all to be called; and that some modern statutes have made similar provisions. But at common law not even this much of a rule of number existed (*ante*, § 1304). Thus, by whichever practice judged (common law, chancery, or statute), the effect of the attesting-witness rule is limited to requiring that he be called, and involves nothing as to the proof he shall make (*ante*, § 1302).

(3) The third question, then, remains: Was any *rule of number*, for the purposes of establishment of belief, or *proof*, introduced by implication of the Statute? Suppose that all three witnesses are called, and thus the attesting-witness rule in its extremest form is satisfied; but suppose further that two of them are unable to recollect, or deny seeing the execution, or otherwise fail to furnish any evidence of execution; in other words, there remains but one witness actually contributing evidence of execution; is he sufficient? It is clear that by the common-law rule for attesting witnesses, he is (*ante*, § 1302); but that by the ecclesiastical rule for wills of personalty (*ante*,

§ 2049. [1] St. 29 Car. II. c. 3, § 5 (devises of lands or tenements "shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect"); the history is examined *post*, §§ 2426, 2454.

[2] Compare the exposition of L. C. J. Pratt quoted *infra*, par. 3.

§ 2048), he is not. The question is thus whether, for wills of realty under the Statute, there is, besides the attesting-witness rule of preference, a rule of number requiring that more than one witness shall give credited testimony to the elements of due execution.

The judicial answer to this was plain and inevitable, namely, that the common law possessed no rules of number, that the Statute merely introduced a new rule of substantive law as well as invoked the existing general rule for attesting witnesses, and that no more was intended by the Statute, and therefore the common-law *rule of one witness remained* in full application. This was established at the very outset of the judicial consideration of the Statute, and was continuously maintained:

1683, *Hudson's Case*, Skinner 79; two of the attesting witnesses swearing against the due execution, other evidence of it was received and acted on; "to which the counsel of the other side urged that if the witnesses were not to be believed, then there would not be three witnesses to the will, and so no will within the statute of frauds and perjuries; to which PEMBERTON, C. J., answered that if there were three witnesses to a will, whereof one was to his own knowledge a thief or person not credible, yet the words of the statute being satisfied, and he having collateral proof to fortify the will, he would direct a jury to find it a good will."

1765, L. C. J. PRATT (Lord CAMDEN), in *Doe* v. *Hindson, H.* v. *Kersey*, 1 Day 41, 49: "Here I must premise one observation, that there is a great difference between the method of proving a fact in a court of justice, and the attestation of that fact at the time it happens. These two things, I suspect, have been confounded; whereas it ought always to be remembered that the great inquiry upon this question is, how the will ought to be attested, and not how it ought to be proved. The new thing introduced by the Statute [of Frauds] is the attestation; the method of proving this attestation stands as it did upon common-law principles. Thus, for instance, one witness is sufficient to prove what all three have attested; and though that witness must be a subscriber, yet that is owing to the general common-law rule that where a witness hath subscribed an instrument, he must always be produced because it is the best evidence. This we see in common experience, for after the first witness has been examined, the will is always read."

This much is of course necessarily implied in all the judicial decisions (*ante*, § 1304) declaring that one attesting witness only need be called; for if one only need be called, and if he can speak to all the elements of execution, no further witness or proof is needed; the settlement of the one point settles the other also. But the question may arise as a separate one in those jurisdictions in which (following the Chancery or a statutory rule) all the attesting witnesses must be called (*ante*, § 1304); for it may then be asked further whether from the mouth of each of them must be obtained separate proof of execution, *i.e.* whether more than one testimony to execution must be given. The question is usually settled, by implication, as above noted; but it has also sometimes been expressly dealt with as a distinct question, and has been almost universally decided in accordance with the original and orthodox view taken by the English Court (quoted *supra*), namely, that testimony to all the elements constituting due execution, by a single witness,

suffices.[3] A contrary result can properly be reached only under a statute expressly requiring that the will be attested "and *proved*" by more than one witness.[4]

It is plain, therefore, that a rule of preference requiring attesting witnesses to be called is distinct from a rule of number requiring credited testimony to execution to be given by two or more witnesses; that either may exist without the other; that the latter exists without the former in a single jurisdiction (*ante*, § 2048); that the former exists without the latter, at common law and under the Statute of Frauds, in almost every other jurisdiction; and that in perhaps a few jurisdictions, by express modern statute, both coexist.

§ 2050. **Same: (4) Nuncupative Wills.** A nuncupative (or oral) will of personalty would have required two witnesses in the ecclesiastical Courts, but of realty, in the common-law Courts (so far as valid at all after the statute of Henry VIII), only one witness. But by the Statute of Frauds a nuncupative will was subjected to a rule of number more stringent even than that of the ecclesiastical Courts; for three were required.[1] The Statute of Frauds was probably inspired directly by the ecclesiastical rules, for the latter had at one period required at least three;[2] and a canonist's hand had been

[3] 1855, Walker *v.* Hunter, 17 Ga. 364, 407; 1862, Tarrant *v.* Ware, 25 N. Y. 425, note; 1862, Auburn Seminary *v.* Calhoun, 25 N. Y. 422, 425.

In *Virginia* the earlier decisions took the opposite view: 1822, Burwell *v.* Corbin, 1 Rand. 131, 141 ("Every important requisite of the statute must be attested and proved by each witness"); 1827, Smith *v.* Jones, 6 Rand. 33, 37, *semble* (two witnesses necessary for will of realty); 1832, Dudleys *v.* Dudleys, 3 Leigh 436, 449, *semble* (two witnesses necessary; here, a will of both realty and personalty); but the later ones took the orthodox view: 1839, Clarke *v.* Dunnavant, 10 Leigh 13, 22 (Brooke, J., diss.); 1846, Pollock *v.* Glassell, 2 Gratt. 439, 461; 1849, Jesse *v.* Parker, 6 Gratt. 57, 61, 64 (under a statute requiring attestation by two witnesses, it is not necessary that by two such witnesses, or by any two witnesses every statutory element shall be proved); 1877, Lambert *v.* Cooper, 29 Gratt. 61, 67 (same); 1878, Cheatham *v.* Hatcher, 30 Gratt. 56, 58 (same).

[4] The statutes on the point have been already collected in dealing with the attesting-witness rule, *ante*, § 1304. The following case seems to justify itself on that ground: 1875, Crowley *v.* Crowley, 80 Ill. 469 (two witnesses necessary).

§ 2050. [1] Holdsworth, History of English Law, vol. III, 1st ed., 1909, p. 422, 3d ed., 1923, p. 539; 1678, St. 29 Car. II, c. 3, § 19 (no nuncupative will of an estate exceeding £30 is to be valid "that is not proved by the oaths of three witnesses at the least, that were present at the making thereof; nor unless it be proved that the testator at the time of pronouncing the same did bid the persons present or some of them bear witness that such was his will, or to that effect"); § 20 ("after six months passed after speaking of the pretended testamentary words, no testimony shall be received . . . except the said testimony, or the substance thereof, were committed to writing within six months after the making of the said will").

The statute's provisions as to a 'rogatio' (or calling to bear witness), and as to the reduction to writing, are matters affecting the validity of execution; and, as the interpretation of the statute on this point is scarcely to be separated from its interpretation as a rule of evidence, no attempt is here made to collect the rulings; they may be found in the following works: Jarman on Wills, 6th Amer. ed. (Bigelow), I, 79; Schouler on Wills, 3d ed., § 373; see also the following cases: 1875, Morgan *v.* Stevens, 78 Ill. 287 (statute applied); 1849, Parkison *v.* Parkison, 12 Sm. & M. Miss. 672, 677 (testator need not call upon the two witnesses also, but only upon "some person present"); 1854, Burch *v.* Stovall, 27 Miss. 725, 729 (the person called upon may be one of the two witnesses; no form of words for "calling" are necessary if such is the import); 1879, Broach *v.* Sing, 57 Miss. 115 (no "calling" proved on the facts); 1837, Tally *v.* Butterworth, 10 Yerg. Tenn. 501 (useful opinion as to whether the two witnesses may speak to different utterances).

[2] Swinburne, quoted *ante*, § 2048.

concerned in the drafting of this part of the Statute.[3] The rule of the Statute may therefore be reckoned as one of those which we owe to the ecclesiastical law.

Apart from such a statute in our own jurisdictions, it would seem that no more than one witness is to be required.[4] But in most jurisdictions there exist by statute provisions similar to those of the Statute of Frauds, specifying more than one witness as necessary.[5] Such statutes, it will be

[3] Chief Baron Gilbert, writing before 1726 (Reports, 261), makes this statement; and, though the identity of the draftsmen has been a mooted point, the influence of the ecclesiastical model at that period, in view of what has been said above in § 2032, seems clear enough. The canonist referred to was Sir Leoline Jenkins, judge of the Prerogative Court of Canterbury: C. D. Hening, The Original Drafts of the Statute of Frauds and their Authors (Pennsylvania Law Rev., LXI, 283); Geo. P. Costigan, Jr., Judicial Legislation in the Interpretation of the Contract Clauses of the Statute of Frauds (Illinois Law Rev., XIV, 1).

For further references showing the Statute of Frauds as a part of a general European movement to require written records of contracts, see the citations *post*, § 2454, and also the historical sketch *post*, § 2426.

[4] 1886, Gould *v.* Safford, 39 Vt. 498, 505 ("the rule of the civil law was merely a rule of proof, and did not relate to the essence of the act"; in a court of common law, the rules of proof of the latter system control).

[5] *Arizona:* Rev. St. 1913, Civ. C. § 1210 (a nuncupative will of an estate exceeding $50 is not valid "unless it be proved by three credible witnesses" that the testator called on "some person" to take notice, etc.);
Arkansas: Dig. 1919, § 10497 (a nuncupative will must be "proved by at least two witnesses, who were present at the making thereof"); § 10499 (the words or substance must have been reduced to writing within 15 days);
California: Civ. C. 1872, § 1289 (a nuncupative will must be proved by "two witnesses who were present at the making thereof, one of whom was asked by the testator at the time to bear witness"); § 1290 (words or substance must have been reduced to writing within 30 days after speaking);
Columbia (Dist.): Code 1919, § 1634 (only soldier's or sailor's nuncupative will shall be valid, and then only if "proved by at least two witnesses" present and requested to bear witness);
Delaware: Rev. St. 1915, § 3245 (nuncupative will of personalty not exceeding $200, must be pronounced "before two or more credible witnesses expressly requested by him to take notice thereof," and reduced to writing and attested by them within 3 days);
Florida: Rev. G. S. 1919, § 3599 (a nuncupative will must be "proved by the oaths of three witnesses present at the making thereof"); § 3600 (like D. C. Code § 1634);
Georgia: Rev. C. 1910, §§ 3925, 3926 (a nuncupative will must be "proved by the oaths of at least three competent witnesses that were present at the making thereof"; and the substance reduced to writing within 30 days); ("three competent witnesses present at the making thereof"); 1914, Reid *v.* Wooster, 142 Ga. 359, 82 S. E. 1054 (statute applied);
Idaho: Comp. St. 1919, § 7473 (may be proved as other wills, provided they were reduced to writing within 30 days after spoken); § 7510 (like Cal. Civ. C. § 1290);
Illinois: Rev. St. 1874, c. 148, § 15 (a nuncupative will is valid if "proven before the county Court by two or more credible disinterested witnesses" who were present and will testify to last illness, etc., "and it being also proven by two disinterested witnesses, other than those hereinbefore mentioned, that the said will was committed to writing," etc.);
Indiana: Burns Ann. St. 1914, § 3133 (nuncupative will must be proved "by two competent witnesses who shall have heard the testator in effect request some of those present to bear witness thereto");
Kansas: Gen. St. 1915, § 11825 (nuncupative will must be "reduced to writing and subscribed by two competent disinterested witnesses" within 10 days, the testator having called upon "some person present . . . to bear testimony");
Louisiana: Rev. Civ. C. 1920, § 1647 (nuncupative testaments by public act, *i. e.* testaments acknowledged before a notary in the presence of three witnesses; only the notary's certified instrument need be produced, unless a plea of forgery has been filed); § 1648 (nuncupative testaments under private signature, *i. e.* testaments not acknowledged before a notary, but made before five resident witnesses or seven non-resident witnesses, must be "proved by the declaration on oath of at least three of the witnesses who were present when they were made"); § 1649 (the witnesses must state "that they recognize their signatures and that of the testator at the foot of the testament"); §§ 1651, 1652 (mystic, or sealed, testaments, valid when acknowledged before a notary and three witnesses, must be "proved by the declaration on oath of at least four of the witnesses who were present at the act of

observed, combine in effect an attesting-witness rule with a rule of number (*ante*, § 2049, par. 3).

superscription"; but if the notary appears, two other witnesses will suffice); § 1653 (nuncupative testament under private signature, or mystic testament; "if any of the witnesses . . . be dead or absent, so that it be not possible to procure the number of witnesses prescribed by law for proving the testament, it will be sufficient to prove it by declaration of the witnesses living who are in the State"); § 1654 ("If none of the persons who were present at such act are living in the State, but all are absent or deceased, it will be sufficient for the proof of the testament if two credible persons make a declaration on oath that they recognize the signatures of the different persons, who have signed the will or the act of superscription"); 1918, Bihm *v.* Bihm, 144 La. 260, 80 So. 323 (statute applied); 1922, Prudhomme *v.* Savant, 150 La. 256, 90 So. 640 (statute applied to a will entirely in typewriting, except the signature);

Maine: Rev. St. 1916, c. 79, §§ 19, 20 (a nuncupative will of more than $100 must be proved by three persons present at the time and requested to bear witness; nuncupative will not provable after six months, unless the substance was reduced to writing within six days);

Michigan: Comp. L. 1915, § 11822 (nuncupative will of estate up to $300, valid if "proved by two competent witnesses");

Minnesota: Gen. 1913, § 7282 (a nuncupative will is to be probated only "upon the evidence of at least two credible and disinterested witnesses");

Mississippi: Code 1906, § 5082, Hem. § 3370 (nuncupative will of an estate exceeding $100; it must "be proved by two witnesses that the testator or testatrix called on some person present" to bear testimony);

Missouri: Rev. St. 1919, § 529 (must be "proved by two witnesses, who were present at the making thereof");

Montana: Rev. C. 1921, § 6992 (nuncupative will; like Cal. Civ. C. § 1289);

Nebraska: Rev. St. 1921, § 1246 (a nuncupative will of an estate of more than $150 must be "proved by the oath of three witnesses at least that were present at the making thereof"); 1905, Godfrey *v.* Smith, 73 Nebr. 756, 103 N. W. 450 (statute applied);

Nevada: Rev. L. 1912, § 6206 (must be "proved by two witnesses who were present at the making thereof");

New Hampshire: Pub. St. 1891, c. 186, § 17 (nuncupative will exceeding $300 of personalty, not valid "unless declared in the presence of three witnesses," etc.);

New Jersey: Comp. St. 1910, Wills, §§ 13-17 (must be proved by three witnesses present at the making; not provable after six months, unless the testimony or its substance was "committed to writing" within six days after the will made; except for soldiers' and sailors' wills);

New Mexico: Annot. St. 1915, § 5864 (a verbal will is to be attested by the "same number of witnesses" — two — required for a written one, "and besides, two witnesses, there being no more, possessing the same qualifications as required for the written will, to testify that the testator, male or female, was in possession of a sound mind and entire judgment");

New York: S. C. A. 1920, § 141 (for a nuncupative will, "its execution and tenor must be proved by at least two witnesses");

North Carolina: Con. St. 1919, § 4144, par. 3 (a nuncupative will must be proved by "two credible witnesses present at the making" called on to bear witness; and cannot be proved after six months, unless put in writing within ten days);

North Dakota: Comp. L. 1913, § 5645 ("must be proved by two witnesses who were present at the making thereof," one of whom was asked to be a witness);

Ohio: Gen. Code Ann. 1921, § 10601 (nuncupative will must be proved by "two competent disinterested witnesses," who reduced the will to writing and subscribed it within 10 days);

Oklahoma: Comp. St. 1921, § 11226 (a nuncupative will "must be proved by two witnesses who were present at the making thereof," one of whom was asked to bear witness);

Pennsylvania: St. 1917, June 7, Dig. 1920, § 8310, Decedents' Estates (no testimony is to be received after six months from the alleged speaking, nor unless the testimony or its substance was committed to writing within six days; for a value of over $100, the requisites "shall be proved by two or more witnesses who were present at the making of such will");

Porto Rico: Rev. St. & C. 1911, §§ 1540–1547 (special rules, based on the Spanish law, and similar to the Louisiana law);

South Carolina: Civ. C. 1922, § 5574 (nuncupative will of estate over $50 must be proved "by the oaths of three witnesses at the least, who were present at the making thereof and bid by the testator to bear witness," etc.);

South Dakota: Rev. C. 1919, § 609 (like N. D. Comp. L. § 5645);

Tennessee: St. 1784, Shannon's Code 1916, § 3898 (nuncupative will of over $250, not good "unless proved two disinterested witnesses present at the making thereof, and unless they, or some of them, were especially required to bear witness thereto," etc.); § 3899 (must be "put in writing within 10 days");

Texas: Rev. Civ. St. 1911, § 7861 (no nuncupative will shall be probated, "unless it be

§ 2051. Same: (5) Holographic Wills; (6) Revocations and Alterations; (7) Sundry Testamentary Acts. (5) When a *holographic* will, being entirely in the testator's handwriting, is by law allowed to be valid, a single witness to its authenticity would upon the common-law principle (*ante*, § 2034) be sufficient.[1] But the few statutes authorizing such wills have usually required more than one witness to its authenticity.[2] In Louisiana, the Philippine Islands, and Porto Rico, special rules exist for proving a "*mystic*" or "*closed*" will, *i. e.* a holograph orally acknowledged to witnesses without showing them the contents or securing their signatures to the document, but enclosed in a sealed envelope upon which the witnesses sign their attestation.[3]

(6) The *revocation* or *alteration* of a will, to be effective, has generally been treated, in the statutes dealing with wills, on the same footing as any act of testamentary disposition, and the usual formalities of attestation have been equally prescribed for it.[4] Apart from such statutory provisions,

proved by three credible witnesses that the testator called on some person" to bear witness); § 3270 (same; "and if the testimony of such witnesses differs materially as to the testamentary words spoken, or as to the testator's calling upon some one to witness the same," probate shall be refused); 1920, Walker v. Fields,—Tex. Civ. App.—, 221 S. W. 632;
Utah: Comp. L. 1917, § 6327 (like Cal. Civ. C. § 1289); § 6328 (like Cal. C. C. P. § 1290);
Vermont: Gen. L. 1917, § 3208 (nuncupative will of personalty of over $200, not to be proved "unless a memorandum thereof is made in writing, by a person present at the time of making it," within six days);
Washington: St. 1917, Mar. 16, c. 156, Probate Code § 36 (none to be good "unless the same be proved by two witnesses who were present at the making thereof, and it be proven that the testator . . . did bid some person to bear witness, etc.");
Wisconsin: Stats. 1919, § 2292 (for estates exceeding $150, no will is to be good "that is not proved by the oath of three witnesses, at least, that were present at the making thereof");
Wyoming: Comp. St. 1920, § 6708 (no number of witnesses prescribed; words must be reduced to writing within 30 days).

As to the interpreting rulings under these statutes, see note 1, *supra*.

§ 2051. [1] 1836, Baker *v.* Dobyns, 4 Dana 220, 221; 1916, Lucker's Will, U. S. Court for China, 1 Extra-terr. Cas. 626 (wife's holographic will proved by husband's testimony to her handwriting).

In Miller's Will, Surr. Ct., 194 N. Y. Suppl. 843 (1922), a will wholly in the testator's handwriting, but also bearing the signatures of witnesses and an attestation clause, is referred to as "entirely [sic?] holographic"; this application of the term should be avoided.

[2] *Arkansas:* Dig. 1919, § 10494 (for holographic wills, even without attesting witnesses, there must be "the unimpeachable evidence of at least three disinterested witnesses to the handwriting of each testator"); 1920, Murphy *v.* Murphy, 144 Ark. 429, 222 S. W. 721 (construing "unimpeachable evidence");
North Carolina: Con. St. 1919, §§ 4131, 4133 (holographic will not attested, or holographic revocation, must be proved as to the testator's handwriting by "three credible witnesses"); § 4144 (also, a holographic will must by one witness be shown to have come from a specified custody);
Tennessee: St. 1784, Shannon's Code 1916, § 3896 (holographic will must be proved by three credible witnesses);
Texas: Rev. Civ. St. 1911, § 3267 (for wills in general, proof of handwriting of the testator and subscribing witnesses must be by two witnesses; for an olographic will, "two witnesses of his handwriting" are necessary).

[3] *Louisiana:* Rev. Civ. C. 1920, §§ 1651–1654 (quoted *ante*, § 2050); § 1655, as amended by St. 1896, c. 119 (holographic will must be proved by "two credible persons, who must attest that they recognize the testament as being entirely written, dated, and signed in the testator's handwriting");
Philippine Islands: Civ. C. §§ 688–693, 706–715 (like P. R. Rev. St. & C. §§ 3774–3780, 3793–3802);
Porto Rico: Rev. St. & C. 1911, §§ 1548–1557, 3774–3780 (three witnesses required; special rules, based on the Spanish law; by § 3778, the judge "shall immediately proceed to prove its identity by means of three witnesses who are acquainted with the handwriting and signature of the testator and who depose that they have no reasonable doubt that the will was written and signed by the testator's own hand. In the absence of competent witnesses, or if those examined have any doubts, and provided the district court deems it proper, handwriting experts may be employed for the purpose of comparison").

[4] That is, where the revocation is attempted by writing, and not by burning, tearing, cancelling, or obliterating.

one witness would at common law suffice for any matter affecting revocation or alteration and not covered by the statutory terms.[5] But in several jurisdictions express provision is made by statute for a specified number of witnesses to prove certain acts in the nature of revocation or alteration.[6] Some of these, in their restriction to personalty, suggest a connection with the ecclesiastical rule.

(7) There occur also a few *miscellaneous* provisions, affecting testamentary acts, for which by statute a specified number of witnesses are required.[7]

§ 2052. **Same: (8) Contents of a Lost Will.** At common law, by the general principle (*ante*, § 2034), no more than one witness was required to prove the contents of a will alleged to have been lost or destroyed. There was an established rule as to the fulness of detail with which the contents must be made to appear (*post*, § 2106), and the clearness or preponderance of proof (*post*, § 2498); and there was authority for the view that testimonial, not merely circumstantial, evidence must be furnished (*post*, § 2090), and perhaps a copy (*ante*, §§ 1267, 1278). But there was no rule requiring more

[5] 1886, Williams *v.* Williams, 142 Mass. 515, 517, 8 N. E. 424 (intent to revive former will by revocation of a later one); 1818, Burns *v.* Burns, 4 S. & R. 295 (similar).

[6] *Ala.* Code 1907, § 6174 (when a will is revoked by burning, etc., by another than the testator, the testator's "direction and consent thereto, and the fact of such burning, canceling, tearing, or obliteration, must be proved by at least two witnesses"); *Alaska:* Comp. L. 1913, § 593 (revocation by injury or destruction "shall be proved by at least two witnesses"); *Ark.* Dig. 1919, § 10501 (the destruction of a will by another than testator, and the testator's direction and consent, "shall be proved by at least two witnesses"); *Cal.* Civ. C. 1872, § 1293 (the cancellation or destruction of will by any other than testator, and his direction, must be proved by two witnesses); *Fla.* Rev. G. S. 1919, § 3598 (revocation or alteration of a will of personalty; the writing, the reading of the writing to the testator, and his allowance of it, must be "proved to have been done by three disinterested and credible witnesses"); *Mich.* Comp. L. 1915, § 13789 (revoking clause must be "established by at least two reputable witnesses, having knowledge thereof"); *Minn.* Gen. St. 1913, § 7256 (destruction, etc., by another person; like Ark. Stats. § 10501); *Mont.* Rev. C. 1921, § 6996 (like Cal. Civ. C. § 1293); *N. J.* Comp. St. 1910, Wills, § 16 (oral revocation of written will, valid only if put in writing and approved by testator "and proved to be so done by three witnesses at the least"); *N. Y.* Cons. L. 1909, Decedent Est. § 34 (two witnesses are required to prove the cancellation, etc., of a will by another person for the testator); *N. C.* Con. St. 1919, § 4133 (revocation by holograph must be shown to be in testator's handwriting by "three witnesses at least"); *N. D.* Comp. L. 1913, § 5661 ("the direction of the testator and the fact of such injury or destruction must be proved by two witnesses," where another than the testator does it); *Okl.* Comp. St. 1921, § 11,242 (cancellation or destruction by any person other than the testator, and the testator's direction, "must be proved by two witnesses"); *Or.* Laws 1920, § 803 (revocation by an agent; "the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses"); *Pa.* St. 1917, June 7, § 20, Dig. 1920, § 8332, Decedents Est. (revocation of will of personalty, if made by nuncupative will, must be "proved to be so done by two or more witnesses"); *S. D.* Rev. C. 1919, § 624 (like N. D. Comp. L. § 5661); *Utah:* Comp. L. 1917, § 6330 (like Cal. Civ. C. § 1293).

[7] *Ariz.* Rev. St. 1913, § 1220 (where a bequest to a subscribing witness would otherwise be void, it shall not be if the will is proved "by the evidence of the subscribing witnesses, corroborated by the testimony of one or more disinterested and credible persons, to the effect that the testimony of such subscribing witnesses, necessary to sustain the will, is substantially true"); *N. H.* Pub. St. 1891, c. 186, § 18 (a 'donatio mortis causa'; "actual delivery" must be "proved by two indifferent witnesses"); 1902, Blazo *v.* Cochrane, 71 N. H. 585, 53 Atl. 1026 (statute applied); *Tex.* Rev. Civ. St. 1911 § 3267 (cited *supra*, note 2).

The following rulings upon a now obsolete statute may be placed here: 1810, Donaldson *v.* Jude, 2 Bibb. 57, 59 (manumission required by statute to be proved by two witnesses); 1815, Clark *v.* Bartlett, 4 Bibb. 201 (same).

than one witness to furnish testimony to the contents;[1] and the execution was to be proved as for wills produced in specie.[2]

Yet by statute, in several jurisdictions, a rule of number has been introduced, — not apparently in imitation of the ecclesiastical law, but merely upon a supposition of the wisdom of such a safeguard.[3] It is difficult to see

§ 2052. [1] ENGLAND: 1876, Sugden *v.* St. Leonards, L. R. 1 P. D. 154, 221, 233, 244.

CANADA: 1858, Haye's Will, 2 Morris Newf. 227; 1859, Calahan's Will, 2 Morris Newf. 276.

UNITED STATES: *Ala.* 1884, Jaques *v.* Horton, 76 Ala. 238, 245; 1886, Skeggs *v.* Horton, 82 Ala. 353, 354, 2 So. 110; 1917, Rawlings *v.* Berry, 128 Ark. 273, 194 S. W. 249 (must be clearly proved); *Conn.* 1874, Johnson's Will, 40 Conn. 587, 589; *Del.* 1843, Kearns *v.* Kearns, 4 Harringt. 83, 85; *Ga.* Rev. C. 1910, § 3863 ("If a will be lost or destroyed subsequent to the death, or without the consent of the testator, a copy of the same, clearly proved to be such by the subscribing witnesses and other evidence, may be admitted to probate"); 1869, Kitchens *v.* Kitchens, 39 Ga. 168, 172 (under this statute, the execution must be proved by the three attesting witnesses, on the rule of § 1304, *ante;* but not the contents, which may be proved by any "other evidence"); 1883, Mosely *v.* Carr, 70 G 333, 336 (preceding case approved; but the opinion is inconsistent); 1884, Burge *v.* Hamilton, 72 Ga. 568, 614 (one witness suffices); 1901, Scott *v.* Maddox, 113 Ga. 795, 39 S. E. 500 (approving Kitchens *v.* Kitchens); *Ill.* 1886, *Re* Page, 118 Ill. 576, 578, 8 N. E. 852; *Ia.* 1913, Thorman's Estate, 162 Ia. 237, 144 N. W. 7; *Ky.* 1836, Baker *v.* Dobyns, 4 Dana 220, 221; *Mo.* 1837, Graham *v.* O'Fallon, 4 Mo. 601, 608; 1839, Dickey *v.* Malechi, 6 Mo. 177, 184; *N. J.* 1863, Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401, 405; *Va.* 1918, Wright *v.* Wright, 124 Va. 114, 97 S. E. 358 (must be clearly proved).

[2] 1863, Harris *v.* Harris, 26 N. Y. 433 (distinguishing proceedings under 2 Rev. St. 132, § 5); 1921, Cooley *v.* Cooley, N. Y. Sup., 189 N. Y. Suppl. 577 (quoted *infra*, n. 3; pointing out that this common-law rule remains applicable in issues of title to real estate); 1870, Krise *v.* Neason, 66 Pa. 253, 259 (Sharswood, J.: "If one witness deposes positively to the handwriting of a party, whether to a lost or an existing paper, it satisfies the rule; the paper or copy is admissible, it matters not how many other witnesses may deny it, or what circumstances may be proved to cast doubt upon it. The question of sufficiency remains for the jury").

[3] *Arizona:* Rev. St. 1913, § 767 ("its provisions" must be "clearly and distinctly proved by at least two credible witnesses"); *California:* C. C. P. 1872, § 1339 ("no will shall be proved as a lost or destroyed will, . . . unless its provisions are clearly and distinctly proved by at least two credible witnesses"); 1901, Camp's Estate, 134 Cal. 233, 66 Pac. 227 (statute applied); 1909, Patterson's Estate, 155 Cal. 626, 102 Pac. 941 (C. C. P. § 1339 does not prevent the establishment, by two witnesses, of a part only; good opinion by Shaw, J.); 1910, Guinasso's Estate, Guinasso *v.* Arata, 13 Cal. App. 518, 110 Pac. 335 (a person who only heard another read a document aloud is not one witness under this rule); 1921, Re Thompson's Est., 185 Cal. 763, 198 Pac. 795 (alleged will of 1916, revoking a will of 1908, but destroyed without intent to revive the will of 1908; evidence to the 1916 will-contents was one witness to due execution and contents, and another witness to the receipt of a letter from the testatrix enclosing a copy of the 1916 will; held, that the rule requiring two witnesses to prove a lost will was not satisfied; unsound; in the first place, the testatrix' own statements were admissions of a predecessor in interest, receivable against as such either party claiming under her; in the next place, a "witness" includes testimonial statements out of Court as well as in Court, and here the testatrix' statements were testimonial; in the third place, the person testifying to the testatrix' admissions was a "witness," by one legitimate interpretation, and in view of the probative convincingness of the proof, that interpretation should have been taken; and finally the solemn futility of the judges' verbal ritual appears in the fact that the opinion actually sets forth the terms of the 1916 will, while in the same page it declares the contents not sufficiently proved: fortunately this Court retained its liquid common sense to an extent sufficient to reject, but only after several pages of conscientious exposition, the further unconscionable claim of the opponent that the 1916 will's revoking clause could be proved by one witness); *Colorado:* Comp. St. 1921, § 5205 ("the contents thereof," in addition to regular proof of execution, must be "likewise shown by the testimony of two or more witnesses"); *Idaho:* Comp. St. 1919, § 7470 (like Cal. C. C. P. § 1339); *Indiana:* Burns Ann. St. 1914, § 3167 (the will's "provisions shall be clearly proven by two witnesses, or by a correct copy and the testimony of one witness"); 1884, Farbing *v.* Webster, 99 Ind. 588, 591 (statute applied); 1894, Jones *v.* Casler, 139 Ind. 382, 38 N. E. 812 (statute applied); 1906, Inlow *v.* Hughes, 38 Ind. App. 375, 76 N. E. 763 (all the provisions to be established must be proved by two witnesses, in the absence of a written copy

why such a rule is more needed for lost wills than for lost deeds or bonds; and it would seem that it unnecessarily introduces an anomaly and a hampering restriction into our customary modes of proof.

§ 2053. **Usage or Custom.** The view has been occasionally advanced that a single witness is insufficient to prove the existence of a custom or usage,[1] — probably from the notion that, since a custom must usually be notorious in order to effect a contract, many persons would know it, and some concurrence of testimony should therefore be shown. One answer to the suggestion is that the common law knows no rule requiring more than one witness in any civil case (*ante*, § 2032). Another is that, if such a possibility of contradiction is

proved); *Michigan:* Comp. L. 1915, § 13788 (lost will's execution and contents "shall be established by at least two reputable witnesses"); *Minnesota:* Gen. St. 1913, § 7280 (not to be established "unless its provisions are clearly and distinctly proved by at least two credible witnesses"); *Montana:* Rev. C. 1921, § 10050 (like Cal. C. C. P. § 1339); *Nevada:* Rev. L. 1912, § 5881 (not to be probated, unless "its provisions are clearly and distinctly proved by at least two credible witnesses"); *New York:* C. C. P. 1877, § 1865, now S. C A. 1920, § 143, and Consol. L. 1909, Decedent Est. § 204, as added by St. 1920, c. 919 (provisions must be "clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness"); St. 1914, c. 443 (surrogates' courts; "a lost or destroyed will can be admitted to probate in a surrogate's court," in a case where by C. C. P. § 1865 "a judgment establishing the will could be rendered by the Supreme Court"); 1921, Cooley *v.* Cooley, N. Y. Sup., 189 N. Y. Suppl. 577 (action for admeasurement of dower, by brother and heir against widow; held, that as the defendant was setting up title by will, which had been lost, and was not proceeding under C. C. P. § 1865 to probate a will, "title to real estate could be shown by common-law proof that the property was devised, . . . and it is not necessary therefore that the will be established by two witnesses, or by the production of the will and one witness as the statute prescribes"; citing Harris *v.* Harris, *supra*, n. 2); 1922, Re Dorrity's Will, Surr. Ct., 194 N. Y. Suppl. 573 (application to probate a lost will; Slater, S., commenting on Dec. Est. Law §§ 200, 204, and S. C. A. § 143; "The genesis of these provisions was the common law codified and placed in the revised statute of 1830. The power given to the Surrogate's Court to probate wills in existence at the time of the death of the testator, or when fraudulently destroyed in his lifetime, was given by chapter 359 of the Laws of 1870. The surrogate's power is purely statutory. The revisors of the Surrogate's Code of 1914 did not see fit to change the condition that had existed since 1870. I know of no reason why concurrent jurisdiction should not be given to the surrogate, so that that Court could probate a will that had been lost, or destroyed by accident or design. The only difference would be that statutory proof, by at least two credible witnesses, must be produced in the Surrogate's Court, while common-law proof will be sufficient in the Supreme Court. It brings to light the opportunity for further legislation to give added power to the surrogates of the State"); *North Dakota:* Comp. L. 1913, § 8643 (not to be probated "unless its provisions are clearly and distinctly proved by at least two credible witnesses") *Oklahoma:* Comp. St. 1921, § 1123 (no will is to be proved as lost or destroyed, "unless its provisions are clearly and distinctly proved by at least two credible witnesses"); *Pennsylvania:* 1922, Lawman's Estate, 272 Pa. 237, 116 Atl. 538 (St. 1833, § 6, Dig. 1920, § 8308, quoted *ante*, § 2048, applied, so as to require two witnesses to the contents of a lost will); *Texas:* Rev. Civ. St. 1911, §§ 3268, 3272 (written will not produced may be proved by "the same amount and character of testimony . . . as is required to prove a written will produced in court"; but "the cause of its non-production must be proved, and such cause must be sufficient to satisfy the Court that it cannot by any reasonable diligence be produced, and the contents of such will must be substantially proved by the testimony of a credible witness who has read the same or who has heard it read"); *Utah:* Comp. L. 1917, § 7590 (like Cal. C. C. P. § 1339); *Washington:* St. 1917, Mar. 16, c. 156, Probate Code § 20; 1897, § 6117 (like Cal. C. C. P. § 1339); *Wyoming:* Comp. St. 1920, § 6704 ("clearly and distinctly proved by at least two credible witnesses").

Compare the rules for *restoring the record of lost documents*, including wills (*ante*, § 1660).

§ 2053. [1] 1817, Thomas *v.* Graves, 1 Mill Const. 308 ("It will rarely happen that one witness will sufficiently establish a usage"; no authority cited); 1843, Halwerson *v.* Cole, 1 Spears L. 321, 323 ("I do not think the evidence of a single individual is enough to establish a usage of trade for Charleston different from the general rule"); and the two overruled cases cited in the next note.

to be feared, it is amply provided for in the liberty of the opponent to produce dissentient witnesses and the fair certainty that he will be prepared to do so. The rule would thus operate as a merely unnecessary burden in cases where no real dispute exists:

1851, FOOT, J., in *Vail* v. *Rice*, 1 N. Y. 155, 158: "There does not appear to be anything in the character of the fact that a usage in a given branch of trade exists, which renders it important that such fact should be established by more than one competent witness; and many cases may arise in which the administration of justice would be needlessly delayed and burthened by requiring two or more witnesses. . . . When only one witness is called to establish such a fact, the duty of a Court and jury will always lead to an inquiry and examination into the circumstances; and if his single testimony is not sufficient, it will not form a basis of judicial action. The question whether the testimony of one witness to such a fact is sufficient may be safely left in every case to the Court and jury."

The rule would probably not to-day be recognized in any court,[2] except under express statute.[3]

§ 2054. **Local Rules in Miscellaneous Civil Cases (Reformation of Instrument, Oral Trust, Contracts, etc.).** In a few jurisdictions, anomalous rules exist, either by judicial decision or under express statute, requiring more than one witness.

(1) In *Pennsylvania*, a rule exists requiring two witnesses (or one corroborated by circumstances) to impeach a *written instrument*,[1] and another,

[2] *Fed.* 1871, Robinson *v.* U. S., 13 Wall. 363, 366 (one witness suffices); *Ala.* 1856, Partridge *v.* Forsyth, 29 Ala. 200, 203 (one witness suffices); *Ia.* 1908, Jones *v.* Herrick, 141 Ia. 415, 118 N. W. 444 (custom in driving teams; one witness suffices); *Md.* 1906, Biggs *v.* Langhammer, 103 Md. 94, 63 Atl. 198, *semble* (marine charter); *Mass.* 1830, Parrott *v.* Thacher, 9 Pick. 425, 431 (one witness held not sufficient under the circumstances; "usage is a thing which must be public and notorious, at least known to all masters of packets in this trade"); 1866, Boardman *v.* Spooner, 13 All. 353, 359 ("It has been considered to be a rule of law that the testimony of a single witness is insufficient to establish a usage of trade"); 1880, Jones *v.* Hoey, 128 Mass. 585 ("Notwithstanding the dictum in Boardman *v.* Spooner, there can be no doubt at the present day that the circumstances that but one witness testifies to a usage is important only as bearing upon the credibility and satisfactoriness of his testimony in point of fact"); 1906, McDonough *v.* Boston El. R. Co., 191 Mass. 509, 78 N. E. 141; *Mo.* 1920, Baker *v.* McMurry Contracting Co., 282 Mo. 685, 223 S. W. 45 (custom as to payment of railroad subcontractors; one witness alone, not sufficient, under certain circumstances; but the opinion confuses the present question and that of the opponent's knowledge of the custom); *N. Y.* 1829, Wood *v.* Hickok, 2 Wend. 501, 504 (testimony of one witness "does not amount to proof of the usage of a particular trade"; no authority cited); 1851, Vail *v.* Rice, 1 N. Y. 155, 158 (preceding case held to establish no rule; one witness sufficient; see quotation *supra*); *N. C.* 1905, Penland *v.* Ingle, 138 N. C. 456, 50 S. E. 850 (brokerage custom); *Va.* 1897, Southwest Va. M. L. Co. *v.* Chase, 95 Va. 50, 27 S. E. 826.

[3] Or. Laws 1920, § 801 ("usage, by the testimony of at least two witnesses"); ib. § 702 (quoted *ante*, § 2034); 1901, Aldrich *v.* R. Co., 39 Or. 263, 64 Pac. 455 (designating the method of enforcing the statutory rule).

Distinguish the question whether the witness must state *specific instances* (*ante*, § 1954), and whether *one instance* suffices (*ante*, § 379), and what *degree of certainty* must be reached in the proof (*post*, § 2498).

§ 2054. [1] 1847, Brawdy *v.* Brawdy, 7 Pa. 157, *semble;* 1886, Thomas *v.* Loose, 114 Pa. 35, 45, 6 Atl. 326; 1895, Pyroleum Appliance Co. *v.* W. H. & S. Co., 169 Pa. 440, 32 Atl. 458 (ruling that two partners were two witnesses); 1898, Keystone Axle Co. *v.* Leyda, 188 Pa. 322, 41 Atl. 477; 1904, Pioso *v.* Bitzer, 209 Pa. 503, 58 Atl. 891 (rule applied); 1916, Thompson *v.* Schoch, 254 Pa. 585, 99 Atl. 72.

Compare the peculiar parol-evidence rule in this State (*post*, § 2431).

requiring the same amount to reform a written instrument;[2] both probably being applications of the Chancery or ecclesiastical rule of two witnesses (*ante*, §§ 2045, 2047).

(2) In *Texas*, professedly on the foundation of a Chancery ruling in England (approved by Chancellor Kent, but in reality a mere casual utterance of caution for the case in hand[3]), a rule has been laid down that an oral declaration or *admission of a trust* annexed to a deed of sale must be proved by two witnesses or by one with corroboration.[4]

(3) In *Louisiana*, contracts affecting *personalty* or the *payment of money*, above $500 in amount, must be proved by one witness and "other corroborating circumstances."[5]

(4) In *Tennessee*, the service of a *surety's notice to the creditor* to sue the principal must be proved by two witnesses.[6]

(5) In *Alabama*, it seems to be the rule that two witnesses, or one with corroboration, are required for a *plea of truth* in *defamation*.[7]

(6) In *Wisconsin*, it has been suggested (perhaps without intending to make

[2] 1898, Cooper *v.* Potts, 185 Pa. 115, 39 Atl. 824; 1902, Sutch's Estate, 201 Pa. 305, 50 Atl. 943; 1914, Thomas *v.* Herring, 244 Pa. 550, 91 Atl. 500 (points out that Pa. St. 1913, May 28, P. L. 358, does not abolish the present rule).

Compare the rule for measure of proof by preponderance of evidence (*post*, § 2498).

[3] 1805, Lench *v.* Lench, 10 Ves. Jr. 517, 519 (issue as to a lien upon an estate purchased by a husband with money from the wife's trustees; as to the husband's declarations, Sir W. Grant, M. R., said that "upon this evidence I should have been disposed to allow the claim or to direct an inquiry; but if evidence of this sort could be proceeded upon, standing unsupported, and in some degree contradicted by the circumstances, it ought to stand wholly uncontradicted by other evidence"); 1815, Boyd *v.* M'Lean, 1 John. Ch. 582, 590 (Kent, C., referred to Lench *v.* Lench with approval, but did not lay down any absolute rule; "Sir W. Grant did not deem the unassisted oath of a single witness to the mere naked declaration of the trustee admitting the trust, as sufficient; . . . it would be easy to multiply instances of the like caution and discretion").

Compare the rule for *giving notice* of such admissions (*ante*, § 1856).

[4] 1849, Neill *v.* Keese, 5 Tex. 23, 28 (purporting to follow Boyd *v.* M'Lean); 1852, Mead *v.* Randolph, 8 Tex. 191 (not clear); 1853, Miller *v.* Thatcher, 9 Tex. 482, 485 (rule approved and established); 1858, Cuney *v.* Dupree, 21 Tex. 211, 219 (rule applied); 1882, Grace *v.* Hanks, 57 Tex. 14, 15 (same).

So also perhaps in *New Jersey:* 1905, Wilson *v.* Terry, 70 N. J. Eq. 231, 62 Atl. 310 (apparently approving this rule for a deed absolute intended as a mortgage).

[5] *La.* Rev. Civ. C. 1920, § 2277 ("All agreements relative to movable property, and all contracts for the payment of money where the value does not exceed $500," if not reduced to writing, are provable by any evidence; but "such contracts or agreements, above $500 in value, must be proved by at least one credible witness and other corroborating circumstances"); applied in the following cases: 1818, Ferry *v.* Legras, 5 Mart. 393; 1834, Lopez *v.* Bergel, 7 La. 178, 181; 1835, Stanley *v.* Addison, 8 La. 207, 210; 1843, Leeds *v.* Debuys, 4 Rob. 257; 1847, Palmer *v.* Dinn, 2 La. An. 536; 1853, O'Brien *v.* Flynn, 8 La. An. 307; 1855, Harrison *v.* McCawley, 10 La. An. 270; 1867, Stribling *v.* Stewart, 19 La. An. 71; 1868, Goldsmith *v.* Friedlander, 20 La. An. 119; 1868, Field *v.* Harrison, 20 La. An. 411; Helm *v.* Ducayet, 20 La. An. 417; 1869, Mille *v.* Dupuy, 21 La. An. 53, 54; 1871, Betzer *v.* Coleman, 23 La. An. 785; 1872, Webster *v.* Burke, 24 La. An. 137; 1876, Rossignol *v.* Triche, 28 La. An. 144; 1898, Berges *v.* Daverede, — La. An. —, 23 So. 891; 1902, Clark *v.* Hedden, 109 La. 147, 33 So. 116; 1904, Hannay *v.* New Orleans C. Exchange, 112 La. 998, 36 So. 831 (Code rule applied); 1905, Morris *v.* Pratt, 114 La. 98, 38 So. 70.

[6] *Tenn.* St. 1801, Shannon's Code 1916, §3518, applied in the following cases: 1827, Waterford *v.* Hensley, Mart. & Y. 275; 1837, Thompson *v.* Watson, 10 Yerg. 362, 368; 1841, Miller *v.* Childress, 2 Humph. 320; 1873, Simpson *v.* State, 6 Baxt. 440; 1882, Jackson *v.* Huey, 10 Lea 184, 189.

[7] 1849, Spruil *v.* Cooper, 16 Ala. 791; 1900, Hereford *v.* Combs, 126 Ala. 369, 28 So. 582 (approving Spruil *v.* Cooper).

Compare the cases cited *post*, § 2498 (proof beyond a reasonable doubt).

a rule) that a single witness will not suffice to prove matters *notoriously* and highly *improbable*.[8]

(7) In some States a rule specifies a required number of witnesses for *proof of handwriting* (*ante*, § 2044).

(8) In *Oregon*, a *survey of land* must be verified by two surveyors.[9]

(9) In the *Federal courts*, two citizen-witnesses must make certain proof in *naturalization* proceedings.[10]

(10) In certain transactions involving *action by an administrative officer*, the production of a certain number of witnesses, for proving to him some preliminary fact, is sometimes required by law. But these statutes, not affecting judicial proof, are without the present purview.[11]

(11) In *Alabama* and *Florida*, two witnesses to land-value are required in proceedings for the *relinquishment of dower*.[12]

(12) In sundry other instances a rule for *corroboration* is made applicable to a certain kind of witness (not to all) in a *certain issue*, *e. g.* the claimant's testimony to a debt of a deceased person, or the wife's testimony to the consideration of a conveyance attacked by creditors. Such rules seem to be applicable in essence to the kind of witness, not the kind of issue, and are therefore noted *post*, §§ 2065, 2066.

(13) In other instances, where a certain *kind of witness* is required, the rule specifies a *number required*, *e. g.* two physicians on a proceeding to commit to an insane hospital. These rules are noted *post*, §§ 2090, 2091.

Topic II: RULES DEPENDING ON THE KIND OF WITNESS

§ 2056. **Uncorroborated Accomplice; (1) History and Present State of the Law.** May a jury lawfully convict of a crime on the sole testimony of an accomplice in the alleged crime? Or must his single testimony be corroborated by other evidence?

Historically, this question did not become a mooted one until the end of the 1700s. Long before then, a struggle had centered round the testimony of accomplices, for in the political trials ever since the time of Henry VIII (when the frequent reports begin) they appear as the chief dependence

[8] 1897, Badger *v.* Mills, 95 Wis. 599, 70 N.W. 687 ("contrary to conceded fact or matters of common knowledge or to all reasonable probabilities"; here the cause of the breaking of a ladder).

[9] *Or.* Laws 1920, § 3423 ("two competent surveyors" required, to make a survey "legal evidence," when not by official surveyors).

[10] The statutes and rulings are placed *post*, § 2066.

[11] The following are examples:

(*a*) Rule requiring two witnesses to absent grantor's signature to entitle *a deed to be accepted for record* by the recorder of deeds; see the statutes cited *ante*, § 1651; the following is an example: S. Dak. Rev. Code 1919, §§ 541, 570, 582-585 (document affecting real property not acknowledged; one subscribing witness necessary for record; otherwise, witnesses to handwriting of party and subscribing witness); § 1577 (personal property mortgage).

(*b*) Rule requiring two witnesses to *homestead residence*, to entitle an entryman to a patent of U. S. land: U. S. Rev. St. 1878, §§ 2290, 2291; 1920, Jones *v.* U. S., 9th C. C. A., 265 Fed. 235.

[12] *Ala.* Code 1907, § 3821 (relinquishment of dower; "the Court must take the testimony of two or more credible witnesses in writing as to the value of the lands," etc.); *Fla.* Rev. G. S. 1919, § 3809 (insane wife; quoted *post*, § 2090).

of the Crown in its prosecutions. But the original controversy was over their admissibility. Through the 1600s and the 1700s it had to be ruled again and again that they were to be received as witnesses.[1] But for a long time no question was made as to the sufficiency of their testimony when admitted. The quantitative conception of an oath (*ante*, § 2032) tended to keep this question in the background. An oath, in the notions of the time, had a certain dead-weight of its own; one oath was as good as another oath. Should a witness once get in, the harm (they thought) was done; for there would be little weighing of the comparative quality of different persons' oaths. The struggle therefore was made at the threshold.

As time went on, and the modern conception of testimony developed, the possibility of admitting a witness and yet discriminating as to the qualitative sufficiency of his testimony became more apparent; and the way was open for the consideration of this question. In a few instances, as the 1700s wore on, and even before then, judicial suggestions are found as to the feasibility of such a discrimination.[2] But not until the end of that century does any Court seem to have acted upon such a suggestion in its directions to the jury. About that time there comes into acceptance a general practice to discourage a conviction founded solely upon the testimony of an accomplice uncorroborated.[3]

But was this practice founded on a *rule of law?* Never, in England, — until very modern times. It was recognized constantly that the judge's instruction upon this point was a mere exercise of his common-law function of advising the jury upon the weight of the evidence, and was not a statement of a rule of law binding upon the jury:[4]

§ 2056. [1] *Ante*, §§ 526, 580, 967.

[2] 1680, Hale, Pleas of the Crown, I, 305 ("The credibility of his testimony is to be left to the jury; and truly it would be hard to take away the life of any person upon such a witness that swears to save his own and yet confesseth himself guilty of so great a crime, unless there be very considerable circumstances which may give the greater credit to what he swears"); 1775, R. *v.* Rudd, 1 Cowp. 331, 336 (Mansfield, L. C. J., after referring to the competency of accomplices as "approvers": "Though under this practice they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight to convict the offenders"); 1863, Plunkett, Evidence of Accomplices, 2 ("As to the origin of this practice of requiring confirmation at all, it cannot be very clearly traced. . . . It was not laid down or acted on in the time of Lord Holt, that is, up to the year 1710: . . . it was after this decision in Rudd's case [1775] that the practice must have been introduced").

[3] 1784, R. *v.* Smith and Davis, 1 Leach Cr. L., 4th ed., 479, note ("The Court, though it was admitted as an established rule of law that the uncorroborated testimony of an accomplice is legal evidence, thought it too dangerous to suffer a conviction to take place under such unsupported testimony"); 1788, R. *v.* Atwood and Robbins, 1 Leach Cr. L., 4th ed., 464 (quoted *infra*); 1788, R. *v.* Durham and Crowder, ib. 478 (foregoing case followed; this case is clearly the later, though the date is misprinted as 1787 in the report).

[4] *England and Ireland:* 1803, R. *v.* Despard, 28 How. St. Tr. 346, 487; 1809, Ellenborough, L. C. J., in R. *v.* Jones, 2 Camp. 132 ("Strange notions upon this subject have lately got abroad; and I thought it necessary to say so much for the purpose of correcting them"); 1821, R. *v.* Dawber, 3 Stark. 34; 1826, R. *v.* Sheehan, Jebb 54 (by all the Irish judges); 1835, R. *v.* Hastings, 7 C. & P. 152 ("It is altogether for the jury"); 1836, R. *v.* Wilkes, 7 C. & P. 272; 1837, R. *v.* Casey, Jebb 203 (by all the Irish judges); 1847, Simmons *v.* Simmons, 1 Rob. Eccl. 566, 575; 1848, R. *v.* Mullins, 7 State Tr. N. S. 1110, 3 Cox Cr. 526; 1852, R. *v.* Dunne, Ire., 5 Cox Cr. 507; 1855, R. *v.* Stubbs, 1 Dears. 555, 7 Cox Cr. 48 ("It is not a rule of law that an accomplice must be confirmed"); 1860, M'Clory *v.* Wright, 10 Ir. C. L. 514, 520; 1860, Magee

1788, BULLER, J., in *R.* v. *Atwood* and *Robbins*, 1 Leach Cr. L., 4th ed., 464: "I thought it proper to refer your case to the consideration of the twelve Judges. My doubt was whether the evidence of an accomplice, unconfirmed by any other evidence that could materially affect the case, was sufficient to warrant a conviction. And the judges are unanimously of opinion that an accomplice alone is a competent witness, and that if the jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal. The distinction between the competency and credit of a witness has long been settled. If a question be made respecting his competency, the decision of that question is the exclusive province of the judge; but if the ground of objection go to his credit only, his testimony must be received and left to the jury, under such directions and observations from the Court as the circumstances of the case may require, to say whether they think it sufficiently credible to guide their decision in the case."

1848, MAULE, J., in *R.* v. *Mullins*, 7 State Tr. N. S. 1110, 3 Cox Cr. 526: "The truth of the matter is, there is no rule of law at all that an accomplice cannot be believed unless he is confirmed. . . . It is an observation addressed, not to the Court to exclude the evidence, but addressed to the jury who have to weigh the evidence, and it is for them to say whether the confirmation will satisfy them or whether they will be satisfied without any. If they are satisfied without any, they may be, and their verdict may be an honest and just and true one. . . . The directions of judges given to juries in that respect are not directions in point of law which juries are bound to adopt, but observations respecting facts, which judges are very properly in the habit of giving, because, with respect to matters of fact, the judge as well as the counsel upon both sides endeavor to assist the jury."

1919, DARLING, J., in *R.* v. *Feigenbaum*, 1 K. B. 431: "The boys were undoubtedly the accomplices of the appellant. It is a rule of law that a jury may convict on the uncorroborated evidence of an accomplice, and, therefore, a judge is not justified in directing the jury, at the close of the case for the prosecution, that they must acquit the prisoner because in his opinion the only evidence against him is the uncorroborated evidence of an accomplice. But it has been laid down in many cases, that the judge ought not to leave the case to the jury without warning them firmly that the evidence of an accomplice must always be regarded with grave suspicion, and that they ought not to convict unless the evidence of the accomplice is corroborated; further, he ought to point out to the jury what corroborative evidence there is, if any, or if, in his opinion, there is no corroborative evidence, he should tell the jury so. Practically this differs little from saying that a judge may direct an acquittal if there is indeed no corroboration of the accomplice's evidence, but a difference does exist, though it may be very slight. In the words of Browning:

'Oh, the little more, and how much it is!
And the little less, and what worlds away.'"

v. Magee, 11 Ir. C. L. 449, 462; 1868, R. *v.* Boyes, 1 B. & S. 311, 320; 1894, Re Meunier, 2 Q. B. 415, 418 (the warning to the jury is customary; but there is no right to withdraw the case for want of corroboration).

But since the establishment of the Court of Criminal Appeal, there is a definite rule of law; 1908, R. *v.* Tate, 2 K. B. 680 (the omission of the caution renders the verdict invalid where no corroboration existed, in the appellate Court's opinion); 1916, R. *v.* Baskerville, 2 K. B. 658 (gross indecency with boys; held that "the rule of practice [as to corroboration] has become virtually equivalent to a rule of law"; examining prior cases).

In CANADA, the orthodox doctrine is still adhered to: *Alta.* 1912, Rex *v.* Betchel, 4 Alta. 402, 5 D. L. R. 497 (abortion; the judge should give a caution to the jury, but a verdict without corroborative evidence is valid); 1915, R. *v.* McClain, 23 D. L. R. 312 (stealing; uncorroborated testimony of an accomplice may suffice); *N. Br.* 1880, R. *v.* Tower, 20 N. Br. 168, 207 (there is no positive rule of law requiring direct corroboration); *N. Sc.* 1917, R. *v.* Morrison, 38 D. L. R. 568 (manslaughter; conviction reversed for failure to give an instruction with warning as to accomplices); *Ont.* 1886, R. *v.* Andrews, 12 Ont. 184, 191 (the practice of instruction is proper, but it is not a rule of law reviewable on appeal); 1910, R. *v.* Frank, 21 Ont. L. R. 196 (following R. *v.* Meunier); 1910, R. *v.* Trapnell, 22 Ont. L. R. 219, 224; *Sask.* 1908, R. *v.* Reynolds, 1 Sask. 480.

In the United States the same discrimination was early accepted:

1837, RUFFIN, C. J., in *State* v. *Hardin*, 2 Dev. & B. 407, 411: "The evidence of an accomplice is undoubtedly competent, and may be acted on by the jury as a warrant to convict, though entirely unsupported. It is, however, dangerous to act exclusively on such evidence; and therefore the Court may properly caution the jury and point out the grounds for requiring evidence confirmatory of some substantial part of it. But the Court can do nothing more; and if the jury really yield faith to it, it is not only legal, but obligatory on their consciences, to found their verdict upon it."

As a matter of common law, then, the doctrine was universally understood (except by one or two Courts [5]) as amounting to no rule of evidence, but merely to a *counsel of caution* given by the judge to the jury.[6] It followed

[5] *Cal.* 1860, People *v.* Eckert, 16 Cal. 110 (misunderstanding some of the English cases); *Ia.* 1848, Ray *v.* State, 1 G. Greene 316 (with sentimental reflections upon the lack of harmony between the English rule and our supposed superior methods of justice); *P. I.* 1902, U. S. *v.* Balayat, 1 P. I. 451, *semble* (theft); 1905, U. S. *v.* Ocampo, 4 P. I. 400 (robbery; not clear); 1905, U. S. *v.* Lim Tico, 4 P. I. 440 (larceny); 1905, U. S. *v.* Balisacan, 4 P. I. 545 (murder); 1906, U. S. *v.* Dadacay, 6 P.I. 1 (conspiracy); 1907, U.S. *v.* Padlan, 7 P. I. 517 (robbery); but these cases are supplanted by those cited *infra*, n. 6; *Tenn.* 1844, Kinchelow *v.* State, 5 Humph. 9, *semble; Tex.* 1854, Jones *v.* State, 13 Tex. 168, 177, *semble.*

[6] *Federal:* 1829 (?) Steinham *v.* U. S., 2 Paine 168, 180; 1829, U. S. *v.* Kessler, Baldw. 15, 22; 1843, U. S. *v.* Troax, 3 McL. 224; 1876, U. S. *v.* Babcock, 3 Dill. 571, 619; 1887, U. S. *v.* Thompson, 31 Fed. 331, C. C.; 1905, Wong Din *v.* U. S., 135 Fed. 702, 68 C. C. A. 340 (conspiracy to evade immigration law); 1910, Hohngren *v.* U. S., 217 U. S. 509, 30 Sup. 588, *semble;* 1912, Keliher *v.* U. S., C. C. A., 193 Fed. 8 (*contra:* "It is well known that the rule in Massachusetts has always been as stated in Roscoe," citing Com. *v.* Bosworth, but erroneously treating it as laying down a rule of law); 1914, Lung *v.* U. S., 9th C. C. A., 218 Fed. 817; 1915, Diggs *v.* U. S., Caminetti *v.* U. S., 9th C. C. A., 220 Fed. 545 (a refusal to instruct as to the credibility of an accomplice is not error; Ross, J., diss.); 1916, Caminetti *v.* U. S., 242 U. S. 470, 495, 37 U. S. 192 ("white slave traffic"); 1917, U. S. *v.* Fischer, D. C. E. D. Pa., 245 Fed. 477; 1917, Bandy *v.* U. S., 8th C. C. A., 245 Fed. 98; 1917, Wallace *v.* U. S., 7th C. C. A., 243 Fed. 300, 307 (illegal sale of drugs); 1919, McGinniss *v.* U. S., 2d C. C. A., 256 Fed. 621 (conspiracy to forge; accomplice's testimony uncorroborated, here held insufficient); 1919, Reeder *v.* U. S., 8th C. C. A., 262 Fed. 36 (hindering by force the execution of a law); 1921, Wagman *v.* U. S., 6th C. C. A., 269 Fed. 568 (illegal carriage of liquor);
Arkansas: 1867, Flanagin *v.* State, 25 Ark. 92;
Colorado: 1873, Solander *v.* People, 2 Colo. 48, 66; 1888, Wisdom *v.* People, 11 Colo. 174, 17 Pac. 519;
Connecticut: 1851, State *v.* Wolcott, 21 Conn. 272, 281; 1875, State *v.* Williamson, 42 Conn. 261, 263; 1904, State *v.* Carey, 76 Conn. 342, 56 Atl. 632 (leading opinion, by Hamersley, J.); 1911, State *v.* Kritchman, 84 Conn. 152, 79 Atl. 75;
Florida: 1867, Sumpter *v.* State, 11 Fla. 247, 252 (R. Jones, *supra*, quoted with approval); 1886, Bacon *v.* State, 22 Fla. 51, 78; 1890, Tuberson *v.* State, 26 Fla. 472, 474, 7 So. 858; 1900, Brown *v.* State, 42 Fla. 184, 27 So. 869; 1905, Caldwell *v.* State, 50 Fla. 4, 39 So. 188 (murder);
Hawaii: 1869, R. *v.* Brown, 3 Haw. 114, 115; 1889, R. *v.* Wo Sow, 7 Haw. 734, 737; 1898, Republic *v.* Edwards, 11 Haw. 571, 573 (sodomy; but the jury should be advised not to convict, and the Court may in discretion instruct them not to do so); 1904, Tong Kai *v.* Terr., 15 Haw. 612 (bribery);
Illinois: 1861, Gray *v.* People, 26 Ill. 344, 347; 1868, Cross *v.* People, 47 Ill. 152, 160 ("It is a matter of discretion with the Court to advise, rather than a rule of law"); 1874, Earll *v.* People, 73 Ill. 329, 334; 1881, Collins *v.* People, 98 Ill. 584, 588 (careful opinion); 1882, Friedberg *v.* People, 102 Ill. 160, 164; 1892, Hoyt *v.* People, 140 Ill. 588, 595, 30 N. E. 315; 1895, Campbell *v.* People, 159 Ill. 9, 42 N. E. 123; 1897, Honselman *v.* People, 168 Ill. 172, 48 N. E. 304; 1906, Juretich *v.* People, 223 Ill. 484, 79 N. E. 181 (false pretences); 1908, People *v.* Frankenburg, 236 Ill. 408, 86 N. E. 128; 1908, People *v.* Feinberg, 237 Ill. 348, 86 N. E. 584; 1912, People *v.* Baskin, 254 Ill. 509, 98 N. E. 957 (receiving stolen goods); 1914, People *v.* Covitz, 262 Ill. 514, 104 N. E. 887; 1914, People *v.* Spira, 264 Ill. 243, 106 N. E. 241 (arson); 1915, People *v.* Craig, — Ill. —, 110 N. E. 9 (fraudulent arson; rule affirmed); 1915, People *v.* Rosenberg, 267 Ill. 202, 108 N. E. 54 (arson); 1919, People *v.* Pattin, 290 Ill. 542, 125 N. E. 248; 1920, People *v.* Green, 292 Ill. 351, 127 N. E. 50 (burglary); 1920, People *v.* Miller, 292 Ill. 318, 127 N. E. 58 (receiving stolen goods);

Indiana: 1851, Johnson *v.* State, 2 Ind. 652; 1853, Dawley *v.* State, 4 Ind. 128; 1855, Stocking *v.* State, 7 Ind. 326, 330; 1859, Ulmer *v.* State, 14 Ind. 52, 57; 1879, Johnson *v.* State, 65 Ind. 269, 271; 1912, Schuster *v.* State, 178 Ind. 320, 99 N. E. 422; 1917, Brewster *v.* State, 186 Ind. 369, 115 N. E. 54 (arson); 1922, Vorhees *v.* State, — Ind. —, 134 N. E. 855 (making liquor);

Kansas: 1866, Craft *v.* State, 3 Kan. 450, 479; 1875, State *v.* Kellerman, 14 Kan. 135, 137, *semble;* 1878, State *v.* Adams, 20 Kan. 311, 327; 1893, State *v.* Patterson, 52 Kan. 335, 354, 34 Pac. 784, *semble* (but *contra*, 1896, State *v.* McDonald, 57 Kan. 537, 46 Pac. 967, *semble*);

Louisiana: 1871, State *v.* Bayonne, 23 La. An. 78; 1873, State *v.* Prudhomme, 25 id. 522, 525 ("rather a rule of practice than a rule of law"); 1881, State *v.* Russell, 33 La. 135, 138 ("the authorities . . . justify conviction by the jury on such testimony although it may not be corroborated by other"); 1886, State *v.* Mason, 38 La. 476; 1888, State *v.* Banks, 40 La. 736, 739, 5 So. 18; 1900, State *v.* Vicknair, 52 La. 1921, 28 So. 273 (foregoing cases approved; here a requested charge that the accomplice's testimony should not be even considered unless corroborated was held properly refused); 1903, State *v.* De Hart, 109 La. 570, 33 So. 605 (the necessity of corroboration is "rather a rule of practice than a rule of law"); 1904, State *v.* Hauser, 112 La. 313, 36 So. 396;

Maine: 1850, State *v.* Cunningham, 31 Me. 355; 1870, State *v.* Litchfield, 58 Me. 267, 270;

Massachusetts: 1839, Com. *v.* Bosworth, 22 Pick. 397; 1852, Com. *v.* Savory, 10 Cush. 535, 538; 1857, Com. *v.* Brooks, 9 Gray 299, 303; 1858, Com. *v.* Price, 10 Gray 472, 475; 1868, Com. *v.* Larrabee, 99 Mass. 413, 415; 1872, Com. *v.* Elliot, 110 Mass. 104, 106; 1877, Com. *v.* Scott, 123 Mass. 222, 237; 1890, Com. *v.* Wilson, 152 Mass. 12, 14, 25 N. E. 16 (where the judge refused to instruct on the subject and was sustained); 1894, Com. *v.* Clune, 162 Mass. 206, 214, 38 N. E. 435; 1896, Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560, 1906, Com. *v.* Phelps, 192 Mass. 591, 78 N. E. 741;

Michigan: 1858, People *v.* Jenness, 5 Mich. 305, 330; 1874, Hamilton *v.* People, 29 Mich. 173, 188;

Mississippi: 1848, Keithler *v.* State, 10 Sm. & M. 192, 228 (the jury "may believe him, if they choose, without corroboration"); 1856, Dick *v.* State, 30 Miss. 593, 599, *semble;* 1860, George *v.* State, 39 Miss. 570, 592, *semble;* 1875, Fitzcox *v.* State, 52 Miss. 923, 926; 1876, White *v.* State, 52 Miss. 216, 227; 1921, Dedeaux *v.* State, 125 Miss. 326, 87 So. 665 (larceny);

Missouri: 1861, State *v.* Watson, 31 Mo. 361, 364 (good opinion); 1877, State *v.* Jones, 64 Mo. 391, 395; 1880, State *v.* Reavis, 71 Mo. 419; 1887, State *v.* Chyo Chiagk, 92 Mo. 395, 413, 417, 4 S. W. 704 (but intimating that it should be a rule of law); 1888, State *v.* Walker, 98 Mo. 95, 109, 11 S. W. 1133; 1890, State *v.* Harkins, 100 Mo. 666, 672, 13 S. W. 830 (repudiating in effect the suggestion in State *v.* Chyo Chiagk); 1891, State *v.* Jackson, 106 Mo. 174, 179, 17 S. W. 301; 1893, State *v.* Minor, 117 Mo. 302, 306, 22 S. W. 1085; State *v.* Crab, 121 Mo. 554, 565, 26 S. W. 548; 1894, State *v.* Dawson, 124 Mo. 418, 422, 27 S. W. 1104; State *v.* Marcks, 140 Mo. 656, 41 S. W. 973; 1895, State *v.* Donnelly, 130 Mo. 642, 32 S. W. 1124; 1897, State *v.* Tobie, 141 Mo. 547, 42 S. W. 1078 (it is reprehensible in a Court to consider an appeal against a doctrine so long established as this); 1898, State *v.* Black, 143 Mo. 166, 44 S. W. 340 (was the Bar entitled to a ruling on this point every twelve months?); 1899, State *v.* Sprague, 146 Mo. 409, 425, 50 S. W. 901; 1902, State *v.* Koplan, 167 Mo. 298, 66 S. W. 967; 1908, State *v.* Bobbitt, 215 Mo. 42, 114 S. W. 511 (murder); 1909, State *v.* Wilkins, 221 Mo. 444, 120 S. W. 22 (sodomy; not clear); 1909, State *v.* Shelton, 223 Mo. 118, 122 S. W. 732; 1919, State *v.* Cummins, 279 Mo. 192, 213 S. W. 969; 1921, State *v.* Howerton, — Mo. —, 228 S. W. 745 (larceny);

Nebraska: 1894, Lamb *v.* State, 40 Nebr. 312, 319, 58 N. W. 963; 1922, Dyson *v.* State, — Nebr. —, 186 N. W. 984 (burglary);

New Jersey: 1877, State *v.* Hyer, 39 N. J. L. 598, 603; 1902, State *v.* Rachman, 68 N. J. L. 120, 53 Atl. 1046; 1904, State *v.* Lyons, 70 N. J. L. 635, 58 Atl. 398 (murder); 1904, State *v.* Simon, 71 N. J. L. 142, 58 Atl. 109; 1911, State *v.* Lieberman, 80 N. J. L. 506, 79 Atl. 331; 1912, Letts *v.* Letts 79 N. J. Eq. 630, 82 Atl. 845;

New York: 1823, People *v.* Reeder, 1 Wheel. Cr. C. 418, 420; 1839, People *v.* Davis, 21 Wend. 308, 314; 1845, People *v.* Costello, 1 Den. 83, 87; 1860, People *v.* Dyle, 21 N. Y. 578; 1864, Dunn *v.* People, 29 N. Y. 523, 528; 1875, Linsday *v.* People, 63 N. Y. 145, 154; at this point the law was changed by St. 1882, c. 360, quoted *infra*, note 10, as C. Cr. P. § 399; the following ruling had been made meantime: 1869, People *v.* Evans, 40 N. Y. 1, 6 (an exception exists for the case of subornation of perjury; the perjurer must be corroborated in the charge against the suborner; this ruling stands alone; but compare the application of the statutory rule to perjury, *post*, § 2059, and the rule for perjury in general, *ante*, § 2042);

North Carolina: 1837, State *v.* Haney, 2 Dev. & B. 390, 397; 1837, State *v.* Hardin, 2 Dev. & B. 407, 411; 1880, State *v.* Holland, 83 N. C. 624; 1903, State *v.* Register, 133 N. C. 746, 46 S. E. 21; 1920, State *v.* Bailey, 179 N. C. 724, 102 S. E. 406;

Ohio: 1859, Allen *v.* State, 10 Oh. St. 287, 305; 1913, State *v.* Hare, 87 Oh. 204, 100 N. E. 825 (bribery);

Pennsylvania: 1879, Kilrow *v.* Com., 89 Pa.

that the jury might or might not regard the caution by acquitting upon an uncorroborated accomplice's testimony; [7] that they alone were to determine whether corroboration existed and was sufficient; [8] and that the trial judge's omission of the caution was of itself not a ground for a new trial, being a matter solely for the trial judge's discretion.[9]

481, 488; 1889, Cox *v.* Com., 125 Pa. 94, 101; 1912, Com. *v.* De Masi, 234 Pa. 570, 83 Atl. 430;
Philippine Islands: 1905, U. S. *v.* Ocampo, 5 P. I. 339 (virtually repudiating, though not citing, the cases cited *supra*, n. 5); 1907, U. S. *v.* Butardo, 9 P. I. 246; 1910, U. S. *v.* Granadoso, 16 P. I. 419; 1910, U. S. *v.* Ambrosio, 17 P. I. 295, *semble;* 1911, U. S. *v.* Bernales, 18 P. I. 525; 1912, U. S. *v.* Callapag, 21 P. I. 262 (expressly affirming U. S. *v.* Ocampo, *supra*); 1913, U. S. *v.* Soriano, 25 P. I. 624, 630 (similar); 1913, U. S. *v.* Dacir, 26 P. I. 503, 508; 1914, U. S. *v.* Bana, 27 P. I. 103; 1915, U. S. *v.* Valdez, 30 P. I. 293, 315; 1916, U. S. *v.* Wayne Shoup, 35 P. I. 57; 1916, U. S. *v.* Bagsic, 35 P. I. 327; 1918, U. S. *v.* Remigio, 37 P. I. 599, 610; 1918, U. S. *v.* Maharaja Alim, 38 P. I. 1;
Porto Rico: 1906, People *v.* Kent, 10 P. R. 325, 345, *semble;*
Rhode Island: 1916, State *v.* Riddell, 38 R. I. 506, 96 Atl. 531 (arson; corroboration not required by rule of law);
South Carolina: 1849, State *v.* Brown, 3 Strobh. 508, 517, *semble;* 1867, State *v.* Wingo, 11 S. C. 275, *semble;* 1897, State *v.* Green, 48 S. C. 136, 26 S. E. 234;
Vermont: 1869, State *v.* Potter, 42 Vt. 495, 506 ("only a rule of practice, and not a rule of law"); 1922, State *v.* Montifoire, — Vt. —, 116 Atl. 77 (abortion);
Virginia: 1839, Brown *v.* Com., 2 Leigh 769, 777, *semble;*
Washington: 1891, Edwards *v.* State, 2 Wash. 291, 306, 26 Pac. 258, *semble;* 1891, Rose *v.* State, 2 Wash. 310, 320, 26 Pac. 264, *semble;* 1900, State *v.* Coates, 22 Wash. 601, 61 Pac. 726; 1901, State *v.* Concannon, 25 Wash. 327, 65 Pac. 534 (corroboration usually to be required); 1901, State *v.* Harras, 25 Wash. 416, 65 Pac. 774 (State *v.* Coates followed); 1905, State *v.* Pearson, 37 id. 405, 79 Pac. 985 (refusal to give a long instruction requiring corroboration under certain circumstances, held error; the opinion harks back to Edwards *v.* State, throws doubt on the intervening rulings, and then declines to lay down any rule; a good example of the kind of cobwebby opinion directed more to arachnidial athletics than the demands of plain certainty in criminal justice); 1909, State *v.* Jones, 53 Wash. 142, 101 Pac. 708; 1911, State *v.* Ray, 62 Wash. 582, 114 Pac. 439; 1911, State *v.* Stapp, 65 Wash. 438, 118 Pac. 337; 1911, State *v.* Dalton, 65 Wash. 663, 118 Pac. 829; 1911, State *v.* Mallahan, 66 Wash. 21, 118 Pac. 898; 1912, State *v.* Wappenstein, 67 Wash. 502, 121 Pac. 989; 1915, State *v.* Engstrom, 86 Wash. 499, 150 Pac. 1173 (larceny);
West Virginia: 1877, State *v.* Betsall, 11 W. Va. 703, 740; 1900, State *v.* Hill, 48 W. Va. 132, 35 S. E. 831;
Wisconsin: 1854, Mercer *v.* Wright, 3 Wis. 645 ("A jury ought not to convict upon the testimony of an accomplice uncorroborated, but all now agree that they *may* do so"); 1879, Ingalls *v.* State, 48 Wis. 647, 652, 4 N.W. 785; 1884, Black *v.* State, 59 Wis. 471, 18 N. W. 457; 1895, Porath *v.* State, 90 Wis. 527, 537, 63 N. W. 1061; 1894, State *v.* Juneau, 88 Wis. 180, 59 N. W. 580; 1905, Murphy *v.* State, 124 Wis. 635, 102 N. W. 1087; 1905, Means *v.* State, 125 Wis. 650, 104 N. W. 815; 1922, O'Keefe *v.* State, — Wis. —, 187 N. W. 656 (indecent liberties);
Wyoming: 1894, McNealley *v.* State, 5 Wyo. 69, 36 Pac. 824 (undecided); 1902, Smith *v.* State, 10 Wyo. 157, 67 Pac. 977 (accomplice's uncorroborated testimony may suffice; but the opinion is inconsistent); 1906, Clay *v.* State, 15 Wyo. 42, 86 Pac. 17 ("[The question] was discussed by this Court in Smith *v.* State, but was not decided"; here again left undecided).

[7] This is stated or implied in all the above cases.

[8] This was the practical consequence; nevertheless, the judges, merely as a part of the caution, did define certain elements of corroboration; these are treated *post*, § 2058.

[9] 1892, Hoyt *v.* People, 140 Ill. 588, 596, 30 N. E. 315; 1890, Com. *v.* Wilson, 152 Mass. 12, 14, 25 N. E. 16; 1896, Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560; 1877, State *v.* Jones, 64 Mo. 391, 395; 1892, State *v.* Woolard, 111 Mo. 248, 256, 20 S. W. 27.

Contra: Can. 1887, U. S. Express Co. *v.* Donohue, 14 Ont. 333, 337; *U. S.* 1873, Solander *v.* People, 2 Colo. 48, 66, *semble* (but only where there is in fact no corroboration); 1861, State *v.* Stebbins, 29 Conn. 463, 473 ("To omit it is now held a clear omission of judicial duty, and becomes a ground, perhaps, for granting a new trial"); 1875, State *v.* Williamson, 42 Conn. 261, 264 (apparently approving the above passage); 1902, Anthony *v.* State, 44 Fla. 1, 32 So. 818; 1858, People *v.* Jenness, 5 Mich. 305, 330, *semble;* 1861, State *v.* Watson, 31 Mo. 361, 365, *semble;* 1918, State *v.* Massey, 274 Mo. 578, 204 S. W. 541 (when "all of the evidence . . is circumstantial"); 1877, State *v.* Hyer, 39 N. J. L. 598, 605; 1854, Jones *v.* State, 13 Tex. 168, 177 (provided the facts make it applicable); 1869, State *v.* Potter, 42 Vt. 495, 506.

Undecided: 1886, State *v.* Mason, 38 La. An. 476.

But in nearly half of the jurisdictions in our own country a statute has expressly turned this cautionary practice into a rule of law.[10] The judge *must* therefore under these statutes *instruct* the jury in the rule of law, and

[10] *Alabama:* Code 1897, § 5300, C. 1907, § 7897 ("A conviction of a felony cannot be had on the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and such corroborative evidence, if it merely shows the commission of the offense, or the circumstances thereof, is not sufficient"); *Alaska:* Comp. L. 1913, § 2262 (like Or. Laws 1920, § 1540); § 1505 (like Or. Laws 1920, § 868); *Arizona:* § 1051 (like Or. Laws 1920, § 1540, inserting after "other evidence," the clause "which in itself and without the aid of the testimony of the accomplice" etc.; this follows the original text of the Cal. Code, since changed); *Arkansas:* Dig. 1919, § 3181 (in felony, not sufficient, "unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof"); § 3180 (in all cases where a rule requires corroboration, the judge "shall instruct the jury to render a verdict of acquittal," if the requirement is not fulfilled); *California:* P. C. 1872, § 1111 (an accomplice's testimony is not sufficient, "unless he is corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof"); C. C. P. § 2061, par. 4 (the judge to instruct, "on all proper occasions," that "the testimony of an accomplice ought to be viewed with distrust"); *Georgia:* Rev. C. 1910, § 5742, P. C. 1910, § 1017 ("The testimony of a single witness is generally sufficient to establish a fact"; except "in any case of felony where the only witness is an accomplice"; but "corroborating circumstances may dispense with another witness"). *Idaho:* Comp. St. 1919, § 8957 (like Cal. P. C. § 1111); *Iowa:* Code 1897, § 5489, Comp. C. 1919, § 9474 (insufficient, "unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof"); *Kentucky:* C. Cr. P. 1895, § 241 (all offenses; like Ark. Dig. § 3181); *Minnesota:* Gen. St. 1913, § 8463 ("A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offence; and the corroboration is not sufficient if it merely shows the commission of the offence or the circumstances thereof"); § 8741 (gambling offences; any person may be convicted "on his own confession out of court or upon the testimony of an accomplice"); *Montana:* Rev. C. 1921, § 11988 (like Cal. P. C. § 1111); § 10672, par. 4 (like Cal. C. C. P. § 2061); *Nevada:* Rev. L. 1912, § 7180 (like Cal. P. C. § 1111, as originally phrased, inserting, after "evidence which," the words, "in itself and without the aid of the testimony of the accomplice"); *New Hampshire:* Pub. St. 1891, c. 272, § 4 (fornication; "no person shall be convicted solely upon the testimony of a partner in guilt"); *New York:* C. Cr. P. 1881, § 399 (not sufficient, "unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime"); *North Dakota:* Comp. L. 1913, § 10841 (like Ia. Code § 9474); *Oklahoma:* Comp. St. 1921, § 2701 (like Ia. Code, § 9474); § 1610 (in bribery, "no conviction shall be had on the uncorroborated testimony of one witness," *i. e.* an informing participant granted immunity); 1913, Fairgrieve *v.* State, — Okl. —, 134 Pac. 837 (an instruction is obligatory); 1913, Gillam *v.* State, 10 Okl. Cr. App. 176, 135 Pac. 441; *Oregon:* Laws 1920, § 868, par. 4 (like Cal. C. C. P. § 2061); § 1540 (like Ia. Code, § 9474); *Pennsylvania:* St. 1860, Mar. 31, § 49, Dig. 1920, § 7721, Crimes (in bribery, an accomplice's testimony is not sufficient, unless "corroborated by other evidence or the circumstances of the case"); *Porto Rico:* Rev. St. & C. 1911, § 6285 (like Cal. P. C. § 1111 as originally worded, *i. e.* inserting "which in itself and without the aid of the testimony of the accomplice," after "other evidence"); § 1530 (like Cal. C. C. P. § 2061); *South Dakota:* Rev. C. 1919, § 4882 (like Ia. Code, § 9474); *Texas:* Rev. C. Cr. P. 1911, § 801 (like Ia. Code, § 9474); *Utah:* Comp. L. 1917, § 8992 (no conviction, etc., unless he is "corroborated by other evidence which in itself and without the aid of the testimony of the accomplice tends to connect," etc. as in Cal. P. C. § 1111); *Wyoming:* Comp. St. 1920, § 7522 (in trials for subornation of perjury "no conviction shall be had on the evidence of the person attempted to be influenced, unsupported by other testimony").

In *Tennessee* and in *Texas*, statutes have now reverted to the common law rule for certain offences: *Tenn.* St. 1913, 2d Extra Sess., c. 1, p. 659, § 13 (liquor offences; "the unsupported evidence of any accomplice" suffices); *Tex.* Rev. P. C. 1911, § 574 (for gaming offences, "a conviction may be had upon the unsupported evidence of an accomplice or participant"); § 582 (betting on horse-race; conviction may be had "upon the unsupported evidence of an accomplice or participant").

the jury must follow it; moreover, the judge administers the rule of law (so far as this is practicable) by defining for the jury the precise conditions of its application. The binding rule of evidence thus created differs little from the terms of the common-law practice; the statute merely makes a rule of law out of a practice which before had no standing except in actual usage. To refuse the instruction when asked is, under the statute, of course unlawful.[11] Moreover, the existence of corroborating circumstances becomes a question of law,[12] upon which a verdict of guilty may be set aside; and the definition of corroboration becomes a task for the judge, which might properly be left, but usually is not, to the trial Court.

The manner in which this change came about is not difficult to perceive. At common law the judge was entitled and bound to assist the jury, before their retirement, with an expression of his opinion (in no way binding them to follow it) upon the weight of the evidence. This utterance was made the medium of many useful general suggestions based on experience. The benefit of this experience was thus obtained for them, without any attempt to fetter their judgment by inflexible dogmas unfitted for invariable application as rules of law. One of these general hints was that about accomplices' testimony. But in this country the orthodox function of the judge to assist the jury on matters of fact was in a misguided moment (except in a few jurisdictions) eradicated from our system (*post*, § 2551). The judge was forbidden to contribute to the jury's aid any expression of opinion upon the weight of evidence in a given case. Unless there was a rule of the law of Evidence upon the subject of an accomplice's testimony, he could not in a given case advise them to refuse to convict upon the uncorroborated testimony of an accomplice. The makers of this innovation upon established trial-methods were thus obliged to turn into a rule of law the old practice as to accomplices, if they wished to retain its benefit at all. This they therefore did. Whether or not they had attempted the impracticable and the undesirable, — whether it is either wise or feasible to construct a fixed rule of law for all cases, is a question which may now be considered.

§ 2057. **Same: (2) Policy of the Rule.** The reasons which have led to this distrust of an accomplice's testimony are not far to seek. He may expect to save himself from punishment by procuring the conviction of others. It is true that he is also charging himself, and in that respect he has burned his ships. But he can escape the consequences of this acknowledgment, if the prosecuting authorities choose to release him provided he secures the conviction of his partner in crime:

[11] 1879, State *v.* Odell, 8 Or. 30, 33; 1877, Davis *v.* State, 2 Tex. App. 588, 606; 1877, Carroll *v.* State, 3 Tex. App. 117. All the cases assume this.

But in *California*, even under C. C. P. § 2061 (quoted *supra*, n. 10), the instruction is not demandable; though the repeated dissent of some of the judges leaves the matter still partly in controversy; 1903, People *v.* Wardrip, 141 Cal. 229, 74 Pac. 744; 1904, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169; 1904, People *v.* Moran, 144 Cal. 48, 77 Pac. 77; 1904, People *v.* Ruiz, 144 Cal. 251, 77 Pac. 907.

[12] *Post*, § 2059.

1837, Lord ABINGER, C. B., in *R.* v. *Farler*, 8 C. & P. 106: "It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material particular. . . . The danger is that when a man is fixed, and knows that his own guilt is detected, he purchases immunity by falsely accusing others."

It is true that this promise of immunity is usually denied, and may not exist; but its existence is always suspected. The essential element, however, it must be remembered, is this supposed promise or expectation of conditional immunity. If that is lacking, the whole basis of distrust fails. We have passed beyond the stage of thought in which his commission of crime, self-confessed, is deemed to render him radically a liar (*ante*, § 526). The extreme case of the wretch who fabricates merely for the malicious desire to drag others down in his own ruin can be no foundation for a general rule.

The promise of immunity, then, being the essential element of distrust, but not being invariably made, no invariable rule should be fixed as though it had been made. Moreover, if made, its influence must vary infinitely with the nature of the charge and the personality of the accomplice. Finally, credibility is a matter of elusive variety, and it is impossible and anachronistic to determine in advance that, with or without promise, a given man's story must be incapable of being believed:

1844, Chief Baron JOY, Evidence of Accomplices, 4: "How the practice which at present prevails could ever have grown into a general regulation must be matter of surprise to every person who considers its nature, or inquires into the foundation on which it rests. Why the case of an accomplice should require a particular rule for itself; why it should not, like that of every other witness of whose credit there is an impeachment, be left to the unfettered discretion of the judge, to deal with it as the circumstances of each particular case may require, it seems difficult to explain. Why a fixed, unvarying rule should be applied to a subject which admits of such endless variety as the credit of witnesses, seems hardly reconcilable to the principles of reason. But, that a judge should come prepared to reject altogether the testimony of a competent witness as unworthy of credit, before he had ever seen that witness; before he had observed his look, his manner, his demeanour; before he had had an opportunity of considering the consistency and probability of his story; before he had known the nature of the crime of which he was to accuse himself, or the temptation which led to it, or the contrition with which it was followed; — that a judge, I say, should come prepared beforehand, to advise the jury to reject without consideration such evidence, even though judge and jury should be perfectly convinced of its truth, seems to be a violation of the principles of common sense, the dictates of morality, and the sanctity of a juror's oath. . . . Nor, if we inquire into the foundation of the rule, shall we find in it anything certain or fixed, such as ought to be the basis of an uniform and never varying rule. We shall be told by one that it is the moral guilt of the witness which produces this, as it were, practical incompetency; whilst another ascribes it to the desire which he has to purchase impunity for his own transgression. If it be the moral guilt of the witness that affects his credit, the degree to which his credit is affected must depend upon and vary with the magnitude of the crime of which each witness confesses himself to be guilty. Crimes are of every different shade, from the most venial petit larceny to the most atrocious murder. Yet to all the rule equally applies. The witness who on cross-examination confesses that he has been engaged in many murders,

appears more stained with guilt than he who comes forward as an accomplice in the petit larceny then under trial; yet the former is without the scope of the rule, whilst the latter comes entirely within the sphere of its application. The testimony of the same witness may in one trial be absolutely rejected under the operation of the rule, and in the very next trial, in the course of the same day, it may be permitted to go to the jury; yet his moral character has undergone no change in the interval. Moral guilt, then, can never afford any rational foundation for a rule which applies indiscriminately to the highest and to the lowest degrees of that guilt. — But an accomplice, we are told, comes forward to save himself, and his credit is affected by the temptation which this holds out to forswear himself. But who is it that establishes his guilt? He himself — he is his own accuser; and the proof, and often the only proof which can be had, of his guilt, comes from his own lips. He is generally admitted as a witness from the necessity of the thing, and from the impossibility without him of bringing any of the offenders to justice. If this be the foundation of the rule, it rests on a shifting sand. The temptation to commit perjury which influences his credit must be proportioned to the punishment annexed to the crime of which the witness confesses himself guilty. But the rule applies with equal force to the accomplice who may apprehend but a month's imprisonment for the most trifling petit larceny, and to him who may reasonably dread death for an atrocious murder. Universal and undiscriminating, the rule levels all distinctions. Where then is the necessity for, or good sense in, such a rule? Why not leave the credit of the accomplice to be dealt with by the jury, subject to such observations upon it from the judge as each particular case may suggest? . . . That persons whom the interest of the community require, and the principles of sound policy invite to come forward, should not be marked by a rule which has not been deemed necessary in the case of more atrocious offenders not appearing in the character of accomplices, seems to me to be what is required by reason and good sense."

1904, Hamersley, J., in *State* v. *Carey*, 76 Conn. 342, 56 Atl. 632: "When the testimony of accomplices was first used, it was, under the then settled law of evidence, incompetent, and was admitted notwithstanding, as an exception to that settled law, justified by necessity. The conditions at that time affecting such testimony were mainly these: A convicted felon was an incompetent witness; an accomplice confessed himself guilty of felony; a person having an interest in the event of a prosecution was an incompetent witness; the liberty or death of an accomplice, at first absolutely, and afterward more or less directly, might depend on the event of the prosecution in which he testified; the necessity of punishing certain crimes induced the enactment of statutes offering bribes to perpetrators of these crimes who, confessing their commission, might charge the crime upon their associates, or furnish the government with evidence that would lead to the arrest and conviction of others. . . . The statutes encouraging informers to buy immunity in crime by accusing others produced accomplices as witnesses in the most odious possible light. The danger of their testimony was enhanced by the condition of the law, which excluded an accused person from the witness stand. The most reputable persons in the realm might be convicted of crime because they could not be heard in contradiction or explanation of accusations by the most infamous. Instances of such cruel injustice were not wanting in times of high political excitement. Notwithstanding an accomplice was thus admitted as a witness only as an exception to the settled law governing competency, he was nevertheless a competent witness. . . . It was under these conditions and in respect to witnesses known as accomplices, thus defined, that during the latter part of the eighteenth and the earlier part of the nineteenth centuries the statements of English judges in respect to their own practice in dealing with such witnesses was made. The undoubted practice of sharply, and often indignantly, denouncing the worthlessness of the unconfirmed testimony of a witness who acknowledged himself a knave, and that he was testifying against his comrades in the hope of obtaining by this means a pardon for his own crimes, was natural, lawful, and just. And the form, force, and extent of such denunciation was wholly

discretionary with the judge, according to the circumstances surrounding each witness. The practice, so far as it was a general practice, of denouncing accomplices as per se witnesses whose unconfirmed testimony it was unsafe to believe, arose from the conditions we have mentioned.

"Those conditions no longer exist. An accomplice, as a witness, is not an exception to the law of competency, selected on grounds of doubtful morality, based on public necessity. A convicted felon is not an incompetent witness. A person interested in the event of a prosecution, however great his interest, is not incompetent. The peculiar statutes that bred the approvers or informers of former times have no place in our legislation. Arrangements for king's evidence or state's evidence cannot be initiated by the informer himself or a private prosecutor, but are confined to an officer of the court appointed by the court. The accused is no longer excluded from the witness stand. He is free to defend himself from unjust accusation. The general law of competency places accomplices on the same footing as other witnesses. The same rules apply to the weight and credibility of their testimony. There is no longer any excuse for speaking of accomplices as an exceptional class of witnesses, incompetent on general principles, and unfortunately admitted under the stress of public necessity. It is not true that every accomplice, even if the meaning of the word is strictly limited to the 'king's evidence' of former times, acknowledges a moral turpitude, ordinarily inconsistent with veracity, or testifies under the compulsion of an irresistible self-interest. It is true that moral turpitude, whether shown by confession or conviction of crime, or otherwise, and self-interest, however great, does not affect the competency of any witness. It is true, as it always has been, that when a competent witness is shown in the course of a trial to have exhibited moral turpitude of a nature ordinarily inconsistent with veracity, or to have such an interest in giving his testimony as to render the temptation to perjury peculiarly powerful, it is the right of the court, in the exercise of its discretion, and may be its clear duty, to call the attention of the jury in the strongest terms to the danger of giving credit to such testimony, unconfirmed by independent evidence. . . . The doctrine of this case, affirmed in the subsequent cases, is inconsistent with the existence of a rule of law binding the judge, whenever an accomplice testifies, to instruct the jury that it is not safe to convict on his testimony alone. We think there is no such rule of law, for the reasons above given." [1]

It may be noted that the legislative creation of a rule of law, by introducing detailed refinements of definition to be applied by the jurors, has merely tended to confuse them with sounds of words, and to place in the hands of counsel a set of juggling formulas with which to practice upon the chance of obtaining a new trial.

§ 2058. **Same: (3) Kind of Crime affected by the Rule.** In the common-law practice, the caution was given without distinction as to the kind or the grade of the crime. But under some of the statutory provisions both distinctions are found; the rule being limited, for example, to felonies,[1] or to bribery.[2] If the rule is a just one at all, it is worth using for all charges of crime.

§ 2057. [1] Compare also the following good opinions: 1870, Appleton, C. J., in State *v.* Litchfield, 58 Me. 267, 270; 1877, Johnson, J., in State *v.* Betsall, 11 W. Va. 703, 740 (pointing out that the judge could in case of need set aside the verdict).

§ 2058. [1] Statutes cited *supra*, § 2056, note 10; the following rulings under them declare the rule not applicable below felonies: 1877, Moses *v.* State, 58 Ala. 117; 1871, Parsons *v.* State, 43 Ga. 197; 1874, Crisson *v.* State, 51 Ga. 597; 1885, Askea *v.* State, 75 Ga. 356; 1886, Porter *v.* State, 76 Ga. 658.

[2] Statutes cited *supra*, § 2056, note 10.

It is also applicable to accomplices in *civil actions* for a penalty,[3] but not to civil cases generally.[4]

§ 2059. **Same: (4) Nature of Corroborative Evidence required.** In examining the nature of the corroborative evidence to be required, the common-law rulings may be drawn upon, for it was by them that the terms of the caution were developed, and the statutory rule of law usually follows closely the judicial custom.

(*a*) It is clear, as to the *testimonial source* of the corroboration, that it must be independent of the accomplice himself; it must rest on other than his credit.[1] It is usually said that the testimony of *another accomplice* is not sufficient;[2] yet the circumstances may sometimes render it sufficiently trustworthy.[3] So also the testimony of an *accomplice's wife*, though sometimes held insufficient,[4] may properly be treated, in a given case, as amply confirmative.[5]

The corroboration may of course come from the *accused himself*, for example, from a confession,[6] or from his failure to produce available testimony, or the like.[7]

[3] *Contra:* 1860, M'Clory *v.* Wright, 10 Ir. C. L. 514, 521; 1860, Magee *v.* Mark, 11 Ir. C. L. 449, 462. It was held not applicable on a bastardy charge: 1882, State *v.* Nichols, 29 Minn. 357, 359, 13 N. W. 153.

[4] 1887, United States Expr. Co. *v.* Donohoe, 14 Ont. 333, 337, *semble;* 1898, Graham *v.* British C. L. & I. Co., 12 Man. 244, 262, 269 (the practice in criminal cases does not apply to civil cases).

§ 2059. [1] This is assumed in all the cases; it is also expressly and superfluously stated in some of the statutes, cited *ante*, § 2056 ("other evidence, in itself and without the aid of the testimony of the accomplice"); it is also expressly noted in the following rulings: 1870, Lopez *v.* State, 34 Tex. 133; 1880, Hannahan *v.* State, 7 Tex. App. 664.

[2] *Eng.* 1832, R. *v.* Noakes, 5 C. & P. 326; 1909, Gay's Case, 2 Cr. App. 327 ("This Court will certainly not hold that the evidence of a number of accomplices needs any less corroboration than that of one accomplice").

U. S. 1898, People *v.* Creegan, 121 Cal. 554, 53 Pac. 1082; 1853, Johnson *v.* State, 4 G. Greene Ia. 65; 1876, Blackburn *v.* Com., 12 Bush Ky. 181, 188; 1901, Porter *v.* Com., — Ky. —, 61 S. W. 16; 1899, State *v.* Yellow Hair, 22 Mont. 33, 55 Pac. 1026; 1903, People *v.* O'Farrell, 175 N. Y. 323, 67 N. E. 588 (that two accomplices testify does not exempt the case from the rule; the sufficiency of the corroboration is for the jury, but its existence is a question of law for the Court); 1919, People *v.* Vollero, 178 N. Y. Suppl. 787; 1875, Roberts *v.* State, 44 Tex. 119, 123; 1879, Heath *v.* State, 7 Tex. App. 464, 466.

It has been ruled that a confession of a co-conspirator, inadmissible against the accused, may not be admitted to corroborate an accomplice: 1919, Fitter *v.* U. S., 2d C. C. A., 258 Fed. 567, 582; this seems unsound.

[3] *Eng.* 1839, R. *v.* Aylmer, 1 Cr. & D. 116 (insufficient unless they have been separately confined); 1913, Payne's Case, 8 Cr. App. 171 (R. *v.* Neal questioned; point not decided); *U. S.* 1875, State *v.* Williamson, 42 Conn. 261, 265 (insufficient unless they had "had no opportunity of being together to prepare a uniform story"); 1903, Stone *v.* State, 45 Ga. 630, 45 S. E. 630 (good opinion by Lamar, J.); 1919, State *v.* Seitz, — Ia. —, 174 N. W. 694 (larceny).

[4] 1835, R. *v.* Neal, 7 C. & P. 168.

[5] *Can.* 1912, R. *v.* Eberts, 4 Alta. 310.

U. S. 1862, U. S. *v.* Horn, 5 Blatchf. 102 with qualifications; general rule not laid down; 1884, Woods *v.* State, 76 Ala. 35, 39; 1868, State *v.* Moore, 25 Ia. 128, 138; 1876, Blackburn *v.* Com., 12 Bush Ky. 181, 188 ("So far as this hope [of escaping prosecution] may be supposed to influence his statements, it may be expected that his wife will be equally affected by it. But the wife, who has none of the moral taint which affects the husband because of his participation in crime, ought not to be discredited alone on the ground that her husband is a felon; such a rule is neither just to her nor safe to society"); 1876, Dill *v.* State, 1 Tex. App. 278, 286.

Not decided: 1857, Haskins *v.* People, 16 N. Y. 344, 351.

[6] 1883, Snoddy *v.* State, 75 Ala. 23; 1914, Knowles *v.* State, 113 Ark. 257, 168 S. W. 148 (incest); 1893, Schaefer *v.* State, 93 Ga. 177, 18 S. E. 552 (confession, plus 'corpus delicti,' suffices); 1921, Parsons *v.* State, — Ind. —, 131 N. E. 382 (knowing receipt of stolen goods); 1915, State *v.* Christianson, 131 Minn. 276, 154 N. W. 1095; 1920, State *v.* Huebsch, 146 Minn. 34, 177 N. W. 778 (incest; confession may supply corroboration); 1921, Shaw *v.* State, 89 Tex. Cr. 205, 229 S. W. 509 (illegal making of liquor).

[7] 1896, People *v.* Sternberg, 111 Cal. 3, 43 Pac. 198; 1860, People *v.* Dyle, 21 N. Y. 578, 580;

(*b*) As to the *tenor* of the confirmative evidence, the question was raised at an early date whether it should be required to refer to specific kinds of facts, or whether the definition should be left untrammelled by further details. The suggestion came to be advanced that the corroborative evidence must at least confirm the accomplice as to the *accused's actual participation* in the crime (or, "connection with the offence"), or (thus it is sometimes put) as to the *accused's identity* with the participators; and for the following reason:

1837, Lord ABINGER, C. B., in *R.* v. *Farler*, 8 C. & P. 106: "A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the person, that is really no corroboration at all."

1826, BUSHE, C. J., and others, in *R.* v. *Sheehan*, Jebb 54, 57, thought "that 'ex concesso' an accomplice was concerned in the crime and knew all the facts; that it was his interest to relate the facts only, because otherwise he would run the risk of differing from the account given by some person present at the commission of the crime; therefore that his uttering truth with regard to the facts did not lead to the inference that he also told truth with respect to the persons concerned, unless he had reason to suppose that there was some unimpeached person who could also prove that the persons charged by him were the persons concerned; and inasmuch as in the case supposed no such person appeared on the trial, he might well suppose that their persons were unknown and could not be identified, so that he might safely charge whom he pleased." [8]

But the fallacy of this reasoning has been well expounded by Chief Baron Joy. Briefly, it lies in this: We are assuming that the accomplice is not to be trusted in the case in hand; his credit is an entire thing, not a separable one; therefore, whatever restores our trust in him personally restores it as a whole; if we find that he is desiring and intending to tell a true story, we shall believe one part of his story as well as another; whenever, then, by any means, that trust is restored, our object is accomplished, and it cannot matter whether the efficient circumstance related to the accused's identity or to any other matter. The important thing is, not *how* our trust is restored, but whether it *is* restored at all:

1844, Chief Baron JOY, Evidence of Accomplices, 8: "[There are] different opinions entertained upon the subject — First, some hold that the corroboration required must go to the criminality or identification of every prisoner on trial accused by the accomplice — . . . Lastly, others are of opinion that the points of corroboration are not necessarily confined to the criminality or identification of any of the prisoners, but that it is enough if the testimony of the accomplice is confirmed in such and so many material parts of it as may reasonably induce the jury to credit him as to the entire of his narrative, and among other parts, as to the guilt of the prisoners. The first opinion appears plausible, and the arguments in support of it are specious, . . . and are apt to captivate those who do not attentively consider the subject. . . . This opinion originates in a misconception as to the nature of the defect in the evidence which is to be supplied. The defect in the evidence is not in its *quantity*, but in its *quality*. The witness swearing directly to the prisoner's guilt, that guilt is established if the witness be credible. What, therefore, is

1884, People *v.* Ryland, 97 N.Y. 126, 132, *semble*. *Contra:* 1868, State *v.* Hull, 26 Ia. 292, 295.

[8] So also: 1839, Morton, J., in Com. *v.* Bosworth, 22 Pick. Mass. 397, 399.

required is to throw something, no matter of what nature, into the opposite scale, which will serve as a counterpoise to the impeachment of the witness' credit arising from the character in which he appears; something that will improve the *quality* of the proof which has been given by the accomplice; and *that* something may be anything which induces a rational belief in the mind of the jury that the narrative of the accomplice is in all respects a correct one. Now, if we try the question by what passes in our own minds, we shall find that there may be many things which may contribute to inspire us with a rational confidence in the testimony of an accomplice as well as some corroboration as to that part of the evidence which goes to affect the prisoner. . . . The correct and accurate manner in which an accomplice details the circumstances of the transaction shows that he was cool and collected, that he possessed observation, that his recollection is fresh, that he was an observer, not an inventor of facts and incidents; and if we find that in every point in which the evidence of other witnesses can be brought into contact with his, they fit into one another and correspond exactly, it is good ground for presuming that his entire narrative is correct. . . . The accomplice, who must be supposed to know the whole details, is expected to relate them, and is thus exposed to detection in a variety of ways. There is, therefore, less necessity for breaking the general uniformity and destroying the harmony of the rules of law, in this case, than in the other."

An ideal instruction upon the theory of Chief Baron Joy is found in the following passage:

1820, GARROW, B., in *Tidd's Trial*, 33 How. St. Tr. 1483 (charging the jury): "It may not be unfit to observe to you here that the confirmation to be derived to an accomplice is not a repetition by others of the whole story of the accomplice and a confirmation of every part of it; that would be either impossible or unnecessary and absurd; . . . and therefore you are to look to the circumstances to see whether there are such a number of important facts confirmed as to give you reason to be persuaded that the main body of the story is correct. . . . You are, each of you, to ask yourselves this question: Now that I have heard the accomplice and have heard other circumstances which are said to confirm the story he has told, does he appear to me to be so confirmed by unimpeachable evidence, as to some of the persons affected by his story or with respect to some of the facts stated by him, as to afford me good ground to believe that he also speaks the truth with regard to other prisoners or other facts, with regard to which there may be no confirmation? Do I, upon the whole, feel convinced in my conscience that his evidence is true and such as I may safely act upon?" [9]

In *England*, this view obtained at first, that no specific corroboration need be furnished as to the accused's identity.[10] But the opposite opinion began to be taken at Nisi Prius, some twenty years later, and finally prevailed.[11]

[9] So also: 1803, R. *v.* Despard, 28 How. St. Tr. 346, 487.

[10] 1803, R. *v.* Despard, *supra;* 1813, R. *v.* Birkett and Brady, R. & R. 252, at a meeting of the judges; 1820, Tidd's Trial, quoted *supra.*

[11] 1826, R. *v.* Sheehan, Jebb 54 (of the Irish judges, six favored the new view; five believed that any corroboration sufficed); 1834, R. *v.* Addis, 6 C. & P. 388, Patteson, J.; R. *v.* Webb, ib. 595, Williams, J.; 1836, R. *v.* Wilkes, 7 C. & P. 272, 273, Alderson, B.; 1837, R. *v.* Farler, 8 C. & P. 106, Lord Abinger, C. B.; 1838, R. *v.* Kelsey, 2 Lew Cr. C. 45; 1838, R. *v.* Dyke, 8 C. & P. 261, Gurney, B.; 1839, R. *v.* Birkett, 8 C. & P. 732, Patteson, J.; 1855, R. *v.* Stubbs, 7 Cox Cr. 48, 1 Dears. 555, by three judges; 1860, M'Clory *v.* Wright, 10 Ir. C. L. 514, 521; 1909, Everest's Case, 2 Cr. App. 130 ("some particular which goes to implicate the accused"); 1909, Warren's Case, 2 Cr. App. 194 ("It is not sufficient that the accomplice has said something which was true"). Then comes vacillation again: 1911, Wilson's Case *et al.*, 6 Cr. App. 125 ("It must not be supposed that corroboration is required, amounting to independent evidence implicating the accused"); 1911, Blatherwick's Case, 6 Cr. App. 281 ("Everest's Case goes too far; Wilson's Case is the correct state-

In the *United States*, it also obtained general acceptance as applied to the common-law caution;[12] and when by statute the cautionary practice was in many jurisdictions created into a rule of law, this definition of the scope of the corroborative evidence was expressly retained.[13]

ment of the law"); 1911, Dimes' Case, 7 Cr. App. 43 (incest; corroboration necessary for an accomplice); 1913, Watson's Case, 8 Cr. App. 249 (Pickford, J., citing Wilson's Case, thought "that authority seems to show that corroboration generally that the story is true is sufficient"; yet Ridley, J., in argument, harking back a century to Thistlewood's Case, 33 How. St. Tr. 681, says "An accomplice may be believed without corroboration"); 1913, Bloodworth's Case, 9 Cr. App. 80 (not clear; Ridley, J., cites Thistlewood's Case again); 1914, Cohen's Case, 10 Cr. App. 91, 101 (subornation of perjury; Reading, L. C. J.: "It is sufficient to say that Everest's Case and Wilson's Case seem to us to lay down the right principle"); 1914, Threlfall's Case, 10 Cr. App. 112, 117 (subornation of perjury; Reading, L. C. J.: "Without attempting to decide whether Everest's Case or Wilson's Case is correct, and assuming that Everest's Case is correct," etc., etc.); 1916, R. *v.* Willis, 1 K. B. 933 (Reading, L. C. J.: "This Court had no intention [in R. *v.* Cohen] . . . to unsettle the law as established in R. *v.* Wilson and R. *v.* Blatherwick"); then comes the following opinion by the same judge, which nevertheless seems to "unsettle" things after all: 1916, R. *v.* Baskerville, 2 K. B. 658 (gross indecency with boys; Reading, L. C. J.: "Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime"; but it may be circumstantial only); 1919, R. *v.* Feigenbaum, 1 K. B. 431 (incitement to theft; corroboration held sufficient; quoted *ante*, § 2056).

[12] *Federal:* 1910, Holmgren *v.* U. S., 217 U. S. 523, 30 Sup. 588; 1919, Kelly *v.* U. S., 6th C. C. A., 258 Fed. 392, 406; *Alabama:* 1856, Martin *v.* State, 28 Ala. 71 (before the statute); *California:* 1866, People *v.* Garnett, 29 Cal. 622, 625 (before the statute); *Georgia:* 1874, Childers *v.* State, 52 Ga. 106, 110 (Warner, C. J., diss.); Hammack *v.* State, 52 Ga. 397, 403; Middleton *v.* State, 52 Ga. 527, 530; 1875, Roberts *v.* State, 55 Ga. 220; 1876, Bailey *v.* State, 56 Ga. 314, *semble;* 1886, Evans *v.* State, 78 Ga. 351 (slight evidence suffices); 1893, Johnson *v.* State, 92 Ga. 577, 20 S. E. 8; 1920, Thompson *v.* State, 25 Ga. App. 29, 102 S. E. 453; 1921, Myers *v.* State, 151 Ga. 826, 108 S. E. 369 (murder); *Illinois:* 1861, Gray *v.* People, 26 Ill. 344, 347; *Iowa:* 1848, Ray *v.* State, 1 G. Gr. 316, 322; *Louisiana:* 1895, State *v.* Callahan, 47 La. An. 444, 482, 17 So. 50; *Massachusetts:* 1839, Com. *v.* Bosworth, 22 Pick. 397, 399; 1856, Com. *v.* O'Brien, 12 All. 183; 1868, Com. *v.* Larrabee, 99 Mass. 413, 419; 1872, Com. *v.* Elliot, 110 Mass. 104, 107; 1873, Com. *v.* Snow, 111 Mass. 411, 417; 1877, Com. *v.* Scott, 123 Mass. 222, 238 (repudiated to an extent by Com. *v.* Holmes, *infra;* see note 18, *infra*); 1878, Com. *v.* Drake, 124 Mass. 21, 25; 1879, Com. *v.* Holmes, 127 Mass. 424, 438 ("upon a point material to the issue, in the sense that it tends to prove the guilt of the defendant"); 1886, Com. *v.* Hayes, 140 Mass. 366, 369; 5 N. E. 264; *Missouri:* 1887, State *v.* Chyo Chiagk, 92 Mo. 395, 417, 4 S. W. 704; 1888, State *v.* Walker, 98 Mo. 95, 109, 9 S. W. 646, 11 S. W. 1133; 1890, State *v.* Harkins, 100 Mo. 666, 672, 13 S. W. 830; 1891, State *v.* Jackson, 106 Mo. 174, 179, 17 S. W. 301; *South Carolina:* 1849, State *v.* Brown, 3 Strobh. 508, 517; *Washington:* State *v.* Jones, 53 Wash. 142, 101 Pac. 708; *Wyoming:* 1894, McNealley *v.* State, 5 Wyo. 69, 36 Pac. 824.

[13] The statutes are given *ante*, § 2056; they are applied in the following cases, but, as each ruling depends upon the evidence in the case in hand, its details are useless for the purpose of a precedent:

Federal: 1921, Rich *v.* U. S., 8th C. C. A., 271 Fed. 566 (knowing transportation of stolen shoes);

Alabama: 1867, Montgomery *v.* State, 40 Ala. 684, 688; 1877, Smith *v.* State, 59 Ala. 104; 1880, Marler *v.* State, 67 Ala. 55, 66, Lumpkin *v.* State, 68 Ala. 56; Marler *v.* State, 68 Ala. 580, 585 (good opinion by Somerville, J.); 1888, Burney *v.* State, 87 Ala. 80, 6 So. 391; 1909, McDaniels *v.* State, 162 Ala. 25, 50 So. 324;

Arkansas: 1894, Vaughan *v.* State, 58 Ark. 353, 365, 24 S. W. 885; 1905, Chancellor *v.* State, 76 Ark. 215, 88 S. W. 880;

California: 1870, People *v.* Ames, 39 Cal. 403; 1870, People *v.* Melvane, 39 Cal. 614; 1875, People *v.* Cleveland, 49 id. 577, 580; 1875, People *v.* Cloonan, 50 Cal. 449; 1875, People *v.* Thompson, 50 Cal. 480 (the evidence must do more than merely "raise a suspicion"); 1882, People *v.* Rolfe, 61 Cal. 541, 544; People *v.* Kunz, 73 Cal. 313, 14 Pac. 836; 1888, People *v.* Grundell, 75 Cal. 301, 305, 17 Pac. 214; 1890, People *v.* McLean, 84 Cal. 480, 483, 24 Pac. 32; 1890, People *v.* Hong Tong, 85 Cal. 171, 173, 24 Pac. 726; 1903, People *v.* Morton, 139 Cal. 719, 73 Pac. 609; 1904, People *v.* Balkwell, 143 Cal. 259, 76 Pac. 1017; 1912, People *v.* Coffey, 161 Cal. 433, 119 Pac. 901; 1915, People *v.* Robbins, 171 Cal. 466, 154 Pac. 317 (crime against nature with a boy; the boy being an accomplice, corroboration was not found; as to P. C. 1872, § 1111, amended by St. 1911, p. 484, "we

This element of the requirement, however, would not be essential when the accomplice's testimony did not directly *relate to the accused's partici-*

cannot see that its meaning has been changed at all");
Georgia: 1900, Chapman *v.* State, 112 Ga. 56, 37 S. E. 102; 1905, Rawlins *v.* State, 124 Ga. 31, 52 S. E. 1; 1914, Baker *v.* State, 14 Ga. App. 578, 81 S. E. 805 (burglary); 1916, Montford *v.* State, 144 Ga. 582, 87 S. E. 797 (homicide);
Idaho: 1906, State *v.* Bond, 12 Ida. 424, 86 Pac. 43 (murder);
Iowa: 1857, State *v.* Upton, 5 Ia. 465 (concealing stolen goods); 1859, State *v.* Willis, 9 Ia. 582 (burglary); 1860, State *v.* Pepper, 11 Ia. 347 (counterfeit money); 1864, State *v.* Tulley, 18 Ia. 88 (seduction); 1868, State *v.* Thornton, 26 Ia. 79, 82 (larceny); 1872, State *v.* Moran, 34 Ia. 453 (burglary); 1874, State *v.* Clemens, 38 Ia. 257 (obstructing track); 1877, State *v.* Graff, 47 Ia. 384 (burglary); 1878, State *v.* Stanley, 48 Ia. 221 (larceny); 1879, State *v.* Wart, 51 Ia. 587, 2 N. W. 405 (arson); 1880, State *v.* Hennessy, 55 Ia. 299, 360, 7 N. W. 641 (arson); 1881, State *v.* Allen, 57 Ia. 431, 435, 10 N. W. 805 (murder); 1883, State *v.* Reader, 60 Ia. 527, 15 N. W. 423 (arson); 1885, State *v.* Dietz, 67 Ia. 220, 25 N. W. 141 (murder); 1886, State *v.* Mikesell, 70 Ia. 176, 30 N. W. 474 (robbery); 1890, State *v.* Van Winkle, 80 Ia. 15, 22, 45 N. W. 388 (larceny); 1893, State *v.* Thompson, 87 Ia. 670, 673, 54 N. W. 1077 (this long list of cases illustrates the abuse to which the rule lends itself in requiring a decision by the Supreme Court upon matters properly for the trial judge alone); 1922, State *v.* Christie, —Ia. —, 187 N. W. 15 (robbery);
Kentucky: 1879, Miller *v.* Com., 78 Ky. 15, 21 ("must extend to every fact necessary to establish the fact that the offense charged was committed and that the prisoner was the perpetrator"); 1881, Bowling *v.* Com., 79 Ky. 604; 1898, Stevens *v.* Com., — Ky. —, 45 S. W. 76 (apparently approving Miller *v.* Com.; here, rape); 1901, Howard *v.* Com., 110 Ky. 356, 61 S. W. 756; 1904, Mann *v.* Com., — Ky. —, 79 S. W. 230 (felonious assault); 1907, Simpson *v.* Com., 126 Ky. 441, 103 S. W. 332 (murder); 1919, Hale *v.* Com., 185 Ky. 119, 214 S. W. 821;
Louisiana: 1905, State *v.* Hopper, 114 La. 557, 38 So. 452 (manslaughter);
Minnesota: 1881, State *v.* Lawlor, 28 Minn. 216, 224, 9 N. W. 698 (it must "tend in some degree to establish the guilt of the accused, but need not be sufficiently weighty or full as standing alone to justify a conviction"); 1883, State *v.* Brin, 30 Minn. 522, 525, 16 N. W. 406; 1901, State *v.* Clements, 82 Minn. 434, 85 N. W. 229; 1915, State *v.* Christianson, 131 Minn. 276, 154 N. W. 1395 (larceny); 1920, State *v.* Ettenburg, 145 Minn. 39, 176 N. W. 171 (arson); 1921, State *v.* Morris, 149 Minn. 41, 182 N. W. 721 (larceny);
Montana: 1912, State *v.* Lawson, 44 Mont. 488, 120 Pac. 808;
Nevada: 1913, State *v.* Williams, 35 Nev. 276, 129 Pac. 316;
New York: 1884, People *v.* Hooghkerk, 96 N. Y. 149, 162; 1884, People *v.* Ryland, 97 N. Y. 126, 131; 1887, People *v.* Everhardt, 104 N. Y. 591, 594, 11 N. E. 62; 1887, People *v.* Elliott, 106 N. Y. 288, 292, 12 N. E. 602; 1888, People *v.* O'Neil, 109 N. Y. 251, 267, 16 N. E. 68; 1919, People *v.* Vollers, 178 N. Y. Suppl. 787;
North Dakota: 1911, State *v.* Reilly, 22 N. D. 353, 133 N. W. 914;
Oklahoma: 1905, Hill *v.* Terr., 15 Okl. 212, 79 Pac. 757; 1906, Barbe *v.* Terr., 16 Okl. 562, 86 Pac. 61; 1906, Fisher *v.* Terr., 17 Okl. 455, 87 Pac. 301 (here the instruction omitted the words of the statute "or the circumstances thereof," though it added other words requiring corroboration of the circumstances connecting the defendant; for this reason alone a new trial was ordered; which demonstrates that freedom from bigoted traditions of antiquated technicality is not necessarily to be looked for in the courts of a new and advanced community); 1907, Coopar *v.* Terr., 19 Okl. 496, 91 Pac. 1032; 1920, Winfield *v.* State, — Okl. Cr. —, 191 Pac. 609 (robbery); 1921, Davis *v.* State, — Okl. Cr. —, 196 Pac. 146 (larceny); 1921, McKinney *v.* State, — Okl. Cr. —, 201 Pac. 673;
Oregon: 1879, State *v.* Odell, 8 Or. 30, 33; 1890, State *v.* Townsend, 19 Or. 213, 23 Pac. 968; 1907, State *v.* Kelliher, 49 Or. 77, 88 Pac. 867 (forgery); 1912, State *v.* Wong Si Sam, 63 Or. 266, 127 Pac. 683; 1919, State *v.* Moss, — Or. —, 182 Pac. 149 (misbranding cattle; State *v.* Odell, approved); 1921, State *v.* Brake, 99 Or. 310, 195 Pac. 583 (murder; corroboration must tend to connect defendant with the act);
Porto Rico: 1907, People *v.* Robles, 13 P. R. 299 (applying C. Cr. P. § 1253);
South Dakota: 1894, State *v.* Hicks, 6 S. D. 325 (need only "tend" to connect the defendant); 1910, State *v.* Walsh, 25 S. D. 30, 125 N. W. 295 (State *v.* Hicks not cited);
Texas: 1858, Bruton *v.* State, 21 Tex. 337, 347; 1875, Wright *v.* State, 43 Tex. 170, 174; 1875, Thomas *v.* State, 43 Tex. 658, 661; 1875, Coleman *v.* State, 44 Tex. 109, 111; Roberts *v.* State, 44 Tex. 119, 123; 1877, Nourse *v.* State, 2 Tex. App. 304, 317; Gillian *v.* State, 3 Tex. App. 132, 137 (mere suspicion is not enough); 1878, Jones *v.* State, 3 Tex. App. 575, 578; Hoyle *v.* State, 3 Tex. App. 239, 245; 1880, Myers *v.* State, 7 Tex. App. 640, 659; 1905, Wright *v.* State, 47 Tex. Cr. 433, 84 S. W. 593; 1905, Crenshaw *v.* State, 48 Tex. Cr. 77, 85 S. W. 1147 (this Court appears disposed to enter upon some questionable

pation[14]; yet it would be sufficient, *i. e.* corroboration as to the accused's participation would suffice although the subject of it was not a part of the accomplice's testimony.[15] Where there were *several defendants*, the corroboration must affect each one in order to make the accomplice's testimony sufficient as against him.[16]

(*c*) In a few jurisdictions it is occasionally said that the corroboration must affect some *material fact* in the accomplice's testimony.[17] But this phrase seems not to mean more, in any case, than that the corroboration must have the effect of persuading to trust the testimony. To-day the place of this phrase is taken by the foregoing requirement as to corroborating the accused's participation or identity;[18] and that indeed seems to have been the meaning of the original proposers.

quibblings in the wording of charges); 1915, Slaughter *v.* State, 76 Tex. Cr. 157, 174 S. W. 580 (prior cases reviewed); 1921, Boone *v.* State, 90 Tex. Cr. 374, 235 S. W. 580 (robbery; test fully defined, approving Welden *v.* State, 10 Tex. App. 400); 1921, Nunnally *v.* State, 90 Tex. Cr. 233, 234 S. W. 391 (transportation of liquor); 1921, Shaw *v.* State, 89 Tex. Cr. 205, 229 S. W. 509 (illegal making of liquor); *Utah:* 1888, U. S. *v.* Kershaw, 5 Utah 618, 19 Pac. 194; 1897, State *v.* Spencer, 15 Utah 149, 49 Pac. 302; 1899, State *v.* Collett, 20 Utah 290, 58 Pac. 684 (Spencer case followed); 1906, State *v.* Thompson, 31 Utah 228, 87 Pac. 709 (adultery); 1914, State *v.* Powell, 45 Utah 193, 143 Pac. 588 (horse-stealing);

Vermont: 1905, State *v.* Bean, 77 Vt. 384, 60 Atl. 807 (Massachusetts rule approved); *Wyoming:* 1906, Clay *v.* State, 15 Wyo. 42, 86 Pac. 17.

[14] 1889, Cox *v.* Com., 125 Pa. 94, 102, 17 Atl. 227.

[15] 1889, Malachi *v.* State, 89 Ala. 134, 141, 8 So. 104; 1874, Hammack *v.* State, 52 Ga. 397, 403; 1893, Blois *v.* State, 92 Ga. 584, 20 S. E. 12 (proof of 'corpus delicti' does not suffice); 1897, McCrory *v.* State, 101 Ga. 779, 28 S. E. 921; 1909, Lane *v.* Com., 134 Ky. 519, 121 S. W. 486; 1852, Com. *v.* Savory, 10 Cush. Mass. 535, 539; 1879, Com. *v.* Holmes, 127 Mass. 424, 441; 1888, Com. *v.* Chase, 147 Mass. 597, 599, 18 N. E. 565; 1860, People *v.* Dyle, 21 N. Y. 578, 580, *semble;* 1915, People *v.* Diaz, 22 P. R. 177, 202 (conspiracy).

A peculiar doctrine in *Massachusetts* is that it may be erroneous to admit corroborating evidence which does not satisfy the above requirement, although in that State the jury may lawfully convict without corroboration: 1839, Com. *v.* Bosworth, 22 Pick. 397; 1852, Com. *v.* Savory, 10 Cush. 535, 538, *semble;* 1868, Com. *v.* Larrabee, 99 Mass. 413, 415; 1879, Com. *v.* Holmes, 127 Mass. 424, 441, 445 ("The decision in Com. *v.* Bosworth has for forty years been treated as settling that if evidence is admitted for the purpose of so far corroborating the testimony of an accomplice as to make it safe for the jury to convict, which is not legally to be considered as corroborative in that sense, the error may be revised by bill of exceptions"; Morton, J., diss.). The effect is that if no evidence at all is offered in corroboration, the jury may convict, but if evidence is offered and admitted, a rule of sufficiency may apply which will render a verdict of conviction illegal; in other words, a = a, but a + 0 = −a. As a consequence, trial judges there would do better to exclude all corroboration whatever, or at least to omit all caution on the subject; and this seems to be the practice begun in Com. *v.* Wilson (1890), 152 Mass. 12, 14, 25 N. E. 16, and continued in Com. *v.* Phelps, 192 Mass. 591, 78 N. E. 741 (1906).

The Massachusetts doctrine is of course unsound, and has been repudiated in Bruton *v.* State, 21 Tex. 337, 348.

In Keliher *v.* U. S., C. C. A., 193 Fed. 8 (1912), the supposed Massachusetts rule is applied without any notice of the later cases.

[16] *Eng.* 1836, R. *v.* Moores, 7 C. & P. 270; 1829, R. *v.* Wells, M. & M. 326, Littledale, J.; 1845, R. *v.* Jenkins, 1 Cox Cr. 177, Alderson, B.; 1855, R. *v.* Stubbs, 7 id. 48, Dears. 555, by three judges; 1916, R. *v.* Baskerville, 2 K. B. 658 (approving R. *v.* Jenkins); *U. S.* 1876, Dill *v.* State, 1 Tex. App. 278, 287; 1869, State *v.* Potter, 42 Vt. 495, 506.

[17] This is said in some of the English cases quoted *supra*, and is laid down in the following rulings: 1908, Barrett's Case, 1 Cr. App. 64 ("some material parts of the evidence"); 1865, State *v.* Schlagel, 19 Ia. 169; 1880, State *v.* Hennessey, 55 Ia. 299, 7 N. W. 641; 1881, State *v.* Allen, 57 Ia. 431, 435, 10 N. W. 805; 1901, State *v.* Jones, 115 Ia. 113, 88 N. W. 196; 1879, Kilrow *v.* Com., 89 Pa. 481, 488; 1889, Cox *v.* Com., 125 Pa. 94, 102, 17 Atl. 227; 1858, Bruton *v.* State, 21 Tex. 337, 348; 1859, State *v.* Howard, 32 Vt. 380, 403.

[18] *Massachusetts:* 1839, Com. *v.* Bosworth, 22 Pick. 397, 399, *semble;* 1879, Com. *v.* Holmes, 127 Mass. 424, 436, 443 (Gray, C. J., referring to the opinion in the preceding case,

(*d*) Under the *statutory rule*, the sufficiency of the evidence as satisfying the definition of the rule of law is of course *for the judge*, while its effect as actually making the accomplice's testimony trustworthy is for the jury.[19]

(*e*) The requirement of corroboration leads to many rulings as to sufficiency, based wholly upon the evidence in each case; from these no additional development of principle can profitably be gathered.[20] As recorded

which first in this State advanced the distinction: "Taking the whole paragraph together, it is manifest that the phrase 'material to the issue' is used as equivalent to 'involving the guilt of the party on trial' or 'having necessary connection with the guilt of the defendant'"; thus practically repudiating the intimation in Com. *v.* Scott, 123 Mass. 222, 231, 238, that a "material" fact might be sufficient though falling short of a fact "tending to connect the defendant with the crime"); 1888, Com. *v.* Chase, 147 Mass. 597, 18 N. E. 565 (approving the foregoing remark); *Missouri:* 1887, State *v.* Chyo Chiagk, 92 Mo. 395, 417, 4 S. W. 704, *semble;* 1890, State *v.* Harkins, 100 Mo. 666, 672, 13 S. W. 830; 1900, State *v.* McLain, 159 Mo. 340, 60 S. W. 736 (following State *v.* Chyo Chiagk); *Texas:* 1875, Wright *v.* State, 43 Tex. 170, 174, *semble;* 1878, Hoyle *v.* State, 4 Tex. App. 239, 244 ("It would serve no good purpose, nor tend to enlighten the jury, to tell them that the accomplice must be corroborated in his statements in any 'material matter'").

In *Idaho* these two phrasings are combined: 1905, State *v.* Knudtson, 11 Ida. 524, 83 Pac. 226 (interpreting Rev. St. 1887, § 7871, quoted *ante*, § 2056).

[19] 1879, Lockett *v.* State, 63 Ala. 5, 11; 1882, Craft *v.* Com., 80 Ky. 349; 1903, People *v.* O'Farrell, N. Y. (cited *supra*, note 2); 1896, People *v.* Mayhew, N. Y. (cited *infra*, n. 20); 1905, People *v.* Patrick, N. Y. (cited *infra*, n. 20); 1912, State *v.* Dodson, 23 N. D. 305, 136 N. W. 789.

[20] ENGLAND: 1910, Kams' Case, 4 Cr. App. 8; 1910, Lucy's Case, 4 Cr. App. 165; 1910, Mason's Case, 5 Cr. App. 171; 1910, Martin's Case, 5 Cr. App. 1; 1917, R. *v.* Kennaway, 1 K. B. 25 (forgery of a will).

UNITED STATES: *Arkansas:* 1881, Casey *v.* State, 37 Ark. 67, 84; 1889, Fort *v.* State, 52 Ark. 180, 187, 11 S. W. 959; 1896, Scott *v.* State, 63 Ark. 310, 38 S. W. 338; 1897, Kent *v.* State, 64 Ark. 247, 41 S. W. 849; 1921, Casteel *v.* State, — Ark. —, 235 S. W. 386 (illegal making of liquor); *California:* 1896, People *v.* Barker, 114 Cal. 617, 46 Pac. 601; People *v.* Armstrong, 114 Cal. 570, 46 Pac. 611; People *v.* Main, 114 Cal. 632, 46 Pac. 612; 1899, People *v.* Compton, 123 Cal. 403, 56 Pac. 44; 1899, People *v.* Solomon, 125 Cal. 19, 58 Pac. 55; 1903, People *v.* Hoagland, 138 Cal. 338, 71 Pac. 359; *Georgia:* 1899, Chapman *v.* State, 109 Ga. 157, 34 S. E. 369 (slight evidence may suffice); 1900, Taylor *v.* State, 110 Ga. 150, 35 S. E. 161; 1902, Dixon *v.* State, 116 Ga. 186, 42 S. E. 357; 1906, Hargrove *v.* State, 125 Ga. 270, 54 S. E. 164 (murder); 1921, Gilbert *v.* State, 27 Ga. App. 604, 109 S. E. 697 (larceny of automobile); 1922, Williams *v.* State, 152 Ga. 498, 110 S. E. 286 (murder; whether motive alone is sufficient corroboration); *Illinois:* 1922, People *v.* Riello, — Ill. —, 135 N. E. 62 (burglary); *Iowa:* 1894, State *v.* Russell, 90 Ia. 493, 494, 58 N. W. 890; 1895, State *v.* Feurhaken, 96 Ia. 299, 65 N. W. 299 (instruction, on a charge of receiving stolen goods, not requiring corroboration as to defendant's knowledge of the stolen character, held proper); 1898, State *v.* Smith, 106 Ia. 701, 77 N. W. 499; 1900, State *v.* Chauvet, 111 Ia. 687, 83 N. W. 717; *Kentucky:* 1914, Deaton *v.* Com., 157 Ky. 308, 163 S. W. 204; *Montana:* 1899, State *v.* Geddes, 22 Mont. 68, 55 Pac. 919; 1900, State *v.* Calder, 23 Mont. 504, 59 Pac. 903; 1902, State *v.* Stevenson, 26 Mont. 332, 67 Pac. 1001; *Nevada:* 1871, State *v.* Chapman, 6 Nev. 320, 324; *New York:* 1896, People *v.* Mayhew, 150 N. Y. 346, 44 N. E. 971; 1905, People *v.* Patrick, 182 N. Y. 131, 74 N. W. 843; 1918, People *v.* Cohen, 223 N. Y. 406, 119 N. E. 886 (murder); 1921, People *v.* Dixon, 231 N. Y. 111, 131 N. E. 752 (murder); *North Dakota:* 1897, State *v.* Coudotte, 7 N. D. 109, 72 N. W. 913; *Oregon:* 1895, State *v.* Scott, 28 Or. 331, 42 Pac. 1 (evidence of mere opportunity to commit adultery, not amounting to design or inclination, held insufficient); 1900, State *v.* Savage, 36 Or. 191, 60 Pac. 610; 1920, State *v.* Turnbow, 99 Or. 270, 193 Pac. 485, 195 Pac. 569 (assault with intent to rob); 1921, State *v.* Rathie, 101 Or. 339, 368, 199 Pac. 169 (murder); *South Dakota:* 1894, State *v.* Phelps, 5 S. D. 480, 488, 59 N. W. 471; 1899, State *v.* Levers, 12 S. D. 265, 81 N. W. 294; *Texas:* 1914, Gillespie *v.* State, 73 Tex. Cr. 585, 166 S. W. 135 (wherein the Court finds itself obliged to repudiate "the impression which prevails with some" that the corroborating evidence "must itself show appellants' guilt without and exclusive of the accomplice's testimony"; it is painful to think that such a belief could be entertained by a lawyer holding a brief in an appellate court); 1922, Townsend *v.* State, 90 Tex. Cr. 552, 236 S. W. 100 (selling liquor); *Utah:* 1915, State *v.* Kimball, 45 Utah 443, 146 Pac. 313 (adultery); 1920, State *v.* Stewart, 57 Utah 224, 193 Pac. 855 (adultery); *Washington:* 1901, State *v.* Harras, 25 Wash. 416, 65 Pac. 774.

precedents of Supreme Courts, they are mere useless chaff, ground out by the vain labor of able minds mistaking the true material for their energies.

§ 2060. **Same: (5) Who is an Accomplice.** In the application of the rule requiring corroboration, the definition of an accomplice, as made by the *substantive* law, usually suffices and is followed.

(*a*) In *bribery* or *subornation*, the other participator is not an accomplice; [1] so also for *subornation of perjury*.[2] In *knowing receipt of stolen goods*, the thief is not an accomplice.[3] In dealings with *intoxicating liquor*, the buyer is an accomplice.[4] *Sundry crimes* are from time to time ruled upon.[5]

(*b*) In *sexual* crimes, the other person — usually the woman — may or may not be an accomplice, according as she is, by the nature of the crime, a victim of it or a voluntary partner in it. Thus, in *adultery*, the other party may well be deemed an accomplice; [6] and so also, perhaps, in

§ 2060. [1] 1912, People *v.* Coffey, 161 Cal. 433, 119 Pac. 901; 1889, State *v.* Quinlan, 40 Minn. 55, 57, 41 N. W. 299 (taking money to withhold evidence; the payor not an accomplice); 1898, State *v.* Durnam, 73 Minn. 150, 75 N. W. 1127 (demanding a bribe; the person paying it not an accomplice); 1895, State *v.* Carr, 28 Or. 389, 42 Pac. 215 (bribery); 1912, State *v.* Wappenstein, 67 Wash. 502, 121 Pac. 989 (approving State *v.* Durnam, Minn.).

Contra, semble: Statutes cited *ante*, § 2056, for Oklahoma, Pennsylvania, Wyoming.

[2] 1887, U. S. *v.* Thompson, 31 Fed. 331, C. C. (subornation of perjury); 1903, Storie *v.* State, — Ga. —, 45 S. E. 630; *Contra:* 1869, People *v.* Evans, 40 N. Y. 1, 6 (perjured person is an accomplice).

[3] 1920, Leon *v.* State, 21 Ariz. 418, 189 Pac. 433; 1913, Newman *v.* People, 55 Colo. 374, 135 Pac. 460; 1898, Springer *v.* State, 102 Ga. 447, 30 S. E. 971; 1899, State *v.* Kuhlman, 152 Mo. 100, 53 S. W. 416.

[4] 1921, Franklin *v.* State, 88 Tex. Cr. 342, 345, 414, 227 S. W. 486, 487, 488 (buyer of liquor is an accomplice, though the offense is distinct); *Contra:* 1919, Baumgartner *v.* State, 20 Ariz. 157, 178 Pac. 30 (purchaser is not an accomplice); 1922, Plachy *v.* State, — Tex. Cr. —, 239 S. W. 979 (under St. 1921, Nov. 2, Vernon's P. C. § 588¼*a* 3, the purchaser is not an accomplice).

[5] In the following *sundry crimes* the rule was applied according to the tests of the substantive law: ENGLAND: 1831, R. *v.* Hargrave, 5 C. & P. 170 (manslaughter; spectators at prize-fight).

UNITED STATES: *Ala.* 1859, Davidson *v.* State, 33 Ala. 350, 352 (illegal card-game); 1860, English *v.* State, 35 Ala. 428 (same); 1860, Bird *v.* State, 36 Ala. 279 (same); 1861, Bass *v.* State, 37 Ala. 469 (betting at illegal game); 1886, Ash *v.* State, 81 Ala. 76 (aiding an escape from jail); 1915, Darden *v.* State, 12 Ala. App. 165, 68 So. 550 (burglary); *Ark.* 1884, Melton *v.* State, 43 Ark. 367, 371 (murder); 1885, Carroll *v.* State, 45 Ark. 539, 545 (murder); 1888, Hillian *v.* State, 50 Ark. 523, 526, 8 S. W. 834 (rescue of prisoner); 1921, Simon *v.* State, 149 Ark. 609, 233 S. W. 917 (keeping a gambling house); *Cal.* P. C. 1872, § 1111 ("An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial" etc.); *Colo.* 1903, Porter *v.* People, 31 Colo. 508, 74 Pac. 879 (larceny); *D. C.* 1914, Paylor *v.* U. S., 42 D. C. App. 428 (the other party to a wager is not an accomplice); *Ga.* 1906, Hargrove *v.* State, 125 Ga. 270, 54 S. E. 164 (murder); *Minn.* 1919, State *v.* Lyons, — Minn. —, 175 N. W. 689 (fraudulent casting of ballots); 1916, State *v.* Price, 135 Minn. 159, 160 N. W. 677 (murder); *Nev.* 1915, Ex parte Bowman, 38 Nev. 484, 151 Pac. 517 (burglary); *N. Y.* 1916, People *v.* Swersky, 216 N. Y. 471, 111 N. E. 212 (poisoning a horse); *Okl.* 1913, Hendrix *v.* State, 8 Okl. Cr. 530, 129 Pac. 78 (gaming); *P. R.* 1914, People *v.* Cerecedo, 21 P. R. 52, 59, 60 (purchaser of lottery tickets, not an accomplice); *S. Dak.* 1904, State *v.* Phillips, 18 S. D. 1, 98 N. W. 171 (larceny); *Tex.* 1919, Scales *v.* State, — Tex. Cr. App. —, 217 S. W. 149 (concealing stolen property); 1921, Chandler *v.* State, 89 Tex. Cr. 308, 232 S. W. 336 (liquor); 1922, Smith *v.* State, — Tex. Cr. —, 237 S. W. 265 (murder by a mother; a daughter under 18, punishable under the juvenile law, may be an accomplice).

[6] 1891, State *v.* Henderson, 84 Ia. 161, 165, 50 N.W. 758 (if voluntary); 1894, State *v.* Ean, 90 Ia. 534, 536, 58 N. W. 898; 1909, State *v.* Brown, — Ia. —, 121 N. W. 513; 1912, Letts *v.* Letts, 79 N. J. Eq. 630, 82 Atl. 845; 1912, State *v.* Case, 61 Or. 265, 122 Pac. 304; 1888, U. S. *v.* Kershaw, 5 Utah 618, 19 Pac. 194, *semble*.

Contra: 1878, State *v.* Colby, 51 Vt. 292, 295 (adultery; testimony of the 'particeps' is to be weighed as in any other crime; repudiating State *v.* Annice, N. Chipm. 9).

For *fornication*, see the New Hampshire statute cited *ante*, § 2056.

incest,[7] and in *pandering* or *pimping*.[8] But the woman is not an accomplice in *rape*,[9] *rape under age*,[10] *seduction*,[11] or *abortion;*[12] nor the participant in

[7] *Accord:* ENGLAND: 1910, Brown's Case, 6 Cr. App. 24; 1911, Drine's Case, 7 Cr. App. 43 (incest; the girl held not an accomplice on the facts); 1913, Bloodworth's Case, 9 Cr. App. 80 (not clear).

UNITED STATES: *Arkansas:* 1914, Knowles *v.* State, 113 Ark. 257, 168 S. W. 148 (if voluntary); *California:* 1904, People *v.* Stratton, 141 Cal. 604, 75 Pac. 166 (like Porath *v.* State, Wis., *infra*); *Georgia:* 1882, Raiford *v.* State, 68 Ga. 672, *semble;* 1901, Solomon *v.* State, 113 Ga. 192, 38 S. E. 332 (for one who "knowingly and wilfully consents"); 1905, Whidby *v.* State, 121 Ga. 588, 49 S. E. 811; *Idaho:* 1915, State *v.* Clark, 27 Ida. 48, 146 Pac. 1107 (on the facts); *Iowa:* 1908, State *v.* Goodsell, 138 Ia. 504, 116 N. W. 605 (unless "the victim of force, fraud, or undue influence," or unless she is under age); 1912, State *v.* Heft, 155 Ia. 21, 134 N. W. 950 (ignoring State *v.* Kouhns, *infra*); 1917, State *v.* Pelser, 182 Ia. 1, 163 N. W. 600 (where the woman consents; but not if under age to consent; these refinements are far removed from any testimonial significance); 1917, State *v.* Kurtz, 183 Ia. 480, 165 N. W. 353; *Minnesota:* 1920, State *v.* Huebsch, 146 Minn. 34, 177 N. W. 778; *North Dakota:* 1899, State *v.* Kellar, 8 N. D. 563, 80 N. W. 476 (if not acting under force or fraud); *Oregon:* 1890, State *v.* Jarvis, 18 Or. 360, 364, 20 Or. 437, 23 Pac. 251, 26 Pac. 302; *South Dakota:* 1906, State *v.* Mungeon, 20 S. D. 612, 108 N. W. 552; *Texas:* 1903, Tate *v.* State, — Tex. Cr. —, 77 S. W. 793 (if she consents); 1904, Clifton *v.* State, 46 Tex. Cr. 18, 79 S. W. 824 (for one who "did not oppose the act"); 1922, Cottrell *v.* State, — Tex. Cr. —, 237 S. W. 928; *Wisconsin:* 1895, Porath *v.* State, 90 Wis. 527, 538, 63 N. W. 1061 (unless she "was the victim of force, fraud, or undue influence").

Contra: Ark. 1910, Gaston *v.* State, 95 Ark. 233, 128 S. W. 1033; *Cal.* 1894, People *v.* Patterson, 102 Cal. 239, 244, 36 Pac. 436, *semble; Ia.* 1897, State *v.* Kouhns, 103 Ia. 720, 73 N. W. 353; 1905, State *v.* Rennick, 127 Ia. 294, 103 N. W. 159 (here the intercourse was by force); 1915, State *v.* Stalker, 169 Ia. 396, 151 N. W. 527 ("unless she consents to the act and is in fact guilty of it herself"); *Ky.* 1894, Whittaker *v.* Com., 95 Ky. 632, 27 S. W. 83; 1915, McCreary *v.* Com., 163 Ky. 206, 173 S.W. 351 (statutory rape of an adopted orphan); 1921, Craig *v.* Com., 190 Ky. 198, 226 S. W. 1074; *Neb.* 1902, Schwartz *v.* State, 65 Nebr. 196, 91 N. W. 190; *Or.* 1912, State *v.* Hornaday, — Or. —, 122 Pac. 304 (apparently without qualification).

The real futility of this accomplice rule is well seen in the opinions on this question whether the woman in incest is an accomplice; it is obviously a matter of the individual case, and will not submit to a rigid rule; any such rule on this subject is solemn gabble.

[8] *Eng.* 1914, King's Case, 10 Cr. App. 117 (pimping; there is no rule, but "the judge is justified in warning the jury"); 1914, Pickford's Case, 10 Cr. App. 269 (corroboration not essential; "there may be cases where it is plain that the woman was an accomplice," and there the "rule of prudence and discretion should be followed); *U. S.* 1916, Caminetti *v.* U. S., 242 U. S. 470, 495, 37 Sup. 192 ("white slave traffic"; the woman assumed to be an accomplice); 1920, Freed *v.* U. S., — D. C. App. —, 266 Fed. 1012 (transporting women for purposes of prostitution; held that though corroboration is not required, an instruction of caution should be given; purporting to follow Caminetti *v.* U. S., 242 U. S. 470; Smyth, C. J., diss.); 1917, People *v.* Richardson, 222 N. Y. 103, 118 N. E. 514 (keeping a disorderly house); 1921, Carter *v.* State, 90 Tex. Cr. 248, 234 S. W. 535 (enticement for carnal intercourse; whether the woman is an accomplice depends on the facts). *Contra, semble:* 1920, Harrington *v.* U. S., 8th C. C. A., 267 Fed. 97 (conspiracy to eloign a witness before trial of a charge of transporting women for purposes of prostitution); 1918, Jackson *v.* U. S., 48 D. C. App. 269 (inmates of a bawdy house are not accomplices of the keeper).

[9] 1903, Trimble *v.* Terr., 8 Ariz. 273, 71 Pac. 932; 1909, Reeves *v.* Terr., 2 Okl. Cr. 351, 101 Pac. 1039.

[10] 1896, Republic *v.* Parsons, 10 Haw. 601, 606; 1922, State *v.* Dahl, — Minn. —, 186 N. W. 586; 1903, State *v.* Peres, 27 Mont. 358, 71 Pac. 162; 1900, Winston *v.* Winston, 165 N. Y. 553, 59 N. E. 273 (it is "not a rule of evidence, but one for the guidance of the judicial conscience"); 1914, Yates *v.* Yates, 211 N. Y. 163, 105 N. E. 195 (rule held not applicable on the facts); 1900, State *v.* Hilberg, 22 Utah 27, 61 Pac. 215; 1903, State *v.* Roller, 30 Wash. 692, 71 Pac. 718.

[11] 1898, Keller *v.* State, 102 Ga. 506, 31 S. E. 92; 1905, Washington *v.* State, 124 Ga. 423, 52 S. E. 910 (reviewing and approving Keller *v.* State, *supra*); 1903, Gatzmeyer *v.* Peterson, 68 Nebr. 832, 94 N. W. 974 (bastardy).

But, by the *statutes* cited in the next section, corroboration is required in these two cases as an independent rule, irrespective of the theory of accomplices.

[12] *Accord: Conn.* 1904, State *v.* Casey, 76 Conn. 342, 56 Atl. 632 (best opinion, by Hamersley, J.); *Ia.* 1896, State *v.* Smith, 99 Ia. 26, 68 N. W. 428; *Ky.* 1888, Peoples *v.* Com., 87 Ky. 487, 489, 9 S. W. 509, 810; Stats. 1915, § 1219; *Md.* 1912, Meno *v.* State, 117 Md. 435, 83 Atl. 759; *Mass.* 1858, Com. *v.* Wood, 11 Gray 85, 93; 1874, Com. *v.* Boynton, 116 Mass. 343; 1878, Corn. *v.* Drake, 124

sodomy.[13] Reference may here profitably be made to the psychology of women's testimony on charges of sexual crime (*ante*, § 875).

(*c*) A *joint principal* is of course an accomplice for the present rule.[14] But the mere prior existence of an *indictment for the same offence* does not of itself make the person an accomplice.[15]

(*d*) The case of a *pretended confederate*, who as detective, spy, or decoy, associates with the wrongdoers in order to obtain evidence, is distinct from that of an accomplice, although the distinction may sometimes be difficult of application:

1848, MAULE, J., in *R.* v. *Mullins*, 7 State Tr. N. S. 1110, 3 Cox Cr. 756: "An accomplice is a person who has concurred in the commission of an offence. . . . [But such are different from] spies, that is, persons who take measures to be able to give to the authorities information so as to prevent those who are disposed to break out from effecting their purpose. . . . In the case of an accomplice, he acknowledges himself to be a criminal; in the case of these men, they do not acknowledge anything of the kind."

The line should perhaps be drawn in this way: When the witness has made himself an agent for the prosecution before associating with the wrongdoers or before the actual perpetration of the offence, he is not an accomplice; but he may be, if he extends no aid to the prosecution until after the offence is committed. A mere detective or decoy or paid informer is therefore not an accomplice;[16] nor an original confederate who betrays before the crime's

Mass. 21, 24; *Minn.* 1875, State *v.* Owens, 22 Minn. 238, 244; *N. J.* 1877, State *v.* Hyer, 39 N. J. L. 598, 601; *N. Y.* 1864, Dunn *v.* People, 29 N. Y. 523, 527; 1885, People *v.* Vedder, 98 N. Y. 630; *N. C.* 1914, State *v.* Shaft, 166 N. C. 407, 81 S. E. 932; *Tenn.* 1904, Smartt *v.* State, 112 Tenn. 539, 80 S. W. 586; *Utah:* 1918, State *v.* McCurtain, 52 Utah 63, 172 Pac. 481 (father of illegitimate child; not decided); *Vt.* 1922, State *v.* Montifoire, — Vt. —, 116 Atl. 77.

Contra: 1912, R. *v.* Betchel, 4 Alta. 402; Mo. St. 1907, p. 245, Mar. 16, Rev. St. 1919, § 4034 (dying declarations of woman in abortion cases; cited more fully *ante*, § 1432).

[13] 1838, R. *v.* Jellyman, 8 C. & P. 604; 1921, People *v.* Troutman, 187 Cal. 313, 201 Pac. 929 (lewd act with a boy under 14; the boy held not an accomplice); 1901, Kelly *v.* People, 192 Ill. 119, 61 N. E. 425 (crime against nature; corroboration of the boy-victim held not necessary); 1917, State *v.* Yates, 181 Ia. 539, 164 N. W. 798. *Contra:* 1908, R. *v.* Tate, 2 K. B. 680 (boy of 16); 1914, R. *v.* Williams, 19 D. L. R. 676, Ont. (gross indecency with a boy; the boy said to be an accomplice); 1915, People *v.* Robbins, 171 Cal. 466, 154 Pac. 317.

[14] 1875, Barrara *v.* State, 42 Tex. 260, 263; Williams *v.* State, 42 Tex. 392, 395; 1876, Irvin *v.* State, 1 Tex. App. 301, 303; 1877, Davis *v.* State, 2 Tex. App. 588, 605; 1878, Roach *v.* State, 4 Tex. App. 46, 49; 1880, Myers *v.* State, 7 Tex. App. 640, 658.

[15] 1919, Music *v.* Com., 186 Ky. 45, 216 S. W. 116 (joint indictment); 1875, Barrara *v.* State, 42 Tex. 260, 263 (the mere fact of the dismissal of an indictment does not show the witness an accomplice; but its dismissal upon an understanding that he will testify and be exempted from prosecution is an admission by the State that he is an accomplice, though his testimony may not criminate him); 1875, Roberts *v.* State, 44 Tex. 119, 123, *semble* (same); and conversely, prior acquittal on the same charge does not show him not an accomplice: 1898, People *v.* Creegan, 121 Cal. 554, 53 Pac. 1092.

Compare the rulings cited *ante*, §§ 949, 967 (*impeachment* of an accomplice). Compare also the rules denying the *disqualification* of an accomplice merely by reason of his *self-confessed turpitude* (*ante*, § 526) or by reason of his being *indicted for the same offense* (*ante*, § 580, notes 2–4); by those rules, however, inasmuch as they declared an accomplice admissible, it seldom became necessary to define the term.

Distinguish also the question whether an accomplice is a "*credible witness*" under statutes requiring a complaint to be sworn to by a specific kind or number of witnesses: 1920, Halbadier *v.* State, 87 Tex. Cr. App. 129, 220 S. W. 85.

[16] *Eng.* 1803, R. *v.* Despard, 28 How. St. Tr. 346, 489; 1848, R. *v.* Dowling, 3 Cox Cr. 509, 515 ("if he only lent himself to the scheme for

committal;[17] yet an accessory after the fact would be,[18] if he had before betrayal rendered himself liable as such.

(*e*) The burden of *proving* the witness to be an accomplice is of course upon the party alleging it for the purpose of invoking the rule, namely, upon the defendant. Whether the witness is in truth an accomplice is left to the jury to determine, and if they conclude him to be such, then and then only are they to apply the rule requiring corroboration.[19] If they are in doubt, and unable to decide, the rule is not to be applied;[20] but they need only believe by the preponderance of evidence.[21]

the purpose of convicting the guilty," he was not an accomplice); 1909, Bickley's Case, 2 Cr. App. 53; 1910, Henser's Case, 6 Cr. App. 76; *Can.* 1916, Amsden *v.* Rogers, 30 D. L. R. 534, Sask. (illegal liquor selling; the buyer held not an accomplice, even though he was a special constable seeking proof of such offences; citing the above text with approval); *U. S.* 1866, People *v.* Farrell, 30 Cal. 316 (counterfeiting); 1874, People *v.* Barric, 49 Cal. 342, 344 (larceny); 1908, O'Grady *v.* People, 42 Colo. 312, 95 Pac. 346; 1873, State *v.* McKean, 36 Ia. 343 (private detective; R. *v.* Despard followed); 1892, State *v.* Brownlee, 84 Ia. 473, 476, 51 N.W. 25 (malicious threat to kill); 1917, State *v.* Burley, 181 Ia. 981, 165 N. W. 190, *semble* (keeping a house of prostitution); 1855, Com. *v.* Downing, 4 Gray Mass. 29 (one purchasing liquor to obtain evidence); 1887, State *v.* Baden, 37 Minn. 212, 34 N. W. 24 (similar); 1910, State *v.* Lee, 228 Mo. 480, 128 S. W. 987 (gaming); 1901, State *v.* Douglas, 26 Nev. 196, 65 Pac. 802 (deputy-sheriff, held not an accomplice on the facts); 1911, State *v.* Smith, 33 Nev. 438, 117 Pac. 19; 1877, Campbell *v.* Com., 84 Pa. 187, 197 (detective becoming a confederate in the Molly Maguire confederacy of crime); 1905, U. S. *v.* Quiamson, 5 P. I. 444 (brigandage; testimony of paid informers, etc., here held to require corroboration); 1905, Marmer *v.* State, 47 Tex. Cr. 424, 84 S. W. 830 (liquor offence; here by express statute).

Compare the cases cited *post*, § 2066 (detective in divorce cases). Compare also the cases *ante*, § 969, as to a detective's testimony being less credible).

[17] 1893, Com. *v.* Hollister, 157 Pa. 13, 16, 27 Atl. 386 (confederate betraying his companions and going on with the crime, not an accomplice). *Contra:* 1916, R. *v.* Willis, 1 K. B. 933 (receiving stolen goods, two accomplices who had pleaded guilty testified, and also the wife of a third; the wife's testimony held not to require corroboration).

An *accomplice's wife* may need corroboration: 1913, Payne's Case, 8 Cr. App. 171.

[18] 1876, State *v.* Hayden, 45 Ia. 11, 16, *semble;* 1879, Miller *v.* Com., 78 Ky. 15, 22 (undecided); 1879, State *v.* Odell, 8 Or. 30, 33.

Contra: 1898, McFalls *v.* State, 66 Ark. 16, 48 S. W. 492 (one who merely conceals the crime out of fear, not an accomplice); 1910, Davis *v.* State, 96 Ark. 7, 130 S. W. 547 (abortion; McFalls *v.* State approved); 1884, Lowery *v.* State, 72 Ga. 649; 1885, Allen *v.* State, 74 Ga. 769, 771; 1918, People *v.* Sapp, 282 Ill. 51, 118 N. E. 416 (murder); 1922, Anderson *v.* Com., 193 Ky. 663, 237 S. W. 45 (robbery); 1893, State *v.* Umble, 115 Mo. 452, 461, 22 S. W. 378; 1916, State *v.* Riddell, 38 R. I. 506, 96 Atl. 531 (arson).

The rule does not apply to an accomplice *in another crime;* 1896. People *v.* Sternberg, 111 Cal. 3, 43 Pac. 198; nor to a person *promised immunity* for a distinct offense: 1920, Wiley *v.* State, — Okl. Cr. —, 191 Pac. 1057.

[19] 1915, Darden *v.* State, 12 Ala. 165, 68 So. 550 (burglary); 1880, Polk *v.* State, 36 Ark. 117, 126; 1879, People *v.* Curlee, 53 Cal. 604, 607 (provided "there is any evidence, however slight, tending to prove his complicity"); 1886, Bernhard *v.* State, 76 Ga. 613, 617; 1907, Driggers *v.* U. S., 7 Ind. Terr. 752, 104 S. W. 1166; 1864, State *v.* McKinzie, 18 Ia. 573; 1865, State *v.* Schlagel, 19 Ia. 169; 1912, Smith *v.* Com., 148 Ky. 60, 146 S. W. 4; 1914, Deaton *v.* Com., 157 Ky. 308, 163 S. W. 204; 1872, Com. *v.* Elliot, 110 Mass. 104, 107; 1881, State *v.* Lawlor, 28 Minn. 216, 223, 9 N. W. 698; 1884, People *v.* Hooghkerk, 96 N. Y. 149, 163; 1908, Driggers *v.* U. S., 21 Okl. 60, 95 Pac. 612; 1880, Butler *v.* State, 7 Tex. App. 635, 639; 1908, Franklin *v.* State, 53 Tex. Cr. 547, 110 S. W. 909 (but the judge should charge peremptorily, where there is no doubt).

Contra: 1895, State *v.* Callahan, 47 La. An. 455, 17 So. 50, *semble* (the Court decides whether he is an accomplice; here the opinions differed, and the effect of the decision is not clear); 1895, State *v.* Carr, 28 Or. 389, 42 Pac. 215 (the question is for the Court, when no corroboration is offered and the evidence of complicity is undisputed). — Of course the prosecution may have conceded the witness to be an accomplice: 1855, Com. *v.* Desmond, 5 Gray, Mass. 80; 1872, Com. *v.* Elliot, 110 Mass. 104, 106 (but a mere hypothetical argument is not an admission). Compare § 2550, *post* (judge and jury).

[20] 1883, Ross *v.* State, 74 Ala. 532, 536; 1888, Childress *v.* State, 86 Ala. 77, 86, 5 So. 775.

[21] 1897, State *v.* Smith, 102 Ia. 656, 72 N. W.

(*f*) In all these details the technical rule requiring corroboration wanders far away from the considerations which psychology tells us are really important and useful in scrutinizing credibility.[22]

§ 2061. **Uncorroborated Complainant in Rape, Sodomy, Adultery, Seduction, Enticement, Bastardy, Breach of Marriage-Promise, and the like.** At common law, the testimony of the prosecutrix or injured person, in the trial of offences against the chastity of women, was alone sufficient evidence to support a conviction; neither a second witness nor corroborating circumstances were necessary:[1]

279; 1912, State *v.* Wong Si Sam, 63 Or. 266, 127 Pac. 683.

[22] For the point of view of psychology as applicable to argument before the jury (not the rules of admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913) especially §§ 179–190, 203–216; and the citations *ante*, § 875.

2061. [1] (1) RAPE. *Accord* (*corroboration not required*): *Ala.* 1875, Boddie *v.* State, Ala., quoted *supra;* 1887, Barnett *v.* State, 83 Ala. 40, 45, 3 So. 612; *Ariz.* 1895, Curby *v.* Terr., 4 Ariz. 371, 42 Pac. 953; *Cal.* 1892, People *v.* Fleming, 94 Cal. 308, 310, 29 Pac. 647; 1904, People *v.* Keith, 141 Cal. 686, 75 Pac. 304; *Fla.* 1897, Doyle *v.* State, 39 Fla. 155, 22 So. 272; *Ga.* 1907, Fields *v.* State, 2 Ga. App. 41, 58 S. E. 327 (assault with intent to rape; rule of Davis *v.* State, *infra*, refused to be extended to assault with intent); *Minn.* 1894, State *v.* Connelly, 57 Minn. 482, 483, 59 N. W. 479; *Miss.* 1893, Monroe *v.* State, 71 Miss. 196, 198, 13 So. 884; *Mo.* 1892, State *v.* Dusenberry, 112 Mo. 277, 292, 20 S. W. 461; 1897, State *v.* Marcks, 140 Mo. 656, 41 S. W. 973 (repudiating the 'obiter dictum' in State *v.* Patrick, *infra;* Sherwood, J., diss.); 1905, State *v.* Dilts, 191 Mo. 665, 90 S. W. 782; 1905, State *v.* Welch, 191 Mo. 179, 89 S. W. 945 (following State *v.* Marcks); *Okl.* Brenton *v.* TERR., 15 Okl. 6, 78 Pac. 83 (repudiating Sowers *v.* Terr., *infra*, which purported to go upon a statute; "this Territory has no statute" applicable to rape); 1904, Brenton *v.* Terr., 15 Okl. 10, 78 Pac. 84; 1909, Reeves *v.* Terr., 2 Okl. Cr. 351, 101 Pac. 1039; 1920, Ex parte Ledington, — Okl. Cr. —, 192 Pac. 595 (but "her testimony should stand unimpeached"); *P. I.* 1916, U. S. *v.* Ramos, 35 P. I. 671, *semble* (attempted rape); *Tex.* 1894, Gonzales *v.* State, 32 Tex. Cr. 611, 620, 25 S. W. 781; 1894, Thompson *v.* State, 33 Tex. Cr. 472, 475, 26 S. W. 987; 1900, Keith *v.* State, — Tex. Cr. —, 56 S. W. 628; *Wis.* 1899, Wilcox *v.* State, 102 Wis. 650, 78 N. W. 763; 1902, Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128; 1909, Vogel *v.* State, 138 Wis. 315, 119 N. W. 190; *Wyo.* 1897, Tway *v.* State, 7 Wyo. 74, 50 Pac. 188.

Contra (*corroboration required*): *Ga.* 1904, Davis *v.* State, 120 Ga. 435, 48 S. E. 180 (by a majority); *Ida.* 1899, State *v.* Anderson, 6 Ida. 706, 59 Pac. 180 (conviction may be "upon the uncorroborated testimony of the prosecutrix," but only when her character is unimpeached and where the circumstances "are clearly corroborative of the statements of the prosecutrix," — whatever this delphic utterance may mean); *Mo.* 1891, State *v.* Patrick, 107 Mo. 147, 168, 173, 17 S. W. 666 (adopting the Nebraska rule; but repudiated *ubi supra*); *Nebr.* 1886, Mathews *v.* State, 19 Nebr. 330, 337, 27 N. W. 234 (where the defendant's testimony "expressly denies that of the prosecutrix, she must be corroborated to authorize a conviction"); 1887, Fager *v.* State, 22 Nebr. 332, 333, 35 N. W. 195 (these two rulings overturn the following, in which originally it had been held that corroboration was not essential: 1877, Garrison *v.* People, 6 Nebr. 274, 283; 1881, Oleson *v.* State, 11 Nebr. 276, 277, 9 N. W. 38); 1894, Hammond *v.* State, 39 Nebr. 252, 257, 58 N. W. 92 (not required necessarily as to the criminal act directly); 1899, Dunn *v.* State, 58 Nebr. 807, 79 N. W. 719; *Okl.* 1897, Sowers *v.* Terr., 6 Okl. 436, 50 Pac. 257; 1913, Allen *v.* State, 10 Okl. Cr. App. 55, 134 Pac. 91, *semble; Wis.* 1898, O'Boyle *v.* State, 100 Wis. 296, 75 N. W. 989 (necessary where her testimony seems unreliable).

(2) RAPE UNDER AGE (STATUTORY RAPE). *Accord* (*corroboration not required*): 1904, Peckham *v.* People, 32 Colo. 140, 75 Pac. 422; 1912, Kidwell *v.* U. S., 38 D. C. App. 566 (corroboration not technically necessary; but here a verdict was set aside for lack of it); 1911, State *v.* Brown, 85 Kan. 418, 116 Pac. 508; 1912, State *v.* Stackhouse, 242 Mo. 444, 146 S. W. 1151; 1914, State *v.* Hughes, 258 Mo. 264, 167 S. W. 529; 1915, State *v.* Hammontree, — Mo. —, 177 S. W. 367; 1908, Leedom *v.* State, 81 Nebr. 585, 116 N. W. 496; 1910, State *v.* Fugita, 20 Nebr. 555, 129 N. W. 360; 1914, State *v.* Ellison, 19 N. M. 428, 144 Pac. 10 (prior cases examined); 1920, State *v.* Armijo, — N. M. —, 187 Pac. 553 (but here a conviction was set aside for lack of corroboration); 1911, State *v.* Rash, 27 S. D. 185, 130 N. W. 91; 1920, State *v.* Dachtler, 43 S. D.

1680, HALE, L. C. J., Pleas of the Crown, I, 633, 635: "The party ravished may give evidence upon oath and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony. . . . It is one thing whether a witness be admissible to be heard; another thing, whether they are to be believed when heard. It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, tho never so innocent."

1875, BRICKELL, C. J., in *Boddie* v. *State*, 52 Ala. 395, 398: "No principle of law forbids a conviction on her uncorroborated testimony, though she is wanting in chastity, if the jury are satisfied of its truth. Her testimony should be cautiously scrutinized, and Court and jury should diligently guard themselves from the undue influence of the sympathy in her behalf which the accusation is apt to excite. If she did not conceal but immediately discovered the offence, and the offender is known to her; if the place of its commission was such that if she made outcry it would not probably be heard and bring her assistance and defence, — these and other circumstances should be considered by the jury. The manner in which she testifies, the consistency of her testimony, should also be carefully considered. If, viewed fairly and carefully, the jury are satisfied of the truth of her evidence, it needs no corroboration from other witnesses to support a conviction."

Nevertheless, in many jurisdictions, a statute, based plausibly on the laudable purpose of protecting against false accusations, has introduced a rule requiring corroboration.[2] This rule is made applicable, in some jurisdic-

407, 179 N. W. 653; 1905, Wallace *v.* State, 48 Tex. Cr. 548, 89 S. W. 827; 1903, State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810; 1905, State *v.* Patchen, 37 Wash. 24, 79 Pac. 479; 1906, State *v.* Mobley, 44 Wash. 549, 87 Pac. 815; 1917, State *v.* Smith, 95 Wash. 271, 163 Pac. 759.

Contra (*corroboration required*): 1906, Livinghouse *v.* State, 76 Nebr. 491, 107 N. W. 854.

(3) SEDUCTION. *Accord* (*corroboration not required*): 1913, Bray *v.* U. S., 39 D. C. App. 600 (seduction); 1906, Wrynn *v.* Downey, 27 R. I. 454, 63 Atl. 401 (breach of promise); 1897, Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341 (even where she consents to an abortion); 1900, State *v.* Seiler, 106 Wis. 346, 82 N. W. 167 (fornication with a female of previous chaste character).

(4) BASTARDY. *Accord* (*corroboration not required*): 1910, Belford *v.* State, 96 Ark. 274, 131 S. W. 953; 1874, McFarland *v.* People, 72 Ill. 368, *semble;* 1905, Evans *v.* State, 165 Ind. 369, 74 N. E. 244; 1881, State *v.* McGlothlen, 56 Ia. 544, 9 N. W. 893; 1882, State *v.* Nichols, 29 Minn. 357, 359, 13 N. W. 153; 1891, Olsen *v.* Peterson, 33 Nebr. 358, 360, 50 N. W. 155; 1894, Robb *v.* Hewitt, 39 Nebr. 217, 220, 58 N. W. 88; 1918, Overseer etc. of Montclair *v.* Eason, 92 N. J. L. 199, 104 Atl. 291 (filiation of a bastard; corroboration of the mother's testimony, not required); 1901, State *v.* Meares, 60 C. S. 527, 39 S. E. 245.

Contra: see the early English cases for married woman's filiation proceedings, *post*, § 2063.

(5) INCEST. *Accord:* 1909, State *v.* Aker, 54 Wash. 342, 103 Pac. 420.

(6) IMPROPER LIBERTIES. *Accord:* 1910, People *v.* Freeman, 244 Ill. 590, 91 N. E. 708 (but the evidence must be "most clear and convincing").

(7) CRIMINAL CONVERSATION: 1914, Morrow *v.* Morrow, 2 Ir. R. 183 (crim. con.; corroboration of the plaintiff's wife as to acts of adultery, not needed).

[2] With the statutes are placed, in this note, the rulings which merely apply the statutory rule to the facts of a given case, or define the scope of the statute; rulings defining or applying some general canon of corroboration (except for the English statutes) are placed in the next section; for statutes applicable merely to *children* (in all crimes), see *post*, § 2066.

ENGLAND: (1) *Rape under age, Incest, Indecent Assault, etc.:* 1885, St. 48 & 49 Vict. c. 69, §§ 2–4 (on a charge of carnally knowing a girl under the age of consent, the testimony of the girl or "any other child of tender years" being made admissible without oath, on certain conditions; nevertheless no conviction can be had on such testimony unless it is "corroborated by some other material evidence in support thereof implicating the accused"); 1909, Cohen's Case, 3 Cr. App. 234 (carnal knowledge; St. 48 & 49 Vict. c. 69 applied); 1909, Hedges' Case, 3 Cr. App. 262 (statute applied); 1910, Graham's Case, 4 Cr. App. 218 (carnal knowledge; here the extraordinary statement is made by Channell, J., that "it is not a case in which corroboration

tions, to rape only; in others, to seduction under promise of marriage; in others, to bastardy; in others, to abortion; and in others, to two or more

is necessarily required"); 1910, Brown's Case, 6 Cr. App. 24, 148 (here the extraordinary statement in Graham's Case, *supra*, is repeated; but on the present charge under the Incest Act 1908, 8 Edw. VII, c. 45, § 2, it is said that "the jury ought to have been cautioned against accepting the uncorroborated evidence of the girl"); 1910, Stone's Case, 6 Cr. App. 89 (similar to Brown's Case); 1913, Pitt's Case, 8 Cr. App. 126 (indecent assault, not under St. 439 Vict., on a girl of 10; "a jury may act on her uncorroborated evidence," but a caution as to a young child's evidence "is always wise"); 1913, Murray's Case, 9 Cr. App. 248 (similar; the jury ought to be directed to require corroboration, where the child is not on oath); 1913, Cratchley's Case, 9 Cr. App. 232 (sodomy with boys of 12 and 10; similar direction, but not mentioning the oath); here compare the English rulings on Accomplices, *ante*, § 2059.

(2) *Bastardy:* 1834, St. 4 & 5 W. IV, c. 76, § 72 (no order of filiation shall be made "unless the evidence of the mother of such bastard child shall be corroborated in some material particular by other testimony"); 1839, R. v. Read, 9 A. & E. 619 (statute applied); 1844, St. 7 & 8 Vict. c. 101, § 3 (similar requirement); 1852, R. v. Pearcy, 17 Q. B. 902 (corroboration found, under the statute); 1860, Hodges v. Bennett, 5 H. & N. 625 (statute applied); 1872, St. 35 & 36 Vict. c. 65, § 4 (a man may be adjudged the putative father of a bastard, "if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices"); 1872, R. v. Armitage, L. R. 7 Q. B. 773 (under the statute the mother's testimony is indispensable; her death does not alter the rule); 1877, Cole v. Manning, L. R. 2 Q. B. D. 611 (under St. 35 & 36 Vict. c. 65, § 4, acts of familiarity held a corroboration on the facts of the case); 1914, Mash v. Darley, 1 K. B. 1 (bastardy; the defendant's conviction of the carnal intercourse with the complainant, held sufficient corroboration); 1914, Mash v. Darley, 3 K. B. 1226 (bastardy; corroboration by defendant's implied admissions, held sufficient on the facts); 1917, Burbury v. Jackson, 1 K. B. 17 (bastardy; mere opportunity of intercourse, held not sufficient, but "it is dangerous to lay down any general rule"); 1920, Thomas v. Jones, [1920] 2 K. B. 399, [1921] 1 K. B. 22 (bastardy; R. v. Baskerville, *ante*, § 2059 cited; the Court divided on appeal, as to corroboration).

(3) *Breach of marriage-promise:* 1869, St. 32 & 33 Vict. c. 68, § 2 (no plaintiff, in an action for breach of marriage-promise, is to recover, unless his or her testimony "shall be corroborated by some other material evidence in support of such promise"); 1872, Hickey v. Campion, 6 Ir. Rep. C. L. 557 (corroboration held sufficient); 1872, Willcox v. Gottfrey, 26 L. T. N. S. 328 (Bramwell, B.: "The promise itself must be confirmed, and not merely the fact that the parties were keeping company;" defendant's failure to testify, held sufficient corroboration); 1877, Bessela v. Stern, L. R. 2 C. P. D. 265, 271 ("the corroboration need not go the length of establishing the contract; if the evidence supports the promise, it is enough;" defendant's failure to deny the promise, when charged in conversation, held sufficient); 1891, Wiedemann v. Walpole, 2 Q. B. 534 (statute applied).

(4) *Cruelty:* 1889, St. 52 & 53 Vict. c. 44, § 8 (similar to St. 1885, for offences of cruelty to children); 1904, St. 4 Edw. VII, c. 15, § 15 (Prevention of Cruelty to Children Act; similar to St. 52 & 53 Vict. c. 44, *supra*).

CANADA: *Dominion:* St. 1890, c. 37, § 13, Crim. Code 1892, § 685, R. S. 1906, c. 146, Crim. C. § 1003 (rape under age, and indecent assault, like Eng. St. 1885); Crim. Code 1892, § 684, R. S. 1906, Crim. C. § 1002 (quoted *ante*, § 2036, n. 22; the rule for treason is made applicable to fraudulent marriage and seduction; but note that it is not of the present type of rule, which requires corroboration for the prosecutrix, but of the former type, *ante*, § 2044, which requires corroboration for a single witness of any sort); St. 1893, c. 31, § 25, R. S. 1906, c. 145, § 16, Evidence Act ("in any legal proceeding," the rule of Eng. St. 1885, *supra*, is adopted, requiring corroboration of a child's testimony "by some other material evidence"; this provision, not being limited to sexual offences, belongs to the broader type noted *post*, § 2066); 1918, Shorten v. The King, 42 D. L. R. 591, Can. S. C. (carnal knowledge of a female child; corroboration found, under Cr. C. § 1003);

Alberta: St. 1910, 2d sess., c. 3, Evidence Act, § 11 (like B. C. Rev. St. c. 78, § 8); 1912, R. v. Whistnant, 8 D. L. R. 468 (indecent assault on a child of 12, under Cr. Code, § 1003; testimony of another child, here her sister aged 9, held not sufficient corroboration); 1916, R. v. Picco, 35 D. L. R. 124 (seduction; corroboration under Cr. C. § 1002 required to implicate the accused);

British Columbia: Rev. St. 1911, c. 76, § 8 (in breach of promise of marriage, the plaintiff's testimony must be "corroborated by some other material evidence in support of such promise"); c. 107, § 60 (necessaries to the mother of an illegitimate child; in an action against the father, the fact of paternity "shall be proved by other testimony than that of the mother"); 1910, R. v. Inman Din, 15 Br. C. 476 (indecent assault on boys; Can. Cr. C. § 1003, applied); 1914, R. v. McGivney, 15 D. L. R. 550, B. C. (indecent

such offences having in common the feature that an alleged injured woman is likely to be the principal witness.

assault upon a child of 6 years; corroboration held sufficient on the facts, one judge diss., under Can. Cr. Code 1906, § 1003, and Can. Evid. Act 1906, § 16); 1914, R. *v.* McInulty, 16 D. L. R. 313, B. C. (indecent assault, etc., under Can. Cr. C. § 1003; held, that the testimony of a second child of tender years cannot be sufficient corroboration, either under Cr. Code, § 1003, or under Can. Evid. Act, § 16; approving R. *v.* Whistnant, 8 D. L. R. 468, Alta., and disapproving R. *v.* Inman Din, 15 Br. C. 476);

Manitoba: Rev. St. 1913, c. 92, § 17 (illegitimate children, filiation of; no order to be made "unless the evidence of the mother is corroborated by some other material evidence implicating the accused"); 1888, Waters *v.* Bellamy, 5 Man. 246 (breach of promise statute applied); 1914, R. *v.* Fontaine, 18 D. L. R. 275 (indecent assault upon a female; corroboration found, under Can. Cr. Code, § 1003); 1921, R. *v.* Schiraba, 62 D. L. R. 308, 316, per Cameron, J. A. (rape; corroboration not required);

Newfoundland: Consol. St. 1916, c. 91, § 4 (like Ont. Rev. St. c. 76, § 11);

Northwest Terr.: 1895, R. *v.* Wyse, 2 N. W. Terr. 103 (Dominion statute applied);

Ontario: Rev. St. 1914, c. 76, § 11 (in breach of promise of marriage, no plaintiff shall recover unless "his or her testimony is corroborated by some other material evidence in support of the promise"); St. 1921, c. 54, § 25, Children of Unmarried Parents Act (no order of affiliation shall be made at the instance of the mother "unless her evidence is corroborated by some other material evidence," but subject thereto proof of paternity may be such as satisfies the judge); 1906, R. *v.* Daun, 12 Ont. L. R. 227, 231 (Dom. Crim. Code 1892, § 684, cited *supra*, applied, on a charge of seduction); 1906, R. *v.* Burr, 13 Ont. L. R. 485 (seduction; corroboration broadly defined); 1907, R. *v.* Armstrong, 15 Ont. L. R. 47 (rape under age; Can. Cr. Code applied); 1909, R. *v.* Bowes, 20 Ont. L. R. 111 (Cr. Code applied); 1912, Dunn *v.* Gibson, 8 D. L. R. 297 (action for assault and ravishment; rule of corroboration held not applicable); 1914, R. *v.* Williams, 19 D. L. R. 676 (gross indecency with a boy; corroboration held not necessary, under Can. Cr. C. § 206);

Prince Edward's Isl.: St. 1889, c. 9, § 7 (like Eng. St. 1869, for breach of marriage-promise);

Saskatchewan: R. S. 1920, c. 44, § 37 (like Ont. R. S. c. 76, § 11).

UNITED STATES: *Federal:* Rev. St. 1878, § 5351, Code § 10563 (seduction of female passenger by officer or crew; "no conviction shall be had on the testimony of the female seduced, without other evidence");

Alabama: Code 1907, § 7776 (no conviction for seduction is to be had "on the uncorroborated testimony of the woman"); § 7701 (carnal knowledge by personating husband; no conviction must be had "on the unsupported evidence of the woman"); 1905, Weaver *v.* State, 142 Ala. 33, 39 So. 341 (corroboration as to "either of the material facts, so as to satisfy the jury that prosecutrix was worthy of credit" suffices);

Alaska: Comp. L. 1913, § 2264 (like Or. Laws 1920, § 1542);

Arkansas: Dig. 1919, § 2414 (no person shall be convicted of seduction under marriage-promise "upon the testimony of the female, unless the same be corroborated by other evidence"); 1918, Patrick *v.* State, 135 Ark. 173, 204 S. W. 852 (seduction; rule of corroboration applied);

California: P. C. 1872, § 1108 (prosecutions for abortion or for enticement of chaste female for purpose of prostitution; the woman's testimony not sufficient "unless she is corroborated by other evidence"); 1897, People *v.* Wade, 118 Cal. 672, 50 Pac. 841 (prosecutrix in seduction under Pen. C. §§ 268, 1108; corroboration not required); 1921, People *v.* Anthony, 185 Cal. 152, 196 Pac. 47 (indecent liberties with female child; *semble*, no rule requiring corroboration); 1921, People *v.* Hulbart, — Cal. App. —, 202 Pac. 939 (under P. C. § 288, prohibiting lewd acts with a child under 14, no rule of corroboration applies to the complaining witness); 1921, People *v.* Troutman, 187 Cal. 313, 201 Pac. 929 (lewd act with a boy, under P. C. § 288; rule of corroboration, held not applicable);

Colorado: Comp. St. 1921, § 6841 (no conviction for seduction is to be had "on the testimony of the female seduced unsupported by other evidence"); 1921, Jones *v.* People, 69 Colo. 500, 195 Pac. 526 (statutory rape; corroboration required);

Hawaii: Rev. L. 1915, § 3903 (rape, abortion, and seduction; no person shall be convicted "upon the mere testimony of such female uncorroborated by other evidence direct or circumstantial"); 1917, Terr. *v.* Capitan, 23 Haw. 771 (seduction; statute applied); 1919, Terr. *v.* Nishi, 24 Haw. 677 (rape; fresh complaint by the female cannot suffice as corroboration; Terr. *v.* Schilling, 17 Haw. 249, repudiated); 1920, Terr. *v.* Fong Yee, 25 Haw. 309 (seduction);

Idaho: Comp. St. 1919, § 8955 (abortion and enticing for prostitution; no conviction is to be had "upon the testimony of the woman upon or with whom the offence was committed, unless she is corroborated by other evidence"); 1916, State *v.* Andrus, 29 Ida. 1, 156 Pac. 421 (incest; corroboration required);

Illinois: Rev. St. 1874, c. 38, § 525 (St. 1899, April 19) (no conviction is to be had for seduc-

Upon principle, the common law lack of a rule was merely an instance of the general absence in our law of rules requiring a specified number

tion "upon the testimony of the female unsupported by other evidence"); 1874, McFarland *v.* People, 72 Ill. 368, *semble* (bastardy; no rule of corroboration exists);
Indiana: Burns' Ann. St. 1914, § 2120 (seduction, and enticement for prostitution; the female's testimony "must be supported by at least one other witness or by strong corroborating circumstances as to every material point necessary to the commission of the offense"); 1905, Evans *v.* State, 165 Ind. 369, 74 N. E. 244 (in bastardy, no corroboration for the mother is necessary); 1905, Evans *v.* State, 165 Ind. 369, 75 N. E. 651 (under Rev. St. 1897, §§ 1004, 1008, now Burns' Ann. St. 1914, §§ 1015, 1019, quoted *ante*, §§ 488, 1326, 1387, 1413, in bastardy no corroboration of the mother is required as a rule of law; here a married mother);
Iowa: Code 1897, § 5486, Comp. C. 1919, § 9473 (in prosecutions for rape or assault with intent, or for enticing for prostitution, or for seduction, the testimony of the "person injured" is insufficient, "unless she be corroborated by other evidence tending to connect the defendant with the commission of the offence"); § 4757, Comp. Code § 8609 (compulsory marriage or defilement; no conviction is to be had "unless the evidence of the prosecuting witness be corroborated by other evidence tending to connect the defendant with the commission of the crime"); 1884, State *v.* Miller, 65 Ia. 60, 63, 21 N. W. 181 (statute assumed applicable to incest); 1891, State *v.* Moore, 81 Ia. 578, 47 N. W. 772 (same); 1897, State *v.* Kouhns, 103 Ia. 720, 73 N. W. 353 (no corroboration needed, where the crime though charged as incest was also rape); 1881, State *v.* McGlothlen, 56 Ia. 544, 9 N. W. 893 (bastardy; corroboration is not required);
Kansas: Gen. St. 1915, § 3397 (seduction under promise of marriage; "the testimony of the woman alone shall not be sufficient evidence of a promise of marriage"); 1907, State *v.* Waterman, 75 Kan. 253, 88 Pac. 1074 (seduction under promise of marriage; rule applied);
Maryland: Ann. Code 1914, Art. 35, § 3 (in proceedings founded on adultery or for breach of marriage-promise, no recovery can be had on the "testimony of the plaintiff alone," but "testimony in corroboration of that of the plaintiff shall be necessary");
Minnesota: Gen. St. 1913, § 8654 (slander of a female's chastity; no conviction "upon the testimony of the woman defamed, unsupported by other evidence, but must be proved by the evidence of at least two persons other than such woman, who heard and understood the language charged as slanderous, or by the admission of the defendant"); § 8662 (seduction under promise of marriage; no conviction "upon the unsupported testimony of the female seduced");
Mississippi: Code 1906, § 1372, Hem. § 1108 (seduction; "the testimony of the female seduced, alone, shall not be sufficient to warrant a conviction"); St. 1914, c. 171 (rape under age; "no person shall be convicted upon the uncorroborated testimony of the injured female"); 1921, State *v.* Bradford, 126 Miss. 868, 89 So. 767 (carnal knowledge of female under St. 1914, c. 171, Hem. Code § 1094; rule of corroboration applied);
Missouri: Rev. St. 1919, § 4029 (in trials for seduction under marriage-promise, "the evidence of the woman as to such promise must be corroborated to the same extent required of the principal witness in perjury"); 1886, State *v.* Hill, 91 Mo. 423, 425, 4 S. W. 121 (by statute, the corroboration need touch only the promise to marry); 1891, State *v.* Wheeler, 108 Mo. 658, 665, 18 S. W. 924; 1897, State *v.* Marshall, 137 Mo. 463, 39 S. W. 63; 1897, State *v.* Davis, 141 Mo. 522, 42 S. W. 1083; 1914, State *v.* Long, 257 Mo. 199, 165 S. W. 748; 1918, State *v.* Stemmons, 275 Mo. 544, 205 S. W. 8 (seduction);
Montana: Rev. C. 1921, § 11984 (like Cal. P. C. § 1108); 1921, State *v.* Pippi, 59 Mont. 116, 195 Pac. 556 (pimping, under St. 1911, c. 1, § 8; the woman-prostitute not required to be corroborated);
Nebraska: Rev. St. 1922, § 10141 (on a trial for taking a woman with intent to marry forcibly or to defile, "and for seduction, for the purpose of prostitution," the female's evidence, "unsupported by other evidence," is insufficient); 1921, Preston *v.* State, — Nebr. —, 185 N. W. 1004 (adultery; the "unsupported evidence of one of the parties," held not sufficient; following Blue *v.* State, 86 Nebr. 189, 125 N. W. 136); 1921, Roberts *v.* State, 106 Nebr. 362, 183 N. W. 555 (carnal knowledge of female under age without consent; statute applied);
Nevada: Rev. L. 1912, § 765 (the paternity of an illegitimate child "shall be established by mutual agreement of the mother and any person whose relations have been sufficiently intimate with her to warrant the conclusion. It may also be established by the confession or admission of the father, when not denied by the mother"; and otherwise, according to the trial Court's discretion); § 6435 (slander of woman's chastity; no conviction shall be had "upon the testimony of the woman slandered unsupported by other evidence"); § 7177 (abortion, enticement of female, etc.; no conviction upon the woman's testimony, "unless she is corroborated by other evidence");
New Jersey: Comp. St. 1910, Crimes, § 49 (intercourse and pregnancy on false representation of singleness or under promise of marriage; "the evidence of the female must be corroborated to the extent required in case of an indict-

of witnesses. As to policy, the same result seems to be sufficiently justified. In the first place, applying the canon already suggested in dealing with the

ment for perjury"); 1881, Zabriskie *v.* State, 43 N. J. L. 640, 647 (corroboration defined and illustrated); 1900, State *v.* Brown, 64 N. J. L. 414, 45 Atl. 800 (statute applied);
New York: Cons. L. 1909, Penal §§ 71, 533, 2013, 2177, 2460 (complaining female's testimony in rape, defilement, abduction, seduction, compulsory prostitution, or compulsory marriage, is insufficient if "unsupported by other evidence"); 1900, People *v.* Page, 162 N. Y. 272, 56 N. E. 750 (rape; corroboration held not sufficient);
North Carolina: Cons. St. 1919, § 4339 (in seduction under promise of marriage, "the unsupported testimony of the woman shall not be sufficient to convict"); § 4225 (abduction or elopement with a married woman; "no conviction shall be had upon the unsupportedtestimony of any such married woman"); 1906, State *v.* Connor, 142 N. C. 700, 55 S. E. 787 (statute applied); 1919, State *v.* O'Higgins, 178 N. C. 708, 100 S. E. 438 (Rev. 1905, § 3360, C. S. § 4225, applied);
North Dakota: Comp. L. 1913, § 10843 (like Okl. Comp. St. § 2703, applying it to abortion also, but omitting from "tending to connect" to the end);
Ohio: Gen. Code Ann. 1921, § 13671 (in prosecutions for seduction under marriage-promise and fornication by a teacher with a pupil, the sole testimony of the female is to be insufficient if "unsupported by other evidence to the extent required" in perjury);
Oklahoma: Comp. St. 1921, § 2703 (on a trial for enticing for prostitution or for seduction, no conviction is to be had "upon testimony of the person injured, unless she is corroborated by other evidence tending to connect the defendant with the commission of the offense"); 1922, Ferbrache *v.* State, — Okl. Cr. —, 206 Pac. 617 (rape; statute applied);
Oregon: Laws 1920, § 1542 (on a trial for enticing to prostitution or for seduction, the female's testimony is not sufficient, "unless she is corroborated by some other evidence tending to connect the defendant with the commission of the crime"); this is not applied to a charge of rape under age: 1901, State *v* Knighten, 39 Or. 63, 64 Pac. 866;
Pennsylvania: St. 1860, Mar. 31, § 41, Dig. 1920, § 8042, Crimes (seduction; "the promise of marriage shall not be deemed established unless the testimony of the female seduced is corroborated by other evidence, either circumstantial or positive"); 1882, Rice *v.* Com., 100 Pa. 28 (statute applied; defendant's competency to testify does not affect the rule); St. 1895, June 26, Dig. § 10361 (quoted *ante*, § 1432; dying declarations in abortion);
Porto Rico: Rev. St. & C. 1911, § 6282 (like Cal. P. C. § 1108, including seduction and rape); 1904, People *v.* Cabranes, 7 P. R. 297 (seduction, as distinguished from seduction under promise of marriage; corroboration not required); 1905, People *v.* Santos, 8 P. R. 348 (seduction under promise of marriage; corroboration held not necessary for offences under P. C. § 261, C. Cr. P. § 250, but necessary for offences under P. C. § 260; following the interpretation of Cal. P. C. § 268); 1905, People *v.* Cordova, 9 P. R. 311 (similar to People *v.* Santos, *supra*); 1907, People *v.* Martinez, 13 P. R. 241, 246 (seduction; under promise of marriage; similar); 1907, People *v.* Canal, 13 P. R. 179, 187 (rape of a female of 14; the opinion is blind, though it scolds the trial Court for a "vacillating" charge); 1912, People *v.* de Jesús, 18 P. R. 575 (rape on a female under 14; St. 1909, Mar. 11, amending C. Cr. P. § 250, by requiring corroboration, applied); 1917, People *v.* Rosario, 25 P. R. 675 (seduction; corroboration as to the promise of marriage, required);
Rhode Island: Gen. L. 1909, c. 347, § 5 (criminal seduction, or drugging to obtain intercourse, etc.; no conviction is to be had upon the testimony of one witness only, unless "corroborated by other evidence");
South Carolina: C. Cr. P. 1922, § 296 (seduction; no conviction "on the uncorroborated testimony of the woman"); 1909, State *v.* Turner, 82 S. C. 278, 64 S. E. 424 (statute applied);
South Dakota: Rev. C. 1919, § 4884 (like Okl. Comp. St. 1921, § 2703);
Tennessee: Shannon's Code 1916, § 6456 (rape under age; no conviction shall be had "on the unsupported testimony of the female");
Texas: Rev. C. Cr. P. 1911, § 789 (seduction; "no conviction shall be had upon the testimony of the said female, unless the same is corroborated by other evidence tending to connect the defendant with the offense charged");
Utah: Comp. L. 1917, § 8988 (like Cal. P. C. § 1108);
Virginia: Code 1919, § 4413 (no conviction shall be had for seduction or for abduction for defilement or marriage, "on the testimony of the female seduced, abducted, or detained, unsupported by other evidence"); 1889, Hausenfluck *v.* Com., 85 Va. 702, 8 S. E. 68[illegible] (statute applied);
Washington: R. & B. Code, 1909, § 2434 (slander of a woman's chastity; no conviction to be had "upon the testimony of the woman slandered unsupported by other evidence"); St. 1907, c. 170, p. 396 (no conviction for rape or seduction "upon the testimony of the female raped or seduced, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense"); R. & B. Code 1909, § 2443 (no conviction for rape, seduction, or other sexual crimes, "upon

treason-rule (*ante*, § 2037), the first condition justifying a rule of number does perhaps exist, namely, the frequency of false accusations of the class in question; but the second does not exist, namely, the relatively small disadvantage that would ensue in case an individual guilty man escaped through the lack of the required number of witnesses, for in none of these offences can such a view be taken of the consequences of letting such offences go unpunished. Furthermore, a rule of law requiring corroboration has probably little actual influence upon the juror's minds over and above that ordinary caution and suspicion which would naturally suggest itself for such charges; and the rule thus tends to become in practice merely a means of securing from the trial judge the utterance of a form of words which may chance to be erroneous and to lay the foundation for a new trial. Finally, the purpose of the rule is already completely attained by the judge's power to set aside a verdict upon insufficient evidence, and under this power verdicts are constantly set aside, in jurisdictions having no statutory rule, upon the same evidence which in other jurisdictions would be insufficient under the statutory rule requiring corroboration.

The truth is that, in the light of modern psychology, this technical rule of corroboration seems but a crude and childish measure, if it be relied upon as an adequate means for determining the credibility of the complaining witness in such charges. The problem of estimating the veracity of feminine testimony in complaints against masculine offenders is baffling enough to the experienced psychologist.[3] This statutory rule is unfortunate in that it tends to produce reliance upon a rule of thumb. Better to inculcate the resort to an expert scientific analysis of the particular witness' mentality, as the true measure of enlightenment.

§ 2062. **Same: Nature of Corroborative Evidence.** The further definition of the term "corroboration," by detailed rules of law, is unwise and unpractical. Whether there exists such corroborative evidence ought to be a question for the determination of the trial judge upon the circumstances of each case; and a few Courts occasionally incline to such a doctrine.[1] So far as

the testimony of the female upon or against whom the crime was committed, unless supported by other evidence"); St. 1913, c. 100, p. 298 (repealing Rem. & Ball. Annot. Codes & Stats. § 2443); 1915, State *v.* Morden, 87 Wash. 465, 151 Pac. 832 (statutory rape; since St. 1913, repealing the Code provision, corroboration is not required as matter of law);

Wisconsin: Stats. 1919, § 4581 (no conviction is to be had for seduction "on the testimony of the female seduced, unsupported by other evidence"); § 4569 (quoted *post*, § 2066);

Wyoming: Comp. St. 1920, § 7521 (in trials for seduction and for taking with intent to force marriage or defilement, "no conviction shall be had on the evidence of the female offended against, unsupported by other evidence").

[3] From the point of view of psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology and General Experience, and illustrated in Judicial Trials" (1913), especially §§ 172–190; and the works cited *ante*, § 875.

§ 2062. [1] 1882, Cunningham *v.* State, 73 Ala. 51, 55 ("Whenever there is any evidence, no matter how slight, in support of any material subject of inquiry, its sufficiency can never become a question for the Court"); 1895, Mills *v.* Com., 93 Va. 815, 22 S. E. 863 ("It is sufficient here to say that it must be evidence which does not emanate from the mouth of the seduced female; that it must not rest wholly upon her credibility, but must be such evi-

further definitions have been attempted, they are of two general types similar to those already noted for the accomplice-rule (*ante*, § 2059). By some Courts it is said that the corroboration must be upon some or all *material* facts.[2] By others, and sometimes by express statutory definition, the corroboration is required to consist of facts *tending to connect the defendant with the commission*.[3] Most of the rulings were a waste of the State's time by the Supreme Courts.

dence as adds to, strengthens, confirms, and corroborates her testimony").

Of course, if it is legally sufficient, the jury have still to say whether it convinces them: 1878, State *v.* Bell, 49 Ia. 440, 443.

[2] *Ala.* 1882, Cunningham *v.* State, 73 Ala. 51, 56 (must be merely "of some matter material to the guilt of the accused," and its effect must be to convince the jury of the witness' truth); 1883, Wilson *v.* State, 73 Ala. 527, 534 (Cunningham case approved; Brickell, C. J., diss., holding that the evidence should "extend to every material fact," and should "tend to connect the defendant with the commission of the offense"); 1888, Cagle *v.* State, 87 Ala. 93, 97, 6 So. 300 (Cunningham case followed); 1890, Cooper *v.* State, 90 Ala. 641, 8 So. 821 (same); 1898, Suther *v.* State, 118 Ala. 88, 24 So. 43; 1909, Allen *v.* State, 162 Ala. 74, 50 So. 279 (Cunningham *v.* State followed); 1909, Pannell *v.* State, 162 Ala. 81, 50 So. 281 (similar); *Del.* 1920, State *v.* Ellis, — Del. —, 112 Atl. 172 (adultery; scope of corroboration, defined); *Minn.* 1860, State *v.* Timmens, 4 Minn. 325, 332 ("upon every material point necessary to the perfection of the offence"); *Mo.* 1883, State *v.* Brassfield, 81 Mo. 151, 159; 1885, State *v.* Patterson, 88 Mo. 88, 92, 99; *Nebr.* 1909, Henderson *v.* State, 85 Nebr. 444, 123 N. W. 459 (the fresh complaint may suffice as corroboration; the opinion makes certain distinctions which seem to be more than any jury should be expected to understand or any trial judge to remember); 1921, Darwin *v.* State, — Nebr. —, 185 N. W. 312; *Okl.* 1901, Harvey *v.* Terr., 11 Okl. 156, 65 Pac. 837 (State *v.* Timmens, Minn., followed).

[3] ABDUCTION: 1885, People *v.* Plath, 100 N. Y. 590, 592, 3 N. E. 790 (abduction for purpose of prostitution, under P. C. § 583; corroboration must extend to "the material facts necessary to establish the commission of a crime and the identity of the person committing it").

ABORTION: 1870, People *v.* Josselyn, 39 Cal. 393 (the evidence must corroborate her in some part of the testimony which "imputes to the defendant the commission of the crime alleged," though not necessarily as to the particular method stated by her); 1911, People *v.* Richardson, 161 Cal. 552, 120 Pac. 20 (People *v.* Josslyn approved).

RAPE: *Iowa:* 1876, State *v.* McLaughlin, 44 Ia. 82, 85; 1877, State *v.* Comstock, 46 Ia. 265, 268; 1883, State *v.* Stowell, 60 Ia. 535, 538, 15 N. W. 418; 1885, State *v.* Mitchell, 68 Ia. 116, 121, 26 N. W. 44; 1890, State *v.* Watson, 81 Ia. 380, 387, 46 N. W. 868; 1892, State *v.* Cassidy, 85 Ia. 145, 52 N. W. 1; 1893, State *v.* Chapman, 88 Ia. 254, 55 N. W. 489; 1894, State *v.* Cook, 92 Ia. 483, 487, 61 N. W. 185; 1895, State *v.* Hutchison, 95 Ia. 556, 64 N. W. 610; 1895, State *v.* French, 96 Ia. 255, 65 N. W. 156; 1897, State *v.* Bailor, 104 Ia. 1, 73 N. W. 344; 1898, State *v.* Baker, 106 Ia. 99, 76 N. W. 509; 1899, State *v.* Fountain, 110 Ia. 15, 81 N. W. 162; 1904, State *v.* Carpenter, 124 Ia. 5, 98 N. W. 775; 1904, State *v.* Egbert, 125 Ia. 443, 101 N. W. 191; 1905, State *v.* Norris, 127 Ia. 683, 104 N. W. 282; 1906, State *v.* Crouch, 130 Ia. 478, 107 N. W. 173; 1907, State *v.* Johnson, 133 Ia. 38, 110 N. W. 170; 1908, State *v.* Ralston, 139 Ia. 44, 116 N. W. 1058; 1909, State *v.* Hetland, 141 Ia. 524, 119 N. W. 961; 1920, State *v.* John, 188 Ia. 494, 176 N. W. 280 (assault with intent); 1920, State *v.* O'Meara, 190 Ia. 613, 177 N. W. 563; 1917, State *v.* Powers, 181 Ia. 452, 164 N. W. 856 (assault with intent to rape); *Nebraska:* 1907, McConnell *v.* State, 77 Nebr. 773, 110 N. W. 666 (assault with intent); 1907, Fitzgerald *v.* State, 78 Nebr. 1, 110 N. W. 676; 1909, Mott *v.* State, 83 Nebr. 226, 119 N. W. 461 (opportunity alone is not enough); *Porto Rico:* 1907, People *v.* Cancel, 13 P. R. 179, 187; 1920, People *v.* Molina, 28 P. R. 157 (rape; an instruction in the simple language of the Code, held not specific enough; unsound); *Washington:* 1909, State *v.* McCool, 53 Wash. 486, 102 Pac. 422; 1911, State *v.* Gibson, 64 Wash. 131, 116 Pac. 872; 1912, State *v.* Raymond, 69 Wash. 98, 124 Pac. 495 (rape; the corroboration must extend to both the intercourse and the force; this court is here backsliding in its elaboration of such technical rules; it was enough to say that there was not sufficient evidence in this case, without building up a fabric of fixed rules).

RAPE UNDER AGE (STATUTORY RAPE): *Iowa:* 1907, State *v.* Blackburn, — Ia. —, 110 N. W. 275; 1907, State *v.* Stevens, 133 Ia. 684, 110 N. W. 1037; *Nebraska:* 1921, Nabower *v.* State, 105 Nebr. 848, 182 N. W. 493; 1921, Robbins *v.* State, 106 Nebr. 423, 184 N. W. 53; *Porto Rico:* 1915, People *v.* Rodriguez, 22 P. R. 98 (rape under 14);

SEDUCTION: CANADA: 1921, R. *v.* Stefanie,

Distinguish here the doctrine about *constancy of accusation in travail* by the complainant in *bastardy* (*ante*, § 1141), and the admissibility of *pregnancy* or *birth of a child*, as corroborating evidence (*ante*, § 168).

60 D. L. R. 452, Alta. (seduction; corroboration need not include the promise of marriage; Stuart, J., diss.); UNITED STATES: *Alabama:* 1920, Tarver *v.* State, 17 Ala. App. 424, 85 So. 855 (seduction); *Arkansas:* 1883, Polk *v.* State, 40 Ark. 482, 484 (must "tend to connect the defendant with the commission of the offense"); 1904, Keaton *v.* State, 73 Ark. 265, 83 S. W. 911; 1905, Carrens *v.* State, 77 Ark. 16, 91 S. W. 30; 1905, Burnett *v.* State, 76 Ark. 295, 88 S. W. 956; 1906, Lasater *v.* State, 77 Ark. 468, 94 S. W. 59; 1909, Nichols *v.* State, 92 Ark. 421, 122 S. W. 1003 (must relate to the promise and the connection); 1920, Woodard *v.* State, — Ark. —, 220 S. W. 671; 1920, Stevens *v.* State, 143 Ark. 618, 221 S. W. 186; *Hawaii:* 1917, Terr. *v.* Capitan, 23 How. 771 (corroboration need extend only to the promise and to the intercourse); *Indiana:* 1901, Hinkle *v.* State, 157 Ind. 237, 61 N. E. 196 (an example of the absurdity of the rule in practice); 1912, Hay *v.* State, 178 Ind. 478, 98 N. E. 712 (seduction; nature of corroboration, discussed); *Iowa:* 1864, State *v.* Tully, 18 Ia. 88; 1871, State *v.* Shean, 32 Ia. 88, 90; 1874, State *v.* Kingsley, 39 Ia. 439; 1878, State *v.* Danforth, 48 Ia. 43, 47; State *v.* Wells, 48 Ia. 671; 1879, State *v.* Curran, 51 Ia. 112, 119, 49 N. W. 1006; 1880, State *v.* Smith, 54 Ia. 743, 7 N. W. 402; 1882, State *v.* Heatherton, 60 Ia. 175, 177, 14 N. W. 230; 1884, State *v.* Fitzgerald, 63 Ia. 268, 272, 19 N. W. 202; 1887, State *v.* Richards, 72 Ia. 17, 21, 33 N. W. 342; State *v.* McClintic, 73 Ia. 663, 665, 35 N. W. 696; 1888, State *v.* Standley, 76 Ia. 215, 219, 40 N. W. 815; 1890, State *v.* Bell, 79 Ia. 117, 119, 44 N. W. 244; 1891, State *v.* Gunagy, 84 Ia. 177, 180, 50 N. W. 882; 1892, State *v.* Smith, 84 Ia. 522, 51 N. W. 24; State *v.* Enke, 85 Ia. 35, 51 N. W. 1146; 1892, State *v.* Brown, 86 Ia. 121, 126, 53 N. W. 92; 1893, State *v.* Baldoser, 88 Ia. 55, 61, 55 N. W. 97; State *v.* Lenihan, 88 Ia. 670, 56 N. W. 292; 1894, State *v.* Knutson, 91 Ia. 549, 552, 60 N. W. 129; 1895, State *v.* Bauerkemper, 95 Ia. 562, 64 N. W. 609; 1898, State *v.* Hayes, 105 Ia. 82, 74 N. W. 757; 1898, State *v.* Hughes, 106 Ia. 125, 76 N. W. 520; 1899, State *v.* Reinheimer, 109 Ia. 624, 80 N. W. 669; 1899, State *v.* McGinn, 109 Ia. 641, 80 N. W. 1068; 1900, State *v.* Burns, 110 Ia. 745, 82 N. W. 325; 1900, State *v.* Kissock, 111 Ia. 690, 83 N. W. 724; 1901, State *v.* Mulholland, 115 Ia. 170, 88 N. W. 325; *Mississippi:* 1894, Ferguson *v.* State, 71 Miss. 805, 815, 15 So. 66 ("as with the accomplice, so here, corroboration to the extent of fairly tending to connect the accused with the commission of the offence should be held sufficient"); 1922, Hollins *v.* State, — Miss. —, 90 So. 630 ("the secret part of the crime . . . is the element as to which she must be corroborated"); *Missouri:* 1904, State *v.* Phillips, 185 Mo. 185, 83 S. W. 1080; 1905, State *v.* Sublett, 191 Mo. 163, 90 S. W. 374 (defendant's admission may suffice); 1911, State *v.* Long, 238 Mo. 383, 141 S. W. 1099; 1916, State *v.* Spears, — Mo. —, 183 S. W. 311; *Nebraska:* 1907, Russell *v.* State, 77 Nebr. 519, 110 N. W. 380; *New York:* 1863, Kenyon *v.* People, 26 N. Y. 203, 208 (corroboration need go only to "those facts which go to prove the offence charged"); 1873, Boyce *v.* People, 55 N. Y. 644 (nature of corroboration indefinitely defined); 1877, Armstrong *v.* People, 70 N. Y. 38, 43 (corroboration is necessary as to the promise and the intercourse; nature of corroboration defined); 1919, People *v.* Taleisnik, 225 N. Y. 489, 122 N. E. 615 (corroboration must cover the marriage and the seduction); *North Carolina:* 1918, State *v.* Fulcher, 176 N. C. 724, 97 S. E. 2; 1918, State *v.* Cooke, 176 N. C. 731, 97 S. E. 171 (seduction; "the statute does not specify how much or in what way she shall be supported"); *Ohio:* 1919, Wertenberger *v.* State, 99 Ohio 353, 124 N. E. 243 (applying Gen. Code, § 13671); *Oklahoma:* 1901, Harvey *v.* Terr., 11 Okl. 156, 65 Pac. 837 (corroboration must cover the promise and the intercourse); 1916, Butts *v.* State, 12 Okl. Cr. 391, 157 Pac. 704; *Porto Rico:* 1916, People *v.* Lopez, 24 P. R. 410; *South Dakota:* 1912, State *v.* Holter, 30 S. D. 353, 138 N. W. 953 (State *v.* King followed); *Texas:* 1911, Nash *v.* State, 61 Tex. Cr. 259, 134 S. W. 709 (the corroboration need not cover the essentials of the offence, in particular, both the promise and the intercourse; Davidson, P. J., diss.; prior cases reviewed); 1912, Murphy *v.* State, 65 Tex. Cr. 55, 143 S. W. 616 (Nash *v.* State followed); 1916, Wood *v.* State, 78 Tex. Cr. 654, 182 S. W. 1122; 1920, Slaughter *v.* State, 86 Tex. Cr. App. 527, 218 S. W. 767 (prior cases elaborately examined, and details of the rule formulated); 1921, Gainer *v.* State, 89 Tex. Cr. 538, 232 S. W. 830; 1922, Polk *v.* State, — Tex. Cr. —, 238 S. W. 834; *Virginia:* 1922, Harding *v.* Com., — Va. —, 110 S. E. 376 (seduction; defendant's admissions may suffice).

It is in some rulings further held that the corroboration need not relate directly to the *fact of intercourse; Ia.* 1857, State *v.* Andre, 5 Ia. 389 (evidence need not refer to "the fact of illicit intercourse," but may concern "intimacy, opportunity, and inducement"); 1874, State *v.* Kingsley, 39 Ia. 439 (Andre case approved); 1879, State *v.* Painter, 50 Ia. 317, 319 ("intimacy" and "opportunity"

§ 2063. **Parent's Bastardizing of Issue, by Testimony to Non-Access; (*a*) History and Present Scope of the Rule.** The story of the rule that parents may not "bastardize their issue" is a singular one; though it has had some parallels in other parts of our law. First, a settled rule; then, a chance judicial expression, in apparent contradiction; then, a series of rulings based on a misunderstanding of this expression and an ignoring of the settled rule; then, an entirely new rule, and new and wondrous reasons contrived and put forward to defend the novelty, as if it had from the beginning been based on the experience and wisdom of generations.

(1) In the first place, then, there clearly was in the beginning no rule at all against using the testimony of a husband or a wife, to prove the non-access of the husband as evidence of the child's bastardy (*i. e.* the parentage of another man than the husband). The only objection that was brought forward was that of the *disqualification of wife or husband* (*ante*, § 600, *post*, § 2227) to testify for or against the other. This was usually held not applicable on the facts of the case; and, in any event, it had nothing to do with the fact of non-access, as such; it applied, if at all, to whatever facts might be in issue involving bastardy. All this is perfectly plain and unquestionable in the precedents of the 1700s.[1]

(2) But about the middle of the 1700s there arose a rule peculiar to *filiation cases* (*i. e.* proceedings to charge a bastard's father with its support), that the order of support should not be made against the defendant on the *sole* and uncorroborated *testimony* of the *mother*, if a married woman:

1734, *R.* v. *Reading*, Lee temp. Hardwicke 79 (order of filiation of a child born of a married woman; objected, "that the wife is the only evidence, and that she is not a competent witness in law to exonerate her husband of the charge and burthen of this child"). HARDWICKE, L. C. J.: "[The wife] may be a competent witness to prove the criminal conversation between the defendant and herself, by reason of the nature of the fact, which is usually carried on with such secrecy that it will admit of no other evidence; . . . but then in the present case it is gone further, for the wife is [here] the only evidence to prove the absence and want of access of her husband, whereas this might be made to appear by other witnesses. . . . It must be a very dangerous consequence to lay it down in general that a wife should be a sufficient sole evidence to bastardize her child and to discharge her

further defined); 1880, State *v.* Araah, 55 Ia. 258, 7 N. W. 601 (same); 1892, State *v.* Smith, 84 Ia. 522, 51 N. W. 24 (same); and other cases *supra*: *S. D.* 1897, State *v.* King, 9 S. D. 628, 70 N. W. 1046, *semble*.

§ 2063. [1] 1717, St. Andrews [*v.* St. Brides, Sessions Cas. K. B. 35 (order of filiation for a married woman's children, wife testifying to non-access; objected "that the wife was not good evidence, it being against her husband"; "but not allowed, for the parishes are only concerned"); 1717, Clerk *v.* Wright, 1 Bott Poor Law, 4th ed., pl. 558, 6th ed., pl. 496 (Chancery issue to try legitimacy; mother's declarations "that the child was not her husband's," excluded, but "if she had been here herself, she might have been examined as to this fact"); 1732, Pendrell *v.* Pendrell, 2 Stra. 925 (inheritance-issue; defendant offered "strong evidence of no access" of the claimant's parents, and the mother was allowed to be called and cross-examined by defendant and her contradictory declarations put in); 1735, R. *v.* St. Peter, 1 Burr. Sett. Cas. 25, Bull. N. P. 112 (father allowed to testify to no marriage, in a pauper-settlement case, because he was not testifying in his own discharge, being liable in either event); 1763, Buller, Nisi Prius, 113 (comments on R. *v.* Reading, *infra*, that, after the husband's death and the cessation of his liability, the mother could without question testify to non-access; so also 287).

husband of the burthen of his maintenance; but the opinion the Court is of at present will not be a precedent to determine any other case wherein there are other sufficient witnesses as to the want of access; but the foundation that is now gone upon is the wife's being a sole witness."

This rule was simple enough, and went on being steadily enforced, without departure, for three quarters of a century.[2] Two or three things about it are plain. In the first place, it was limited strictly to filiation proceedings; it had no status as a rule of general application, for its reason had no such bearings. In the next place, the ground of the objection was that of interest, *i. e.* the wife was testifying to discharge the husband of the child's support; yet the objection did not in strictness apply (since the husband was not a party), and furthermore the exception of necessity (*ante*, § 612) would in any event allow her testimony to intercourse with the other man. Her testimony to non-access, however, being only technically admissible within the rule of disqualification by interest, some additional corroboration was thought essential in order to found an order; hence the doctrine of R. *v.* Reading forbade such an order, in Lord Hardwicke's language, where the wife was "a sole witness."

The important feature of this rule is thus the bearing of the wife's disqualification by interest; and, when the question first comes up in the United States, the same objection is the one that occupies judicial attention,[3]

[2] 1737, R. *v.* Bedel, Lee temp. Hardw. 379 (order of filiation, granted below upon proof of non-access by "the examination of the said E. the wife and other proof upon oath"; order confirmed: Page, J.: "Though 't is said to be on the examination of the wife, 't is also upon other good proof upon oath"); 1752, R. *v.* Rook, 1 Wils. 340 (order of filiation; the mother, being married, swore that her husband was in jail and had had no access; it was objected that "a wife cannot be admitted to prove that her husband had no access to her"; and the whole Court agreed, upon the ruling of Lord Hardwicke in R. *v.* Reading, that "an order of bastardy could not therefore be made upon her oath alone"; distinguishing R. *v.* Bedel, "for there were [other] witnesses to prove the husband had no access"; and concluding that "as the justices have determined solely upon the evidence of a wife, the order must be quashed"); 1807, R. *v.* Luffe, 8 East 193 (order of filiation for a married woman's bastard, granted below "upon the oath of the said M. T., as otherwise," proving non-access; Ellenborough, L. C. J.: ["The objection is] that the wife was examined generally and alone to the fact of non-access, and that the order is founded on her evidence only, whereas it is laid down in the cases that an order of this sort cannot be made on the evidence of the wife alone, but that there must be other proof of non-access"; but he pointed out that the words "as otherwise" in the order must imply other sufficient testimony upon oath; Lawrence, J.: "[The order is sustainable] because it was made upon other evidence besides that of the wife; . . . we may presume that if there had been no other evidence of non-access than that of the wife, the sessions would not have confirmed the order"; Grose and LeBlanc, JJ., spoke similarly).

[3] *New Hampshire:* 1844, Parker *v.* Way, 15 N. H. 45 (filiation proceeding, by married woman; said *obiter*, citing Com. *v.* Shepherd, Pa., that the mother is "not a witness to prove non-access"); *Pennsylvania:* 1801, Com. *v.* Stricker, 1 Browne Appendix 47 (indictment for bastardy; "the parent is not a witness to prove non-access," because "it may be proved by other testimony"); 1814, Com. *v.* Shepherd, 6 Binn. 283 (prosecution for begetting a bastard on a married woman; the woman allowed to testify to connection, but not to non-access, "because everything else is capable of proof by other persons, and nothing but necessity will warrant the dispensing with the rule that a woman shall not be a witness in a matter wherein her husband is concerned"; Yeates, J., diss., on the authority of R. *v.* M'Clean, "a case of great notoriety some years before the American revolution"; "many instances have occurred wherein that precedent has been followed; also such is the practice in England, under orders of filiation of the bastard children of married women"); *circa* 1825, Com. *v.* Wentz, 1 Ashm. 269 (indictment for fornication and bastardy; the statute of

— a principle which, of course, to-day in most of our jurisdictions is outlawed (partly or entirely) by statute (*ante*, § 619). That the testimony is to the fact of non-access is therefore of no importance at all in this rule of R. *v.* Reading, except so far as the necessity-exception to the rule of disqualification by interest might not apply to that fact while it might apply to others. That the fact of non-access, of itself, was a thing not proper to be testified to, either on moral or on sentimental grounds, or that parents could not testify to illegitimacy, never for a moment occurred to these judicial expounders of the common law; and this is seen clearly enough in rulings throughout the 1700s, in other kinds of litigation, where the objection based on disqualification by interest did not arise as it did for the case of filiation-proceedings.[4]

(3) But, in the meantime, while these rulings were being made, came Lord Mansfield's sonorous utterance, in another part of the juristic field, that "the law of England," as well as "decency, morality, and policy," forbade a *parent's testimony to non-access:*

> 1777, *Goodright* v. *Moss*, Cowp. 591 (ejectment; issue of the claimant's legitimacy as born after marriage of F. and M.; argued for the claimant that "though the testimony of parents in their lifetime or their declarations after their decease might be admissible in cases where proof of the marriage was presumptive only, as by cohabitation or general reputation, yet neither their declarations nor their personal testimony [of birth before marriage] could be admitted to bastardize their issue, where as in this case the fact of the marriage was actually proved [by the register-entry]." MANSFIELD, L. C. J.: "All the cases cited are cases relative to children born in wedlock; and the law of England is clear that the declarations [or testimony on the stand] of a father or mother cannot be admitted to bastardize the issue born after marriage. . . . As to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule founded in decency, morality, and policy, that they shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party."

It is possible to imagine more than one explanation of the aberration which prompted this utterance. But what Lord Mansfield said was plain. It might be argued that he spoke 'obiter'; yet Lord Mansfield's 'obiter dicta' were as effective as other men's positive decisions; and at any rate it *was* his opinion. What must be conceded and emphasized, however, is that he had no authority whatever for his utterance. If there is any such law of England, or was for any period, it was invented by him and dates from his utterance.[5]

1705 making the unmarried mother competent to prove the intercourse, held not to exclude a married mother; the opinions in Com. *v.* Shepherd followed and approved as to the early practice).

[4] Cases cited *supra*, note 1; the following utterance is plain: 1795, Kenyon, L. C. J., in R. *v.* Bramley, 6 T. R. 330: "Parents may be called as witnesses with respect to the legitimacy of their issue; and if they may be called to prove that they are legitimate children, there is no reason why they should be considered as incompetent when called to prove that the children are illegitimate."

[5] Compare his inventions of the rule against 'allegans suam turpitudinem' (*ante*, § 525) and of the rule against jurors impeaching their verdicts (*post*, § 2352).

Before long it began to be repeated with approval,[6] and the way was paved for substituting his new law for the existing law.[7]

(4) But what had become, in the meantime, of R. *v.* Reading? Was not its authority, and that of its successors, as firm and unmistakable as ever? Could Lord Mansfield's single utterance overthrow a long line of clear precedents? It could and did, but first through misconstruing them. Whom the gods wish to destroy, they first make mad; which, for legal precedents, means that they must first be misunderstood. In 1809, in R. *v.* Kea, within two years after R. *v.* Luffe [8] (the last lineal successor of R. *v.* Reading), the settled rule in filiation-orders was held to mean that the married mother was incompetent to testify, and not merely that she could testify but must be corroborated.[9] This, of course, was in positive contradiction of those cases, though it purported to follow them. The way was now open. R. *v.* Kea excluded the married mother's testimony to non-access in filiation cases; Lord Mansfield had declared for a broader exclusion of *either parent's testimony to that fact in all cases*. The two rules were now harmonious; one was merely broader than the other. The broader now began to be followed, and for fifty years in England was accepted without question.[10] By that

[6] 1792, Sir W. Wynne, in Smyth *v.* Chamberlayne, quoted in Nicolas, Adulterine Bastardy, 147, from Gardner Peerage Case, Appendix; 1813, Banbury Peerage Case, reported in Nicolas, Adulterine Bastardy, 470 (Lord Redesdale refers with doubt to a mother's declarations); 1814, Phillipps, Evidence, 1, 241.

For the modern English rule requiring corroboration for *bastardy* in general, see *ante*, § 2061.

[7] The wide contrast between the then existing law, and the law that was about to be, may be easily seen. Lord Mansfield's rule, in the first place, applied to *all issues* of litigation whatever; the rule of R. *v.* Reading applied to *filiation* proceedings only. Lord Mansfield's rule applied to *both parents* equally; the rule of R. *v.* Reading applied only to the *mother*. Again, the one was based on a broad and *fixed* ground of policy; while the other was *flexible* according to the rule of disqualification by interest. Finally, and most important, the former was a rule *excluding* absolutely the testimony; while the latter *admitted* the testimony and merely required corroboration before an order could be founded on it. This last feature of Lord Mansfield's rule was its most ill-advised one, and has constantly remained a stubborn puzzle and a source of fantastic speculation in judicial opinion.

[8] Quoted *supra*, note 2.

[9] 1809, R. *v.* Kea, 12 East 132 (order of filiation of married woman's child, granted "as well on the testimony of the said other witnesses as to the non-access of M. P., as on the evidence so given by M. D. [the wife] as aforesaid, and not exclusively on either"; order quashed, because "to hold this evidence receivable would be in direct contradiction to R. *v.* Reading and other cases," the wife being examinable "only to those facts which she might legally prove, and not to the non-access of the husband").

[10] 1833, Cope *v.* Cope, 1 Moo. & R. 269, Alderson, J. (issue to try legitimacy; wife's declarations as to the father, excluded, because "she is not allowed herself to prove the illegitimacy of the child, as by showing non-access"); 1836, R. *v.* Sourton, 5 A. & E. 180, K. B. (pauper-settlement; husband's testimony not receivable to prove non-access, on the authority of Goodright *v.* Moss, though the true doctrine of R. *v.* Reading was called to the Court's attention by counsel; the first bench decision positively adopting the new rule); 1841, R. *v.* Mansfield, 1 Q. B. 444 (pauper settlement; the wife was sole witness to non-access, but this was not treated as improper, the Court holding merely that non-access was not fully proved); 1850, Wright *v.* Holdgate, 3 C. & K. 158, Cresswell, J. (issue to try legitimacy; husband not admitted to prove access, on the principle of R. *v.* Sourton); 1855, Anon. *v.* Anon., 22 Beav. 481, 23 Beav. 273 (legitimacy; rule held to forbid wife's testimony to non-access before marriage, the child being then conceived); 1856, Legge *v.* Edmonds, 26 L. J. Ch. 125, 135 (title depending on legitimacy; wife's testimony to facts regarding non-access—here, by reason of impotency—held not receivable, by Wood, V. C., who pointed out the correct early rule, and said of the modern rule "that it appears to me to be very far from satisfactory").

time, the statutory abolition of married persons' incompetency (*ante*, § 620) led to a reconsideration of the question; and, for a time at least, the original and orthodox rule of R. *v.* Reading (but not limited to filiation cases) was revived. To what extent the law of England will pare down Lord Mansfield's innovation cannot be surely known from the modern rulings.[11]

(5) In the United States, the original practice, so far as there is any report of it, was entirely in harmony with the orthodox rule of R. *v.* Reading, *i. e.* it knew merely a rule of corroboration for married mothers in filiation or similar proceedings.[12] But the circulation of Lord Mansfield's dogmatic pronouncement, in the treatises of the early 1800s, soon brought the new rule to the attention of our Courts; and they seem usually to have accepted it with unquestioned faith.[13] It may have become, in some jurisdictions, too deeply planted to be uprooted.[14]

[11] 1870, Rideout's Trusts, L. R. 10 Eq. 41 (title depending on legitimacy; James, V. C., having in view the statutory abolition of husband's and wife's incompetency, took the fact of non-access to be proved upon the husband's testimony with other corroborating evidence; having refused to act on the husband's testimony alone); 1877, Yearwood's Trusts, L. R. 5 Ch. D. 545 (title depending on legitimacy; Hall, V. C., followed the preceding case, similar in its facts, as involving the principle that the evidence was "admissible, but not to be acted upon unless corroborated by other evidence"); 1879, Nottingham Guardians *v.* Tomkinson, L. R. 4 C. P. D. 343 (ruling in Yearwood's Trusts doubted); 1889, Burnaby *v.* Baillie, L. R. 42 Ch. D. 282, 294 (similar).

[12] 1801, Yeates, J., in Com. *v.* Shepherd, Pa., quoted *supra*, note 3.

[13] *Federal:* 1825, Stegall *v.* Stegall's Adm'r, 2 Brockenb. 256, 262 (title depending on legitimacy; whether mother's testimony to non-access was admissible, left undecided; Marshall, C. J.); *Arkansas:* 1915, Kennedy *v.* State, 117 Ark. 113, 173 S. W. 842 (filiation of a bastard; the married mother's testimony to non-access of her husband, held inadmissible; here her testimony to the defendant's intercourse was admitted, but the presumption of legitimacy is held to prevail for lack of any evidence of non-access by the husband; the opinion heartily approves Lord Mansfield's rule and unctuously descants on the propriety of forbidding the resolution of "secrets purely delicate and personal" which it would be "grossly indecent to advertize to the world" and would "scandalize the marital relation"; but the opinion fails to explain why the mention of the married mother's marital non-access does all these shocking things and yet the mention of her adultery with the defendant does not; the sentimental view of the present doctrine has never been able to square itself with logic); *California:* Civ. C. 1872, §§ 144, 145 (provisions as to presumption of legitimacy after divorce for adultery of husband or of wife); 1902, Mills' Estate, 137 Cal. 298, 70 Pac. 91 (rule applied to A.'s wife's testimony to non-access with A., in favor of her children claiming as illegitimate heirs of B.; but the opinion seems to confuse this rule and the presumption of legitimacy, *post*, § 2527); 1911, People *v.* Richardson, 161 Cal. 552, 120 Pac. 20 (defendant was charged with administering drugs with intent to commit abortion, to a woman seduced by him in August, 1908—June, 1909, and married to another man in August, 1909, the child being safely born alive in December, 1909; the mother's testimony to the pregnancy by the defendant, held not to be excluded by the present doctrine); 1919, McNamara's Estate, 181 Cal. 82, 183 Pac. 552 (inheritance; wife may testify to separation during marriage; but may not testify to non-intercourse during the period of cohabitation; the Code does not sanction the common-law rule here in question; Mills' Estate not approved on that point; and the prohibition above noted is attributed to the

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[14] It has been held that the *abolition of disqualification by interest* does not abolish this rule: 1880, Egbert *v.* Greenwalt, 44 Mich. 245, 248, 6 N. W. 654; 1861, Chamberlain *v.* People, 23 N. Y. 85, 88; 1874, Tioga *v.* South Creek, 75 Pa. 433, 437.

Distinguish the question as to using *hearsay* statements under the *pedigree-exception* (*ante*, §§ 1494, 1500), and the question as to the force of the *presumption of legitimacy* (*post*, § 2527).

Compare the rulings on *corroboration in bastardy* (*ante*, § 2061), and the modern statutes making parents competent in cases of *family-desertion* (*ante*, § 488); which presumably would avail to nullify the present rule in issues of family desertion.

conclusive presumption of legitimacy, *post*, § 2527; Melvin, J., diss.); *Delaware:* 1912, Bancroft *v.* Bancroft, 27 Del. 9, 85 Atl. 561 (question not decided); *Georgia:* 1854, Wright *v.* Hicks, 15 Ga. 160, 172 (adulterine bastardy; the declarations of the parents, were they alive, were said to be not admissible, "but being dead, they are competent testimony"); *Hawaii:* 1906, Godfrey *v.* Rowland, 17 Haw. 577, 583 (rule followed); Rev. L. 1915, § 2975 (in prosecutions for wife-desertion, etc., the parents are competent as to "the parentage of such child or children"); *Indiana:* 1868, Dean *v.* State, 29 Ind. 483 (bastardy suit by a married woman whose husband had been absent in the army; the mother admitted as a witness); 1905, Evans *v.* State, 165 Ind. 369, 74 N. E. 244 (bastardy; the married mother's testimony to non-access of her husband is admissible); 1905, Evans *v.* State, 165 Ind. 369, 75 N. E. 651 (the married mother, on a bastardy charge, may testify to non-access; repudiating the policy of the above rule, but reaching the result under Burns' Ann. St. 1914, §§ 1015, 1019 quoted *ante*, §§ 488, 1326, 1387, 1413, by refusing to imply the rule into the statute as a qualification; refusing also to require corroboration as a rule of law); *Iowa:* 1908, Wallace *v.* Wallace, 137 Ia. 37, 114 N. W. 527 (divorce on the ground of wife's pregnancy by another man at the time of marriage; a child was born four months after marriage; the wife's affidavit of her ante-marital intercourse with the other man and of lack of intercourse with the husband at the same period, rejected; but on the former point alone, the Court would have admitted the affidavits); *Kansas:* Gen. St. 1915, § 3415 (like Haw. Rev. L. § 2975); *Louisiana:* 1829, Tate *v.* Penne, 7 Mart. N. S. 548, 555 (title depending on legitimacy; declarations of the mother, a party, held inadmissible under the French law); *Massachusetts:* 1814, Canton *v.* Bentley, 11 Mass. 441 (pauper settlement; husband's testimony to his absence from the wife during the appropriate period, to prove the son illegitimate, held probably inadmissible; question expressly not decided, and no cases cited); 1861, Hemmenway *v.* Towner, 1 All. 209 (illegitimacy; father's declarations not admitted, but on the ground of the presumption of legitimacy); 1862, Haddock *v.* R. Co., 3 All. 656 (ejectment; parent's declarations as to offspring being spurious, inadmissible); 1870, Abington *v.* Duxbury, 105 Mass. 287, 290 (pauper settlement; wife's testimony to non-access, excluded); 1922, Taylor *v.* Whittier, — Mass. —, 134 N. E. 346 (devise to a child, whose legitimacy was disputed; on the issue of impotency, the mother's testimony was held inadmissible); *Michigan:* 1880, Egbert *v.* Greenwalt, 44 Mich. 245, 248, 6 N. W. 654 (crim. con.; wife's and husband's testimony to their non-intercourse during cohabitation, so as to fix defendant as author of her pregnancy, held inadmissible); 1897, Rabeke *v.* Baer, 115 Mich. 328, 73 N. W. 242 (marriage with R. in February, and a child in September; wife's testimony to non-intercourse with R. before marriage, excluded, in an action against B. for seduction in the previous October; but to intercourse with B. in October, allowed); 1921, Brown *v.* Long Mfg. Co., 213 Mich. 221, 182 N. W. 124 (claim as child of deceased employee; testimony of alleged wife and deceased father as to non-access, held not within the present rule, the parties not being lawfully married); *New York:* 1832, Cross *v.* Cross, 3 Paige Ch. 139, 141 (wife's admissions, not receivable to establish non-access, in a bill for divorce and declaration of illegitimacy); 1841, Ratcliff *v.* Wales, 1 Hill 63, 65 (*obiter* statement similar to the next ruling); 1853, People *v.* Overseers, 15 Barb. 286, 292 (filiation of married woman's bastard; mother inadmissible to prove non-access); 1861, Chamberlain *v.* People, 23 N. Y. 85, 88 (perjury by husband in trial of divorce for adultery, by testifying to non-access to the wife; declared to be improper testimony); *North Carolina:* 1825, State *v.* Pettaway, 3 Hawks 623, 625 (filiation of married woman's bastard; mother not allowed to speak to non-access); 1849, State *v.* Wilson, 10 Ired. 131 (bastardy; opinion obscure, but apparently assumes that the wife was not competent as to non-access); 1874, Boykin *v.* Boykin, 70 N. C. 262 (neither husband nor wife may prove access or non-access); 1916, West *v.* Redmond, 171 N. C. 742, 88 S. E. 341 (partition proceedings; principle applied to exclude a mother's declarations as to a child's illegitimacy); *Oklahoma:* Comp. St. 1921, § 8024 (presumption of legitimacy can be disputed by husband or wife only, etc.; "illegitimacy, in such case, may be proved like any other fact"); 1899, Bell *v.* Terr., 8 Okl. 75, 56 Pac. 853 (bastardy; mother may not testify to the husband's non-access); *Oregon:* 1921, Westfall *v.* Westfall, 100 Or. 224, 197 Pac. 271 (annulment of marriage for fraud in concealing pregnancy; rule cited); *Pennsylvania:* the early cases are cited *supra*, note 3; 1857, Dennison *v.* Page, 29 Pa. 420, 423 (legitimacy; neither parent may prove non-access); 1874, Tioga *v.* South Creek, 75 Pa. 433, 536 (pauper settlement; same ruling); *South Carolina:* 1853, Johnson *v.* Chapman, Busbee Eq. 213 (title depending on legitimacy of a posthumous child; father's admissions as to non-access, held inadmissible); 1868, Moseley *v.* Eakin, 15 Rich. 324, 340 (wife admitted to testify that a marriage was consummated by intercourse, but not the contrary to prove a child spurious); *Texas:* 1892, Simon *v.* State, 31 Tex. Cr. 186, 196, 199 (incest; declarations of defendant's parents as to his illegitimacy, excluded); *Utah:* Comp. L. 1917, § 8113 (desertion or non-support of wife or child; husband and wife may testify to "the fact of such marriage and the parentage of such child"); *Vermont:* Gen. L. 1917, § 3541 (family-desertion; hus-

It is agreed, however, on all hands that the prohibited testimony concerns solely the *specific fact of non-access, i. e.* testimony to any other fact constituting illegitimacy, or to illegitimacy in general, is admissible.[15]

The example of the modern English judges in allowing the question to be reconsidered justifies us in inquiring whether there is any sound policy which to-day can be invoked in its maintenance.

§ 2064. **Same: (*b*) Policy of the Rule.** In considering the possible grounds upon which the rule may be supported, the rule of disqualification by interest may be dismissed as irrelevant. That rule was advanced as the foundation of the original rule of corroboration,[1] and it did have a bearing in the specific and original case of filiation-proceedings (although even there it was technically satisfied), but not on the fact of non-access, merely or always.

The rule, then, as an independent one, standing by itself, must be based upon some extrinsic ground of "decency, morality, and policy," in Lord Mansfield's phrase. But why is such a person's testimony to such a fact indecent, immoral, or impolitic? Among several judicial efforts to supply an answer to this question, the following may be taken as typical:

1874, GORDON, J., in *Tioga* v. *South Creek*, 75 Pa. 433, 437: "Many reasons have been given for this rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous; and this, not so much from the fact that it reveals immoral conduct upon the part of the parents, as because of the effect it may have upon the child, who is in no fault, but who must nevertheless be the chief sufferer thereby. That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency."

band and wife competent and compellable as to any fact, "including . . . the parentage of such child"); *Virginia:* 1811, Bowles *v.* Bingham, 2 Munf. 442 (title depending on legitimacy; the answer of the husband, an opponent, denied legitimacy on the ground of non-access; point not decided); *Wisconsin:* 1884, Mink *v.* State, 60 Wis. 583, 585, 19 N. W. 445 (prosecution by a married woman for filiation of a bastard; wife's testimony to non-access, held inadmissible); 1885, Watts *v.* Owens, 62 Wis. 512, 519, 22 N. W. 720 (same ruling, on an issue of legitimacy); 1892, Shuman *v.* Shuman, 83 Wis. 250, 53 N. W. 455 (title depending on legitimacy; parents' statements of non-access, excluded).

[15] *Eng.* 1860, Darcy's Infants, 11 Ir. C. L. R. 298 (legitimacy under a will; mother's affidavits to an illegal Roman Catholic ceremony, admitted); 1875, Murray *v.* Milner, L. R. 12 Ch. D. 845, 849 (deceased father's statements in a will, as to "my reputed son," admitted); 1885, Aylesford Peerage Case, L. R. 11 App. Cas. 1 (a letter of the mother, held admissible, not as an assertion regarding legitimacy, but as an "act of an important nature done by the mother with reference to the care, custody, and bringing up of her child"); 1903, Poulett Peerage, App. Cas. 395 (legitimacy of a peerage claimant, born less than six months after the marriage; the father's testimony of non-access before marriage and of separation shortly after marriage upon the wife's confession of pregnancy by another man before marriage, admitted; the general principle held not to include such a case).

Can. 1892, Mulligan *v.* Thompson, 23 Ont. 54 (loss of service; rule not applicable to illegitimate birth as evidence of seduction; commenting on Evans *v.* Watt, 2 Ont. 166, and Ryan *v.* Miller, 21 U. C. Q. B. 202, 22 id. 87).

U. S. Cal. 1919, McNamara's Estate, 181 Cal. 82, 183 Pac. 552 (inheritance of a child born during separation of husband and wife; the presumption of legitimacy here being not conclusive, the deceased husband's admissions that he was the father were received); *Ia.* 1862, Niles *v.* Sprague, 13 Ia. 198, 207 (declarations denying marriage, admitted on the facts); *Pa.* 1801, Com. *v.* Stricker, 1 Browne, Appendix 47 (bastardy; mother, a married woman, may prove anything but non-access); *S. C.* 1819, Allen *v.* Hall, 2 Nott & McC. 114 (partition; parent admissible to disprove marriage).

§ 2064. [1] Cases cited *ante*, § 2063, note 2.

We learn, then, that the indecency or unseemliness lies in allowing a person to testify to an illicit connection, and that the immorality consists in allowing a parent to give testimony which will ruin his own child's legal status. The utterly artificial and false nature of the rule could not more forcibly appear than in the inconsistency of these 'ex post facto' reasons. (1) There is an indecency, we are told. And yet, in nine cases out of ten, the sole question that the wife is asked is (for example) whether her husband was in St. Louis from 1849 to 1853 during the time that she was in New York. Is this indecent? Moreover, the very next question may be whether during that time she lived with the alleged adulterer; and this (by general concession) is indubitably allowable. In every sort of action whatever, a wife may testify to adultery or a single woman to illicit intercourse; yet the one fact singled out as "indecent" is the fact of non-access on the part of a husband. Such an inconsistency is obviously untenable.[2] (2) There is an immorality and a scandal, we are told, in allowing married parents to bastardize their children. And yet they may lawfully commit this same immorality by any sort of testimony whatever, except to the fact of non-access. They may testify that there was no marriage-ceremony, or that the child was born before marriage, or that the one party was already married to a third person, or their hearsay declarations (after death) to illegitimacy in general may be used. In all these other ways they may lawfully do the mean act of helping to bastardize their own children born after marriage. Where is the consistency here? Of what value is this conjuring phrase about "bastardizing the issue," if it will not do the trick more than once in a dozen times? Moreover, what shall be said of a system of law which, while thus rebuking parents who come to prove their children bastards, at the same time by its own inhuman prohibition (unique among civilized peoples) has refused absolutely to allow those parents, by any means whatever, to remove afterwards (by legitimation) the consequences of their original error and to give to their innocent children the sanction of lawful birth, — a refusal which is still maintained in most of our jurisdictions? That the same law which harshly fixes the stain of bastardy as perpetually indelible should censure parents for the abomination of testifying to that bastardy is preposterous.

The truth is that these high-sounding "decencies" and "moralities" are mere pharisaical afterthoughts, invented to explain an otherwise incomprehensible rule, and having no support in the established facts and policies of our law. There never was any true precedent for the rule; and there is just as little reason of policy to maintain it.

§ 2065. **Surviving Claimant's Testimony against Deceased; Oral Admissions of Deceased; Advancements and Bequests.** Beginning with a modern

[2] 1801, Rush, P., in Com. *v.* Stricker, 1 Browne, Appendix 47 Pa.: "To admit a married woman, upon an inquiry into the legitimacy of a child born in the absence of her husband, to swear she has lived in adultery, . . . and at the same time to say that she shall not give evidence that her husband had no access to her, because the evidence would be indecent, seems rather mysterious and incomprehensible."

Chancery ruling in England, an effort was there made to declare, by an inflexible rule, that the testimony of a claimant on his own behalf, in support of a claim against a deceased person, could never of itself suffice, but must be corroborated by other evidence:

1886, CHATTERTON, V. C., in *Re Harnett*, 17 L. R. Ire. 543, 547: "Look at the result of acting on such evidence alone. A claimant, who cannot by possibility be contradicted, and who may be too clever and unscrupulous to break down under cross-examination, could put forward a claim founded solely on his own oath, which the judge can detect no reason for disregarding, and which in the absence of such a rule he would be bound to act upon, the only person who could contradict it being dead. It is not a rule which depends on the character of the witness, but on the manifest danger which requires the establishment of a general rule applicable to all alike from the great difficulty or impossibility of detecting falsehood."

The danger against which this rule attempts to guard is plausible, and the same which has led, in most States, to the absolute exclusion of such testimony. But the obnoxious character of that rule has been already noticed (*ante*, § 578). It remains only to oberve that the present rule, though decidedly an improvement over the rule of exclusion, and though lacking the peculiar vices of the latter, is nevertheless a misguided one. In the first place, it favors the dead above the living, for it would rather see an honest survivor unjustly lose his claim than an honest decedent be made unjustly to pay; yet, the equities being equal, the living person should rather be favored. In the next place, it is based on a mere contingency — the contingency that the claim will be dishonest and that there will be no means of exposing its dishonesty; and so, for the sake of defeating the dishonest man who may arise, the rule is willing to defeat the much more numerous honest men who are sure to possess just claims. Again, the rule in England was utterly inconsistent (until recently) with the practice in criminal cases. The mouth of the accused was closed by law, as in civil cases that of the opponent was closed by death; yet no judge on this account was found to advance a rule that the person injured by the crime must be corroborated in order that a conviction might be supported. Finally, there is always an abstract impropriety and injustice in any rule which interposes a technicality to prevent judicial action upon testimony which is in fact completely believed and trusted:

1885, BRETT, M. R., in *Re Garnett*, L. R. 31 Ch. D. 1, 9: "There is no such law. Are we to be told that a person whom everybody on earth would believe, who is produced as a witness before the judge, who gives his evidence in such a way that anybody would be perfectly senseless who did not believe him, whose evidence the judge in fact believes to be absolutely true, is according to a doctrine of the Courts of Equity not to be believed by the judge because he is not corroborated? The proposition seems unreasonable the moment it is stated. . . . The evidence ought to be thoroughly sifted, and the mind of any judge who hears it ought to be first of all in a state of suspicion. But if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd. And what is ridiculous and absurd never is, to my mind, to be adopted either in law or in equity."

Nor did this rule ever obtain a final place in English law. It was, after some time, completely repudiated in England [1] and in some Courts of Canada; [2] although it has been preserved by the Courts of Ireland,[3] and has been legislated into Canadian law.[4]

§ 2065. [1] 1852, Crouch *v.* Hooper, 16 Beav. 182 (Romilly, M. R.: "In these cases, from the nature of the evidence given, it is not subject to any worldly sanction, it being obviously impossible that any witness should be convicted of perjury for speaking of what he remembers to have been said in a conversation with a deceased person"); 1865, Grant *v.* Grant, 34 Beav. 623, 627 (parol gift to a wife, claimed by her against the executor; Sir J. Romilly, M. R.: "There is a rule constantly acted on in chambers in equity, that the unsupported testimony of any person on his own behalf cannot be safely acted on"; here corroboration was found); 1865, Down *v.* Ellis, 35 Beav. 578, 581 (similar ruling by same judge); 1873, Hill *v.* Wilson, L. R. 8 Ch. App. 888, 899 (gift to the plaintiff by the deceased of money covered by a note from the plaintiff; one judge said that the plaintiff's testimony, "unless corroborated, should be wholly disregarded"); 1875, Fowkes *v.* Pascoe, L. R. 10 id. 343, 349 (gift claimed against a deceased's estate; James, L. J.: "Although this Court has more than once said that it is too dangerous to rely on the mere evidence of a party interested as to conversations with a deceased person, yet it is legally admissible, and is not to be disregarded"); 1882, Re Finch, L. R. 23 Ch. D. 267 (similar facts; Jessel, M. R.: "It is the first time I have ever heard of such a doctrine as this. . . . It is a rule of prudence that, sitting as a jury, we do not give credence to the unsupported testimony of the claimant; with a view, no doubt, of preventing perjury and with a view of protecting a dead man's estate from unfounded claims. It is not a rule of law, but it is a question to be decided by a jury"; Baggallay, L. J., speaks of it as "the general rule," Lindley, L. J., as "the ordinary practice. . . to be very reluctant" in such cases); 1883, Maddison *v.* Alderson, L. R. 8 App. Cas. 467, 487 (Lord Blackburn denied the existence of such a rule); 1885, Re Richardson, L. R. 30 Ch. D. 400 (circumstances held to furnish corroboration); 1885, Re Garnett, L. R. 31 App. Cas. 1, 8 (quoted *supra*); 1885, Re Hodgson, 31 App. Cas. 177 (Sir J. Hannen: "We are of opinion that there is no rule of English law laying down such a proposition").

[2] *Man.* 1885, Rankin *v.* McKenzie, 3 Man. 323 (creditor's claim against an estate; Hill *v.* Wilson, Eng., followed); 1906, Doidge *v.* Mimms, 13 Man. 48, 54 ("There is no distinct law against it; the rule is one of prudence only"; but here it was applied); *N. Br.* 1874, Ex parte Simpson, 15 N. Br. 142, 144 (the uncorroborated evidence of an interested person, fixing an estate with liability, ought to be "very clear and free from suspicion"); 1880, Powell *v.* Wark, 20 N. Br. 15, 24 (there is no rule requiring such corroboration; but "it would be well if it were enacted"); *N. W. Terr.* 1901, Blank Estate, 5 Terr. L. R. 230 (the rule of corroboration held not applicable in passing an administrator's account, but only where a claim is contested in court; Re Garnett and Re Hodgson approved).

[3] 1869, Hartford *v.* Power, Ir. R. 3 Eq. 602, 607 (claim of loan against deceased woman's separate estate; Chatterton, V. C., refused to allow "any claim merely upon the unsupported evidence of the claimant"; following Lord Romilly's rule); 1879, Re Boak, L. R. Ire. 3 Ch. D. 222 (similar); 7 id. 322, 327 (ruling affirmed on appeal); 1886, Re Harnett, 17 L. R. Ire. 543, 547 (rule continued, in spite of the English rulings).

[4] CANADA: *Dominion:* 1903, McDonald *v.* McDonald, 33 Can. Sup. 145 (applying the Nova Scotia statute); 1903, Thompson *v.* Coulter, 34 Can. Sup. 261 (applying the Ontario statute);

Alberta: St. 1910, 2d sess., c. 3, Evidence Act, §§ 12, 13 (like Ont. Rev. St. c. 76, § 12); 1914, Voyer *v.* Le Page, 17 D. L. R. 476 (mortgage claim; Alta. Stat. 1910, c. 3, Evid. Act, § 12, applied); 1914, Voyer *v.* Le Page, 19 D. L. R. 52 (partnership and mortgage; under Evidence Act, § 12, where separate transactions are involved, corroboration as to some only suffices if it satisfies the Court of the party's general credibility); 1915, Brocklebank *v.* Barter, 22 D. L. R. 209 (building-contract; Alta. Evid. Act, § 12 held not to require corroboration where the "party's own evidence" is "documentary"); 1921, Imperial Bank *v.* Trusts & Guarantee Co., 57 D. L. R. 693 (note indorsed by the deceased; issue as to the deceased's waiver of notice of dishonor; the rule held not applicable to the testimony of an employee of a bank acting as collecting agent);

British Columbia: Rev. St. 1911, c. 78, §§ 10, 11 (substantially like Ont. R. S. c. 76, §§ 12, 13); 1904, Blacquierre *v.* Corr, 10 B. C. 448; 1914, Groat *v.* Kinnaird, 20 D. L. R. 421 (B. C. Ev. Act, § 12, requiring corroboration, held not applicable to a son who was defendant to a counterclaim by the executors for a loan, unless the executors had made out a 'prima facie' case so that the burden of proof shifted to the son to prove that the money received was a gift; per Beck, J.: "It is much to be regretted that such a provision appears in our Evidence Act; I think it is calculated to produce gross injustice in many cases");

In the United States, it has been introduced in a few jurisdictions by statute,[5] — not as a reproduction of a supposed English rule, but rather as

1915, Ledingham *v.* Skinner, 21 D. L. R. 300 (claim for board and lodging furnished by plaintiff's wife; the wife's testimony held not sufficient corroboration, under B. C. R. S. 1911, c. 78, § 11; two judges diss.);
Newfoundland: Consol. St. 1916, c. 91, §§ 13, 14 (like Ont. R. S. c. 76, §§ 12, 13);
Nova Scotia: Rev. St. 1900, c. 163, § 35 (quoted *ante*, § 488); construed in the following cases: 1877, Chesley *v.* Murdock, 2 Can. Sup. 48; 1879, Confederation L. Ass'n *v.* O'Donnell, 2 Russ. & C. 570, Can. Sup. Cassels' Dig. 1893, p. 370; 1910, Kaulbach's Estate, Moorhead *v.* Kaulbach, 45 N. Sc. 62 (each fact material to recovery must be corroborated); 1916, Josephs *v.* Morton, 26 D. L. R. 433 (claim against an insolvent deceased; corroboration required); 1917, McGuire *v.* McGuire, 33 D. L. R. 103, whether a sum of money handed by deceased to D. was a gift 'causa mortis,' not 'inter vivos'; corroboration required for the donee under R. S. 1900, c. 163, § 35);
Ontario: Rev. St. 1914, c. 73, § 12 (in an action "by or against the heirs, next of kin, executors, administrators, or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence"); § 13 ("In an action by or against a lunatic so found or an inmate of a lunatic asylum, or a person who from unsoundness of mind is incapable of giving evidence, an opposite or interested party shall not obtain a verdict, judgment, or decision on his own evidence, unless such evidence is corroborated by some other material evidence"); some of the cases applying the statute are as follows: 1876, Birdsell *v.* Johnson, 24 Grant 202; 1878, McDonald *v.* McKinnon, 26 Grant 12; 1881, Halleran *v.* Moon, 28 Grant 319; 1886, Tucker *v.* McMahon, 11 Ont. 718; 1891, Radford *v.* Macdonald, 18 Ont. App. 167 (leading case); 1896, Green *v.* McLeod, 23 Ont. App. 676; 1910, Schwent *v.* Roetter, 21 Ont. L. R. 112 (statute applied); 1920, Mushol *v.* Benjamin, 54 D. L. R. 248 (moneys advanced to deceased; corroborative evidence not needed for each item separately, where there is "an underlying connection between several items" and there is sufficient corroboration as to some); 1921, Capital Trust Co. *v.* Fowler, 64 D. L. R. 289 (stock bought on false representations; the statute held not to apply to the opponent's answers on discovery are used against him in part; Magee, J. A., diss.); 1921, Hawley *v.* Hand, 64 D. L. R. 504 (action by an execution creditor of the estate of H., to set aside transfers of stock by H. to his wife as fraudulent; held that the wife's testimony in support of the transfer, though not within the letter of the statute, was within the spirit, but that the judge was at liberty to act upon the wife's uncorroborated testimony; the opinion turns in part on the burden of proof of good faith in transfers between relatives, on the principle of § 2504, *post*);
Prince Edward Island: St. 1889, c. 9, § 11 (like Ont. Rev. St. c. 76, § 12); § 12 (like ib. § 13);
Yukon: Consol. Ord. 1914, c. 30, § 35 (like N. Sc. Rev. St. 1900, c. 163, § 35).

[5] *Federal:* 1916, Bassity's Estate, U. S. Court for China, Extra-terr. Cas. 595 (U. S. St. 1900, c. 786, cited *infra*, under Alaska, applied);
Alaska: U. S. St. 1900, June 6, c. 786, § 823, Alaska Comp. L. 1913, § 1655 (no claim against a decedent's estate, rejected by the executor, etc., shall be allowed "except upon some competent or satisfactory evidence other than the testimony of the claimant");
Illinois: Rev. St. 1874, c. 3, § 60 (if objection is made to a claim against a decedent's estate, "the same shall not be allowed without other sufficient evidence" than the claimant's oath to his claim in writing);
Louisiana: St. 1906, No. 207 ("Parol evidence shall be incompetent to prove any debt or liability upon the part of a party deceased, except it consist of the testimony of at least one credible witness of good moral character besides the plaintiff; or except it be to corroborate a written acknowledgment or promise to pay signed by the debtor; or unless an action upon the asserted indebtedness shall have been brought within a delay of twelve months after the decease of the debtor"); 1920, Manion's Succession, 148 La. 98, 86 So. 667 (under St. 1906, No. 207, all parol evidence is excluded, if the claim is not sued on before 12 months); 1922, Moon *v.* Dye, 150 La. 254, 90 So. 639 (son's debt to mother; statute applied);
New Mexico: Annot. St. 1915, §§ 2175, 2280 (in a suit by or against the heirs, etc., 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"); 1891, Gildersleeve *v.* Atkinson, 6 N. M. 250, 27 Pac. 477 (corroboration defined; it must "of itself . . . point with reasonable certainty to the allegation"); 1898, Byerts *v.* Robinson, 9 N. M. 427, 54 Pac. 932 (statute applied); 1904, Gillett *v.* Chaves, 12 N. M. 353, 78 Pac. 68 (statute applied); 1910, Childers *v.* Hubbell, 15 N. M. 450, 110 Pac. 1051 (statute applied); 1910, Radcliffe *v.* Chaves, 15 N. M. 258, 110 Pac. 699 (statute

a half-way measure intended to answer the same purpose as the statutes which in other jurisdictions (*ante*, §§ 488, 578) absolutely prohibit such testimony.

In a few States a similar rule is recognized for proof of an *oral agreement* for an *advancement* or *bequest* by a deceased;[6] and in a few jurisdictions a *claim against a decedent's estate* cannot be sufficiently established by the decedent's *oral admissions* alone.[7]

applied); 1915, National Rubber Co. *v.* Oleson, 20 N. M. 624, 151 Pac. 695 (statute applied); 1915, Union Land & G. Co. *v.* Arce, 21 N. M. 115, 152 Pac. 1143 (statute applied); 1921, 1922, Cardoner's Est., Bujac *v.* Wilson, — N. M. —, 196 Pac. 327, — N. M. —, 206 Pac. 1070 (contract to carry on litigation; rule of Gildersleeve *v.* Atkinson adhered to; as to the suggestion above in the text, that the rule is unwise in that it prevents recovery where the Court "believes absolutely in the claimant's testimony and feels sure that he ought to recover, as we feel free to say we do in this case," the opinion points out that the Legislature must remedy this, "if the rule is bad in policy"; statute held not applicable to matters occurring since the death);
Oregon: Laws 1920, § 1241 (no claim against an executor or administrator, if rejected by him, shall be allowed "except upon some competent or satisfactory evidence other than the testimony of the claimant"); 1904, Goltra *v.* Pentland, 45 Or. 254, 77 Pac. 129 (nature of the corroboration, defined);
Virginia: Code 1919, § 6209 ("In an action or suit by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony; and in any such action or suit, if such adverse party testifies, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence"); 1921, Robertson's Ex'r *v.* Atlantic C. R. Co., 129 Va. 494, 106 S. E. 521 (Code 1919, § 6209, requiring corroboration, does not apply to the testimony of an agent making a contract with a deceased person, the agent not being "an adverse or interested party").

In *New Hampshire*, a statute allowing the Court to admit such testimony exceptionally, where "injustice may be done without the testimony," has been interpreted to mean that the injustice must appear from other evidence, *i. e.* a species of corroboration: 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).

In *Maryland*, an analogous rule requires a claim of contract against a deceased person to be established by "clear and satisfactory proof from disinterested sources"; 1903, Duckworth *v.* Duckworth, 98 Md. 92, 56 Atl. 490 (citing the prior cases, and ruling also as to the use of the deceased's admissions).

[6] *California:* 1917, Emerson's Estate, 175 Cal. 724, 167 Pac. 149 (the heirs charging a special administrator with a loan of $9000 by the deceased his brother, the administrator testified to an oral settlement with the brother; held (1) that the evidence needed corroboration on the present principle, and (2) that it was prohibited by Cal. C. C. P. § 1880, par. 3); *New Jersey:* 1896, Cochrane *v.* McEntee, — N. J. Eq. —, 51 Atl. 279 (uncorroborated testimony of a daughter, as to a promise by her deceased parents to make her a bequest, held insufficient "under the usual rule of a court of equity"; citing only Jacob's Fisher's Digest, p. 1504); *New York:* The following explanation has been made: 1918, McKeon *v.* Van Slyck, 223 N. Y. 398, 119 N. E. 851 ("In Hamlin *v.* Stevens, 177 N. Y. 39, we said that oral declarations of an intention to bequeath one's estate to another ought not to be held sufficient basis for the finding of a contract unless corroborated in all substantial particulars by disinterested witnesses. In saying that, we did not mean to lay down a rule of law"); 1919, Ward *v.* New York Life Ins. Co., 225 N. Y. 314, 322, 122 N. E. 207 (foregoing case approved); 1919, Re Sherman, Re De-Yoe's Estate, 227 N. Y. 350, 125 N. E. 546 (earlier cases distinguished); 1920, Atkins *v.* Nelson, App. T. 184 N. Y. Suppl. 876 (foregoing cases noticed); 1922, Re Sullivan, Surr. Ct., 192 N. Y. Suppl. 318 (claim for board furnished to decedent; "claims of this character must be carefully scrutinized"; prior rulings noticed); *Tennessee:* 1919, Gibson *v.* Buis, 142 Tenn. 133, 218 S. W. 220 (advancement to a legatee, claimed by her as a gift; rule applied to her testimony; citing only the erroneous statement of an American treatise that "the English Courts" apply such a rule).

[7] 1906, Clarke *v.* Roberts' Estate, 38 Colo. 316, 87 Pac. 1077; 1918, Fee *v.* Wells, 65 Colo. 348, 176 Pac. 829 (alleged parol trust of an insurance amount; the beneficiary's admissions of a trust, held not sufficient); 1855, Wilder *v.* Franklin's Ex'r, 10 La. An.

§ 2065*a*. **Industrial Patent Applicant's Claim of Prior Invention.** In *patent causes*, where an existing grant of patent is sought to be avoided by the fact of *priority of another claimant's invention* of the same thing, the assertion of the rival claimant that his conception and use of the invention were prior in time will often describe conduct and events taking place in the privacy of his own workshop or home. Such assertions are easy to make and hard to meet. Accordingly, a rule of practice has grown up in the United States Patent Office declaring that the alleged inventor's uncorroborated testimony will not suffice.[1] But this rule has not been definitely sanctioned by the Federal Supreme Court.[2]

Nor should it be. There can be no need for such a rule of law (*ante*, § 2033), especially where the evidence is weighed by a seasoned official acting without a jury. If the official does not believe the claimant's assertion, his own reasoning suffices to support his judgment of credibility. If he does believe the assertion, he should not be hampered by a fixed rule of thumb interfering with that judgment. That he should be cautious in relying on such assertions, is unquestioned:

279; 1883, Bodenheimer *v.* Bodenheimer's Ex'r, 35 La. An. 1005; 1919, Roy *v.* King's Estate, 55 Mont. 567, 179 Pac. 821 (action for board and lodging furnished to deceased; her admissions held sufficient); 1855, Portis *v.* Hill, 14 Tex. 69.

Compare the rule in some jurisdictions for the sufficiency of proof of such claims by *oral admissions of a trust* (*ante*, § 2054, n. 4).

§ **2065***a*. [1] 1895, Hisey *v.* Peters, 6 D. C. App. 68 (priority of inventions; priority of conception rested "virtually upon the imperfectly supported assertions of H. himself; and this, according to the repeated rulings by the Commissioners of Patents, is not deemed sufficient evidence of the fact of priority in a case of interference, and especially not where there are circumstances that throw doubt upon the accuracy of the allegation or statement"; citing only rulings of the Commissioner of Patents); 1897, Mergenthaler *v.* Scudder, D. C. 11 App. 264 ("It has been ruled in many cases that the mere unsupported evidence of the alleged inventor on an issue of priority as to the fact of conception and the time thereof cannot be received as sufficient proof of the fact of prior conception"; citing only rulings of the Commissioner of Patents); 1908, Durkee *v.* Winguist, 31 D. C. App. 248 ("It is well settled that the uncorroborated testimony of a junior party in an 'interference' is insufficient to overcome the presumption attaching to the prior filing date of the senior party"); 1909, Schmidt *v.* Clark, 32 D. C. App. 290; 1912, Huff *v.* Gulick, 38 D. C. App. 334; 1913, Kitchen *v.* Smith, 189 Off. Gaz. 255, 39 D. C. App. 500, Decisions Com. Pat. 1913, p. 335 ("An inventor's uncorroborated testimony is not sufficient to establish conception of the invention or its reduction to practice"; citing precedents); 1913, Shields *v.* Lees, 41 D. C. App. 236; 1920, H. C. Underwood, Interference Practice, p. 61 ("the mere uncorroborated statements of an inventor are not sufficient to show conception, disclosure, or reduction to practice").

[2] 1891, Clark Thread Co. *v.* Willimantic Linen Co., 140 U. S. 481 (invention said to have anticipated one patented in 1858; the Court remarks, the only evidence as to time being the inventor's own testimony, "that species of evidence in cases of this kind ought to be received with great caution"); 1891, The Barbed Wire Patent, 143 U. S. 275, 284 (quoted *supra*); 1917, Crone *v.* Gibson Co., 2d C. C. A., 247 Fed. 503 (anticipation of invention; "written corroboration" as to date, not necessary); 1922, Armstrong *v.* DeForest Radio T. & T. Co., D. C. S. D. N. Y., 279 Fed. 445 (Mayer, D. J.: "I do not understand that corroboration, in the sense of full knowledge by a witness of the inventive conception and an understanding of the apparatus, in addition to the testimony of the inventor, is necessary; the question always is as to what will satisfy the trier of the facts"); 1922, Armstrong *v.* DeForest Radio T. & T. Co., 2d C. C. A., — Fed. — (priority of invention: Manton, J.: "While it is true that the uncorroborated testimony of an inventor is to be accepted with caution, yet there is no rule of law that requires the rejection of the uncorroborated testimony of an inventor as to the date of his conception; . . . the rule as to corroboration is one of caution and discretion, and is not a statutory provision").

1891, BROWN, J., in *The Barbed Wire Patent*, 143 U. S. 275, 284, 12 Sup. 443: "We have now to deal with certain unpatented devices, claimed to be complete anticipations of this patent, the existence and use of which are proven only by oral testimony. In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them, aside from the temptation to actual perjury, Courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory and beyond a reasonable doubt. Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information. The very fact, which Courts as well as the public have not failed to recognize, that almost every important patent, from the cotton gin of Whitney to the one under consideration, has been attacked by the testimony of witnesses who imagined they had made similar discoveries long before the patentee had claimed to have invented his device, has tended to throw a certain amount of discredit upon all that class of evidence, and to demand that it be subjected to the closest scrutiny. Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defence of a prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer. The doctrine was laid down by this court in Coffin *v.* Ogden, 18 Wall. 120, 124, that 'the burden of proof rests upon him,' the defendant, 'and every reasonable doubt should be resolved against him.'"

§ 2066. **Miscellaneous Witnesses requiring Corroboration (Children, Chinese Immigrants, Aliens Naturalized, Divorce Witnesses, Notary's Certificate, etc.).** (1) In a few jurisdictions, a statute requires the testimony of a *child* to be corroborated.[1]

(2) A Federal statute has required the testimony of *Chinese*, in establishing a right of alien re-immigration, to be corroborated by white witnesses;[2] but

§ 2066.[1] *Eng.* 1885, St. 48 & 49 Vict. c. 69, § 4 (quoted *ante*, § 2061); 1889, St. 52 & 53 Vict. c. 44, § 8 (offences of cruelty to children; cited *ante*, § 2061, n. 2); 1904, St. 4 Edw. VII, c. 15, § 15 (Prevention of Cruelty to Children Act; similar to the preceding act); St. 1908, 8 Edw. VII, c. 67, § 30 (Children Act; like St. 48 & 49 Vict. c. 69, § 4, for offences against children).

Can. Dom. St. 1893, c. 31, § 25, being R. S. 1906, c. 145, Evid. Act, § 16 (child's testimony "in any legal proceeding," admissible without oath; quoted *ante*, § 488; adding, as par. 2, "No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence"); compare also ibid. Crim. C. § 1003, quoted *ante*, § 2061; *Alta.* St. 1910, 2d sess., c. 3, Evidence Act, § 17 (like Dom. Evid. Act, § 16); *B. C.* Rev. St. 1911, c. 78, § 6 (like Dom. Evid. Act, § 16); c. 107, § 100 (contributing to a child's delinquency; like Eng. St. 1885); *Man.* Rev. St. 1914, c. 65, § 39 (like Dom. Evid. Act, § 16); *Sask.* Rev. St. 1920, c. 44, Evidence Act, § 36 (like Dom. Evid. Act, § 16);

U. S. N. Y. C. Cr. P. 1881, § 392 (unsupported testimony in a criminal prosecution of a child under twelve, allowed to testify without an oath, is insufficient; quoted in full, *ante*, § 1828, n. 1).

[2] *U. S.* St. 1892, May 5 (27 Stat. L. 25), c. 60, § 6, Code § 3658 (deportation of Chinese laborers, unlawfully without certificate in the U. S.; the judge is to order deportation "unless he shall establish clearly . . . to the satisfaction of said United States judge, and by at least one credible witness other than Chinese," that he was a resident of the U. S. on May 5, 1892); St. 1893, Nov. 3 (28 Stat. L. 7), c. 14, § 2, Code § 3045 (a Chinese applying for readmission as a merchant formerly here "shall establish by the testimony of two credible witnesses other than Chinese" the fact of having conducted such business and of not having been a manual laborer); Departmental Rulings S. 17555, 21039 (statute construed as to the tenor of the required testimony); 1900, Li Sing *v.* U. S., 180 U. S. 486, 21 Sup. 449 (statute of 1893 applied); 1902, Quong Sue *v.* U. S., 54 C. C. A. 652, 116 Fed. 316 (statute of 1892 applied); 1904, U. S. *v.* Louie Juen, 128 Fed. 522, D. C. (Chinese witnesses suffice to prove presence as a merchant before the passage of St. 1892); 1915, U. S. *v.* Chin Sing Quong, D. C. N. D. N. Y., 224 Fed. 752 (under St. May 5, 1892, c. 60, § 6, the rule requiring the testimony of other than Chinese witnesses does not expressly apply to proof of a Chinese merchant status before 1892 as entitling a Chinese who

this cannot be extended to one of Chinese parentage making proof of citizenship by birth.[3] The policy of such race-discriminations has elsewhere been criticized (*ante*, §§ 516, 936).

(3) For more than a century past, an *alien* applying for *naturalization* must provide corroboration of his own statements as to residence, and other facts, in the shape of two citizens of the United States.[4] Experience shows the need of some such precaution;[5] but it may be questioned whether this is the soundest one.

(4) In *divorce*, the testimony of *detectives*, or spies, or persons of loose moral character, has been said to require corroboration;[6] but this ought merely to be a caution of common sense which would occur to any juror.

has never left the U. S. and is resisting deportation, but only to one seeking re-entry; but the testimony of Chinese witnesses, though not technically requiring such corroboration, is open to such credit as may seem proper in each case).

[3] 1900, U. S. *v.* Lee Seick, 40 C. C. A. 448, 100 Fed. 398 (statutory requirement of two witnesses does not apply to proof of U. S. birth; Chinese testimony to U. S. birth of Chinese, sufficient); 1901, Woey Ho *v.* U. S., 48 C. C. A. 705, 109 Fed. 888 (in passing on a claim of citizenship by one of Chinese parentage, the Court said: "A Court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. All people, without regard to their race, color, creed, or country, whether rich or poor, stand equal before the law").

The following ruling is therefore presumably discredited: 1899, Re Louie You, 97 Fed. 580 (one of Chinese race claiming to have been born in the U. S. and to have been absent sixteen years, three Chinese witnesses testifying to the petitioner's identity with the person proved to have been born here; held, nevertheless, that the identity must be corroborated by "some white witness, or some fact not depending on Chinese testimony").

For the *exclusion of* Chinese witnesses in similar cases, see *ante*, § 516.

[4] U. S. St. 1906, June 29, § 4, Code 1919, § 3675 (petition for naturalization "shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the U. S."); § 3680 (similar rule for proof of residence); 1908, In re Martorana, D. C. E. D. Pa., 159 Fed. 1010; 1908, In re Schatz, C. C. Or., 161 Fed. 237 (the two witnesses to prove at the hearing need not be the same two witnesses named in the notice posted prior to the hearing); 1917, U. S. *v.* Gulliksen, 8th C. C. A., 244 Fed. 727 (naturalization; St. 1906, June 29, applied); 1921, U. S. *v.* Olsen, D. C. W. D. Wash., 272 Fed. 706, 719 (under U. S. St. 1906, June 29, § 4, requiring two credible witnesses that the petitioner "is in every way qualified" to be a citizen, testimony that he is qualified except in that he was active in the I. W. W. is not sufficient).

[5] *E. g.* 1899, Re Lipshitz, 97 Fed. 584.

[6] *England:* 1859, Sopwith *v.* Sopwith, 4 Sw. & Tr. 243, 245 (comments on the untrustworthiness of hired detectives' testimony, without stating any rule); 1865, Ginger *v.* Ginger, L. R. 1 P. & D. 37 (Lord Penzance: "It is a serious responsibility to undertake to separate man and wife on the unsupported testimony of one witness [to adultery], and that a woman, by her own admission, of loose character").

Canada: 1899, Bell *v.* Bell, 34 N. Br. 615, 622 (not clear); 1891, Aldrich *v.* Aldrich, 21 Ont. 447, 449 (one witness of loose character, uncorroborated, held insufficient).

United States: Del. 1912, Bancroft *v.* Bancroft, 27 Del. 9, 85 Atl. 561 (construing St. 1907, c. 221, § 20, vol. 24, replacing Rev. St. 1893, c. 75, § 6); *Ky.* Stats. 1915, § 2119 (quoted *post*, § 2067); 1918, Wesley *v.* Wesley, 181 Ky. 135, 204 S. W. 165 (divorce; corroboration of witness to adultery required, under Stats. § 2119); *N. J.* 1921, Sargent *v.* Sargent, 92 N. J. Eq. 703, 114 Atl. 439 ("While the testimony of detectives, paid spies, and household servants is competent, it should be scrutinized carefully and should not be relied on unless it is corroborated"); *N. Y.* 1839, Banta *v.* Banta, 3 Edw. Ch. 295 (McCoun, V. C.: "The only witness to prove the adultery is a common prostitute," and the decree was on this and other circumstances, refused); 1844, Turney *v.* Turney, 4 id. 566 (testimony to adultery from two women of loose character "may do when corroborated by facts or circumstances from other witnesses," but here it did not suffice); 1889, Moller *v.* Moller, 115 N. Y. 466, 468, 22 N. E. 169 ("The Courts have come to regard the uncorroborated evidence of such witnesses [prostitutes and private detectives] as insufficient to break the bonds of matrimony"; citing the above cases); *W. Va.* Code 1914, c. 64, § 10, as amended by St. 1915, c. 73 (quoted *post*, § 2067).

(5) Occasionally it is ruled that the recitals of a *notary's certificate of acknowledgment* of a deed cannot be overthrown by the grantor's uncorroborated assertion.[7]

(6) Sometimes it is said that a *wife's testimony* to the consideration of a parol contract for a *conveyance* to her from the *insolvent husband* must be corroborated in chancery.[8]

(7) Here and there an odd local rule is found for some special sort of testimony, *e. g.* the party's *oral rescission* of a written contract,[9] the correctness of a *guardian's account*,[10] the parental claim to *custody of children*,[11] the woman plaintiff in an action for *slander* of chastity,[12] the dying declaration of the woman on a charge of *abortion*,[13] the testimony of a person professing to have been *instigated to crime*,[14] the plaintiff's testimony in certain issues arising as to *stray animals*,[15] the mother's testimony on an issue of an *illegitimate child's inheritance*,[16] the accused's testimony on a charge of *frequent-*

[7] *Ill.* 1874, Russell *v.* Baptist Theol. Union, 73 Ill. 337, 341 ("the mere evidence of the party purporting to have made the acknowledgment" is not sufficient to overthrow the notary's certificate); 1892, Oliphant *v.* Liversedge, 142 Ill. 160, 169, 30 N. E. 334 (same); 1898, Davis *v.* Howard, 172 Ill. 340, 50 N. E. 258 (same); 1899, Sassenberg *v.* Huseman, 182 Ill. 341, 349, 55 N. E. 346 (same); 1903, Gritten *v.* Dickerson, 202 Ill. 372, 66 N. E. 1090 ("the uncorroborated testimony of the grantor, or party executing a deed, is not sufficient to overcome the evidence afforded by the officer's certificate of acknowledgment"); *Wash.* 1903, Western L. & S. Co. *v.* Waisman, 32 Wash. 644, 73 Pac. 703 (mortgagor).

Compare here the rule for standard of proof (*post*, § 2498).

[8] *Can.* 1917, Union Bank *v.* Murdock, 37 D. L. R. 522, Man. (conveyance to wife in fraud of creditors; the wife's testimony to valuable consideration, held not sufficient without corroboration; reviewing prior Canadian cases); *U. S.* 1905, Davis *v.* Yonge, 74 Ark. 161, 85 S. W. 90, *semble;* 1905, Waters *v.* Merrit P. Co., 76 Ark. 252, 88 S. W. 879 ("by some other evidence of the existence of a valid debt").

[9] *Wash.* 1894, Quinn *v.* Parke & L. M. Co., 9 Wash. 136, 37 Pac. 288 (oral rescission of a written contract; the uncorroborated testimony of a party, held not sufficient); 1904, Cooke *v.* Cain, 35 id. 353, 77 Pac. 682 (oral rescission; Quinn *v.* P. & L. M. Co., *supra*, held not to establish a general rule).

[10] *Vt.* Gen. L. 1917, § 3710 (guardian's account; Court shall examine the guardian on oath, except when no objection is made and other evidence establishes correctness of account).

[11] *Ohio:* Gen. Code Ann. 1921, § 8033 (custody of children; "upon hearing the testimony of either or both of such parents, corroborated by other proof," the Court shall award the custody).

[12] *Wis.* Stats. 1919, § 4569 (slander of chastity; the testimony of the plaintiff "unsupported by other evidence" is not sufficient; "but must be proved by the evidence of at least two persons other than such person who heard and understood the language charged as slanderous or by admission of the defendant"); and other statutes cited *ante*, § 2061, note 2.

[13] *Mo.* St. 1907, p. 245, Mar. 16, R. S. 1919, § 4034 (corroboration of the woman's dying declarations in abortion cases; cited more fully *ante*, § 1432); 1921, State *v.* Keller, 287 Mo. 124, 229 S. W. 203 (R. S. 1909, § 5240, now R. S. 1919, § 4034, applied).

[14] *Hawaii:* Rev. L. 1915, § 3684 (instigation to commit an offense; the "mere testimony" of the person professing to have been instigated, not sufficient when "not corroborated by other evidence direct or circumstantial," except when expressly otherwise provided).

[15] *Can. Alta.* St. 1913, 2d sess., c. 27, § 4 (dangerous animals; an order of impounding may be made "upon hearing the evidence of two credible witnesses other than the complainant," where no claimant appears); *U. S. Md.* Ann. Code 1914, Art. 34, § 3 (estray animal; owner must prove title, before a justice, "by one credible witness").

[16] *La.* Rev. Civ. C. 1920, § 210 (proving paternal descent of unacknowledged illegitimate child; "the oath of the mother, supported by proof of the cohabitation of the reputed father with her, out of his house, is not sufficient to establish natural paternal descent, if the mother be known as a woman of dissolute manners," etc.).

Compare the *bastardy* statutes *ante*, § 2061.

The following statute, now obsolete, may here be noted: *Eng.* St. 21 Jac. I, c. 27 (if a bastard's mother conceal its death so that it

ing an opium den;[17] and doubtless others will be proposed.[18] Other rules having a similar object, but applicable in terms to specific issues, and not specific kinds of witnesses, have been noted (*ante*, §§ 2044, 2054). Both varieties should be compared with the rules for *measure of proof* in certain issues (*post*, § 2498), which seek likewise to regulate belief by an artificial standard.

None of these rules are worth while; and none need receive attention in any other jurisdiction than their native habitat.

§ 2067. **Uncorroborated Confession of Respondent in Divorce**; (*a*) **History of the Rule.** The ecclesiastical Courts in England administered the canon or church law as emanating from the continental authorities of the Catholic church; additionally to this, there were in local force certain constitutions of the legates sent to England, as well as other ecclesiastical rules provided by the English church authorities. Now in the general canon law, as contained in the Corpus Juris Canonici, consisting of papal decrees and decretals, and dating prior to 1400, there appears to have been no general and established rule declaring a confession by the respondent in divorce insufficient to support a judgment.[1] Nor does there appear to have existed, in the local English ecclesiastical decrees or constitutions before 1600, anything to that effect.[2] The rule, then, as we find it later obtaining, must be regarded

may not appear whether or not it is born alive, this is to be murder, unless she prove, by one witness at least, that it was born dead); repealed by St. 43 Geo. III, c. 58, § 3; commented on in Hawkins, Pl. Cr. II, c. 46, § 43, Blackstone, Comm. IV, 198; 1791, Pennsylvania *v.* M'Kee, Addis. 1, 5 (statute commented on).

[17] *Or.* Laws 1920, § 2160 (the frequenting of an opium den is 'prima facie' evidence of the purpose of smoking; defendant's evidence "unsupported by other evidence" is not to rebut this).

[18] 1921, Buncle *v.* Sioux City Stockyards Co., 192 Ia. 555, 185 N. W. 139 (personal injury of employee; corroboration not necessary as matter of law; here, hernia).

§ 2067. [1] It does not clearly appear, from the rescript given in Decretal. IV, 19, 5 'de divortiis' (dated 1187–1191), that there was then any rule as to the insufficiency of a confession in a petition for divorce in general; it appears, however, that the wife was 'diligentius admonita' whether she had confessed adultery for ulterior motives; in 1091 (Decret. Pars II, causa 35, qu. VI, can. IV, 'si duo viri') a canon had been made, providing for dissolution on the ground of consanguinity if two or three witnesses prove it 'vel ipsi forte confessi fuerint.' But in 1188–1191 (Decretal. IV, 13, 5, 'de cognatione legali'; attributed to Pope Celestine III) it was ordered that a petition for separation on the ground of prior consanguinity should not be granted "upon their confession alone nor upon repute of the neighborhood, since some persons sometimes would wish to collude between themselves against their marriage and would incline easily to a confession of incest"; and in 1216–1227, ib. IV, 15, 7, 'de frigidis,' a judge is directed to grant a divorce for impotence after causing an inspection, 'ne id confiterentur in fraudem.'

The modern Catholic Church procedure appears to have no rule about using divorce-confessions; but the institution of 'defensor vinculi' (Codex juris canonici Pii X, 1917, Canons 1586, 1968) presumably renders needless any formal rule.

[2] Lindewood's Provinciale discloses nothing of the sort. The work Reformatio Legum Ecclesiasticarum (Anglicanarum), which was a report of a committee of revision, acting under St. 25 H. VIII (1534) and St. 5 Edw. VI (1551), and was promulgated in 1552 (consulted in the edition of 1640), contains no trace of a divorce rule; of this book Sir Wm. Scott said, in Hutchins *v.* Denzell, *infra*, that it was "of great authority" in showing the practice. Gibson, in his Codex Juris Ecclesiastici Anglicani (ed. 1713, tit. 12, c. 17, p. 534), commenting on Canon 105 of 1603 (*supra* in the text) says that the church rule rested on the Decretal of Celestine III, cited as Extrav., tit. 13, c. 5 (cited *supra*, note 1), and adds: "This prohibition had been expressly renewed in the canons of 1597," without citation. The editor of Walcott's Constitutions and Canons Ecclesiastical of the Church of England (1874; at p. 145) in a note mentions, without citing the source, a constitution of 1597, reading: 'Nec partium confessioni, quæ in his causis saepe fallax est, temere confidatur'; which falls short of the canon of 1603.

as founded on an ecclesiastical law of specifically English origin; for after the time of Henry VIII no papal or continental pronouncement was of any validity in English ecclesiastical Courts.[3]

In 1603 and 1605, at convocations in Canterbury and York, certain constitutions and canons were passed by the assembled Church of England, and were ratified by the King; though never by Parliament. These canons, thus imperfectly sanctioned, were held[4] not to bind the laity 'proprio vigore' as to their new matter; though they did bind the clergy, and therefore presumably the ecclesiastical Courts within their proper jurisdiction. It is upon one of these canons of 1603, and upon that only, that the modern rule in question rests (for it cannot be doubted that the common-law Courts knew nothing of any such rule).[5] This canon is as follows:

1603, *Canon 105*, at the Convocation of Canterbury:[6] "Forasmuch as matrimonial causes have been always reckoned and reputed amongst the weightiest, and therefore require the greater caution when they come to be handled and debated in judgment, especially in causes wherein matrimony having been in the church duly solemnized is required upon any suggestion or pretext whatsoever to be dissolved or annulled, We do strictly charge and enjoin that, in all proceedings to divorce and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as it is possible) be sifted out by deposition of witnesses and other lawful proofs and evictions, and that credit be not given to the sole confession of the parties themselves, howsoever taken upon oath either within or without the court."

This canon seems thenceforth to have been regarded as a valid rule of law in the ecclesiastical Courts, and received repeated application.[7]

[3] By St. 25 H. VIII, c. 19, St. 35 H. VIII, c. 16, and St. 1 Eliz. c. 1, the existing papal decrees and decretals, with the English provincial and legatine constitutions, were confirmed, so far as not repugnant to the common law and so far as they "be yet accustomed and used here in the Church of England." In the time of Edward VI, the proposed Reformatio (cited *supra*), of 1552, had failed to receive the royal assent. The history is most amply given in Makower's Constitutional History of the Church of England (Sonnenschein's ed.), 1895, pp. 161, 366.

[4] Lord Hardwicke, in Middleton *v.* Croft, 2 Stra. 1056 (1737).

[5] Because they had no jurisdiction of divorce causes, and because no ecclesiastical rule had been made binding upon the lay Courts. The following case, sometimes cited as authority, involves a different point and throws no light on either the common law or the ecclesiastical rule: 1682, Anon., 2 Mod. 314 (in a libel for annulment of marriage on account of the husband's former marriage, "they both appear and confess the matter, upon which a sentence of divorce was to pass"; whereon a prohibition was asked by the children in the King's Bench, because it was "a contrivance between him and his wife . . . to defeat their children of an estate settled upon them in marriage with remainders over"; and "the reason why a prohibition was prayed was . . . for that the inheritance and freehold of land were concerned in this case"; and since the spiritual Court had no jurisdiction in such causes, the prohibition was intimated to be grantable; evidently on the general principle of Hicks *v.* Harris, 12 Mod. 35, that "if they encroach on the common law, though they have original conusance, we will prohibit"; compare § 2250, *post*).

[6] Walcott's Constitutions and Canons, p. 145; the text is also to be found in Poynter (1824), Marriage and Divorce, p. 196 and App. II. In Ireland, Canon 53, in 1634 (quoted in Milw. 537), followed the English canon of 1603.

[7] These reports before the 1800s are scanty: 1792, Timmings *v.* Timmings, 3 Hagg. Eccl. 76, 77 (separation only); 1798, Williams *v.* Williams, 1 Hagg. Cons. 299, 304 (Lord Stowell: "Confession [here extrajudicial] is a species of evidence which, though not inadmissible, is to be regarded with great distrust; . . . [it] is received in conjunction with other circumstances, yet it is on all occasions to be most accurately weighed"); 1800, Crewe *v.* Crewe, 3 Hagg. Eccl. 123, 131; 1816, Searle *v.* Price, 2 Hagg. Cons. 187, 189; 1817, Burgess *v.* Burgess, 2 Hagg. Cons. 223; 1820, Mortimer *v.* Mortimer, 2 Hagg. Cons. 310, 315; 1831, Owen

But in 1857 the ecclesiastical (prerogative) Courts were reorganized by statute in England, and their secular jurisdiction was transferred to the common-law Courts; and the question naturally then arose whether the rules of Evidence (including this one) of the ecclesiastical law were transplanted into the common-law Courts along with their new jurisdiction; and, if not, whether there was any common-law rule requiring corroboration for a respondent's confession in divorce. Both these questions were immediately answered in the negative: [8]

1858, Cockburn, C. J., in *Robinson* v. *Robinson*, 1 Sw. & Tr. 362, 365, 393 (divorce for adultery; Court for Divorce and Matrimonial Causes, superseding the Ecclesiastical Court, and including all the common law judges, the chancellor, and the probate judge, any two of them with the probate judge forming a full Court): "As this Court is not a Court of ecclesiastical jurisdiction, nor bound in cases of divorce 'a vinculo' by rules of merely ecclesiastical authority, it is at liberty to act and bound to act on any evidence, legally admissible, by which the fact of adultery is established; and if therefore there is evidence, not open to exception, of admissions of adultery by the principal respondent, it would be the duty of the Court to act on such admissions, although there might be a total absence of all other evidence to support them. No doubt the admissions of a wife unsupported by corroborative proof should be received with the utmost circumspection and caution. . . . Nevertheless, if after looking at the evidence . . . the Court should come to the conclusion, first, that the evidence is trustworthy, secondly, that it amounts to a clear, distinct, and unequivocal admission of adultery, we have no hesitation in saying that the Court ought to act upon such evidence and afford to the injured party the redress sought for."

In the United States, in the few instances in which no express statute existed, the opposite conclusion was reached, — not by deliberate decision, but apparently upon the tacit assumption that the statutory transference of the former jurisdiction of the ecclesiastical Courts included by implication this rule of evidence.[9] In most jurisdictions, however, the same statute had in fact expressly enacted the ecclesiastical rule of evidence; and thus the rule was placed beyond the necessity of judicial

v. Owen, 4 Hagg. Eccl. 261; 1841, Cobbe v. Garston, Milw. 529, 537 (Ireland; a confession, plus a single uncorroborated witness, insufficient; here, in annulment on the ground of previous marriage); 1842, Harrison v. Harrison, 4 Moore P. C. 96, 103 (divorce for impotence; on appeal from the Consistory Court, the Privy Council refused to declare that inspection of the person was essential as corroboration, and held that the party's refusal to allow inspection was sufficient, the absence of collusion being clear); 1845, Shuldham's Divorce, 12 Cl. & F. 363, *semble*; 1846, Noverre v. Noverre, 1 Rob. Eccl. 428, 440 ("There must be other evidence, then; though I am not aware of any case in which the 'quantum' or description, as auxiliary to a confession, has been the subject of discussion"); 1847, Tucker v. Tucker, 11 Jur. 893 ("I accede not only to the rule of the canon, but to the principle on which it is founded").

[8] *Accord: England:* 1858, Robinson v. Robinson, 1 Sw. & Tr. 362, 365, 393, 29 L. J. P. M. 178, 191 (quoted *supra*); 1865, Williams v. Williams, L. R. 1 P. & D. 29 (preceding case approved; "in each case the question will be whether all reasonable ground for suspicion is removed"); 1907, Getty v. Getty, Prob. 334 (written confession by wife of adultery committed 19 years before, not mentioning the name; corroboration required; the facts of this case are as odd as any modern fiction).

Canada: 1912, Edmonds v. Edmonds, B. C., 1 D. L. R. 550.

In *Ontario*, however, a limited legislative change has been made: *Ont.* R. S. 1914, c. 148, § 37 (no marriage shall be declared void "upon consent of parties, admissions, or in default," etc.).

[9] Cases *infra*, note 10, in Massachusetts, Minnesota, and elsewhere.

adoption.[10] Whether it does exist as a part of the common law, where no such statute obtains and no prior rulings have assumed its existence, seems therefore to be an arguable question.

[10] *Alabama:* Code 1907, § 3799 ("no decree can be rendered on the confession of the parties or either of them"); 1856, King v. King, 28 Ala. 315, 319 (Code held to adopt in effect the rule of Canon 105); 1858, Cornelius v. Cornelius, 31 Ala. 479, 481;
Alaska: Comp. L. 1913, § 1516 (like Or. Laws 1920, § 880);
Arizona: Rev. St. 1913, Civ. C. § 3861 ("no divorce shall be granted on the testimony of a party, unless the same be corroborated by other evidence");
Arkansas: Dig. 1919, § 3504 (statements of complaint are not to be taken as true because of defendant's "failure to answer, or his or her admission of their truth"); 1853, Viser v. Bertrand, 14 Ark. 267, 278, 283 (confessions, in the answer or otherwise, not sufficient for any charge); 1855, Welch v. Welch, 16 Ark. 527, 528; 1857, Jacob v. Bob, 18 Ark. 399, 410; 1879, Rie v. Rie, 34 Ark. 37, 38; 1881, Kurtz v. Kurtz, 38 Ark. 119, 123; 1881, Brown v. Brown, 38 Ark. 324, 327; 1890, Scarborough v. Scarborough, 54 Ark. 20, 14 S. W. 1098;
California: C. C. P. 1872, § 2079 (in divorce for adultery, "a confession of adultery, whether in or out of the pleadings, is not of itself sufficient to justify a judgment of divorce"); Civ. C. § 130 (the "uncorroborated statement, admission, or testimony of the parties," in divorce, is not sufficient); 1858, Conant v. Conant, 10 Cal. 249, 254; 1859, Baker v. Baker, 13 Cal. 87, 96 ("The question . . . is this, 'Would the entire testimony, confessions, and circumstances lead the guarded discretion of a reasonable and just man to the conclusion?'"); 1898, Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298 (corroboration found, on the facts); 1905, Berry v. Berry, 145 Cal. 784, 79 Pac. 531;
Columbia (Dist.): Code 1919, § 964 (no default decree "without proof"; "nor shall any admissions contained in the answer of the defendant be taken as proof of the facts charged as the ground of the application, but the same shall in all cases be proved by other evidence"); 1904, Lenoir v. Lenoir, 24 D. C. App. 160, 165 (the rule applied in a proceeding for annulment, where on default the plaintiff testified by deposition); 1905, Michalowicz v. Michalowicz, 25 D. C. App. 484 (corroboration held not sufficient on the facts);
Delaware: Rev. St. 1915, § 3023 (no decree to be granted "unless the cause is shown by affirmative proof aside from any admissions on the part of the defendant");
Georgia: Rev. C. 1910, § 2949 (confessions of adultery or cruelty are insufficient "if unsupported by corroborating circumstances and made with a view to be evidence in the cause"); 1858, Buckholts v. Buckholts, 24 Ga. 238, 244 ("When the evidence consists exclusively in such confessions, a total divorce will not be granted"); 1875, Woolfolk v. Woolfolk, 53 Ga. 661 (Code applied);
Hawaii: Rev. L. 1915, § 2925 ("no sentence of nullity of marriage shall be pronounced solely on the declarations or confessions of the parties, but the Court shall in all cases require other satisfactory evidence of the facts on which the allegation of nullity is founded"); § 2931 (in divorce, "the Court shall require exact legal proof upon every point, notwithstanding the consent of parties; and the admission of the respondent shall not be competent evidence, except to prove the original marriage");
Idaho: Comp. St. 1919, § 4641 (divorce not to be granted "upon the uncorroborated statement, admission, or testimony of the parties"); 1908, Bell v. Bell, 15 Ida. 7, 96 Pac. 196 (the confession of the respondent is not sufficiently corroborated by the plaintiff's testimony and admissions; going on the language of the statute); 1919, Piatt v. Piatt, 32 Ida. 407, 184 Pac. 470 (like Bell v. Bell);
Illinois: Rev. St. 1874, c. 40, § 8 ("If the bill is taken as confessed, the Court shall proceed to hear the cause by examination of witnesses in open court," and the Court shall in no case grant divorce unless satisfied "that the cause of divorce has been fully proven by reliable witnesses"); § 9 ("No confession of the defendant shall be taken as evidence unless the court or jury shall be satisfied that such confession was made in sincerity and without fraud or collusion to enable the complainant to obtain a divorce"); 1852, Shillinger v. Shillinger, 14 Ill. 147, 150 ("It would be erroneous to grant the decree, on taking the bill for confessed, without any evidence"); 1859, Bergen v. Bergen, 22 Ill. 187, 189, *semble* (admissions, if free from fraud or collusion, may suffice);
Indiana: Burns' Ann. St. 1914, § 1077 ("no decree shall be rendered on default without proof"); 1846, McCulloch v. McCulloch, 8 Blackf. 60 (other evidence is necessary, under the early statute, even if the confession is believed); 1861, Scott v. Scott, 17 Ind. 309, *semble* (default or confession alone not sufficient, even under later statutes declaring marriage a civil contract);
Kansas: Gen. St. 1915, § 7579 (a divorce is not to be granted "upon the uncorroborated testimony of either husband or wife or both of them"); § 7578 (admissions not obtained "by connivance, fraud, coercion or other improper means," are receivable); 1905, May v. May, 71 Kan. 317, 80 Pac. 567 (statutes applied);

Kentucky: Stats. 1915, § 2119 (no divorce petition "shall be taken for confessed, or be sustained by the admission of the defendant alone, but must be supported by other proof. Two witnesses, or one and strong corroborating circumstances, shall be necessary to sustain the charge of adultery or lewdness. The credibility of good character of such witnesses must be personally known to the judge, or to the officer taking the deposition, who shall so certify, or it must be proved"); C. C. P. § 422 ("The statements of a petition for divorce shall not be taken as true because of the defendant's failure to answer on admission of their truth; and the facts as to residence of the parties must be proved by one or more credible witnesses"); 1898, McCampbell *v.* McCampbell, 103 Ky. 745, 46 S. W. 18 (the statute is satisfied by testimony to the witnesses' good character presented to the judge); 1908, Robards *v.* Robards, — Ky. —, 109 S. W. 422 (McCampbell *v.* McCampbell followed);

Louisiana: 1840, Harman *v.* McLeland, 16 La. 26 ("mere acknowledgment," insufficient); 1866, Weigel's Succession, 18 La. An. 49, 53 (preceding case approved); 1887, Mack *v.* Handy, 39 La. An. 491, 496, 2 So. 181 (mere confession is "insufficient of itself");

Maine: 1830, Cayford's Case, 7 Greenl. 57, 61 (the mere confession of a party charged with adultery is not sufficient, "to prevent collusive arrangements between husband and wife to obtain a divorce"); 1834, Bradley *v.* Bradley, 11 Me. 367 (cruelty; record of conviction, on a plea of guilty, for assault and battery on the wife, admitted; nothing said as to sufficiency);

Maryland: Ann. Code 1914, Art. 16, § 36 (in all cases of default in divorce, "the Court shall order testimony taken and shall decide the case upon the testimony so taken"); § 41 ("The admission of a respondent of the facts charged . . . shall not be taken of itself as conclusive proof");

Massachusetts: 1806, Holland *v.* Holland, 2 Mass. 154 (confession, "unsupported by other evidence," insufficient); 1831, Billings *v.* Billings, 11 Pick. 461 ("the circumstances here proved by other evidence than the confessions showed there could be no collusion," and this sufficed; the reporter's headnote to this case is misleading);

Michigan: Comp. L. 1915, § 11428 ("No decree of divorce shall be made solely on the declarations, confessions, or admissions of the parties, but the Court shall require other evidence of the facts"); 1842, Sawyer *v.* Sawyer, Walker Ch. 48, 51 ("other proof is required in corroboration"; but on a charge other than adultery corroboration "need not be of so decisive a character," where there is less danger of collusion); 1845, Emmons *v.* Emmons, Walker Ch. 48, 532 (a rule of Court requires proof to be taken on a confession by default or answer); 1867, Robinson *v.* Robinson, 16 Mich. 79 (decree cannot be entered by consent); 1869, Dawson *v.* Dawson, 18 Mich. 335 (statute applied);

Minnesota: Gen. St. 1913, § 8465 ("Divorces shall not be granted on the sole confessions, admissions, or testimony of the parties, either in or out of court"); 1861, True *v.* True, 6 Minn. 458, 462 (confession alone, insufficient, even though no statute expressly adopts the ecclesiastical rule);

Mississippi: Code 1906, § 1676, Hem. § 1418 (divorce bill "is not to be taken as confessed, nor shall admissions made in the answer be taken as evidence"); 1839, Tewksbury *v.* Tewksbury, 4 How. 109, 112 (confessions here held sufficient with other evidence); 1856, Armstrong *v.* Armstrong, 32 Miss. 279, 288, *semble* (confessions alone, insufficient);

Missouri: 1858, Twyman *v.* Twyman, 27 Mo. 383 (admissions alone, insufficient);

Montana: Rev. C. 1921, § 10685 (like Cal. C. C. P. § 2079);

Nebraska: Rev. St. 1922, § 1550 (no decree of divorce and nullity "shall be made solely on the declarations, confessions, or admissions of the parties"; but "other satisfactory evidence" shall be required);

New Hampshire: 1830, Washburn *v.* Washburn, 5 N. H. 195 (confessions "alone are clearly insufficient"); 1863, White *v.* White, 45 N. H. 121 (same; limited here to adultery); 1867, Burgess *v.* Burgess, 47 N. H. 395 (plea of guilty to indictment in another State for adultery, sufficient if corroborated);

New Jersey: 1831, Clutch *v.* Clutch, 1 N. J. Eq. 474 (confessions "are never held sufficient without strong corroborating circumstances"); 1838, Miller *v.* Miller, 2 N. J. Eq. 139, 142; 1866, Jones *v.* Jones, 17 N. J. Eq. 351; 1870, Derby *v.* Derby, 21 N. J. Eq. 36, 47 ("it is not usual" to rely upon them alone); 1875, Tate *v.* Tate, 26 N. J. Eq. 55 ("it is a settled rule" not to rely upon them alone); 1883, Summerbell *v.* Summerbell, 37 N. J. Eq. 603, 610 ("I take the rule to be that if the proofs in a cause irrespective of the confession of the incriminated party well nigh demonstrate the fact of the adultery charged but do not entirely satisfy the conscience of the Court, the confession may then (if free from suspicion of collusion or duress or improper influence or of having been prepared to furnish evidence) be permitted to decide the otherwise doubtful judgment of the Court"); 1900, Perkins *v.* Perkins, 59 N. J. Eq. 515, 46 Atl. 173 (applied to a defence of adultery set up to the wife's application for alimony); 1900, Weigel *v.* Weigel, 60 N. J. Eq. 322, 47 Atl. 183; 1901, Kloman *v.* Kloman, 61 N. J. Eq. 153, 49 Atl. 810 (confession alone, not sufficient without corroboration as to the act charged); 1919, Carsten *v.* Carsten, 90 N. J. Eq. 181, 107 Atl. 45 (corroboration may be by circumstances); 1921, Stewart *v.* Stewart, — N. J. Eq. —, 114 Atl. 851 (plea of guilty of adultery, in a criminal case, suffices without corroboration);

§ 2068. **Same: (*b*) Policy of the Rule.** The rule is founded on the rooted propensity (apparently nothing novel in our own generation) to resort to a

New York: C. P. A. 1920, § 1143 (annulment; the confession of a party is alone insufficient; "other satisfactory evidence of the facts must be produced"); § 1150 (divorce; if the defendant defaults or does not deny the allegation of adultery, the plaintiff "must nevertheless satisfactorily prove the material allegations"); 1799, Doe *v.* Doe, 1 John. Cas. 25 (confessions, "with other proof," held sufficient, by a majority); 1814, Betts *v.* Betts, 1 Johns. Ch. 197 (an early statute at this time required proof to be taken, upon admission by default or answer; a master's report based "almost wholly on proof by confession," held insufficient for a decree of divorce for adultery); 1824, Barry *v.* Barry, 1 Hopk. Ch. 113 (decree of separation, not to be found on a default alone); 1836, Devenbagh *v.* Devenbagh, 5 Paige 554 (statute applied, prohibiting a decree solely upon confessions); 1861, Lyon *v.* Lyon, 62 Barb. 138, 142;

North Carolina: Con. St. 1919, § 1662 (in divorce for adultery, neither party's admissions shall be received); 1849, Hansley *v.* Hansley, 10 Ired. 506, 511; 1893, Toole *v.* Toole, 112 N. C. 152, 16 S. E. 912 (effect of extrajudicial admissions, considered);

North Dakota: Comp. L. 1913, § 4400 ("No divorce can be granted . . . upon the uncorroborated statement, admission, or testimony of the parties");

Ohio: Gen. Code Ann. 1921, § 11988 (in divorce or alimony proceedings, admissions obtained by "fraud, connivance, coercion, or other improper means," not to be received; a decree is not to be granted "upon the testimony or admissions of a party unsupported by other evidence"); 1833, Brainard *v.* Brainard, Wright 354 (applying the statute); 1834, Bascom *v.* Bascom, ib. 632;

Oklahoma: Comp. St. 1921, § 515 (in divorce or alimony proceedings, "the Court may admit proof of the admissions of the parties, . . . carefully excluding such as shall appear to have been obtained by connivance, fraud, coercion, or other improper means. . . . But no divorce shall be granted without proof");

Oregon: Laws 1920, § 880 (like Cal. C. C. P. § 2079);

Pennsylvania: 1847, Matchin *v.* Matchin, 6 Pa. St. 332, 337 ("confession alone," insufficient); 1868, Wood *v.* Wood, 2 Brewst. 447 (preceding case followed); 1916, Hess *v.* Vinton Colliery Co., 255 Pa. 78, 99 Atl. 218 (trespass to property; plaintiff's original statement of claim, before amendment, admitted);

Rhode Island: Gen. L. 1909, c. 247, § 18 (no divorce shall be granted "solely upon default nor solely upon admissions by the pleadings");

South Dakota: Rev. C. 1919, § 161 (like N. D. Comp. L. § 4400);

Tennessee: Shannon's Code 1916, § 4212 (where defendant's answer admits the facts, the Court shall nevertheless "hear proof of the facts");

Texas: Rev. Civ. St. 1911, § 4633 ("the decree of the Court shall be rendered upon full and satisfactory evidence; . . . no divorce shall be granted upon the evidence of either husband or wife, if there be any collusion between them"); 1848, Sheffield *v.* Sheffield, 3 Tex. 79, 83 (statute applied); 1855, Simmons *v.* Simmons, 13 Tex. 468, 473 (same); 1874, Mathews *v.* Mathews, 41 Tex. 331, 333 (same); 1884, Endick *v.* Endick, 61 Tex. 559, 561 (same; conviction of assault and battery on a wife, upon plea of guilty, insufficient);

Utah: Comp. L. 1917, § 2999 ("no decree of divorce shall be granted upon default or otherwise, except upon legal testimony taken in the cause");

Vermont: Gen. L. 1917, § 3558 (no marriage is to be declared null "solely on the declarations or confessions of the parties"); 1827, Gould *v.* Gould, 2 Aik. 180 (confession alone, not sufficient on a charge of adultery); 1877, Richardson *v.* Richardson, 50 Vt. 119, 122 (statute applied);

Virginia: Code 1919, § 5106 (in divorce, "the bill shall not be taken for confessed, nor shall a divorce be granted on the uncorroborated testimony of the parties or either of them; and . . . the cause shall be heard independently of the admissions of either party in the pleadings or otherwise");

Washington: R. & B. Code 1909, § 985 (divorce; when defendant admits the allegations or fails to answer, "the Court shall require proof" before granting a decree of divorce, etc.);

West Virginia: Code 1914, c. 64, § 8, as amended by St. 1915, c. 73 (divorce bill "shall not be taken for confessed," and "the cause shall be tried and heard independently of the admissions of either party in the pleadings or otherwise"); Code 1914, c. 64, § 10, as amended by St. 1915, c. 73 ("no divorce for adultery shall be granted on the uncorroborated testimony of a prostitute or a 'particeps criminis'"); 1906, Trough *v.* Trough, 59 W. Va. 464, 53 S. E. 630 (statute applied);

Wisconsin: Stats. 1919, § 2360*i* (in divorce defaults, the cause must be shown "by affirmative proof aside from any admission to the plaintiff on the part of the defendant");

Wyoming: Comp. St. 1920, § 5013 (no decree "shall be made solely on the declarations, confessions or admissions of the parties, but the Court shall in all cases require other evidence in its nature corroborative of such declarations," etc.).

Compare the cases cited *ante*, § 2046 (corroboration of divorce complainant), and § 2066 (corroboration of witnesses of loose character, etc.).

false confession of guilt in order to secure freedom from the marriage tie in cases where no legally recognized cause for its dissolution really exists:

1738, Mr. *Thomas Oughton*, Ordo Judiciorum, tit. 213, p. 316: "Since in our days (by the Devil's persuasion) a great many divorces are sought on the ground of adultery, in order by that pretext that the divorced parties may be able to proceed to another marriage, and since (in order thus the more easily to obtain a divorce) the wife is used to confess the adultery of which she is by collusion charged, though in truth none has been committed; and sometimes also the husband (that he may take a new wife) induces the wife by threats, blows, blandishments, or some other unlawful mode, to confess the adultery, though she had committed none, Therefore, to avoid and obviate this craft and fraud, the judge, in this class of cases, is accustomed to search out the woman's mind in private (all other persons, especially the husband, being withdrawn), and to examine her carefully as to the truth and as to the motive for such a confession, and by every lawful means and mode to elicit the truth; and if he finds craft and fraud of this sort, or even some probable suspicion of it, he is accustomed to refuse a judgment of divorce, unless the petitioner for the divorce shall have proved the alleged adultery by witnesses, or at least by vehement presumptive circumstances and public repute, or otherwise informed the judge's conscience (because the alleged crime may be true), from which the judge may believe that the woman's confession of the adultery has not proceeded from craft or fraud."

1859, FIELD, J., in *Baker* v. *Baker*, 13 Cal. 87, 94: "The object of the rule is to prevent collusion between the parties. Without some limitation of this kind it would be in the power of the parties to obtain a divorce in all cases. The public is interested in the marriage relation and the maintenance of its integrity, as it is the foundation of the social system; and the law wisely requires proof of the facts alleged as the ground for its dissolution. The agreement of the parties will not answer, as then the marriage relation would be one only of temporary convenience. The default in the action will not answer, as this would only be another form for carrying out their previous agreement. Confessions will not answer, because they may be the result of collusion, and be untrue in fact. But the public can have no interest in suppressing the truth; and, as a means of its ascertainment, the confessions of parties against their interests have always been regarded as evidence of the most important character."

That such a frequency of false confession prevails is indubitable. That prudence would require a judge always to seek such corroboration is equally indubitable. But it does not follow that a fixed rule of law ought to exist. Its behest is generally superfluous, since ordinary prudence and knowledge of human nature point the same warning. All the arguments generally applicable against fixed rules of number or quantity (*ante*, § 2033) are here also applicable. The present rule probably does less harm than any other of the sort; but it belongs to a class of rules not broadly wise in principle nor essentially useful in practice.

§ 2069. **Same: (*c*) Scope of the Rule.** (1) The language and the policy of the Canon apply to the proof of *all causes of divorce;* and, although the comments of Oughton are limited to the cause of adultery, the ecclesiastical practice seems to have followed no such limitation, nor have the statutes or decisions in this country (with rare exceptions) accepted it.[1]

§ 2069. [1] Cases cited *ante*, § 2067. The rule, however, applies only to proof of the *cause* for divorce, and not to proof of the *fact of marriage:* 1868, Hitchcox v. Hitchcox, 2 W. Va. 435, 438 (Maxwell, J., diss.). For the rule as to proof of marriage, see *post*, § 2082.

(2) The application of the rule to a petition for separation (divorce 'a mensa et thoro'), and not merely to divorce in the narrower sense ('a vinculo matrimonii') has sometimes been doubted; but the policy of the rule seems to apply alike to both.[2]

(3) The language of the Canon requires only that "credit be not given to the sole confession" of the party; and Oughton's comment shows the proper construction of this to be, not that a decree may not be rendered upon the confession as the sole testimony to the direct fact of the charge, but that credit is not to be given to it for that purpose until all fear of collusion or duress is removed. In other words, the *corroboration* from other evidence need not directly bear upon the main fact, but need only be such as restores confidence in the confession itself. This is the view taken in the more careful rulings;[3] although ordinarily the distinction seems to have been ignored. As to any further detailed rules defining the nature of the corroborative evidence, the orthodox practice refuses properly to make any.[4]

(4) That the confession is at least and always *admissible*, and that the rule merely declares it insufficient unless corroborated, is plain enough on principle; and this is generally conceded.[5] Nevertheless, their inadmissibility has sometimes been asserted inadvertently or in ambiguous language,[6] and even deliberately;[7] and the phrasing of a statute has in some jurisdictions perpetuated this totally groundless rule and has forced the Courts to follow it in those jurisdictions.[8]

(5) The rule does not require corroboration where the confession is con-

[2] 1792, Timmings *v.* Timmings, Eng., cited *ante*, § 2067; 1837, Richardson *v.* Richardson, 4 Port. Ala. 467, 477; 1919, Bolmer *v.* Edsell, 90 N. J. Eq. 299, 106 Atl. 646 (nullity; extent of corroboration of parties, considered).

[3] For example, in Billings *v.* Billings, 11 Pick. 461, cited *ante*, § 2067.

[4] English cases cited *ante*, § 2067.

[5] 1814, Kent, C., in Betts *v.* Betts, 1 John. Ch. 197, 199 ("The confession of the accused is a legitimate species of proof, which is recognized throughout the whole law of evidence"); 1859, Baker *v.* Baker, 13 Cal. 87, 96 (Field, J.: "Having in view, then, the doctrine of the law as it existed previous to the adoption of the statute, and the reason of it, and regarding the statute as merely declaratory of that doctrine, we are necessarily led to the conclusion that it was never intended to exclude entirely the introduction of the confessions, but only, as the statute in terms purports, that upon them the decree shall not be granted"); 1905, Michalowicz *v.* Michalowicz, 25 D. C. App. 484; 1860, Johns *v.* Johns, 29 Ga. 718, 722; 1887, Mack *v.* Handy, 39 La. An. 491, 496, 2 So. 181; 1877, Richardson *v.* Richardson, 50 Vt. 119, 122.

[6] 1853, Scott, J., in Viser *v.* Bertrand, 14 Ark. 267, 278; 1831, Vance *v.* Vance, 8 Greenl. 132 (confession admitted where collusion was wanting; but here the decree seems to have been given upon the confession alone, and the ruling seems to have been upon its sufficiency); 1794, Tewksbury *v.* Tewksbury, 2 Dane's Abr. Mass. 310, *semble* (similar); 1805, Baxter *v.* Baxter, 1 Mass. 346 (confession uncorroborated, held "inadmissible"; but here no other evidence was offered, and the ruling was really upon the sufficiency of the confession).

[7] 1849, Hansley *v.* Hansley, 10 Ired. N. C. 506, 510, *semble*.

[8] 1837, Richardson *v.* Richardson, 4 Port. Ala. 467, 477 ("Our statute has not left the discretion to any Court to receive aid from a confession"); 1847, Moyler *v.* Moyler, 11 Ala. 620, 628; 1849, Gray *v.* Gray, 15 Ala. 779, 785 (the Code, cited *ante*, § 2067, afterwards changed the law in this State); 1833–1834, Brainard *v.* Brainard, Bascom *v.* Bascom, Wright Oh. 354, 632; 1848, Sheffield *v.* Sheffield, 3 Tex. 79, 83 (inadmissible, probably, under a statute requiring a decree to proceed upon "evidence independent of the confession"); 1884, Endick *v.* Endick, 61 Tex. 559, 561; 1890, Hampton *v.* Hampton, 87 Va 148, 12 S. E. 340 (excluded, under the statute quoted *ante*, § 2067, n. 10; displacing Bailey *v.* Bailey, 21 Gratt. 43); 1906, Trough *v.* Trough, 59 W. Va. 464, 53 S. E. 630 (excluded, under the statute quoted *ante*, § 2067, n. 10).

tained in a formal *plea of guilty to a criminal charge*, made in prior proceedings and admissible on the principle of § 1066, *ante*.[9]

§ 2070. **Uncorroborated Confession of Accused in Criminal Cases; (1) English Rule.** Whether the uncorroborated confession of the accused in a criminal case is alone sufficient to support a conviction is a question which for more than a hundred years has been culpably left unsettled in English law.[1] Frequent opportunities were presented for settling it, but they were not improved; and the law was left in an unfortunate state of obscurity, subject to much difference of opinion.

To begin with, there is a report of a ruling in 1784 that such a confession sufficed;[2] but neither the report nor the ruling was treated as of final authority. It is fairly clear that before that time no special requirement existed, and that the matter was unhampered by any quantitative rule.[3] But during the 1800s the question was frequently raised; and, while the trend of opinion apparently disfavored such a fixed rule, none of the decisions enunciated a clear proposition or put the matter beyond controversy.[4]

[9] 1921, Stewart *v.* Stewart, — N. J. Eq. —, 114 Atl. 851.

§ 2070. [1] The principle that an extra-judicial confession, without corroboration, does not suffice, was an important one in the Continental legal systems: 1900, Pertile, Storia del diritto italiano, 2d ed., vol. VI, pt. 1, p. 428; 1882, Esmein, Histoire de la procédure criminelle en France, 268, 278 (transl. as History of Continental Criminal Procedure, 1913, in Continental Legal History Series, vol. V). Examples of its application may be seen in Feuerbach's Remarkable (German) Criminal Trials (1846; tr. Duff-Gordon), *passim*, and in N. W. Senior's essay on Feuerbach, in his Biographical Sketches (1863).

[2] 1784, R. *v.* Wheeling, 1 Leach Cr. L., 4th ed., 311, in note to R. *v.* Jacobs ("In the case of John Wheeling, tried before Lord Kenyon at the summer assizes at Salisbury, 1784, it was determined that a prisoner may be convicted on his own confession, when proved by legal testimony, although it is totally uncorroborated by any other evidence").

[3] The passages from Lord Hale and Sir Edward Coke, quoted *post*, § 2081, are sometimes cited upon the present point; but it is obvious that they have nothing to do with a confession rule. Whatever rule there was in earlier times would have looked in the opposite direction, *i. e.* the confession would have been regarded as the strong and necessary evidence; for example: 1660, Hulet's Trial, 5 How. St. Tr. 1179, 1195 (L. C. B. Bridgman, charging the jury: "If you believe it upon these relations [of witnesses], and after his own confession, . . . then he is to be found guilty. . . . If you take it singly, if you have nothing of other proof, what another man says of me doth not charge me, unless there be something of my own. . . . It is my duty to tell you that what is said by another of me, that alone is not a pregnant evidence").

The civil law rule about confession throws no light on the subject, because it rested on a different theory of proof; see the citations *supra*, note 1, and Professor Lowell's articles on the Judicial Use of Torture, 11 Harv. L. Rev. 293.

[4] 1821, R. *v.* Eldridge, R. & R. 440 (larceny of a mare; whether the mare had been stolen or had been found as an estray was in issue; "a very full confession" was read; the question was reserved "whether a prisoner can or ought to be convicted of a felony on his own confession merely, without other proof of a felony having been committed"; the judges held that there was "sufficient evidence to confirm the confession," thus not deciding the question); 1822, R. *v.* Falkner, R. & R. 481 (robbery; the prosecuting witness not appearing, the confessions were used; the question being reserved, the judges "held the conviction right"; yet here there was evidence that one defendant "was desirous" to prevent the witness from appearing); 1823, R. *v.* White, Rt. & R. 509 (larceny of oats; explicit confessions of guilt; the trial judge doubted about using them, as the prosecutor "could not establish that a felony had been committed," but after admitting the confessions and reserving the point, "the judges present held the conviction right"; from the report, however, it would seem that there was in fact sufficient independent evidence of the loss of the oats); 1823, R. *v.* Tippet, R. & R. 509 (similar charge; on reserving the question, all the seven judges meeting held that there was sufficient independent evidence, "and most of the learned judges thought that without the owner's evidence the prisoner's confession was evidence upon which the jury might have con-

The proposed rule appeared in two variations; by the one, the corroborative evidence might be of *any sort* whatever; by the other, it must specifically relate to the 'corpus delicti', *i. e.* the fact of injury. The latter form tended to prevail; but in neither form did the rule obtain a general footing. So far as it can be supposed to obtain at all to-day in the English and Irish courts,[5] it is apparently restricted to the case of homicide:

1874, FITZGERALD, J., in *R.* v. *Unkles*, Ir. R. 8 C. L. 50, 58: "The rule is rather one of judicial practice than part of the law of evidence. . . . It would perhaps at present be more correct to define it thus, that a party accused of homicide ought not to be convicted on his own confession merely, without proof of the finding of the dead body or evidence 'aliunde' that the party alleged to have been murdered is in fact dead."

The policy of any rule of the sort is questionable. No one doubts that the warning which it conveys is a proper one; but it is a warning which can be given with equal efficacy by counsel or (in a jurisdiction allowing the orthodox function of judges) by the judge in his charge on the facts. Common intelligence and caution, in the jurors' minds, will sufficiently appreciate it, without a laying on of the rod in the shape of a rule of law. Moreover, the danger which it is supposed to guard against is greatly exaggerated in common thought. That danger lies wholly in a false confession of guilt. Such confessions, however, so far as handed down to us in the annals of our courts, have been exceedingly rare (*ante*, § 867). Such a rule might ordinarily, if not really needed, at least be merely superfluous. But this rule, and all such rules, are to-day constantly resorted to by unscrupulous counsel as mere

victed"); 1824, Hawkins, Pleas of the Crown, 8th ed., b. 2, c. 46, § 37 ("But if a confession be voluntarily made and regularly proved on the trial, it is sufficient, if the jury believe it to be true, to convict the prisoner without any corroborating evidence to support it"; so also ib. § 42, citing Hall's case, MS., 1790, "before the judges"); 1831, R. *v.* Tuffs, 5 C. & P. 167 (Lord Lyndhurst, C. B.; larceny of heifers; the heifers were not proved to be missed, but on the defendant's confession that he had taken two heifers from the "World's End Dolver," this, with evidence that the prosecutor's farm was the only one of the name, was held sufficient); 1831, R. *v.* Edgar, note by Mr. Greaves to Russell on Crimes, 4th ed., III, 367, 825 (indictment for obtaining money by false pretenses; Patteson, J.: "Could a man be convicted of murder on his own confession alone, without any [other] proof of the person being killed? I doubt it"); 1847, R. *v.* Flaherty, 2 C. & K. 782 (bigamy; the defendant had surrendered himself voluntarily as a felon, saying "that he had married two wives, both of whom were now with him, and that he could have no peace or quiet with them"; Pollock, C. B., held that his mere confession was not sufficient); 1854, R. *v.* Burton, Dears. Cr. C. 282 (cited *post*, § 2076; the defendant here had said, "Don't be hard on me"; taking this as a confession, the case is still inconclusive as a ruling on the present point). The following learned writers have also expressed the opinion that no clear decision was deducible in these rulings: 1865, Mr. Greaves, note to Russell on Crimes, 4th ed., III, 366, 825; 1843, Professor Greenleaf, Evidence, § 217 ("In each of the English cases usually cited in favor of the sufficiency of this evidence, there was some corroborating circumstance").

[5] 1874, R. *v.* Unkles, Ir. R. 8 C. L. 50 (unlawful disclosure by election agent of the tenor of a vote; defendant's confession as to the tenor of the vote held sufficient; "it is not open now to doubt that the mere confession of the accused alone is sufficient to warrant his conviction," but conceding the special rule of practice as to homicide; Whiteside, C. J., diss.); 1887, R. *v.* Sullivan, Ire., 16 Cox Cr. 347 (unlawful publication of notice of seditious meeting; assuming that the actual holding of such a meeting was a necessary part of the 'corpus delicti,' held that "an uncorroborated confession is sufficient to sustain a conviction for larceny" or any other crime, except homicide); 1913, Sykes' Case, 8 Cr. App. 233 (murder; corroboration apparently held necessary).

verbal formulas with which to entrap the trial judge into an error of words in his charge to the jury. These capabilities of abuse make it a positive obstruction to the course of justice.

§ 2071. **Same: (2) Rule in the United States.** The conflicting state of the English rulings left it open to the different Courts of this country to choose which rule they might please. Except in a few jurisdictions,[1] they seem to have preferred, wherever the question has come up for decision, to adopt the fixed rule that corroboration was necessary, — chiefly moved, in all probability, by Professor Greenleaf's suggestion [2] that "this opinion certainly best accords with the humanity of the criminal code and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases."

In a few jurisdictions, the rule is properly not limited to evidence concerning the 'corpus delicti'; *i. e.* the corroborating facts may be of *any sort whatever*, provided only that they tend to produce a confidence in the truth of the confession: [3]

§ 2071. [1] *Federal:* 1858, U. S. *v.* Williams (quoted *infra*); *Hawaii:* 1894, Republic *v.* Tokuji, 9 Haw. 548, 552 (question not decided); *Massachusetts:* Corroboration *not necessary:* 1862, Com. *v.* Tarr, 4 All. 315, *semble* (adultery); 1867, Com. *v.* McCann, 97 Mass. 580, *semble* (arson); *necessary:* 1857, Com. *v.* Howe, 9 Gray 110, *semble* (burglary); 1876, Com. *v.* Smith, 119 Mass. 305, 309, 312, *semble* (arson); *undecided:* 1900, Com. *v.* Morrissey, 175 Mass. 264, 56 N. E. 285; *North Carolina:* 1797, State *v.* Long, 1 Hayw. 455 [524] ("A naked confession, unattended with circumstances, is insufficient. . . . As there are no confirmatory circumstances in the present case, it is better to acquit the prisoner"); 1847, State *v.* Cowan, 7 Ired. 239, 244, *semble* (not necessary); *Philippine Isl.:* 1902, U. S. *v.* Sotelo, 1 P. I. 544, *semble* (larceny; corroboration here held sufficient); 1903, U. S. *v.* De La Cruz, 2 P. I. 148 (robbery; corroboration required); 1912, U. S. *v.* So Fo, 23 P. I. 379, 382 (opium offence; uncorroborated extrajudicial confession, held sufficient; citing Hopt *v.* Utah, 110 U. S. 574, which does not decide this point; ignoring U. S. *v.* Sotelo and U. S. *v.* De La Cruz, *supra*, and making the singular statement that "the proposition is so well settled that further citation of authorities is unnecessary"); 1913, U. S. *v.* De los Santos, 24 P. I. 329, 359 (confession must be corroborated; said *obiter*).

[2] Evidence, § 217.

[3] *Accord: Federal:* 1858, U. S. *v.* Williams, 1 Cliff. 5, 21, 26, 27 ("All that can be required is that there should be corroborative evidence tending to prove the facts embraced in the confession"; but "whether under any circumstances a free and voluntary confession, deliberately made, would be sufficient without corroboration, it is not necessary now to decide"); 1916, Bolland *v.* U. S., 4th C. C. A., 238 Fed. 529 (knowing receipt of stolen goods); *Georgia:* P. C. 1910, § 1031 ("A confession alone, uncorroborated by other evidence, will not justify a conviction"); 1871, Murray *v.* State, 43 Ga. 256 (arson); 1872, Holsenbake *v.* State, 45 Ga. 43, 56 (murder; under the Code, "we do not feel authorized to draw any line; the confession must be corroborated, but how far and in what particulars is not said; . . . each case must stand on its own footing, the jury being the judges"); 1876, Crowder *v.* State, 56 Ga. 44 (aiding an escape; corroboration found); 1876, Williams *v.* State, 57 Ga. 478 (murder; same); 1879, Daniel *v.* State, 63 Ga. 339 (same); 1880, Paul *v.* State, 65 Ga. 152 (same); 1882, Williams *v.* State, 69 Ga. 11, 34 (same); 1883, Anderson *v.* State, 72 Ga. 98, 105 (same); 1888, Burger *v.* State, 81 Ga. 196, 6 S. E. 282 (corroboration found); 1893, Schaefer *v.* State, 93 Ga. 177, 18 S. E. 552 (murder; same; compare the later cases cited in the next note); 1909, Milner *v.* State, 7 Ga. App. 82, 66 S. E. 280; 1910, Huey *v.* State, 7 Ga. App. 398, 66 S. E. 1023 (assault with intent to rape); *Illinois:* 1856, Bergen *v.* People, 17 Ill. 426 (incest; rule restricted to felonies; but compare the later cases cited in the next note); *Indiana:* Burns Ann. St. 1914, § 2115 ("A confession made under inducements is not sufficient to warrant a conviction without corroborating evidence"); *Kansas:* 1905, State *v.* Kesner, 72 Kan. 87, 82 Pac. 720; 1913, State *v.* Cardwell, 90 Kan. 606, 135 Pac. 597, *semble* (rape under age); *New Jersey:* 1818, State *v.* Aaron, 1 South. 232, 239, 244 (murder; confession of a child, held not sufficient without some corroboration); 1828, State *v.* Guild, 10 N. J. L 163 (not deciding the point, but holding that the corroboration need only involve any cir-

1856, SKINNER, J., in *Bergen* v. *People*, 17 Ill. 426, required "some proof that a crime had been committed, or of circumstances corroborating and fortifying the confession; . . . proof of any number of these facts and circumstances consistent with the truth of the confession, or which the confession has led to the discovery of, and which would not probably have existed had not the crime been committed, necessarily corroborate it; . . . the corroborating fact or facts in proof need not necessarily, independent of the confession, tend to prove the 'corpus delicti.'"

But in most jurisdictions the stricter form of rule is taken, and the evidence must concern the 'corpus delicti': [4]

cumstances "such as serve to strengthen it, . . . to impress a jury with a belief in its truth"); 1912, State *v.* Kwiatkowski, 83 N. J. L. 650, 85 Atl. 209; *North Dakota:* Comp. L. 1913, § 9459 ("No person can be convicted of murder or manslaughter or of aiding suicide, unless the death of the person alleged to have been killed and the fact of the killing by the accused as alleged, are each established as independent facts; the former by direct proof and the latter beyond a reasonable doubt; but in no case upon a plea of not guilty, shall the confession or admission of the accused, in writing or otherwise, be admissible to establish the death of the person alleged to have been killed"); *Oregon:* 1904, State *v.* Rogoway, 45 Or. 601, 78 Pac. 987, 81 Pac. 234 (rule in U. S. *v.* Williams approved); *Rhode Island:* 1899, State *v.* Jacobs, 21 R. I. 259, 43 Atl. 31 (the other evidence need not prove the crime independently of the confession); *Vermont:* 1904, State *v.* Blay, 77 Vt. 56, 58 Atl. 794 (larceny); *Washington:* R. & B. Code 1919, § 2151 ("A confession made under inducement is not sufficient to warrant a conviction without corroborating testimony").

[4] *Accord: Federal:* 1918, Daeche *v.* U. S., 2d C. C. A., 250 Fed. 566, 571 (conspiracy to injure vessels);
Alabama: 1860, Mose *v.* State, 36 Ala. 211, 231 (murder; "the 'corpus delicti' being otherwise established," confession suffices, if satisfactorily proved); 1876, Matthews *v.* State, 55 Ala. 187, 194 (rape; rule, as stated, confined to felony); 1877, Johnson *v.* State, 59 id. 37 (larceny; extrajudicial confession, "not corroborated by independent evidence of the 'corpus delicti,'" insufficient); 1884, Winslow *v.* State, 76 Ala. 42, 47 (arson; general principle affirmed); 1893, Ryan *v.* State, 100 Ala. 94, 14 So. 868 (larceny; general principle affirmed); 1902, Hall *v.* State, 134 Ala. 90, 32 So. 750;
Arkansas: Dig. 1919, § 3182 (if not made in open court, not sufficient "unless accompanied with other proof that such offense was committed"); 1884, Melton *v.* State, 43 Ark. 367, *semble* (murder); 1905, Misenheimer *v.* State, 73 Ark. 407, 84 S. W. 494 (rape; New York rule followed); 1905, Hubbard *v.* State, 77 Ark. 126, 91 S. W. 11 (murder; foregoing case approved); 1910, Harshaw *v.* State, 94 Ark. 343, 127 S. W. 745 (forgery); 1913, Greenwood *v.* State, 107 Ark. 568, 156 S. W. 427; 1914, Russell *v.* State, 112 Ark. 282, 166 S. W. 540 (embezzlement); 1918, Lind *v.* State, 137 Ark. 92, 207 S. W. 47 (seduction; the woman's testimony may serve as corroboration);
California: 1867, People *v.* Jones, 31 Cal. 565 (for felonies; here robbery); 1875, People *v.* Thrall, 50 Cal. 415 (robbery); 1913, People *v.* Frey, 165 Cal. 140, 131 Pac. 127; 1914, People *v.* Ford, 25 Cal. App. 388, 143 Pac. 1075 (murder; but why does an Appellate Court cite six cases from another Supreme Court on this point, ignoring its own?);
Florida: 1894, Lambright *v.* State, 34 Fla. 564, 575, 16 So. 582 (murder); 1897, Holland *v.* State, 39 Fla. 178, 22 So. 298; 1903, Mitchell *v.* State, 45 Fla. 76, 33 So. 1009 ('corpus delicti' must include the criminal agency);
Georgia: 1898, Wimberly *v.* State, 105 Ga. 188, 31 S. E. 162; 1898, Davis *v.* State, 105 Ga. 808, 32 S. E. 158, *semble* (some evidence of 'corpus delicti' needed); 1903, Bines *v.* State, 118 Ga. 320, 45 S. E. 376 (arson; the evidence other than the confession must show the burning to have been felonious); 1904, Joiner *v.* State, 119 Ga. 315, 46 S. E. 412 (wife-beating; corroboration found); 1904, Owen *v.* State, 119 Ga. 304, 46 S. E. 433 (larceny); 1904, Morgan *v.* State, 120 Ga. 499, 48 S. E. 238 (arson); 1921, Langston *v.* State, 151 Ga. 388, 106 S. E. 903 (murder);
Illinois: 1879, May *v.* People, 92 Ill. 343, 345, *semble* (larceny); 1882, Williams *v.* People, 101 Ill. 382, 386 (receiving stolen goods); 1886, Andrews *v.* People, 117 Ill. 195, 202, 7 N. E. 265 (similar); 1895, Bartley *v.* People, 156 Ill. 234, 40 N. E. 831, *semble*; 1895, Campbell *v.* People, 159 Ill. 9, 42 N. E. 123; 1896, Gore *v.* People, 162 Ill. 259, 44 N. E. 500; 1902, Johnson *v.* People, 197 Ill. 48, 64 N. E. 286 (Gore *v.* People approved); 1914, People *v.* Harrison, 261 Ill. 517, 104 N. E. 259 (a quibble over the instructions);
Indiana: 1904, Griffiths *v.* State, 163 Ind. 555, 72 N. E. 563 (corroboration defined); 1909, Strickland *v.* State, 171 Ind. 642, 87 N. E. 12; 1911, Messel *v.* State, 176 Ind. 214, 95 N. E. 565 (stating the rule in a peculiar form, not noting the real point of distinction);

1876, BRICKELL, C. J., in *Matthews* v. *State*, 55 Ala. 187, 194: "Evidence of facts and circumstances attending the particular offense, and usually attending the commission of similar offenses, or of facts to the discovery of which the confession has led, and which would not probably have existed if the offense had not been committed, or of facts having a just tendency to lead the mind to the conclusion that the offense has been committed, would be admissible to corroborate the confession."

1921, Gaines *v.* State, — Ind. —, 132 N. E. 580 (burglary);
Indian Territory: 1906, Leftridge *v.* U. S., 6 Ind. T. 305, 97 S. W. 1018 (homicide; some evidence of the 'corpus delicti' is needed);
Iowa: Code 1897, § 5491, Comp. C. 1919, § 9475 ("The confession of the defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that the offense was committed"); 1865, State *v.* Turner, 19 Ia. 145 (under the Code); 1878, State *v.* Knowles, 48 Ia. 598 (here held not a confession); 1879, State *v.* Feltes, 51 Ia. 495, 501, 1 N. W. 755 (murder); 1880, State *v.* Dubois, 54 Ia. 363, 6 N. W. 578 (larceny); 1905, State *v.* Westcott, 130 Ia. 1, 104 N. W. 341 (murder; rule of the statute applied and developed); 1920, State *v.* Cook, 188 Ia. 655, 176 N. W. 674 (attempt to break and enter; a fantastic application of the rule, tending to dishearten police officers and encourage thieves);
Kentucky: C. Cr. Pr. 1895, § 240 ("A confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed"); 1872, Cunningham *v.* Com., 9 Bush 149, 152 (murder; the Code held to imply corroboration by evidence tending to connect the accused); 1887, Patterson *v.* Com., 86 Ky. 313, 320, 5 S. W. 387 (murder; preceding construction disapproved); 1891, Wigginton *v.* Com., 92 Ky. 282, 289, 17 S. W. 634 (murder; the construction in the Cunningham case definitely repudiated); 1897, Dugan *v.* Com., 102 Ky. 241, 43 S. W. 418 (declaring the Cunningham case overruled); 1901, Gilbert *v.* Com., 111 Ky. 793, 64 S. W. 846 (a confession needs no corroboration, if the 'corpus delicti' is otherwise evidenced); 1908, Polson *v.* Com., — Ky. —, 108 S. W. 844 (rule as to instructions, stated); 1911, Higgins *v.* Com., 142 Ky. 647, 134 S. W. 1135 (murder; Patterson *v.* Com. followed); 1913, Lee *v.* Com., 155 Ky. 62, 159 S. W. 648 (burglary; instruction not needed where the 'corpus delicti' is independently proved); 1915, Clary *v.* Com., 163 Ky. 48, 173 S. W. 171 (embezzlement); 1917, Frierson *v.* Com., 175 Ky. 684, 194 S. W. 914 (rape under age); 1921, Bruce *v.* Com., 191 Ky. 846, 232 S. W. 63 (larceny; confessions held not corroborated); 1921, Com. *v.* Stites, 190 Ky. 402, 227 S. W. 574 (incest; instruction held not proper on the facts);
Michigan: 1882, People *v.* Lane, 49 Mich. 340, 13 N. W. 622 (attempt to murder); 1908, People *v.* Ranney, 153 Mich. 293, 116 N. W. 999 (obtaining money by a worthless check; prior cases collected); 1911, People *v.* Lapidus, 167 Mich. 53, 132 N. W. 470;
Minnesota: Gen. St. 1913, § 8462 (a confession is not "sufficient to warrant his conviction, without evidence that the offence charged has been committed"); § 8741 (gambling offences; conviction may be had "on his own confession out of court"); 1860, State *v.* Laliyer, 4 Minn. 368, 375 (murder); 1882, State *v.* Grear, 29 Minn. 221, 222, 13 N. W. 140 (assault); 1922, State *v.* Wylie, — Minn. —, 186 N. W. 707 (larceny);
Mississippi: 1853, Stringfellow *v.* State, 26 Miss. 157, 163 (murder; restricting the rule to "capital felonies"); 1856, Brown *v.* State, 32 Miss. 433, 450 (murder; preceding case cited); 1857, Sam *v.* State, 33 Miss. 347, 352 (arson; general principle affirmed); 1867, Jenkins *v.* State, 41 Miss. 583 (larceny; same); 1870, Pitts *v.* State, 43 Miss. 472, 481 (murder; same);
Missouri: 1849, Robinson *v.* State, 12 Mo. 592, 596 (larceny); 1859, State *v.* Lamb, 28 Mo. 218, 229, *semble* (murder); 1867, State *v.* Scott, 39 Mo. 424, 425 (robbery); 1874, State *v.* German, 54 Mo. 526, 529 (murder); 1881, State *v.* Patterson, 73 Mo. 695, 708 (murder); 1883, State *v.* Dickson, 78 Mo. 438, 447 (murder); 1903, State *v.* Coats, 174 Mo. 396, 74 S. W. 864 (the 'corpus delicti' need not be "absolutely proven, independent of the confession"); 1904, State *v.* Knowles, 185 Mo. 141, 83 S. W. 1083 (embezzlement);
Montana: 1871, Terr. *v.* McClin, 1 Mont. 394, 398 (burglary);
Nebraska: 1880, Priest *v.* State, 10 Nebr. 393, 399, 6 N. W. 468 (murder); 1885, Smith *v.* State, 17 Nebr. 358, 361, 22 N. W. 780 (larceny); 1899, Sullivan *v.* State, 58 Nebr. 796, 79 N. W. 721; 1905, Blacker *v.* State, 74 Nebr. 671, 105 N. W. 302 (forgery);
Nevada: 1905, Re Kelly, 28 Nev. 491, 83 Pac. 223 (rape);
New York: 1836, People *v.* Hennessey, 15 Wend. 147, *semble* (embezzlement); 1836, People *v.* Badgley, 16 N. Y. 53, 57 (forgery); 1855, People *v.* Porter, 2 Park. Cr. C. 14 (blasphemy); 1859, U. S. *v.* Mulvaney, 4 Park. Cr. C. 164 (opening a letter before delivery); C. Cr. P. 1881, § 395 (a confession is insufficient "without additional proof that the crime charged has been committed"); 1886, People *v.* Jachne, 103 N. Y. 182, 199 (any circumstances which are "calculated to suggest the commission of crime" suffice; though *semble* they do not touch the 'corpus

No further detailed rules as to the nature of the corroborative evidence seem to have been attempted.[5]

As to the application of the rule, it remains only to note that it has of course no bearing upon an *infra-judicial confession*, which is in effect a plea of guilty.[6]

§ 2072. **Same: (3) Definition of Corpus Delicti.** The meaning of the phrase 'corpus delicti' [1] has been the subject of much loose judicial comment, and an apparent sanction has often been given to an unjustifiably broad meaning. It is clear that an analysis of every crime, with reference to this element of it, reveals three component parts, *first*, the occurrence of the specific kind of injury or loss (as, in homicide, a person deceased; in arson, a house burnt; in larceny, property missing); *secondly*, somebody's criminality as the source of the loss, — these two together involving the commission of a crime by somebody; and, *thirdly*, the accused's identity as the doer of this crime.

(1) Now, the term 'corpus delicti' seems in its orthodox sense to signify merely the first of these elements, namely, the *fact of the specific loss or injury sustained:*

delicti'); 1888, People *v.* Deacons, 109 N. Y. 374, 377, 16 N. E. 676 ("The meaning of the Code is that there must be some other evidence of the 'corpus delicti' besides the confession"); 1903, People *v.* White, 176 N. Y. 331, 68 N. E. 630 (statute applied); 1915, People *v.* Roach, 215 N. Y. 592, 600, 109 N. E. 618 (murder; confession held corroborated);
Ohio: 1872, Blackburn *v.* State, 23 Oh. St. 146, 149, 164 (homicide);
Oklahoma: 1909, Shires *v.* State, 2 Okl. Cr. 89, 99 Pac. 1100;
Oregon: Laws 1920, § 1537 (a confession is insufficient "without some other proof that the crime was committed"); 1909, State *v.* Brinkley, 55 Or. 134, 105 Pac. 708 (larceny; *semble*, other admissions of the accused may suffice as evidence to corroborate the confession);
Pennsylvania: 1882, Gray *v.* Com., 101 Pa. 380, 386 (homicide);
Porto Rico: 1911, People *v.* Rosado, 17 P. R. 417 (murder; P. C. § 206 cited);
South Carolina: 1852, State *v.* Vaigneur, 5 Rich. L. 391, 401 (not clear);
Texas: 1854, Jones *v.* State, 13 Tex. 168, 177; in this State the rule's application seems to have been supplanted by the other rules about 'corpus delicti' (*post*, § 2182) and confessions (*ante*, § 831); 1912, Harris *v.* State, 64 Tex. Cr. 594, 144 S. W. 232 ("the confession may be used to aid the proof of the 'corpus delicti'");
Washington: 1906, State *v.* Marselle, 43 Wash. 273, 86 Pac. 586 (rape; here the rule is pedantically applied).

[5] The testimony of an *accomplice* may suffice: 1921, Parsons *v.* State, — Ind. —, 131 N. E. 382 (knowing receipt of stolen goods); 1887, Patterson *v.* Com., 86 Ky. 313, 320, 5 S. W. 387; 1922, People *v.* Joyce, 233 N. Y. 61, 134 N. E. 836 (murder; per two judges); 1918, Henry *v.* State, 14 Okl. Cr. 189, 169 Pac. 658 (sale of official civil service examination papers); 1921, State *v.* Weston, — Or. —, 201 Pac. 1083 (murder). *Contra, semble:* 1884, Melton *v.* State, 43 Ark. 367, 370.

Conversely, a confession duly corroborated may serve as sufficient, under § 2059, *ante*, *to corroborate an accomplice:* 1893, Schæfer *v.* State, 93 Ga. 177, 18 S. E. 552; 1887, Patterson *v.* Com., 86 Ky. 313, 320.

[6] And this should include a confession to a *committing magistrate:* 1876, Matthews *v.* State, 55 Ala. 187, 190, *semble;* 1859, State *v.* Lamb, 28 Mo. 218, 230; 1847, State *v.* Cowan, 7 Ired. N. C. 239, 244. In Messel *v.* State, 176 Ind. 214, 95 N. E. 565 (1911), the opinion needlessly hesitates by stating that this "seems to be" thus.

But of course the *rule itself* does not apply to a *committing magistrate's* action: 1909, Lundstrom *v.* State, 140 Wis. 141, 121 N. W. 883 (not decided).

In the *Philippine Islands* a special interpretation is placed on a plea of guilty at the preliminary inquiry; 1905, U. S. *v.* Tolosa, 5 P. I. 616; 1906, U. S. *v.* José, 6 P. I. 211.

The rule at large has been erroneously said to apply to the admissions of a plaintiff suing for a *defamatory charge of crime:* 1876, Georgia *v.* Kepford, 45 Ia. 48, 52.

For the rule in *treason*, where a confession in open court dispenses with the two witnesses, see *ante*, § 2038.

§ 2072. [1] "The term 'corpus delicti' first appears in Farinacius, Quæstiones, 1, 6" (Pertile, Storia del diritto italiano, 2d ed., 1900, vol. VI, pt. 2, p. 144); compare the quotations in Esmein (1882), Hist. de la procédure criminelle, 267 (translated as History of Continental Criminal Procedure, in the Continental Legal History Series).

1705, *Captain Green's Trial*, 14 How. St. Tr. 1199, 1246; piracy; the ship said to have been seized was not shown to be missing. *Counsel* for defence: "By the 'corpus delicti,' subject of the crime, is not meant that the subject of the crime must be so extant as to fall under the senses, but that the loss sustained is felt and known. As for example, in the crime of murder, though the body cannot be reached, yet the particular loss is known; it is notorious the queen wants a subject, friends want a relation whom they can point out; in piracy and robbery, merchants want their ships and goods; so that the loss is felt and known, though 'de facto' the subject cannot be pointed out. . . . And this is the true meaning of what is 'corpus delicti,' the subject of the crime."

1879, BARRETT, J., in *State* v. *Potter*, 52 Vt. 33, 39: "The idea and the rule is . . . that a person should not be convicted of having killed a person until it was proved that that person is in fact dead. When that is made out, the 'corpus delicti' is made out, — that is, the subject-matter of the alleged crime, namely, a person dead."

This, too, is 'a priori' the more natural meaning; for the contrast between the first and the other elements is what is emphasized by the rule; *i. e.* it warns us to be cautious in convicting, since it may subsequently appear that no one has sustained any loss at all; for example, a man has disappeared, but perhaps he may later reappear alive. To find that he is in truth dead, yet not by criminal violence — *i. e.* to find the second element lacking, is not the discovery against which the rule is designed to warn and protect us.

(2) But by most judges the term is made to include the second element also:[2]

1850, SHAW, C. J., in *Com.* v. *Webster*, Mass., Bemis' Rep. 473: "In a charge of criminal homicide, it is necessary in the first place by full and substantial evidence to establish what is technically called the 'corpus delicti', — the actual offence committed; that is, that the person alleged to be dead is in fact so; that he came to his death by violence and under such circumstances as to exclude the supposition of a death by accident or suicide and warranting the conclusion that such death was inflicted by a human agent; leaving the question who that guilty agent is to after consideration."

1872, CHURCH, C. J., in *People* v. *Bennett*, 49 N. Y. 137, 143: "The 'corpus delicti' has two components, viz., Death as the result, and the criminal agency of another as the mean."

This broader form makes the rule much more difficult for the jury to apply amid a complex mass of evidence, and tends to reduce the rule to a juggling-formula.

(3) A third view, indeed, too absurd to be argued with, has occasionally been advanced, at least by counsel, namely, that the 'corpus delicti' includes the third element also, *i. e.* the *accused's identity* or agency as the criminal. By this view, the term 'corpus delicti' would be synonymous with the whole

[2] So also: 1910, Ausmus *v.* People, 47 Colo. 167, 107 Pac. 204 (stating also but not definitely approving the orthodox rule); 1921, State *v.* James, — N. J. L. —, 114 Atl. 553; 1907, State *v.* Pienick, 46 Wash. 523, 90 Pac. 645; 1917, State *v.* Gray, 98 Wash. 279, 167 Pac. 951 (liquor prescriptions); 1913, State *v.* Merrill, 72 W. Va. 500, 78 S. E. 699 (infanticide).

This is the common phrasing of this second form. But originally it appears merely in the form "death by the agency of another," *i. e.* not necessarily by a criminal act, but merely a death other than by the operation of disease or other natural force. A loose reading of this original phrasing, which probably belongs under the first form, led to the second form quoted above; the original phrasing may be seen in the following opinions: 1858, Clifford, J., in U. S. *v.* Williams, 1 Cliff. 5, 25; 1871, Christian, J., in Smith *v.* Com., 21 Gratt., Va. 809, 813.

of the charge, and the rule would require that the whole be evidenced in all three elements independently of the confession.[3]

To illustrate the different definitions by the various crimes, it would follow, under the orthodox definition, that in homicide the fact of death, whether or not feloniously caused, is the 'corpus delicti';[4] in arson, the fact of burning, whether or not wilful;[5] and in false representations, the fact of the acting in reliance upon representations, whether or not they were false.[6]

§ 2073. **Same: (4) Order and Sufficiency of Evidence of Corpus Delicti.** (*a*) That the evidence of the 'corpus delicti' should be put in *before* a confession is certainly good practice, and is occasionally said to be the rule;[1] but the

[3] Repudiating this definition: 1911, Messel *v.* State, 176 Ind. 214, 95 N. E. 565 (rape under age); 1917, State *v.* Schyhart, — Mo. —, 199 S. W. 205 (killing cattle).

[4] *Accord:* 1908, State *v.* Gebbia, 121 La. 1083, 47 So. 32 (fact of death is the 'corpus delicti'). *Contra:* 1918, People *v.* Pretswell, 202 Mich. 1, 167 N. W. 1000 (death by an automobile); 1904, State *v.* Knapp, 70 Oh. 380, 71 N. E. 705 (but the term does not include the precise mode of death as charged, — here, by strangulation); 1921, State *v.* Weston, 102 Or. 102, 201 Pac. 1083 (murder); 1921, State *v.* Howard, 102 Or. 431, 203 Pac. 311; 1921, Williams *v.* Com., 130 Va. 778, 107 S. E. 655 (murder of wife; indigestion as the cause of death, held not sufficiently negatived).

The *identification* of the deceased is not a part of the 'corpus delicti'; 1888, People *v.* Palmer, 109 N. Y. 110, 114, 16 N. E. 529 (in a lucid opinion by Finch, J.). *Contra:* 1921, People *v.* Peete, — Cal. App. —, 202 Pac. 51, 58 (murder; identification of belt-buckle, ring, cuff-buttons, tooth, etc., on a corpse with unrecognizable features, held sufficient proof of 'corpus delicti'; but purporting to follow People *v.* Palmer, N. Y.).

[5] *Accord:* 1857, Sam *v.* State, 33 Mass. 347, 352, *semble*.

Contra: Canada: 1911, R. *v.* Girvin, 3 Alta. 387, 398. *United States:* 1884, Winslow *v.* State, 76 Ala. 42, 48; 1915, Daniels *v.* State, 12 Ala. App. 119, 68 So. 499; 1895, People *v.* Simonsen, 107 Cal. 345, 40 Pac. 440; 1898, People *v.* Jones, 123 Cal. 65, 55 Pac. 698; 1915, Wade *v.* State, 16 Ga. App. 163, 84 S. E. 593; 1922, People *v.* Wallace, 303 Ill. 504, 135 N. E. 723 (larceny of 11 hogs of L.; in L.'s fenced farm were 61 hogs on July 25, and on Sept. 6, only 50; none had died, and none could get through the fence; on Aug. 22 defendants hauled and sold 11 hogs for W., whose farm was near L.'s; held, that the 'corpus delicti' was not proved, in that the identity of the hogs taken by defendant was not proved; unsound; it was amply proved that L. lost 11 hogs and that they were lost by criminal agency; this was the 'corpus delicti'; anything more, to complete the charge, was the defendant's agency; the identity of the hogs taken by defendant was part of this third element); 1921, State *v.* Cristani, 192 Ia. 615, 185 N. W. 112; 1922, Meyers *v.* Com., 194 Ky. 523, 240 S. W. 71; 1915, State *v.* McLarne, 128 Minn. 163, 150 N. W. 787; 1915, State *v.* Cox, 264 Mo. 408, 175 S. W. 50; 1920, State *v.* Adkins, — Mo. —, 222 S. W. 431; 1916, State *v.* Maranda, 114 Oh. 364, 114 N. E. 1038; 1916, State *v.* Brown, 103 S. C. 437, 88 S. E. 21.

[6] 1876, State *v.* Lewis, 45 Ia. 20; 1908, People *v.* Ranney, 153 Mich. 296, 116 N.W. 999 (obtaining money by passing a worthless check).

Contra: 1904, Johnson *v.* State, 142 Ala. 1, 37 So. 937 (false pretences; the falsity of the pretence is part of the 'corpus delicti,' under the present rule); 1895, People *v.* Simonsen, 107 Cal. 345, 40 Pac. 440.

Other crimes: 1904, Wistrand *v.* Pepple, 213 Ill. 72, 72 N. E. 748 (rape; the age of the defendant, being part of the 'corpus delicti,' cannot be evidenced by the confession alone); 1901, Brown *v.* State, 85 Miss. 27, 37 So. 497 (breaking and entering with intent).

These definitions are seldom directly passed upon, and it would be unprofitable to trace the various *obiter* expressions in judicial opinion.

The following curious statute seems to belong here: Kan. St. 1913, c. 244, Gen. St. 1915, § 8128 (in prosecutions for forgery, "proof that such signature is not in the handwriting of the person whose signature it purports to be shall be 'prima facie' evidence that the signing of such name was unauthorized and is a forgery").

§ 2073. [1] 1884, Winslow *v.* State, 76 Ala. 42, 47 ("some preliminary testimony, tending to show the 'corpus delicti'"); 1902, Smith *v.* State, 133 Ala. 145, 31 So. 806 (no authority cited); 1901, People *v.* Ward, 134 Cal. 301, 66 Pac. 372 (the order of evidence, except where a confession is offered, is in the trial Court's discretion); 1899, Gantling *v.* State, 41 Fla. 587, 26 So. 737; 1918, Terr. *v.* Hart, 24 Haw. 349, 358 (embezzlement); 1919, People *v.* Jackzo, 206 Mich. 183, 172 N. W. 557 (murder).

better view is that the trial judge may determine the order of this evidence,[2] on the general principles otherwise prevailing (*ante*, §§ 1867, 1869).

(*b*) The application of all rules of Evidence rests with the judge, not the jury; hence, under this rule requiring the existence of some corroborative evidence of the 'corpus delicti', it is for the *trial judge* to say whether there is such evidence; *i. e.* on the general principle of the judicial function (*post*, § 2550) he may take the case from the jury if there is not at least some evidence sufficient to satisfy the rule:[3]

1884, CLOPTON, J., in *Winslow* v. *State*, 76 Ala. 42, 47: "It is the province of the judge to determine whether there is testimony sufficient to make it appear 'prima facie' that a crime has been committed. The evidence on which the judge acts may not necessarily establish the 'corpus delicti.' It may be and often is conflicting and contradictory. In such case, the credibility of the witnesses and the sufficiency of the entire evidence are for the ultimate decision of the jury."

(*c*) Yet for the jury again the same question comes up for determination, after retiring to consider their verdict. They are bound by the rule of Evidence not to convict unless there is in their belief some evidence of the 'corpus delicti' to corroborate the confession. The judge's ruling was provisional only, as preliminary to allowing the case to go to the jury; and they in their turn must conclude, without reference to the judge's ruling, whether the corroboration exists to satisfy them.[4]

(*d*) Supposing that it does, the rule of Evidence is at an end for them, and they are left with nothing but the general duty in criminal cases to be convinced of the defendant's guilt beyond a reasonable doubt. Here, however, it is often said that they must be convinced beyond such a doubt both as to the 'corpus delicti' and the defendant's guilty participation.[5] But this is

[2] 1904, Scott *v.* State, 141 Ala. 1, 37 So. 357 (homicide by poisoning; one judge diss.); 1910, People *v.* Wilkins, 158 Colo. 130, 111 Pac. 612; 1908, State *v.* Washelesky, 81 Conn. 22, 70 Atl. 62; 1897, Holland *v.* State, 39 Fla. 178, 22 So. 298; 1905, Williams *v.* State, 123 Ga. 138, 51 S. E. 322 (murder); 1905, State *v.* Kesner, 72 Kan. 87, 82 Pac. 720; 1908, State *v.* Gebbia, 121 La. 1083, 47 So. 32; 1860, State *v.* Laliyer, 4 Minn. 368, 378; 1882, State *v.* Grear, 29 Minn. 221, 222, 13 N. W. 140; 1898, Whitney *v.* State, 53 Nebr. 287, 73 N. W. 696; 1921, State *v.* James, — N. J. L. —, 114 Atl. 553; 1921, State *v.* Weston, 102 Or. 102, 201 Pac. 1083 (murder); 1917, State *v.* Desloyers, 40 R. I. 89, 100 Atl. 64 (murder); 1879, State *v.* Potter, 52 Vt. 33, 40; 1915, State *v.* Scott, 86 Wash. 296, 150 Pac. 423.

Undecided: 1900, Carl *v.* State, 125 Ala. 89, 28 So. 505; 1915, Daniels *v.* State, 12 Ala. App. 119, 68 So. 499 (arson).

Other rulings dealing with the order of evidence are: 1839, R. *v.* Howell, 3 State Tr. N. s. 1087, 1104 (felonious burning during a riot; principle applied so as to require evidence of identity after proof of burning the house in question and before other evidence of the riot was offered); 1902, Anthony *v.* State, 44 Fla. 1, 32 So. 818; 1899, People *v.* Benham, 160 N. Y. 402, 55 N. E. 11 (the order as between 'corpus delicti' and motive is in the trial Court's discretion).

[3] 1905, People *v.* Ward, 145 Cal. 736, 79 Pac. 448 (he must "advise" them to acquit; prior cases in this State reconciled); 1894, Lambright *v.* State, 34 Fla. 564, 575, 16 So. 582; 1921, Buckhanon *v.* State, 151 Ga. 827, 108 S. E. 209 (felonious nature of death here evidenced by expert opinion only); 1860, State *v.* Laliyer, 4 Minn. 368, 377; 1921, Walker *v.* State, — Miss. —, 89 So. 921 (making liquor illegally); 1882, Gray *v.* Com., 101 Pa. 380, 386 (there need be offered only "sufficient evidence of the 'corpus delicti' to entitle the case to go to the jury").

[4] 1884, Winslow *v.* State, 76 Ala. 42, 47; 1921, Driver *v.* State, — Ala. App. —, 89 So. 897 (larceny); 1899, Coley *v.* State, 110 Ga. 271, 34 S. E. 845.

[5] 1884, Winslow *v.* State, 76 Ala. 42, 47; 1893, Ryan *v.* State, 100 Ala. 94, 95, 14 So. 868 ("If upon the whole evidence the jury are

unnecessary. They cannot believe the defendant's guilt of crime beyond a doubt without also believing that the harm charged as the 'corpus' of the crime was sustained.[6]

§ 2074. **Same: (5) Other Rules as to Sufficiency of Admissions and Proof of Corpus Delicti, discriminated.** (*a*) Whether the accused's statement amounts to a *confession*, so as to require corroboration under the present rule, depends on the definition of a confession (*ante*, § 821).

(*b*) Whether a confession, otherwise inadmissible at all, becomes *admissible* when *confirmed* by discovering the facts confessed, involves another principle (*ante*, § 856).

(*c*) The supposed rule that the 'corpus delicti' must be evidenced by direct testimony, or *eye-witnesses* (*post*, § 2081) has nothing to do with the rule about confessions; except that the definition of 'corpus delicti' is common to both discussions.

(*d*) *Confessions of adultery* may call for the application of several independent rules.[1]

§ 2075. **Uncorroborated Admissions in Civil Cases.** There is no general rule that the admissions of a party in a civil case are insufficient, without corroborating evidence, as a foundation for a verdict (*ante*, § 1055). But there are a few such rules limited to admissions in specific classes of issues, viz. *divorce* (*ante*, § 2067), *marriage* (*post*, § 2086), and sundry issues (*ante*, § 2066), or to admissions dispensing with certain rules of evidence, viz. *documentary originals* (*ante*, §§ 1255, 1259), and *attesting witnesses* (*ante*, § 1300).

satisfied beyond a reasonable doubt both as to the 'corpus delicti' and the identity of the defendant as the guilty perpetrator, it becomes their duty to convict"); 1894, Lambright *v.* State, 34 Fla. 564, 575, 16 So. 582; 1860, State *v.* Laliyer, 4 Minn. 368, 377 (going upon the statutory word "proof"); 1870, Pitts *v.* State, 43 Miss. 472, 481.

[6] This seems the view taken in the following opinions: 1882, Gray *v.* Com., 101 Pa. 380, 386; 1858, State *v.* Davidson, 30 Vt. 377, 386.

[§ 2074. [1] In a suit for *divorce*, the general principle (*ante*, § 2067) applies to a confession of adultery. In a criminal *prosecution for adultery*, the general principle (*ante*, §§ 2070–2073), requiring corroboration of an accused's confession, may be applied to a confession of adultery. In a similar prosecution, the rule, if it existed, requiring the 'corpus delicti' to be proved by eye-witnesses (*post*, § 2081), would equally apply to a charge of adultery. In a similar prosecution, or in a suit for divorce grounded on adultery, the question whether a *marriage* may be sufficiently proved by admissions or confessions, without eye-witness proof (*post*, § 2086), may be raised; but there the subject of the confession is supposed to be the fact of marriage, not the adultery.

TITLE V (*continued*): SYNTHETIC RULES

SUB-TITLE II: KINDS OF WITNESSES REQUIRED

CHAPTER LXX.

§ 2078. **Nature of these Rules.** The nature of these rules has been already briefly examined, in surveying the various kinds of Synthetic rules (*ante*, § 2030). We are here concerned with such rules as require a particular kind of witness to be indispensably included in the whole mass of evidence upon a given subject. The distinction between the preceding sort of Synthetic rules (*ante*, § 2034) and the present sort is that those require a specified *number* of witnesses, while these require a specified *kind* of witness. For example, a rule requiring that among the evidence of a certain fact there should always be the testimony of a white person, or the testimony of a male person, or the testimony of a military officer, or the testimony of a citizen, would be a rule of the present sort. Such a rule must, however, be *distinguished* from a *rule of Preference* (*ante*, §§ 1285, 1335). A rule preferring provisionally a certain kind of witness has the effect of requiring such a witness to be produced, or shown unavailable, before any other evidence can be used; but if he is unavailable, other testimony may suffice. By the present type of rule, it is not required that such a witness be called before any other can be offered, yet if he is not ultimately called, the

impossibility of obtaining him is no excuse. At both points, the two types of rule are opposed.

In fact, however, rules of this sort are almost wholly lacking in our law. They rest upon the assumption that, no matter how strong and complete the remainder of the evidence may be, a particular kind of testimony will always be, for the subject in hand, relatively so valuable that it should be indispensably required in every case whatever. Such an assumption, in its rigidity, is wholly opposed to that spirit of our law of Evidence (*ante*, § 1286) which trusts, for the due securing of evidence, rather to the interested zeal of the parties than to the command of the law.

There has been practically no attempt to establish such a rule except for one class of testimony, namely, *eye-witnesses*. Even for that class, there is to-day no universally accepted rule making an eye-witness indispensable, and the one rule that has any considerable vogue was an anomalous creation intruded into the common law merely by the powerful pronouncement of Lord Mansfield. This type of rule is opposed to the genius and traditions of the common law.

§ 2079. **In Criminal Cases, All Eye-Witnesses, or Witnesses Indorsed on the Indictment, must be Produced by the Prosecution**; (1) **History and Present State of the Law.** In England, many things are done, or left undone, by custom and understanding, in the practice of the law, though no rule of law compels or forbids the doing. Especially in the conduct of a criminal prosecution are tacit traditional dictates of professional ethics, wholly lacking the force of legal rules, daily observed by counsel for the prosecution. Among these customs, based on a supposed fairness and honorable decency, seems to have been a practice of *calling all the witnesses* whose names were by law required by statute in cases of felony to be *indorsed upon the indictment*, as having testified before the grand jury. This indorsement was intended as a measure of fairness to give notice to the accused of the witnesses to be produced against him; its effect as excluding witnesses not so indorsed has been already considered (*ante*, § 1850). In its present aspect, the additional effect was recognized that all witnesses thus indorsed were to be called, without omission.

This custom, doubtless of not much earlier standing, appears noted in the reports by 1820–1830. During the next decade, there appears a related though distinct custom of professional ethics, having the same bearing for *known eye-witnesses* of the facts, whether or not such witnesses had testified before the grand jury and been indorsed on the indictment. In a long series of Nisi Prius rulings, these two practices are noticed in the reports, the different judges taking more or less rigid views of their stringency as rules of professional behavior. But it will be apparent, from the judicial language, and in the light of the known relations between bench and bar in England, that at no time did this principle

of professional behavior receive the sanction of a rule of law.[1] Nor did it in Canada.[2]

But these Nisi Prius rulings, in which the judicial language varied somewhat, coming incompletely to the notice of some American Courts, and being considered without due regard to the impalpable but real distinction

§ 2079. [1] 1823, R. *v.* Simmonds, 1 C. & P. 84 (larceny; Hullock, B.: "Though the counsel for the prosecution is not bound to call every witness whose name is on the back of the indictment, it is usual for him to do so; and if he does not, I, as the judge, will call the witness, that the prisoner's counsel may have an opportunity of cross-examining him"); 1823, R. *v.* Whitbread, 1 C. & P. note (Holroyd and Burrough, JJ., held that the prosecution was not bound to call every indorsed witness); 1823, R. *v.* Taylor, 1 C. & P. note (Park, J., called all the witnesses, to allow cross-examination); 1825, R. *v.* Hollingberry, 6 Dowl. & R. 345, 348 (not all witnesses before the grand jury need be called); 1830, R. *v.* Beezley, 4 C. & P. 220 (Littledale, J., said that all ought to be called); 1833, R. *v.* Bodle, 6 C. & P. 186 (if the prosecution declines to call, the Court may in discretion order his examination); 1838, R. *v.* Chapman, 8 C. & P. 558 (murder; an eye-witness, defendant's brother; *semble* that the prosecution ought to, but need not, call him); 1838, R. *v.* Holden, 8 C. & P. 606, 609 (murder; prosecution required by Patteson, J., to call defendant's daughter, an eye-witness; "every witness who was present at a transaction of this sort ought to be called"); 1839, R. *v.* Bull, 9 C. & P. 22 (manslaughter; Vaughan, J.: "I think that every witness ought to be examined; in cases of this kind counsel ought not to keep back a witness because his evidence may weaken the case for the prosecution; our only object here is to discover truth"); 1839, R. *v.* Vincent, 3 State Tr. N. s. 1037, 1064 (calling of indorsed witnesses is discretionary even in felony, "but it is a discretion always exercised"; here done for a misdemeanor); 1844, R. *v.* Carpenter, 1 Cox Cr. 72 (rape; every witness deposing to the magistrate should go before the grand jury, be indorsed, and summoned at the trial; per Alderson, B.); 1845, R. *v.* Stroner, 1 C. & K. 650 (rape; a person to whom the woman had complained, and a washerwoman who had washed her clothes, were not indorsed nor summoned, but were in attendance for the defence; Pollock, C. B.: "They must both be called as witnesses for the prosecution; but I shall allow the counsel for the prosecution every latitude in examining them"); 1847, R. *v.* Woodhead, 2 C. & K. 520 (prosecution not bound to call all indorsed witnesses, "the rule which the judges have lately laid down"; but they "should be here," because otherwise the defendant might rely on the indorsement and neglect to summon them himself); 1847, R. *v.* Barley, 2 Cox Cr. 191 (arson; Pollock, C. B., at first agreed with an unreported ruling of Alderson, B., that indorsed witnesses need not be called, but "after consulting Coleridge, J., intimated that the witnesses ought to be called"); 1848, R. *v.* Edwards, 3 Cox Cr. 82 (Erle, J.: "I believe a majority of the judges have distinctly decided that the counsel for the prosecutor is not bound to call all the witnesses at the back of the bill"); 1848, R. *v.* Farrell, 3 Cox Cr. 139 (Ireland; Pennefather, B.: "It is not only due to the public, but also due to the prisoner, that every one produced before the grand jury should be called"); 1857, Monaghan, C. J., in Spollen's Trial, Ire., pamph. 122 ("We see no obligation to examine any witness. The duty of the crown is simply this, to examine and bring forward every trustworthy witness upon whose truth and accuracy they can rely; but it is not their duty to bring forward any witness that they may think is not telling the truth"); 1858, R. *v.* Cassidy, 1 F. & F. 79 (Parke, B., "said that certainly the usual course was for the prosecutor to call the witness, and if he declined to examine, the prisoner might cross-examine him. He thought however, the practice did not stand upon any very clear or correct principle, and was supported only on the authority of single judges"; "the correct principle" being merely that the prosecutor "by having had certain witnesses examined before the grand jury whose names were on the back of the indictment, he only impliedly undertook to have them in court for the prisoner to examine them as his witnesses; for the prisoner, on seeing the names there, might have abstained from subpœnaing them"; and he ruled that the prosecutor was not bound to call); 1876, R. *v.* Thompson, 13 Cox Cr. 181 (Lush, J., followed R. *v.* Edwards).

By St. 1894, 57 & 58 Vict. c. 41, § 16 (Prevention of Cruelty to Children), providing for using the child's deposition when its evidence was not "essential," some question arose whether the cause could be proceeded with at all for lack of the child's testimony; but a statute of 1904, 4 Edw. VII, omitted the doubtful clause; citations are given *ante*, § 1411.

[2] 1914, R. *v.* Hazel and Westlake, 16 D. L. R. 378, Man. (conspiracy with K. to assist K. to escape from jail when confined under a charge of murder; trial Court's refusal to call K. as a witness, or to direct the prosecution to call him, held proper on the facts).

at the English bar between professional custom and a rule of law, served to establish in some quarters the notion that a rule of common law existed, requiring the prosecution to call all indorsed witnesses or all eye-witnesses. This notion first obtained a recognition in Michigan, where it became firmly established.[3] But in only one or two other jurisdictions has it found favor,

[3] The rule begins in 1872, with Hurd *v.* People; but the opinion in that case sought to support it by prior unrelated rulings, which really dealt only with the relevancy of circumstantial evidence; whether the rule in Michigan to-day applies to indorsed witnesses also, or only to eye-witnesses, is doubtful: 1862, Maher *v.* People, 10 Mich. 212, 225 (murder; evidence of the deceased's adultery with the defendant's wife just before the killing, and of the defendant's information of it, held admissible for the defendant, on the ground that the prosecution should not "designedly select a part of the facts," but should "show the transaction as a whole"; citing, "by analogy," the above English cases, and adding *obiter:* "For myself, I am inclined to the opinion that all the facts constituting the 'res gestæ,' so far as the prosecuting counsel is informed of and has the means of proving them, should . . . be laid before the jury by the prosecution"); 1868, Brown *v.* People, 17 Mich. 429, 433 (murder; prosecution's evidence of a smell of chloroform about the premises, admitted; because it was "both the right and the duty of the prosecution . . . to give to the jury by evidence as complete a picture as possible of all the surroundings"); 1871, Strang *v.* People, 24 Mich. 1, 10 (rape; defendant's conduct before and after, admitted for prosecution, citing the Brown case); 1872, Hurd *v.* People, 25 Mich. 404, 416 (murder; circumstances affecting self-defence considered; the principle of the Maher case invoked as authority for a ruling that the prosecution should have produced a certain eye-witness of the assault; the English cases cited, and the present rule here first laid down); 1874, Wellar *v.* People, 30 Mich. 16, 22 (murder; one of two eye-witnesses required to be called; the rule does not perhaps require all where they would be too numerous; but indorsement of name involves no more than to "have the witness in court ready to be examined"); 1877, Bouker *v.* People, 37 Mich. 4, 8 (celebrating unlawful marriage; certain bystanders not required to be called, because merely cumulative and also participants in crime); 1878, Thomas *v.* People, 39 Mich. 309, 312 (assault with intent to murder; failure of the only eye-witness to certain conduct to respond to subpœna, no excuse for not producing); 1878, People *v.* Goldberg, 39 Mich. 545 (receiving stolen goods; defendant's brother-in-law, at whose house the goods were afterwards deposited, not required to be called); 1879, People *v.* Gordon, 40 Mich. 716, 720 (burglary; available eye-witness not produced; inference may be drawn); 1880, People *v.* Long, 44 Mich. 296, 6 N. W. 673 (larceny; defendant's father, who searched him immediately afterwards, not required to be called); 1883, People *v.* Quick, 51 Mich. 547, 18 N. W. 375 (larceny; prosecution need not call every witness named on the information; no cases cited); 1883, People *v.* Wolcott, 51 Mich. 612, 618, 17 N. W. 78 (larceny; defendant's wife indorsed, not required to be called on account of relationship); 1884, People *v.* Henshaw, 52 Mich. 564, 18 N. W. 360 (larceny; same; indorsed witness not present at the offence need not be called); 1889, People *v.* Swetland, 77 Mich. 53, 57, 43 N. W. 779 (forgery; persons whose names were borne on the instrument, required to be called by prosecution); 1890, People *v.* McCullough, 81 Mich. 25, 34, 45 N. W. 515 (manslaughter; "there is no rule requiring the prosecution to call accomplices as witnesses," but it should not at the same time join them, if eye-witnesses, as defendants, so as to disqualify them for defendant); 1891, People *v.* Deitz, 86 Mich. 419, 428, 49 N. W. 296 (assault with intent to do bodily harm; prosecution held bound to call four eye-witnesses); 1892, People *v.* Wright, 90 Mich. 362, 51 N. W. 517 (keeping a house of ill-fame; a companion of one witness to an act of prostitution, not required to be called, the act being merely evidence and not the offence); 1892, People *v.* Kenyon, 93 Mich. 19, 22, 52 N. W. 1033 (assault and battery; a fifth person present, the only indifferent one, required to be called); 1894, People *v.* Germaine, 101 Mich. 485, 60 N. W. 44 (assault with intent to murder; the second of two eye-witnesses required to be called); 1894, People *v.* Kindra, 102 Mich. 147, 150, 60 N. W. 458 (keeping open a saloon after hours; witnesses merely cumulative to a matter fully proved, not required to be called; rule depends upon circumstances); 1895, People *v.* Considine, 105 Mich. 149, 63 N. W. 196 (certain witnesses required, in trial Court's discretion, to be called); 1895, People *v.* Resh, 107 Mich. 251, 65 N. W. 99 (accomplice need not be called); 1896, People *v.* Pope, 108 Mich. 361, 66 N. W. 213 (calling and tendering for cross-examination suffices); 1896, People *v.* Grant, 111 Mich. 346, 70 N. W. 647 (rule applied); 1897, People *v.* Baker, 112 Mich. 211, 70 N. W. 431 (accomplice need not be called); 1897, People *v.* Savant, 112 Mich. 297, 70 N. W. 576 (calling one who did not see the affray, not necessary); 1898, People *v.* Hughes, 116 Mich. 80, 74 N. W. 309 (the witness need not be asked about the

and in these it is not clear that the rule in both branches has been accepted; elsewhere, it is repudiated.[4]

act charged; calling, swearing, and tendering, sufficient); 1904, People *v.* Hossler, 135 Mich. 384, 97 N. W. 754 (like People *v.* Wolcott, *supra*); 1921, People *v.* Schwartz, 215 Mich. 197, 183 N. W. 723 (murder; principle applied).

From the following rulings on the present point should be distinguished (as they sometimes are not) the rule and the precedents (*ante*, §§ 1850–1855) as to the *exclusion of unindorsed* witnesses.

[4] *Federal:* 1834, U. S. *v.* Gibert, 2 Sumner 19, 81 (piracy, and setting fire to a ship; a witness who saw the match applied, not required, in preference to one who saw the smoke, etc.);
Arizona: 1900, Halderman *v.* Terr., 7 Ariz. 120, 60 Pac. 876 (rule entirely repudiated);
Florida: 1886, Selph *v.* State, 22 Fla. 537, 543 (prosecution need not call all eye-witnesses nor all indorsed witnesses; see quotation *post*, § 2080); 1899, Alvarez *v.* State, 41 Fla. 532, 27 So. 40 (Selph case approved);
Idaho: 1901, State *v.* Rice, 7 Ida. 762, 66 Pac. 87 (failure to call an indorsed witness, held not error on the facts);
Illinois: 1880, Lamb *v.* People, 96 Ill. 73, 91 (murder; per Craig, J., the prosecution is not bound to call all the indorsed witnesses); 1886, Bressler *v.* People, 117 Ill. 422, 437, 8 N. E. 62 (larceny; prosecution not compelled to call all the indorsed witnesses); 1902, Carle *v.* People, 200 Ill. 494, 66 N. E. 32 (similar rule); 1912, People *v.* Baskin, 254 Ill. 509, 98 N. E. 957 (State may ask judge to call an eye-witness); 1912, People *v.* Rardin, 255 Ill. 9, 99 N. E. 59 (similar for three indorsed witnesses);
Indiana: 1877, Winsett *v.* State, 57 Ind. 26, 30 (illegal sale of liquor; prosecution not bound to call "all the witnesses present at the transaction"); 1889, Keller *v.* State, 123 Ind. 110, 111, 23 N. E. 1138 (assault and battery; similar ruling); 1892, Siberry *v.* State, 133 Ind. 677, 685, 33 N. E. 681 (calling of eye-witnesses not necessary, where unavailable; whether ever demandable, undecided); Burns' Ann. St. 1914, § 1944 (in a complaint before a justice for assault or battery, no trial can be had unless the injured party "be present as a witness at the trial, or having been subpœnaed refuses to attend and cannot be compelled to attend by attachment for any other cause than sickness or inability to attend by reason of the injuries" alleged, or unless he is subpœnaed and returned not found, etc.; and "no trial shall be had upon a complaint for an affray, unless some person who saw the same shall be present as a witness, or having been subpœnaed refuses to attend");
Iowa: 1883, State *v.* Middleham, 62 Ia. 150, 153, 17 N. W. 446 (murder; prosecution not bound to call all eye-witnesses); 1899, State *v.* Hudson, 110 Ia. 663, 80 N. W. 232, *semble* (rule not accepted); 1920, State *v.* Christ, 189 Ia. 474, 177 N. W. 54 (homicide; the State not required to call deceased's wife, who was in Court and had testified before the grand jury);
Kentucky: 1911, Porter *v.* Com., 145 Ky. 548, 140 S. W. 643 (two of five eye-witnesses of a homicide; Commonwealth's attorney's discretion controls);
Louisiana: 1904, State *v.* Gosey, 111 La. 616, 35 So. 786 (the Michigan doctrine given an indefinite approval; here, with reference to putting on the stand a co-indictee not on trial); 1878, State *v.* Williams, 30 La. Ann. 842 (murder; the calling of certain witnesses not required; Michigan rule repudiated; but the State's attorney's unfair conduct may be ground for a new trial); 1906, State *v.* Goodson, 116 La. 388, 40 So. 776 (State *v.* Gosey approved); 1906, State *v.* Stewart, 117 La. 476, 41 So. 798 (assault with intent to kill; an exception to the judge's refusal "to require the district attorney to call the witnesses to the 'res gestæ' and to place them upon the stand for examination" was overruled, following State *v.* Williams; the professional duty of the State officer to elicit all the truth "is other and very different from a right in the accused to require that the district attorney" should produce all the eye-witnesses; "it may be that some special case might justify special relief");
Massachusetts: 1808, Com. *v.* Kinison, 4 Mass. 646 (counterfeit note; the receiver of it testified by accidental marks to its identity, but a person to whom he had passed the note received was not called; held, on the principle of the best evidence and the authority of Williams *v.* E. I. Co., quoted *ante*, § 1339, that the other person should have been called); 1885, Com. *v.* Haskell, 140 Mass. 128, 2 N. E. 773 (arson; "there is no law which required the Government, rather than the defendant, to hold or call him [an alleged accomplice] as a witness");
Minnesota: 1899, State *v.* Smith, 78 Minn. 362, 81 N. W. 17 (not necessary to call all indorsed witnesses, nor, *semble*, all eye-witnesses); 1907, State *v.* Sheltrey, 100 Minn. 107, 110 N. W. 353 (the prosecution held not bound to call all eye-witnesses or indorsed witnesses; but either party may comment on the failure of the other to call, on the principles of § 285, *ante*);
Mississippi: 1880, Morrow *v.* State, 57 Miss. 836 (murder; the stepdaughter of defendant's brother, an eye-witness, whose former testimony exonerated defendant, not required to be produced; production not necessary in general, except in the Court's discretion, or

§ 2080. **Same: (2) Policy of the Rule.** The arguments advanced in favor of the rule are in effect two only. The first, which applies only to the case

where the eye-witness is biassed against defendant); 1894, Hale *v.* State, 72 Miss. 140, 144, 16 So. 387 (murder; prosecution held not compelled to call the eye-witnesses, who were here the accused's sister and a co-defendant); 1895, Carlisle *v.* State, 73 Miss. 87, 19 So. 207 (criminal seduction; trial Court's discretion approved in not requiring production of the woman, who would have favored defendant);
Missouri: 1879, State *v.* Kilgore, 70 Mo. 546, 550 (question raised, but not decided; the desired person not being "certainly" an eye-witness); 1882, State *v.* Eaton, 75 Mo. 586, 593 (on the suggestion of defendant's counsel that there were other eye-witnesses, no calling is required; rule wholly repudiated); 1895, State *v.* Harlan, 130 Mo. 381, 32 S. W. 997 (same); 1896, State *v.* David, 131 Mo. 380, 33 S. W. 28 (same); 1897, State *v.* Billings, 140 Mo. 193, 41 S. W. 778 (no rule requires calling all that have been summoned); 1919, State *v.* Ferguson, 278 Mo. 119, 212 S. W. 339 (not all eye-witnesses need be called);
Montana: Rev. C. 1921, § 11981 ("Upon a trial for murder or manslaughter it is not necessary for the State to call as witnesses all persons who are shown to have been present at the homicide; but the Court may require all of such witnesses to be sworn and examined"); 1884, Terr. *v.* Hanna, 5 Mont. 248, 5 Pac. 252 (murder; wife of deceased required to be called, the deceased's family being the only eye-witnesses; the authorities described as "clear and conclusive," citing only the Michigan and earlier English cases); here the Code was enacted; then: 1893, State *v.* Russell, 13 Mont. 164, 169, 32 Pac. 854 (murder; one not an eye-witness, not required to be called); 1896, State *v.* Metcalf, 17 Mont. 417, 424, 43 Pac. 182 (murder; one of two persons present required to be called, though drunk at the time of the affray; the rule applies to "those witnesses who were present at the transaction, or who can give direct evidence on any branch of it, . . . unless possibly where too numerous"); 1898, State *v.* Rolla, 21 Mont. 582, 55 Pac. 523 (under P. C. § 2082, the calling of eye-witnesses is in the Court's discretion); 1903, State *v.* Tighe, 27 Mont. 327, 71 Pac. 3 (all need not be called); 1920, State *v.* Vandervoort, 57 Mont. 540, 189 Pac. 764 (homicide; the defendant's brother was the only eye-witness; the State held not bound to call him under the circumstances; the opinion, by relying upon Chitty's Criminal Law and not referring to the original authorities, is led to record the erroneous statement that "under the old English common law, the prosecution was compelled to place all eye-witnesses on the stand");
New York: 1857, People *v.* Fitzpatrick, 5 Park. Cr. C. 26 (rule denied);
North Carolina: 1841, State *v.* Martin, 2 Ired. 101, 119 (murder; rule wholly repudiated); 1849, State *v.* Stewart, 9 Ired. 342, 344 (murder; preceding case approved); 1850, Simpson's Trial, N. C., 5 Amer. St. Tr. 370, 384 (murder by poison; endorsed witnesses, not required to be called; here, two medical men; State *v.* Martin followed); 1853, State *v.* Perry, Busbee 330, 333; State *v.* Martin followed); 1876, State *v.* Smallwood, 75 N. C. 104, 106 (same); 1880, State *v.* Baxter, 82 N. C. 602, 606 (same);
North Dakota: 1893, State *v.* McGahey, 3 N. D. 293, 301, 55 N. W. 753 (shooting with intent to kill; a seventh eye-witness not required to be called; precise rule not clearly stated);
Oregon: 1898, State *v.* Barrett, 33 Or. 194, 54 Pac. 807 (no such rule of compulsory calling exists; but the trial Court might in discretion require the production of testimony which the prosecution was attempting to suppress; quoted *post*, § 2080);
Pennsylvania: 1880, Donaldson *v.* Com., 95 Pa. 21, 24 (rape; a physician who had examined the woman "should have been called as a witness," but "we do not reverse for this reason . . . but merely express our opinion as to what should have been done in the peculiar circumstances of this case"); 1883, Rice *v.* Com., 102 Pa. 408 (criminal seduction; it was "the plain duty" of the prosecution to call the woman's father, who was present at an alleged admission of a promise of marriage); 1899, Com. *v.* Keller, 191 Pa. 122, 43 Atl. 198 (cumulative testimony to threats; calling not required); 1908, Com. *v.* Deitrick, 221 Pa. 7, 70 Atl. 275 (rule repudiated);
Philippine Isl.: 1912, U. S. *v.* Gonzalez, 22 P. I. 325 (adultery; one of several eye-witnesses, not required to be called); 1914, U. S. *v.* Bragat, 28 P. I. 78 (prosecuting officer's discretion generally controls);
Porto Rico: 1903, People *v.* Roman, 5 P. R. 17 (rape; the prosecution required to produce two women, said to be the ones raped, for identification); 1904, People *v.* Battistini, 5 P. R. 120 (fraudulent representations; certain witnesses not required to be called); 1904, People *v.* Perez, 7 P. R. 345 (seduction; a boy eye-witness required to be called); 1912, People *v.* Roman, 18 P. R. 217, 231 (murder, no requirement for producing "all the witnesses whose names were indorsed on the information");
South Dakota: 1906, State *v.* Kapelino, 20 S. D. 591, 108 N. W. 335 (assault with intent; Michigan rule repudiated);
Texas: 1876, Porter *v.* State, 1 Tex. App. 394, 396 (assault with intent to murder; assaulted party required to be called, on the "best evidence" principle); 1886, Hunnicutt *v.* State, 20 Tex. App. 632, 639 (murder; three

of indorsed witnesses, is that the failure to call them may deprive the accused of their testimony, since he has properly expected, from observing their names indorsed on the indictment, to find them called by the prosecution, and may therefore have omitted to secure them by summons on his own behalf.[1] The second argument, which applies to both branches of the rule, is that the burden and risk of calling a hostile witness, and of being obliged to examine a material witness under the restrictions applicable to examining one's own witness (*ante*, § 896), should fall upon the prosecution rather than upon the accused:

1872, CHRISTIANCY, C. J., in *Hurd* v. *People*, 25 Mich. 404, 416: "The prosecutor in a criminal case is not at liberty, like the plaintiff in a civil case, to select out a part of an entire transaction which makes against the defendant, and then to put the defendant to the proof of the other part, so long as it appears at all probable from the evidence that there may be any other part of the transaction undisclosed, especially if it appears to the Court that the evidence of the other portion is attainable. The only legitimate object

other eye-witnesses required to be called, though relatives of the defendant; general principle sanctioned); 1886, Phillips *v.* State, 22 Tex. App. 139, 174, 2 S. W. 601 (murder; whether a certain witness should be called, left to the trial Court's discretion); 1887, Wheelis *v.* State, 23 Tex. App. 238, 245, 5 S. W. 224 (same); 1891, Thompson *v.* State, 30 Tex. App. 325, 328, 17 S. W. 448 (murder; certain eye-witnesses held improperly not put on the stand); 1893, Mayes *v.* State, 33 Tex. Cr. 33, 41, 24 S. W. 421 (like Phillips *v.* State); 1894, Reyons *v.* State, 33 Tex. 143, 144, 25 S. W. 786 (same); 1895, Kidwell *v.* State, 35 Tex. 264, 33 S. W. 342; 1896, Williford *v.* State, 36 Tex. 414, 424, 37 S. W. 761 (murder; defendant's mother not required to be called; "there is no rule of law to compel the State to put on every witness who may have been near and knew of any circumstances connected with the killing"); 1899, McGrew *v.* State, — Tex. —, 49 S. W. 226 (similar); 1900, Robinson *v.* State, — Tex. —, 57 S. W. 811 (similar); 1901, McCandless *v.* State, 42 Tex. Cr. 655, 62 S. W. 745; 1903, Holloway *v.* State, 45 Tex. Cr. 303, 77 S. W. 14 (this and the preceding case leave the rule still unsettled); 1905, Thompson *v.* State, — Tex. Cr. —, 89 S. W. 1081 (assault; one eye-witness having testified, the rule that the others must be called was held not applicable; "it seems that the later authorities have drifted away from that proposition; but it is not necessary to discuss it"; is "drifting away" a process to be viewed with equanimity?); 1906, McCrear *v.* State, 49 Tex. Cr. 228, 94 S. W. 899 (assault on defendant's wife; the State not required to call the wife);

Utah: 1886, People *v.* Oliver, 4 Utah 460, 11 Pac. 612 (assault; an indorsed witness out of the jurisdiction, not necessary to be called); 1889, People *v.* Robinson, 6 Utah 101, 104, 21 Pac. 403 (assault; "we know of no law requiring the prosecution to call the witnesses whose names are indorsed"; yet if the transaction is only imperfectly disclosed, it is the prosecution's duty to call those who can complete it);

Vermont: 1877, State *v.* Magoon, 50 Vt. 333, 340 (said *obiter* that "the State is bound to produce and use all witnesses within reach of its process, of whatever character, whose testimony will throw light upon and characterize the transaction under inquiry"; compare the citation *ante*, § 918); 1894, State *v.* Harrison, 66 Vt. 523, 527, 29 Atl. 807 (same, said *obiter*); 1897, State *v.* Slack, 69 id. 486, 38 Atl. 311 (same);

Virginia: 1892, Hill *v.* Com., 88 Va. 633, 639, 14 S. E. 330 (shooting with intent to wound; indorsed witnesses need not all be called, unless the trial Court in discretion requires it; "it is for the representatives of the Commonwealth to say what witnesses he may call"; yet the trial Court may in discretion make an order requiring a certain eye-witness to be called); 1893, Clark *v.* Com., 90 Va. 360, 367, 18 S. E. 440 (murder; same ruling as to eye-witnesses; here the trial Court had exercised its discretion to call the witness);

Washington: 1895, State *v.* Payne, 10 Wash. 545, 39 Pac. 57 (prosecution need not produce all its witnesses);

West Virginia: 1882, State *v.* Cain, 20 W. Va. 679, 685, 693 (murder; State not required to call an eye-witness; rule wholly repudiated, on the ground that defendant has equal power to produce the witness);

Wisconsin: 1909, Dillon *v.* State, 137 Wis. 655, 119 N. W. 352 (rule rejected);

Wyoming: 1899, Ross *v.* State, 8 Wyo. 351, 57 Pac. 924 (eye-witness not required to be called); 1899, Johnson *v.* State, ib. 494, 58 Pac. 761 (indorsed witness, not being an eye-witness, not required to be called).

§ 2080. [1] Stated by Parke, B., in R. *v.* Cassidy, quoted *ante*, § 2079.

of the prosecution is to show the whole transaction as it was, whether its tendency be to establish guilt or innocence."

1874, CAMPBELL, J., in *Wellar* v. *People*, 30 Mich. 16, 24: "If such witness need not be called by the prosecution, the defense cannot impeach him, and must either call him and run the risk of finding him against them, or, if they fail to call him, be prejudiced by the argument that they have omitted to prove what was in their power, and must have done so because they dared not call out the facts. There is no fairness in such a practice, and a prosecutor should not be permitted to resort to it. He is not responsible for the shortcomings of his witnesses, and he is responsible for any obstacle thrown in the way of eliciting all the facts."

Any rule supported by the names of Campbell and Christiancy must receive respectful consideration; but it may be doubted whether they ever lent their great authority to a doctrine of so little worth. As to the first argument above noted, it is sufficiently met by the trial judge's unquestioned power to postpone the trial in case of a real hardship; ordinarily, the accused's counsel can protect himself by ascertaining beforehand the intentions of the prosecuting counsel, which the latter is in fairness bound to disclose. As to the second argument, it is as easily answered. There is no question, it must be remembered, of losing useful testimony; for the accused has the power to summon the same witness if he desires to. The question is merely whether the accused can force the prosecution to summon him and tender his testimony. The efforts to establish the rule have been made by counsel who wish to have a witness' testimony without the restrictions of using him as their own. These restrictions are no doubt artificial and impolitic (*ante*, § 899), and the present issue is merely another instance of the absurdity of the rule against impeaching one's own witness. But so long as the rule exists, and exists equally for accused and for prosecution, there is no reason why the former should be allowed to evade it by indirection. Its burden must be borne by one party as well as by the other. So far as the leading-question rule is concerned, it does not hamper the direct examination of a hostile witness (*ante*, § 774); and it thus disappears from consideration. The sum and substance, therefore, of the proposed rule here under consideration is that the counsel for the accused desires to be freed from the disadvantage of not being able to impeach a witness called by himself; that is the 'animus' of all these efforts. If that rule is a good one, it ought not to be evaded in this way; if it is a bad one, there ought to be no exemption for one side which is withheld from the other side.[2] There is no occasion for a new rule compelling the prosecution to call a witness for no other reason than to relieve the defence from those restrictions.

This answer, in one form or another, has been repeatedly expounded in repudiation of the proposed rule:

1882, HENRY, J., in *State* v. *Eaton*, 75 Mo. 586, 594: "One accused of crime is entitled in this country to the State's process to compel the attendance of such witnesses as he may desire; and there is therefore no sound reason for requiring the State to introduce

[2] In some jurisdictions, the just method is taken of allowing either party to impeach, where the witness is one called by the Court using its discretion (*ante*, § 918).

all persons to testify who were witnesses to the alleged criminal act. It is not unfrequently the case that a hundred persons are present at a homicide, and to require the State to introduce them all would unreasonably protract a trial and cause a vast and unnecessary accumulation of costs. We see no reason why the State's attorney, acting under official oath, and as much bound as the representative of the State to protect the innocent as to bring the guilty to justice, should not be left to his discretion as to what number and character of witnesses he will call for the State to prove an alleged crime against the accused. If others than those called by him know facts favorable to the accused, he may have process to compel their attendance; and if they come to speak the truth, a cross-examination by the State's attorney can be a matter of no consequence to them."

1886 McWHORTER, C. J., in *Selph* v. *State*, 22 Fla. 537, 544: "There is no necessity for any such practice in this State. The prisoner . . . is entitled to the compulsory process of the Court to compel the attendance of his witnesses, and if he introduces no evidence, he is entitled to the concluding argument to the jury. Every lawyer knows the value to the prisoner of this privilege. Were the rule as insisted on in force in this State, it would be difficult to convict a prisoner where the State was compelled to introduce the evidence relied on by him for his defence, and then, because he had not introduced any evidence himself, allow him the concluding argument to the jury. Besides this, the compulsion of one side to introduce witnesses for the other would create confusion in practice as to the right of contradiction of witnesses and their cross-examination; and would be useless, as the prisoner has the power to put the witnesses on the stand himself if he desires it."

1892, LEWIS, P., in *Hill* v. *Com.*, 88 Va. 633, 639, 14 S. E. 330: "It is obvious that the rule contended for by the prisoner would, if adopted, lead to very serious results in the administration of justice. If the prosecuting attorney were bound to call all attainable witnesses present at the transaction, he might often be compelled to introduce witnesses unworthy of credit, and yet not be permitted to impeach them. He might be unwittingly compelled to call confederates of the defendant, and thus by his own evidence win an easy victory for the accused at the expense of justice."

1898, BEAN, J., in *State* v. *Barrett*, 33 Or. 194, 54 Pac. 807: "[The practice] probably came into use in England at a time when the right of a defendant in a criminal case to be represented by counsel, or to have witnesses appear and testify in his behalf, was either denied entirely, or very much abridged. Under such circumstances, it was, of course, important that the prosecution be compelled to prove the entire transaction, and to call all the witnesses present at the time, whether they would testify for or against the defendant. But these restrictions upon the rights of a defendant do not, and never did, exist in this country. Here the right of the accused to appear by counsel, and to have compulsory process for obtaining witnesses in his favor, is everywhere recognized, and generally guaranteed by the fundamental law. There is therefore no necessity for requiring the State to call all the persons who were present when the offense was committed, or any particular number of them. The rights of the defendant are not in any way abridged by a failure to do so. He has the assistance and advice of counsel selected by himself, if able to employ one, and, if not, appointed by the Court, and compulsory process for obtaining witnesses at the public expense. In addition to this, the State is bound to make out its case beyond a reasonable doubt; and if the prosecuting officer does not call sufficient witnesses for that purpose, or if any unfavorable inference can be drawn from his failure to call any witness, the defendant is not likely to suffer by the omission; and if he calls only such witnesses as are favorable to the State, the defendant has a right to call any others which he may suppose will relate the facts favorable to him."

§ 2081. **Corpus Delicti must be proved by Eye-witnesses, not merely by Circumstantial Evidence.** The attempt has often been made to establish a rule that, for proving the 'corpus delicti' — the fact of death, on a charge of

homicide, or of abstraction of goods, on a charge of larceny [1] — there must be direct or *testimonial evidence, i. e.* a witness who has seen the lifeless body of the person, or the vacant place where the goods were. This attempt has been founded chiefly upon a cautionary passage of Lord Hale's and a misunderstood utterance of Lord Stowell's:

1680, Sir *Matthew* HALE, Pleas of the Crown, II, 290: "I would never convict any person for stealing the goods 'cujusdam ignoti' merely because he would not give an account how he came by them, unless there was due proof made that a felony was committed of these goods. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead, — for the sake of two cases, one mentioned in my lord Coke's P. C. cap. 104, p. 232, a Warwickshire case,[2] another that happened in my remembrance in Staffordshire." [3]

1790, Sir *Wm.* SCOTT (Lord STOWELL) in *Evans* v. *Evans*, 1 Hagg. Cons. 35, 105 (divorce for cruelty; the particular issue being whether the husband had wilfully pushed the wife out of bed, and the only fact established being that the wife somehow had fallen out of bed): "I certainly shall not presume circumstances in order to make out such a case [of intentional ejection]. It has been asked, and very properly asked, 'Don't Courts of justice admit presumptive proof? Do you expect ocular proof in all cases?' I take the rule to be this: If you have a criminal fact ascertained, you may then take presumptive proof to show who did it, — to fix the criminal, having then an actual 'corpus delicti.' Show me, then, in this case, that the crime has been committed, and I shall not be at a loss to fix the criminal. But to take presumptions in order to swell an equivocal fact, a fact that is absolutely ambiguous in its own nature, into a criminal fact, is a mode of proceeding of a very different nature, and would, I take it, be an entire misapplication of the doctrine of presumptions. The fact, then, not being a criminal one upon the face of it, and being subject to three or four different interpretations, all of which are perfectly innocent, I think myself by no means at liberty to say that I ought by presumption merely to make out this fact to be necessarily an act of delinquency."

1858, JOHNSON, C. J., in *Ruloff* v. *People*, 18 N. Y. 179, 184: "[The rule] may have its probable foundation in the idea that where direct proof is absent as to both the fact of the death and of criminal violence capable of producing death, no evidence can rise to the degree of moral certainty that the individual is dead by criminal intervention, or even lead by direct inference to those results; and that where the fact of death is not certainly ascertained, all mere inculpatory moral evidence wants the key necessary for its satisfactory interpretation and cannot be depended on to furnish more than probable results. It may be also that such a rule has some reference to the dangerous possibility that a general preconception of guilt, or a general excitement of popular feeling, may creep in to supply the place of evidence, if upon other than direct proof of death or a cause of death the jury are to be permitted, upon whatever evidence may be presented to them competent upon any part of the case, to pronounce a defendant guilty."

§ 2081. [1] The definition of the term 'corpus delicti' has been already examined (*ante*, § 2072).

[2] The following is the case referred to: 1628, Coke, Third Institute, 232 (Warwickshire case of 1611; an uncle, charged with the murder of a niece who had disappeared, produced another child to impersonate the niece; the fraud being discovered, he was hanged; in truth, the niece had run away, and at the age of sixteen returned to claim her property).

[3] This was a case resembling that of the Perrys, cited *infra*, and perhaps that very case.

A similar warning to Lord Hale's was later given in a forcible passage not so often cited: 1688, Sir John Hawles, Solicitor-General, Remarks on Cornish's Trial, 11 How. St. Tr. 463: "To say truth, when verdicts have been given on such evidence [probable presumptions or inferences], they have been often faulty. [After noting the Perry case and the Warwickshire case,] therefore it is a most dangerous and unwarrantable thing for a jury in capital matters, especially in treason, to convict a person upon the evidence of probabilities."

The class of cases referred to by Lord Hale certainly call attention to the risk of hastily concluding that an accused is guilty before it appears plainly that the alleged injury has been actually suffered. These cases, to be sure, are rare enough; not half a dozen seem to be recorded in all our annals.[4] But their rarity of occurrence makes caution none the less necessary. Lord Hale's remark, however, appears to be nothing more than a general expression of caution, not a definite rule of law. Moreover, a caution as to the degree of proof or persuasion is a very different thing from a requirement as to a specific kind of evidence; and it does not appear that he meant to say definitely that an eye-witness of the 'corpus delicti' was necessary. As to Lord Stowell's remark, he was in the first place dealing with the civil-law rules of Evidence, which rested on a different classification;[5] and in the next place, he merely requires that some evidence be produced, and that one's conclusion be not formed merely by bare presumption or inference. The supposed authorities, in short, yield scanty support for the rule.

Concluding, then, that a caution is desirable as to the degree of persuasion that ought to be insisted on in the tribunal, *i. e.* a rule in the nature of the reasonable-doubt rule (*post*, § 2497), but asking whether there is any proper place for a rule of Evidence requiring an eye-witness to the fact of loss or injury, the unnecessary and impracticable nature of such a fixed rule is apparent. It would be unnecessary, because complete persuasion may often be attained without such testimony. It would be impracticable, because such testimony may often be unattainable, and then the effect of such a rule is merely to promise immunity to such criminals as can also succeed in making that kind of testimony unavailable:

1854, *R.* v. *Burton*, Dears. Cr. C. 282, 18 Jur. 157; the defendant was found, with pepper in his pocket, coming out of a warehouse containing a large quantity of similar pepper, both loose and in bags; it was impossible to ascertain directly whether there was

[4] Besides the Staffordshire and Warwickshire cases, the following are the only ones of false conviction that appear to be recorded: 1705, Captain Green's Trial, 14 How. St. Tr. 1199, 1294, 1309, 1312 (piracy by seizing a ship in the East Indies; it subsequently appeared that the ship and crew in question were safe and had never been seized at all); 1660, Perry's Case, 14 How. St. Tr. 1312 (murder; the supposed murdered man, whose body was not found, returned home two years after the accused's execution); 1819, Boorn's Case, Rutland, Vt., Fay & Burt's Pam. Report, 5 Law Reporter, 193, 10 North Amer. Review 418, Greenleaf's Evidence, 7th ed., § 214, note, reprinted also in 6 American State Trials Series (murder; several years after the disappearance, there was a confession, trial, and conviction; the culprit was about to be hung, when the supposed deceased was discovered alive and brought back; but here parts of the body were believed to have been found).

Compare the cases of false confession (*ante*, § 867). In 12 American Criminal Reports 213 (1905), the editor, Mr. John F. Geeting, has a valuable note collecting cases, including some not elsewhere noticed.

[5] It may be noted here that the passage in the Roman Digest sometimes put forward as the source of the supposed rule, concerns an altogether different problem: Digesta, 29, 5, 1, §§ 1, 24: De senatus consulto Silaniano et Claudiano: "Cum aliter nulla domus tuta esse possit, nisi periculo capitis sui custodiam dominis tam ab domesticis quam ab extraneis praestare servi cogantur, ideo senatus consulta introducta sunt de publica quaestione [torture] a familia necatorum habenda. . . . Item illud sciendum est, nisi constet aliquem esse occisum, *non haberi* de familia *quaestionem:* liquere igitur debet scelere interemptum, ut senatus consulto locus sit."

any shortage in the warehouse amount. Mr. *Ribton*, of counsel: "It is submitted that the 'corpus delicti' must be proved in every case, and you cannot make any difference in the application of the rule." MAULE, J.: "The offence must be proved. If a man go into 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 [by direct testimony] that any wine was stolen or any wine missed." Mr. *Ribton:* "The 'corpus delicti' must be proved." MAULE, J.: "Where is the rule that the 'corpus delicti' must be expressly proved?" Mr. *Ribton:* "In Lord Hale it is so laid down." MAULE, J.: "Only as a caution in cases of murder." JERVIS, C. J.: "We are all of opinion that there is nothing in the objection."

1834, STORY, J., in *U. S.* v. *Gibert*, 2 Sumn. 19, 27: "[This] proposition [that the body must be found] certainly cannot be admitted as correct in point of common reason or of law. . . . A more complete encouragement and protection for the worst offences of this sort could not be invented than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas."

1850, SHAW, C. J., in *Com.* v. *Webster*, Mass., Bemis' Rep. 479: "It has sometimes been said by judges that a jury ought never to convict in a case of homicide unless the dead body be found and identified. This, as a general proposition, is undoubtedly true and correct; and disastrous and lamentable consequences have resulted from disregarding the rule. But, like other general rules, it is to be taken with some qualification. It may sometimes happen that the dead body cannot be produced, although the proof of the death is clear and satisfactory; as in a case of murder at sea, where the body is thrown overboard in a dark and stormy night, at a great distance from land or any vessel; although the body cannot be found, nobody can doubt that the author of that crime is chargeable with murder."

A striking example, both of the sufficiency of circumstantial evidence for purposes of this kind and of the impracticability of a rule requiring any other sort of evidence, is found in a celebrated trial of some piratical murderers, in which Mr. Justice Story illuminated the subject in his charge to the jury:

1818, *Williams' Trial*, U. S. Circ. Ct. Boston, Russell & Gardner's Rep. 42, 68, 80; murder on the high seas. Mr. *Samuel L. Knapp*, for the defence: "The difference between a certainty to a common intent, and a certainty to an absolute intent, is greater than we commonly imagine. If a man goes out to sea in a small boat, and a storm arises, and afterwards the boat is found upset, it is fair and just, to all common purposes and intents, to infer that he has perished; but still he might not be dead; such instances have occurred in our time, and the supposed deceased was afterwards found to be alive. Would you not say, gentlemen, that a man who was seen going over the falls of Niagara in a skiff, and never heard of more, was dead? Yet men have gone over the falls safe, and it would not be impossible that he might be alive whom we thought was lost. When Daniel was cast into the lion's den, it might have been fairly inferred that he was instantly destroyed. But still that inference would have been false; for he was not killed; the angel of the Lord shut the mouths of the famished lions. Does not the same angel walk on the waters to rescue his charge from the deep? It was indeed a special providence; but that special providence which all acknowledge, and which no one can define, is constantly operating on all the incidents of life. If Baynard should at this time come into this court, it would surprise us; but stranger things than that have happened. In this case you have no right to conjecture or reason upon his being dead. The only question is, has his death been proved to a demonstration?" Mr. *George Blake*, for the prosecution: "First, then,

gentlemen, is it true that Thomas Baynard, the person alluded to, is actually dead? . . . Without the aid of inference or presumption, the fact is now established, that the body of this supposed victim was seen upon the deck of the schooner Plattsburgh, breathless, and to all appearance lifeless, on the night of that day which is mentioned in the indictment. That while lying in this situation, it was taken from the deck by two of the prisoners at the bar, Williams and Rog, and thrown into the sea. He was never afterwards seen on board the vessel; nor does it appear that, from that day to this, any man has seen or heard from him, as being alive on the face of the earth. The vessel, at the time of this occurrence, was upon the ocean, and at the distance of several hundred miles from any land. No other vessel was then in view; nor was any one seen for several days preceding or subsequent to the period alluded to. Such, gentlemen of the jury, are the circumstances, upon which the allegation is founded that this man is dead. Permit me to inquire, can there be a doubt of the fact? It is true indeed, that the body of this sufferer was not followed to his deathbed in the ocean, by either of the witnesses, who have spoken on this occasion. No one has declared to you, upon the sanctity of an oath, that he watched the process of that suffocation which is described in the indictment, or witnessed the very last gasp of the deceased. It has, therefore, been insisted by the counsel in the defence, and with a degree of earnestness that would denote their sincerity in the objection, that our evidence of the death is yet incomplete. The wide ocean must be ransacked, the dead body must have been discovered, or it would be unsafe and presumptuous to convict for the murder. Such, gentlemen, is the argument of counsel in the defence. . . . [But I say to you that] so sure as that the life of Thomas Baynard was not preserved by a miracle, if his body as well as spirit (as in one memorable instance that might be mentioned) were not literally translated, that fatal night, from its abiding place on earth, to another and a brighter world, so certain is the conclusion, that he is not now existing." STORY, J., charging the jury: "The counsel for the prisoner contend to you, that there is no evidence of the actual death of Baynard, that it is still possible he may have been saved, by some miraculous interposition, from the devouring waves to which they had committed him. But by what spirit of the deep was he protected? To what region has he been conveyed? He has gone, gentlemen, you will think, I believe, to that region towards which we are all of us advancing. If you are satisfied with the truth of the evidence presented to you, it is impossible for you to indulge the least doubt on the point of his actual death. In no case can you arrive, perhaps, at absolute certainty of the death of an individual. There always remains some ground for the conjectures of the doubting. They may say that your own senses are not always sufficient to satisfy you. Should you even see a man laid out in his coffin, you may yet call to mind, that there have been instances of resuscitation, which have contradicted the tenor of human experience. But we must act as reasonable men on reasonable evidence; and in this case, *that* can leave no doubt that Baynard is dead."

In the rulings in *England*, there was at first some indication of a willingness to erect Lord Hale's caution into a definite rule of law. But it may now be said that no such fixed rule is there countenanced, either at large, or for the specific cases of larceny and murder;[6] and in the ecclesiastical

[6] *England:* 1792, R. *v.* Hindmarsh, 2 Leach Cr. L., 4th ed., 569 (murder on shipboard by throwing the captain overboard; counsel for the defendant argued that the death was not shown and the captain might have been picked up by other ships; the Court "admitted the general rule of law," presumably meaning L. C. B. Hale's rule, and Mr. J. Ashurst "left it to the jury upon the evidence to say whether the deceased was not killed before his body was cast into the sea"; all the judges approved the finding of murder); 1820, Best, J., in R. *v.* Burdett, 4 B. & Ald. 95, 122 (criminal libel; the issue being whether there was evidence of publication in Leicestershire, to support the venue; "We must act on presumptive proof or leave the worst crimes unpunished. I admit, where the presumption is attempted to be

Courts Lord Stowell himself early repudiated such a rule for the proof of adultery.[7]

In the *United States*, it has been generally conceded that no such rule exists; *i. e. circumstantial evidence* of a proper degree of strength is *sufficient* to prove the death of the person, loss of the goods, or other injury forming the 'corpus delicti', and testimony by eye-witnesses of the deed done, or at least of the person's dead body, or of the vacant place where the goods were, is not required.[8] In three jurisdictions, however, such a rule has

[7] 1798, Williams *v.* Williams, 1 Hagg. Cons. 299 (Sir Wm. Scott: "[The Court will be] vigilant to see that the two main points of such cases [of adultery] are sufficiently proved, viz. the criminal act, and that the person against whom the proofs of that act is established was the wife. It is undoubtedly true that direct evidence of the fact is not required, as it would render the relief of the husband almost impracticable; but I take the rule to be that there must be such proximate circumstances proved" as satisfy the Court); 1810, Loveden *v.* Loveden, 2 Hagg. Cons. 1, 2 (Sir Wm. Scott: "It is a fundamental rule that it is not necessary to prove the direct fact of adultery").

[8] The following cases declare this, except so far as any qualifications are expressly noted; the qualification, sometimes made, that direct evidence must be produced *when it is obtainable*, lacks of course the most objectionable feature of the proposed rule, and expresses nothing more than the practice which any competent prosecuting officer would naturally observe:

Federal: 1834, U. S. *v.* Gibert, 2 Sumn. 19, 27 (quoted *supra*); 1858, U. S. *v.* Williams, 1 Cliff. 5, 20 (a rule requiring the finding of the body "ought always to be enforced whenever direct proof exists and it is practicable to obtain it");

Alabama: 1878, Colquitt *v.* State, 61 Ala. 48, 52, *semble;* 1884, Winslow *v.* State, 76 Ala. 42, 47; 1893, Ryan *v.* State, 100 Ala. 94, 95, 14 So. 868; 1900, Martin *v.* State, 125 Ala. 64, 28 So. 92;

California: 1880, People *v.* Alviso, 55 Cal. 230, 233 (murder; in exceptional cases); 1920, People *v.* Hamilton, — Cal. App.—, 192 Pac. 467 (murder);

Florida: 1899, Gantling *v.* State, 41 Fla. 587, 26 So. 737 (murder);

Georgia: 1859, Phillips *v.* State, 29 Ga. 105, 108, *semble* (arson; opinion not clear; perhaps *contra* for murder);

Illinois: 1894, Carlton *v.* People, 150 Ill. 181, 186, 37 N. E. 244 (arson); 1895, Campbell *v.* People, 159 Ill. 9, 42 N. E. 122 (infanticide); 1904, Heyman *v.* Heyman, 210 Ill. 524, 71 N. E. 591 (divorce); 1905, Hoch *v.* People, 219 Ill. 265, 76 N. E. 356 (murder); 1913, People *v.* See, 258 Ill. 152, 101 N. E. 257; 1914, People *v.* Goodwin, 263 Ill. 99, 104 N. E. 1018;

raised as to the 'corpus delicti,' that it ought to be strong and cogent; but in a part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption as" in the most trifling cause); 1838, R. *v.* Hopkins, 8 C. & P. 591 (infanticide; a body, differing in description, being found, Abinger, L. C. B., said the defendant need not account for her child "unless there be evidence to show that her child is actually dead"); 1845, R. *v.* Dredge, 1 Cox Cr. 235 (larceny of a doll; the goods being found on the defendant, but the prosecuting witness being unable to identify them or to swear that he had not sold them, an acquittal was ordered); 1854, R. *v.* Burton, Dears. Cr. C. 282 (larceny; see quotation *supra*); 1857, R. *v.* Hooper, 1 F. & F. 85 (larceny of coal; there being no testimony that coal from the place in issue was missed, Willes, J., left it to the jury to say whether any had been taken); 1862, R. *v.* Cheverton, 2 F. & F. 833 (infant-murder by mother; the body of a child was found near the place next day, but was not identified; Erle, C. J.: "It is no doubt essential that you should be satisfied that the body found in the Colne was the body of the prisoner's child, and put there by her. . . . [After referring to Lord Hale,] On the whole evidence, are you satisfied that the body found in the river was the body of the prisoner's child and that it was put there by her;"); 1868, R. *v.* Mockford, 11 Cox Cr. 16 (larceny of fowls; circumstantial evidence of the loss of the fowls, held sufficient); 1908, R. *v.* Nash, L. R. 6 Cr. App. 225 (murder); 1910, R. *v.* Crippen, 1 K. B. [1911] 149, and Notable British Trials Series, Crippen's Trial (1920), App. D. (murder; mutilated body held sufficiently identified; no question raised as to the present rule);

Ireland: 1917, R. *v.* McNicholl, 2 Ir. R. 557 (murder of an illegitimate child, the body not being found; Sir James Campbell, C. J.: "What has been relied upon as an inflexible legal maxim is nothing more than a wise and necessary caution to be addressed by the presiding judge to the jury"; nor is the case of murder any exception to the rule; the opinion carefully reviews the authorities and the policy);

Canada: 1905, R. *v.* King, 6 N. W. Terr. 139, 147 (murder).

been enacted by statutes;[9] one of which, at least, seems to be, in Mr. Justice Story's phrase, "a condonation of all murders" in which the murderer has

Indiana: 1855, Stocking *v.* State, 7 Ind. 326, 330 (murder); 1874, McCulloch *v.* State, 48 Ind. 109, 111 (murder; but no decision made as to a case where no remains of the person are found); 1908, Mason *v.* State, 171 Ind. 78, 85 N. E. 776 (larceny); 1911, Messel *v.* State, 176 Ind. 214, 95 N. E. 565 (rape under age);

Indian Terr.: 1906, Leftridge *v.* U. S., 6 Ind. T. 305, 97 S. W. 1018 (homicide);

Iowa: 1870, State *v.* Keeler, 28 Ia. 551 (murder); 1897, State *v.* Millmeier, 102 Ia. 692, 72 N. W. 275 (arson); 1921, State *v.* Townsend, 191 Ia. 362, 182 N. W. 392 (murder; decomposed corpse);

Kansas: 1876, State *v.* Winner, 17 Kan. 298, 305 (murder); 1913, State *v.* Cardwell, 90 Kan. 606, 135 Pac. 597 (rape under age);

Kentucky: 1896, Laughlin *v.* Com., — Ky. —, 37 S. W. 590 (murder);

Massachusetts: 1850, Com. *v.* Webster, 5 Cush. 295, 310 (murder); 1898, Com. *v.* Williams, 171 Mass. 461, 50 N. E. 1035;

Minnesota: 1867, State *v.* Hogard, 12 Minn. 293, 298, *semble* (larceny);

Missouri: 1905, State *v.* Henderson, 186 Mo. 473, 85 S. W. 576 (murder); 1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235 (murder); 1911, State *v.* McCord, 237 Mo. 242, 140 S. W. 885 (rape); 1921, State *v.* Poor, 286 Mo. 644, 228 S. W. 810 (murder; body burned);

New Mexico: 1902, U. S. *v.* Griego, 11 N. M. 392, 72 Pac. 20 (adultery);

North Carolina: 1860, State *v.* Williams, 7 Jones L. 446, 454 (homicide);

Oklahoma: 1913, Woody *v.* State, 10 Okl. Cr. 322, 136 Pac. 430 (adultery);

Oregon: 1899, State *v.* Hanna, 35 Or. 195, 57 Pac. 629, *semble* (larceny); 1905, State *v.* Williams, 46 Or. 287, 80 Pac. 655 (murder); 1906, State *v.* Barnes, 47 Or. 592, 85 Pac. 998 (murder);

Pennsylvania: 1846, Com. *v.* Harman, 4 Pa. St. 269, 272, *semble* (homicide); 1882, Gray *v.* Com., 101 id. 380, 386, *semble* (homicide);

Philippine Isl.: 1903, U. S. *v.* De La Cruz, 2 P. I. 148 (robbery);

Porto Rico: 1917, People *v.* Villegas, 25 P. R. 815 (larceny of ducks);

Rhode Island: 1917, State *v.* Deslovers, 40 R. I. 89, 100 Atl. 64;

South Carolina: 1896, State *v.* Martin, 47 S. C. 67, 25 S. E. 113 (though not definitely deciding more than that the identification of a body found may be made by circumstantial evidence);

Tennessee: 1844, Tyner *v.* State, 5 Humph. 383, *semble* (larceny); 1847, Carey *v.* State, 7 Humph. 499, *semble* (stealing); 1891, Lancaster *v.* State, 91 Tenn. 267, 269, 18 S. W. 777, *semble* (murder);

Vermont: 1858, State *v.* Davidson, 30 Vt. 377, 385, *semble* (robbery); 1879, State *v.* Potter, 52 Vt. 33, 39; 1896, State *v.* Brink, 68 Vt. 659, 35 Atl. 492 (adultery; overruling State *v.* Way, 6 Vt. 311); 1902, State *v.* Kimball, 74 Vt. 223, 52 Atl. 430 (adultery);

Virginia: 1871, Smith *v.* Com., 21 Gratt. 809, 813 (murder); 1878, Johnson *v.* Com., 29 Gratt. 796, 820 (burglary; preceding case approved);

Washington: 1902, State *v.* Gates, 28 Wash. 689, 69 Pac. 385;

West Virginia: 1885, State *v.* Flanagan, 26 W. Va. 116, 123 (murder); 1913, State *v.* Merrill, 72 W. Va. 500, 78 S. E. 699 (infanticide);

Wisconsin: 1892, Zoldoske *v.* State, 82 Wis. 580, 597 (murder); 1899, Buel *v.* State, 104 Wis. 132, 80 N. W. 78; 1903, Paulson *v.* State, 118 Wis. 89, 94 N. W. 771; 1905, Winsky *v.* State, 126 Wis. 99, 105 N. W. 480 (burglary);

Wyoming: 1898, Dalzell *v.* State, 7 Wyo. 450, 53 Pac. 297 (no rule laid down; evidence here held sufficient).

[9] *New York:* 1856, People *v.* Wilson, 3 Park. Cr. C. 191, 207, *semble* (murder; circumstantial evidence suffices); 1858, Ruloff *v.* People, 18 N. Y. 179, 184 (the law in homicide "does not permit a conviction without direct proof of the death or of the violence or other act of the defendant which is alleged to have produced death"); 1872, People *v.* Bennett, 49 N. Y. 137, 143 ("The point of the [preceding] decision is that, as to one or the other of the component parts of the 'corpus delicti', there must be direct evidence; that both cannot be established by mere circumstantial evidence; but the Court affirms the rule that when one is proved by direct evidence, the other may be by circumstances"); 1881, Penal Code, § 181, Cons. L. 1909, Penal, § 1041 ("No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of killing by the defendant as alleged, are each established, as independent facts; the former by direct proof, and the latter beyond a reasonable doubt"); 1888, People *v.* Beckwith, 108 N. Y. 67, 71, 15 N. E. 53 (murder; statute applied); 1888, People *v.* Palmer, 109 N. Y. 110, 112, 16 N. E. 529 (murder; statute construed; 'corpus delicti' does not include identity of the deceased); 1905, People *v.* Patrick, 182 N. Y. 131, 74 N. E. 843 (statute applied);

North Dakota: Comp. L. 1913, § 9459 (quoted *ante*, § 2070; like N. Y. P. C. § 181, *supra*); 1917, State *v.* Sogge, 36 N. D. 262, 161 N. W. 1022 (infanticide; Comp. L. 1913, § 9459 applied; here there was direct evidence that the child had been born alive, but the trial Court's instruction was held faulty);

successfully destroyed his victim's body. In another jurisdiction, it is provided that in capital cases the death penalty shall not be imposed for a conviction on circumstantial evidence alone;[10] *i. e.* there must be some direct or testimonial evidence; but this loose and unpractical rule violates all the traditions of the common law, and merely represents a compromise on the issue of abolishing capital punishment.

§ 2081*a*. **Eye-witness of a Personal Injury; Insurance-Clause.** There is of course no rule, at either common law or by statute, requiring an eye-witness as part of the period of a *personal injury*, in a civil action either of tort or of contract (*ante*, 2078). Under statutes providing for a review by the Supreme Court of findings of an industrial commission, as to the sufficiency of evidence that the *employee's injury was received in the course of employment*, it has sometimes been argued that there must be an eye-witness to the injury. But such a rule would be not only unfair in numerous cases of actual injury, but often futile and productive of evasion in dishonest cases; and has properly been repudiated.[1]

Insurers against *death* or *personal injury* by accident have experienced difficulty in exposing false claims of accident, advanced in cases of suicide or self-inflicted injury, where the absence of eye-witnesses has left the evidence doubtful. Courts have here wisely made no deviation from the general rule. But in *contracts of accident-insurance* or *life-insurance* such a clause is sometimes inserted. On the general principle of the validity of such contracts affecting the mode of proof (*ante*, § 7*a*), this species of clause is plainly valid.

§ 2082. **Proof of a "Marriage in Fact"; (1) Marriage in Evidence and in Substantive Law.** The possible modes of evidencing a marriage depend so intimately upon the theory of the marriage-contract in substantive law that the main features of the latter must be kept in mind in examining the rules of Evidence.

Texas: 1874, Wilson *v.* State, 41 Tex. 320, 325, 43 id. 412, 476, *semble* (murder; circumstantial evidence suffices); 1876, Brown *v.* State, 1 Tex. App. 154, *semble* (same; larceny); 1885, Lightfoot *v.* State, 20 Tex. 77, 98, *semble* (same; murder); P. C. § 549, Rev. P. C. 1911, § 1084 ("No person shall be convicted of any degree of homicide unless the body of the deceased, or portions of it, are found and sufficiently identified to establish the fact of the death of the person charged to have been killed"); 1889, Puryear *v.* State, 28 Tex. 73, 78, 11 S. W. 929 (statute applied); 1898, Kugadt *v.* State, 38 Tex. Cr. 681, 44 S. W. 989 (the identification, under the statute, may be by circumstantial evidence); 1899, Gay *v.* State, 40 Tex. Cr. 242, 49 S. W. 612 (preceding case followed); 1900, Bailey *v.* State, 42 Tex. Cr. 289, 59 S. W. 900 (following Kugadt *v.* State); 1902, Landreth *v.* State, 44 Tex. Cr. 239, 70 S. W. 758 (preceding cases approved); 1921, Mettall *v.* State, 89 Tex. Cr. 216, 233 S. W. 315 (confession may be used "in aid of other proof to establish the 'corpus delicti' ").

[10] *Colo.* R. S. 1908, § 1624, Comp. St. 1921, § 6666 ("nor shall any person suffer the death penalty who shall have been convicted on circumstantial evidence alone"); 1913, Dumas *v.* People, 62 Colo. 418, 163 Pac. 259 (Rev. St. 1908, § 1624, quoted *supra*, applied to a charge of murder; "a confession by the defendant is circumstantial evidence"; unsound in theory; two judges diss.).

§ 2081*a*. [1] 1917, Ohio Building Safety Vault Co. *v.* Industrial Board, 277 Ill. 96, 102 (employee's death; cause of death, as occurring in course of employment, may be evidenced "by circumstantial as well as by direct evidence"); 1918, Smith-Lohr Coal Co. *v.* Industrial Com., 286 Ill. 34, 37 (following Ohio B. S. V. Co. *v.* Ind. Board, *supra*); 1920, Hydrox Chemical Co. *v.* Industrial Commission, 291 Ill. 579, 126 N. E. 564.

As the common law emerged into the 1800s, and the question of the elements of a valid marriage came exclusively within the jurisdiction of the common-law Courts, after the long domination of the ecclesiastical Courts over that subject, there came up everywhere for settlement a controversy upon a fundamental point, requiring a long historical survey for its proper understanding. That controversy was, briefly, over this question: Whether for a valid marriage-contract an *informal and private exchange of consent*, similar to that by which any other contract could be made, would suffice; or whether the exchange of consent must take place before an *ordained clergyman* or other person authorized to celebrate marriages. In 1843, the latter requirement was declared to be and to have been the common law of England;[1] though it seems entirely clear that the former view is historically the correct one;[2] and it has in fact been taken as the law for Scotland and for probably every one of the jurisdictions in the United States.[3] The controversy in the substantive law thus lay between the private or informal consent and the public or ceremonial consent.

Now this ceremonial marriage, so important in the substantive law, though open to confusion with the "marriage in fact" of the law of Evidence, is unquestionably distinct in its meaning; indeed the evidential rule about a "marriage in fact" was laid down nearly a century before the case of R. *v.* Millis, and at a time when the erroneous doctrine about a ceremonial marriage had not yet been clearly adopted by English Courts. The meaning of "marriage in fact" is simple and undoubted (though it is not a meaning for which any clue is given by the unfortunate phrase itself); it is a marriage which can be evidenced by an *eye-witness of the act of exchanging consent.*[4] It is thus apparent that, so far as the theory of law is concerned, the informal marriage can be equally a "marriage in fact" with the ceremonial one; that is to say, a friend who is present at the informal exchange of consent may testify as an eye-witness to the "marriage in fact" and thus satisfy the rule of Evidence. Conversely, a ceremonial marriage may in the substantive law be required (as in England), and yet may be evidenced merely by habit and repute, where the rule of Evidence requiring proof by an eye-witness does not apply. It can be understood, then, at the outset, that the evidential rule about a "marriage in fact" has nothing essentially to do with the controversy of substantive law as to a ceremonial marriage.

There is, to be sure, an accidental relation between the two so far as concerns the ease of proof of one sort or another. (1) On the one hand, proof of a "marriage in fact" *i. e.* by an eye-witness, will be more likely to be available in a jurisdiction where the ceremonial marriage is the only valid one.

§ 2082. [1] R. *v.* Millis, 10 Cl. & F. 534; Beamish *v.* Beamish, 9 H. L. C. 274.

[2] Pollock & Maitland, History of the English Law, II, 362–382.

[3] 1905, Reaves *v.* Reaves, 15 Okl. 240, 82 Pac. 490 (summarizing the history); 1891, Bishop, Marriage, Divorce, and Separation, § 409; 1904, Howard, History of Matrimonial Institutions; 1922, O. E. Koegel, Common Law Marriage and its Development in the United States, *passim*.

[4] See the quotations *post*, § 2085.

The celebrating clergyman or magistrate being an eye-witness, his certificate serves as eye-witness proof (*post*, § 2087), and either this or the marriage-register kept by him will generally be available; moreover, the persons usually required in such jurisdictions to attend the ceremony as witnesses will furnish another available source of eye-witness proof. In a jurisdiction sanctioning the informal exchange of marriage-consent, no eye-witness proof will be available, if the parties have taken the full liberty of the law and have exchanged consent privately and without the presence of either clergyman, magistrate, or friends. Consequently, to require as a rule of Evidence, eye-witness proof of marriage in such jurisdictions often amounts to practically the same thing as requiring, by rule of substantive law, a ceremonial marriage; because the required eye-witness cannot be had.[5] Nevertheless, this is purely an accidental coincidence of fact, and not the result of any legal identity of ceremonial marriage and "marriage in fact"; as is easily seen by supposing the case of a consent informally exchanged before friends; for this would not be a ceremonial marriage valid by the substantive law of England, although it would furnish the eye-witness proof sufficient to satisfy the rule of evidence. (2) On the other hand, proof by habit and repute, *i. e.* by conduct as married persons and by reputation of the community (*post*, § 2083), will be more significant and cogent in jurisdictions where the substantive law requires no more than an informal and private exchange of consent to constitute a valid marriage. But in a jurisdiction where a ceremonial marriage is alone valid and must therefore have been alleged in the pleadings, here, though from habit and repute it may still be inferred that this ceremonial marriage had been performed, yet the inference will not be so readily drawn unless some satisfactory explanation can be given of the absence of that eye-witness evidence which ought ordinarily to be available if in truth there was a ceremonial marriage, — for example, the certificate or the register. Thus, in such a jurisdiction, as a mere coincidence, that kind of evidence — habit and repute — may often be discredited in a way which would be impossible in other jurisdictions, — a difference often noticeable between Scotch and English marriages in their consideration by the House of Lords.[6] This difference, however, will be seen, from what has been said, to be merely a practical consequence of the substantive law, and not of any difference in the rules of evidence as to the sufficiency of habit and repute.

§ 2083. **Same: (2) Habit and Repute as the Ordinary Evidence.** The act of exchange of marriage-consent, as constituting a marriage, may conceivably be evidenced by various sorts of evidence, any one of which might suffice to persuade the tribunal, in the absence of some special quantitative require-

[5] See Lord Eldon's amusing anecdote of the Irish peer (*ante*, § 1642). But even in the Gretna Green marriages it was once in a while resorted to: 1827, Wakefield's Trial, Pelham's Chronicles of Crime, ed. 1891, II, 132 (where David Laing himself, the celebrated blacksmith-parson, was a witness).

[6] An example of the efficacy of the cohabitation evidence in leading to the inference even of a ceremonial marriage is seen in Re Shephard, 1904, 1 Ch. 456. An example of the occasional violence of this inference, based on habit and repute only, is found in Travers *v.* Reinhardt, 205 U. S. 423, 27 Sup. 563.

ment. One of these kinds would be the testimony of a person present and seeing or hearing the words of consent. Another would be the admissions of a party-opponent to the suit. Both of these would be ordinary instances of evidence usually employed for proving any other fact in litigation. But two other kinds are also available, by way of exception to the general rules of evidence.

In the first place, the *conduct of the two persons*, in living together in the manner usual for married persons, is some circumstantial evidence that they exchanged consent at a prior time. The evidential nature of this inference has been already examined (*ante*, § 268); its general admissibility is unquestioned. It is enough here to note that this evidence from conduct is commonly spoken of as "*habit*"; and that it is something more than mere cohabitation, or living together, because it signifies living together and behaving in every way with the evident belief and assumption that they have the rights and responsibilities of persons who have contracted a lawful marriage.

In the second place, *repute of the community* or neighborhood that these persons have been lawfully married is a kind of testimony which is based partly on the parties' habit as married persons, partly on contributions of personal knowledge by those who have witnessed the exchange of consent, and partly on the absence of contrary evidence which would naturally have come to light had it existed. This net result of the sifting of the facts by gossip and by interested investigation is summed up on the community's reputation; and this, though it would ordinarily be inadmissible by the Hearsay rule, is by long acceptance admissible under a special exception to that rule. The scope and reason of this Exception, making reputation admissible to prove marriage, has already been considered, (*ante*, §§ 1602–1605); it is enough here to note that it is always admissible.

Now these two sorts of evidence, habit and reputation, are commonly found available together, and are therefore commonly offered at the same time. They are admitted on distinct theories, the one being circumstantial in its nature, the other testimonial; but in practical use they are generally found associated. The typical judicial treatment of them may be gathered from the following exposition:

1867, L. C. CHELMSFORD, in the *Broadalbane Case*, L. R. 1 Sc. App. 182, 192, 196, 211: "Habit and repute arises from parties cohabiting together openly and constantly, as if they were husband and wife, and so conducting themselves towards each other for such a length of time in the society or neighborhood of which they are members as to produce a general belief that they are really married." Lord WESTBURY: "Cohabitation as husband and wife is a manifestation of the parties having consented to contract the relationship 'inter se.' It is a holding forth to the world by the manner of daily life, by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances, to these representations and this continued conduct, then habit and

repute arise and attend upon the cohabitation. The parties are holden and reputed to be husband and wife; and the law of Scotland accepts this combination of circumstances as evidence that consent to marry has been lawfully interchanged."

These two kinds of evidence, then, being always admissible (*ante*, §§ 268, 1602), the question now to be considered is whether there is any quantitative rule as to their sufficiency; *i. e. Are they alone sufficient*, if the jury trust them, *to prove a marriage*, or is proof by an eye-witness indispensable? Is it of no avail to furnish evidence of habit and repute unless also a certificate or register or oral testimony of a bystander is furnished?

Here we may start with the general proposition that *habit and repute alone suffice ordinarily in civil cases*.[1] There is a common-law rule declaring them

§ 2083. [1] *Accord:* ENGLAND: 1805, Leader *v.* Barry, 1 Esp. 353 (non-assumpsit; Lord Kenyon said "an action for criminal conversation was the only civil case where an actual marriage, by producing a copy of the register, need be proved; the same strictness was required in an indictment for bigamy"); 1827, Doe *v.* Fleming, 4 Bing. 266 (ejectment; quoted *infra*); 1832, Maxwell *v.* Maxwell, Milward Eccl. 290, 292 (restitution of conjugal rights); the following early case is therefore of no validity: 1754, Conran *v.* Lowe, 1 Lee Eccl. 630, 638 (on the facts, proof of cohabitation held insufficient without calling a witness to the ceremony, in a claim for restitution of conjugal rights).

CANADA: 1885, Currie *v.* Stairs, 25 N. Br. 4, 7 (slander charging adultery); 1858, Graham *v.* Law, 6 U. C. C. P. 310, 313 (dower).

UNITED STATES: *Federal:* 1907, Travers *v.* Reinhardt, 205 U. S. 423, 27 Sup. 563; 1919, Hamlin *v.* Grogan, 8th C. C. A., 257 Fed. 59 (inheritance; following Travers *v.* Reinhardt); *Arkansas:* 1913, Farmer *v.* Towers, 106 Ark. 123, 152 S. W. 993 (heirship); *California:* 1864, People *v.* Anderson, 26 Cal. 129, 133 (proving a witness incompetent by marriage); *Connecticut:* 1812, Hammick *v.* Bronson, 5 Day 290, 293 (ejectment, title depending on marriage); 1885, Northrop *v.* Knowles, 52 Conn. 522 (title depending on legitimacy; reputation of adulterous relation, excluded on the principle *ante*, § 1602; present point not involved); *Delaware:* 1902, State *v.* Miller, 3 Pen. 518, 52 Atl. 262 (information for failure to support children); *Illinois:* 1875, Miller *v.* White, 80 Ill. 580, 585 (trespass); 1878, Lowry *v.* Coster, 91 id. 182, 184 (loss of support by sale of liquor); *Indiana:* 1846, Fleming *v.* Fleming, 8 Blackf. 234 (dower); *Iowa:* 1906, Smith *v.* Fuller, — Ia. —, 108 N. W. 765 (dower); *Kentucky:* 1808, Crozier *v.* Gano, 1 Bibb 257, 258 (detinue); 1831, Sneed *v.* Ewing, 5 J. J. Marsh. 460, 491 (inheritance and legitimacy); 1835, Stover *v.* Boswell, 3 Dana 232, 233 (dower); 1844, Taylor *v.* Shemwell, 4 B. Monr. 575, 576 (ejectment); 1846, Kuhl *v.* Kuaner, 7 B. Monr. 130 (claim against husband for deceased wife's estate; here proof of a marriage in fact was required, because "a direct issue is made up by the parties" on that point; no authority cited; the other cases in this State leave this ruling of no authority); 1847, Donnelly *v.* Donnelley's Heirs, 8 B. Monr. 113, 116 (dower); 1859, Chiles *v.* Drake, 2 Metc. 146, 154 (death by wrongful act); *Louisiana:* 1831, Taylor *v.* Swett, 3 La. 33, 36 (inheritance); 1833, Holmes *v.* Holmes, 6 La. 463, 471 (breach of carrier's contract); 1847, Hobdy *v.* Jones, 2 La. An. 944 (slander charging concubinage); 1878, Blasini *v.* Blasini, 30 La. Rev. 1388, 1397 (succession); *Maine:* 1849, Taylor *v.* Robinson, 29 Me. 323, 328 (slander spoken of plaintiff's wife); *Maryland:* 1739, Cheseldine *v.* Brewer, 1 H. & McH. 152 (ejectment); 1828 Fornshill *v.* Murray, 1 Bland Ch. 479, 482 (distribution of estate; eye-witness required; this and the following case are of no authority in view of the other rulings); 1836, Sellman *v.* Bowen, 8 G. & J. 50, 54 (dower; eye-witness required); 1848, Cope *v.* Pearce, 7 Gill 247, 263 (distribution of estate); 1868, Boone *v.* Purnell, 28 Md. 607, 629 (ejectment); 1873, Redgrave *v.* Redgrave, 38 Md. 93, 97 (administration); *Massachusetts:* 1812, Newburyport *v.* Boothbay, 9 Mass. 414 (pauper settlement); *Michigan:* 1878, Proctor *v.* Bigelow, 38 Mich. 282 (dower); *Minnesota:* 1877, State *v.* Worthingham, 23 Minn. 528, 534 (bastardy complaint); *Mississippi:* 1849, Stevenson *v.* McReary, 12 Sm. & M. 9, 56 (ejectment); 1856, Henderson *v.* Cargill, 31 Miss. 367, 409 (distribution of estate); *Missouri:* 1857, Boatman *v.* Curry, 25 Mo. 433, 438 (title to sue as husband and wife); *New Hampshire:* 1841, Wendell *v.* Safford, 12 N. H. 179, 184 (breach of promise); 1843, Young *v.* Foster, 14 N. H. 114, 118 (dower); 1846, Dalton *v.* Bethlehem, 20 N. H. 505, 514 (pauper settlement); 1858, Stevens *v.* Reed, 37 N. H. 49, 53 (dower); *New York:* 1809, Fenton *v.* Reed, 4 Johns. 52 (insurance); 1820, Jackson *v.* Claw, 18 Johns. 347 (ejectment); 1842, *Re* Taylor, 9 Paige 611, 614 (lunatic's estate); 1850, Clayton *v.* Wardell, 4 N. Y. 230, 234 (legitimacy); 1868, O'Gara *v.* Eisenlohr, 38 N. Y. 296, 298

insufficient in bigamy and criminal conversation (*post*, § 2085); there is a further field for controversy as to their sufficiency in other criminal charges and in suits for divorce (*post*, § 2085); and there is sometimes a distinction as to marriage documents (*post*, § 2088). But, apart from these special rules, there remains the uncontroverted field of civil cases in general; and here the universally accepted principle, serving as the normal doctrine, is to be understood as making no discrimination against this sort of evidence:

1878, CAMPBELL, C. J., in *Proctor* v. *Bigelow*, 38 Mich. 282: "In most cases where the right to property is to be made out by proof of a marriage, the witnesses who were present are not living or attainable. One or both of the married persons must die before any inheritance or dower can exist. It would be impossible in a majority of such cases to prove a marriage by any better testimony than conduct and reputation."

But is this true except of the two kinds of evidence, habit and repute, *in combination?* Will either alone equally suffice? In practice, the conditions which furnish the one sort usually furnish the other; so that the question rarely arises for decision. Moreover, the terms are not always used with precision, for in judicial utterances each of the two words is frequently found employed in the sense of both combined. Nevertheless, in evidential theory the two are distinct; and there seems no sound reason for treating them as valueless unless coupled.

(*a*) *Habit*, then, or conduct as married persons, ought of itself to be sufficient:[2]

(administration); 1832, Jenkins v. Bisbee, 1 Edw. Ch. 377 (creditor's bill); 1877, Chamberlain v. Chamberlain, 71 N. Y. 423, 427 (distribution of estate); *North Carolina:* 1799, Telts v. Foster, Taylor 121 (remainder over on marriage); 1827, Weaver v. Cryer, 1 Dev. 337, 341 (trover); 1859, Archer v. Haithcock, 6 Jones L. 421; *Pennsylvania:* 1816, Chambers v. Dickson, 2 S. & R. 475 (dower); 1855, Thorndell v. Morrison, 25 Pa. 326, 327 (ejectment); 1866, Com. v. Stump, 53 Pa. 132. 135 (inheritance tax); 1873, Richard v. Brehm. 73 Pa. 140, 144 (ejectment); *Texas:* 1847, Tarpley v. Poage, 2 Tex. 139, 149 (promissory note); *Vermont:* 1819, Poultney v. Fairhaven, Brayt. 185 (pauper settlement; to prove a woman not the lawful wife of E., prior cohabitation and reputation as the wife of A. were held "not proper to *disprove* her the wife of S."; not cited, but practically repudiated, in the next case); 1860, Northfield v. Vershire, 33 Vt. 110, 112 (facts substantially similar; "evidence of reputation and cohabitation is competent to prove a marriage whenever the question arises in any civil action, except in actions for criminal conversation"); *Virginia:* 1899, Eldred v. Eldred, 97 Va. 606, 34 S. E. 477 (title depending on legitimacy); 1919, Reynolds v. Adams, 125 Va. 295, 99 S. E. 695 (inheritance); *Washington:* 1909, Weatherall v. Weatherall, 56 Wash. 344, 105 Pac. 822 (bill to establish a marriage; prior cases reviewed).

[2] *Accord: England:* 1751, Revel v. Fox, 2 Ves. Sr. 269 (bill by remainder-man against a woman who was given an estate till marriage; the defendants denied the marriage; L. C. Hardwicke: "The great thing in this case is the shortness of time in which the cohabitation subsisted; . . . those circumstances are certainly proper evidence of the marriage, for on a limitation over in case of marriage, if marriage is had, it is probably clandestine; if therefore the Court was to say such circumstances were evidence, it would be impossible to prove it. But, both defendants denying it on oath, and insisting on trying it, it must be tried; for a jury are proper judges of the fact"); 1762, R. v. Stockland, 2 Burr. Sett. Cas. 508 (pauper settlement; "Lord Mansfield seemed to think that thirty years' cohabitation as man and wife was sufficient proof"); 1874, Lyle v. Ellwood, L. R. 19 Eq. 98, 106, *semble*.

United States: 1852, Morris v. Morris, 20 Ala. 168, 172, *semble* (divorce for adultery); 1906, Ward v. Merriam, 193 Mass. 135, 78 N. E. 745 (slander); 1846, Dalton v. Bethlehem, 20 N. H. 505, 514. *Contra:* 1893, Arnold v. Chesebrough's Ex'r, 7 C. C. A. 572, 58 Fed. 927; 1876, Cargile v. Wood, 63 Mo. 501, 513; 1866, Com. v. Stump, 53 Pa. 132, 135. In these opposed cases, the judges probably use "cohabitation" as meaning merely "living together"; this of course makes their state-

1844, Mr. J. *Hubback*, Succession, 248: "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 celebrated 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. The presumption of marriage from these circumstances is too reasonable not to have a place in the laws of other countries. 'Cohabitation,' says Lord Stair, 'and the behaving as man and wife for a considerable time, presumeth marriage, though there be neither contract, promise, nor 'sponsalia' preceding, nor evidence of copulation by children.' 'Oritur presumptio matrimonii ex tractatu quo vir et mulier ut conjuges alter alterum se habet' (Mascardus). . . . If the marriage to be proved was kept secret and disavowed by the parties, and thus not only wants the aid of reputation in its favor, but may also be encountered by declarations and reputation of a contrary tendency, it will be important to adduce evidence of reasons for the concealment."

(*b*) *Repute*, also, may alone suffice; and in practice, it may well occur that reputation-evidence alone will be available: [3]

1827, PARKE, B., in *Doe* v. *Fleming*, 4 Bing. 266: "The general rule is that reputation is sufficient evidence of marriage, and a party who seeks to impugn a principle so well established ought at least to furnish cases in support of his position."

§ 2084. **Same: (3) Lord Mansfield's Rule in Morris v. Miller.** The cast of thought, in that greatest of English judges, was a strong and individual one; and his instincts of justice and common sense were at the same time so keen that his influence upon the whole body of English law was not only marked but beneficent. It goes with such a nature to disregard precedent, where precedent, or the lack of it, seems to stand in the way of good sense; he did not sit there (in his celebrated phrase) "to take the rules of Evidence from Keble or Siderfin." [1] Yet the guidance of instinct alone — one's individual or momentary views of justice — may prove erroneous, by the broader standard either of other men or of other times; and in such instances the willingness to disregard precedents appears, for the case in hand, as a regrettable source of error. In the course of events, little opportunity has arisen to pass such censure upon Lord Mansfield's judgments; his immediate successors, smaller men than he, were shocked at his innovations; but Time has been his vindicator. Yet in the law of Evidence, oddly enough, it has been his fate not to find this vindication. Rarely did he make any real contribution to its theory or its practice; [2] not infrequently he helped to obscure

ment correct enough, since (as above explained) the "habit" which is evidence of marriage is something more than mere cohabitation in the narrow sense; it is "living together as husband and wife."

[3] *Accord: England:* 1790, Sherborne *v.* Naper, 2 Ridgw. P. C. 224 (not clear); 1795, Reed *v.* Passer, Peake, N. P. 231, 233, *semble*, per Kenyon, L. C. J.: 1832, Evans *v.* Morgan, 2 Cr. & J. 453, 456; 1843, R. *v.* Millis, 10 Cl. & F. 534, 596, per L. C. Lyndhurst; 1858, Goodman *v.* Goodman, 4 Jur. N. S. 1220, 1224, 28 L. J. Ch. 745 (Doe *v.* Fleming approved); *United States:* 1841, Wendell *v.* Safford, 12 N. H. 179, 186 (breach of promise). *Contra: Eng.* 1814, Lord Redesdale, in Cunningham *v.* Cunningham, 2 Dow 482, 510; *U. S.* 1903, Summerville *v.* Summerville, 31 Wash. 411, 72 Pac. 84.

That a *divided reputation* is insufficient is noticed *ante*, § 1603.

§ 2084. [1] Lowe *v.* Jolliffe, 1 W. Bl. 365.

[2] The notable instance is his rule for compelling documentary discovery on motion (*ante*, § 1858).

it; and in several respects he created, in scorn of precedent, rules which merely encumbered the law of Evidence with unnecessary and impolitic restrictions.[3] One of these was the rule requiring *proof of a "marriage in fact"* in *bigamy* and *criminal conversation.*

This rule he laid down in the following cases:

1767, *Morris* v. *Miller*, 4 Burr. 2057; the opinion of the Court was asked "upon the following question, 'whether to support an action for criminal conversation, there must not be proof of an actual marriage'; the fact was, they were married at Mayfair chapel; the register or books could not be admitted in evidence; Keith, who married them, was transported; and the clerk, who was present, was dead; so that the plaintiff could not prove the actual marriage by any evidence." Counsel for plaintiff argued that "we proved articles [of post-nuptial settlement], . . . cohabitation, name, and reception of her by everybody as his wife; though we did not indeed prove it by any register or by witnesses who were present at the marriage." Lord MANSFIELD said: "It certainly may be done so in all cases except two," namely, bigamy and criminal conversation. The plaintiff's counsel argued that the defendant's admission of the marriage sufficed. The defendant's counsel argued that the reputation evidence "does not come up to the rule of being the best evidence in the plaintiff's power," and that it was not an actual *i. e.* ceremonial marriage. Lord MANSFIELD, C. J.: "Proof of actual marriage is always used and understood in opposition to proof by cohabitation and reputation and other circumstances from which a marriage may be inferred. . . . We are all clearly of opinion that in this kind of action, an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage in fact; acknowledgment, cohabitation, and reputation, are not sufficient to maintain this action. . . . It shall not depend upon the mere reputation of a marriage, which arises from the conduct or declarations of the party himself. . . . Inconvenience might arise from a contrary determination; which might render persons liable to actions founded upon evidence made by the persons themselves who should bring the action.[4] . . . Perhaps there need not be strict proof from the register, or by a person present, but strong evidence must be had of the fact, — as, by a person present at the wedding dinner, if the register be burnt and the parson and clerk are dead."

1779, Lord MANSFIELD, C. J., in *Birt* v. *Barlow*, 1 Doug. 171, 174: "An action for criminal conversation is the only civil case where it is necessary to prove an actual marriage; in other cases, cohabitation, reputation, etc., are equally sufficient since the Marriage Act as before. But an action for criminal conversation has a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes by persons giving the name and character of wife to women to whom they are not married, it struck me, in the case of Morris *v.* Miller, that in such an action a marriage in fact must be proved."

Certain things may plainly be gathered from these two cases, upon which the rule has always been supposed to be founded. (*a*) It does not appear that there was any such restriction before these opinions were rendered.[5] "It struck me," says Lord Mansfield, that there ought to be such a rule. No doubt the then prevalent canon of the "best evidence," [6] invoked by counsel

[3] The others were the rule excluding 'allegans suam turpitudinem' (*ante*, § 525), the rule against parents "bastardizing their issue" (*ante*, § 2063), and the rule against jurors impeaching their verdict (*post*, § 2352).

[4] The following sentence is from the report in 1 W. Bl. 632.

[5] The only prior cases on the subject seem to have been one in the Ecclesiastical Court, Conran *v.* Lowe, 1754, 1 Lee Eccl. 630, cited *ante*, § 2083, and R. *v.* Norwood, 1765, cited *post*, § 2086.

[6] *Ante*, § 1173.

in argument, served as the justifying principle. (*b*) The phrase "proof of a *marriage in fact*," or "actual marriage," signified, as a rule of evidence in these decisions, *proof by an eye-witness*, *i. e.* either by the register containing the parson's entry or by the oral testimony of parson, clerk, or some other person present at the ceremony. This has since been the accepted meaning;[7] though in a jurisdiction where a ceremonial marriage is not required by the substantive law (*ante*, § 2082) the term covers also proof by an eye-witness to the exchange of marriage-consent, even when given informally. (*c*) This special requirement, as declared by Lord Mansfield, was limited to two kinds of issues, one a criminal charge, namely, *bigamy*, the other a civil action, namely, *criminal conversation*. (*d*) The requirement of eye-witness proof, as made by him, clearly declared evidence of habit and repute insufficient. He further mentioned "acknowledgment" as insufficient; but here he probably signified merely that acknowledgment which is to be found in conduct as a married person, in other words, "habit" (*ante*, § 2082), and did not mean to include an *express admission*, in words, of the performance of a marriage ceremony. Nevertheless, his meaning is open to dispute; and hence different judicial views have since been taken upon the question whether by Lord Mansfield's rule eye-witness proof was required even where the marriage had been expressly admitted by the defendant.[8]

The policy of Lord Mansfield's rule has received but scanty judicial exposition.

(1) For the action of *criminal conversation*, it was placed by him on the ground, partly that the action was penal in its nature (as indeed it has always been treated, in a marked degree, in England), partly that to receive habit and repute alone might enable a man having a mistress to recover damages from another man for the seduction of a woman whose relation to the plaintiff did not justify him in claiming any right to her chastity. So far as the first reason is concerned, it stands or falls with the general policy of establishing a special rule for criminal cases. So far as the second reason is concerned, it indeed is based on a real contingency; yet it is doubtful whether there is any need of exercising special vigilance in behalf of a defendant whose conceded conduct deprives him of honorable sympathy.[9]

[7] 1843, Gilchrist, J., in State *v.* Winkley, 14 N. H. 480, 495: "In criminal prosecutions, like indictments for bigamy, adultery, etc., direct evidence of the marriage is required, and this may appear from the testimony of witnesses who were present at the ceremony. This constitutes proof of a marriage in fact, and is merely direct evidence of the marriage as contradistinguished from cohabitation, etc. which is indirect evidence of the marriage."

[8] The best judicial examinations of the decision in Morris *v.* Miller are those of Smith, J., in West *v.* State (1853), 1 Wis. 209, 218, and of White, J., in Warner *v.* Com. (1817), 2 Va. Cas. 95, 98, where its significance is carefully analyzed.

[9] It may be added that the action for criminal conversation, in Lord Mansfield's time, occupied a far more prominent position and was therefore more liable to abuse. The prevalence of rakish habits among men of fashion and birth, and the practical lack of divorce, made this action frequent as the sole means of self-vindication for the injured husband; in this manner it came naturally to present also an attractive means of blackmail. Lord Baltimore's case (quoted *ante*, § 782), into which Lord Mansfield himself was drawn as a mediator, was a typical and celebrated instance of the social conditions amid which he laid down the rule in Morris *v.* Miller.

(2) For the charge of *bigamy*, there is in the first place the general policy of caution applicable in all criminal cases. Nevertheless, this seems sufficiently met by the broad rule of reasonable doubt (*post*, § 2497); moreover, it was clearly not Lord Mansfield's reason, for he expressly confines the rule to a charge of bigamy, and the reason must therefore be sought in some circumstance peculiar to that offence. Here he vouchsafed no light in his opinion. What reasons there are, *pro* and *con*, may partly be gathered from the judicial language later quoted (*post*, § 2086). On the whole, the reasons against making such a requirement in the present connection seem plainly to preponderate. Whatever peculiarity there is to the offence of bigamy points indeed to a looser rather than a stricter rule as appropriate. What is the peculiar immorality of the offence of bigamy? Usually, it is the deception of the other party to the marriage, by leading her (or him) into a void and unsanctioned relation and by afterwards deserting for another; as well as the injury to the progeny by placing them in the world without the rights of legitimate children. Now this deception and desertion and social wrong are equally consummated by a relation appearing in habit and repute to be a marriage, even though it be not a valid one. The moral meanness of that man, and the social consequences of his misconduct, are equally reprehensible, whether or not his first marriage could be proved by an eye-witness, and whether the marriage was legally binding or not. If it was not, it ought to have been. That the law of Evidence, instead of applying the equitable maxim that what ought to have been done will be treated as having been done, should let him go free of the charge of bigamy, precisely because he did not do the honest and lawful thing, is a singular instance of 'hæret in cortice'. As the rule of Evidence is confessedly based on a moral tenderness for the accused, it would seem that this moral tenderness should not be shown to a person whose conduct is equally reprehensible in any case. The most meritorious opponent in a civil case, whether it be a wife, or heirs, or creditors, may be deprived of his alleged rights upon proof of marriage not consisting in eye-witness testimony. It is a scandal to be more cautious and tender in favor of an opponent in that particular criminal charge in which the opponent has placed himself on a level of moral meanness below that of the least meritorious opponent in any civil case.

§ 2085. **Same: (4) Eye-Witness required for Criminal Conversation and Bigamy.** It remains to notice the state of the law to-day in respect to Lord Mansfield's rule:

(*a*) In the civil action for *criminal conversation*, there is no doubt about the common law; it was plainly determined in Morris *v.* Miller and Birt *v.* Barlow (*ante*, § 2084), and has ever since been accepted.[1] The comparative

§ 2085. [1] ENGLAND: 1784, Hemmings *v.* Smith, 4 Doug. 33 (an eye-witness proved the marriage-ceremony, but did not identify the then wife with the person debauched by defendant; Buller, J.: "Upon the point of identity there is no difference between this action and others; it is only in the proof of marriage in fact that it differs"; and the fact that the woman married was alive as wife in 1778, four or five years before the adultery,

infrequency of this action nowadays has allowed the rule to continue without dispute.

(*b*) On a charge of *bigamy*, the English rule has in a few jurisdictions been followed.[2]

But in the great majority it has been rejected, either by judicial ruling or by statutory change;[3] so that in the latter jurisdictions habit and repute suffice, as on other issues (*ante*, § 2083).

was held sufficient to go to the jury as to her identity with the woman debauched); 1844, Catherwood *v.* Caslon, 13 M. & W. 260 ("the uniform practice ever since" Morris *v.* Miller and Birt *v.* Barlow requires proof of a marriage in fact).

CANADA: 1912, Zdrahal *v.* Shatney, 7 D. L. R. 554, Man. (criminal conversation; the testimony of the plaintiff alone to a ceremonial marriage, held not sufficient, by two judges; but Cameron and Haggart, JJ. A., correctly held that "we have the evidence of an eye-witness, to wit, the plaintiff," and thus the rule of Morris *v.* Miller was satisfied); 1920, Robson *v.* Thorpe, 55 D. L. R. 139, Sask (crim. con.; certified copy of the marriage registry in England, with the wife's testimony, held sufficient; the wife's testimony alone would not have sufficed).

UNITED STATES: 1818, Kibby *v.* Rucker, 1 A. K. Marsh. Ky. 391; 1905, Snowman *v.* Mason, 99 Me. 490, 59 Atl. 1019; 1921, Reed *v.* Stevens, 120 Me. 290, 113 Atl. 712 (crim. con., the marriage "must be strictly proved"); 1875, Hutchins *v.* Kimmell, 31 Mich. 126, 130; 1883, Perry *v.* Lovejoy, 49 Mich. 529, 532, 14 N. W. 485 (the rule does not apply to an action for enticement, not alleging criminal intercourse); 1914, Vollmer *v.* Stregge, 27 N. D. 579, 147 N. W. 797 (the parties themselves are eye-witnesses). Add to these the citations under § 2086, *post*; Courts there adopting the eye-witness rule would equally do so here; the statutes also, in the next note, sometimes deal with this action.

Contra: Ala. Code 1907, § 2466 (criminal conversation; proof may be made "by general reputation" and cohabitation); *Ga.* Rev. C. 1910, § 4465 (adultery or crim. con.; "proof of the marriage may be made by general reputation and the parties living together as husband and wife").

For the question whether other evidence is needed of the *identity* of the person named in the marriage-register or by the oral witness, see *post*, § 2529, where the presumption of identity from name is treated.

[2] 1879, Halbrook *v.* State, 34 Ark. 511, 514, *semble* (for the second marriage); 1885, Green *v.* State, 21 Fla. 403 (polygamy); 1895, Hiler *v.* People, 156 Ill. 511, 520, 41 N. E. 181 (but compare the statute *infra*, note 3); 1829, Damon's Case, 6 Greenl. Me. 148, 149; N. H. Pub. St. 1891, c. 174, § 17 (cited *infra*, note 7); 1915, U. S. *v.* Evangelista, 29 P. I. 215; Tex. Rev. P. C. 1911, § 485 (on a trial for bigamy or racial intermarriage, "proof of marriage by mere reputation shall not be sufficient"); Wash. R. & B. Code 1919, § 2153, Stats. 1897, § 7232 (on charge of bigamy, adultery, etc., "a recorded certificate of marriage, . . . there being no decree of divorce, proves the marriage of the person"). Add to these the Courts in the following notes requiring eye-witness proof for other issues; they would certainly require it for bigamy also. So also the Courts cited in § 2086, *post*, as requiring it even where admissions are offered, would also require it where habit and repute are offered.

[3] UNITED STATES: *Federal:* Code 1919, § 10600 (polygamy, etc.; "every ceremony of marriage . . shall be certified by a certificate," etc., which "shall be prima facie evidence of the facts required by this section to be stated"; but this shall not prevent "the proof of marriages, whether lawful or unlawful, by any evidence otherwise legally admissible").

Alabama: 1898, Bynon *v.* State, 117 Ala. 80, 23 So. 640 (for the first marriage); 1898, Moore *v.* Heineke, 119 Ala. 627, 24 So. 374 (same); for prior Alabama rulings, see *post*, § 2086; *Arizona:* Rev. St. 1913, Civ. C. § 1047 (on a charge of bigamy, evidence of "either of the marriages by the register, certificate, or other record evidence," is not necessary, but only "such evidence as is admissible to prove a marriage in other cases"); Civ. C. § 1762 (proof of marriage; like Minn. Gen. St. 1913, § 8459); *California:* P. C. 1872, § 1106 (in bigamy, "it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof"); *Colorado:* Comp. St. 1921, § 6835 (like Ill. Rev. St. c. 38, § 29); *Idaho:* Comp. St. 1919, § 8953 (bigamy; proof of marriage by "register, certificate, or other record evidence," not necessary; marriage provable as "in other cases"); *Illinois:* Rev. St. 1874, c. 38, § 29 (St. 1845; in bigamy, "it shall not be necessary to prove either of the marriages by the register or certificate thereof, or other record evidence; but the same may be proved by such evidence as is admissible to prove a marriage in other cases"); *Indiana:* Burns Ann. St. 1914, § 2351 (bigamy; like Ill. Rev. St. c. 38, § 29); *Kansas:* Gen. St. 1915, § 7578

(*c*) On a *prosecution for adultery or incest*, Lord Mansfield's rule would not be applicable. In a few jurisdictions it has been extended to those offences;[4] but this is not justified either by precedent or by policy, and has elsewhere been denied.[5]

(*d*) In *criminal cases in general* the rule as stated in terms by Lord Mansfield does not apply; and modern statutes defining the offence of *family-desertion* have taken care to make this clear.[6] Never-

(cohabitation and reputation, receivable); *Massachusetts:* Gen. L. 1920, c. 207, § 47 ("Marriage may be proved by evidence of the admission thereof by an adverse party, by evidence of general repute or of cohabitation by the parties as married persons, or of any fact from which the fact may be inferred"); 1876, Com. *v.* Holt, 121 Mass. 61; *Minnesota:* Gen. St. 1913, § 8459 (whenever marriage is in issue, the admission of it by the opponent, or general repute, or cohabitation, or "any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent"); 1867, State *v.* Johnson, 12 Minn. 476, 483 ("competent" means here "such evidence as if believed would authorize a jury to find the fact of marriage"; and thus changes the common-law rule as to sufficiency); 1878, State *v.* Armington, 25 Minn. 29, 35; *Missouri:* 1883, State *v.* Gouce, 79 Mo. 600, 601, *semble;* 1890, State *v.* Cooper, 103 Mo. 266, 271, 15 S. W. 327; *Montana:* Rev. C. 1921, § 5697 (consent and consummation of marriage "may be proved under the same general rules of evidence as facts in other cases"); § 11982 (like Cal. P. C. § 1106); *Nevada:* Rev. L. 1912, § 6456 (bigamy; like Cal. P. C. § 1106); *North Dakota:* Comp. L. 1913, § 10861 (like Cal. P. C. § 1106); *Oklahoma:* Comp. St. 1921, § 2720 (like Cal. P. C. § 1106); *Philippine Islands:* Civ. C. §§ 53–55 (quoted *ante*, § 1336); *Porto Rico:* Rev. St. & C. 1911, § 3223 (for marriages dating after the Code, "certification from the book of marriages" is the only proof, unless "the book shall have disappeared"); § 3224 (in the latter case, cohabitation and the record of birth of children may suffice); § 3225 (for marriages in the U. S. or a foreign country not requiring registration "in a regular and authentic manner," any evidence admissible by law may suffice); § 6280 (like Cal. P. C. § 1106); *South Dakota:* Rev. C. 1919, § 4901 (like Cal. P. C. § 1106); § 103 ("Consent to and subsequent consummation of marriage . . . may be proved under the same general rules of evidence as facts in other cases"); *Vermont:* Gen. L. 1917, § 7010 (cohabitation and admissions, competent in prosecutions involving marriage); 1896, State *v.* Sherwood, 68 Vt. 414, 35 Atl. 352, *semble* (eye-witness not necessary to show a previous marriage which would make a later one no bigamy).

[4] 1827, State *v.* Roswell, 6 Conn. 446 (incest with daughter; to prove the marriage with her mother, marriage in fact must be shown; admissions and reputation insufficient; rule for bigamy and crim. con. held applicable); 1875, Arnold *v.* State, 53 Ga. 574 (adultery by marrying another's wife); 1896, Republic *v.* Kuhia, 10 Haw. 440 (adultery; here the testimony of the celebrant himself, without his record, was held sufficient); 1896, Republic *v.* Waipa, 10 Haw. 442 ("on a charge of adultery, marriage must be proved by direct evidence"); 1841, State *v.* Hodgskins, 19 Me. 155, 157; 1868, Boone *v.* Purnell, 28 Md. 607, 629; 1799, Com. *v.* Moffat, 2 Dane's Abr. Mass. 296 (must be proved by a witness present or by a register-certificate); 1818, Com. *v.* Littlejohn, 15 Mass. 163 (lewd cohabitation with a married person; the marriage not sufficiently provable by cohabitation); 1904, State *v.* Eggleston, 45 Or. 346, 77 Pac. 738, *semble;* 1893, Bailey *v.* State, 36 Nebr. 808, 812, *semble;* 1843, State *v.* Winkley, 14 N. H. 480, 495; 1915, U. S. *v.* Nebrida, 32 P. I. 160 (on the facts); 1916, U. S. *v.* Memoracion, 34 P. I. 633 (eye-witness' testimony may suffice); 1789, State *v.* Annice, N. Chipm. Vt. 9.

[5] *Canada:* 1916, R. *v.* Lindsey, 30 D. L. R. 417, Ont. (incest; habit and repute held sufficient); *United States: Ga.* Rev. C. 1910, § 4465 (quoted *supra*, note 1); 1921, Plummer *v.* State, 27 Ga. App. 185, 108 S. E. 128 (adultery and fornication); *Tenn.* 1834, Ewell *v.* State, 6 Yerg. 364, 369 (incest; proof of marriage by eye-witnesses not required; here reputation sufficed); *Tex.* P. C. 1911, § 489, 1895, § 352 (on a trial for incest, the relationship may be proved as in civil suits); § 491 (adultery; proof of marriage may be made by marriage license and return or certified copy, or by a person "present at such marriage," or by one "who has known the husband and wife live together as married persons").

The statutes cited in note 3, *supra*, also often bear on this point. For Alabama rulings, see *post*, § 2086.

[6] ENGLAND: 1765, R. *v.* Norwood, East Pl. Cr., I, 337 (wife's murder of husband, *i. e.* petit treason; Lord Mansfield, C. J., with others); 1826, R. *v.* Hassall, 2 C. & P. 435 (indictment against Sarah H., as single woman, and James H., for stealing; defence, that Sarah H. was wife of James H. acting under coercion; habit and repute held insufficient on the facts, by Garrow, B.; but "I quite agree

theless, a few Courts have seen fit to expand the rule to cover all criminal cases.[7]

with my Lord Mansfield that the two cases mentioned are the only ones in which it is necessary to give direct proof of an actual marriage").

CANADA: St. 1913, 3–4 Geo. V, c. 13, § 14 (inserting a new § 242 B in Criminal Code 1906; failure to support family; "that a man has cohabited with a woman or has in any way recognized her as being his wife" shall be evidence of lawful marriage, and "that a man has in any way recognized children as being his children" shall be evidence of their being his legitimate children).

UNITED STATES: *Alaska:* St. 1919, c. 49, § 5 (family desertion; like Tex. P. C. § 640c); *Arkansas:* Dig. 1919, § 2597 (wife-abandonment, etc.; "no other evidence" than in civil cases, needed to prove marriage or paternity); *California:* 1909, People v. Le Doux, 155 Cal. 535, 102 Pac. 517 (marricide; a bigamous marriage with L. being alleged as the motive, the rule for bigamy was correctly not applied to the proof of marriage with the deceased, because the defendant's belief alone was material to the motive); *Colorado:* 1918, Smith v. People, 64 Colo. 290, 170 Pac. 959 (desertion and non-support); *Columbia (Dist.)*; St. 1906, Mar. 23, § 2, c. 1131, U. S. Stat. L. vol. 34, p. 87 (offence of failing to support one's family; "no other evidence shall be required" to prove marriage or parentage than in civil actions); *Delaware:* Rev. St. 1915, § 3041 (family-desertion; like Wis. Stats. 1919, § 4587c); *Florida:* 1899, Mobley v. State, 41 Fla. 621, 26 So. 732 (murder of paramour; eye-witness not necessary to prove defendant's marriage to another woman); *Hawaii:* Rev. L. 1915, § 2975 (desertion of family by husband; "no other or greater evidence" required to prove the marriage or paternity than in civil action); *Illinois:* Rev. St. 1874, c. 38, § 491, St. 1893, June 17 (in a prosecution of a husband for abandoning his family, no other evidence of marriage is necessary than is required "in a civil action"); St. 1901, May 11, § 3 (in prosecutions for abandonment of wife or child, no other evidence of marriage shall be required than in civil actions); St. 1915, June 24, p. 470, § 6 (family-desertion; like Wis. Stats. § 4587c, omitting "whether legitimate or illegitimate"); *Iowa:* 1906, State v. Rocker, 130 Ia. 239, 106 N. W. 645 (murder; marriage of one co-defendant to the deceased); *Kansas:* Gen. St. 1915, § 3415 (family-desertion by husband; like Haw. Rev. L. 1915, § 2975); *Massachusetts:* Gen. L. 1920, c. 273, § 7 (desertion or non-support of family; like Wis. Stats. 1919, § 4587c); *Minnesota:* 1917, c. 213, § 3 (family desertion; "no other or greater evidence" required to prove "the relationship of the defendant to such wife or child" than in a civil action); *Missouri:* Rev. St. 1919, § 3274 (on a prosecution for abandonment of wife or child, proof of marriage or paternity as in civil cases suffices); St. 1921, Apr. 7, p. 281, and Mar. 24, p. 284, amending Rev. St. 1919, § 3274 (abandonment etc. of family; "no other evidence" required to prove marriage or parentage than would be needed in a civil action); *Nevada:* St. 1913, Mar. 26, p. 445, § 2 (family desertion; "no other evidence" required to prove marriage or parentage than in a civil action"); *New Jersey:* St. 1917, Mar. 19, c. 61, § 5 (family-desertion; "no other or greater evidence shall be required" to prove marriage or parentage than "to prove such facts in a civil action"); *North Carolina:* 1859, Archer v. Haitchcock, 6 Jones L. 421 ("in criminal proceedings, it is confined to an indictment for bigamy"); *North Dakota:* Comp. L. 1913, § 9600 (family-desertion; like Wis. Stats. 1919, § 4587c); *Oregon:* Laws 1920, § 2171 (family non-support; (1) cohabitation to be evidence of marriage; (2) birth of child during marriage to be evidence of paternity); *Texas:* 1880, Jackson v. State, 8 Tex. App. 60 (assault with intent to murder); Rev. P. C. 1911, § 640c (family-desertion; for proving marriage or parentage "no other or greater evidence shall be required" than in civil actions; wife shall be competent to all facts, including marriage and parentage); *Utah:* Comp. L. 1917, § 8113 (desertion or non-support of wife or child; for evidencing marriage or parentage, "no other evidence" to be required than "to prove such fact in civil action"). *Vermont:* Gen. L. 1917, § 3541 (family desertion a penal offence; no other evidence of marriage required than in civil action); *Washington:* R. & B. Code 1909, § 5935 (family-desertion; no other evidence required to prove marriage or parentage than "to prove such facts in a civil action"); *Wisconsin:* St. 1911, c. 576, Stats. 1919, § 4587c (family-desertion; "no other or greater evidence shall be required to prove the marriage of such husband or wife, or that the defendant is the father or mother of such child or children whether legitimate or illegitimate, than is or shall be required to prove such facts in a civil action"); *Wyoming:* Comp. St. 1920, § 5036 (desertion of family; like Wis. Stats. 1919, § 4587c, omitting "whether legitimate or illegitimate").

[7] 1852, Cook v. State, 11 Ga. 53, 61; 1917, Green v. New Orleans S. & G. I. R. Co., 141 La. 120, 74 So. 717, *semble* (cited more fully, *post*, § 2088); N. H. Pub. St. 1891, c. 174, §§ 16, 17 (in civil actions, except for criminal conversation, "acknowledgment, cohabitation, and reputation is competent proof of marriage"; in indictments for "bigamy, adultery, and the like," and actions for criminal conversation, "there must be proof of a marriage in fact"); 1903, State v. Tillinghast, 25 R. I. 391, 56 Atl.

(*e*) In suits for *divorce*, founded on *adultery*, Lord Mansfield's rule has of course no application; nevertheless the rule has occasionally been applied in such a proceeding.[8]

Much less has it any proper place in divorce suits founded on *other causes*, or in other *civil cases;* and on this there has been general agreement; [9] except in the few jurisdictions (*ante*, § 1336) where the register of civil status is the preferred evidence for family history in general.[10]

It must of course be understood, looking both at the general nature of this class of rules (*ante*, § 2077) and at the principle of receiving habit and repute as ordinarily sufficient (*ante*, § 2083), that habit and repute are always *admissible*, even where by the present rule eye-witness evidence is required in order that the case may go to the jury.[11] The rule, in other words, merely declares habit and repute insufficient evidence without eye-witness evidence,

181 (crime of non-support; rule assumed to apply to all criminal cases, without citing authority, and in an ill-considered opinion); 1872, Dove *v.* State, 3 Heisk. Tenn. 348, 355, 365 (woman offered by the State, objected to as defendant's wife; on the facts, proof by certificate or eye-witness required; no authority cited); 1920, State *v.* Stewart, 57 Utah 224, 193 Pac. 855 (adultery; oral testimony to marriage, held sufficient; but the Court's remark "It is generally held that stricter proof of marriage is required in criminal than in civil cases," is incorrect; there never has been for criminal cases in general a stricter rule as generally held); 1853, West *v.* State, 1 Wis. 209, 218, 225 (here, seduction by a married man).

Note also the following: 1906, Green *v.* State, 125 Ga. 742, 54 S. E. 724 ("a witness cannot be impeached by showing by parol evidence that he has committed bigamy"; no authority is cited for this confused statement).

[8] 1814, Ellis *v.* Ellis, 11 Mass. 92 (divorce for adultery by second marriage; the hearsay certificate not sufficient; oath in Court required); 1861, Case *v.* Case, 17 Cal. 598, 600 (divorce for adultery; proof of "actual marriage" necessary); 1886, People *v.* Stokes, 71 Cal. 263, 12 Pac. 71 (open cohabitation; opinion not clear). The statutes cited *supra*, note 3, would probably affect these rulings. The rule would be absurd for divorce.

[9] *Fed.* U. S. Code 1919, § 4356 (Five Civilized Tribes of Indians; proof of marriage of Indian woman to white man may be made by general repute or cohabitation "or any other circumstantial or presumptive evidence"); § 10188 (pensions of widows of colored and Indian soldiers and sailors, enlisted prior to Mar. 4, 1873; no other evidence is required than habit and repute or a ceremony believed to be obligatory); § 10189 (soldiers' and sailors' widows' pensions; marriage "shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time," etc.); § 10252 (World War pensions; cited *post*, § 2087); *Cal.* Civ. C. 1872, § 57 ("Consent to marriage and the solemnization thereof may be proved under the same general rules of evidence as facts are proved in other cases"); *Fla.* 1869–71, Burns *v.* Burns, 13 Fla. 369, 380, *semble* (cruelty); *Ill.* Rev. St. 1874, c. 40, § 11 (in divorce proceedings, a marriage in a "foreign state or country" is provable by "acknowledgment of the parties, their cohabitation, and other circumstantial testimony"); *Ind.* 1850, Trimble *v.* Trimble, 2 Ind. 76 (unspecified grounds); *Me.* 1921, Smith *v.* Heine S. B. Co., 119 Me. 552, 112 Atl. 516 (widow's claims under workmen's compensation law; eye-witness not required); *Mich.* 1884, Cross *v.* Cross, 55 Mich. 280, 21 N. W. 309, *semble* (cruelty and abandonment); *Oh.* Gen. C. Annot. 1921, § 11989 (in divorce and alimony cases, habit and repute are "competent evidence," and in the Court's discretion may suffice); 1832, Houpt *v.* Houpt, Wright 156 (but only under statute, for the marriage to be dissolved; for any other marriage, such evidence is probably to be rejected in discretion); *Okl.* Comp. St. 1921, § 515 (in divorce and alimony proceedings, cohabitation and reputation "may be received as evidence of the marriage"); *Tex.* 1851, Wright *v.* Wright, 6 Tex. 3, 19 (cruelty); *Vt.* 1839, Mitchell *v.* Mitchell, 11 Vt. 134 (unspecified grounds); *Wash.* 1903, Summerville *v.* Summerville, 31 Wash. 411, 72 Pac. 84; 1921, Emmans' Estate, 117 Wash. 182, 200 Pac. 1117 (letters of administration; certificate of marriage not required); *W. Va.* 1868, Hitchcox *v.* Hitchcox, 2 W. Va. 435, 438, *semble* (cruelty).

Contra: 1854, Harman *v.* Harman, 16 Ill. 85 (divorce for cruelty; but this ruling is probably affected by the statute cited *supra*).

[10] See the citations *supra*, note 3, *post*, § 2088, and *ante*, § 1336.

[11] 1860, Com. *v.* Hurley, 14 Gray 411, and cases cited *ante*, §§ 268, 1602. *Contra:* 1867, Berry, J., in State *v.* Johnson, 12 Minn. 476, 482; but this view is without any support whatever.

precisely in the same way that an accomplice's testimony is by some Courts (*ante*, § 2056) held insufficient without corroboration.

§ 2086. **Same: (5) Eye-Witness not required when Proof is by Admissions.** Should Lord Mansfield's rule be extended to require eye-witness evidence, not only in addition to habit and repute, but even where the defendant's express admissions of the marriage can be shown? This is the part of the controversy about which there has been most argument. The authorities for enlarging the rule to that extent have never been numerous, but they have served to force the question strongly upon the attention of almost every Court. The argument in favor of such an extension has been set forth as follows:

1803, Serjeant *East*, Pleas of the Crown, I, 471: "It may be difficult to say that it is not evidence to go to the jury, like the acknowledgment of any other matter 'in pais' where it is made by a party to his own prejudice at the time. But it must be admitted that it may under circumstances be entitled to little or no weight; for such acknowledgments, made without consideration of the consequences and palpably for other purposes at the time, are scarcely deserving of that name in the sense in which acknowledgments are received as evidence, — more especially if made before the second marriage, or upon occasions when in truth they cannot be said to be to the party's own prejudice nor so conceived by him at the time."

1858, CAMPBELL, J., in *People* v. *Lambert*, 5 Mich. 349, 366: "Some confusion has been created by not distinguishing between the various kinds of confessions. A deliberate confession in open court is treated as sufficient evidence, always, so far as it goes, if made on the trial of the cause, and perhaps even on the preliminary hearing, provided it is made freely. It is regarded as proof on the same principle as a plea of guilty, because the accused cannot be supposed to act without consideration. But confessions made extrajudicially are often misunderstood and easily perverted. . . . There would be a peculiar difficulty in resting upon confessions and cohabitation alone, arising from the fact that persons forming illicit connections are very rarely bold enough to live openly in the community in such a relation and avow its existence. To confess it would expel them from all decent society; and very few are so infatuated as to forego the advantages of social intercourse and respectability if they can obtain them by the assumption of virtue. For civil rights the law holds them to their professions; but in criminal cases the offense must actually exist. No doubt, in these as in all other criminal prosecutions, circumstantial evidence of a conclusive nature may often avail, where direct testimony is inaccessible. But it must be testimony not reasonably capable of any other interpretation. . . . Circumstantial evidence assumes many forms, and cannot always be limited or defined in advance. We do not mean to decide whether or not evidence by an eye-witness of an actual marriage may not in some cases be dispensed with where there is other circumstantial evidence going to establish it conclusively. But it would be very unsafe to permit a conviction upon any proof which is susceptible of two interpretations and upon which any theory can reasonably be based of innocence of the offense charged. We think the first marriage and its legality must be affirmatively proved by evidence beyond the mere confessions and conduct of the prisoner [so far] as shown in the bill of exceptions."

The answer to this argument has been frequently expounded. It is, in brief, that no more consideration should be shown to a defendant in this sort of a case than in any other; that an express confession or admission, at any rate

when corroborated (*ante*, § 2070) is sufficient evidence in all other criminal cases; and that the eye-witness rule, when admissions are available, is a serious obstacle to the due punishment of the offence of bigamy:

1825 (?), President KING, in *Com.* v. *Murtagh*, 1 Ashm. Pa. 272, 274: "I would yield without hesitation to the reasoning on which [the ruling of this Court in Forney *v.* Hallacher] rests, drawn from the habits, manners, and peculiar condition of the country, which makes so strict a rule as that established in Morris *v.* Miller inapplicable to our peculiar condition. In a country where no public or ecclesiastical agency is requisite to give a marriage validity, where a contract in 'verba de præsenti' made between the parties capable of contracting matrimony is all that is required to make a good marriage, where we have no uniform and permanent registry of marriages, where the youthful and active part of our population are daily bending their steps to the rich and boundless fields of enterprise in the region of the father of the waters, and where so great a portion of our population are foreigners whose marriages have been celebrated in lands afar remote, the most manifest inconvenience would result if we servilely followed a rule of evidence applicable to a people living in a state of society so artificial as that of modern England, — a rule obviously the offspring of the British marriage acts, and which is not satisfactory even there. . . . The reason for relaxing the rule, if it existed 'proprio vigore' in England, would be the great moral necessity which required it from the peculiar character and condition of our community; and necessity, moral or absolute, has been said to be sufficient ground for dispensing with the usual rules of evidence."

1834, MELLEN, C. J., in *Ham's Case*, 11 Me. 391, 394: "The question which at once presents itself on this occasion is, Why should not the defendant's deliberate and explicit confession of his marriage, in such a prosecution, be as competent evidence to prove such marriage as a similar confession is to prove the crime of adultery charged? If either fact exists, it must certainly be within his own knowledge; and, as a general proposition it is certainly true that a deliberate and voluntary confession, understandingly made, is the best evidence; for he who makes it speaks from his actual knowledge of the fact; no one has any interest in its truth or interest in disputing it. . . . Viewing the question under consideration independently of decided cases, there would seem but one reason why the deliberate confession of his marriage, made by defendant in a prosecution against him for bigamy or adultery, should not be received as competent and satisfactory evidence of such marriage, — namely, that the person solemnizing the marriage had no legal authority to do it, and yet the want of authority might not have been known by the person officiating or by the defendant himself when he made the confession. . . . In no other cases, however, do we perceive that any unfavorable consequences could ensue which would not follow upon a conviction upon undisputed proof of a legal marriage. . . . [Yet] the plea of guilty is a confession of the crime, which includes a confession of the marriage, that being essential to the existence of the crime; the Court receives such a plea and passes sentence on the offender, though even this solemn confession in open court may be made under a mistaken belief that the marriage was solemnized by a person duly authorized, though the fact was otherwise. . . . The question then is, whether a deliberate confession of marriage is not as convincing evidence of the fact as the testimony of a witness present; for in the case of confession [as well as of eye-witnesses] the question of identity can never arise. . . . When we take all the foregoing circumstances into consideration, together with the known fact that marriages are seldom recorded as the law requires, and the difficulty of ascertaining who were present at the marriage, especially among the lower classes and after the lapse of a few years, we apprehend that the interests of public justice would be advanced by a relaxation of the rules of evidence touching the point before us and by a more liberal principle applied in the investigation of facts, so that the laws of the land may be more surely enforced against unprincipled offenders and the public morals be more faithfully and effectually guarded."

1876, COFER, J., in *Com.* v. *Jackson*, 11 Bush 679, 683, 687: "[In actions for criminal conversation,] the plaintiff knows when, where, and by whom he was married, and at least some of the persons who were witnesses of the fact, and generally has it in his power to offer direct and positive proof. But the case is often quite otherwise with the government in prosecutions for bigamy. The prosecuting officer must often be wholly ignorant of the time and place of the prisoner's first marriage, of the names and residence of those present at its consummation, and the avenues of information will generally be closed to him, especially when the first marriage took place (as is generally the case with bigamists) in some other State or country. . . . It is difficult to perceive any reason for discriminating between admissions to prove a marriage and [admissions to prove] other facts essential to constitute the legal guilt of the accused. There can be no more danger of doing injustice in receiving such evidence in the class of cases under consideration than in any other. Where the declarations of the prisoner and the fact that he has recognized and cohabited with the woman alleged to be his wife are alone relied upon, the jury should still be told that this is only evidence to prove an actual marriage, and that it is for them to decide whether the facts proven are sufficient to warrant them in finding that the prisoner was in fact married to the alleged wife, and unless they so belive they should acquit, although they may believe he recognized and cohabited with her as his wife. This will place the declarations of one indicted for a crime in which proof of actual marriage is necessary to make out his guilt upon the same footing with those charged with other crimes, and will not give comparative immunity to this detestable crime by obstructing the path of the prosecutor with a rule of evidence which it is believed would render conviction impossible in a large majority of such cases where the moral evidence of guilt is conclusive, and where a conviction could be had by simply applying to that class of cases the same rules of evidence applied to other crimes subjecting the offender to like punishment." [1]

These opposing reasons have generally been regarded as preponderating.

The state of the law is as follows:

(*a*) In actions for *criminal conversation*, the defendant's admissions seem to have been held sufficient in England from the outset,[2] in spite of the ambiguous language of Lord Mansfield in Morris *v.* Miller (*ante*, § 2084); in the United States, the same view has been shown some favor.[3]

(*b*) In prosecutions for *bigamy*, Lord Mansfield's rule is not favored in England or Canada as requiring eye-witness proof where the defendant had deliberately admitted the marriage; [4] and the same view has generally

§ 2086. [1] The following are other good opinions: 1822, Gibson, J., in Forney *v.* Hallacher, 8 S. & R. Pa. 158; 1827, Johnson, J., in State *v.* Hilton, 3 Rich. L. S. C. 434; 1852, Nisbet, J., in Cook *v.* State, 11 Ga. 53, 59, 63.

[2] 1769, Rigg *v.* Curgenven, 2 Wils. 395, 399 (bribery at elections; answering an argument of the counsel in which Morris *v.* Miller was cited, the Court of Common Bench, Wilmot, C. J., said: "As to the case mentioned of criminal conversation, to be sure a defendant's saying, in jest or in loose rambling talk, that he had laid with the plaintiff's wife, would not be sufficient alone to convict him in that action; but if it were proved that the defendant had seriously or solemnly recognised that he knew the woman he had laid with was the plaintiff's wife, we think it would be evidence proper to be left to a jury without proving the [actual] marriage"); yet compare the contrary suggestion by some of the judges in R. *v.* Truman, cited *infra*, note 4.

[3] 1822, Forney *v.* Hallacher, 8 S. & R. Pa. 158 (crim. con.; eye-witness not necessary as against confessions; but, *semble*, reputation not sufficient; Morris *v.* Miller on the former point repudiated; Mr. J. Gibson's vigorous opinion makes this the leading case on this part of the subject); 1825 (?), Com. *v.* Murtagh, 1 Ashm. Pa. 472 (declaring the ruling in Forney *v.* Hallacher to be the law); 1855, Thorndell *v.* Morrison, 25 Pa. 326, 328 (same); S. Dak. Rev. Code 1919, § 103 (quoted *ante*, § 2085). *Contra:* 1818, Kibby *v.* Rucker, 1 A. K. Marsh. Ky. 391, *semble;* 1876, Com. *v.* Jackson, 11 Bush Ky. 679, 673, *semble;* 1834, Ham's Case, 11 Me. 391, 397.

[4] ENGLAND: 1795, R. *v.* Truman, East Pl. Cr., I, 470 (besides cohabitation, a document

been taken in the United States.[5] Nevertheless, in a few jurisdictions, the contrary result, based chiefly on an early New York ruling, has been accepted.[6]

was proved which, being a proceeding in a Scotch Court to punish the defendant for secretly contracting the first marriage, contained an indorsement in the defendant's hand acknowledging that marriage; this was held sufficient, all the Judges being present except Perryn, B., and Buller, J.; two of the judges thought that the acknowledgments being in writing upon the Court proceedings distinguished the case; but "some thought that the acknowledgment alone would have been sufficient," distinguishing Morris *v.* Miller because "the acknowledgment of the defendant in such an action of the plaintiff's marriage might be of a *fact* not within his knowledge; as [on the contrary] it must be [of his own knowledge] if a defendant in bigamy admitted his own marriage"); 1839, R. *v.* Upton, 1 C. & K. 165 note, Erskine, J.; 1840, Woods *v.* Woods, 2 Curt. Eccl. 516, 521, *semble* (in criminal cases acknowledgment suffices); 1843, R. *v.* Newton, 2 Moo. & Rob. 503, Wrightman and Cresswell, JJ.; 1843, R. *v.* Simmonsto, 1 C. & K. 164 (same case as the preceding, under a different name). *Contra:* 1876, R. *v.* Savage, 13 Cox Cr. 178.

CANADA: *Accord:* 1860, R. *v.* Creamer, 10 Low. Can. 404, 408. *Contra:* 1890, R. *v.* Ray, 20 Ont. 209 (bigamy; defendant's confession of the first marriage, not sufficient; "We must follow the latest English case, R. *v.* Savage"). *Not clear:* 1911, R. *v.* Naoum, 24 Ont. L. R. 306 (bigamy; defendant's oral admission of first marriage).

[6] Add to the following rulings the statutes cited *ante*, § 2085.

Federal: 1880, Miles *v.* U. S., 103 U. S. 304, 311; *Arizona:* 1920, Ford *v.* State, 21 Ariz. 567, 192 Pac. 1117 (Miles *v.* U. S. approved); *Georgia:* 1904, McSein *v.* State, 120 Ga. 175, 47 S. E. 544 ("the defendant's uncorroborated admissions are sufficient to establish the first marriage"); *Illinois:* 1854, Harman *v.* Harman, 16 Ill. 85, 88 (common-law rule not decided); 1886, Tucker *v.* People, 117 Ill. 88, 92, 7 N. E. 51, *semble;* 1887, Tucker *v.* People, 122 Ill. 583, 592, 13 N. E. 809 (under the statute *ante*, § 2085; but "whether the marriage . . . might be established solely by such evidence, it will not be necessary here to determine"); 1895, Hiler *v.* People, 156 Ill. 511, 520, 41 N. E. 181 (evidence including admissions, held insufficient, but no express statement is made as to the sufficiency of admissions; opinion loose; Tucker *v.* People not cited); 1898, Lowery *v.* People, 176 Ill. 466, 50 N. E. 165 (oral admissions may suffice, on a charge of bigamy); *Indiana:* 1861, State *v.* Seals, 16 Ind. 352; 1874, Squire *v.* State, 46 id. 459, 460; *Kentucky:* 1876, Com. *v.* Jackson, 11 Bush 679; *Missouri:* 1897, State *v.* Jenkins, 139 Mo. 535, 41 S. W. 220; *North Carolina:* 1892, State *v.* Wylde, 110 N. C. 500, 15 S. E. 5; 1897, State *v.* Melton, 120 N. C. 591, 26 S. E. 933; *Ohio:* 1847, Wolverton *v.* State, 16 Oh. 173, 176, *semble;* 1867, Stanglein *v.* State, 17 Oh. St. 453, 461, *semble; Pennsylvania:* 1825 (?), Com. *v.* Murtagh, 1 Ashm. 272; *Rhode Island:* 1897, State *v.* Gallagher, 20 R. I. 266, 38 Atl. 655; *South Carolina:* 1827, State *v.* Britton, 4 McC. 256 (admissions, with cohabitation, held sufficient; probably the same case as the next); 1827, State *v.* Hilton, 3 Rich. L. 434 (same); *S. Dakota:* Rev. Code 1919, § 103 (quoted *ante*, § 2085); *Texas:* 1883, Dumas *v.* State, 14 Tex. App. 464, 472 (reputation, with cohabitation and admission, "is competent evidence to establish a 'prima facie' case sufficient to sustain a verdict"); 1899, Waldrop *v.* State, 41 Tex. Cr. 194, 53 S. W. 130, *semble;* 1912, Johnson *v.* State, 68 Tex. Cr. 104, 150 S. W. 936 (following Dumas *v.* State; but mere admissions, without cohabitation or other circumstances, do not suffice); 1920, Ahlberg *v.* State, 88 Tex. Cr. 173, 225 S. W. 253; *Utah:* 1879, U. S. *v.* Miles, 2 Utah 19, 25; 1885, U. S. *v.* Simpson, 4 Utah 227, 230, 7 Pac. 257; 1887, U. S. *v.* Bassett, 5 Utah 131, 137, 13 Pac. 237; 1888, U. S. *v.* Harris, 5 Utah 621, 19 Pac. 197, *semble;* 1890, U. S. *v.* Schow, 6 Utah 381, 24 Pac. 30; *Virginia:* 1817, Warner *v.* Com., 2 Va. Cas. 95, 98; 1867, Oneale *v.* Com., 17 Gratt. 582, 587; 1871, Bird *v.* Com., 21 Va. 800, 807.

Add to these the rulings to the same effect in note 7, *infra*, concerning adultery: such Courts would perhaps make a similar ruling in bigamy.

[6] *Federal:* 1851, Gaines *v.* Relf, 12 How. 472, 534 (mere confession of a husband, not a privy in interest, that he was formerly married, held not sufficient to "overthrow his marriage"; but here the declarant was assumed to be living, and was not a party or privy); *Alabama:* 1907, Williams *v.* State, 151 Ala. 108, 44 So. 57 (Parker *v.* State approved and followed); *Georgia:* 1905, Murphy *v.* State, 122 Ga. 149, 50 S. E. 48; *Michigan:* 1858, People *v.* Lambert, 5 Mich. 349; 1896, People *v.* Isham, 109 Mich. 72, 67 N. W. 819; *New York:* 1810, People *v.* Humphrey, 7 Johns. 314 (going merely upon the authority of Morris *v.* Miller and Birt *v.* Barlow); 1850, Clayton *v.* Wardell, 4 N. Y. 230, 234 (People *v.* Humphrey disapproved; "this rule is far from being well established"); 1853, Gahagan *v.* People, 1 Park. Cr. 378, 385 (following People *v.* Humphrey); 1862, Hayes *v.* People, 25 N. Y. 390, 393, 396 ("To convict of bigamy, a marriage in fact must be proved").

Add to these the Courts ruling the same way

(*c*) In a prosecution for *adultery*, the eye-witness rule should not apply; [7] yet in a few jurisdictions the requirement is made.[8]

(*d*) To *criminal cases in general* there is of course no ground for extending the rule.[9]

(*e*) In suits for *divorce*, founded on *adultery*, the rule has equally no place; [10] as also in suits for divorce founded upon any other cause.

(*f*) In *civil cases* in general, just as habit and repute may suffice (*ante*, § 2083), so also the opponent's admissions of the marriage are unquestionably sufficient, so far as any rule of law is concerned.[11]

for adultery, *infra*, note 8; such Courts would apply the same rule for bigamy.

The *Alabama* rulings leave the law perhaps uncertain: 1842, Ford *v.* Ford, 4 Ala. 142, 144 (dower; said *obiter* that in bigamy and crim. con. the register or an eye-witness is necessary); 1847, Morgan *v.* State, 11 Ala. 289 (incestuous adultery; admission of relationship, uncorroborated, insufficient); 1848, Cameron *v.* State, 14 Ala. 546 (living in adultery; defendant's oral admission of marriage, sufficient; Morris *v.* Miller repudiated); 1853, Martin *v.* Martin, 22 Ala. 86, 102 (dower; register or eye-witness not required); 1857, Langtry *v.* State, 30 Ala. 536 (bigamy; cohabitation and a written admission offered; neither register nor eye-witness necessary); 1870, Williams *v.* State, 44 Ala. 24 (bigamy; point not decided); 1875, Brown *v.* State, 52 Ala. 338 (bigamy; cohabitation alone, not sufficient); 1875, Williams *v.* State, 54 Ala. 131 (bigamy; repeated oral admissions of a foreign marriage, sufficient); 1876, Buchanan *v.* State, 55 Ala. 154 (living in adultery; admissions of the marriage held "competent," but repute held "not legal proof"); 1877, Brewer *v.* State, 59 Ala. 101 (bigamy; sufficiency of admissions, not decided); 1884, Parker *v.* State, 77 Ala. 47 (bigamy; admissions sufficient).

[7] *Ga.* 1852, Cook *v.* State, 11 Ga. 53, 59 (incestuous adultery); *Haw.* 1902, Terr. *v.* Castro, 14 Haw. 131 (adultery); *Me.* 1830, Cayford's Case, 7 Greenl. 57 (but not deciding that a confession of a domestic marriage, without any corroboration, would suffice); 1834, Ham's Case, 11 Me. 391, 396 (the above doubt settled; the principle being equally applicable to a domestic marriage; quoted *supra*); 1841, State *v.* Hodgskins, 19 Me. 155, 158; 1858, State *v.* Libby, 44 Me. 469, 478; *Mass.* 1876, Com. *v.* Holt, 121 Mass. 61, 63; *Mo.* 1857, State *v.* McDonald, 25 Mo. 176, *semble* (but the distinction between sufficiency and admissibility is not noticed); 1883, State *v.* Gouce, 79 Mo. 600, 601, *semble;* 1890, State *v.* Cooper, 103 Mo. 266, 271, 15 S. W. 327; *R. I.* 1867, State *v.* Medbury, 8 R. I. 543; *Utah:* 1906, State *v.* Thompson, 31 Utah 228, 87 Pac. 709; 1909, State *v.* Moore, 36 Utah 521, 105 Pac. 293; 1912, State *v.* Moore, 41 Utah 247, 126 Pac. 322.

Add also the statutes cited *ante*, § 2085.

[8] *Conn.* 1827, State *v.* Roswell, 6 Conn. 446 (cited *ante*, § 2085, n. 4); *Mass.* 1799, Com. *v.* Moffat, 2 Dane's Abr. 296 ("In this case the Court decided, on agreement, that no written or parol proof that he confessed he was married in England could be good. . . . This decision was on the authority of Morris *v.* Miller and other cases cited"); *Minn.* 1860, State *v.* Armstrong, 4 Minn. 335, 344; 1867, State *v.* Johnson, 12 Minn. 476, 481. Yet for the last two jurisdictions compare the statutes cited *ante*, § 2085. For Alabama rulings, see note 6, *supra*.

[9] *Eng.* 1765, R. *v.* Norwood, East Pl. Cr., I, 337 (wife's murder of a husband as petit treason; on objection that there must be proof "of actual marriage, and that such proof could only be by producing a copy of the register of such marriage or by some person who was present at the time," the evidence in the case being of cohabitation and admissions and the defendant's brother's testimony, Mansfield, L. C. J., with Parker, C. B., Smythe, Bathurst, Perrot, and Aston, JJ., "were of opinion that the marriage was sufficiently proved"); *Can.* St. 1913, 3–4 Geo. V, c. 13, § 14 (failure to support family; quoted *ante*, § 2085); *U. S.* 1910, People *v.* Adams, 161 Mich. 371, 127 N. W. 354 (seduction by a married man); 1898, State *v.* Misenheimer, 123 N. C. 758, 31 S. E. 852 (criminal slander; admissions of a divorce, allowed); 1853, West *v.* State, 1 Wis. 209, 218 (seduction by a married man); and the other statutes concerning family-desertion, quoted *ante*, § 2085, n. 6.

[10] *Accord:* the statutes cited *supra*, § 2085, frequently declare this, and the rulings cited in the foregoing notes to the present section will usually indicate the same result. *Contra, semble:* 1919, Bolmer *v.* Edsall, 90 N. J. Eq. 299, 106 Atl. 646 (nullity; discussion of habit and repute as corroborative evidence of a ceremonial marriage); 1855, Simons *v.* Simons, 13 Tex. 468, 473 (in divorce for adultery, under the statutory rule of § 2067, *ante*). *Undecided:* 1861, Fuller *v.* Fuller, 17 Cal. 605, 611.

[11] 1774, Mace *v.* Cadell, Cowp. 232 (trover by a bankrupt's creditors against a woman claiming the goods as 'feme sole'; 'her admission of marriage to the bankrupt, held sufficient); U. S. Code 1919, § 4356 (marriage of white man to Indian woman of Five Civilized

In any case, no matter what the rule as to eye-witness proof, the admission or confession is *receivable*. The eye-witness rule merely declares it insufficient of itself to support a verdict.[12] *What constitutes an admission* or confession has here received little attention in judicial definition.[13] It may be supposed that in general the sense of the word, as used for the confessions of accused persons (*ante*, § 821), would be followed, *i. e.* any express statement in words declaring that a marriage took place or that the relation of husband and wife exists. There can be within this broad notion no further limitation by rule of law. This or that admission may by the jury be held not persuasive under the circumstances, but the rule of law will not attempt to discriminate further.[14]

§ 2087. **Same**: (6) **Other Rules affecting Proof of Marriage, distinguished.** (*a*) In dealing with the precedents on the foregoing topic, particularly in criminal prosecutions for bigamy and adultery, it is to be understood that the case may also be affected by a distinct rule (*ante*, § 2070), applicable (in the jurisdictions recognizing it) in all *criminal cases* alike, namely, the rule that an *uncorroborated confession of the accused* is insufficient. By the rule here, the confession is of the fact of marriage, which is for bigamy and adultery only one element of the charge; while the confession to which the corroboration-rule applies is a confession of the crime as a whole.

Tribes may be evidenced by admissions); 1902, State *v.* Miller, 3 Pennew. Del. 518, 52 Atl. 262 (information for failure to support children); 1866, Laughlin *v.* Eaton, 54 Me. 156, 157 (malicious prosecution on charge of adultery); 1889, Applegate *v.* Applegate, 45 N. J. Eq. 116, 119, 17 Atl. 293, *semble* (bill for support); 1909, Walker *v.* Walker, 151 N. C. 161, 65 S. E. 923 (inheritance depending on legitimacy; the mother's declarations as to non-marriage received); 1859, Hill *v.* Hill's Adm'r, 32 Pa. 511, 513 (dower; intestate's admission of marriage to claimant, received); 1860, Kenyon *v.* Ashbridge, 35 Pa. 157 (title depending on legitimacy; father's admissions of marriage, receivable); 1877, Greenawalt *v.* McEnelley, 85 Pa. 353, 355 (title depending on legitimacy; father's admissions, cohabitation, and repute, sufficient; in bigamy and crim. con., admissions said to be "sufficient evidence"); 1810, Purcell *v.* Purcell, 4 Hen. & M. Va. 507, 512 (alimony).

Contra: 1813, Wilson *v.* Mitchell, 3 Camp. 93 (assumpsit; plea, coverture; plaintiff's admissions held insufficient, per Lord Ellenborough; this ruling is anomalous and inexplicable); 1911, Whigby *v.* Burnham, 135 Ga. 584, 69 S. E. 1114 (action by son against widow, for land inherited; the deceased father's admission that he was already married to another woman, not received for the plaintiff; the grounds of the ruling are inexplicable).

For the Alabama rulings, see note 6, *supra*.

For a comparison of other rules as to sufficiency of admissions, see *ante*, § 1055.

[12] 1853, Parker, J., in Gahagan *v.* People, 1 Park. Cr. N. Y. 378, 386; 1920, Ahlberg *v.* State, 88 Tex. Cr. 173, 225 S. W. 253.

Contra: 1827, State *v.* Roswell, 6 Conn. 446 (Peters and Lanman, JJ., diss. on this point); 1905, Bowman *v.* Little, 101 Md. 273, 61 Atl. 223, 657, 1084 (to prove identity; the opinion is full of loose law); 1867, State *v.* Johnson, 12 Minn. 476, 482 (cohabitation, repute, conduct, and admissions, not admissible at common law; McMillan, J., diss.).

There is no ground whatever for the view taken in these three rulings; it proceeds merely upon an early looseness in the use of the word "competent" in the sense of "sufficient." The same fallacy has already been noted (*ante*, § 2069, par. 4, and § 2085, n. 9) as to evidence of confessions and of habit and repute.

[13] 1869, Vincent's Appeal, 60 Pa. 228, 241 (indorsement on a false certificate that it was true, held sufficient).

[14] In particular, any such limitation as that proposed in the following passage is unsound: 1853, Smith, J., in West *v.* State, 1 Wis. 209, 226, 228, "Declarations of the defendant, made idly, or with a view to shield himself from prosecution or public censure while living in a state of concubinage, . . . so also, declarations made to parry social criticism or to avoid legal inquisition, are of little or no weight. But marriage in fact is the point to be established by proof; a confession, therefore, of the fact of marriage, — not of the relation of husband and wife; a distinct unequivocal confession, seriously and solemnly made, of the fact of the marriage rite having been performed . . . should be held sufficient."

(*b*) In a suit for *divorce*, the *uncorroborated admission* of the respondent as to the cause for the divorce is generally held insufficient, by a different rule (*ante*, § 2067). That rule, however, properly has no reference to the proof of the marriage upon which the petitioner's claim rests, but only to the proof of the cause for divorce.

(*c*) For proving a marriage before an *administrative official*, the Federal War Risk Insurance Act [1] makes provision sanctioning five different modes; the general Pension Act accepts the law of the place of residence.[2]

(*d*) Numerous other rules affect the proof of marriage. Whether the *wife may testify* to the fact of marriage, against one charged with bigamy, is a question of privileged testimony (*post*, § 2231). Whether the parent may *bastardize the issue*, by testifying to *non-access* or non-marriage, has been already dealt with (*ante*, § 2063). Whether the hearsay statement of a *deceased member of the family*, as to the fact of marriage, may be admitted is a question of the Pedigree exception to the Hearsay rule (*ante*, §§ 1480–1503). In the same way, the admissibility of *affidavits* (*ante*, § 1710), of *registers of marriage* (*ante*, § 1642), and of *certificates of marriage* (*ante*, § 1645), has been already dealt with in considering other Hearsay exceptions; and the *conclusiveness* of the *marriage-register* has been considered with the rules for preferred evidence (*ante*, § 1336). The question whether *marriage* will be *presumed* from cohabitation after a *legal obstacle has been removed* is a question of the law of presumptions, and, so far as it has any place in the law of Evidence, is noticed *post*, § 2506; the expressions about eye-witness proof in such a case are really expressions as to the effect of the presumption. So also the question whether the *authority of the celebrant* must be expressly shown (*post*, § 2505).

§ 2088. **Same: (7) Celebrant's Certificate or Register not preferred to Oral Eye-Witness.** Some heresies die a hard death. With a phœnix-like persistence they arise again and again, after repeated judicial pronouncements which ought to have been final, to plague each new generation and to call for fresh incinerations. One of these is the supposition that, as between possible sorts of eye-witness evidence, the *celebrant's certificate* or *register-entry* is preferred to the *oral testimony* of celebrant, clerk, or bystander. This, if it were the law, would be a genuine rule of preference as between different kinds of testimony (*ante*, §§ 1286, 1336). But there is no such rule. The marriage-certificate was at common law probably not even admissible (*ante*, § 1645); and it has always been recognized that both certificate and register were of inferior value, inasmuch as further evidence of the identity of the parties named may be required:

1834, MELLEN, C. J., in *Ham's Case*, 11 Me. 391, 396: "It is an admitted principle, and constantly adopted in practice, that the testimony of a witness who was present at the marriage ceremony is legal evidence, and in fact it is better evidence than the record;

§ 2087. [1] U. S. St. 1917, Oct. 6, c. 105 § 2, Code § 10252 as amended by St. 1919, Dec. 24.
[2] Code §§ 10188, 10189, quoted *ante*, § 2085.

because the record does not establish the fact of identity, but a witness on the stand proves not only the marriage solemnized but that the defendant on trial was one of the parties."

That the certificate or register, or a copy, should have been thought to be preferred to oral testimony could hardly be due to Lord Mansfield's language in the original cases.[1] Nor did the later English rulings give the notion any countenance.[2] Yet not only have the Courts been constantly called upon to repeat the primal ruling, but Legislatures have frequently deemed it necessary to dispel some apparently persistent misconception by declaring the same thing in statutes. These statutes usually deal only with the issue of *bigamy* and *family-desertion*, because chiefly upon these issues the eye-witness rule was invoked.[3] The judicial utterances have declared that no such rule exists for *bigamy*,[4] or for *adultery*,[5] or for *desertion* or *criminal cases* in general,[6] or for *criminal conversation*,[7] or for *divorce*,[8] or for *civil cases* in general.[9]

§ 2088. [1] 1765, R. *v.* Norwood, East Pl. Cr., I, 337 (quoted *ante*, § 2086, n. 9); 1767, Morris *v.* Miller, 4 Burr. 2057 (quoted *ante*, § 2084); 1779, Birt *v.* Barlow, 1 Doug. 171 (crim. con.; the register-copy being offered, the trial Court ruled "that the Marriage Act had directed the witnesses to subscribe their names to the register in order to facilitate the investigation of the legal evidence of marriages; and that till these five witnesses and the minister were accounted for, as by shewing them all dead or the like, I could not admit less proof than that of some person present to demonstrate the identity of the parties"; Lord Mansfield, C. J.: "[The registers] were meant as well to prevent false entries as to guard against illegal marriages without license or the publication of banns; . . . but it would be very prejudicial if the act were so construed as to render the proof of marriages more difficult than formerly; . . . registers are in the nature of records, and need not be produced, nor proved by subscribing witnesses; . . . as to the proof of identity, whatever is sufficient to satisfy a jury is good evidence").

[2] *Eng.* 1840, Woods *v.* Woods, 2 Curt. Eccl. 516, 522 (incest; Dr. Lushington: "The evidence of any one person present at the marriage is sufficient, without calling for the register at all"; quoted *ante*, § 1336); 1762, St. Devereux *v.* Much Dew Church, 1 W. Bl. 367 (pauper settlement; marriage provable by bystander, without celebrant or lawful register); *U. S.* 1889, State *v.* Schweitzer, 57 Conn. 533, 537, 18 Atl. 787 (failure to support wife).

[3] These are quoted *ante*, § 2085.

[4] 1840, Jackson *v.* People, 3 Ill. 231 (statute applied); 1865, State *v.* Williams, 20 Ia. 98; 1906, Richardson *v.* State, 103 Md. 112, 63 Atl. 317; 1888, People *v.* Perriman, 72 Mich. 184, 187, 40 N. W. 425 (marriage certificate not preferred; eye-witnesses said to supply "more direct and reliable testimony" than documents); 1839, State *v.* Kean, 10 N. H. 347, 349; 1857, State *v.* Marvin, 35 N. H. 22; 1845, State *v.* Robbins, 6 Ired. N. C. 23, 26; 1920, Ahlberg *v.* State, 88 Tex. Cr. 173, 225 S. W. 253; 1817, Warner *v.* Com., 2 Va. Cas. 95, 108 (marriage certificate, required by law in Pennsylvania, not preferred to testimony of eye-witness on the stand); 1867, Oneale *v.* Com., 17 Gratt. Va. 582, 587; 1871, Bird *v.* Com., 27 Gratt. Va. 800, 806.

[5] *Ia.* 1867, State *v.* Wilson, 22 Ia. 364; 1874, State *v.* Hazen, 39 id. 648; *Mass.* 1813, Com. *v.* Norcross, 9 Mass. 492; 1818, Com. *v.* Littlejohn, 15 Mass. 163; 1892, Com. *v.* Dill, 156 Mass. 226, 228, 30 N. E. 1016; 1895, Com. *v.* Hayden, 163 Mass. 453, 456, 40 N. E. 846 (under statute); *N. H.* 1843, State *v.* Winkley, 14 N. H. 480, 495; 1857, State *v.* Marvin, 35 N. H. 22, 27 (town register, not preferred to other testimony; here, of the celebrant); 1874, State *v.* Clark, 54 N. H. 456, 460; *Vt.* 1834, State *v.* Way, 6 Vt. 311, *semble;* 1913, State *v.* Nieburg, 86 Vt. 392, 85 Atl. 769; *Wash.* State *v.* McGilvery, 20 Wash. 240, 55 Pac. 115 (incest); 1905, State *v.* Nelson, 39 Wash. 221, 81 Pac. 721; *Wis.* 1839, Mills *v.* U. S., 1 Pinney, 73, 75, *semble;* 1887, State *v.* Hooks, 69 Wis. 182, 184, 43 N. W. 57.

[6] 1889, State *v.* Schweitzer, 57 Conn. 532, 537, 18 Atl. 787 (neglect to support a wife); 1903, State *v.* Tillinghast, 25 R. I. 391, 56 Atl. 181, *semble* (non-support); 1884, Firmeis *v.* State, 61 Wis. 140, 142, 20 N. W. 663 (desertion of children); 1899, Jenness *v.* State, — Wis. —, 29 N. W. 759 (failure to support).

[7] 1836, Nixon *v.* Brown, 4 Blackf. Ind. 157, *semble;* 1867, Kilburn *v.* Mullen, 22 Ia. 498, 503; 1906, Hill *v.* Pomelear, 72 N. J. L. 528, 63 Atl. 269; 1914, Vollmer *v.* Stregge, 27 N. D. 579, 147 N. W. 797; 1885, Jacobsen *v.* Siddal, 12 Or. 280, 7 Pac. 108.

[8] 1814, Ellis *v.* Ellis, 11 Mass. 92 (divorce for adultery; certificate of marriage not sufficient; proof must be "on oath").

[9] 1848, Patterson *v.* Gaines, 6 How. U. S. 550, 589; 1842, Arthur *v.* Broadnax, 3 Ala. 557; 1906, Southern R. Co. *v.* Brown, 126 Ga.

In the few jurisdictions where the Continental system of an official *register of civil status* has been inherited, the register of course is the preferred evidence for all the recorded facts of family history, and this would include the fact of marriage on all issues.[10] But this is distinctly alien to the Anglo-American common-law traditions.

§ 2089. **Owner's Testimony to Non-Consent, in a Charge of Larceny.** At the suggestion of two eminent American writers and judges, based upon a single English ruling afterwards repudiated, a rule came near to being built up that, on a charge of *larceny*, the evidence that the taking was done against the *owner's consent* must include the *owner's testimony* as an indispensable element. That suggestion was placed on the following grounds:

> 1858, Messrs. *Esek Cowen* and *Nicholas Hill*, Note to the Fourth Edition of Phillipps on Evidence, No. 183, p. *635: "Where non-consent is an essential ingredient in the offense, as it is here, direct proof alone, from the person whose non-consent is necessary, can satisfy the rule. You are put to prove a negative, and the very person who can swear directly to the necessary negative must if possible always be produced.[1] Other and inferior proof cannot be resorted to till it be impossible to procure this best evidence. . . . In such cases mere presumptive 'prima facie,' or circumstantial evidence, is secondary in degree and cannot be used till all the sources of direct evidence are exhausted. Indeed the rule is general. You shall not be permitted to grope in the twilight of circumstantial evidence when the broad daylight of direct and positive proof is attainable."

This proposed rule — which might perhaps be more correctly classed as a rule of preference (*ante*, § 1335) — had but a slight foundation. Premised by certain unimportant English rulings as to the burden of proof in showing a negative,[2] there came a single tentative ruling requiring, in proof of non-consent, the testimony of the person whose non-consent was affirmed.[3] This

1, 54 S. E. 911 (death by wrongful act); 1907, Sellers *v.* Page, 127 Ga. 633, 56 S. E. 1011 (foreclosure); 1903, Casley *v.* Mitchell, 121 Ia. 96, 96 N. W. 725 (dower); 1906, Smith *v.* Fuller, — Ia. —, 108 N. W. 765 (dower); 1883, Baughman *v.* Baughman, 29 Kan. 283 (said generally of all cases); 1905, Hardin *v.* Hardin, — Ky. —, 87 S. W. 284 (negro marriage); 1871, Shotwell *v.* Harrison, 22 Mich. 410, 415; 1902, Rhode Island H. T. Co. *v.* Thorndike, 24 R. I. 105, 52 Atl. 873; 1893, McQuade *v.* Hatch, 65 Vt. 482, 483, 27 Atl. 136 (loss of support by liquor furnished); 1907, Massuco *v.* Tomasi, 80 Vt. 186, 67 Atl. 551 (breach of promise to marry).

Whether the certificate or register needs to be supplemented by evidence of the *identity* of the persons named and the parties in the case is a question involving the presumption of identity of person from identity of name, treated *post*, § 2529.

[10] *I. e.* in Louisiana, Philippines, and Porto Rico; the statutes and cases cited *ante*, § 1336, show the bearing of those rules: *Louisiana:* here the rule obtains that the record, or a copy, must be produced or accounted for: 1917, Green *v.* New Orleans S. & G. I. R. Co., 141 La. 120, 74 So. 717 (action for death by wrongful act; plaintiff's claim to be the legitimate sisters of the decedent was disputed; Monroe, C. J., referring to the requirement of registration introduced in 1855, Civ. C. § 105: "In any case in which it is sought to prove a contract of marriage, the proponent should be required to produce a certified copy of the public record which the law declares shall be made of the contract," using the analogies of wills and contracts required to be in writing and recorded; 1918, Thomas' Succession, 144 La. 25, 80 So. 186 (rival widows claiming an inheritance). *Philippines:* 1915, Sison *v.* Ambalada, 30 P. I. 118, 124 (inheritance; lack of record of marriage does not negate the presumption from cohabitation).

§ 2089. [1] Citing R. *v.* Rogers, *infra*, note 3, and Williams *v.* East India Co., cited *ante*, § 1339.

[2] 1801, R. *v.* Stone, 1 East 639 (shooting game, not being qualified); 1802, Frontine *v.* Frost, 3 B. & P. 302 (quitting a ship without leave).

[3] 1811, R. *v.* Rogers, 2 Camp. 654 (indictment for coursing a deer without the consent of

was afterwards wholly repudiated in England.[4] Nevertheless, the approval of the eminent writers above quoted gave the question a vogue in this country, and left it a living one long after the suggestion had been negatived in England. In at least three jurisdictions the suggestion seems to have become the law, and perhaps in one or two others.[5] In the remainder, no notice of the suggestion has in general been taken.[6] So far as the policy of it is concerned,

the owner; the question being whether "the onus lay upon the prisoner to prove that he had the consent," Lord Ellenborough, C. J., held that the owner must be called to negative consent).

[4] 1826, R. *v.* Hazy, 2 C. & P. 458 (cutting timber without the owner's consent; the steward testified to the non-consent of the deceased owner; Bayley, J., left it to the jury to say whether there was "reasonable evidence" to show this); 1826, R. *v.* Allen, 1 Moo. Cr. C. 154 (killing deer, etc., without the owner's consent; Gaselee, J., on the citation of R. *v.* Rogers, consulted the Judges, who met and held that the owner need not be called); 1856, R. *v.* Wood, Dears. & B. 1 (being unlawfully on land to take game; on objection that the "direct evidence" of tenant or landlord must be brought to prove lack of permission, the Court for Crown Cases Reserved overruled the objection).

[5] *Colorado:* 1905, Jones *v.* People, 33 Colo. 161, 79 Pac. 1013 (rule apparently approved, citing only Wisconsin cases; but here it was proved impossible to find the owner); *Florida:* 1921, Albritton *v.* State, 81 Fla. 684, 88 So. 623 (larceny of cow owned by six persons; non-consent may be evidenced circumstantially, but here there was no evidence at all as to three of the six); *Iowa:* 1869, State *v.* Osborne, 28 Ia. 9 (rule accepted, on the authority of the note to Phillipps; testimony of the owner's son in possession, the owner being ill, held here sufficient); *Nebraska:* 1891, Bubster *v.* State, 33 Nebr. 663, 50 N. W. 953 (larceny of a buggy; the owner required to be called, on the authority of the note to Phillipps); 1895, Perry *v.* State, 44 Nebr. 414, 63 N. W. 26 (larceny of a buggy; same ruling); 1897, Rema *v.* State, 52 Nebr. 375, 72 N. W. 474 (if the owner testifies, he must deny consent); 1901, Trimble *v.* State, 61 Nebr. 604, 85 N. W. 844 (owner's testimony here held satisfactory); 1903, Van Syoc *v.* State, 69 Nebr. 520, 96 N. W. 266 (circumstances may suffice; 1910, Johns. *v.* State, 88 Nebr. 145, 129 N. W. 247 (non-consent must clearly appear from the owner's evidence); *Tennessee:* 1833, Lowrance *v.* State, 4 Yerg. 145 (owner's daughter's testimony as to ownership of money, sufficient); *Texas:* Here the rule was first repudiated, then adopted, and then intermittently applied: 1855, Henderson *v.* State, 14 Tex. 503, 513 (death of a person whose name was forged need not be proved by "direct evidence"); 1876, Wilson *v.* State, 45 Tex. 76, 78 (charge that want of consent could be established by the owner or possessor or "by facts and circumstances . . . of such a nature as to exclude absolutely every reasonable presumption" of consent, approved; owner need not be called); 1876, McMahon *v.* State, 1 Tex. App. 102, 105 (want of consent may be established "by circumstantial as well as direct testimony; this we regard as a settled proposition . . . acted on by our own Supreme Court without variation from the decision in Henderson *v.* State down to the present time"; defendant had here argued that the owner's testimony was "the best evidence"); then a change of ruling took place: 1876, Erskine *v.* State, 1 Tex. App. 405 (possessor required, as the "best evidence," to be called, on authority of the note in Phillipps; none of the preceding cases alluded to and no other authority cited in support); 1879, Jackson *v.* State, 7 Tex. App. 363 (person having actual possession, required to be called); 1880, Rains *v.* State, 7 Tex. App. 588 (owner not required to be called); 1882, Wilson *v.* State, 12 Tex. App. 481, 487 (where there are both owner and possessor and want of consent of both is essential, each must be called, if available, before resorting to circumstantial evidence); 1883, Bowling *v.* State, 13 Tex. App. 338 (same); 1883, Williamson *v.* State, 13 Tex. App. 514, 519 (same); 1883, Dresch *v.* State, 14 Tex. App. 175, 178 (second Wilson case approved); 1901, Wisdom *v.* State, 42 Tex. Cr. 579, 61 S. W. 926 (burglary, owner's lack of consent may be evidenced circumstantially, but not when direct testimony is available); 1902, Spiars *v.* State, — Tex. Cr. —, 69 S. W. 533 ("It appears to be the rule now that the want of consent of the owner to the taking must be proved by positive testimony, where this is attainable, and circumstantial evidence, no matter how strong, will not suffice"); *Wisconsin:* 1853, State *v.* Morey, 2 Wis. 495 (larceny of meat; testimony of owner, if known, must be offered; on the authority of the note in Phillipps); 1877, State *v.* Moon, 41 Wis. 684 (larceny of mare; same ruling; testimony other than the owner's can be resorted to only as secondary); 1901, Fetkenhauer *v.* State, 112 Wis. 491, 88 N. W. 294 (failure to call the owner does not of itself require a verdict to be directed for defendant).

[6] Except in the following rulings repudiating it: *Cal.* 1893, People *v.* Davis, 97 Cal. 194, 31 Pac. 1109 (larceny of a pocket-book; rule not applied); *Mass.* 1823, Com. *v.* James, 1 Pick. 375, 381 (larceny of barilla-soda, by a miller mixing with it other substances and

there is nothing to be said in its favor. The accused is amply protected by the rule of reasonable doubt (*post*, § 2497); and the proposed rule merely adds an unnecessary complication and an opportunity for contriving a verbal trap for the judge in his instructions to the jury.

§ 2090. **Required Expert Witnesses: Medical Witnesses in** (*a*) **Malpractice,** (*b*) **Committal of Insane.** There is no general policy or rule that requires expert testimony to form a part of the evidence on subjects open to expert testimony. No rule of Preference exists for expert witnesses as such (*ante*, § 1286): much less, then, would a rule of Quantity be recognized.

Two exceptional rules, however, here find wide acceptance, — the first, an apparent exception only; the second, a real one, based on a special policy.

(*a*) On any and every topic, only a qualified witness can be received; and where the topic requires special experience, only a person of that special experience will be received (*ante*, §§ 555, 556). If therefore a topic requiring such special experience happens to form a main issue in the case, the evidence on that issue *must* contain expert testimony, or it will not suffice.

Now such an issue is rarely found. Generally, the topics on which only an expert witness can be received form usually but one element in the main issuable fact. Moreover, generally, the parties are eager enough to produce such expert testimony without any rule to require them. It happens, however, that in one class of cases, viz., *actions for malpractice against a physician or surgeon*, the main issue of the defendant's use of suitable professional skill is generally a topic calling for expert testimony only; and also that the plaintiff in such an action often prefers to rest his case on the mere facts of his sufferings, and to rely upon the jury's untutored sympathies, without attempting specifically to evidence the defendant's unskilfulness as the cause of those sufferings. Here the Courts have been obliged to insist on the dictate of simple logic, resulting from the principle above cited (of § 555, *ante*), that expert testimony on the main fact in issue must somewhere appear in the plaintiff's whole evidence; and for lack of it the Court may rule, in its general power to pass upon the sufficiency of evidence (*post*, § 2551), that there is not sufficient evidence to go to the jury. In actions for malpractice, therefore, something like a rule-of-thumb has been recognized in many jurisdictions:[1]

retaining part of the original; held, that the truckman carrying the goods to and from the mill need not be produced to negative adulteration during transport); 1847, Com. *v.* Kenney, 12 Metc. 235, 236 (robbery); *Mich.* 1889, People *v.* Jacks, 76 Mich. 218, 221, 42 N. W. 1134; *Nev.* 1913, State *v.* Patchen, 36 Nev. 510, 137 Pac. 406 (burglary); *Okl.* 1901, Filson *v.* Terr., 11 Okl. 351, 67 Pac. 473; 1906, Hurst *v.* Terr., 16 Okl. 600, 86 Pac. 280 (larceny of cattle; rule repudiated); *S. Dak.* 1908, State *v.* Faulk, 22 S. D. 183, 116 N. W. 72 (non-consent need not be proved by the owner); *Wash.* 1901, State *v.* Wong Quong, 27 Wash. 93, 67 Pac. 355.

The following ruling seems to be of the present sort; 1809, White *v.* Fox, 1 Bibb Ky. 369, 370 (prosecuting attorney, not preferred in proving consent of prosecutor).

§ 2090. [1] The doctrine seems to have obtained its popularity through the ruling of the Federal Court first cited:

Federal: 1897, Ewing *v.* Goode, C. C. S. D. Oh., 78 Fed. 442 (eye-treatment; quoted *supra*); *California:* 1919, Perkins *v.* Trueblood, 180 Cal. 437, 181 Pac. 642 (leg-operation; McGraw *v.* Kerr, Colo., approved; here experts were called, but they failed to assert facts of negligence); *Colorado:* 1895, Jackson *v.* Burnham, 20 Colo. 536, 39 Pac. 577 (phimosis; "resort must be had to the opinion of experts"); 1912, McGraw *v.* Kerr, 23

1891, JOHNSTON, J., in *Pettigrew* v. *Lewis*, 46 Kan. 78, 26 Pac. 458 (eye-operation; the defendant demurred to the sufficiency of the plaintiff's evidence of negligence): "There was no proof, however, of a want of skill or care on the part of the defendants; and negli-

Colo. App. 163, 128 Pac. 870 ("If no standard [of skill] was established by the testimony of physicians then the jury had no standard"); 1917, Norkett *v.* Martin, 63 Colo. 220, 165 Pac. 256 (diagnosis and treatment of "an ailment"; McGraw *v.* Kerr approved); 1918, Tadlock *v.* Lloyd, 65 Colo. 40, 173 Pac. 200 (malpractice; expert testimony to cause of death was in the case; but "the code of ethics among physicians is frequently a bar to securing positive testimony on questions such as are here involved"); *Indiana:* 1916, Adolay *v.* Miller, 60 Ind. App. 656, 111 N. E. 313 (arm-fracture; verdict for plaintiff set aside because "there is no evidence from any physician who has given the jury any standard"); *Iowa:* 1911, Kline *v.* Nicholson, 151 Ia. 710, 130 N. W. 722 (said obiter that questions of professional skill "are to be determined in the light of expert evidence"); 1917, Snearly *v.* McCarthy, 180 Ia. 81, 161 N. W. 108 (leg-fracture; lack of expert testimony held to justify a directed verdict for defendant); 1917, Semmons *v.* National Travelers' Ben. Ass'n, 180 Ia. 666, 163 N. W. 338 (death consequent upon a fall; medical testimony held not necessary; cases collected); 1918, O'Grady *v.* Cadwallader, 183 Ia. 178, 166 N. W. 755 (arm-fracture; "in the absence of any showing [of negligence] from those learned in the profession . . . there can be no recovery"); *Kansas:* 1870, Tefft *v.* Wilcox, 6 Kan. 46 (shoulder-dislocation; said obiter that expert testimony is required); 1891, Pettigrew *v.* Lewis, 46 Kan. 78, 26 Pac. 458 (eye-operation; quoted *supra;* demurrer to evidence sustained for lack of expert testimony to the skill and effect of the operation); 1912, Johnson *v.* Powell, Sly *v.* Powell, 87 Kan. 142, 123 Pac. 881 (finger-injury; unskilled testimony held not sufficient); 1919, Paulich *v.* Nipple, 104 Kan. 801, 180 Pac. 771 (leg-fracture; Sly *v.* Powell followed); 1921, Rainey *v.* Smith, 109 Kan. 692, 201 Pac. 1107 ("It is the rule in this State that negligence of a physician or surgeon must be proved by expert evidence"); *Michigan:* 1886, Carstens *v.* Hanselman, 61 Mich. 426, 28 N. W. 159 (fractured leg; Campbell, C. J.: "It is not competent to allow juries to determine for themselves [by mere inspection] whether a physician's course has been proper or improper in the treatment of a fractured limb"); 1907, Neifert *v.* Hasley, 149 Mich. 232, 112 N. W. 705 (leg-amputation; "if in any case non-expert testimony . . . may be such evidence of negligent treatment by an attending surgeon as a jury may act upon, this case is not such a one"); 1909, Farrell *v.* Haze, 157 Mich. 374, 122 N. W. 197 (leg-fracture; an instruction that the cause of the loss of the foot was "a scientific question, which . . . can only be answered by an expert," held improperly refused); 1912, Rogers *v.* Kee, 171 Mich. 551, 137 N. W. 260 (femoral fracture; "malpractice must be sustained by the testimony of expert witnesses in order to prevail"); 1914, Miller *v.* Tolles, 183 Mich. 252, 150 N. W. 118 (amputation of leg; Farrell *v.* Haze, *supra*, followed); 1915, Zoterell *v.* Repp, 187 Mich. 319, 153 N. W. 692 (ovarial operation; Miller *v.* Tolles approved); *Minnesota:* 1912, Sawyer *v.* Berthold, 116 Minn. 441, 134 N. W. 120 (wrist-fracture; "there must be evidence from expert witnesses tending to show improper or unskilful treatment, in order to sustain a charge of malpractice against the physician"); *Montana:* 1920, London *v.* Scott, 58 Mont. 645, 194 Pac. 488 (administration of an anæsthetic; "from the very nature of the case," expert opinion was required); *New York:* 1868, Walsh *v.* Sayre, 52 How. Pr. 334 (hip-operation; motion by defendant to require plaintiff to submit to examination by defendant's expert witnesses, granted, because "the determination of the action depends on the judgment of skilled surgeons"); 1919, Robbins *v.* Nathan, Sup. App. Div., 179 N. Y. Suppl. 281 (dental operation; verdict for plaintiff set aside, because of "an absolute dearth of testimony" from experts; though "in some cases the lack of skill or want of care is so obvious that expert testimony is unnecessary"; citing intervening cases in the intermediate courts); *Pennsylvania:* 1903, De Long *v.* Delaney, 206 Pa. 226, 55 Atl. 965 (leg crushed; verdict for plaintiff set aside, for lack of expert testimony as to using a tourniquet); *Rhode Island:* 1901, Barker *v.* Lane, 23 R. I. 224, 49 Atl. 963 (treatment of arm; said obiter that the question "must be determined by the testimony of experts"); 1904, Bigney *v.* Fisher, 26 R. I. 402, 59 Atl. 72 (leg-fracture; Barker *v.* Lane approved); *Vermont:* 1907, Sheldon *v.* Wright, 80 Vt. 298, 67 Atl. 807 (leg-fracture; "there cannot be a recovery for malpractice in the case of an operation like this under consideration without medical expert testimony"; but the testimony may not be credited); 1909, Lawson *v.* Crane, 83 Vt. 115, 74 Atl. 641 (leg-fracture; Sheldon *v.* Wright approved); *Virginia:* 1918, Hunter *v.* Burroughs, 123 Va. 113, 96 S. E. 360 (X-ray injury; there was no expert witness for the plaintiff, on the "mechanical standard," and one on the "general professional standard"; but for the defendant there were several; held sufficient); *Washington:* 1914, Coombs *v.* James, 82 Wash. 403, 144 Pac. 536 (electrical treatment producing a miscarriage; Ewing *v.* Goode,

gence cannot be presumed. The mere fact that the plaintiff's eyes have been weak and sore since the operation was performed does not prove negligence in the defendants, nor establish a liability against them. To maintain her action, the plaintiff should have offered the evidence of skilled witnesses to show that the present condition of her eyes was the result of the operation, and that it was unskillfully and negligently performed. 'This evidence must, from the very nature of the case, come from experts, as other witnesses are not competent to give it, nor are juries supposed to be conversant with what is peculiar with the science and practice of the professions of medicine and surgery to that degree which will enable them to dispense with all explanations.' . . . Cases may arise where there is such gross negligence and want of skill in performing an operation as to dispense with the testimony of professional witnesses; but not so in the present case. It is not conceded or proved that the weakness of her eyes had materially resulted from the operation; and even if it was, the questions would still arise: Was she in a fit physical condition to undergo the operation? Did the defendants, before beginning the operation, make due examination to determine her condition and the necessity for an operation? Was the operation performed in a careful and skillful manner? What was the standard of professional skill and scientific knowledge required of these men in that locality? Was the after-treatment and were the directions given for the subsequent care of the eye such as would meet the approval of the profession in its present advanced condition? If a mistake was made, was it a case of reasonable doubt or uncertainty or a mere error in judgment for which there is no responsibility? . . . In the absence of competent proof, showing that the defect in plaintiff's eyes was due to a want of ordinary care and skill on the part of the defendants, the district Court ruled correctly in sustaining the demurrer to the evidence."

1897, TAFT, J., in *Ewing* v. *Goode*, C. C. S. D. Oh., 78 Fed. 442: "When a case concerns the highly specialized art of treating an eye for cataract, . . . the Court and jury must be dependent on expert evidence; there can be no other guide; and, where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury," in the exercise of the judge's general power to direct a verdict for the defendant where the whole evidence is not sufficient to go to the jury.

It must be understood that this rule-of-thumb may not always be applicable on the facts; that it is due merely to a peculiar situation in actions for malpractice; and that it is merely a special application of the judge's general power to pass upon the sufficiency of evidence. There is not and ought not to be any general rule, for actions in general, requiring expert testimony, so far as the topic permits of testimony from persons not so qualified.

(*b*) The other exceptional rule applies to an issue on which lay testimony is indeed admissible (*ante*, §§ 568, 1934), but has shown itself in the past to

supra, followed; "there is no other guide" than the "evidence of medical men"); 1918, Inglis *v.* Morton, 99 Wash. 570, 169 Pac. 962 ("It may be conceded that in malpractice cases the case is made by the nature of the testimony and not by the profession or calling of the witnesses"; but here the trial judge's action in taking the issue from the jury for lack of expert testimony was sustained); 1918, Swanson *v.* Hood, 99 Wash. 506, 170 Pac. 135 (malpractice; argument that the case "is to be determined upon expert testimony alone," repudiated); 1922, Cornwell *v.* Sleicher, — Wash. —, 205 Pac. 1059 (malpractice; "evidence by a person skilled in surgery," held not indispensable); *Wisconsin:* 1885, Quinn *v.* Higgins, 66 Wis. 664, 24 N. W. 482 (leg-fracture; the question of a surgeon's negligence "must be determined mainly upon expert evidence"); 1896, Wurdemann *v.* Barnes, 92 Wis. 206, 66 N. W. 111 (ear-and-eye injury; no medical witness being called by plaintiff, the evidence was held insufficient); 1920, Krueger *v.* Chase, 172 Wis. 163, 177 N. W. 510 (dental anæsthetic; verdict for plaintiff set aside because the expert testimony was not given effect).

be inadequate and capable of leading to gross error, viz., the issue of *insanity* as a *ground for committal* to a place of restraint.

The confinement of the insane in asylums both private and public was for a long time attended with abuses, chief among which was the constant possibility of dreadful injustice by the incarceration of a sane person, either through error or through sinister design of relatives. As early as the eighteenth century a proposal was made in Parliament,[2] as a part of a bill for regulating madhouses, to require the testimony of physicians to be adduced upon any hearing for committal. But it was nearly a century later before radical measures were taken to remove thoroughly the shortcomings of the administrative law; these measures followed an agitation fomented by the novelist Charles Reade, that heroic breaker-of-lances against oppression and injustice.[3]

In the United States, the same movement led to similar measures. It is now virtually the universal rule (by statute) that on a proceeding to commit a person to restraint as mentally deranged or defective, the testimony of *two physicians* must be adduced.[4] The details vary in the different States;

[2] Hansard's Parliamentary History, XVII, 837 (April 22, 1773; on the second reading, the mover, Mr. Townsend, said: "I have proposed in the bill, Sir, that no person should be received into these houses without being examined by persons appointed by the College of Physicians").

[3] Charles Reade, Hard Cash (1863); Memoir of Charles Reade, by C. L. and C. Reade, pp. 357, 304, 314 (1887).

[4] CANADA: *Dominion:* R. S. 1906, c. 136, § 12 (committal of a leper to a lazaretto; two duly qualified and practising physicians, or a medical officer of a lazaretto, must certify); 1918, R. *v.* Keirstead, 42 D. L. R. 193, N. B. (murder; plea, insanity; held that the crown was not bound to call Dr. A., superintendent of the Provincial hospital for mental diseases); *Newfoundland:* Consol. St. 1916, c. 114, § 27 (committal of insane; "a certificate signed by two medical practitioners" must be produced at the inquiry). The following statute is peculiar: *Saskatchewan:* R. S. 1920, c. 193, § 4, St. 1921–22, c. 6, § 15 (committal of lunatics and mental defectives; the evidence must include "if possible, the evidence of two non-professional persons acquainted with the facts").

UNITED STATES: *Alabama:* Code 1907, § 859 (committal of insane; the judge "shall examine witnesses, at least one of whom shall be a physician"); § 7180 (accused appearing to be insane; the judge must "call a respectable physician and other credible witnesses"); *Alaska:* Comp. L. 1913, § 831 (committal of insane; examination and testimony by physician or surgeon required, "in case there is a physician or surgeon in the vicinity who can be procured"); *Arkansas:* Dig. 1919, § 9404 (committal of insane; the judge in addition to other testimony "shall cause such insane person to be examined by two reputable, competent, and disinterested physicians, such examination to be made at different times and places separately"); *California:* Pol. C. 1872, § 2169 (on proceedings of committal for insanity, the court must secure "at least two medical examiners, who must hear the testimony of all witnesses, make a personal examination of the alleged insane person, and testify before the judge" etc.; the Court must also call "any other person whom he has reason to believe has any knowledge" etc.); *Colorado:* Comp. L. 1921, §§ 550, 559 (committal of insane; county lunacy commissioners shall consist of two licensed physicians; if the county has not enough physicians, one shall be appointed from elsewhere); § 565 (discharge; two reputable physicians shall be appointed to report); *Connecticut:* Gen. St. 1918, § 1658 (for committal of insane, "two reputable physicians," qualified as further defined, must testify to insanity); *Florida:* Rev. G. S. 1919, § 3809 (in proceedings for relinquishment of dower of insane married women, "such witnesses shall consist of not less than two practicing physicians and three other credible witnesses who shall be personally acquainted with said woman"); § 2309 (committal of insane; Court appoints a committee, consisting of one "intelligent citizen" and "two practising physicians of good professional standing," etc.); *Georgia:* Rev. C. 1910, § 3092 (guardianship of lunatics, etc.; the jurors must include a physician); St. 1915, Aug. 14, No. 192, and Civ. C. 1910, § 3092 (committal of the insane; jury must include a physician); *Idaho:* Comp. St. 1919, §§ 1177,

and sometimes the medical experts sit as assessors with the judge; but the principle is the same, and is unquestionably sound. Even with this precau-

1178 (commitment of insane; judge must summon "two or more witnesses best acquainted with such insane person" and "at least one graduate in medicine"); §§ 1219, 1220 (similar for commitment of feeble-minded or epileptic); *Indiana:* Burns Ann. St. 1914, § 3694 (committal of insane; "two reputable practicing physicians," residing in the county, must examine the person); *Iowa:* Comp. C. 1919, § 2059; *Kansas:* Gen. St. 1915, §§ 9597, 9600 (on application containing the names of two witnesses, judge must designate a physician to report; if no jury is had, judge must appoint "a commission of two qualified physicians in regular and active practice," to make a personal examination and report); *Kentucky:* Stats. 1915, § 2157 (committal of insane; the person charged must be present in court, unless two regular practising physicians make oath that he is of unsound mind, etc.); *Louisiana:* St. 1910, No. 253, § 1 (committal of insane; judge must summon two licensed and reputable physicians, one of whom is the coroner, etc., to sit with him as a commission); *Maine:* Rev. St. 1916, c. 145, § 18 (commitment to insane hospital; "the evidence of at least two respectable physicians . . . shall be required"); *Massachusetts:* Gen. L. 1920, c. 123, §§ 51, 62, 115 (committal of insane or of defective delinquent; certificate of insanity by "two properly qualified physicians," required); c. 201, § 6 (appointment of guardian for insane; "the Court may require additional medical testimony"); *Michigan:* Comp. L. 1915, § 1324 (committal to asylum as insane must be on certificate of insanity made by "two reputable physicians," appointed by probate court); § 1343 (similar, for order of discharge as sane); § 1424 (similar, for committal as insane of person charged with certain crimes); § 1546 (similar for committal of feeble-minded, etc., to asylum); § 1601 (similar for committal of epileptics, but here only "one or more competent and disinterested physicians" is required); *Minnesota:* Gen. St. 1913, § 4086 (committal for mental disease; judge appoints a board of three physicians, who determine); § 4114 (committal of inebriates; judge appoints a board of "two reputable persons," one a physician, who with him determine); § 7467 (similar, for committal of insane); St. 1917, c. 344, § 6 (committal of feeble-minded, inebriate, and insane; judge may appoint two physicians who with him form the board; and the board may appoint as adviser "some person skilled in mental diagnosis"); *Mississippi:* St. 1920, Apr. 3, c. 210, § 18 (committal to State colony for feeble-minded; certificate of two physicians necessary); *Missouri:* Rev. St. 1919, § 12289 (committal to State insane hospital; "at least one of the witnesses examined shall be a reputable physician"); *Montana:* Rev. C. 1921, § 1433 (committal of insane; "at least two graduates of medicine" must be examined); *Nebraska:* Rev. St. 1921, § 6905 (committal of insane; county commissioners of insanity "shall appoint some regular practicing physician of the County to visit or see such person and make a personal examination," etc.); *Nevada:* Rev. L. 1912, § 2204 (committal of insane; "one or more licensed practicing physicians" must also be summoned to examine the party); § 2211 (same, for idiots and feeble-minded); St. 1913, Mar. 25, p. 348 (like provision, but repealing the foregoing); *New Hampshire:* Pub. St. 1891, c. 10, § 18, St. 1895, c. 14 (committal to asylum must be on certificate or testimony of "two reputable physicians"); *New Jersey:* Comp. St. 1910, Idiots, etc., §§ 3*b*, 3*i* (committal to asylum; two physicians required, for certain purposes); Lunatic Asylums, §§ 117, 125 (similar, with elaborate detail); *New Mexico:* Annot. St. 1915, § 5099 (on an issue of commitment of an insane person to an asylum, the judge "must issue subpœnas to two or more witnesses best acquainted with said person, to appear and testify"; also a subpœna "for at least one graduate of medicine"); *New York:* Cons. L. 1909, Insanity, §§ 80, 81 (committal of insane; judge's order must be based on certificate by "two qualified medical examiners in lunacy," as defined); St. 1919, c. 633, being Cons. L. 1909, c. 71, Mental Deficiency, § 24 (committal of mental defectives; order shall be made "only upon a certificate of mental defect made by two qualified examiners"); § 25 (committal for examination; "the examination . . . must be made by two competent physicians, or a competent physician and psychologist, duly qualified as required by § 25 of this Chapter"); *North Carolina:* Con. St. 1919, § 6192 (committal of insane; clerk of court shall call in the county physician, or "some other licensed and reputable physician"; "he shall take the testimony of at least one licensed physician," etc.); *North Dakota:* St. 1915, Mar. 8, c. 121 (amending Comp. L. § 4380; insanity as ground for divorce; three specialists in mental diseases must first examine the party, "all of whom shall agree that such insane person is incurable"); *Ohio:* Gen. Code Ann. 1921, §§ 1954, 1956 (committal of insane; judge shall subpœna witnesses "two of whom shall be reputable physicians," not related to the party, etc.); *Oklahoma:* St. 1917, c. 174, Mar. 26, §§ 11, 12 (committal of insane; the judge "shall appoint two reputable physicians" to examine the person, and their certificate must first be filed); *Oregon:* Laws 1920, § 2838 (committal of insane; "one or more competent physicians" shall examine the person); *Pennsylvania:* St. 1905, Apr. 18, Dig. 1920, § 1994

tion, it is to be feared that judges too often rely perfunctorily on the formal certificates of the medical experts.

§ 2091. **Miscellaneous Proposals as to requiring Testimonial Evidence for Wills, Contracts, etc.** (1) It has been at least once decided that the proof of the *contents of a lost will* must include the testimony of an eye-witness, *i. e.* one who has read it;[1] but this ruling seems to stand alone.

(2) For some issues, *official certificates*, or other official testimony, is required to be called; but these are Preferential rules (*ante*, §§ 1335–1356).

(3) There is for some kinds of documents a rule that certain sorts of testimonial evidence shall be preferred to others in *proving a copy;* but these are Preferential rules (*ante*, § 1267).

(4) The question of substantive law whether a *promise to marry* suffices if made by implication in conduct, and not expressly in words (a question generally answered in the affirmative), has sometimes been discussed as if it involved the question whether testimonial evidence was necessary and circumstantial evidence insufficient;[2] but this is merely a case of the misuse of evidential terms.

(5) For a *nuncupative will* some statutes require that the proof must include a writing of some sort, made seasonably after the testamentary act by the witnesses (*ante*, § 2050).

§ 2092. **Contracts to Require Specific Kinds of Witnesses (Insurance Policies; Construction Contracts, etc.).** It is common, in a few classes of transac-

(divorce for insanity; "the question of lunacy shall be fully established by expert testimony"); St. 1913, June 12, § 13, Dig. § 10653 (committal of feeble-minded; there must be a certificate under oath of a reputable physician, etc.); *Rhode Island:* Gen. L. 1909, c. 96, § 1 (committal of insane; certificate or testimony of two practising physicians required); *South Carolina:* Civ. C. 1922, § 5304 (commitment to State hospital for insane; probate judge may summon "two duly licensed physicians," who must agree in their certificate); § 5348 (State training-school for feeble-minded; on hearing for commitment, the Court shall appoint a commission of "two qualified physicians, or one qualified physician and one qualified psychologist," to be residents, etc.); *South Dakota:* Rev. C. 1919, § 10071 (committal to insane hospital; "the board . . . shall appoint some regular practicing physician . . . to report to it thereon"); *Tennessee:* Shannon's Code 1916, § 2617 (committal of insane; statement of "at least one reputable physician," necessary); § 2677a7 (another mode; certificate by "two reputable physicians," etc.); *Texas:* Rev. Civ. St. 1911, § 152 (committal to asylum; judge must appoint a commission of six, one or more of whom must be a physician, according to locality); *Utah:* Comp. St. 1917, § 5402 (insanity committal; Court shall summon "two practicing physicians," who shall examine the person, etc.); *Virginia:* Code 1919, § 1017 (committal of insane, etc.; judge and two physicians shall constitute a commission, the physicians to make personal examination); § 1032 (certificate of two physicians, sufficient, without an order of the judge); *Washington:* R. & B. Code, 1909, § 5953 (committal of insane; judge must summon "two or more witnesses," to testify, "and shall also cause to appear . . . two reputable physicians," who act as jury); *West Virginia:* Code 1914, c. 55, § 5, as amended by St. 1915, c. 51 (committal of insane; commissioners shall include among the witnesses "two reputable physicians" etc.); § 9 (committal of lunatics; the justice shall "summon a physician and any other witnesses"); *Wisconsin:* Stats. 1919, § 51.01 (commitment of insane; judge shall appoint "two disinterested physicians to examine and report").

§ 2091. [1] 1847, Chisholm *v.* Ben, 7 B. Monr. Ky. 408, 412 (contents and execution not sufficiently proved; there must be some testimony by persons who have seen the will; testator's declarations alone not enough).

Distinguish the rules as to the *qualifications of a witness* to the contents (*ante*, § 1278), the *preference* for a copy (*ante*, § 1267), and the *completeness* of the terms as proved (*post*, § 2106); there is no rule requiring *two witnesses* to contents (*ante*, § 2052).

[2] *E. g.* in Honyman *v.* Campbell, 2 Dow & Cl. 282.

tions, to require that in case of controversy arising, the evidence shall include the testimony of a specified kind of witness. This requirement is based on experience in such cases, as viewed from the standpoint of the party making the requirement for the protection of his interest. The principal question here is only the contractual validity of such a clause; this has been considered *ante*, § 7*a*.

The most common instances are the requirements of an *eye-witness* to injury or death in a policy of *insurance against death or accident;* of an *architect's certificate* of work done under a *construction contract;* and of an *arbitrator's award* in a contract of arbitration.

§ 2093. **Statute of Frauds; Written Admission of the Party to be charged.** Under this head — *i. e.* as a Synthetic rule — falls the requirement of the Fourth and the Seventeenth Sections of the Statute of Frauds and Perjuries that no action shall be maintainable upon certain kinds of contracts unless there be "some note or memorandum in writing of the said bargain" "signed by the parties to be charged." The effect of these provisions is not to require the contract to be constituted in and by the writing, but to declare that, on a trial for its enforcement, the evidence shall be insufficient, no matter what it may amount to, unless it includes "the admission in writing of the party to be charged." [1]

The application of the rules of the Statute is impossible and unnecessary to be followed in this work. But it may be observed that its evidential policy is sound:

1828, Best, C. J., in *Strother* v. *Barr*, 5 Bing. 136, 151: "I seldom pass a day in a Nisi Prius Court without wishing that there had been some written statement evidentiary of the matters in dispute. More actions have arisen, perhaps, from want of attention and observation at the time of a transaction, from the inperfection of human memory, and from witnesses being too ignorant, too much under the influence of prejudice, to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of parol testimony." [2]

The requirements of the remaining Sections of the Statute are distinct in theory; they make the writing a constitutive formality of the act; the transaction shall be "utterly void" if not "in writing." In this aspect their place in the law is elsewhere briefly examined (*post*, §§ 2454–2455).

§ 2093. [1] 1895, Browne, Statute of Frauds, 5th ed., § 354*a*; and the further exposition in this treatise, *post*, § 2454.

In a few States, the statute additionally provides that, apart from a signed memorandum, the *party's testimony* will suffice to establish the contract: Iowa, Code 1919, § 4628. This is construed to mean that the party's testimony must *in itself suffice completely* for the purpose, and can neither be corroborated nor contradicted: 1920, Quaker Oats Co. *v.* Kidman, 189 Ia. 695, 179 N. W. 128 (collecting prior cases).

[2] The radical difference of proportion, in the part played by this rule, between the Continental law and our own, is emphasized in Mr. Bodington's essay on The French Law of Evidence (1904).

TITLE V (*continued*): SYNTHETIC RULES

SUB-TITLE III: VERBAL COMPLETENESS

CHAPTER LXXI.

§ 2094. **General Principle: Verbal Utterances must be taken as a Whole, not by Fragments or by Summary.** A. When an ordinary *act* or *occurrence* is testified to — as, a collision on the highway or an affray in a room, — the

witness relates whatever circumstances are deemed useful by the party offering him, and then rests. There is no rule specifying how much of the entire happening, or how many particulars in the sequence of events, must be placed before the tribunal by him as a condition precedent to his relating anything at all. There is no need of such a rule, and for several reasons:

First, the remainder of the relevant facts known to the witness may be fully brought out upon cross-examination; this is, indeed, one of the chief functions and utilities of the process of cross-examination (*ante*, §§ 1361, 1368). Secondly, a single witness is seldom acquainted with the entire sequence of events or of conduct, and it would therefore be impracticable to reject any one witness because he cannot recount the whole. Thirdly, a rule requiring the party to offer the whole of the occurrences through the several witnesses who together could testify about the whole would be unduly exigent, because presumably the opponent is equally well acquainted with the possible sources of testimony and can equally well call such witnesses to supplying missing material circumstances. Finally, matters of conduct and external event are seldom so inseparably united that any one act or occurrence would by itself be wholly misleading, and therefore could seldom need to be compared with other acts and occurrences to arrive at a true comprehension of the sense of the former; the whole, to be sure, will need to be known, but each event has in itself usually a clear and unchangeable significance. For example, on a charge of larceny of a horse, one witness testifies to having seen the defendant driving the horse on a certain day at a certain street corner. Here, whatever else significant there was at that time and place, as observed by the witness, can be ascertained on cross-examination; again, it would be absurd to require that this one witness, who happened to see merely this one act, should testify to all the rest of the defendant's conduct, as a condition of testifying at all; furthermore, it would be equally unfair to require the prosecution through other witnesses to cover the entire matter of the defendant's conduct or of the horse's fate since the date of the taking; and, finally, nothing is lost by not so doing, because the fact (if believed to be so) of the defendant's possession of the horse at the time and place stated remains absolute and unchangeable, no matter what innocent explanation the defendant may subsequently give; the inferences to be drawn from his possession may be changed, but, whether it appears that he had bought or had borrowed the horse or had taken him by mistake or had stolen him, the possession at that place and time remains as a constant fact and has suffered no change in the course of the later testimony.

In general, then, looking at the usual character and practical bearings of conduct and events not involving verbal[1] utterances, there is for such

§ 2094. [1] "Verbal" is here used in its proper sense of "consisting in words," whether spoken or written. "Oral" signifies "consisting in speech," and not written or printed. Unless these two terms are kept distinct, scientific discussion is impossible.

facts no need and no opportunity for a rule requiring the whole of the deed or the occurrence to be offered or taken together.[2]

B. But where *words* are the object of proof, the conditions are decidedly otherwise. Verbal[3] utterances are attempts to express ideas in words. The more complicated the idea, the more elaborate is the structure of the verbal utterance. A simple life, reduced to its lowest terms, may be lived in a dwelling of one room; but a 'fin-de-siècle' existence, with all its appurtenant needs, conveniences, luxuries, and follies, demands a complex mansion with scores of apartments, countless petty fittings, and a huge estate of many departments. The rural weekly newspaper and the metropolitan daily journal represent, in their contrast between brief simplicity and voluminous detail, the contrasts of life in country and city. So with any utterance of any thought; the complexity of the latter produces elaboration in the former. It follows that the thought as a whole, and as it actually existed, cannot be ascertained without taking the utterance as a whole and comparing the successive elements and their mutual relations. To look at a part alone would be to obtain a false notion of the thought. The total — that is to say, the real — meaning can be got at only by going on to the end of the utterance. One part cannot be separated and taken by itself without doing injustice, by producing misrepresentation.

I. Now the *causes* of an *incomplete reproduction* of a verbal[3] utterance, in making proof in court, are diverse, and thus lead to diverse expedients to cure them. For example, where a written utterance is *produced*, all the words are then and there before the tribunal, and the only source of incompleteness would be the party's failure to read or to show the whole; the remedy for this — to compel complete reading or exhibition — is simple, and lies ready at hand (*post*, § 2102). If, however, the original cannot be brought into court, but is available — as, a public record — for *taking a copy*, or if it is a lost private document but a copy has been preserved, the remedy lies in requiring the use of the copy (*post*, §§ 2105, 2108).

But if the document is lost and no copy exists, or if the utterance was originally oral and was not reduced to writing at the time, there is no source of reproducing it except the *memory* of those who saw or heard it. Here the question becomes a serious one whether we are to be satisfied with as much as can be remembered of it, or whether none is to be listened to because of the risk of obtaining only an imperfect and perhaps misleading account. The law has solved this problem by declaring that the substance shall suffice, even if verbal[3] precision and minor portions are sacrificed (*post*, §§ 2097, 2099, 2105). A contrary rule would no doubt be unendurable, and the risk of error must be incurred in preference to the certainty of hardship which would otherwise ensue. Nevertheless, the great possibilities of error in trusting to recollection-

[2] It is true that the Michigan rule about calling all the eye-witnesses of a crime (*ante*, § 2079) was originally based on the suggestion of some such principle as the above; but no such doctrine has been advanced elsewhere.

[3] See note 1, *supra*.

testimony of oral utterances, supposed to have been heard, have never been ignored; but an antidote is constantly given by an instruction to the jury against trusting overmuch to the accuracy of such testimony. In the following passage, the typical warning is well phrased; here, as usually, it is applied specifically to proof of *oral admissions* or *confessions of a party*, because these are the commonest in practice; but the general warning applies to all oral utterances: [4]

1833, *Earle* v. *Picken*, 5 C. & P. 542: "In the course of this circuit, Mr. Justice PARKE several times observed that too great weight ought not to be attached to evidence of what a party has been supposed to have said, as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say."

1866, REDFIELD, C. J., Note to Greenleaf on Evidence, 12th ed., § 200: "In a somewhat extended experience of jury trials we have been compelled to the conclusion that the most unreliable of all evidence is that of the oral admissions of the party. And especially where they purport to have been made during the pendency of the action, or after the parties were in a state of controversy. It is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of them; and in some instances it will appear that the witness deposes to the statement of one party as coming from the other; and it is not very uncommon to find a witness of the best intentions repeating the declarations of the party in his own favor as the fullest admissions of the utter falsity of his claims. When we reflect upon the inaccuracy of many witnesses in their original comprehension of a conversation, their extreme liability to mingle subsequent facts and occurrences with the original transactions, and the impossibility of recollecting the precise terms used by the party, or of translating them by exact equivalents, we must conclude that there is no substantial reliance upon this class of testimony."

1875, NEILSON, J., in *Tilton* v. *Beecher*, Abbott's Rep. II, 837 (on the above quotations being cited to him): "When you and I were boys, we found that general principle cited in all the text-books very much after the form that you have put it. . . . Perhaps the best statement of that has been given in Starkie on Evidence, to the effect that this kind of testimony is dangerous, first, because it may be misapprehended by the person who hears it; secondly, it may not be well-remembered; thirdly, it may not be correctly repeated."

Such, then, are the sources of incompleteness, and the appropriate remedies which they suggest.[5]

II. As to the *forms* in which the incompleteness may appear, they are reducible to two, namely, lack of *verbal precision* and lack of *entirety of parts*. Upon this distinction will depend many of the rules applying the general

[4] So also: 1808, Trimble, J., in Myers *v.* Baker, Hardin Ky. 544, 549; 1830, Walworth, M. C., in Law *v.* Merrills, 6 Wend. N. Y. 268, 277; 1921, Kimball, J., in Hoge *v.* George, 27 Wyo. 423, 200 Pac. 96.

As to the *giving of an instruction* on this point, there is much useless learning: 1903, People *v.* Wardrip, 141 Cal. 233, 74 Pac. 744 (under C. C. P. § 2061); 1904, People *v.* Buckley, 143 Cal. 375, 77 Pac. 169; 1904, People *v.* Moran, 144 Cal. 48, 77 Pac. 777; 1904, People *v.* Ruiz, 144 Cal. 251, 77 Pac. 907; 1905, Castner *v.* Chicago, B. & Q. R. Co., 126 Ia. 581, 102 N. W. 499; 1905, Rosenwald *v.* Middlebrook, 188 Mo. 58, 86 S. W. 200; 1904, Thompson *v.* Purdy, 45 Or. 197, 77 Pac. 113, 83 Pac. 139; 1906, State *v.* Hutchings, 30 Utah 319, 84 Pac. 893; 1905, Grotjan *v.* Rice, 124 Wis. 253, 102 N. W. 551.

[5] For a further consideration of the grounds of distrust as affecting an *accused's confession*, see *ante*, § 866.

principle (*post*, §§ 2097, 2099), because the defect to be cured may exist in only one of these forms without the other; and their difference may properly be illustrated at the outset:

(1) *Verbal*[6] *precision* is of course important to the correct understanding of any verbal utterance, whether written or oral, because the presence or absence or change of a single word may substantially alter the true meaning of even the shortest sentence. The fact is undoubted; although the law cannot deter tribunals from accepting the best precision that is obtainable merely because of the inherent possibilities of vital error on individual words. The following illustrations will serve to show something of the part this danger has played in judicial annals:

1824, Mr. *Thomas Starkie*, Evidence, 7th Am. ed., II, 549: "Of all kinds of evidence, that of extrajudicial and casual observations is the weakest and most unsatisfactory. Such words are often spoken without serious intention, and they are always liable to be mistaken and misremembered, and their meaning is apt to be misrepresented and exaggerated. I once heard a learned judge (now no more), in summing up on a trial for forgery, inform the jury that the prisoner, in a conversation which he had had with one of the witnesses, had said, 'I *am* the drawer, the acceptor, and the indorser of the bill.' Whilst the learned judge was commenting on the force of these expressions, he was, at the instance of the prisoner, set right as to the statement of the witness, which was that the prisoner had said, 'I *know* the drawer, the acceptor, and the indorser of the bill.' Had the witness, and not the judge, made the mistake, the consequences might have been fatal. The prisoner was acquitted."

1875, *Tilton* v. *Beecher*, Abbott's Rep. II, 305, 307, 815; the plaintiff, in his action for criminal conversation, was confronted with a public statement of his, in which he had printed certain of the evidence in his possession as to the defendant's adultery with his wife; a part of this consisted of passages from letters to him from his wife, showing her consciousness of the temptations of the defendant, her original resistance, and her subsequent yielding; one of these extracts as printed was: "To love is praiseworthy, but to abuse the gift is sin. Here I am strong. No demonstrations or fascinations could cause me to yield my womanhood." The defence showed that the original passage read: "I have been thinking, my darling, that, knowing as you do your immense power over an audience to move them as you will, — that same power you have with all public men, over any woman whom you may love — to love is praiseworthy, but to abuse *your* gift *of influence* is sin; therefore I would fain help restore to you that which I broke down, — self-respect. Your manhood and its purity and dignity, if you feel it, is stronger than even love itself. I know this; because here I am strong. No demonstrations or fascinations could cause me to yield my womanhood." The defence claimed that this letter was written just after a mutual explanation in which *he* had confessed to her that *he* had gone too far in his relations with women-friends, and in which she had received his expressions of contrition, forgiven him, and sought to restore his sense of self-respect; so that the extract quoted was made, by the omission of the words above italicized, to refer to *her* temptations, when in fact it referred to *his own;* Mr. *Tracy*, for the defendant, thus arguing: "This is the letter, gentlemen, which was so marvelously garbled by the plaintiff in the early part of this controversy before the church, — so garbled as to put upon the wife an imputation that she herself was tempted, and was likely to fall, and was resisting her own temptation. He made it read, as you remember, speaking of herself: 'To love is praiseworthy, but to abuse the gift is sin. Here I am strong. No temptation could

[6] See note 1, *supra*.

induce me,' etc." But when you get at this letter and read the whole of it, you see that she is speaking of *him*, and the abuse of *his* influence over women, and she is remonstrating with him against that abuse."

1909, *Trial of Professor Foster* for Heresy (Chicago Record-Herald, June 8, 1909). Dr. Wm. Matthews, a zealous religionist, believing that Professor Foster, of the Theological Faculty of the University of Chicago, had published heretical doctrine, advanced charges of heresy before an ecclesiastical Conference held in Chicago. The critic in his address quoted many passages from the accused's writings, and commented on them; and the following incident here occurred:

Dr. Matthews, after quoting Professor Foster as stating in his book that "he who calls himself a Bible believer is a *knave*," declared with great earnestness: "If that be so, thank God I am one."

"Does Professor Foster say that?" interrupted Professor Parker.

"Yes, sir," declared Dr. Matthews.

"On what page?" demanded Professor Parker.

"Page 282," was the reply.

"How do you spell the word '*knave*'?" was the next question.

"*K-n-a-v-e*," spelled Dr. Matthews.

"If you will turn to the passage you refer to on page 282 of Professor Foster's book," returned Professor Parker, pointing to it in an open copy of the book which he held in his hand, "you will find that it reads: 'He who calls himself a Bible believer is a *naive*,' meaning a simple, untutored person, not a scoundrel, as one would be led to believe from your interpretation."

Dr. Matthews thanked the professor for his correction, but was visibly embarrassed by his error.

(2) *Entirety of parts* is equally essential to the correct understanding of an utterance. A word is interpretable in the light of the use of the same word in another part; a clause is modified by a prior or subsequent clause; one sentence qualifies another; and one paragraph may form only a part of the whole exposition. We must compare the whole, not because we desire the remainder for its own sake, but because without it we cannot be sure that we have the true sense and effect of the first part. Entirety of parts is thus as essential as verbal precision; for the greatest possibilities of error lie in trusting to a fragment of an utterance without knowing what the remainder was. Apparent as this is to all, the following illustrations emphasize its truth in judicial annals:

1683, *Algernon Sidney's Trial*, 9 How. St. Tr. 817, 829, 868; seditious libel. Mr. *Williams*, his counsel, had instructed him: "In the evidence against you for your writing, take care that all that was writt by you on that subject be produced, and that it be not given in evidence against you by pieces, which must invert your sense"; on the trial, one of the passages read against Sidney from his manuscript was: "The general revolt of a nation from its own magistrates can never be called rebellion." *Sidney*, arguing against using these passages piecemeal, said: "My lord, if you will take Scripture by pieces, you will make all the penmen of Scripture blasphemous. You may accuse David of saying, 'There is no God,' and accuse the Evangelists of saying, 'Christ was a blasphemer and a seducer,' and the Apostles, that they were drunk." L. C. J. JEFFRIES: "Look you, Mr. Sidney; if there be any part of it that explains the sense of it, you shall have it read. Indeed, we are trifled with a little. It is true, in Scripture it is said, 'There is no God'; and you must not take that alone, but you must say, 'The fool hath said in his

heart, There is no God.' Now here is a thing imputed to you in the libel; if you can say there is any part that is in excuse of it, call for it." [7]

1888, *Parnell Commission's Proceedings*, 85th day, Times' Rep. pt. 23, p. 227; the Land League and its leaders were charged with encouraging crime and outrage, by speech and action; Mr. *T. D. Sullivan* was cross-examined as to speeches of his which seemed to encourage crime. *Q.* "Now I will call your attention to a speech of yours at Kilbrennon on the 18th of October, 1880. (Reading.) 'We will so organize the Irish counties that *they will want extra police in every county* in Ireland.' How would you make it necessary to have extra police force; by crime, or not by crime?" *A.* "By no crime; by an extension of the National organization to those counties." . . . *Q.* "Will you explain what you mean by the words 'they will want extra police in every county'?" *A.* "Please read the other portion of my speech." President *Hannen:* "I am bound to say that I think that that requires explanation; but the witness asks that the context should be read." Mr. *Murphy* (reading): "'Against that accursed system the people are rising in peaceful revolt, and it is high time that they should do so; and I tell you that that peaceful revolt of theirs cannot be put down if the people prove true to each other. . . . A few days ago there was issued from Dublin Castle a circular announcing that an increased force of constabulary would be sent to the counties of Galway and Mayo, and the increased charges of these constabulary, it is said, will be put on the people. I will tell you what to do with those increased charges. The people are already paying as much as they can pay, and a great deal more than they ought to pay, and if this increased charge or increased rate is put on the tenantry in any part of Ireland, I tell them to go and stop it out of their rent. Let them tell the landlord that this increased police rate exceeds their power to meet or discharge, that they have no way under heaven of paying it unless by stopping it out of their rents. But once the landlords find out that you are on the track, you will see how soon they will manage to do without this extra force. . . . I tell you that for the working out of your cause *no outrages* on your part *are necessary or desirable*. If you spread through your county, and if there is spread through all Ireland, this organization I speak of, it will be more powerful than any amount of terrorism or outrage that could be committed in any one corner of the land.'" *Witness:* "My meaning is practically plain; that extra police force were sent to that part of the country for the suppression of a legal and righteous agitation, and the extent of that legal and righteous agitation in other parts of the country would put a burden upon the landlords in Dublin Castle which they would not like to bear." President *Hannen:* "I think I see the witness's meaning; his explanation is that the Government would suppress their agitation, though a legal one, and by extending the organization they would make it necessary for the Government to employ more police in suppressing what he regards as a legal organization." [8]

[7] Scripture passages are sometimes in danger from this rule, as the following anecdote shows: "J. T. Trowbridge, the aged author, is writing his autobiography at his home in Arlington, Mass. Mr. Trowbridge was born in Ogden, N. Y. The other day he said: 'I went to school at Lockport in my boyhood, and there was a Lockport stonecutter whom I used to like to talk to, for he had a mind as simple as a child's. I remember a job that he once undertook — the job of cutting a sentence from Scripture over the door of a little stone church. The committeemen who intrusted him with this job did not comprehend his childlike, unreflecting nature, or they would not have couched their order in the terms they did. They wanted the sentence: "My house shall be called a house of prayer." He told them they had better write it down for him. But they said it would only be necessary to write down the chapter and verse, and he could copy the sentence right out of the good book. Well, our Lockport stonecutter copied the sentence, but he did not end where he should have ended. He went right on to the sentence's conclusion. The result was that the legend over the church door read: "My house shall be called a house of prayer; *but ye have made it a den of thieves*." ' " (Chicago Record-Herald, Aug. 23, 1903.)

[8] Even better, if that were possible, than Sidney's celebrated illustration, is the following anecdote; 'se non è vero, è ben trovato': "One evening there was arrested in the city an old gentleman of position and cheery habits. The policeman said he had found the old gentleman on the street very drunk. The complaint was entered against him, but he was released on

But what is *the whole* of the utterance? No doubt this principle of entirety is flexible in its application. A simple thought requires but a simple utterance; a complex thought, a complicated utterance. When, therefore, we obey the canon that the whole of the utterance must be considered, the scope of our survey may be very variable, so far as concerns the mere number of words, sentences, or paragraphs. The whole that is to be considered is obviously not the whole of a phrase or a paragraph, any more than it is the whole of the printer's line or page, but the whole of the thought, — that is, such a quantity of utterance as the utterer has indicated to be distinct and entire in itself, for the purpose of representing a distinct thought. If this dividing line can be ascertained, there is no need of looking beyond it. A cry for "help!" is entire in a single exclamation. A local railroad-passage contract is entire upon a small piece of pasteboard. But a treatise in defence of usury will require a perusal of several chapters to discover the entire thesis. Thus the possibilities are infinite and the boundaries indefinite, in this search for entirety of utterance. It will be difficult for the law, in applying the principle, to employ any fixed test. Yet the law cannot be expected to be satisfied practically with the indefiniteness which in theory the conception of entirety involves; and therefore the application of it is full of difficulties.

The general principle, then, — which may be termed the principle of Completeness — that the *whole of a verbal utterance must be taken together*, is accepted in the law of Evidence; for the law in this respect does no more than recognize the dictates of good sense and common experience. There are in the application of it important qualifications and exceptions, but the recognition of the principle, and the reason for it, is unquestionable. It appears clearly conceded and consciously applied as early as the 1600s,[9] and no doubt

his recognizance, and sent home in a hack. When his case came up in court, the only witnesses summoned to prove his condition were the policeman and the old family servant of the accused, a faithful and devoted retainer. The policeman had given his testimony to the fact of the old gentleman's intoxication. Then the old servant was called to the stand. He testified flatly, to the surprise of the court room, that the old man was sober when he came home. The prosecuting attorney proceeded to question. 'You say that Mr. —— was sober when he came home?' 'Yes, sir.' 'Did you put him to bed?' 'Yes, sir.' 'And he was perfectly sober?' 'Yes, sir.' 'What did he say when you put him to bed?' 'He said "Good night."' 'Anything else?' 'He said as how I was to call him early.' 'Anything else?' 'Yes, sir.' 'What was it? Tell us exactly what he said, every word.' 'He said as how I was to call and wake him early, for *he was to be queen of the May!*' The old gentleman was fined."

[9] The following precedents seem to show that the rule, as such, dates definitely from the 1600s: 1571, Newis *v.* Lark, 2 Plowd. 403, 410 (assize of disseizin; objection "to the manner of giving evidence," that "the whole last will and testament was not shewn, but part of it only; . . . and forasmuch as the last will is the foundation of the evidence, it was said that the plaintiffs ought to shew it fully and entirely as it is, for it may be that there is some other matter of substance precedent, as a condition or other circumstance, limited to all that which comes after, for which reason it was said that the whole ought to be shewn. But all the justices argued to the contrary; for the party in any title or bar or other matter, where land or other thing may be gained or lost, shall not be forced to shew more than that which serves his purpose"; two judges partly dissenting); 1613, Read *v.* Hide, Coke's Third Institute, 173 ("It was resolved that no exemplification ought to be of any letters patent or of any other record, or of the inrolment thereof; but the whole record or the inrolment thereof ought to be exemplified, so that the whole truth may appear, and not of such part as makes for the one party and nothing that makes against him or that manifesteth the truth").

was implicitly understood long before that period. Nothing turns upon its history as a general principle (though there have been historical changes in specific rules coming under it), because it has had little distinct individuality in judicial practice and has thus had no independent development as a whole. In the following passages, scattered through three centuries, will be found some of the most interesting and instructive expositions of the principle:

Ante 1625, *Stukeley* v. *Butler*, Hob. 168, 170: "It is a good rule, 'incivile est, nisi tota sententia perspecta, de aliqua parte judicare' . . . And indeed in one sentence it is vain to imagine one part before another; for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives 'vitam et modum' to the sentence."

Circa 1690, Sir *John Hawles*, Solicitor-General, Remarks on *Lord Russell's Trial*, 9 How. St. Tr. 809: "How could Sheppard speak positively of the discourse, or of the design of it, when he owns he did not hear all the discourse, and gives a very good reason for it? For he said he went several times down to fetch wine, sugar, and nutmeg, and did not know what was said in his absence: he said he heard nothing about a rising, nor heard any further discourse; but on recollection, he heard something about a declaration of grievances in order to a rising, as he supposed; the particulars he could not tell. Now what sort of evidence was that? In all civil matters, a witness shall not be permitted to give evidence of the content of a deed or writing, without producing the deed or writing itself, or a true copy of it, and upon very good reason; for he may make an untrue construction of it. I remember a witness who swore to the content of a deed of intail; and being asked, whether he knew a deed of intail, and by what he knew the deed he spoke of to be a deed of intail, answered he knew a tailed deed very well, and he knew the deed to be a tailed deed, because it had a tail half as long as his arm (meaning the label of the deed). And if this be the practice and the reason of the practice, in civil matters, shew me any authority or reason anything should be permitted to be given in evidence in treason, which is not permitted to be given in evidence in the trial of any civil matter."

Ante 1767, BULLER, J., Trials at Nisi Prius, 228: "When a man gives in evidence a sworn copy of a record, he must give the copy of the whole record in evidence, for the precedent or subsequent words or sentence may vary the whole sense and import of the thing produced, and give it quite another face."

1789, Mr. *Thomas Erskine*, for the defence, in *Stockdale's Trial*, 22 How. St. Tr. 257 (the alleged libel was a pamphlet criticising the prosecution of Warren Hastings as unfair and corrupt, and certain extreme passages were set out in the indictment): "Out of a work consisting of about two thousand five hundred and thirty lines of manly, spirited eloquence, only forty or fifty lines are culled from different parts of it and artfully put together, so as to rear up a libel out of a false context, by a supposed connexion of sentences with one another, which are not only entirely independent, but which, when compared with their antecedents, bear a totally different construction! In this manner the greatest works upon government, the most excellent books of science, the sacred Scriptures themselves, might be distorted into libels, by forsaking the general context and hanging a meaning upon selected parts. Thus, as in the text put by Algernon Sidney, 'The fool has said in his heart, There is no God,' the attorney-general, on the principle of the proceeding against this pamphlet, might indict the publisher of the Bible for blasphemously denying the existence of Heaven, in printing 'There is no God.' These words alone, without the context, would be selected by the information, and the Bible, like this book, would be underscored to meet it. Nor could the defendant in such a case have any possible defence, unless the jury were permitted to see, by the Book itself, that the verse, instead of denying the existence of the Divinity, only imputed that imagination to a fool."

1820, ABBOTT, C. J., in *The Queen's Case*, 2 B. & B. 287 (for all the judges): "One of the

reasons for the rule requiring the production of written instruments is in order that the Court may be possessed of the whole. If the course which is here proposed should be followed [*i. e.* not producing it] the Court may never be in possession of the whole, though it may happen that the whole if produced may have an effect very different from that which might be produced by a statement of a part."

1823, ABBOTT, C. J., in *Thomson* v. *Austen*, 2 Dowl. & R. 361: "It is at all times a dangerous thing to admit a portion only of a conversation in evidence, because one part taken by itself may bear a very different construction and have a very different tendency to what would be produced if the whole were heard; for one part of a conversation will frequently serve to qualify and to explain the other."

1831, CURIA, in *Bank* v. *Brown*, Dudley 62, 65: "It is an established rule that the whole of a document or writing offered in evidence must be read, if required. Otherwise there would be no certainty as to the sense and meaning of the entire document. The dangerous tendency of permitting an extract from a letter to be read in evidence is at once obvious; by suppressing a part, the meaning of the writer may be entirely perverted."

1858, MERRICK, J., in *Com.* v. *Keyes*, 11 Gray, 323, 324: "It is undoubtedly the general rule that whenever the statements, declarations or admissions of a party are made subjects of proof, all that was said by him at the same time and upon the same subject is admissible in his favor, and the whole should be taken and considered together. This is essential to a complete understanding of what he intended to express by the particular phrases and language which he uses. To give effect to general statements, without regard to the qualifications with which they are accompanied, and by which they may be materially modified, would manifestly lead to error, and be likely to be directly productive of injustice. All therefore is to be heard and weighed before it can be affirmed that the force and effect of language, whether written or spoken, are fully and justly apprehended. In the construction of contracts, the same principle prevails, requiring that each particular part shall be examined and considered, in order to learn and comprehend, the scope and purport of the whole. All writings, whether of a public or private character, are to be subjected to the same kind of scrutiny. No provision of a statute, however minute, is to be overlooked when searching for the design and object of the Legislature in its enactment, and in considering how it ought to be interpreted and explained; just as particular covenants in a deed, or devises in a will, are to be construed according to the intent of the parties in the one case, and of the testator in the other, so far as it can be ascertained by bringing into view all the expressions and provisions contained in these respective instruments."

§ 2095. **Two Branches of the Rule; Compulsory and Optional Completeness; Precision and Entirety.** (1) The application of the general principle takes, first of all, two distinct aspects having practical consequences; they are represented by the questions, *Must* the whole be offered? and, *May* the whole be offered?

I. The first is obviously a question asked by the *original proponent* of the utterance. He proposes to prove a part of a conversation, a deed, or a record; he is met by the objection that he can offer no part unless he offers the whole; and the question for him is, *Must* he do this? This is, in practical application, the stricter effect of the principle, and indeed is not enforced invariably or for all classes of utterances.

II. Supposing that a part only is deemed sufficient, the further question then arises, but this time for the *opponent*, against whom the utterance is offered, namely, *May* the whole be now put in? Here the principle has natur-

ally a universal application. To arrive at the sense of the utterance as a whole, the remainder of it may now be put in by the opponent. The chief practical question here is, of course, as to the limits to be set to these complementary parts, in order to admit nothing more than what really qualifies the first utterances; for otherwise the rule would become a mere excuse for the intrusion of irrelevancies.

(2) Under the first head, in applying the rule that the whole *must be put in* (and in theory under the second head also, but not commonly in practice), the principle divides into two sub-principles, which may be termed respectively the principles of *Precision* and of *Entirety* (*ante*, § 2094). The distinction rests on the obvious fact that the incompleteness of a verbal utterance may lie either in using a summary of its effect, without the precise words, or in using a fragment only, verbally precise as far as it goes, but wholly lacking the complementary portion. By the sub-principle of Precision, verbal accuracy of reproduction is required; by the sub-principle of Entirety, the presence of all the parts is required. Either of these may be dispensed with, while requiring the other; and circumstances often make desirable this partial modification of the general principle.

(3) A difference of rule may often turn upon the circumstance that the utterance, when *in writing, is produced before the tribunal*, availably for direct use in evidence by the opponent, or is not so produced. On the one hand, the requirement of Precision may be impracticable in the latter case, yet plainly feasible in the former. On the other hand, the requirement of Entirety may be dispensed with in the former case, because the opponent has it easily in his power to put in the complementary portions.

(4) Finally, the rules must often, by practical necessity, be different for *oral* and for *written utterances*. The former lie in memory only, and overmuch cannot be demanded in the reproduction of words by mere memory. The latter may be copied literally and entirely, or may be produced 'in specie' (*ante*, § 1179). Hence, less strictness may be shown in applying the principle to the former class of utterances.

An arrangement of rules, in such a way as to exhibit the practical consequences connected with these vital distinctions, while at the same time keeping together the various kinds of utterances (letters, conversations, deeds, records, depositions, and so on) that naturally classify themselves in ordinary usage, seems to be not feasible. But, with a view to clear exposition of principle and also to practical convenience, the following grouping seems most satisfactory:

I. *Must* the Whole of the Utterance be *first offered* by the *Proponent?* A. Oral Utterances; considered with reference to (*a*) Verbal Precision; and (*b*) Entirety of Parts. B. Documents; considered according as they are (*a*) Produced in court; or (*b*) Lost or destroyed; (*c*) Public records. II. *May*

the Whole be *afterwards offered* by the *Opponent?* (*a*) General principle; and its application to various kinds of utterances; (*b*) Application to separate speeches or writings; (*c*) Application to answers in chancery.

I. MUST THE WHOLE OF THE UTTERANCE BE FIRST OFFERED BY THE PROPONENT?

A. ORAL UTTERANCES

§ 2097. (*a*) **Verbal Precision; General Principle, and its Application to Conversations, Admissions, Confessions, Slanders, and Sundry Utterances.** Complete certainty as to an utterance's true meaning can be ascertained only by considering every word in it. The change, omission, or addition of even a single word may radically alter the meaning. But for oral utterances such verbal precision need not and cannot be required. It need not be, for the importance of single words in oral discourse is comparatively much less than in writings; and it cannot be, since memory does not retain precise words, except of simple utterances and for a short time. Hence, verbal precision is in general *not required* in proving *oral utterances;* the *substance* or effect is sufficient:

1836, RICHARDSON, C. J., in *Eaton* v. *Rice*, 8 N. H. 380: "It can rarely happen that a witness who was present when a conversation was had between two individuals can at any time afterwards, and particularly at any distant time, state precisely what was said by them, although he may recollect distinctly an agreement made between them at the time. If, then, in all cases the witness is required to state what was said so accurately that the jury may be enabled to judge by the terms used what a contract was, it must frequently happen that a contract not in writing cannot be proved at all. . . . The recollection of a witness as to what an agreement between parties was, according to his understanding of what was said by them at the time, may be very satisfactory evidence, although he may not be able to recollect distinctly one word that was said. . . . . The credit that may be due to a witness in these cases may depend much on his being able to detail enough of the conversation to show that his understanding of the matter was probably right. But what he understood is in all cases evidence to be weighed by the jury."

1883, COOLEY, J., in *Bathrick* v. *Detroit Post & T. Co.*, 50 Mich. 629, 637, 16 N. W. 172 (dealing with a question as to the plaintiff's admission of carnal intercourse): "It would have been entirely proper to permit the witness to testify that he had conversations in which the criminal intercourse was admitted or assumed, even though he did not remember the words made use of. It is not surprising that a man should remember the substance or the result of a conversation, and yet not be able to recall the words made use of; and it sometimes casts suspicion on the veracity of a witness that he assumes to remember the very words of a conversation, when there was nothing in the case which was likely to impress upon his mind anything beyond the general result. But if a witness fails to remember words when it would seem that he ought to do so, the jury must be relied upon to give due weight to the fact when considering his evidence."

The general rule, universally accepted, is therefore that the substance or effect of the actual words spoken will suffice, the witness stating this substance as best he can from the impression left upon his memory. He may

give his "understanding" or "impression" as to the net meaning of the words heard. This rule is applicable to oral utterances in general, — including *admissions*, *conversations* (whether as forming contracts or merely as admissions), and the like.[1] It applies also to an accused's *confessions*,[2] and to *seditious utterances*;[3] yet it is commonly said that precise proof must be made for *defamatory utterances*,[4] — though here the rulings under the

§ 2097. [1] *Ill.* 1871, Helm *v.* Cantrell, 59 Ill. 524, 531 ("the witness does not pretend to give either the conversation or the substance of it," but says that C. "fully admitted his liability on the note"; held inadmissible, as an inference); 1879, Hewitt *v.* Clark, 91 Ill. 608; *Me.* 1856, Lewis *v.* Brown, 41 Me. 448, 451 (the witness could not recollect the language of a compromise-agreement, but "understood" from him that he would limit his claim; not excluded, but treated as inconclusive); *Md.* 1901, Worthington *v.* State, 92 Md. 222, 48 Atl. 355 (a witness' "impression" as to the substance of a dying declaration; "it was rather the recollection than the impression of the witness which was sought; . . . the law does not require that the very words be repeated"); *Mass.* 1873, Kittredge *v.* Russell, 114 Mass. 68; 1903, Hayes *v.* Pitts-Kimball Co., 183 Mass. 262, 67 N. E. 249 (the exact words of a deceased's statement, admissible under St. 1898, c. 535, are not required); *Mich.* 1875, Willard *v.* Fralick, 31 Mich. 435; 1876, Chambers *v.* Hill, 34 Mich. 523, 524 (title to personalty; that the plaintiff's intestate spoke of it "as the defendant's," allowed; though "the witness should certainly have given the words of the intestate if she could do so"); 1883, Bathrick *v.* D. P. & T. Co., 50 Mich. 629, 637 (quoted *supra*); *Mo.* 1867, Buchanan *v.* Atkinson, 39 Mo. 504; 1875, Cornet *v.* Bertelsmann, 61 Mo. 126 (admissible; but of little weight); 1904, McKee *v.* Higbee, 180 Mo. 263, 79 S. W. 407 (conversations and terms of a lost letter, involving a contract to bequeath, held not sufficiently proved); *N. H.* 1836, Eaton *v.* Rice, 8 N. H. 380 (quoted *supra*); 1841, Maxwell *v.* Warner, 11 N. H. 569; 1844, Braley *v.* Braley, 16 N. H. 432; 1864, Kingsbury *v.* Moses, 45 N. H. 222, 225 ("he may mean to state what the parties in fact or in substance said as he understood them, or merely to give his inferences drawn from what was said; in the former case the testimony would be competent"); *N. Y.* 1910, People *v.* Giro, 197 N. Y. 152, 90 N. E. 432; *N. Car.* 1897, State *v.* Robertson, 121 N. C. 151, 28 S. E. 59; *Or.* 1905, Busch *v.* Robinson, 46 Or. 539, 81 Pac. 237, *semble*; *Vt.* 1895, Norton *v.* Parsons, 67 Vt. 526, 32 Atl. 481; *Wis.* 1898, Fertig *v.* State, 100 Wis. 301, 75 N. W. 960 (the substance of the relevant parts, sufficient).

The following distinction is sound, but rests ultimately on the principle of leading questions (*ante*, § 769): 1897, Chatfield *v.* Bunnell, 69 Conn. 511, 37 Atl. 1075 (excluding the question whether to A, who heard the defendant talk with B, the defendant said the same as to B; "a witness cannot thus be allowed to testify in gross as to the similarity of separate and distinct conversations with different persons on the same subject").

Compare similar rulings for proof of *former testimony*, *post*, § 2098.

For proving the substance of *dying declarations*, see *ante*, § 1448.

[2] 1911, Godinho's Case, 7 Cr. App. 12 (not decided; R. *v.* Sexton, as cited in Roscoe, Criminal Evidence, 13th ed., 39, doubted); 1855, Brister *v.* State, 26 Ala. 107, 127; 1904, State *v.* Brinte, 4 Del. 551, 58 Atl. 258 (the questions, to which the confession made answer, need not be included); 1883, State *v.* Donovan, 61 Ia. 278, 281, 16 N. W. 130 (the witness "could not give the language used by defendant, but could testify only from the impressions received and the ideas formed from the conversations"; held sufficient); 1877, State *v.* Hughes, 29 La. An. 514; 1895, State *v.* Madison, 47 La. An. 30, 16 So. 566; 1896, State *v.* Desroches, 48 La. An. 30, 19 So. 250.

For the rule as to putting in the *remainder of the confession*, see *post*, § 2101.

[3] *Eng.* 1820, R. *v.* Hunt, 1 State Tr. N. S. 171, 252 (seditious meeting; the sense of the spoken utterances, though not the exact words, allowed); 1821, R. *v.* Edmonds, ibid. 785, 820 (conspiracy; the substance of words in a speech allowed; L. C. B. Richards: "Am I not to hear in court what a gentleman says of what passes because he cannot give the words?"); 1843, R. *v.* O'Connell, 5 St. Tr. N. S. 1, 196 (notes of the substance of portions of a speech, admitted, though other portions of the speech were not noted by the witness); *U. S.* 1920, Trelease *v.* U. S., 8th C. C. A., 266 Fed. 886 (seditious utterances, under Espionage Act 1917; testimony to the substance and impression of the speech, not its exact language, held admissible).

[4] *Eng.* 1838, Harrison *v.* Bevington, 8 C. & P. 708, 710 (slander; a witness testified: "I do not remember the words at all, only the impression made upon my mind; it was respecting Harrison; the conversation was with Mr. L.; the defendant began it"; Abinger, L. C. B.: "What were the words? This is an action for slander; you cannot have the

present principle can with difficulty be distinguished from those applying the doctrine of variance in the law of pleading.[5]

The Opinion rule is sometimes given an improper effect in excluding such evidence of the "substance" or "effect" of utterances. Supposing that the witness could relate from memory the precise words used, the Opinion rule would operate to prohibit him from condensing them into a summary statement of their substance or effect, because by that rule the data observed by the witness must be laid in detail before the jury, *if they can be*, without his inferences based upon them (*ante*, § 1918). But if they cannot be laid before the jury, then the witness' inferences, or net impressions, are by that very rule allowable. Consequently, if his memory of the precise words fails him, his impression of their net meaning is not forbidden by the Opinion rule. That rule does not require the impossible; it merely forbids the superfluous. It does not, in its proper use, commit the absurdity of saying that, even when the witness cannot remember the precise words, he is forbidden from giving any account at all of what he heard. Nevertheless, some Courts misguided by the Opinion rule, have reached that result (*ante*, § 1969).[6]

§ 2098. **Same: Application to Testimony at a Former Trial.** A controversy was once rife, and came up for settlement in almost every Court, over the propriety of making an exception to the general rule in offering evidence of testimony at a former trial. This may be proved under certain conditions (*ante*, §§ 1373, 1401), and a witness speaking merely from memory is equally receivable with a written report (*ante*, § 1330). For the witness, speaking from memory, then, is there to be any stricter rule as to verbal precision than there is for the proof of other kinds of utterances? Must the former witness' very words be reproduced? If they must, then a special exception to the general rule here obtains.

The propriety of such an exception has been defended in the following passage:

1836, PUTNAM, J., in *Com.* v. *Richards*, 18 Pick. 434, 439: "We require full proof of all that the deceased witness swore to. His words . . . are to be recited; . . . Some part which was said and not recollected might certainly limit and qualify the meaning of the words which are recollected. Hence it is that persons who are in hearing, who are

impression"); *U. S.* 1845, Teague *v.* Williams, 7 Ala. 844, 847 (he "cannot be allowed to state the impression produced," but "must state the language that was employed, according to the best of his recollection"); 1848, Douge *v.* Pearce, 13 Ala. 127, 130 ("while it is not proper for a witness to give his impression derived from the conversation," yet he may "give the substance of the conversation").

[5] And for that reason it is useless to examine here the mass of decisions inextricably dealing with the two principles. The following may serve as illustrations: *Eng.* 1802, Maitland *v.* Goldney, 2 East 426, 437 (to prove words "to the effect of those set forth" is not enough); *U. S.* 1811, Nye *v.* Otis, 8 Mass. 122; 1826, Fox *v.* Vanderbeck, 5 Cow. N. Y. 513, 515 ("they must be proved substantially as laid; all the words need not be proved, but it is enough to prove some material part of them"); 1828, Olmstead *v.* Miller, 1 Wend. N. Y. 506, 510 (preceding case approved).

[6] Furthermore, the word "impression" or "understanding," may be used by the witness in the sense that he never actually heard the utterance plainly; and in that view it may be a question whether he is qualified at all as a witness. The principle and the rulings governing such instances have been already considered in dealing with testimonial qualifications, *ante*, §§ 658, 727.

favorably inclined to one party, may recollect a particular expression which conformed to their wishes, and wholly omit the words of qualification; while others, who incline towards the other side, will remember the words of qualification and forget or take no notice of the particular expression. . . . To be worth anything, the whole of what the deceased said upon the matter should be stated. And if you get the whole, it is very defective; for you cannot have a true representation of the countenance, manner, and expression of the deceased witness, which either confirmed or denied the truth of the testimony. . . . It is true that this strictness will generally exclude such testimony."

But this strictness is in fact neither necessary nor feasible. The objections to recognize such an exception to the general rule are forcibly stated in the following passages, which are also useful for their broad statements as to the universality of the principle:

1843, HUBBARD, J., in *Warren* v. *Nichols*, 6 Metc. Mass. 261, 268: "Such a rule is in my judgment rather a provision for the exclusion than for the admission of such testimony, because as a matter of fact not one person in ten thousand can possibly recollect the very words used by the witness. It is the constant observation of lawyers familiar with trials at Nisi Prius that the testimony of witnesses is never taken down by different persons in the same words, though the facts and ideas are substantially the same; and also that the same witness, when called to testify on a second trial, does not and cannot repeat the very words used by himself on the first hearing, though he is narrating the same events or expressing the same thoughts. . . . In other cases, where a person is called to testify to words spoken, as in actions of slander, [or] to the declarations of a party or of a witness with a view of contradicting him, he is not required to give the identical words of the party or the witness, but he may state the substance of what he has heard and in language as nigh that which was used as he can recollect. What sufficient reason, then, exists in the present case to depart from the rule as practised upon in other cases? It is said that a slight variation may substantially affect the testimony. Very possibly it may; but is there not the like exposure to material variation in those cases where the substance of the declaration is admitted? It is argued that the deceased party was under oath, and therefore the same words should be given; but such is the case with living witnesses whose declarations under oath are testified to with the view of contradicting them. The substance of what the witness said, the facts he stated, the opinions he expressed, the reasons he assigned, the explanations he gave, the motives he avowed, may all be faithfully testified to without repeating all his words. The synonymy of our language is such that a literal adherence to the same expressions is not necessary to the conveying of the same ideas. . . . [The stricter view would] prescribe a rule for the admission of testimony which the imperfection of our nature in the structure of our memories will not warrant. It in truth excludes the thing which it proposes to admit, and at the same time opens a door for knaves to enter where honest men cannot approach."

1846, PERLEY, J., in *Young* v. *Dearborn*, 22 N. H. 372, 377: "Where the former testimony has any complication or any considerable extent, no cautious and conscientious witness would take it on himself to repeat it in the exact words from memory, or from any notes that could possibly be taken. To hold a rule so stringent would be likely to encourage rash and unscrupulous witnesses to undertake an exact recital of the evidence, and exclude the cautious and guarded statement of others who were conscious of the extreme difficulty of such a task and would venture to give no more than the substance."

1856, BARTLEY, C. J., in *Summons* v. *State*, 5 Oh. St. 325, 346, 351: "There would seem to be no sound reason for subjecting it [former testimony] to a rigid rule amounting to its almost total exclusion, which is inapplicable in other cases where testimony showing words spoken or the statements of a party or other person is admissible. In prosecutions for

perjury, the testimony of the accused upon which perjury is assigned is not required to be 'ipsissimis verbis,' but allowed to be given in substance; so with the declarations of a co-conspirator, declarations made 'in extremis,' or the admissions or confessions of a party. So also with testimony of a verbal slander, or the declarations or statements of a party or witness, offered for purposes of contradiction or impeachment. . . . What sufficient reason can exist for a departure from the rule in case of the testimony of a deceased witness on a former trial?"

The stricter doctrine was clearly not the original and orthodox one in England,[1] and seems to have come first into existence there under Lord Kenyon;[2] but apparently did not long persist.[3] In the United States, Lord Kenyon's ruling served to raise the question, which passed along from Court to Court, in the first half of the 1800s, as one of the serious controversies of the day in the law of Evidence. But the better view finally prevailed everywhere; the general principle that verbal precision was not necessary, and that the substance or effect would suffice, came to be accepted as the sound one; and the contrary rule now survives only in the one or two jurisdictions bound by early decisions, — decisions which are gradually being whittled away so as to leave at least an endurable and not wholly impracticable rule.[4] The uni-

§ 2098. [1] 1685, Cornish's Trial, 11 How. St. Tr. 434; Sir John Hawles' comments, 11 How. St. Tr. 459; 1696, Sir John Fenwick's Trial, 13 How. St. Tr. 620; 1754, Canning's Trial, 19 How. St. Tr. 514.

[2] 1791, R. *v.* Joliffe, 4 T. R. 284, 290 (Kenyon, L. C. J.: a person who "could not undertake to give his words, but merely to swear to the effect of them," was rejected); 1791, R. *v.* Jones, Peake N. P. 37 (Kenyon, L. C. J.: "The whole of the defendant's evidence on the former trial should be proved, for if in one part of his evidence he corrected any mistake he had made in another part of it, it will not be perjury"); 1793, R. *v.* Dowlin, Peake N. P. 170 (same; yet where a matter could only be dealt with on cross-examination, proof of the whole cross-examination was sufficient).

[3] 1825, R. *v.* Rowley, Mood. Cr. C. 111 (perjury as to a vehicle-accident; the witness recited "all [of the testimony] that was material to this inquiry"; "all of the evidence of the prisoner relative to the accident, to the best of his recollection"; admitted, by all the Judges). *Contra*, in Canada: 1851, Fraser *v.* Black, 2 All. N. Br. 312 (the words used by the former witness, required to be proved).

[4] In the following citations, the *substance* or effect is held sufficient, except as otherwise noted; an additional note is made where some form of qualification is used, or where the principle of Entirety, and not merely of Verbal Precision, is dealt with, since under the principle of Entirety (*post*, § 2103) the present rulings often serve also as authorities:

Federal: 1838, U. S. *v.* White, 5 Cr. C. C. 457 (the "very words," not necessary); 1851, U. S. *v.* Macomb, 5 McLean 286, 293, 299 (substance, including cross-examination, sufficient; practically repudiating the prior rulings of U. S. *v.* Wood, 3 Wash. C. C. 440, and Bennett *v.* Adams, 2 Cr. C. C. 551); 1878, Ruch *v.* Rock Island, 97 U. S. 693 (precise words not necessary; the "main and principal points" sufficient); 1897, Chicago St. P. M. & O. R. Co. *v.* Myers, 25 C. C. A. 486, 80 Fed. 361 (the testimony had shown the place where the plaintiff was standing when injured, and effected this by verifying certain photographs; the non-production of the photographs with the stenographic report was held to leave the latter substantially defective);

Alabama: 1846, Gildersleeve *v.* Caraway, 10 Ala. 260, 263 (yet here excluded, where the witness had forgotten the substance of the cross-examination); 1849, Tharpe *v.* State, 15 Ala. 749; 1850, Davis *v.* State, 17 Ala. 354, 357; 1850, Clealand *v.* Huie, 18 Ala. 343, 346; 1895, Thompson *v.* State, 106 Ala. 67, 17 So. 512;

Arkansas: 1894, Vaughan *v.* State, 58 Ark. 353, 378, 24 S. W. 885; 1905, Petty *v.* State, 76 Ark. 515, 89 S. W. 465 (substance);

California: 1872, People *v.* Murphy, 45 Cal. 137, 145; 1905, Arnold's Estate, 147 Cal. 583, 82 Pac. 252 (usually the questions, and not only the answers, must be read);

Connecticut: 1912, Hope *v.* Valente, 86 Conn. 301, 85 Atl. 541 (a party's admission contained in his former testimony may be read against him without putting in the remainder);

Delaware: The stricter rule has been laid down, and would perhaps be followed to-day: 1842, Kinney *v.* Hosea, 3 Harringt. 397 ("even to his very words"; but only as to the relevant portions);

Georgia: Rev. C. 1910, § 5773, P. C. § 1027 (must remember "the substance of the entire

versal practice of stenographic reporting of testimony in important litigation has now removed the question from the field of frequent controversy.

testimony as to the particular matter about which he testifies"); 1852, Riggins *v.* Brown, 12 Ga. 271, 275 (a "brief" of testimony "as M. gave it," admitted); 1859, Trammell *v.* Hemphill, 27 Ga. 525, 527 ("the substance of the words"); 1879, Puryear *v.* State, 63 Ga. 692; 1882, Atkins *v.* State, 69 Ga. 595, 596; 1883, Mitchell *v.* State, 71 Ga. 128, 154; 1900, Denson *v.* Denson, 111 Ga. 809, 35 S. E. 680;
Illinois: 1849, Marshall *v.* Adams, 11 Ill. 41 (the "words substantially must be given, and not the result of what his evidence proved"); 1885, Iglehart *v.* Jernegan, 16 Ill. 513 (undecided; the rule that the substance is sufficient, preferred);
Indiana: 1864, Horne *v.* Williams, 23 Ind. 37, 40 (repudiating Ephraims *v.* Murdock, 7 Blackf. 10, which had been doubted in Ward *v.* State, 8 Blackf. 101); 1893, Bass *v.* State, 136 Ind. 165, 170, 36 N. E. 124 (all on the particular subject suffices);
Iowa: 1851, Rivereau *v.* St. Ament, 3 G. Greene 119; 1870, Woods *v.* Gevecke, 28 Ia. 561; 1876, Harrison *v.* Charlton, 42 Ia. 573, 575; 1876, Fell *v.* R. Co., 43 Ia. 177, 179; 1884, State *v.* Fitzgerald, 63 Ia. 271, 19 N. W. 202; 1881, Small *v.* R. Co., 55 Ia. 582, 592, 8 N. W. 437; 1890, State *v.* O'Brien, 81 Ia. 88, 90, 46 N. W. 752 (substance sufficient; but it must include the cross-examination); St. 1898, c. 9, § 1, Suppl. 1902, § 245*a*, Comp. C. § 7291 (transcript of the shorthand notes of a court reporter must be certified to contain "the whole of the shorthand notes of the evidence of such witness," "but the party offering the same shall not be compelled to offer the whole of such transcript"); 1903, Connell *v.* Connell, 119 Ia. 602, 93 N. W. 582 (under St. 1898, c. 9, the shorthand transcript must contain the "whole of the evidence of such witness");
Kansas: 1874, Gannon *v.* Stevens, 13 Kan. 460; 1885, Solomon R. Co. *v.* Jones, 34 Kan. 461, 8 Pac. 730; 1904, State *v.* Harmon, 70 Kan. 476, 78 Pac. 805 (substance suffices; preceding cases not cited, though cases from seven other jurisdictions are cited); but a stricter rule is laid down in Kan. St. 1905, c. 494, § 1, Gen. St. 1915, § 3003, making a court stenographer's transcript of "all the evidence of any witness," admissible; cited more fully *ante*, § 1669;
Kentucky: 1856, Thompson *v.* Blackwell, 17 B. Monr. 609, 623 ("substance of all that was sworn," sufficient); 1882, Bush *v.* Com., 80 Ky. 247;
Maine: 1855, Emery *v.* Fowler, 39 Me. 326, 332; 1864, Lime Rock Bank *v.* Hewett, 52 Me. 531, 534; 1906, State *v.* Herlihy, 102 Me. 310, 66 Atl. 643 ("it is sufficient to prove the substance of the whole testimony");
Maryland: 1821, Bowie *v.* O'Neale, 5 H. & J. 226, 231 (not the "legal effect," but "what he did actually prove"); 1840, Garrot *v.* Johnson, 11 G. & J. 173, 182 (sufficient "to prove facts," *i. e.* that the deceased "in giving his testimony deposed to certain facts"); 1872, Waters *v.* Waters, 35 Md. 539 (here excluded because the cross-examination was omitted); 1873, Black *v.* Woodrow, 39 Md. 194, 220 (not "the precise language," but "the facts proved, and not the mere substance of the evidence");
Massachusetts: The strict rule was originally adopted and for a long time persevered with: 1828, Melvin *v.* Whiting, 7 Pick. 79, 81, *semble* (words required); 1836, Com. *v.* Richards, 18 Pick. 434, 438 ("his words . . . are to be recited"); 1843, Warren *v.* Nichols, 6 Metc. 261 ("The witness must be able to state the language in which the testimony was given, substantially and in all material particulars"; distinguishing the case of perjury, where it is enough to prove that the witness "testified positively to a fact and did not afterwards . . . retract or modify that statement"; Hubbard, J., diss., quoted *supra*); 1852, Gould *v.* Norfolk Lead Co., 9 Cush. 346; 1860, Corey *v.* Jones, 15 Gray 544; 1867, Woods *v.* Keyes, 14 All. 236; but a paring process has since been begun, usefully modifying the rule: 1879, Costigan *v.* Lunt, 127 Mass. 354 ("the language must be given 'substantially and in all material particulars,' but not necessarily with absolute verbal identity"); 1908, McGivern *v.* Steele, 197 Mass. 164, 83 N. E. 405; 1910, Jaquith *v.* Morrill, 204 Mass. 181, 90 N. E. 556 (Costigan *v.* Lunt approved and applied); 1911, Com. *v.* Shooshanian, 210 Mass. 123, 96 N. E. 70 (the witness may state such part as he remembers, if the needed remainder is stated by others);
Michigan: 1870, Burson *v.* Huntington, 21 Mich. 429; 1873, Fisher *v.* Kyle, 27 id. 455;
Missouri: 1865, Jaccard *v.* Anderson, 37 Mo. 94; 1867, Morris *v.* Hammerle, 40 Mo. 489, 496; 1877, State *v.* Able, 65 Mo. 357, 371 (substance, but not merely effect, receivable; good instance of the mode of applying the principle); 1887, Scoville *v.* R. Co., 94 Mo. 84, 87, 6 S. W. 654 ("substantially the same," though not all nor in the very language, suffices);
Nebraska: 1896, Twohig *v.* Leamer, 48 Nebr. 247, 67 N. W. 152;
New Hampshire: 1846, Tibbets *v.* Flanders, 18 N. H. 284, 292 (excluded, where not reciting "the substance of the whole of his testimony"); 1851, Young *v.* Dearborn, 22 id. 372 (the "substance" is sufficient; quoted *supra*);
New Jersey: 1843, Sloan *v.* Somers, 20 N. J. L. 66, 67 (testimony as to "substantially what he then stated," apparently held sufficient; but here certain notes supplied the words also);
New York: There has here been a progress

By many Courts a distinction was once taken between the "*substance*" and the "*effect*" or "legal effect" of the testimony as heard, the former being

from strictness to liberality: 1806, Jackson *v.* Bailey, 2 Johns. 17, 20 ("what such witness had formerly sworn," received; Livingston, J., diss., because the testimony cannot be sufficiently recollected); 1826, Wilbur *v.* Selden, C. Cow. 162, 165 ("the words of the witness must be given, not what is supposed to be the substance of his testimony"); 1836, Clark *v.* Vorce, 15 Wend. 193, 195 (over-strictness discountenanced; a witness admitted "who could not pretend to give his precise words," but "intended to take down the words" and had taken "very full and particular minutes"); 1852, Huff *v.* Bennett, 6 N. Y. 337 (minutes which "were pretty full," but "he would not say that they contained the testimony of S. accurately," excluded); 1863, Martin *v.* Cope, 3 Abb. App. C. 182, 192 (minutes containing "not substantially the meaning, but substantially the language of the witness," received); 1867, McIntyre *v.* R. Co., 37 N. Y. 287, 291 (minutes containing the "substance," admitted, though they had not "the whole language of the witness, nor the whole of his testimony"); 1882, Trimmer *v.* Trimmer, 90 N. Y. 676 (one who remembered "the general topics to which B. testified and the subject of some of the evidence," allowed to give "the substance" of that evidence);

North Carolina: 1832, Ballenger *v.* Barnes, 3 Dev. 460, 465 (the substance is sufficient, but not merely the effect); 1836, Ingram *v.* Watkins, 1 Dev. & B. 442, 444 (where the testimony is offered in chief, the whole must be given; but where offered only to show a self-contradiction as impeaching, only "all that the impeached witness said in relation to the matter in which the repugnancy is alleged"); 1848, Edwards *v.* Sullivan, 8 Ired. 302, 304 (preceding case approved); 1855, Jones *v.* Ward, 3 Jones L. 24, 26 (approving Ballenger *v.* Barnes); 1875, Buie *v.* Carver, 73 N. C. 264 (the witness had not heard all that the other had said; excluded); 1900, State *v.* McLaughlin, 126 N. C. 1080, 35 S. E. 1037 (that the former testimony "was substantially the same" as the present, excluded, in impeaching a witness; details must be specified);

Ohio: 1848, Wagers *v.* Dickey, 17 Oh. 439, 440; 1856, Summons *v.* State, 5 Oh. St. 325, 352 (quoted *supra;* practically repudiating Bliss *v.* Long, Wright 351);

Pennsylvania: 1823, Cornell *v.* Green, 10 S. & R. 16 (practically repudiating Lightner *v.* Wike, 4 S. & R. 203); 1824, Wolf *v.* Wyeth, 11 S. & R. 149; 1824, Watson *v.* Gilday, 11 S. & R. 337, 342 (but the cross-examination must be included); 1825, Smith *v.* Lowe, 12 S. & R. 34; 1828, Chess *v.* Chess, 17 S. & R. 409, 411; 1843, Moore *v.* Pearson, 6 W. & S. 53; 1845, Gould *v.* Crawford, 2 Pa. St. 85, 90; 1864, Philadelphia & R. R. Co. *v.* Spearen, 47 Pa. St. 300, 306 (though a witness took only such part of a cross-examination as was material, it was received as sufficient); 1873, Brown *v.* Com., 73 Pa. 326; 1881, Hepler *v.* Bank, 97 Pa. 420, 424 ("He may state in his own language the facts as detailed by that witness, as they were impressed on his mind at the time. . . . All that is required is that the recollection of the witness be reasonably clear as to the fact testified to, and how, if at all, such testimony was affected by the cross-examination");

South Carolina: 1888, State *v.* Jones, 29 S. C. 201, 229, 7 S. E. 296;

Tennessee: 1850, Kendrick *v.* State, 10 Humph. 479, 488 (substance sufficient, provided the whole, including the cross-examination, is given); 1871, Planters' Bank *v.* Massey, 2 Heisk. 360, 367 (substance on the particular subject, sufficient); 1871, Kinnard *v.* Willmore, 2 Heisk. 619, 621 (the witness could not remember what M. had sworn at a former trial where he was present, but was sure that, whatever it was, it was the same as at another trial; excluded, as having no real memory); 1872, Wade *v.* State, 7 Baxt. 80 (substance sufficient; that different accounts differ in detail is immaterial); 1898, Weeks *v.* McNulty, 101 Tenn. 495, 48 S. W. 809 (whole of former testimony, so far as relevant, admissible);

Texas: 1866, Thurmond *v.* Trammell, 28 Tex. 371, 382; 1882, Parks *v.* Caudle, 58 Tex. 220; 1893, Bennett *v.* State, 32 Tex. Cr. 216, 219, 22 S. W. 687 (substance of the particular subject only is sufficient);

Vermont: 1845, State *v.* Hooker, 17 Vt. 670 (any quantity of recollection sufficient); 1849, Marsh *v.* Jones, 21 Vt. 378, 380 (the substance in the very words of the deceased, required; "this is the rule required in proving the words spoken in slander, libel, and on indictments for perjury; and substantially the same rule is required" for parties' admissions); 1851, Williams *v.* Ward, 23 Vt. 369, 376 (the witness could not recollect the deceased's cross-examination, but thought he should have recollected had it altered the testimony in chief; held sufficient); 1852, Downer *v.* Rowell, 24 Vt. 343, 346 (like Marsh *v.* Jones); 1867, Whitcher *v.* Morey, 39 Vt. 470; 1873, Earl *v.* Tupper, 45 Vt. 284;

Virginia: 1827, Caton *v.* Lenox, 5 Rand. 31, 39 (enough to give "the matter substantially");

Wisconsin: 1892, Jackson *v.* State, 81 Wis. 127, 132, 51 N. W. 89 ("substantially correct," sufficient);

Wyoming: 1903, Foley *v.* State, 11 Wyo. 464, 72 Pac. 627 (the substance of the whole of what related to the subject must be given).

Compare also the cases cited *ante*, § 1045, n. 3 (witness' self-contradictions).

received, the latter rejected. The distinction seems to have originated in the following passage:

1856, BARTLEY, C. J., in *Summons* v. *State*, 5 Oh. St. 325, 351: "There is a distinction, however, between narrating the statements made by the deceased witness and giving the effect of his testimony. This distinction may be illustrated thus: If a witness state that A, as a witness on a former trial, proved the execution of a written instrument by B, that would be giving the effect, which is nothing else than the result or conclusion produced by A's testimony. But if the witness states that A testified that he had often seen B write, that he was acquainted with his handwriting, and that the name subscribed to the instrument of writing exhibited was B's signature, that would be giving the substance of A's testimony, though it might not be in the exact words."

It is true enough that by the Opinion rule the witness should perhaps be forbidden to give the merely legal effect of the testimony, as illustrated in the above passage, — provided at least that he can remember the further details from which he drew his inference. But the terms "substance" and "effect" are ill calculated to convey any tangible distinction to the mind of the witness, and their use tends to degenerate into an unprofitable quibble. It would be simple enough to leave the application of the principle entirely in the hands of the trial judge, who will see that the witness searches his memory for as precise an account as he can give.[5]

But it is proper enough, in applying the principle of Entirety of Parts (*post*, § 2099), to discriminate to this extent, that when the former testimony is used not as that of an *independent* witness (*ante*, § 1373) but merely as containing a *self-contradictory statement* by the same witness on the stand (*ante*, § 1032), or as containing a *party's admission* (*ante*, §§ 1048, 1075), it suffices to put in only the part containing the self-contradiction [6] or the admission.[7]

[5] Another distinction, occasionally drawn, is between the "substance of the *words*" and the "substance of the *testimony*"; but this is a futile one and comes fairly within the definition of a quibble; it is merely another way of telling the witness that he must give the testimony as nearly as he can in the original words.

Still another discrimination, lacking any virtue, but sometimes met with, is that the substance suffices for former testimony, when used in *contradiction* (*ante*, § 1032), but not when used as *independent testimony* (*ante*, § 1373): 1852, Gould *v.* Lead Co., 9 Cush. Mass. 338, 347; 1867, Day *v.* Stickney, 14 All. Mass. 260 (distinguishing the asking of such a question merely by way of fair notice to the witness before proving the contradiction; the Massachusetts rule not requiring this under the rule of §§ 1025, 1029 *ante*).

[6] *Can.* 1873, Bryson *v.* Hamilton, N. Br., Stevens Dig. 1880, p. 619; *U. S.* 1871, Pound *v.* State, 43 Ga. 130; 1891, Burnett *v.* State, 87 Ga. 622, 13 S. E. 552; 1893, State *v.* Sortor, 52 Ga. 531, 540, 34 Pac. 1036 (defendant's preliminary examination; all that bears on subject in question, sufficient); 1892, Maxted *v.* Fowler, 94 Mich. 111, 53 N. W. 921 (even for a written report of the testimony; compare Lightfoot *v.* People, cited *post*, § 2103, for a deposition); 1902, Zibbell *v.* Grand Rapids, 129 Mich. 659, 89 N. W. 563; 1903, Mackmasters *v.* State, 83 Miss. 1, 35 So. 302 (accused's testimony); 1836, Ingram *v.* Watkins, 1 Dev. & B. N. C. 442, 444 (cited in note 4, *supra*); 1848, Edwards *v.* Sullivan, 8 Ired. N. C. 304; 1883, Rounds *v.* State, 57 Wis. 48, 14 N. W. 865 (defendant's preliminary examination); 1896, Emery *v.* State, 92 Wis. 146, 65 N. W. 848 (parts of testimony before the coroner).

[7] *Eng.* 1803, Collett *v.* Lord Keith, 4 Esp. 212 (the defendant's testimony at a former trial, admitted, though the judge had there told him, at a certain point, "he need not indicate his conduct by giving reasons; the whole world would agree with him," and the witness had refrained; this circumstance held merely to be "matter of observation to make to the jury"); *U. S.* 1902, Southern L. & T. Co. *v.* Benbow, 131 N. C. 413, 42 S. E. 896 (former testimony as admissions; entirety

Where the former testimony is offered in the shape of a *written report* or of a *deposition*, it is no longer offered as an oral utterance but as a writing, and is amenable to a somewhat different principle, later dealt with (*post*, § 2103).

Distinguish, of course, the question, under the Hearsay rule, whether a *judge's note* or a *magistrate's* or *stenographer's written report* of testimony is admissible to prove what was said (*ante*, §§ 1666, 1667, 1669), and also the question, under the same rule, whether a *bill of exceptions* is receivable for the same purpose (*ante*, § 1668); the exclusion of the latter by some Courts is partly based on the incompleteness of the testimony set forth in such a bill, *i. e.* the present principle is given a certain effect in reaching that result. Distinguish also the question, under the principle of Preference, whether a *magistrate's report* of testimony is *preferred* to a witness speaking from memory only (*ante*, §§ 1329, 1330) and whether such a report is *conclusive* as to the tenor of the testimony (*ante*, § 1349).

§ 2099. (*b*) **Entirety of Parts: General Principle, as applied to Admissions, Conversations, Slanders, Former Testimony, and the like.** It has been already noted (*ante*, § 2095, par. 2) that the idea of Completeness involves, not merely Verbal Precision, but Entirety of Parts. The second branch of inquiry therefore is, how far the principle of Completeness requires *the offering at the same time of all the parts of an oral utterance, as a condition of offering any part of it.* This inquiry conceives of an utterance as composed, not simply of consecutive words, but of clauses and sentences, forming connected parts of a single effort to express a general thought having various details. It is understood on all hands that the opponent may in any event afterwards put in the remainder (*post*, § 2103); but the question here is, whether the proponent must in the first instance put in all the parts, or may merely select that part which serves his purpose.

On this point, there is a singular lack of judicial authority. While working out in fair detail the application of the principle of Entirety to written utterances (*post*, §§ 2102 ff.), the Courts have almost ignored its development in application to oral utterances. We are relegated for information to the general spirit pervading their treatment of other aspects of the principle, and are obliged to depend upon an implied rather than an expressed rule.

These general indications are of three sorts. In the first place, the existence of copious rulings allowing the opponent afterwards to put in the remainder of the utterance (*post*, § 2115), and the absence of rulings requiring the proponent to put in the whole at first, indicate that there is no general and accepted principle or practice making the latter requirement. In the next place, however, the language judicially used in applying the rule of Verbal Precision requiring the "substance" to be offered (*ante*, § 2097) suggests that this "substance," though not reproducing the precise words, should at least

not required; compare the second ruling in this case, cited *post*, § 2099, n. 1); 1868, Johnson *v.* Powers, 40 Vt. 611, 612 (examination in chief of an opponent suffices, where the witness was unable to give the cross-examination, unless the opponent had no opportunity to show that the cross-examination qualified the direct).

represent the tenor of the utterance as a whole, and not mere fragments of it. In the third place, the single case in which Entirety of Parts is clearly required, namely, testimony at a former trial (*infra*, par. 4) appears to be treated judicially as exceptional. So far, then, as judicial indications have gone, it may be said that there is no general rule requiring the proponent to put in the whole of an oral utterance (either the whole as it was in fact uttered or the whole of what a specific witness heard), but that in exceptional instances some such a requirement would be made.

The following passages will illustrate both this general tendency and also the absence of a positive rule:

1888, *Parnell Commission's Proceedings*, 1st, 4th, 6th, 7th, 83d, days, Times' Rep. pt. 1, p. 236, pt. 2, pp. 28, 104, 109; pt. 23, p. 60; the Land League and its leaders were charged with encouraging outrage and crime, and numerous speeches were offered to prove this; repeated discussions took place, during the trial, as to the fair and proper way of using the passages relied upon; in the Attorney-General's opening, the following statements were made; the *Attorney-General:* "I have not got the whole of the speeches; I have only reports. A man may speak for two hours, but I may have only a few lines of his speech." President HANNEN: "If you have not got the whole of them, it will be open to Sir Charles Russell to correct you by referring to such reports as do exist; but what you do use [in your opening address] you will put in the whole of it [in evidence later]." The *Attorney-General:* "Without exception, the whole extract at my command of every speech I read shall be put in." Then at a later day, when certain speeches were put in evidence by Sir *H. James* from constables' notes, Mr. *Healy* having claimed that "the proper course is to read the entire speech," President HANNEN said: "It is not necessary for you, Sir Henry, to read the whole speech, but only those portions on which you rely. . . . The only regular course is this (and whatever it leads to, it must be followed): You, Sir Henry, will call attention to what you consider the material parts of the speech, and Sir C. Russell can on cross-examination refer to other portions which he may consider, and, if necessary, the cross-examination can be postponed until he has had an opportunity of seeing the full speeches." Shortly afterwards, the counsel for the *Times* proposed an arrangement by which copies of all the reports of speeches were to be prepared and underlined and furnished to all parties for convenient reference, when Mr. *Healy* inquired: "Some of the speeches made would cover two or three columns if taken verbatim, but they have been condensed [in the constables' notes] into three or four sentences. What is the intention with regard to them?" Sir *H. James:* "We can only present the short report in those cases, because that is all we have got." On a still later occasion, Mr. *Reid*, the counsel for Mr. O'Brien, read passages from his speeches showing his opposition to criminal methods, and was interrupted by the *Attorney-General:* "You have omitted a passage which precedes that." Mr. *Reid:* "I thought the rule was that what you wished to read should be read subsequently." *Attorney-General:* "I was only suggesting that the course which has been pursued on every other occasion by Sir Charles Russell and yourself should be pursued now." President HANNEN (to Mr. Reid): "This question arose before, and there was great complaint on your part that the Attorney-General did not read all, and then you read, or Sir C. Russell read something. But I have laid down the rule that, unless you can come to a compromise, the true rule is for you to read what you attach importance to and for the other side to do the same."

In order to ascertain the propriety of any exceptions to the rule, it may be noted that three general considerations affect here the policy of requiring the whole of an oral utterance. In the first place, oral utterances are not

marked off as distinct wholes in the way that written utterances are. It is simple enough to see that one letter or one deed ends at the signatures, and that the piece of paper is an entirety by itself. So one account in a ledger, or the judicial record of a single cause, plainly constitutes a connected series of written utterances having an entirety and a distinct existence of its own. But oral utterances can usually not be given any such separate unity of character; nor can it be told whether a later utterance will concern the prior one; and the process of discovering in advance such unity as may here and there exist would result, on the whole, in innumerable subtle discriminations and tedious investigations, with rarely any profit to correspond. In the second place, oral utterances (even assuming that some entirety could be predicated of them) are often or usually so delivered that no one witness could testify to the entire utterance on the subject in question. This witness may have heard a definite portion, and yet the speaker may have delivered a qualifying remainder after the departure or during the inattention of the particular hearer. More commonly still, and most important of all, the hearer will have remembered only that portion in which he was interested or in which he heard what he wished to hear; the remainder he has made no effort to remember. If, then, any requirement of entirety existed, that witness would perhaps seldom be found who could honestly aver that he heard and remembered all the parts of the entire utterance. In the third place, the opponent himself, in many or most instances, has it in his own power to remedy any defects in the proponent's proof of parts of utterances, by bringing forward, at his stage of the proof, the remaining parts, if any, which qualify the others. This consideration, so far as it goes, reduces to a minimum the need for any requirement that the proponent should prove the whole in the first instance.

Keeping in mind, then, the relative force of these three considerations, and applying them to the most common kinds of oral utterances which come to be proved in litigation, it may be suggested that the following rules would adequately meet the needs of proof in the present respect:

(1) For a *party's admissions* and conversations involving admissions, for a *witness' self-contradictions at a prior time*, and for oral words charged as *seditious* or *defamatory*, the proponent need prove in the first instance that part only which serves his purpose;[1] and this would mean not only that

§ 2099. [1] *Can.* 1916, Huck *v.* Canadian Pacific R. Co., 29 D. L. R. 571, Alta. (personal injury; a report of defendant's employee having been introduced by the plaintiff as containing admissions, held that the jury were not as matter of law required to accept and believe the whole, including exculpatory parts); *U. S.: Fed.* 1920, Schoberg *v.* U. S., 6th C. C. A., 264 Fed. 1, 9 (seditious anti-war utterances; report of seditious parts of speeches at meetings, admitted, the listener having omitted the remarks on other subjects, but having taken notes of "all conversation of defendants which bore on their supposed pro-German utterances"); *Fla.* 1903, Sylvester *v.* State, 46 Fla. 166, 35 So. 142; *La.* 1906, State *v.* Freddy, 117 La. 121, 41 So. 436 (conversation only partly heard, admitted); *N. C.* 1876, Davis *v.* Smith, 75 N. C. 115 (witness called by the parties to answer a question, allowed to give what fragments he heard of their conversation); 1883, State *v.* Lawhorn, 88 N. C. 634, 637; and cases cited *ante*, § 2097, note 1, § 2098, notes 6, 7.

The following rulings require the whole of an *admission: Ga.* 1853, Brown *v.* Upton, 12 Ga. 505, 507; *La.* 1828, Quick *v.* Johnson, 6 Mart. N. S. 532; *Mass.* 1849, O'Brien *v.*

the whole utterance need not be proved, but not even all that the witness heard.

(2) For *contracts* and other oral utterances having in themselves a legal effect — *notices, demands, orders to an agent*, and the like — all material parts should be offered at once, subject to exceptions in the circumstances of each case.[2]

(3) For *dying declarations* and other oral utterances admissible under exceptions to the Hearsay rule, since the above considerations usually conflict in result, no general rule can fairly be laid down.[3]

(4) For *testimony at a former trial*, the first consideration above noted is lacking, since the cross-examination often results in decided modifications of the direct examination. Nevertheless, many topics are often dealt with in a single testimony, so that what is needed is only the part dealing with that particular topic, on both the direct and the cross-examination. The second and third considerations above also are often lacking. Accordingly, the fair rule, and the one generally applied judicially, is to require the witness to be able to state *all the material parts of the testimony on that topic, both in direct and in cross-examination.*[4]

§ 2100. **Same: Application to Accused's Confessions.** (5) For an *accused's confessions*, the second and third considerations above point to the same result as in ordinary admissions; yet the first is not of such force, since a confession in the stricter sense (*ante*, § 821) is usually a distinct connected statement. As a practical compromise, then, the rule might well be that the witness should state the material parts of all that he heard; but no more should be required. The precise judicial rule, however, is not entirely clear:

(*a*) In the first place, it is generally conceded that the whole of the utter-

Cheney, 5 Cush. 148, 152 (admission as to a bond; "the admission in full" must be taken; here, however, a judicial admission was concerned); *N. C.* 1904, Southern L. & T. Co. *v.* Benbow, 135 N. C. 303, 47 S. E. 435 (memorandum of admissions in a conversation, not containing the exact words nor the entire substance, but only the effect of isolated parts, excluded; the opinion confuses the principles involved, and while citing inappropriate cases on former testimony, fails to cite either the N. C. cases *supra*, or that cited *ante*, § 2097, n. 1, or even the prior ruling on the similar point at the former trial of the same case, cited *ante*, § 2098, n. 7).

In the *Philippines* and *Porto Rico* the following provisions, taken from Spanish law, apply: *P. R.* Rev. St. & C. 1911, § 4302 ("Entries, registries, and private papers shall be evidence against the person who has written them only in all that may appear clearly stated; but a person who wishes to make use thereof is bound to accept them also in the part prejudicial to him"); § 4307 ("The confession [*i. e.* admission] can not be partially used against him who makes it unless it should refer to different facts, or when a part of the confession is proven by other means, or when, in any particular it should be contrary to nature or law"); *Philippine Isl.* Civ. C. §§ 1228, 1233 (like P. R. Rev. St. & C. §§ 4302, 4307).

Compare the cases cited *ante*, § 2097.

The subject of proof of oral utterances evidenced by notes or a written report sworn to is apt to be confused with the proof of a writing admissible for its own sake (*post*, §§ 2103-2111).

[2] 1877, Flood *v.* Mitchell, 68 N. Y. 507, 511 (memorandum of an oral agreement, omitting "two articles"; not admitted, because "it was not an accurate statement of the conversation and agreement").

[3] For *dying declarations*, the cases are collected *ante*, § 1448.

[4] The cases to this effect have been for convenience placed *ante*, § 2098; it is difficult to separate the rulings upon that topic and this.

For *written reports or depositions*, see *post*, § 2103.

ance is not required if it was not heard, but *only so much as was heard and is remembered.*[1]

(*b*) In the next place, the circumstance that there were *at another time separate utterances*, touching the same subject, but not otherwise connected, does not exclude the one utterance offered.[2]

(*c*) In the third place, for the remaining case — *an entire utterance, wholly heard* — the precise rule of law is obscure. It is commonly said that the *whole of the confession or admission must be taken together;* but this obviously leaves unsettled whether it is meant that the prosecution must put it all in at first, or merely that the accused may call for or offer the remainder (*post*, § 2115), on cross-examination or otherwise, — two very different meanings in practical effect.[3] The following classical passages illustrate the usual obscure tenor of judicial utterances on this point:

§ 2100. [1] *Alabama:* 1849, Drake *v.* State, 110 Ala. 9, 20 So. 450 (defendant's threats); *California:* 1895, People *v.* Daniels, 105 Cal. 262, 38 Pac. 720; 1898, People *v.* Dice, 120 Cal. 189, 52 Pac. 477 (murder; substance of threats, though only a part of the whole conversation, sufficient); 1910, People *v.* Luis, 158 Cal. 285, 110 Pac. 580 (admitted, where he heard all and remembers the substance); *Delaware:* 1917, Lowber *v.* State, 6 Boyce Del. 353, 100 Atl. 322 (rape under age; whole of defendant's conversation, admitted); *Florida:* 1896, Thalheim *v.* State, 38 Fla. 169, 20 So. 938; 1916, Morey *v.* State, 72 Fla. 45, 72 So. 490 (murder; exculpatory statements of defendant, made on the same subject and at the same time as inculpatory ones already evidenced, admitted; following Thalheim *v.* State, *supra*); *Georgia:* 1872, Westmoreland *v.* State, 45 Ga. 225, 279; 1890, Woolfolk *v.* State, 85 Ga. 69, 99, 11 S. E. 814; *Illinois:* 1893, Jamison *v.* People, 145 Ill. 357, 378, 34 N. E. 486; *Iowa:* 1855, Mays *v.* Deaver, 1 Ia. 216, 222 ("That he did not hear all, would go to the effect of the testimony, and not to its admissibility"); 1863, State *v.* Elliott, 15 Ia. 72, 74 (conversation overheard in jail; the part heard may be received); 1880, State *v.* Moelchen, 53 Ia. 310, 314, 5 N. W. 186 (a witness to a quarrel in a foreign language, who understood only one word used, "knife," admitted); *Kentucky:* 1904, Green *v.* Com.,— Ky. —, 83 S. W. 638 (here the substance is required); *Louisiana:* 1895, State *v.* Vallery, 47 La. An. 182, 16 So. 745; 1897, State *v.* Daniel, 49 La. An. 954, 22 So. 415 (part of an altercation between deceased and defendant, received); 1900, State *v.* Spillers, 105 La. 163, 29 So. 480; 1904, State *v.* Gianfala, 113 La. 463, 37 So. 30 ("in the main, all that was said suffices); *Montana:* 1906, State *v.* Lu Sing, 34 Mont. 31, 85 Pac. 521 (confession of a Chinese, speaking broken English, and understood in part only, admitted; the above rule confirmed); 1909, State *v.* Berberick, 38 Mont. 423, 100 Pac. 209 (substance of a confession, admitted); *North Carolina:* 1897, State *v.* Robertson, 121 N. C. 551, 28 S. E. 59, *semble; Oklahoma:* 1918, Oklahoma State Bank *v.* Buzzard, — Okl. —, 175 Pac. 750; *Philippine Isl.* 1911, U. S. *v.* Gavarlan, 18 P. I. 510; *South Carolina:* 1832, State *v.* Covington, 2 Bail. 569, 570 ("That which is heard may be given in evidence, but that which is not heard cannot, from necessity"); 1856, State *v.* Gossett, 9 Rich L. 428, 436; *Texas:* 1922, Parker *v.* State, — Tex. Cr. —, 238 S. W. 943; *Vermont:* 1911, State *v.* Averill, 85 Vt. 115, 81 Atl. 461; *Virginia:* 1858, Shifflet's Case, 14 Gratt. 652, 657 (testimony of one who did not hear the whole of a confession, received).

Contra: 1870, People *v.* Gelabert, 39 Cal. 663 ("The alleged confession was partly in Spanish and partly in broken English, and the witness stated that he did not understand all that the prisoner said in Spanish"; excluded); 1874, State *v.* Gilcrease, 26 La. An. 622 (no precedent cited).

There might be an exception where the utterance was palpably incomplete with reference to the accused's intended utterance, — as where an external interruption cuts off his statement before he has voluntarily stopped: 1865, William *v.* State, 39 Ala. 532 (slave's confession, stopped at a certain point by his master's command, excluded entirely).

Compare the similar rule for dying declarations, *ante*, § 1448.

[2] 1872, Com. *v.* Pitsinger, 110 Mass. 101; 1899, Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551 (certain conversations of defendant, held not connected); 1910, People *v.* Giro, 197 N. Y. 152, 90 N. E. 432; 1847, State *v.* Cowan, 7 Ired. N. C. 239, 242 (the witness had overheard a conversation between two prisoners in jail, but not the conversation that they had at other times; held, sufficient to state all that was said by them on the one occasion, and, *semble*, merely on the one subject in controversy); 1856, State *v.* Gossett, 9 Rich L. S. C. 437; 1854, Jones *v.* State, 13 Tex. 168, 177.

[3] In an occasional decision a rule is sometimes enforced that the whole must be pre-

1696, *R.* v. *Paine*, 5 Mod. 163; seditious libel; the defendant had confessed "that he wrote the libel, but that he did neither compose or publish it, but only delivered it, instead of another paper, to B."; *Per Curiam:* "As to the first point, [whether he was the author and composer of the libel,] there was no proof that he was the composer of it, or that he wrote it. but by his own confession before the mayor. Now if such confession shall be

sented in the first instance; but it cannot be said that this is in general the implied meaning. It is only possible to note this universally accepted, but inconclusive phrase, that "the whole of the confession must be taken together":

ENGLAND: 1827, R. *v.* Jones, 2 C. & P. 629 (the defendant had confessed that she cut the child's throat, but had also said that it was stillborn; Bosanquet, Serjt.: "There is no doubt that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another"); 1829, R. *v.* Higgins, 3 C. & P. 603 (larceny; the prisoner's statement before the magistrate "was read as evidence on the part of the prosecution"; in it he said that the goods were "honestly bought and paid for"; Park, J.: "If the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner, as well as against him; but still, like all evidence given in any case, it is for you to say whether you really believe it"); 1830, R. *v.* Steptoe, 4 C. & P. 397 (oral statement; Park, J., "You are to take what he says altogether; you are not bound to take the exculpatory part as true, merely because it is given in evidence"); 1910, Stone's Case, 6 Cr. App. 89, 96; 1911. Gray's Case, 6 Cr. App. 242.

CANADA: 1916, R. *v.* Girvin, 34 D. L. R. 344, Alta. (forgery; the accused's admissions must be considered as a whole; careful elucidation per Beck, J.).

UNITED STATES: *Ala.* 1845, Wilson *v.* Calvert, 8 Ala. 757; 1854, Eskridge *v.* State, 25 Ala. 33; 1855, Chambers *v.* State, 26 Ala. 59, 63; 1858, Corbett *v.* State, 31 Ala. 329, 341; 1872, Parke *v.* State, 48 Ala. 266, 268; 1873, Burns *v.* State, 49 Ala. 370, 374; 1875, Eiland *v.* State, 52 Ala. 335; 1893, Webb *v.* State, 100 Ala. 47, 51, 14 So. 865; *Ark.* 1883, Frazier *v.* State, 42 Ark. 72; 1901, Williams *v.* State, 69 Ark. 599, 65 S. W. 103; *Cal.* 1853, People *v.* Nairs, 3 Cal. 106; 1870, People *v.* Gelabert, 39 Cal. 663; 1875, People *v.* Keith, 50 Cal. 137; 1904, Risdon *v.* Yates, 145 Cal. 210, 78 Pac. 641 (the defendant's plea of guilty before a justice having been introduced, the Court allowed the entire statement made at the time by the defendant to be used in explanation); *Ga.* 1857, Long *v.* State, 22 Ga. 40, 42; 1896, Myers *v.* State, 97 Ga. 76, 25 S. E. 252; *Ill.* 1870, Comfort *v.* People, 54 Ill. 404, 406; *Ia.* 1899, State *v.* Novak, 109 Ia. 717, 79 N. W. 465; *Ky.* 1873, Berry *v.* Com., 10 Bush 17; *Mass.* 1892, Com. *v.* Campbell, 155 Mass. 537, 30 N. E. 72; 1892, Com. *v.* Trefethen, 157 Mass. 180, 197, 31 N. E. 961; 1893, Com. *v.* Russell, 160 Mass. 8, 10, 35 N. E. 84; *Mich.* 1912, People *v.* Bowen, 170 Mich. 129, 135 N. W. 824 (the remainder may be introduced, even though it involved disclosing privileged communications with a wife); *Miss.* 1849, Coon *v.* State, 13 Sm. & M. 249; 1850, McCann *v.* State, 13 Sm. & M. 498; *Mo.* 1838, Bower *v.* State, 5 Mo. 382; 1874, State *v.* Carlisle, 57 Mo. 106; 1904, State *v.* Knowles, 185 Mo. 141, 83 S. W. 1083; 1905, State *v.* Merkel, 189 Mo. 315, 87 S. W. 1186; 1906, State *v.* Myers, 198 Mo. 225, 94 S. W. 242 (for the prosecution); *N. C.* 1870, State *v.* Worthington, 64 N. C. 594, 595; *Tenn.* 1824, Tipton *v.* State, Peck 307, 314; *Tex.* 1871, Conner *v.* State, 34 Tex. 659, 661; 1920, Pickens *v.* State, 86 Tex. Cr. App. 657, 218 S. W. 755 (applying the further detail, adopted in this State, that where exculpatory statements are coupled with confessional statements and are introduced for the prosecution, the prosecution has the burden of disproving the exculpatory parts); *Vt.* 1859, State *v.* Mahon, 32 Vt. 244; *Va.* 1838, Brown's Case, 9 Leigh 633; *Wis.* 1869, Griswold *v.* State, 24 Wis. 148; *Wyo.* 1906, Clay *v.* State, 15 Wyo. 42, 86 Pac. 17.

Supposing all to be required, it may of course be supplied by combining the testimony of *two or more witnesses:* 1874, People *v.* Ah Wee, 48 Cal. 236 (here the deceased's remark in English was reported by one, and the defendant's answer in Chinese by another person); 1875, People *v.* Keith, 50 Cal. 137, 139.

In many of these rulings, it is a favorite cautionary addition that the exculpatory part *need not be believed;* the opinion in Tipton *v.* State, Tenn., *supra*, perhaps best phrases this; it is never denied, and citations in detail are unnecessary. But obviously it is a superfluous statement. No witness *need* be believed (*ante*, § 2034); the jury may always believe as much or as little as they please of his testimony. Furthermore, the complementary and exculpatory part of the confession is put in, not as testimony, but merely as qualifying the effect of the confessing portions; this is more fully considered at large, *post*, § 2113. There is but one instance in which the tribunal *must* accept the qualifying portions of a statement and give effect to them as true, and that is a pleading not traversed; because the other party has there admitted the statements in the pleading to be true; this principle is illustrated *post*, § 2122, in the question whether an entire answer in chancery is to be taken as true.

taken as evidence to convict him, it is but justice and reason, and so allowed in the civil law, that his whole confession shall be evidence as well for as against him; and then there will be no proof of a malicious and seditious publication of this paper, for he confessed that it was delivered by mistake."

1716, Serjeant *Hawkins*, Pleas of the Crown, II, c. 46, § 40: "It seems an established rule that, wherever a man's confession is made use of against him, it must all be taken together and not by parcels."

1868, WILSON, J., in *Johnson* v. *Powers*, 40 Vt. 611, 612: "The object of the party using such declarations or admissions against the party who made them is only to ascertain that which he conceded against himself; yet, unless the whole is received and considered, the true meaning and import of the part which is evidence against him cannot be ascertained. It is therefore a rule of evidence that the whole declaration or admission of the party made at one time shall be taken together; but the jury are at liberty to believe a portion and disbelieve the other, as they are all evidence."

It may be suggested, however, that where the confession is presented in *written form* — as, in a magistrate's report of a preliminary examination — the considerations affecting written documents should apply (*post*, § 2103), and the whole need not be put in, because the writing is before the Court, and the accused may have the remainder read for himself.[4] This, however, was apparently not the English practice; the whole was read for the prosecution.

(*d*) Since Confessions are not admissible against third persons (*ante*, §§ 1076, 1079), the *names of other co-indictees*, mentioned in a confession used and read against the party making it, were by most English judges ordered to be omitted.[5] But by other judges the names were ordered read and the jury instructed not to use the confession against them.[6] In Canada and the United States the latter practice is favored.[7] The statement need in theory

[4] 1893, Webb *v.* State, 100 Ala. 47, 52, 14 So. 865 (entire confession need not be offered by the prosecution). Add here the cases cited *ante*, § 2098, notes 4, 6, 7, dealing with a defendant's examination before the magistrate.

For the rule of preference that the *magistrate's written report must* be produced, see *ante*, § 1326.

[5] 1830, Note by the Reporters, 4 C. & P. 225 ("The practice has been, in reading confessions, to omit the names of other accused parties, and, where they are used, to say 'another person,' 'a third person,' etc., where more than one other prisoner was named; and some judges have even directed witnesses who came to prove verbal declarations to omit the names of those persons in like manner").

[6] 1830, R. *v.* Clewes, 4 C. & P. 221, 224; R. *v.* Fletcher, 4 C. & P. 250; R. *v.* Hearne, 4 C. & P. 215 (all per Littledale, J.); compare R. *v.* Walkley (1833), 6 C. & P. 175.

[7] CANADA: 1905, R. *v.* Martin, 9 Ont. L. R. 218 (the whole is read, but the judge instructs the jury "not to pay the slightest attention to it except so far as it goes to affect such person" confessing).

UNITED STATES: *Fed.* 1896, U. S. *v.* Ball, 163 U. S. 662, 16 Sup. 1192; *Ark.* 1904, Howson *v.* State, 73 Ark. 146, 83 S. W. 933; *Del.* 1904, State *v.* Brinte, 4 Del. 551, 58 Atl. 258; *Ill.* 1914, People *v.* Hotz, 261 Ill. 239, 103 N. E. 1007; 1916, People *v.* Buckminster, 274 Ill. 435, 113 N. E. 713 (*contra:* parts affecting other persons on trial must be omitted if they can be omitted "without in any way weakening the confession as to the one who made it," but the opinion remains obscure, by applying the ruling only to involuntary, *i. e.* inadmissible confessions); *Ky.* 1908, Polson *v.* Com., — Ky. —, 108 S. W. 844; *La.* 1893, State *v.* Donelson, 45 La. An. 744, 749, 12 So. 922; 1896, State *v.* Thibodeaux, 48 La. An. 600, 19 So. 680; 1900, State *v.* Robinson, 52 La. An. 616, 27 So. 124; 1901, State *v.* Sims, 106 La. 453, 31 So. 71; *Mass.* 1896, Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560; 1913, Com. *v.* Borasky, 214 Mass. 313, 101 N. E. 377; 1919, Com. *v.* Teregno, 234 Mass. 56, 124 N. E. 889 (murder); *N. J.* 1917, State *v.* Stanford, 90 N. J. L. 724, 101 Atl. 53; 1921, State *v.* Newman, 95 N. J. L. 280, 113 Atl. 225 (conspiracy, joint indictees tried together); *N. M.* 1921, State *v.* McDaniels, — N. M. —, 196 Pac. 146 (murder); *N. Car.* 1897, State *v.*

be only in the nature of an admission (*ante*, § 1048); yet practically, when it *involves others*, it ought to be a real confession (*ante*, § 821).[8]

(*c*) Of course, the *prosecution* may desire here to invoke the rule (*post*, § 2115) *allowing* the whole to be put in. This is usually the case where the confession contains a mention of *another crime* committed *by the accused*. On the usual principles (*ante*, §§ 194, 300–367), this additional crime would ordinarily not be provable for its own sake; yet under the present principle and that of § 2115, *post*, the accused's allusion to it in his confession may and must be listened to if it is a part of the one entire statement confessing the crime charged at bar.[9]

B. Documents

§ 2102. (*a*) **Document produced in Court; must the whole be put in?** When a document is produced in Court, the principle of Verbal Precision (*ante*, § 2095, par. 2) is of course usually satisfied, because the document itself contains all of its very words. The only question can be as to the applicability of the other principle, Entirety of Parts (*ante*, § 2095, par. 2). Here, too, it would seem at first sight that the principle was amply satisfied, since the whole and every part of it is in fact produced in the document itself. Yet not every part may be desired to be put in evidence and read as such by the offeror at that time. Undoubtedly it may be read later by the opponent (*post*, § 2113). But *must* the offeror read it then as a part of his evidence?

In the majority of instances, perhaps, the decision of this question either way is of no real consequence, and the application of the rule becomes a mere

Collins, 121 N. C. 667, 28 S. E. 520; *Okl.* 1911, Ford *v.* State, 5 Okl. Cr. 240, 114 Pac. 273; *S. Car.* 1881, State *v.* Workman, 15 S. C. 540, 545; 1881, State *v.* Dodson, 16 S. C. 453, 460; *Tex.* 1908, Gibson *v.* State, 53 Tex. Cr. App. 349, 110 S. W. 41; 1920, Sapp *v.* State, 87 Tex. Cr. App. 606, 223 S. W. 459 (special discriminations made by Morrow, J.); *Utah:* 1912, State *v.* Romeo, 42 Utah 46, 128 Pac. 530; *Vt.* 1895, State *v.* Cram, 67 Vt. 650, 32 Atl. 502; 1896, State *v.* Fournier, 68 Vt. 262, 35 Atl. 178; *Wash.* 1905, State *v.* Mann, 39 Wash. 144, 81 Pac. 561; 1912, State *v.* Beebe, 66 Wash. 463, 120 Pac. 122 (*contra*, distinguishing State *v.* Mann in some way not entirely clear).

[8] 1907, McCann *v.* People, 226 Ill. 562, 80 N. E. 1061 (here two judges dissented because of this principle); 1897, State *v.* Green, 48 S. C. 136, 26 S. E. 234; 1897, State *v.* Mitchell, 49 S. C. 410, 27 S. E. 424 (here the whole was excluded, because it was in no sense a confession, but merely a throwing of blame on the other defendant).

The principle upon which the confession can be *used against a co-defendant* has been considered *ante*, § 1076; it is only on the supposition that the confession cannot lawfully affect the co-defendant that the above question arises as to omitting names.

[9] There is usually an unnecessary scrupulosity on this point: 1896, Gore *v.* People, 162 Ill. 259, 266, 44 N. E. 500 (murder); 1905, Wistrand *v.* People, 218 Ill. 323, 75 N. E. 891 (rape; the whole may be read, under proper instructions); 1854, Lord *v.* Moore, 37 Me. 208, 217 (civil action for arson; in the defendant's admissions, a part which mentioned another similar act of his was received as being inseparable from the whole); 1904, People *v.* Loomis, 178 N. Y. 400, 70 N. E. 919 (a confession of another crime, made at the same time as the confession of the crime charged, is not admissible, unless the latter "necessarily relates to another crime" or "is so essentially interwoven with every other part" of the statement that the whole must be listened to); 1908, People *v.* Rogers, 192 N. Y. 331, 85 N. E. 135 (murder; following People *v.* Loomis, *supra*); 1908, People *v.* Cahill, 193 N. Y. 232, 86 N. E. 38 (electoral perjury; three judges dissenting); 1904, State *v.* Knapp, 70 Oh. 380, 71 N. E. 705 (wife-murder; defence, insanity; a written confession, recounting also the killing of four other women, held properly admitted, under cautionary instructions); 1907, Barnett *v.* State, 50 Tex. Cr. 538, 99 S. W. 556 (burglary); 1906, State *v.* Dalton, 43 Wash. 278, 86 Pac. 590 (murder at a burglary; a confession mentioning former crimes, admitted).

quibble, or a skirmish for a tactical position, involving the rule against impeaching one's own witness (*ante*, § 909). But in a given case this may not be so, and the question must be answered on principle. Unfortunately, no generally accepted rule seems to have been established, as the following passages illustrate:

1794, *Eaton's Trial*, 23 How. St. Tr. 1030, Mr. *Gurney*, for the defence: "I desire that the whole of the [alleged seditious] speech of Mr. Thelwall may be read, a part only of which is included in the indictment." Mr. *Fielding*, for the prosecution: "You may read it as part of your evidence." Mr. *Gurney:* "I know I may; but I conceive I have a right to have it read as part of yours. Whenever a part of a paper is read in evidence by one party, the other party has a right to insist upon the whole being read at that time." Mr. RECORDER: "I think you [to Mr. *Gurney*] must read it as a part of *your* evidence, if you wish to have it read."

1837, Messrs. *Moody & Robinson*, Note to 2 Mo. & Rob. 46: "It seems reasonable that, where a party produces a document in evidence, he must be considered as producing the whole of the document; his opponent has therefore a right to refer to any part of it as already in proof. In other words, he may extract the remaining contents of the document (provided they be relevant to the subject-matter) and bring them before the jury, on the same principle that he may by cross-examination extract from a witness all facts within that witness' memory, provided they be relevant to the subject-matter."

1875, *Tilton* v. *Beecher*, N. Y., Abbott's Rep. II, 270; Mr. *Evarts* (cross-examining); "Look at this article, Mr. Tilton, . . . and say if it was written by you and published in your newspaper?" A. "Yes, sir." Mr. *Shearman:* "It is an article entitled, 'Mr. Tilton's Rejoinder to Mr. Greeley.'" Mr. *Fullerton:* "If we have the sermon, let us have the text." Mr. *Beach:* "I think it is the rule, sir, that where an answering letter is read, the letter to which it was a reply should be read also." Judge NEILSON: "That is the rule. Perhaps if counsel will look at it they can judge whether it is material." Mr. *Evarts:* "Your Honor, we understand exactly what the rule is. All that can be claimed by our learned friends is that it gives them the right to read any part of the paper to which it is a reply, if they see fit. They cannot make us read it." Judge NEILSON: "I have had occasion to say that where one party puts a paper in they were at liberty to read a part of it. But it was deemed all put in by *them*, and the other side could read any portion of it they thought proper." Mr. *Fullerton:* "That does not present this case." Mr. *Evarts:* "How does it fail to present this case? Supposing it is all in, are we obliged to read it all? . . . I do not understand that we are obliged to read the whole article to get at the point which is important to us." Judge NEILSON: "The whole must be deemed put in by you." Mr. *Evarts:* "That may be." Judge NEILSON: "And you read such part as you now think proper, and they can afterwards call attention to other parts. I think that will answer."

It would seem that the general tendency is to require the whole of a single document to be put in and treated as the evidence of the party desiring to offer a part only, even though the actual reading be postponed. But the rulings are not harmonious, nor always definite.[1] The matter should be left entirely to the discretion of the trial Court.

§ 2102. [1] *Eng.* 1862, Milne v. Leisler, 7 H. & N. 786, 795 (whole of a letter must be read); *Can.* 1915, Stanoszek v. Canadian Collieries, 22 D. L. R. 691, B. C. (report of a mine-manager; ruling obscure); *U. S.* 1899, Wright v. Bragg, 37 C. C. A. 574, 96 Fed. 729 (on a witness' admission of genuineness of a letter and passage in it, opposing counsel may inspect the letter to find explanations in other parts of it); 1869, Spanagel v. Dellinger, 38 Cal.

§ 2103. **Same: Depositions and Former Testimony.** (1) A *deposition* represents the answers to the direct examination and the cross-examination. Since the proponent of a witness testifying 'viva voce' offers merely his answers to the direct examination, and the opponent may or may not choose to obtain further testimony on cross-examination, it would seem, by analogy, that the *taker* of a deposition, when using it, need put in the direct examination only,[1] leaving to the opponent to use the cross-examination or not, as he pleases.[2] The same rule — that not all need be read — should also obtain for the *non-taker* wishing to use a deposition which the taker has failed to

279, 283 ("they were entitled on demand to a reading of the remaining portions thereof immediately and before the intervention of other evidence"; here, the opponent's pleading in a former suit); 1875, Lester *v.* Ins. Co., 55 Ga. 475, 479 (part only of a letter may be read; "the whole letter was in evidence," and either party might read relevant portions); 1909, Augusta N. S. Co. *v.* Forlaw, 133 Ga. 138, 65 S. E. 370 (the whole of a letter need not be offered); 1898, Slingloff *v.* Bruner, 174 Ill. 561, 51 N. E. 772 (letters showing a testator's feelings; the whole not required to be read); 1904, Fowles *v.* Joslyn, 135 Mich. 333, 97 N. W. 790 (defendant's book-entry admitting payment, received against him, without offering the entire book).

For the general right to *inspect a document before cross-examination begun*, see *ante*, § 1859.

For the *time* of putting in a *contradictory document in impeachment* and the time of *re-examining upon it for explanations*, see *ante*, § 1261.

§ 2103. [1] *Accord:* 1897, Bunzel *v.* Maas, 116 Ala. 68, 22 So. 568; 1920, Bernhardt *v.* City & Suburban R. Co., — D. C. App. —, 263 Fed. 1009 (plaintiff having failed to read a deposition, defendant then offered to read parts of it; held error to require defendant to read the whole, even as testimony of the plaintiff); 1903, Reed *v.* Ins. Co., 117 Ga. 116, 43 S. E. 433, *semble* (remainder of answers to interrogatories may be put in by the opponent, as the evidence of the party offering the first part); 1899, Watson *v.* R. Co., 76 Minn. 358, 79 N. W. 308 (part may be read, subject to trial Court's order to read all at the same time); 1922, Littig *v.* Urbauer-Atwood & Co., — Mo. —, 237 S. W. 779 ("reading a detached portion of the deposition or instrument, and then asking the witness whether he made such a statement, etc.," held improper: this is unsound; a lying witness could not be exposed, under such restrictions; *e. g.* Sir Charles Russell could never have exposed the forger Pigott, in the cross-examination quoted *ante*, § 1260); 1841, Southwark *v.* Ins. Co., 6 Whart. Pa. 327, 330 (all of the direct examination must be read); 1892, Thomas *v.* Miller, 151 Pa. 482, 486, 25 Atl. 127 (same for party's own deposition).

Contra: 1832, Temperley *v.* Scott, 5 C. & P. 341 (proponent of a deposition required to read the cross-examination after the direct examination; Tindal, C. J.: "If the witness was here, the cross-examination would immediately follow on the examination in chief; and I do not see any reason why they should be separated when the examination is in writing"); 1901, Orland *v.* Farrell, — Cal. —, 65 Pac. 976; 1872, McArdle *v.* Bullock, 45 Ga. 89, 92; 1875, Kilbourne *v.* Jennings, 40 Ia. 473, 474 (co-defendant firm reading a deposition of a partner, obliged to read the whole, so far as pertinent); 1899, Walkley *v.* Clarke, 107 Ia. 451, 78 N. W. 70 (must read all material parts); 1875, Grant *v.* Pendery, 15 Kan. 236, 243 (cross-examination also must be read); 1868, Lightfoot *v.* People, 16 Mich. 507, 511, 516 (the whole must be read, whether used as independent evidence or as containing inconsistent statements serving to impeach); 1874, Hamilton *v.* People, 29 Mich. 195, 198 (preceding case approved); 1859, Hill *v.* Sturgeon, 28 Mo. 323, 329; 1883, Converse *v.* Meyer, 14 Nebr. 190, 15 N. W. 340; 1919, Landis Christmas S. Club *v.* Merchants' Nat'l Bank, 178 N. C. 403, 100 S. E. 607 (cross-examination must also be read).

Not decided: 1902, Alexander *v.* Grand Lodge, 119 Ia. 519, 93 N. W. 508.

But of course the whole of *each answer* must in any case be read and not be taken by sentences or fragments: 1842, Perkins *v.* Adams, 5 Metc. Mass. 44, 48; compare § 2121, *post*.

[2] Whether the proponent should read the cross-examination immediately after the taker has read the direct examination, as ruled in Temperley *v.* Scott, *supra*, is merely a question of the *time* and order of evidence (*ante*, § 1884).

Of course the *opponent* in such case is not *obliged* to put in the cross-examination unless he pleases, — any more than he would be obliged to cross-examine on the stand; this is elementary: 1849, Williams *v.* Kelsey, 6 Ga. 365, 375; 1890, Byers *v.* Orensstein, 42 Minn. 386, 44 N. W. 129 (here omitting a part only); compare §§ 909, 1893, *ante*.

But the direct examiner *may*, on the present principle, put in the cross-answers to a deposition if the cross-examiner does not do so; 1849, Williams *v.* Kelsey, 6 Ga. 365, 375.

use; and this much seems generally conceded.[3] Where the deposition (so-called) consists of the *opponent's answers to interrogatories* in the nature of a bill of discovery, the analogy of answers in chancery is the controlling one (*post*, § 2124).[4]

(2) When *testimony at a former trial* is offered in the shape of a written verbatim report, and is not proved by oral testimony resting on recollection, the analogy of a deposition would seem to apply, so that the offeror need not read any more than he considers material, the opponent having it conveniently in his power to use the remainder afterwards.[5] Yet the general rule applied for oral utterances, namely, that all the parts must be given, in substance, and so far as relevant (*ante*, § 2098), would probably by some Courts be here applied.[6]

§ 2104. **Same: Separate Writings referred to in the Writing offered; Letters of a Correspondence.** Where a writing offered *refers to another writing*,

[3] *Fed.* 1909, Crotty *v.* Chicago Great Western R. Co., 8th C. C. A., 169 Fed. 593 (not all need be read, "if what is read does not consist of mere fragmentary excerpts, a correct appreciation of which depends upon the context"); *Ia.* 1885, Citizens' Bank *v.* Rhutasel, 67 Ia. 316, 319, 25 N. W. 261 (the party reading a deposition taken but not used by the opponent must read all that covers "any given subject," but need read no more); 1908, Farmers' Merchants' Bank *v.* Wood, 143 Ia. 635, 118 N. W. 282 (whether the deposition of an officer of an opponent corporation must all be offered, not decided); *Minn.* 1899, Watson *v.* St. P. C. R. Co., 76 Minn. 358, 79 N. W. 308; *Nebr.* 1883, Converse *v.* Meyer, 14 Nebr. 190, 15 N. W. 261; 1901, Hamilton B. S. Co. *v.* Milliken, 62 Nebr. 116, 86 N. W. 913 (need not use the whole, but must offer all that affects a given subject); *N. Dak.* 1902, First Nat'l Bank *v.* Minneapolis & N. E. Co., 11 N. D. 280, 91 N. W. 436 (only parts that are relevant must be read); 1904, Gussner *v.* Hawks, 13 N. D. 453, 101 N. W. 898 (First N. Bank *v.* M. & N. E. Co. approved; but here the cross-examiner's offer of three answers of the cross-examination only was held insufficient); *Okl.* 1921, Sealey *v.* Smith, 81 Okl. 97, 197 Pac. 490 (issue of title; plaintiff allowed to use parts of depositions taken by defendant); *Pa.* 1844, Calhoun *v.* Hays, 8 W. & S. 127, 130.

Contra: 1876, Fountain's Adm'r *v.* Ware, 56 Ala. 558, *semble;* 1913, Walter *v.* Sperry, 86 Conn. 474, 85 Atl. 739, *semble;* 1915, Jonas *v.* South Covington & C. St. R. Co., 162 Ky. 171, 172 S. W. 131; Hill *v.* Sturgeon, 28 Mo. 323, 329; 1913, Boney *v.* Boney, 161 N. C. 614, 77 S. E. 784 (cannot put in the cross-examination alone).

But here may the cross-examiner put in merely the *cross-answers*, without the related direct answers? On the present principle, he may not; for the cross-answers, like bill and answer in chancery (*post*, § 2111), are connected with the direct questions. But the same consequence follows also under the rule for *order of examination* (*ante*, § 1893), and the authorities are there examined.

If however the cross-examiner does put in the whole, he is not prevented from doing so by the fact that he *did not take* the deposition; for either party may use a deposition once taken (*ante*, § 1389).

Whether former testimony *reported in writing* need be proved by the writing at all is examined elsewhere (*ante*, § 1326).

Compare the cases cited *post*, § 2115, n. 3, and *ante*, § 1045, n. 3.

[4] An opponent's *answer in chancery*, when used in evidence at law, must by a rule of long tradition be read as a whole if used at all; but, when used in the same suit in chancery, it is a pleading, and only so much need be used as is desired by the one using it, provided he does not separate grammatically connected parts. This much is accepted on all hands. But the subject is so closely united, in the course of precedents, with the further question how much the opponent may put in by way of explanation, that the two matters cannot well be dealt with separately, and they are therefore considered *post*, § 2121. Whether the *bill* must be put in with the answer is considered *post*, § 2111.

[5] 1920, Boulder *v.* Stewardson, 67 Colo. 582, 189 Pac. 1 (former direct testimony of a deceased witness, admitted without offering the cross-examination); 1897, Waller *v.* State, 102 Ga. 684, 28 S. E. 284 (in reading the report of a deceased witness' testimony, the prosecution need offer only the direct examination, or such portions as it deems material; the defence being at liberty to read the remaining portions); 1908, Leifheit *v.* Neylon, 139 Ia. 32, 117 N. W. 4 (testimony of a party-opponent at a former trial, here used as containing admissions; the offerer need read only such parts as he sees fit).

[6] The cases have been placed *ante*, § 2098.

the latter should also be put in at the same time, provided the reference is such as to make it probable that the latter is requisite to a full understanding of the effect of the former. The same principle would apply to another writing, not expressly referred to, but necessary by the nature of the documents to a proper understanding of the one offered. Much, therefore, will depend upon the circumstances of each case and the character of each document, and no fixed rule can fairly be laid down; the trial Court's discretion should control. Such separate writings have been required to be offered in various classes of cases;[1] in particular, the requirement may be made for other documents referred to in a *deposition*,[2] or for prior *letters of a correspondence* referred to in subsequent ones offered,[3] though on the latter point inconsistent general rules have been laid down.

§ 2104. [1] *Eng.* Thornton *v.* Stephen, 2 Mo. & Rob. 45 (libel; another document referred to, required to be read by the plaintiff); *U. S.* 1901, Barber *v.* International Co., 73 Conn. 587, 48 Atl. 758 (admission of a contract referring to a schedule, without the schedule, held not improper on the facts); 1906, Merchant's L. & T. Co. *v.* Egan, 222 Ill. 494, 78 N. E. 800 (memorandum referred to in a conversation; the trial Court's discretion controls); 1885, Elmore *v.* Overton, 104 Ind. 548, 555, 4 N. E. 197 (action for maliciously refusing a license to a qualified teacher; parts of a full set of examination papers, rejected); 1846, Cordray *v.* Mordecai, 2 Rich. S. C. 518, 525 (an order to sell a ship, and a guaranty by the purchaser, executed at the same time, required to be read together).

[2] 1828, Yates *v.* Carnsew, 3 C. & P. 99 (defendant had been examined in bankruptcy, and his books had at that time been inspected at his office for convenience' sake; held that his examination and the inspection were "all one transaction," and the latter could not be used without the former); 1831, Hewitt *v.* Pigott, 5 C. & P. 75 (letter to the plaintiff, handed in with his answer in chancery in another proceeding, not allowed to be used here without the answer in chancery); 1837, R. *v.* Dennis, 2 Lew. Cr. C. 261 (defendant's examination before a magistrate may be put in without putting in all the preceding depositions, because it is "not an answer to the depositions but to the charge"; but any particular deposition referred to must be read).

[3] *Eng.* 1801, Johnson *v.* Gilson, 4 Esp. 21 (opponent's letter produced and read; held, that a reference in the letter to papers inclosed in it made their reading necessary if it "refers to them in such a way that it is necessary to incorporate the papers inclosed with the body of the letter in order to make it intelligible or the sense complete," but not if they were "independent papers not referred to by the letter but which it only covers"); 1844, Watson *v.* Moore, 1 C. & K. 626 (a letter offered which appeared to be an answer to one of the offeror's; the latter required to be offered with it); *U. S.* 1858, Coats *v.* Gregory, 10 Ind. 345, 346 (letter of plaintiff offered as containing extracts from letters and statements of defendant; rejected, the whole of the quoted letters, etc., not accompanying it).

Contra: Eng. 1795, Barrymore *v.* Taylor, 1 Esp. 326 (because the prior letters were in the receiver's hands, "and if he thought them necessary to explain the transaction, he might produce them"); 1850, DeMedina *v.* Owen, 3 C. & K. 72; *U. S.* 1832, U. S. *v.* Doebler, 1 Baldw. 519, 522, *semble* (forgery, an accomplice wrote to defendant telling him to write if he wanted any more forged notes; defendant wrote to ask for some; the latter letter proved, without proving the former); 1897, Barnes *v.* Trust Co., 169 Ill. 112, 48 N. E. 31 (letter by the defendant in answer to one from the plaintiff, put in by the plaintiff; held, that the one from the plaintiff need not be put in at the same time, being receivable afterwards from the defendant); 1871, Brayley *v.* Ross, 33 Ia. 505, 508 (not required, unless the initial letter is necessary to the correct understanding of the reply); 1870, Stone *v.* Sanborn, 104 Mass. 319, 324 (breach of promise of marriage; the plaintiff offered certain of the defendant's letters containing admissions of the promise and words constituting a breach; held, that so far as any letter of the defendant appeared to be a reply to a letter of the plaintiff, this did not require the latter to be put in jointly; "when a particular communication which refers to a previous one is not introduced as containing the terms of a contract, we see no more reason for obliging the party to put in the previous communication also, when the communications are written, than when they are oral"); 1899, New Hampshire T. Co. *v.* Korsmeyer P. & H. Co., 57 Nebr. 784, 78 N. W. 303 (in offering a reply-letter of opponent, the answered letter need not be offered, where the former "is fairly self-explanatory"); 1856, Hayward R. Co. *v.* Duncklee, 30 Vt. 29, 39 (letter leading to a reply-letter from a third person; former letter not required, being unavailable).

§ 2105. (*b*) **Document Lost or Destroyed; (1) Deeds, Letters, Contracts, Abstracts, etc.; Substance of the Material Parts suffices.** In dealing with the general principle requiring the production of a documentary original if it is available, it has already been seen (*ante*, § 1267) that testimony based on recollection is an allowable mode of proof for lost documents, though for some kinds of documents testimony by copy is preferred if it can be had (*ante*, §§ 1268–1272). Assuming, then, that there is no prohibition of any qualified witness to the contents of a lost or destroyed document, the question arises, under the present principle, how far Completeness is required in the proof of its terms.

Here must be distinguished the sub-principles (*ante*, § 2095, par. 2) of Verbal Precision and of Entirety of Parts. (a) As to *Entirety of Parts*, it is clear that for documents having in themselves a legal effect — such as deeds and contracts — all the material parts must be established by the testimony to contents. It would be imprudent to act judicially upon a part of a document whose material effect must depend equally upon other and missing parts. This practice, doubtless, would sometimes leave honest rights unenforceable because their tenor is unknown; but this contingency is preferable to the constant and greater risk in the other direction. Much will depend, to be sure, on the circumstances of each case, for certain parts of a document might alone be material in certain litigation and the remainder immaterial. Moreover, for writings not having in themselves a legal effect — such as letters involving admissions — less strictness ought to be observed. (b) As to the other sub-principle, however, namely, *Verbal Precision*, the opposite conclusion is to be approved. Not only are the identical words not always essential, but the proof of them, when a copy does not exist, is practically impossible. To insist on complete verbal accuracy would be in effect to prohibit entirely the proof of lost documents by recollection, and this, as above noted, would be contrary to a fundamental principle. Verbal precision of proof, then, is usually not insisted upon, and could not be.

The *substance of the material parts*, but by no means the words themselves (except, of course, so far as the witness is able), is the rational limit of the law's requirement. This principle has been repeatedly enunciated judicially:

1794, L. C. J. EYRE, in *Hardy's Trial*, 24 How. St. Tr. 681: "That paper being destroyed, the witness will give such account of it as he can; he may either refresh his memory by looking at this paper, or if he can venture to say that this contains in it the substance of the other, it may be received upon that account as the best evidence."

1828, MARSHALL, C. J., in *Tayloe* v. *Riggs*, 1 Pet. 591, 600: "When a written contract is to be proved, not by itself but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proven satisfactorily."

1857, GOOKINS, J., in *Thompson* v. *Thompson*, 9 Ind. 323, 333 (holding that the date of a deed need not be shown): "Proof of its contents is necessarily addressed to the jury; but under the direction of the Court that on the one hand vague and uncertain recollection will not do, and on the other that a degree of precision which the memory never

retains is not required. The property conveyed, the estate created, the conditions annexed, the signing, sealing, and delivery, are required to be proved with reasonable certainty by witnesses who can testify clearly to its tenor and contents."

1861, JENKINS, J., in *Roe & McDowell* v. *Doe & Irwin*, 32 Ga. 39, 50: "We know of no rule which determines with precision the degree of fulness with which the contents of a deed shall be stated in such cases. We think all the law requires is a statement of the substantial, material parts of a deed, so that the jury may determine who were the parties, what the subject of conveyance, whether a deed was really signed, sealed, delivered, and attested as the law requires, and, as nearly as may be, the time of execution."

1884, SCHOLFIELD, C. J., in *Perry* v. *Burton*, 111 Ill. 138, 140: "A witness testifying to the contents of a lost deed is not to be expected to be able to repeat it 'verbatim' from memory. . . . All that parties, in such cases, can be expected to remember is that they made a deed, to whom, and about what time, for what consideration, whether warranty or quit-claim, and for what party. To require more would, in most instances, practically amount to an exclusion of oral evidence in the case of a lost or destroyed deed."

(1) In the application of this principle to *documents in general* there is ample room for difference of opinion as to the soundness of particular rulings; the principle deserves liberal treatment, and this it has not always received. But, as to the principle itself, there seems to be no controversy.[1]

§ 2105. [1] The following cases include those which merely require a stronger *degree of proof* of the contents than mere preponderance of evidence, under the principle of § 2498, *post;* Courts do not always distinguish the two principles; compare also the cases applying the *Opinion rule* to a witness' *impression* or *understanding* (*ante*, § 1957).

CANADA: 1841, Doe *v.* Stiles, 1 Kerr N. Br. 338, 346 (deed's terms held not sufficiently shown); 1849, Doe *v.* Jack, 1 All. N. Br. 476 (surrender of lease; rules of sufficiency, declared); 1887, Ross *v.* Williamson, 14 Ont. 184 (agreement; sufficiency of contents, defined).

UNITED STATES: *Federal:* 1822, U. S. *v.* Britton, 2 Mason 464, 468 (the contents must be "pointedly and clearly" described); 1828, Riggs *v.* Taylor, 1 Pet. 591, 600 (contract; quoted *supra*); 1851, U. S. *v.* Macomb, 5 McLean 286, 298 (substance of an instrument, sufficient); *Alabama:* 1859, Shorter *v.* Sheppard, 33 Ala. 648, 653 (proof must be "clear and satisfactory and such as to secure as far as possible the safety designed to be given by the written evidence"); 1888, Potts *v.* Coleman, 86 Ala. 94, 100, 5 So. 780 (substance or substantial parts of a lost deed, sufficient); 1895, Elyton Land Co. *v.* Denny, 108 Ala. 553, 561, 18 So. 561 (acreage and grantor of deed mentioned, but not signature, attestation, record, length, boundaries, or words; excluded); 1901, Anniston C. L. Co. *v.* Edmondson, 127 Ala. 445, 30 So. 61 (parts of a deed allowed to be proved); 1901, Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663 (testimony to the substance of a lost deed, held sufficient); *Arkansas:* 1838, Brown *v.* Hicks, 1 Ark. 233, 243, *semble* (copy of a bill of sale "substantially the same," held not sufficient); 1853, Hooper *v.* Chism, 13 Ark. 496, 501 ("reasonable certainty" required as to its terms; here, a lost bill of sale, insufficiently proved); 1905, Carpenter *v.* Jones, 76 Ark. 163, 88 S. W. 871 (lost deed; instructions passed upon; foregoing cases not cited); *California:* 1855, Posten *v.* Rassette, 5 Cal. 469; 1860, Collier *v.* Corbett, 15 Cal. 183, 186 (contents of lost deeds, held sufficiently proved); 1903, Kenniff *v.* Caulfield, 140 Cal. 34, 73 Pac. 803 (substance of a deed suffices); *Florida:* 1895, Edwards *v.* Rives, 35 Fla. 89, 17 So. 416 (substance sufficient; see this case in another aspect, *ante*, § 1957); *Georgia:* 1831, Bank *v.* Brown, Dudley 62, 65 (part of a letter, insufficient on the facts); 1861, Roe & McDowell *v.* Doe & Irwin, 32 Ga. 39, 50 (deed sufficiently proved on the facts); 1861, Bond *v.* Whitfield, 32 Ga. 215, 217 (judicially established copy of a bill of exchange, held imperfect on the facts); 1896, Neely *v.* Carter, 96 Ga. 197, 23 S. E. 313 (copy of a deed showing several signers, though the execution by one only had been proved, excluded); *Illinois:* 1846, Rector *v.* Rector, 8 Ill. 105, 119 ("it should be made satisfactorily to appear what were the substantial conditions and covenants"; here said of specific enforcement of a contract); 1858, Rankin *v.* Crow, 19 Ill. 630; 1859, Bennett *v.* Walker, 23 Ill. 97, 103 (contents of a deed sufficiently shown; careful opinion); 1864, Owen *v.* Thomas, 33 Ill. 320, 326 (deed; contents not sufficiently proved); 1872, Case *v.* Lyman, 66 Ill. 229, 233 (lost letter; contents sufficiently shown); 1874, King *v.* Worthington, 73 Ill. 161, 163 (substance of deeds, etc., sufficient); 1882, Rhode *v.* McLean, 101 Ill. 467, 471 (bond sufficiently proved); 1884, Perry *v.* Burton, 111 Ill. 138 (quoted *supra*); 1899, Harrell *v.*

Enterprise Sav. Bank, 183 Ill. 538, 56 N. E. 63 (Perry *v.* Burton approved; an entry that land had been "conveyed," held sufficient on the facts); 1903, South Chicago B. Co. *v.* Taylor, 205 Ill. 132, 68 N. E. 732 (a quitclaim deed said to be "similar" to one lost, excluded); 1916, Shipley *v.* Shipley, 274 Ill. 506, 113 N. E. 906 (deed destroyed before recording); *Indiana:* 1857, Thompson *v.* Thompson, 9 Ind. 323, 333 (date of a deed need not be proved); 1858, Wiggins *v.* Holley, 11 Ind. 11 (not sufficient on the facts); *Iowa:* 1879, Elwell *v.* Walker, 52 Ia. 256, 261, 3 N. W. 64 (antenuptial contract in letters; proof of contents not sufficiently definite); 1880, Jackson *v.* Benson, 54 Ia. 655, 7 N. W. 88 (that a deed was a warranty deed, excluded); 1884, Ross *v.* Loomis, 64 Ia. 437, 20 N. W. 749 (substance of a deed, sufficient); *Maine:* 1858, Tobin *v.* Shaw, 45 Me. 331, 349 (contents of letters, "so far as she recollected," allowed); 1886, Camden *v.* Belgrade, 78 Me. 204, 3 Atl. 652 (substance sufficient; here a marriage certificate); *Maryland:* 1893, Baltimore *v.* War, 77 Md. 593, 603, 27 Atl. 85 (letter described as being "an order to put B. to work," held insufficient); 1909, Robinson *v.* Singerly P. & P. Co., 110 Md. 382, 72 Atl. 828 (lost agreement, sufficiently shown); *Massachusetts:* 1858, Clark *v.* Houghton, 12 Gray 44 (substance sufficient); *Michigan:* 1882, People *v.* McKinney, 49 Mich. 334, 336, 13 N. W. 619 (letters; one who remembered a part of their substance, admitted); 1890, Shouler *v.* Bonander, 80 Mich. 531, 535, 45 N. W. 487 (substance must be shown; here, an agreement); 1899, Holmes *v.* Deppert, 122 Mich. 275, 80 N. W. 1094 (lost deed; "the words or the substance of the words," sufficient, but not the "sense of the deed"); *Minnesota:* 1889, Wakefield *v.* Day, 41 Minn. 344, 347, 43 N. W. 71 (lost deed's contents must be "clearly established"); 1908, Rogers *v.* Clark Iron Co., 104 Minn. 198, 116 N. W. 739 (lost land-patent; Perry *v.* Burton, Ill. approved); *Mississippi:* 1854, Mayson *v.* Beazley, 27 Miss. 106 (full abstract of the contents of lost partnership-books, admitted); 1876, Jelks *v.* Barrett, 52 Miss. 315, 321 (lost deeds, map, etc., proved in sufficient fulness); *Missouri:* 1878, Wilkerson *v.* Allen, 67 Mo. 502, 510 (contents of advertisement, sufficiently proved); 1886, Strange *v.* Crowley, 91 Mo. 287, 294, 2 S. W. 421 (substance of a letter, received); 1920, Gipson *v.* Owens, 286 Mo. 33, 226 S. W. 856 (deed of adoption; evidence of substantial contents held insufficient); *Montana:* 1904, Capell *v.* Fagan, 29 Mont. 507, 77 Pac. 55 (deed's terms not sufficiently shown); *New Jersey:* 1913, Borstelman *v.* Brohan, 81 N. J. Eq. 401, 87 Atl. 145 (proof should be "clear and cogent"); *New York:* 1820, Jackson *v.* M'Vey, 18 John. 330, 333 ("We consider the conclusion unsound that because a witness cannot recollect the courses of the description in a deed, that therefore he cannot prove the contents of it"); 1847, Sizer *v.* Burt, 4 Den. 426, 429 (a witness to the contents of a memorandum of claims spoke of it as "containing a list of claims . . . but these two were all that in any way referred to" the claim in hand, and then read a copy of those two items in the memorandum; held that he had in substance given the entire contents, and that therefore the fact that the exact copy covered a part only was immaterial); 1850, Metcalf *v.* Van Benthuysen, 3 N. Y. 424, 428 ("the substance of the contents of the operative parts of the instruments," required; here on the facts a deed was not substantially proved); 1865, Graham *v.* Chrystal, 2 Abb. App. C. 263 (one who "thought he might perhaps state" the substance of letters, held properly excluded); 1875, Edwards *v.* Noyes, 65 N. Y. 126, *semble* (substance required); *North Carolina:* 1835, Kello *v.* Maget, 1 Dev. & B. 414, 424 (abstract of a bond receivable, where no copy exists); 1906, Ivey *v.* Bessemer C. C. Mills, 143 N [illegible] 55 S. E. 613 (a "substantial copy of t[illegible] part of a letter," excluded, on the f[illegible], State *v.* Corpening, 157 N. C. 621, [illegible]14 (part of a letter of defendant being [illegible]oyed, the remainder containing admissions was received; but the opinion does not show appreciation of the question involved); 1904, Simpson *v.* Weise, 34 Wash. 360, 75 Pac. 973 (a memorandum of a contract detained by the opponent may suffice); 1909, Scurry *v.* Seattle, 56 Wash. 1, 104 Pac. 1129 (deed with conditions, held not sufficiently evidenced); Con. St. 1919, § 1766 (when a deed is shown to be lost or destroyed, and the registry also is destroyed, and no copy can be had, the deed will be presumed to have "transferred an estate in fee simple," if the grantor had one, and to have been made upon sufficient consideration); *Ohio:* 1875, Gillmore *v.* Fitzgerald, 26 Oh. St. 171, 174 (deed's contents not sufficiently shown); *Pennsylvania:* 1821, Dennis *v.* Barber, 6 S. & R. 420 (an over-strict ruling); 1832, Hart *v.* Yunt, 1 Watts 253 (brief abstract of receipts, showing only the sums mentioned in each, *semble*, inadmissible); 1854, Bell *v.* Young, 3 Grant 175 ("As to the degree of certainty required in secondary evidence, the law has no rule, except that it need not be a copy of the lost instrument"; here testimony that a note was for "about $80, above $70," was held sufficient); 1860, Boyd *v.* Com., 36 Pa. 355, 359 (docket entry of contents of a trustee's bond, filed but lost, received); 1870, Coxe *v.* England, 65 Pa. 212, 223 (portion of contents of a letter, held insufficient); 1895, Burr *v.* Kase, 168 Pa. 81, 31 Atl. 954 (proof insufficient on the facts); *Texas:* 1887, Shifflet *v.* Morelle, 68 Tex. 382, 387 (title-documents destroyed; testimony that in substance they vested title in J. M., excluded; opinion rule invoked); 1921, Hutchison *v.* Massie, — Tex. Civ. App. —, 226 S. W. 695 (lost deed; evidence of its terms, held not sufficient); *Vermont:* 1830, Booge *v.* Parsons, 2 Vt. 456, 459

(2) The same principle should apply where the original document, though produced, is *illegible*.[2]

(3) It would follow from the foregoing that, as to lost *deeds*, a conveyancer's *abstract of title*, as ordinarily made up, would suffice when verified by him as a witness on the stand.[3] To avoid the inconvenience of calling such persons in every instance, and to meet the objection of the Hearsay rule, as well as to provide for the preservation of trustworthy abstracts and notes, a statute has in several States authorized the use of such abstracts under special conditions without calling the maker.[4]

(4) A peculiar case arises where the deed is sought to be proved (the production of the original being excused) by a public *deed-register* containing only an *abstract*, not a full copy, of the deed. Here the present principle would not necessarily allow the use of these recorded-abstracts, because the original might still be available, though not required to be produced (*ante*, § 1224); accordingly they have sometimes been excluded.[5] But the matter is also complicated by the question whether these records are (as official statements) sufficiently authorized by law to be used at all, even if they are full copies; and the rulings under that principle (*ante*, §§ 1648, 1651, 1682) must be considered in reaching a conclusion.

Whether the copy of a recorded deed must indicate or *recite the existence of the seal on the deed* was formerly a much mooted topic; it involved three questions, whether the deed was valid without bearing a seal, whether the record was valid without recording the seal, and the present one, whether the copy sufficed in completeness.[6]

(lost deed; testimony that P. "deeded to O. and J. his right in said town, designating lot No. 57 as a part of said right," held insufficient by itself); 1839, Cleavland *v.* Button, 11 Vt. 138 (bond apparently destroyed; evidence held not "clear, satisfactory, and conclusive"); *Virginia:* 1871, Poague *v.* Spriggs, 21 Gratt. 220, 231 (loose testimony as to the contents of important letters, received, but held insufficient to produce persuasion).

Distinguish the following question of criminal pleading: 1901, State *v.* Peterson, 129 N. C. 556, 40 S. E. 9 (indictment for forging a lost note; proof of the substance, held sufficient).

[2] *Eng.* 1842, Lord Trimlestown *v.* Kemmis, 9 Cl. & F. 749, 775 (mutilated deed, received on the facts); *U. S.* 1812, Peart *v.* Taylor, 2 Bibb Ky. 556, 559 (mutilated letter, received, as "its fair import can be collected with certainty"); 1827, Rhoades *v.* Selin, 4 Wash. C. C. 715, 717 (a copy "so far as the deed is legible," admitted). The following ruling is over-strict: *Ire.* 1795, R. *v.* Jackson, Dublin, Ridgeway's Rep. 67 (a seditious letter was offered to be proved by a press copy; but as it was "not legible throughout," it was excluded).

[3] Some of the foregoing cases were doubtless of this sort.

[4] These have been placed *ante*, § 1705, with the rulings applying them. Compare the citations *post*, § 2109.

[5] 1839, New Jersey R. & T. Co. *v.* Suydam, 17 N. J. L. 25, 59, per Dayton, J. (a registry of mortgages contained by law merely an abstract; neither the registry nor a copy of it admissible to show the contents of the original). *Contra:* 1886, Smith *v.* Lindsey, 89 Mo. 76, 80, 1 S. W. 88 (abstract or index of deeds, made by law, admissible where the full records are destroyed and the originals unavailable); 1851, Garrigues *v.* Harris, 16 Pa. St. 344, 352 (abstract of a N. J. mortgage, received, because supposed to be there allowed by law); 1825, Bird *v.* Smith, 3 McC. S. C. 300 (under a statute authorizing certified copies of North Carolina grants, a certified copy of the plat and the memorial or abstract of the grant was receivable, the complete grant being well understood not to be recorded). Compare § 1225, *ante*.

Sometimes a statute expressly regulates the matter: Ont. Rev. St. 1914, c. 122, § 2 (contracts for sale of land; quoted *ante*, § 1225); Mich. Comp. L. 1915, §§ 2817, 3162, 3397 (village or city or county condemnation proceedings; register's or deputy's certified abstract of title, admissible to show ownership).

[6] The substantive law being so much involved, the authorities cannot be here col-

(5) From the foregoing general principle must be distinguished the operation of certain distinct principles which sometimes have a bearing on the same situation: (*a*) A witness who has *not read all of a document* is not qualified to speak to its terms, and is therefore excluded at the outset (*ante*, § 1278). Supposing him to be properly qualified in this respect, the present principle then operates to exclude his testimony if he cannot recollect the substance of the contents. (*b*) A witness must not, in testifying to the contents of a deed or the like document, give his *opinion as to its legal effect*, but must state the concrete facts of its terms. This application of the Opinion rule to proof of the contents of a document has already been considered (*ante*, § 1957); but in one or two instances the rulings above cited appear to proceed upon this ground; the rulings (*ante*, § 2097), distinguishing between the "substance" and "effect" of an oral utterance, proceed upon the same principle. (*c*) It is a much mooted question whether an *opponent's admissions* of a document's contents suffice to exempt from producing the original (*ante*, § 1255); assuming that they do, it would seem to follow that the admission need not be precise and detailed as to the terms of the document, but may merely admit its general tenor and effect.[7] (*d*) The degree of persuasion — whether beyond a reasonable doubt, or the like — required for proof of a lost deed is usually greater than that required ordinarily in civil cases (*post*, § 2498).

§ 2106. **Same**: (2) **Wills**. It has already been seen (*ante*, § 1267) that the contents of a lost will may be proved by testimony from recollection as well as by copy. But, in applying the present principle and asking what detail of terms must be reached by the proof, it is obvious that somewhat more strictness is allowable for proof of wills. Not only is the case of a lost will commonly more material (owing to the lack of a registration system) than of an alleged lost deed, but the contingent harm at stake is less, since the devolution of property to the legal heirs is (in the traditional English belief) less of an injustice to the devisee who cannot prove the will than would be the loss of title by a grantee who was unable to prove the terms of his deed against the grantor or his successors. There is therefore, both in

lected; the following will give a clue: 1859, Smith *v.* Dall, 15 Cal. 510; 1864, Holbrook *v.* Nichol, 36 Ill. 161, 164; 1866, Deininger *v.* McConnel, 41 Ill. 227, 232; 1900, Pease *v.* Sanderson, 188 Ill. 597, 59 N. E. 425; 1859, Switzer *v.* Knapp, 10 Ia. 72, 75; 1816, Hedden *v.* Overton, 4 Bibb 406; 1874, Starkweather *v.* Martin, 28 Mich. 471; 1901, Strain *v.* Fitzgerald, 128 N. C. 396, 38 S. E. 929; N. C. St. 1915, c. 249 (certified copies by the State secretary of abstracts of grants not reciting the great seal of State to have been affixed to the original are admissible); 1915, Howell *v.* Hurley, 170 N. C. 401, 87 S. E. 107 (applying St. 1915, c. 249); 1899, State *v.* Cooper, — Tenn. Ch. —, 53 S. W. 391; 1895, Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347; 1903, Virginia Coal & I. Co. *v.* Keystone C. & I. Co., 101 Va. 723, 45 S. E. 291 (land-patent); 1850, Williams *v.* Bass, 22 Vt. 352; 1904, Wilson *v.* Braden, 56 W. Va. 372, 49 S. E. 409; 1902, Peters *v.* Reichenbach, 114 Wis. 209, 90 N. W. 184.

[7] 1851, Pritchard *v.* Bagshawe, 11 C. B. 459, 463 (an abstract of deeds, received as an admission of the deeds' contents; Jervis, C. J.: "It would be a dangerous principle to lay down that a statement made by a party is not evidence against him because it is not quite full"). *Contra:* 1859, Shorter *v.* Sheppard, 33 Ala. 648, 658, *semble* (admission that a person had "reconveyed," held insufficient to establish its contents).

policy and in practice, more strictness shown in requiring proof of the terms of an alleged lost will.

They must be "clearly and satisfactorily" proved, it is usually said.[1]

§ 2106. [1] These rulings, as noted later, deal also in part with the degree of persuasion which the tribunal must reach; but it is practically convenient to place them all here:

ENGLAND: 1823, Lemann *v.* Bonsall, 1 Add. 389, 390 (nuncupative will; "the true import and substance, at least," must be proved); 1823, Foster *v.* Foster, 1 Add. 462, 465 (a good example of a will made up of torn fragments with the gaps supplied by the draftsman's recollection); 1876, Sugden *v.* St. Leonards, L. R. 1 P. D. 154 (quoted *supra*); 1890, Harris *v.* Knight, L. R. 15 P. D. 170, 179 ("by evidence which is so clear and satisfactory as to remove, not all possible, but all reasonable doubts on those points"); 1917, Phibbs' Estate, Prob. 93 (will destroyed by fire in the post-office; here the names of the attesting witnesses could not be ascertained).

CANADA: 1890, McLeod's Estate, 23 N. Sc. 154, 162 (codicil's contents held not sufficiently shown).

UNITED STATES: *Alabama:* 1884, Jaques *v.* Horton, 76 Ala. 238, 245 (proof must be "clear and positive"); 1886, Skeggs *v.* Horton, 82 Ala. 353, 354, 2 So. 110 (but it need not be proved beyond a reasonable doubt); 1914, Allen *v.* Scruggs, 190 Ala. 654, 67 So. 301 (substance only is required, not the words); *Arkansas:* Dig. 1919, § 10545 (inadmissible "unless its provisions be clearly and distinctly proved by at least one witness, a correct copy or draft being deemed equivalent to one witness"); *California:* C. C. P. 1872, § 1339 ("its provisions" must be "clearly and distinctly proved by at least two credible witnesses"); 1901, Camp's Estate, 134 Cal. 233, 66 Pac. 227 (will held sufficiently established on the facts); 1909, Patterson's Estate, 155 Cal. 426, 102 Pac. 941 (a part distinctly proved can be given effect); *Connecticut:* 1874, Johnson's Will, 40 Conn. 587, 589 (not sufficiently proved on the facts); *Delaware:* 1849, Butler *v.* Butler, 5 Harringt. 178 (see quotation *supra*); *Georgia:* Rev. C. 1910, § 3863 (must be "clearly proved"); *Illinois:* 1882, Anderson *v.* Irwin, 101 Ill. 411, 415 (will sufficiently proved on the facts, quoted *supra*); 1913, Cassem *v.* Prindle, 258 Ill. 11, 101 N. E. 241 ("substance of the will" suffices); *Indiana:* 1894, Jones *v.* Casler, 139 Ind. 382, 384, 38 N. E. 812 (will sufficiently proved on the facts); *Kentucky:* 1838, Allison's Dev. *v.* Allison's Heirs, 7 Dana 90, 95 (proof of "the substance of the different devises as to the property or interest devised, and to whom devised," held sufficient); 1844, Steele *v.* Price, 5 B. Monr. 58, 65 (will sufficiently proved on the facts); 1907, Bradshaw *v.* Butler, 125 Ky. 162, 100 S. W. 837 (Steele *v.* Price followed); *Maine:* 1910, In re Lord's Will, 106 Me. 51, 75 Atl. 286 ("clear, strong, satisfactory, and convincing"; why not add, "positive, plain, pronounced, and persuasive"?); *Maryland:* 1913, Tinnan *v.* Fitzpatrick, 120 Md. 342, 87 Atl. 802 (purporting, executor the sole beneficiary with holding a will for eight years until all attesting witnesses were dead, and then coming forward with a copy, the original having been destroyed in a great conflagration; proof held not sufficient); *Massachusetts:* 1844, Davis *v.* Sigourney, 8 Metc. 487 (where the proof is by "the recollection of witnesses, the evidence must be strong, positive, and free from doubt"; here there was some doubt as to whether certain estates were for life or in fee); 1900, Tarbell *v.* Forbes, 177 Mass. 238, 58 N. E. 873 ("what is required is the substance of its material provisions"; explaining Davis *v.* Sigourney); *Missouri:* 1835, Jackson *v.* Jackson, 4 Mo. 210 (part of a lost will may suffice); 1839, Dickey *v.* Malechi, 6 Mo. 177, 184 (same); *Nebraska:* 1903, Williams *v.* Miles, 68 Nebr. 463, 94 N. W. 705, 96 N. W. 151 (there must be "clear and convincing" proof); *New Jersey:* 1863, Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401, 405 ("The true rule is that the will may be established upon satisfactory proof of the destruction of the instrument and of its contents or substance; whether the proof be by one witness or by many, it must be clear, satisfactory, and convincing"); 1898, Coddington *v.* Jenner, 57 N. J. Eq. 528, 41 Atl. 874 (must be "clear, satisfactory, and convincing"); *New York:* 1844, Grant *v.* Grant, 1 Sandf. Ch. 235, 243, *semble* ("substantial contents" suffice); 1922, Fox's Will, Surr., 193 N. Y. Suppl. 232 (terms of will, not sufficiently shown); *Ohio:* Gen. C. 1921, §§ 10546, 10547, Rev. St. 1898, § 5947 (contents of lost or destroyed will may be "substantially proved"); *Oklahoma:* Comp. St. 1921, § 1123 ("No will shall be proved as a lost or destroyed will . . . unless its provisions are clearly and distinctly proved by at least two credible witnesses"); *Pennsylvania:* 1906, Michell *v.* Low, 213 Pa. 526, 63 Atl. 246; *Philippine Isl.* 1906, Araujo *v.* Celis, 6 P. I. 223 (proof not sufficient); 1906, Timbol *v.* Manalo, 6 P. I. 254 (proof held sufficient); *South Dakota:* Rev. C. 1919, § 3214 (like Okl. Comp. St. § 1123); *Tennessee:* 1897, McNeely *v.* Pearson, — Tenn. —, 42 S. W. 165 (must be "clear and convincing"); *Vermont:* 1842, Minkler *v.* Minkler, 14 Vt. 125, 127; 1868, Dudley *v.* Wardner, 41 Vt. 59 ("full and satisfactory" proof; here a copy was said to be receivable); *Virginia:* 1896, Thomas *v.* Ribble, — Va. —, 24 S. E. 241 (proof must be very clear).

Though the situation obviously admits of no fixed rule, the following passages will illustrate the general mode of judicial treatment:

1876, COCKBURN, C. J., in *Sugden* v. *St. Leonards*, L. R. 1 P. D. 154, 161, 230 (here the will was lost, but there was evidence of its contents in the shape of a summary by a witness who had many times read it or heard parts read, of eight codicils, and of other fragmentary evidence): "[As regards the question] whether, assuming that we have not before us all the contents of the lost will, probate should be allowed of that which we have, so long as we are satisfied that we have the substantial parts of the will made out, I cannot bring myself to entertain a doubt. If part of a will were accidentally burnt, or if a portion of it were torn out designedly by a wrongdoer, it would nevertheless, in my opinion, be the duty of a court of probate to give effect to the will of the testator as far as it could be ascertained. It is not because some, who would otherwise have benefited by the will, may thus fail to profit by the intended dispositions of the testator, that his will should be frustrated and fail of effect where his intentions remain clearly manifest. . . . I think that there could not be a more mischievous consequence; and although it may be unfortunate that the will cannot be carried into execution to the full extent of the testamentary dispositions of the testator, I think that of two evils or inconveniences it is far better, where the Court can see its way to the essentially substantial dispositions made in a will, that it should give effect to them, although possibly some of the intentions of the testator may not be carried into effect."

1849, WOOTTEN, J., in *Butler* v. *Butler*, 5 Harringt. 178, 179: "Proving part only of the contents of a will which is lost or destroyed is not sufficient to establish it, even as to the part so proved, unless it satisfactorily appears that there is nothing in the preceding or subsequent part of the will which would qualify, change, or in any way alter the particular devise proved; for without knowing the certainty of the will, and the language used by the testator, it would be impossible to determine what estate would pass by it. The words of the particular devise which may be attempted to be established might convey a fee simple; yet something might precede or follow which would reduce it to a life estate or subject it to some other restriction or limitation; or the words of the devise might create but a life estate, which by the preceding and subsequent part of the will might be enlarged and extended to a fee simple; and either an estate in fee simple, for life, or for years, might depend entirely upon some contingencies, conditions, limitations, or restrictions imposed by some subsequent part of the will. . . . [The proof should be] at least sufficient to form the basis of a correct conclusion as to the legal import of the will, and the nature and extent of the estate conveyed by it. Any rule less stringent would, instead of closing the avenues to fraud, throw open the door to those of a much more serious and dangerous character than could reasonably be expected to result from the loss or destruction of such instruments."

1882, MULKEY, J., in *Anderson* v. *Irwin*, 101 Ill. 411, 414: "The law is intended to be practical in its application to the varied transactions and circumstances which go to make up the affairs of life and which are constantly giving rise to legal controversies. . . . The counterpart of this [the best evidence] rule is, the law is always satisfied where the fact sought to be established has been proven by the best evidence of which in its nature it is susceptible. . . . The instrument in controversy having been destroyed without the fault of the defendant in error and with the connivance of a part if not all of the plaintiffs in error who interposed any defence in the court below, and there not appearing to be any copy of it in existence, it would be equivalent to denying the plaintiff relief altogether to require her to prove the very terms in which it was conceived. All that could reasonably be required of her under such circumstances would be to show in general terms the disposition which the testator made of his property by the instrument, that it purported to be his will, and was duly attested by the requisite number of witnesses."

This general principle has been applied in different courts with varying degrees of strictness, and no more detailed rule can be deduced; a statute, however, often adopts a rule in some similar form of words.

From the operation of the present principle, however, must be distinguished certain others: (*a*) The degree of persuasion — whether beyond a *reasonable doubt*, or the like — which is required for the tribunal in proof of a lost will is apparently greater than that ordinarily demanded — *i. e.* persuasion by preponderance of evidence — in other civil cases (*post*, § 2498). The same rulings usually lay down both principles without discrimination in the same phrases (as illustrated in the citations above), yet the fulness of detail as to the contents of the will and the degree of persuasion as to the fact of these contents are certainly different things, and may properly be distinguished even though judges may fail to do so. (*b*) The *number of witnesses* required in proof of the *contents* of a lost will is no other than is required in other documentary cases (*ante*, § 2052); yet the *execution* of it must of course be proved by the same number that would have been required for a will produced 'in specie' (*ante*, §§ 1304, 2048, 2049). (*c*) A *fragment* of a will *never executed* is of course not receivable, because it never became a will,[2] but it is in that case not rejected because of the present rule. (*d*) When a will has been *probated*, it becomes part of the record of the judgment of probate; whether it can be used in another court by copy of the will alone, without also bringing a copy of the remainder of the probate proceedings, is therefore a question of proving the parts of a judicial record (*post*, § 2110). (*e*) Whether a *lost will* must be evidenced preferably by a copy, was once much debated (*ante*, § 1267).

§ 2107. (*c*) **Public Records; (1) Lost or Destroyed; Substance suffices; Burnt Record Acts.** When a public record is *lost* or *destroyed*, the same situation exists as for private documents lost or destroyed; hence, as already noticed (*ante*, § 2105), verbal precision of proof cannot be required, but entirety of material parts must be insisted upon. The *substance* of the missing document suffices;[1] and a *statute* sometimes expressly sanctions this for specific classes of records.[2]

[2] 1824, Montefiore *v.* Montefiore, 2 Add. Eccl. 354.

§ 2107. [1] 1836, Sturtevant *v.* Robinson, 18 Pick. Mass. 175, 179 (paper containing "the substantial contents of the lost paper," here a writ, received, nothing better being available); 1851, Com. *v.* Roark, 8 Cush. Mass. 210, 213 (*verbatim* testimony to a part of a lost judicial record, not necessary); 1875, Cunningham *v.* R. Co., 61 Mo. 33, 36 (nature and substance of the lost record must be shown); 1849, Browning *v.* Flanagin, 22 N. J. L. 567, 571 ("a mere abstract of the writ," sufficient on the facts); 1865, Leland *v.* Cameron, 31 N. Y. 115, 120 (lost execution; an attorney's entry of its issuance, held sufficient evidence; "its contents were prescribed either by statute or by the practice of the Courts," and "we must assume that the execution was in due form"); 1876, Mandeville *v.* Reynolds, 68 N. Y. 528, 533 (contents of a lost judgment-roll, sufficiently shown by a judgment-docket verified by the clerk upon past recollection as substantially correct, and by a "judgment-book," similarly verified; "where the lost paper is of a kind which is usually drawn up in accordance with a statute and usually follows a form devised for that kind of instrument," such evidence suffices to show that the document contained the essential legal features).

[2] *Ind.* Burns Ann. St. 1914, § 480 (burnt record of partition proceedings, provable by certified transcript of judgment "without the residue of the record"); § 481 (burnt or lost

It follows that the proof of lost deed-records by an *abstract of title* based upon them would at common law suffice, if duly authenticated on the stand by the person who made it; the chief object, therefore, of the "burnt-record acts" of several States is to authorize the hearsay use of conveyancers' abstracts without calling the maker to the stand (*ante*, § 1705).[3]

But, though under the present principle, the substance as proved by a witness from recollection or memoranda may thus suffice, yet by another principle — that of Preference — proof by *written copy* is always preferred, in the case of a public record; *i. e.* if a written copy is known to be in existence and can be obtained, it must be used (*ante*, § 1269).

§ 2108. **Same: (2) Record Accessible; Copy of Whole required.** Where the public record is in existence, it is usually no more procurable for presentation in Court than when it is lost, and therefore, being by law irremovable, its production 'in specie' is ordinarily not required (*ante*, §§ 1215–1222). But, with reference to the proof of its contents, a very different application of the principle of Completeness ensues; for, since the original is in existence and accessible to all, it is still feasible to reproduce the original by written copy, in full both as to verbal precision and as to entirety of parts. Since this is feasible, it may well be required, having in mind the great importance, especially for legal documents, of comparing every word and part in the whole before determining the total sense and effect that should be given it.

Accordingly, it has always been an accepted principle, for *accessible public records*, that the proof must be by *written verbatim copy of the whole:*

Ante 1726, Chief Baron GILBERT, Evidence, 17, 23: "When any record is exemplified, the whole record must be exemplified, for the construction must be taken from the view of the whole matter taken together; . . . for the precedent and subsequent words and sentence may vary the whole sense and import of the thing produced, and give it quite another face; and therefore so much at least ought to be produced as concerns the matter in question."

1820, JOHNSON, J., in *Vance* v. *Reardon*, 2 N. & McC. 299, 303: "The mischiefs of confounding them [copies and extracts] appear to me too manifest to need exposure. A party is not presumed, nor is he bound, to know what evidence his adversary will adduce against him; and if he [the adversary] be permitted to extract from a record only so much as he may deem necessary to his own side of the question and to give it in as evidence, he will always take care to leave out that which makes against him. By the same rule, the opposite party would have the same right to extract so much as was subservient to his side of the question, which, from the specimen of extraction furnished by this case, would produce inexplicable difficulties."

record of deed or mortgage; "general index of the record," sufficient to prove "proper execution and record"); Md. Annot. C. 1914, Art. 35, § 56 (land-office commissioner's certified copy under seal of extract of deed transmitted by court clerk, admissible if deed and record are lost or destroyed); W. Va. Code 1914, c. 73 A, § 10 (proceedings of commissioners to establish contents of burnt records, usable when "no higher or better evidence can be had").

Add here the statutes dealing with the use of *judicially established copies* (*ante*, § 1660), and of *illegible, mutilated*, or other records recopied (*ante*, § 1275).

The use of a *clerk's docket or minute-book* is further considered *post*, § 2450, under the principle that it is the *record itself*, when the judgment-roll has not been made up or is lost.

[3] For an *abstract of title* as an *admission* by the *party* making it, see *ante*, § 2105, note 5. The proof of the lost *deed itself* by a *record* containing only an *abstract* has already been considered in § 2105, note 4.

1829, PORTER, J., in *Dismukes* v. *Musgrove*, 8 Mart. N. S. 375, 381: "The necessity of producing the whole of a record is founded on the idea that the part omitted contains something unfavorable to the party offering it, and that the construction must be gathered from the whole taken together."

Before noticing the application of this principle, certain others must be called to mind which lead by other roads to the same result in certain respects. (*a*) By the rule about producing originals, a *voluminous record* (usually of pecuniary accounts, sometimes of other entries) may be proved by a summary or abstract (*ante*, § 1230). This is in form an exemption from producing the original, but practically involves the present rule also. (*b*) By the exception to the Hearsay rule for Official Statements, a *certified copy* of a public record is admissible when made by an officer having authority to furnish copies. Now this authority is universally conceded to extend merely to the furnishing of full copies, and consequently an official *certificate of the effect* or *substance* of a record is not receivable under that Hearsay exception, unless by statute express authority to give such certificates has been conferred (*ante*, § 1678). The result of that principle is to require a 'verbatim' copy from official certifiers.[1] But obviously it says nothing as to the use of sworn or examined copies, *i. e.* verified on the stand by the witness who has made them; and in his case, therefore, the requirement of Completeness is due solely to the present principle; though for certified copies the present principle and the above Hearsay exception coincide in their effect. (*c*) By a rule of Preference, *a written copy* is always *preferred* to *oral testimony by recollection*, in proving the contents of a public record (*ante*, § 1269). Its practical effect coincides with that of the present rule of Completeness. Nevertheless, it is genuinely a rule of Preference, because, even if a witness could repeat the record's contents 'verbatim' from recollection, still a written copy would be preferred; so that the rule of preference is directed to the priority of written-testimony over recollection-testimony, and does not in itself declare anything as to the 'verbatim' tenor of the testimony. (*d*) Last of all comes the present principle of Completeness, by virtue of which the record's contents must be reproduced 'verbatim,' — this principle being independent of the other two, and having an operation of its own over and above theirs, even though at some points there may be a coincidence of effect, apparent or real.

By the rule of Completeness, then, there is required (*ante*, § 2095, par. 2) both *verbal precision* and *entirety of parts:*

(1) *Verbal precision* might be satisfied by a recollection-witness testifying 'verbatim' to the record's contents. But, by the rule of Preference above noted, this 'verbatim' report must be in writing, *i. e.* a "copy." That a *written copy of the record* must be produced is thus the composite result of the two rules.[2]

§ 2108. [1] Whether the certificate is *in form* correct — as, by using the words "a true copy," a "correct copy" — also concerns the principle of § 1678, *ante;* some authorities are there collected.

[2] Authorities have been placed *ante*, § 1269.

(2) The requirement of *entirety of parts* renders it necessary to examine the different kinds of public records, in order to ascertain in what consists entirety, and what portions belong together as inseparable parts of a single whole. To that question we now come:

§ 2109. **Same: Application to Sundry Public Records (Deed-Registers, Land-Patents, Assessors' Books, Corporate Records, Statute-Rolls, Marriage-Registers, etc.).** The various sorts of public records differ so widely in tenor and constitution of parts that no fixed rule is possible. In general, there is a broad distinction between records which merely *copy* in succession for permanent reference *single private documents* each complete in itself — such as records of deeds or land-patents — and records which contain *successive entries of officers* as to their doings from time to time in a certain class of matters. In the former instance, the same rule should apply that would have been applied to the document if proved by copy from the original (*ante*, §§ 1268–1272), *i. e.* the copy must be of the whole document as recorded, but not of any other document that may happen to be recorded in the same book.[1] But in the other class of records, where successive entries are made by the officer in a single book, concerning many persons or pieces of property, the same person or property being dealt with in perhaps various parts of the book, it is not necessary to reproduce any but the entries affecting the subject-matter of the litigation.[2] In particular, the use of copies of entries in a *parish-register* of marriages, births, and deaths will depend much on the scope of the family occurrences desired to be proved.[3] So also the proof of *corporate*

§ 2109. [1] *Eng.* 1650, Nelthrop *v.* Johnson, Clayt. 142 ("in this case, part of a long patent was copied out, and sworn true and [that] it was so much of it as did concern the thing in question"; excluded, "for that there may be provisoes, etc., in the patent, and the witness could not swear he did read the roll throughout of this patent, . . . 'quod nota', if he could, it seems it had been admitted"); *U. S.* 1866, Rice *v.* Cunningham, 29 Cal. 492, 497 (book of official grants, with an entry of a grant to K.; the marginal entry, "not taken," required to be read also); 1884, Hamilton *v.* Shoaff, 99 Ind. 63, 65 (record of a deed; answers in a deposition reciting items in the record, excluded); 1887, Mercier *v.* Harnan, 39 La. An. 94, 1 So. 410 (abstract of record of copy of marriage-contract, excluded); 1899, Cary *v.* Cary, 189 Pa. 65, 42 Atl. 19 (copy of a mortgage containing also a copy of an entry of satisfaction; the latter held to be also in evidence); 1857, Atkins *v.* Lewis, 14 Gratt. Va. 30, 34, *semble* (abstract of a land-patent, not receivable on objection made).

Contra: Can. N. Br. Consol. St. 1903, c. 127, § 30 ("in the proof of title from the Crown" by examined or certified copy, clauses "which may not be pertinent or relevant to the matter in question" need not be proved; and no copy shall be excluded for omissions which "do not prejudice the opposite party or affect the merits in question"); § 31 (yet plats or plans referred to must be copied, unless on proof that no such plat or plan is there entered); *U. S.* 1831, Robinson *v.* Gilman, 3 Vt. 163, 164 (extracts from a land-warrant, sufficient on the facts).

Compare the rule as to proving the *substance of a lost deed* (*ante*, § 2105). Whether a *seal* must be recited in the copy of the record, or in the record, is also there briefly noticed.

Compare also, on all the kinds of documents in this section, the cases cited *ante*, § 1678 (certificate of effect of a record).

[2] Ark. Dig. 1919, § 4128 (extract or entry from tax-list or book or from auditor's records, admissible equally with the entire list, etc.); 1848, Job *v.* Tebbetts, 10 Ill. 376, 380 (extracts from tax-records, held sufficient); 1898, State *v.* Howard, 91 Me. 396, 40 Atl. 65 (U. S. collector's list of liquor taxpayers; entry relating to defendant alone, sufficient); Oh. Gen. C. 1921, § 12362, § 5339 *c* (abstracts of certain lost records, etc., receivable); 1845, Farr *v.* Swan, 2 Pa. St. 245, 255 ("An extract is evidence, if it appears on its face to contain all that relates to the subject in controversy"; here, of a plot of lots); Tenn. Shannon's Code 1916, § 5576*a* 2 (deed-register's copy of relevant part of description of tract is admissible).

[3] 1875, American Life Ins. Co. *v.* Rosenagle, 77 Pa. 507, 515 (copy of parish-register entries

records will naturally vary according to the matters in issue.[4] The parts of a *statute* are in no less a degree composite and variant, and the extent to which a copy must reproduce the terms depends on the issue and on the scope of the statute.[5]

§ 2110. **Same: Application to Judicial Records (Common-Law Judgment, Chancery Decree, Probate of Will, Criminal Conviction, Sheriff's Deed, etc.).** (1) A *judicial record*, made up as it is of separate documents and entries representing the successive stages in the proceedings, is of all records the one which most requires the application of the principle of Completeness; and it is to this kind of record that the judicial utterances already quoted (*ante*, § 2108) chiefly refer. Without considering the plaintiff's statement of claim, the defendant's statement of defence, the intermediate motions and orders, the verdict, and the later doings, it is impossible to ascertain what are the terms of the judgment which is to be proved and acted on.

Only one distinction is to be noted, namely, that since a judgment may be invoked for varying purposes, the scope of the portion needing to be examined may not be the whole. Ordinarily, a judgment is invoked in order to obtain its enforcement in a later proceeding in the same or another court or in another jurisdiction, and thus the whole of the record must be consulted. But in many cases the *fact of the judgment* having been rendered is sufficient for the purpose in hand, and in this situation the final order of judgment is alone needed. It is therefore conceded on all hands that in cases where the fact of judgment rendered, irrespective of the full details of the precise matters in controversy, is alone material, a copy of the final

by tabulating all material dates, etc., held sufficient); 1878, State *v.* Colby, 51 Vt. 291, 295 (clerk's certified copy of marriage record, omitting the certificate of the minister, not sufficient); 1879, State *v.* Potter, 52 Vt. 33, 38 (copy of marriage record held sufficient on the facts); 1887, Blair *v.* Sayre, 29 W. Va. 604, 606, 2 S. E. 97 (official abstract of marriage certificates, etc., admitted under statute). Compare the statutes cited *ante*, § 1644, which often imply something on this point.

[4] 1855, Banks *v.* Darden, 18 Ga. 318, 341 (corporation books, when offered, "are testimony before the jury as to all entries appertaining to the same transaction"; but the offeror may read what he chooses, leaving the opponent to read the rest); 1866, Vischer *v.* R. Co., 34 Ga. 536, 539 (corporation book of minutes; relevant parts not first read may be treated as "already before the jury"); 1900, Fouche *v.* Bank, 110 Ga. 827, 36 S. E. 256 (corporation minutes; the whole relating to the transaction, not required); 1843, Woods *v.* Banks, 14 N. H. 101, 109 ("In admitting copies of records [here proprietary records], it would be absurd to require a copy of the whole book; copies of so much of the record as relates to the subject-matter of the suit are allowed; but there should generally be an entire copy of the proceedings of a particular meeting or anything else done and transacted at a particular time"); 1854, Whitehouse *v.* Bickford, 29 N. H. 471, 481 (*semble* it must be merely "a full record of the entire matter which it embraces or to which it relates"); 1858, Sinking Fund Com'rs *v.* Bank, 1 Metc. Mass. Ky. 174, 185 (recital of corporation's proceedings as set forth in a mortgage, received as a copy).

[5] 1838, Adle *v.* Sherwood, 3 Whart. Pa. 481, 483 (so much only of a statute "as pertains to the matter in point" need be certified); 1839, Swift *v.* Fitzhugh, 9 Port. Ala. 39, 54 (only the material portion need be offered); 1845, Chamberlain *v.* Maitland, 5 B. Monr. Ky. 448 (deposition of a foreign notary verifying an extract from a law as to holidays, admitted); 1864, Biesenthall *v.* Williams, 1 Duv. Ky. 329 (similar; treated as a "sworn extract" of a record); 1859, Grant's Succession, 14 La. An. 795 (contents of a usury statute, sufficient on the facts); 1824, State *v.* Welsh, 3 Hawks N. C. 404, 407 (title of a statute not sufficient, in proving an incorporation); 1876, Grant *v.* Coal Co., 80 Pa. 208, 216 (copy of a chapter of a foreign statute, held sufficient).

For proof of a *foreign statute* by expert testimony, see *ante*, §§ 1271, 1953.

order of judgment, with perhaps one or two other parts of the record, will suffice:[1]

1828, MILLS, J., in *McGuire* v. *Kouns*, 7 T. B. Monr. 386: "It is a general rule that records, when used in evidence, must be produced entire. But this rule is laid down with some exceptions and limitations. The reason assigned for it is that the part of the record which is lacking may give the rest a different meaning. Where a record is used as evidence to prove the facts therein contained, the rule well applies. But where it is only used (as it is here) to show the fact that there was such a judgment, then so much of the record as is relevant is frequently permitted to be used. Here the fact to be shown [in an action for land bought at a sale on execution] was that there was such judgment to warrant the execution, and enough of the record is produced to establish that fact."

(2) Between these two extremes, therefore, lie an innumerable variety of cases. At one end are the cases in which the entire record is needed in order to enforce in detail the terms of the right vindicated by the judgment. At the other end are the cases in which merely the final order is needed as showing that in fact it was made. Naturally, then, the scope of the copy will depend upon the *nature of the issue in hand*. No fixed rule can be laid down; the substantive law applicable to the case in hand will have an important bearing.[2]

§ 2110. [1] 1892, Gibson *v.* Robinson, 90 Ga. 756, 763, 16 S. E. 969; 1900, Little Rock C. Co. *v.* Hodge, 112 Ga. 521, 37 S. E. 743; 1855, Lee's Adm'x *v.* Lee, 7 Mo. 531, 534; Md. Ann. Code 1914, Art. 35, § 64 ("short copies" of a judgment or decree are receivable to prove "the recovery of such judgment or decree"); 1897, Rainey *v.* Hines, 121 N. C. 318, 28 S. E. 410.

[2] The substantive law being usually the determining feature, it would be unprofitable to attempt a full collection of the precedents; the following will serve merely as illustrations of the principle:

ENGLAND: 1661, Trowel *v.* Castle, 1 Keb. 21, *semble* (chancery decree must be accompanied by bill and answer); 1833, Blower *v.* Hollis, 1 Cr. & M. 393 (same question; undecided); 1841, Leake *v.* Westmeath, 2 Moo. & Rob. 394 (bill and answer required).

CANADA: *N. Br.* Consol. St. 1903, c. 127, § 29 ("such parts which may be so necessary" of specified kinds of records will suffice instead of the whole); *N. Sc.* Rev. St. 1900, c. 163, § 15 (certified copy of an order or entry of judgment suffices, without the record).

UNITED STATES: *Arkansas:* 1881, Wilson *v.* Spring, 38 Ark. 181, 186 (decree in chancery reciting former proceedings, the other records having been burned; decree alone sufficient on the facts, but also because it was effective in this case 'proprio vigore' without the other proceedings); 1886, Hallum *v.* Dickinson, 47 Ark. 120, 124, 14 S. W. 477 ('nul tiel record'; parts set forth held insufficient); *California:* 1857, Nims *v.* Johnson, 7 Cal. 110 (record, lacking judgment-book, held insufficient); 1861, Goldstone *v.* Davidson, 18 Cal. 41 (certification of each part of the record as a separate paper, sufficient, though not proper); C. C. P. 1872, § 1907 (certified copy of a foreign judicial record must contain "an exact transcript of the whole of it"); *Georgia:* 1887, Doggett *v.* Sims, 79 Ga. 253, 257, 4 S. E. 909 (record of conviction, not sufficient on the facts); 1899, Ocean S. S. Co. *v.* Wilder, 107 Ga. 220, 33 S. E. 179; 1906, Patterson *v.* Drake, 126 Ga. 478, 55 S. E. 175; *Illinois:* 1886, McMillan *v.* Lovejoy, 115 Ill. 498, 4 N. E. 772; 1902, People *v.* Pike, 197 Ill. 449, 64 N. E. 333 (county court records, held sufficiently proved on the facts); *Indiana:* 1861, Phelps *v.* Tilton, 17 Ind. 423; 1881, Kusler *v.* Crofoot, 78 Ind. 597, 600 (action on notes for a judgment; copy held incomplete on the facts); 1881, Jenkins *v.* State, 78 Ind. 133 (conviction; record sufficient on the facts); 1883, Anderson *v.* Ackerman, 88 Ind. 481, 490 (partnership; record held sufficiently complete); 1884, Brown *v.* Eaton, 98 Ind. 591, 595 (action on a judgment; record incomplete on the facts); 1889, Winemiller *v.* Thrash, 125 Ind. 353, 25 N. E. 350 (malicious prosecution; the indictment allowed to be read); 1905, Chicago & S. E. R. Co. *v.* Grantham, 165 Ind. 279, 75 N. E. 265 (eminent domain; transcript held sufficient); *Iowa:* 1855, Lattourett *v.* Cook, 1 Ia. 1, 5 (whole not required on the facts); 1858, Campbell *v.* Ayres, 6 Ia. 339, 344 (judgment without pleadings, not sufficient on the facts); *Kentucky:* 1808, Walker *v.* Kendall, Hardin 404, 409; 1819, Grebbin *v.* Davis, 2 A. K. Marsh. 17; 1903, Tompkins *v.* Com., 117 Ky. 138, 77 S. W. 712 (competency of a

(3) The *probate of a will* is a judgment pronouncing the due execution of a will, and therefore a copy of the will alone will usually not suffice, where the offer assumes the execution of the will as a fact; the whole of the record of probate must on principle be offered. But the presumption of regularity of official proceedings (*post*, § 2534) may well suffice to dispense with certain parts of the record or to prove certain parts of the proceedings not contained in the record. The requirements, however, of the substantive law and of local procedure, as well as the general regulation of the subject in modern times by express statute of procedure, so complicate the subject that it would be unprofitable to attempt to disentangle the operation of the principle of Evidence.[3]

divorced wife; record of divorce not required); *Maryland:* Annot. Code 1914, Art. 35, § 67 (instead of a transcript of the record of a cause in a domestic court, the original papers with a transcript under seal of the docket entries will suffice); St. 1918, Apr. 10, c. 130, amending Ann. Code, Art. 35, § 56 (certified copy of extract of deed, mortgage, etc. by court clerk, transmitted to land office, admissible); 1911, Mundy *v.* Jacques, 116 Md. 11, 81 Atl. 289 ('nul tiel' record; complete copy of Illinois judgment-record required; distinguishing Code Art. 35, *supra*, n. 1, as applying only to domestic judgments); *Massachusetts:* 1842, Eaton *v.* Hall, 5 Metc. 287, 290 (an order of reference to arbitration; "proof of a copy, or of the contents so full and complete as to be substantially a copy," allowed); *Michigan:* 1897, Drosdowski *v.* Chosen Friends, 114 Mich. 169, 72 N. W. 169; *Mississippi:* 1854, Mandeville *v.* Stockett, 28, Miss. 398, 408 (when the record itself is not producible, its disputed contents must be tried by complete transcripts, not by certified extracts or by depositions); 1857, Shirley *v.* Fearne, 33 Miss. 653, 667 (same); 1897, Rule *v.* State, — Miss. —, 22 So. 872 (perjury; to determine materiality the whole of the record or as much as is helpful should be produced; here, the defendant was allowed to produce additional parts); *Missouri:* 1829, Phillipson *v.* Bates, 2 Mo. 116 [95]; *New York:* 1807, Wilson *v.* Conine, 2 John. 280 (chancery decree awarding execution on a prior decree recited, offered to show the prior decree; held insufficient as a copy); 1830, Winans *v.* Dunham, 5 Wend. 47 (approving the preceding); 1827, Packard *v.* Hill, 7 Cow. 434, 443, on app. 2 Wend. 411, 5 Cow. 375, 384 (foreign judgment; documents held sufficient); *Pennsylvania:* 1823, Hampton *v.* Speckenagle, 9 S. & R. 212, 221 (record of partition, held insufficient); *Tennessee:* 1833, Lowry *v.* M'Durmott, 5 Yerg. 225 (decrees of sale read, without producing bill and answer, to show land-title); 1842, Lewis *v.* Bullard, 3 Humph. 207 (action on a prosecution bond; execution not usable without the whole record); 1848, McCully *v.* Malcom, 9 Humph. 187, 192 (copy of indictment, without the rest of the record, excluded); 1849, Whitmore *v.* Johnson, 10 Humph. 610, 612 (decree divesting title to realty, sufficient without the whole record); 1865, Carrick *v.* Armstrong, 2 Coldw. 265 (champertous agreement to transfer judgment; deposition, etc., without the entire record, inadmissible); 1871, Coffee *v.* Neely, 2 Heisk. 304, 307 (clerk's certificate of record, held to import a copy of the whole); 1873, Saint *v.* Taylor, 12 Heisk. 488, 491 (insolvency in another State; decree sufficient, without the entire record); 1880, Garner *v.* State, 5 Lea 213, 217 (justice's judgment recovered on county warrants; whole of the record to be produced); 1880, Willis *v.* Louderback, 5 Lea 561 (sale by decree of Court; whole record required); 1912, King *v.* Cox, 126 Tenn. 553, 151 S. W. 58 (damages on dissolution of injunction; part of record, held not sufficient on the facts: cases collected); St. 1919, Apr. 16, c. 130 (certified copy of final decree, without the entire record, admissible); *Vermont:* 1797, Richards *v.* Pearl, D. Chip. 113 (trespass for cattle taken from the plaintiff, who obtained them under an execution; judgment as well as execution required to be read); *Virginia:* 1836, White *v.* Clay, 7 Leigh 68, 78 (injunction bond decree; extracts sufficient on the facts); 1918, Virginia & W. Va. Coal Co. *v.* Charles, D. C. W. D. Va., 251 Fed. 83 (decree of sale of lands).

Sometimes, though a prior decree is required, it may be sufficiently proved by a *recital* in the one offered (*ante*, § 1664).

Compare the citations *ante* § 1678 (certificate of effect of a record).

[3] The following cases may serve as illustrations; the statutes collected *ante*, § 1681, will guide to the local statutory provisions: *Fed.* 1897, Newman *v.* V. T. C. S. & I. Co., 25 C. C. A. 382, 80 Fed. 228 (probate presumed to have been made on due proof); 1909, Pineland Club *v.* Robert, 4th C. C. A., 170 *Fed.* 341 (a record of a will must show that there was a decree admitting it to probate, on the principle of § 1658, *ante*; hence a re-record of a certified copy of a will from the probate

(4) In discrediting a witness by proof of *conviction for crime*, a copy of the entire record was required at common law; but now, almost everywhere, by statute, it is allowed to prove the conviction by the cross-examination of the witness himself or by a brief certificate of the record's tenor (*ante*, § 1270).

(5) In proving title by the deed of a *sheriff* or *tax-collector* selling upon execution for a private debt or for taxes, the present principle requires at least the proof of the *judgment* and the *execution* as well as the *deed*. But, since the sheriff's deed usually recites the former documents or one of them, the further question arises whether this hearsay recital is admissible evidence of the other documents. Over both of these questions much controversy has occurred (*ante*, § 1664).[4] The present principle would also in strictness require the copy of the recorded deed to include the *entire description of all parcels of land* sold and conveyed on that occasion; but here again, for reasons of practical convenience, statute often permits the use of a deed-copy containing the description of the specific parcel of land in controversy "exclusive of the description of all other real estate therein described." [5]

§ 2111. **Same: Application to Bill, Answer, and Deposition in Chancery.** (1) It came to be generally accepted at common law that a *bill* in Chancery could not be used as an *admission* in another cause at law against the party filing the bill (*ante*, § 1065). So far, however, as it may nowadays be admissible, it is not to be considered as a judicial record, for it is offered without regard to what was determined in the suit or whether anything at all was determined. It is separable by itself, as a single connected statement, and it may of course be read without using the remaining parts of the record.[1] Whether it must be read as a whole, or may be read in parts only, depends upon the view taken of the controverted question already examined

court, no decree of probate appearing therein, was held not admissible under S. C. St. 1866, Dec. 20, admitting records of certified copies of lost originals); *Fla.* 1880, Bellamy *v.* Hawkins, 17 Fla. 750, 756 (certified extracts of probate records, excluded); *Ind.* 1885, Vail *v.* Rinehart, 105 Ind. 6, 12, 4 N. E. 218 (probate proceedings, held sufficiently complete); *N. J.* 1911, May 1, c. 309 (exemplified copy of probate of foreign will need not contain proofs of execution); *Pa.* 1820, Miller *v.* Carothers, 6 S. & R. 215, 223 (held sufficient although here only one witness had sworn before the register; both being now dead); 1829, Ripple *v.* Ripple, 1 Rawle 386, 389 (admissible, where by the certificate on the copy the probate appears to have been in due form); 1841, Loy *v.* Kennedy, 1 W. & S. 396 (register's certificate of probate, with a copy of the will, sufficient, though it showed defective proof before the register); *S. C.* 1893, Hankinson *v.* R. Co., 41 S. C. 1, 17, 19 S. E. 206 (statutory permission to prove the appointment of an executor by copy of the letters of administration dispenses with using the rest of record); *Tenn.* 1849, Harris *v.* Anderson, 9 Humph. 779 (certified copy of a foreign registered will, omitting the probate, excluded); 1860, Marr *v.* Gilliam, 1 Coldw. 488, 512 (same); 1884, Smith *v.* Neilson, 13 Lea 461, 467 (same); 1881, Mosely *v.* Wingo, 7 Lea. 145 (certified copy of a probate, held sufficient); 1897, McNeely *v.* Pearson, — Tenn. —, 42 S. W. 165 (a certified copy of a will in the probate court lacked signatures, etc., but the recitals of the record described the missing elements of the will; the due execution presumed); *Va.* 1831, Ex parte Todd, 2 Leigh 819 (whether the certificate must show foreign proof in detail, undecided).

[4] Similar questions arise for an *administrator's deed:* 1908, Felix *v.* Caldwell, 235 Ill. 159, 85 N. E. 228 (administrator's deed without decree, the records of court being destroyed, admitted, in connection with Rev. St. 1872, c. 30, § 12).

[5] *E. g.: Wash.* R. & B. Code 1909, § 1261.

§ 2111. [1] See the cases cited *ante*, § 1065.

(*ante*, § 2102), namely, whether the whole of any single writing must be used; and the practice is apparently unsettled.[2]

(2) An *answer* in Chancery — which was unquestionably receivable as an admission (*ante*, § 1065) — is for the same reason a separable document which may be treated as independent of the record; the *remainder of the record*, therefore, need not as such be proved. But an answer is at least, as its very name implies, a response to charges in the bill. On the principle, therefore, of incorporated separate writings (*ante*, § 2104), the *bill* must in strictness be *read with the answer;* for how can an answer be intelligible without the question calling for it?

1838, *Pennell* v. *Meyer*, 8 C. & P. 470. Mr. *Campbell*, for the defendant, on the defendant's answer being offered by the plaintiff: "The bill must be read as well as the answer; it is like parts of a conversation." Mr. *Wilde*, for the plaintiff: "It is not necessary; it is only the rigmarole of a draftsman.[3] . . . It is not like a conversation, because one part takes place at one time, and another part at another. . . . It is the surmise of counsel only; it does not tell the real case." Mr. *Campbell*, for the defendant: "An answer in chancery is an answer to specific questions put; first, it tells the story, and then divides the narrative into particular questions." TINDAL, C. J.: "What is the use of it, when I must tell the jury that it is only the imagination of a young man sitting in his chambers? It can only be to prejudice the jury. I never knew it done." Mr. *Campbell:* "How can your lordship and the jury know what the answer is, unless you know the statement to which it is an answer?" TINDAL, C. J.: "No doubt the questions are evidence, — the interrogatory parts of the bill." Mr. *Campbell:* "I believe the defendant's answer would not be held sufficient, though he answered all the interrogatories, if he omitted to answer all the parts of the narrative." TINDAL, C. J.: "I think, if you insist upon it upon principle, I cannot object to it; though I never knew it done before."

In strictness, then, the bill must be put in with the answer;[4] yet it is not likely that this would to-day be required, except so far as the former appears necessary to complete the sense of the latter.[5] — That the *whole of the answer* must at least be put in is elsewhere noticed (*ante*, § 2103, *post*, § 2121).

(3) A *deposition* is no part of the record, but is a separate statement by a person not a party to the cause; hence, there would ordinarily be no need of producing with it a copy of the record. But since a deposition in another

[2] 1859, Davies v. Flewellen, 29 Ga. 49 (opponent allowed to read "other parts of the same bill relating to the same issue"); 1878, Sciple v. Northcutt, 62 Ga. 42, 45 (amendment, in a separate document, to a bill in chancery, need not be read with the bill, but the opponent may read it); 1888, Jones v. Grantham, 80 Ga. 472, 476, 5 S. E. 764 (bill in chancery; "whatever the law may be, with regard to admitting a part only, . . . we are sure that if a part only be tendered, that part should be distinctly pointed out, and all of the instrument necessary to make that part fully and correctly understood should go to the jury").

[3] For this peculiarity of it, see *ante*, § 1065.

[4] 1726, Gilbert, Evidence, 55 ("because without the bill there does not appear to be a cause depending"); 1828, Rowe v. Brenton, 8 B. & C. 737, 765 (answer to interrogatories in an ancient proceeding, admitted, the interrogatories themselves being lost).

[5] 1879, Munroe v. Phillips, 64 Ga. 32, 40 (action against an administratrix; after two returns to the probate court were admitted, the opponent was allowed to put in the remainder made at the same time and sworn to in the same affidavit); 1884, Dowling v. Feeley, 72 Ga. 557, 567 (similar suit; a return of the defendant being offered by the plaintiff, held that he need not put in the vouchers referred to therein, the defendant being allowed to put in such as were connected); 1899, Edwards v. Mattingly, 107 Ky. 332, 53 S. W. 1032 (original answer, without all the pleadings, may be read).

cause cannot be used unless the parties and the issues were there the same (*ante*, § 1386), a copy of the record must, in strictness, be produced, that the identity of parties and issues may be seen. To avoid this cumbrous formality, it early became customary for the Chancellor, on authorizing an issue at law, to order the depositions to be there received without that formality. Accordingly, when the commission or other order adequately exhibits the necessary data, a copy of the record is unnecessary:[6]

1813, L. C. ELDON, in *Corbett* v. *Corbett*, 1 Ves. & B. 335, 336: "There is a great mistake upon this subject of reading depositions at law. The interposition of this Court is not from absolute necessity. If the depositions are taken in a cause between the same parties, and proof is given at the trial that the witnesses are unable to attend, the depositions may be read without an order. But then the party must incur the expense and trouble of having the bill, answer, and all the proceedings. To prevent that inconvenience, therefore, where the trial is ancillary to a suit here, an order of this Court is obtained, directing the judge at 'nisi prius' to receive the deposition without more proof than that it is the deposition."

II. MAY THE WHOLE OF THE UTTERANCE BE AFTERWARDS PUT IN BY THE OPPONENT?

§ 2113. **General Principle; the Whole on the Same Subject, if Relevant, may be put in.** For the reasons already sufficiently examined (*ante*, § 2094) the opponent, against whom a part of an utterance has been put in, may, in his turn, complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance. It has been seen, in the foregoing sections, that there is much opportunity for difference of opinion whether the *proponent* in the first instance *must* put in the whole. But there is and could be no difference of opinion as to the *opponent's right*, if a part only has been put in, himself to *put in the remainder*. Indeed it is the very fact of this opportunity and right which (as already seen) has frequent bearing upon the question whether it is worth while to require it from the proponent in the first instance.

This right of the opponent to put in the remainder is universally conceded, for every kind of utterance without distinction; and the only question can be as to the scope and limits of the right.[1]

[6] *Accord:* 1807, Bayley v. Wylie, 6 Esp. 85 (Ellenborough, L. C. J., said that "no state of things could make it necessary to produce the bill and answer, provided . . . the commission was produced"; and even this might be dispensed with where it was by lapse of time presumed lost); 1808, Palmer v. Aylesbury, 15 Ves. Jr. 176 (by the Editor, an order is not necessary; but without it "the Court of law must go through the other preliminary proof of the bill, answer, and issue joined; and it is to exempt the judge who tries the questions at law from the necessity of hearing the whole record read that an order is made as an authority for the reception of the evidence without that introductory matter"); 1818, Gordon v. Gordon, 1 Swanst. 165, 170.

Whether the *whole of the deposition* itself must be read has been considered *ante*, § 2103.

§ 2113. [1] It is therefore one of the characteristic superfluities of Code legislation that this always conceded principle should frequently be found solemnly enacted, while the important controversies already considered are ignored and left without a settlement: *Cal.* C. C. P. 1872, § 1854 ("When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may

The ensuing controversies are in effect concerned merely with drawing the line so that the opponent shall not, under cloak of this conceded right, put in utterances which do not come within its principle and would be otherwise irrelevant and inadmissible. In the definition of the limits of this right, there may be noted three general corollaries of the principle on which the right rests, namely: (*a*) *No utterance irrelevant to the issue* is receivable; (*b*) *No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part,* is receivable; (*c*) *The remainder* thus received merely *aids in the construction of the utterance as a whole,* and is not in itself testimony.[2]

(*a*) First, then, *no utterance irrelevant to the issue* is receivable. This limitation is obvious enough; because the sole purpose in listening to the remainder is to obtain a correct understanding of the effect of the part first put in; and no remaining part, even if contained in the same breath or the same writing, can furnish such aid if it is wholly irrelevant to the issue. Practically, this limitation is often unenforceable where the remainder of the utterance is contained in the same single writing; but in theory of law, at any rate, the irrelevant portions are to be given no consideration for any purpose by the tribunal:[3]

1862, WILDE, B., in *Milne* v. *Leisler,* 7 H. & N. 786, 803: "No doubt, there are cases where documents which are admissible are not proof of all the facts stated in them. For instance, if a notice to quit is given in evidence, and on its being read it appears that the landlord has drawn it up thus: 'In consequence of your not having paid your rent for the last year, and having ill-treated the farm, and allowed the premises to be out of repair, I hereby give you notice to quit on such a day,' . . . it is plain that a document may be admissible and yet not proof of all the facts stated in it."

1840, COWEN, J., in *Garey* v. *Nicholson,* 24 Wend. 350, 351: "[The rule about the whole being admissible] must obviously mean that the additional conversation called for

be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence"); *Ga.* Rev. C. 1910, § 5830 ("Where either party introduces part of a document or record, the opposite party may read so much of the balance as is relevant"); Rev. C. 1910, § 5783, P. C. § 1030 ("When an admission is given in evidence, it is the right of the other party to have the whole admission and all the conversation connected therewith"); *Ia.* Code 1897, § 4615, Comp. Code § 7322 (like Nebr. Rev. St. § 8849); *La.* C. Pr. 1900, § 356 (the opponent using a party's confessions in answers to interrogatories "must not divide them; they must be taken entire"); *Mont.* Rev. C. 1921, § 10515 (like Cal. C. C. P. § 1854); *Nebr.* Rev. St. 1921, § 8849 ("When part of an act, declaration, conversation, or writing, is given in evidence by one party, the whole on the same subject may be inquired into by the other; thus, when a letter is read, all other letters on the same subject between the same parties may be given. And when a detached act, declaration, conversation, or writing which is necessary to make it fully understood, or to explain the same, may be given in evidence"); *Or.* Laws 1920, § 711 (like Cal. C. C. P. § 1854); *P. I.* C. C. P. 1901, § 283 (like Cal. C. C. P. § 1854); *P. R.* Rev. St. & C. 1911, § 1391(like Cal. C. C. P. § 1854); *Tex.* Rev. C. Cr. P. 1911, § 811 ("When part of an act, declaration, or conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into on the other, as when a letter is read all other letters on the same subject between the same parties may be given. And when a detached act, declaration, conversation, or writing which is necessary to make it fully understood, or to explain the same may also be given in evidence").

[2] Approved in People *v.* Schlessel, 196 N. Y. 476, 90 N. E. 44 (1909).

[3] *Accord:* 1888, Hathaway *v.* Tinkham, 148 Mass. 85, 87, 19 N. E. 18.

should be relevant to the matter in issue. All evidence is received under that qualification; and, if not so restrained, might operate as a waste of time; other subjects might be introduced having no connection with the subject-matter of the suit."

1902, GRANT, J., in *Atherton* v. *Defreeze*, 129 Mich. 364, 88 N. W. 886 (title to horses; a witness for the plaintiff testified to the defendant's admission that the horses were not his; on cross-examination by the defendant's attorney, the witness, in reply to the question, "What else did he say?" said: "He said he was so blind he couldn't see; and I asked him about how much the colts were worth, and he said about $300, and if he didn't get them he would go to the poorhouse"): "Parts of a conversation, having no reference whatever to the issue upon trial, are not admissible under the rule that a party is entitled to the entire conversation. The rule means only that he is entitled to the entire conversation bearing upon the subject in controversy. Ten subjects may be talked about in one conversation. When one of the ten is the subject of litigation, it is not competent to put in evidence the conversation about the other nine. Defendant's blindness and poverty had nothing to do with the title to the property."

(*b*) Secondly, *no more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable.* This limitation is the logical result of the principle on which the rule rests. But it has not been commonly observed in defining the rule. The usual phrase is that the "whole" of the utterance — *i. e.* the remainder of the whole — may be put in; and this received distinct sanction in the following leading opinion:

1820, ABBOTT, C. J., in *The Queen's Case*, 2 B. & B. 297: "The conversations of a party to the suit, relative to the subject-matter of the suit, are in themselves evidence against him in the suit, and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation, — not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion."

But this liberal allowance cannot, in theory at least, be defended. The single purpose of considering the utterance as a whole is to be able to put a correct construction upon the part which the first party relies upon, and to avoid the danger of mistaking the effect of a fragment whose meaning is modified by a later or prior part (*ante*, § 2094). It follows that the purpose is accomplished when the tribunal has had placed before it the remaining parts which may modify or explain the first part:

1838, DENMAN, L. C. J., in *Prince* v. *Samo*, 7 A. & E. 627 (on cross-examination, in an action for falsely prosecuting a suit for debt, testimony was obtained of the plaintiff's admission on the stand in the former trial that he had been an insolvent; on re-examination, other parts of his former testimony, dealing with his present claim, were asked about): "My opinion was that the witness might be asked as to everything said by the plaintiff, when he appeared on the trial of the indictment, that could in any way qualify or explain the statement as to which he had been cross-examined, but that he had no right to add any independent history of transactions wholly unconnected with it. . . .

Upon the whole, we think it must be taken as settled that proof of a detached statement made by a witness at a former time does not authorize proof by the party calling that witness of all that he said at the same time, but only of so much as can be in some way connected with the statement proved. . . . We cannot assent to [the above passage of the opinion in The Queen's Case]. We will merely observe that it was not introduced as an answer to any question proposed by the House of Lords, and may therefore be strictly regarded as extrajudicial; that it was not necessary as a reason for the answer to the question that was proposed; that it was not in terms adopted by Lord Eldon or any of the other judges who concurred; that it was expressly denied by Lords Redesdale and Wynford; and that it does not rest on any previous authority."

1858, MERRICK, J., in *Com.* v. *Keyes*, 11 Gray 323, 325: "There is an important limitation to the rule, in giving evidence of conversations or of oral statements and declarations. The proof in such case is to be confined to what was said upon or concerning those matters which are made subjects of inquiry or investigation. Every remark or observation made upon those topics is to be received as competent evidence, because they may essentially modify the character and purport of the whole conversation, and vitally affect what might otherwise appear to be explicitly asserted or denied. But if, during the same interview between the witness and the party, other subjects of conversation or discussion are introduced, remote and distinct from that which is the object of inquiry or investigation, it is obvious that whatever may be said concerning them can have no tendency to illustrate, vary or explain it. Everything pertaining to these additional and extraneous matters should therefore be rejected as irrelevant and useless. . . . It appears that Smith, a witness produced in behalf of the government, testified on cross-examination to a conversation which he had with Walton, after they left the shop where the liquor, the sale of which constituted the offence alleged against the defendant, was procured, relative to the woman from whom they obtained it. Before re-examination the district attorney asked him by what name the woman was called by Walton; to which it was answered 'He called her Mrs. Keyes.' This inquiry was limited to what was said by Walton concerning the name of the woman, and necessarily restricted the reply to that matter alone. It did not in the least degree refer to anything which Walton might have said relative to the act of sale, or to what took place in the shop before they left it. The two things were entirely distinct and independent of each other. The first related merely to the identity of the woman; the other, to an act alleged to have been done in violation of law. It is easy to see what, in this position of the case, were the extent and limit of the right of the defendant in pursuing the examination in reference to the inquiry which had already been made. She was entitled to pursue it for the purpose of drawing out from the witness everything whatever which was said by Walton, directly or indirectly, concerning the name or identity of the woman; but having exhausted his knowledge on that subject, she could not proceed to bring in statements or declarations on another subject essentially distinct and different. She desired to ask what further was said about the transaction; which plainly must be understood to have been an inquiry what was said concerning the act of sale with which the defendant was charged in the complaint. The statement or declaration of Walton on that subject could be nothing more than mere hearsay, and was of course in itself inadmissible."[4]

Nevertheless, it is perhaps in practice undesirable to enforce such a limitation, if it is likely to lead to cumbersome definitions and to lend itself rather to quibbling objections than to substantial improvement in the investigation of truth. The simple rule, in the form to-day most commonly enforced, that

[4] The following is also a good opinion; 1840, Cowen, J., in Garey *v.* Nicholson, 24 Wend. 350, 352. The propriety of the distinction taken in the Queen's Case has been well defended by Spear, J., in Lombard *v.* Chaplin, 98 Me. 309, 56 Atl. 903 (1903).

"the whole of what was said at the same time on the same subject" may be put in, has proved easily workable, and has been attended by no technical refinements in its use.[5] It may therefore be said that the above limitation, though sound enough in principle, should not be sanctioned unless Courts can trust themselves to leave its application wholly to the determination of the trial judge.[6]

(c) Thirdly, *the remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony.* This, also, is simply a necessary deduction from the general principle. The remainder of the utterance, regarded as an assertion of the facts contained in it, is merely a hearsay statement, and as such has no standing. It is considered by the tribunal merely in order to piece out and interpret the first fragment and ascertain whether as a whole the sense of the first becomes modified. For example, in Sidney's celebrated example, if a person is charged with saying "There is no God," he appeals to the preceding clause, "The fool hath said in his heart"; the total effect is to remove the first impression that the speaker has himself asserted atheism, and to show that he has merely attributed the atheistic utterance to a fool; but the prior clause is nevertheless not to be taken as testimony that some fool *has* made that statement. It may be immaterial whether he has or not; but if it were material, this prior clause could not serve to prove it; that clause is 'functus officio' when it has removed the misleading effect of the last clause as being a statement of the speaker himself. All this is logically unquestionable. Nevertheless, it is not uncommon for Courts to treat the remaining utterance, thus put in, as having a legitimate assertive and testimonial value of its own, — as if, having once got in, it could be used for any purpose whatever.[7]

§ 2114. **Other Principles discriminated (Res Gestæ, Witness' Explanation of Inconsistencies, Admissions by Reference or by Silence, Letters explaining Conduct).** In other parts of the system of Evidence, there are rules which

[5] The rulings will be found noted in the appropriate classes of precedents, *post*, § 2115.

[6] The principle in question was given a ludicrous application and led to a quick passage of wit between eminent counsel on an occasion in the trial of Tilton *v.* Beecher (Abbott's Rep. II. 546); Mr. Tilton having taken up a Bible in order to give Mr. Evarts on cross-examination "a better answer than my own, sir," Mr. Evarts objected. Judge Neilson: "Do you think it would be incongruous?" Mr. Evarts: "It gives us a right to put in the whole book, if he reads a part." Mr. Fullerton: "Well, sir, that would bring on your own condemnation."

[7] 1848, Church, C. J., in Bristol *v.* Warner, 19 Conn. 7, 19 (approving an instruction allowing the plaintiff to read the remainder of his own letter as evidence: "By 'substantive evidence' the judge did not mean conclusive evidence, nor even evidence which the jury was bound to believe, but only that it was, if true, relevant to the matter in dispute, to prove or disprove, as distinguished from mere explanatory evidence"); 1841, Storer *v.* Gowen, 18 Me. 174 ("Both are equally evidence to the jury").

Contra: 1894, Carter *v.* Carter, 152 Ill. 434 449, 28 N. E. 948 (letters referred to in a conversation); 1906, Merchant's L. & T. Co. *v.* Egan, 222 Ill. 494, 78 N. E. 800; 1873, Com. *v.* Vosburg, 112 Mass. 420 (telegram containing a significant assertion of fact admitted as explaining part of an admissible conversation in which it was referred to, but not allowed to be relied upon as to the assertion in it); 1832, Rice *v.* Withers, 9 Wend. N. Y. 138, 141 ("If those declarations were proof of the facts asserted, every defendant could justify, and no recovery would be had against him").

Compare the correct view as applied to a witness' self-contradictions (*ante*, § 1018).

admit the use of utterances complementary or explanatory in their nature; and their difference in principle from the present principle must here be noticed:

(1) Under the 'res gestæ,' or *Verbal Act* doctrine, it is allowable to ascertain the complete significance of a person's conduct by listening to what he said when doing the act (*ante*, §§ 1772–1786). For example, if adverse possession by Doe is relied upon to give prescriptive title, Doe's occupation of the land having been shown and his acts of ploughing or fencing having been put in evidence, it may further be shown that he said, when ploughing or fencing, "My father left me this land by will," or "I have a deed to this farm," because this gives to his acts the significance of an adverse claim.[1]

(2) An opponent may be shown to have made an *admission by reference*, *i.e.* by expressly stating that whatever a certain third person has said or will say is true, or by *silent assent* to another person's statement. Here, in effect, he adopts the other person's statement as his own, and the statement of the other person is received on the footing of an admission (*ante*, §§ 1070–1075).[2]

(3) Again, when *conduct* is offered as *indicating a state of mind*, the inference from the conduct can often not be properly made unless the circumstances leading up to and causing the conduct are considered, and these circumstances may consist in third persons' statements, which may therefore be evidenced. Thus, on an issue of sanity, the person's conduct acting upon letters received may show that his mind operated rationally upon the letters (*ante*, § 228).

(4) When a *witness* or a *party* has been *impeached by prior utterances* showing *bias* or *self-contradiction*, fairness requires that he be allowed to explain away their effect, if he can (*ante*, §§ 952, 1044, 1058). One way of explaining may be to give the remainder of what he said at the time. Here, then, the putting in of the explanatory parts is justifiable equally on two principles.[3]

(5) That the stage of *re-examination or cross-examination* is the proper *time* for putting in explanatory utterances is one of the rules for the Order of Evidence (*ante*, §§ 1884, 1896), and does not involve the tenor or limits of the utterance.

§ 2114. [1] It may be noted here that this is genuinely a branch of the principle of Completeness; *i. e.* under the Verbal Act Doctrine, the act as a whole consists of a conduct-part and a verbal part, and the verbal part may be put in as completing the conduct-part; while the principle as applied in the present Chapter deals with a verbal part complementing another verbal part. In both classes of cases it is done by virtue of the principle of Completeness; but the former class is more conveniently dealt with in the above-cited place in order to distinguish it from the Hearsay exceptions.

[2] Thus, where the separate statement is that of a third person, the two principles may overlap in their application; *i. e.* the separate statement is admissible equally under both principles.

[3] On this point a distinction was drawn by Abbott, C. J., in The Queen's Case (quoted *supra*, § 2113), in which he pronounced for admitting only the explanatory remainder in favor of a witness, but the whole in favor of a party. This distinction, however, already examined for the case of a witness (in § 1045), is unsound, and was repudiated in Prince v. Samo (quoted *supra*).

§ 2115. **Principle's Application to (1) Oral Admissions, Conversations, Confessions, Former Testimony, Depositions.** The general phrasing of the principle, then, is that when any part of an oral statement has been put in evidence by one party, the opponent may afterwards (on cross-examination or re-examination) put in the remainder of what was said on the same subject at the same time. This phrasing leaves something to be desired in definiteness, but it is practically applied without much difficulty and with little or no quibbling.

Its most common application is to *conversations* in general, including the *admissions of an opponent* and to *inconsistent statements of a witness* used in impeachment;[1] here, it may be noted that a conversation in a party's

§ 2115. [1] In the following rulings it is not always certain whether the statements were *oral* or written; in some cases, they were the statements of a *witness*, not a party's admissions; furthermore, the rulings usually declare merely that the whole may be admitted, and where they expressly limit the utterance to the explanatory part (on the principle of § 2113, par. 2, *ante*) it is so noted; the rule is applied to a conversation, where not otherwise noted; compare also the statutes quoted *ante*, § 2113, and the cases cited *post*, §§ 2119, 2120:

CANADA: 1890, Halifax Banking Co. *v.* Smith, 29 N. Br. 462, 465, 18 Can. Sup. 710 (conversation between a solicitor and one of the officers of the plaintiff bank; in the Dominion Court a larger scope was allowed; in the Provincial Court Prince *v.* Samo, Eng., was followed).

UNITED STATES: *Alabama:* 1849, McLean *v.* State, 16 Ala. 672, 677; 1853, Nelson *v.* Iverson, 24 Ala. 14; 1879, Washington *v.* State, 63 Ala. 192; 1896, Drake *v.* State, 110 Ala. 9, 20 So. 450 (threats by a defendant); 1903, Hudson *v.* State, 137 Ala. 60, 34 So. 854; 1905, Braham *v.* State, 143 Ala. 28, 38 So. 919 (all said upon the same subject); *California:* 1904, Risdon *v.* Yates, 145 Cal. 210, 78 Pac. 641 (general principle stated); *Connecticut:* 1832, Barnum *v.* Barnum, 9 Conn. 242, 247; 1833, Clark *v.* Smith, 10 Conn. 1, 5 (expressly following the opinion in The Queen's Case, *ante*, § 2113); 1848, Bristol *v.* Warner, 19 Conn. 7, 19; 1909, Thomas *v.* Young, 81 Conn. 702, 71 Atl. 1100 (not all that is said on any subject at a single interview is admissible); *Florida:* 1896, Thalheim *v.* State, 38 Fla. 169, 20 So. 938; 1903, Fields *v.* State, — Fla. —, 55 So. 185; *Georgia:* 1851, Rolfe *v.* Rolfe, 10 Ga. 143, 145; 1874, Hanson *v.* Crawley, 51 Ga. 528, 534; 1879, Cox *v.* State, 64 Ga. 374, 382, 411, 414; 1904, Brown *v.* State, 119 Ga. 572, 46 S. E. 833 (only the explanatory parts); *Illinois:* 1842, Young *v.* Bennett, 5 Ill. 43, 47 (the witness having stated some of his remarks drawing forth the defendant's answers, held that the rest of the witness' remarks were not admissible, "unless the answer would without them be unintelligible"); 1893, Jamison *v.* People, 145 Ill. 357, 378, 34 N. E. 486 (by an accused); 1904, Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28 (remainder of a conversation forming part of a negotiation of compromise, admitted); 1913, Foster *v.* Shepherd, 258 Ill. 164, 101 N. E. 411 (remainder of defendant's conversation with several persons, admitted); *Indiana:* 1901, Diehl *v.* State, 157 Ind. 549, 62 N. E. 51 (the whole is admissible, "at least so far as it may materially tend to impeach, rebut, explain, or qualify, the portion introduced by his adversary"); 1912, Tyrrel *v.* State, 177 Ind. 14, 97 N. E. 14 (former testimony; after impeachment by parts, then only so much as "explains, modifies, or is necessary to enable the jury to understand the statements introduced to impeach," is admissible in rebuttal); *Iowa:* 1859, Gaddis *v.* Lord, 10 Ia. 141, 142 (whole of a conversation at the same time and on the same subject, admissible; under the Code, quoted *ante*, § 2113); 1862, Wilhelmi *v.* Leonard, 13 Ia. 335 ("whole of the conversation"); 1863, State *v.* Elliott, 15 Ia. 72, 73 (rule not applicable to statements volunteered by the party not as a part of a conversation); 1882, Hess *v.* Wilcox, 58 Ia. 380, 382, 10 N. W. 847 (principle applied); 1897, Hartman Steel Co. *v.* Hoag, 104 Ia. 269, 73 N. W. 611 (conversation by opponent; what was said to him, admitted); 1904, Pettis *v.* Green Riv. A. Co., — Ia. —, 99 N. W. 235 (Code rule applied); 1916, State *v.* Menilla, 177 Ia. 283, 15 S. N. W. 645 (murder; applying Code § 4615); *Louisiana:* 1825, Pratt *v.* Fowler, 3 Mart. N. S. 452, 454; 1844, Lewis *v.* Gibson, 9 Rob. 146, 148; 1854, Bean *v.* Evans, 9 La. An. 163; *Maine:* 1841, Storer *v.* Gowen, 18 Me. 174 (party's oral admissions; the whole "must be taken together"); 1903, Lombard *v.* Chaplin, 98 Me. 309, 56 Atl. 903 (party's letter; the whole admitted); *Maryland:* 1827, Turner *v.* Jenkins, 1 H. & G. 161, 163; 1916, Flaccus Glass Co. *v.* Gavin, 39 Md. 431, 98 Atl. 213 (contract for bottles); *Massachusetts:* 1814, Whitwell *v.* Wyer, 11 Mass. 6, 10; 1858, Com. *v.* Keyes, 11 Gray 323 (only

presence is in effect merely one form of an admission, because statements in a party's presence are usually equivalent to admissions by him (*ante*, § 1071).

the explanatory part; quoted *ante*, § 2113); 1867, Straw *v.* Greene, 14 All. 206 (same); 1868, Farley *v.* Rodocanachi, 100 Mass. 427, 429 (here, by a slip, the rule is stated in the broader form); 1886, Dole *v.* Wooldredge, 142 Mass. 161, 184, 7 N. E. 832 (same as Com. *v.* Keyes); 1893, Com. *v.* Armstrong, 158 Mass. 78, 32 N. E. 1032 (same); 1899, Cusick *v.* Whitcomb, 173 Mass. 330, 53 N. E. 815 (same); *Michigan:* 1902, Atherton *v.* Defreeze, 129 Mich. 364, 88 N. W. 886 (only the part that relates to the subject is admissible; quoted *ante*, § 2113); *Mississippi:* 1904, Flowers *v.* State, 85 Miss. 591, 37 So. 814 (statement of the deceased); *Missouri:* 1839, Howard *v.* Newsom, 5 Mo. 523; 1873, Burghart *v.* Brown, 51 Mo. 600; 1911, State *v.* McDonough, 232 Mo. 219, 134 S. W. 545 (remainder of a conversation with a witness on other topics, excluded); 1911, State *v.* Lovell, 235 Mo. 343, 138 S. W. 523; *Nebraska:* 1901, Curlson *v.* Hohn, — Nebr. —, 95 N. W. 1125 (irrelevant parts, admissible in the trial Court's discretion); *New Hampshire:* 1843, State *v.* Winkley, 14 N. H. 491 (instead of the question to the impeached witness being confined to a specification of the original remarks, and asking categorically whether he made them, it may ask, "What did you say at the time?" thus bringing out the whole of the conversation; the theory being that by detailing the whole "he makes a denial in substance of having used the expressions in question"); 1844, Barker *v.* Barker, 16 N. H. 333, 338, *semble;* 1900, State *v.* Saidell, 70 N. H. 174, 46 Atl. 1083 (the whole, "so far as it explained or qualified the matters inquired about," allowed); *New Jersey:* 1850, Somerville & E. R. Co. *v.* Doughty, 22 N. J. L. 495, 500, *semble; New York:* 1875, Tilton *v.* Beecher, N. Y., "Official" Report, II, 313 (crim. con.; Mr. Samuel Wilkeson, a witness for the defendant, was discredited by testimony that he had admitted that the publication of the charges of crim. con. would "knock the Life of Christ higher than a kite," meaning Mr. Beecher's book; but explained that what he had really said was that this result would occur "*if* these imputations were true"); 1808, Carver *v.* Tracy, 3 Johns. 427 (whole of an oral admission must be taken); 1840, Garey *v.* Nicholson, 24 Wend. 350, 352 (like Prince *v.* Samo, Eng.); 1842, Kelsey *v.* Bush, 4 Hill 440 (action on a note for a store; defendant's statement, when admitting execution, alleging a breach of warranty, held admissible; the rule stated in the old form, and the preceding case not cited); 1862, Rouse *v.* Whited, 25 N. Y. 170, 172 (Prince *v.* Samo, Eng., followed; good opinion by Sutherland, J.); 1879, Platner *v.* Platner, 78 N. Y. 90, 103 (preceding case approved); 1892, Fleischman *v.* Toplitz, 134 N. Y. 349, 355, 31 N. E. 1089 (similar); *North Carolina:* State *v.* Pulley, 63 N. C. 9 (the witness an accomplice testifying for the State); *Oklahoma:* 1911, Gibbons *v.* Terr., 5 Okl. Cr. 212, 115 Pac. 129; 1909, Mahon *v.* Rankin, 54 Or. 328, 102 Pac. 608 (only the qualifying parts; the opinion illustrates the possibilities of perverse technicalism above-mentioned in § 2113); *Oregon:* 1918, Boyd *v.* Grove, 89 Or. 80, 173 Pac. 310 (trespass by sheep); *Rhode Island:* 1902, Sherman *v.* Stafford Mfg. Co., 23 R. I. 529, 51 Atl. 26 (the rule "does not extend to matters distinct from the admissions"); *South Dakota:* 1910, State *v.* West, 24 S. D. 530, 124 N. W. 751 (accused's admissions); *Tennessee:* 1901, Colquit *v.* State, 107 Tenn. 381, 64 S. W. 713 (irrelevant opinion statements, held inadmissible in explanation); *Vermont:* 1905, State *v.* Bean, 77 Vt. 384, 60 Atl. 807 ("all that he said upon the subject at the same time must be received"); *Virginia:* 1921, Ellison *v.* Com., 130 Va. 748, 107 S. E. 697 (witness' affidavit read in self-contradiction; the whole, containing hearsay not a part of the contradiction, not admissible); *Wisconsin:* 1896, Emery *v.* State, 92 Wis. 146, 65 N. W. 848; 1903, Paulson *v.* State, 118 Wis. 89, 94 N. W. 771; 1906, Hupfer *v.* National Dist. Co., 127 Wis. 306, 106 N. W. 831 (witness allowed to put in parts of his former testimony in explanation; English rule followed); 1906, Smith *v.* Milwaukee E. R. & L. Co., 127 Wis. 253, 106 N. W. 829 (whole of a conversation affecting contributory negligence).

The rule equally admits a statement by a *third person* taking part in the conversation between the parties: 1866, Gillam *v.* Sigman, 29 Cal. 637, 641; this is on the principle of § 1071, *ante* (admissions by silent assent to statements made in one's presence).

But the rule does not admit the remainder of the utterance when the first part has come into evidence *merely incidentally* and has not been put in evidence for its own sake: 1919, People *v.* Baker, 290 Ill. 349, 125 N. E. 263 (murder; to explain the witness' notice of defendant's actions, he answered on cross-examination that deceased had called his attention to defendant's presence; on re-examination, the remainder of deceased's utterance, alleging defendant's hostility, was not admitted); 1827, Winchell *v.* Latham, 6 Cow. N. Y. 682, 684 (a witness to a note was asked on cross-examination, to test his credit, whether he had mentioned seeing it to anybody, and to whom; he named the alleged maker as such a person; the alleged maker's reply not allowed to be evidenced on re-examination; otherwise, if the purpose and effect of the original question had been to show an admission by the maker's silence).

The principle also finds application to *confessions of an accused*[2] and to *testimony at a former trial* and to *depositions*.[3]

§ 2116. **Same: (2) Sundry Writings.** The principle as applied to writings permits the whole of the same document to be put in. But since for writings the whole is usually either required to be put in by the first party or is in effect before the Court, under the principles already examined (*ante*, §§ 2102–2111), there remains but little opportunity for the operation of the present principle. It finds occasional use for *miscellaneous documents*,[1] for *judicial records*,[2] and for *corporate records*.[3]

[1] The authorities have already for convenience been placed *ante*, § 2097.

Compare also the citations *ante*, § 2100.

[2] *Federal:* 1820, Harrison *v.* Rowan, 3 Wash. C. C. 583; *Georgia:* 1896, Lowe *v.* State, 97 Ga. 792, 25 S. E. 676 (all of the former testimony containing the alleged contradiction); *Illinois:* 1864, Aulger *v.* Smith, 34 Ill. 534 (former testimony of a party; the whole may be called for); 1905, Miller *v.* People, 216 Ill. 309, 74 N. E. 743 (former testimony used as admissions; the remainder may be offered "which tended to explain, qualify, correct, or in any manner throw light on the matters touched upon by the questions and answers which were proven"); *Indiana:* 1895, Siberry *v.* State, 149 Ind. 684, 39 N. E. 937 (after a stenographer had given parts of testimony at a former trial, the stenographer was asked by the opponent to give other and qualifying parts of the testimony, and these parts were ruled to be not in effect qualifying); *Massachusetts:* 1910, Grebenstein *v.* Stone & Webster Eng. Co., 205 Mass. 431, 91 N. E. 411 (the whole of a witness' former statement, held not improperly read, in the trial Court's discretion); *Michigan:* 1904, Culver *v.* South H. & E. R. Co., 126 Mich. 443, 101 N. W. 663 (whole of former testimony, inadmissible); *Missouri:* 1857, State *v.* Phillips, 24 Mo. 485 (the whole was read); 1875, Prewitt *v.* Martin, 59 Mo. 333 (same); 1881, State *v.* Talbott, 73 Mo. 358 (taking a modified view); 1892, Wilkerson *v.* Eilers, 114 Mo. 245, 251, 21 S. W. 514 (after cross-examination to contradictions in a deposition, the whole may be read, even though the cross-examiner read none); 1896, State *v.* Punshon, 133 Mo. 44, 34 S. W. 25 (of an accused before the coroner); 1857, State *v.* Phillips, 24 Mo. 475, 485 (deposition); 1875, Prewitt *v.* Martin, 59 Mo. 325, 334 (deposition); 1906, State *v.* Myers, 198 Mo. 225, 94 S. W. 242 (foregoing cases approved); *Montana:* 1890, State *v.* Jackson, 9 Mont. 518, 24 Pac. 213; *New Hampshire:* 1885, Whitman *v.* Morey, 63 N. H. 448, 454, 2 Atl. 899 (parts of a deposition having been used as a self-contradiction, the opponent was allowed to read as much "as pertained to the same subjects and tended to qualify, limit, or explain the answers read"); *New York:* 1893, Re Chamberlain, 140 N. Y. 390, 393, 35 N. E. 602 (former examination used by opponent in part; in rebuttal, only the explanatory parts are to be used); 1904, Hanlon *v.* Ehrich, 178 N. Y. 474, 71 N. E. 12 (there is no "hard and fast rule that will fit every case alike"; "in no event, however, should the writing, or any part thereof, be read until it has been marked in evidence"; here a general objection not specifying the parts objected to as not strictly contradictory, was held not sufficient); 1904, Taft *v.* Little, 178 N. Y. 127, 70 N. E. 211 (other parts of the opponent's former testimony, allowed to be read, so far as explanatory); *Oklahoma:* 1898, Huntley *v.* Terr., 7 Okl. 60, 54 Pac. 314 (self-contradictions in former testimony; the whole of the witness' testimony may be read in explanation); 1904, Flohr *v.* Terr., 14 Okl. 477, 78 Pac. 565; *Texas:* 1907, Corpus *v.* State, 51 Tex. Cr. 315, 102 S. W. 1152 (so much as is pertinent and explanatory of a contradictory statement offered in impeachment may be used; otherwise, the whole; here applied to former testimony).

Compare the cases *ante*, § 2098. The same is implied in the cases cited *ante*, § 2103; an *opponent's own answers to interrogatories* may stand on a different footing (*post*, § 2124).

Distinguish the question whether, in showing the rest of the utterances, the *magistrate's report of testimony* may be contradicted or added to (*ante*, § 1349).

§ 2116. [1] 1905, McBrayer *v.* Walker, 122 Ga. 245, 50 S. E. 95 (a deed offered by a grantee's administrator; the grantor allowed

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§ 2116. [1] 1855, Miles *v.* Wingate, 6 Ind. 458 (bill of exceptions as part of record of former suit, admitted; "a record is an entire thing, and if admissible for any purpose, all its parts are received"); 1871, Jones *v.* Hopkins, 32 Ia. 503, 504 (whole of a record introduced, to explain a claim leading to the judgment); 1908, Matias *v.* Alvarez, 10 P. I. 398 (whole of a record introduced); 1920, State *v.* Bramlett, 114 S. C. 389, 103 S. E. 755 (murder of Mrs. M.; defendant had introduced some affidavits in alimony proceedings brought by his wife; the State not allowed to use the whole record including an affidavit of the wife).

Compare the cases cited *ante*, § 2108.

[2] 1823, Pike *v.* Dyke, 2 Greenl. 213 (records of an adjourned meeting of town proprietors three years later, excluded). Compare the cases cited *ante*, § 2109.

§ 2117. **Same: (3) Charge and Discharge Statements.** When the admission offered consists of a statement that the claimed money, services, or the like, were in fact received, a statement made at the same time, that the claim was discharged in some way, should be admitted; because the statement thus on the whole becomes a statement of non-liability, not of liability, and the first part of it is materially modified. It is not that the second part is in itself testimony to the discharge, but rather that it destroys the 'prima facie' quality of the first part as an admission of liability:

1813, MANSFIELD, C. J., in *Randle* v. *Blackburn*, 5 Taunt. 245 (the defendant having made out an account of the plaintiff's claim for timber against a ship, figuring it at £807, and having written on the same paper a counter-claim for £764 demurrage, the plaintiff offered the paper as an admission of the whole claim, without offering other evidence, and insisted that the defendant should offer some evidence of the counter-claim): "The defendant never admitted this account as distinct from the demurrage. His statement was made all in one breath; and I cannot distinguish what he admitted to be due for the timber from what he claimed for the demurrage. The verdict therefore was only for the balance, and was perfectly right. . . . It would be doing monstrous injustice if we were not to hold this, that the whole of the declaration must be taken together. I always have thought that, if a man gave an account of a transaction, the whole of it must be taken together."

1808, *Carver* v. *Tracy*, 3 Johns. 427: "The defendant said that he received a dollar of the plaintiff, but it was his due; on this declaration [for one dollar had and received], the justice without further evidence decided that the plaintiff was entitled to recover, and that the defendant must prove the debt he claimed." On appeal, *per* CURIAM: "The justice was manifestly wrong. The whole conversation of the defendant must be taken together. The plaintiff could not take one part and reject the other. What was said by the defendant, taken together, was a denial of the demand of the plaintiff, who was bound to prove it."

This would seem to be to-day universally conceded.[1] That any doubt ever arose is probably due to the existence at one time of a controversy on a similar point as to the use of a statement of discharge in an answer in chancery, which rests on other grounds (*post*, § 2121).

to use, on this principle, the grantee's indorsement on the deed showing a usurious mortgage; properly, however, the principles governing were those of § 2132, *post*, and § 1082, *ante*, and not the present one at all); 1882, State *v.* Hawkins, 81 Ind. 486, 487 (official bond); 1895, Robinson *v.* Cutter, 163 Mass. 377, 40 N. E. 112 (letter); 1815, Griffith *v.* Ketchum, 12 Johns. N. Y. 379, 380 (sheriff's return); 1883, Grattan *v.* Life Ins. Co., 92 N. Y. 284 (letter); 1823, Trustees *v.* Hogg, 2 Hawks N. C. 370, 374 (petition to plaintiff); 1922, Weston *v.* Royal Typewriter Co., — N. C. —, 110 S. E. 581 (party's pleading in the case); 1917, Stern & Sons, Inc. *v.* Chagnon, 39 R. I. 567, 99 Atl. 592 (breach of contract; remaining parts of correspondence, excluded because immaterial); 1922, Shell *v.* State, — Tex. Cr. —, 240 S. W. 546 (murder; part of a letter of deceased having been admitted, the remaining pages were held admissible for defendant).

§ 2117. [1] *Arkansas:* 1854, Adkins *v.* Hershy, 14 Ark. 442 (admission as to an account, asserting credits due, considered as a whole); *Maryland:* 1827, Oliver *v.* Gray, 1 H. & G. 204, 219 (a debtor's acknowledgment, used to take a debt out of the statute; his statement of its discharge, made at the same time, must stand or fall with the acknowledgment; so that the creditor cannot disprove the discharge and still use the acknowledgment); *New York:* 1808, Carver *v.* Tracy, 3 Johns. 427 (quoted *supra*); 1812, Wailing *v.* Toll, 9 Johns. 141 (defendant's statement, admitting plaintiff's attendance as physician, but alleging that she was under age and had not employed him, taken as a whole); 1813, Fenner *v.* Lewis, 10 Johns. 38, 45; 1813, Credit *v.* Brown, 10 Johns. 365 (defendant's statement, that he shot the plaintiff's dog, but did it to defend himself from attack, taken as a whole); 1814, Hopkins *v.* Smith, 11 Johns. 161 (plaintiff's statement that defendant signed a note with J. H., but

§ 2118. **Same: (4) Account-Books.** The use of the whole of a ledger-account (or, in general, of all the items of account between the same parties in the same book or series of books) is open to the objection that the entries are not made at the same time but at different times, and that the case is therefore not precisely like a single oral statement or letter admitting a claim but asserting its discharge. In the latter instance it is easy to see that the intended tenor as a whole is a statement of non-liability, while in the former instance each entry admitting debit is usually at the time of making it a separate whole. Nevertheless, good sense has dictated that the whole of an account shall be taken together, whatever on strict principle might have been excluded.[1] The result has been thus defended:

claiming that J. H. signed as surety only, taken as a whole); 1817, Methodist Ep. Church *v.* Jaques, 2 Johns. Ch. 77, 116 (paper exhibited to charge may be used also in discharge); 1818, Smith *v.* Jones, 15 Johns. 229 (statement admitting a purchase but alleging payment, taken as a whole); 1837, Gough *v.* St. John, 16 Wend. 646, 652 ("'Prima facie' an inculpatory admission must be viewed in connection with matter in exculpation which comes out in the same conversation"; here, admissions of knowledge of insolvency); *North Carolina:* 1797, Barnes *v.* Kelly, 2 Hayw. 45; 1823, Jacobs *v.* Farrall, 2 Hayw. 570, 571 (statement admitting an account but claiming another account in discharging, taken together); *Pennsylvania:* 1788, Newman *v.* Bradley, 1 Dall. 240 (defendant's statement that he borrowed the money, but repaid it, taken as a whole; yet where the details mentioned in the favorable part of the statement are disproved by others, that part should be rejected); 1814, Shaller *v.* Brand, 6 Binn. 435, 438 (memorandum stating a right of dower and also its release, taken together); *South Carolina:* 1818, Arthur *v.* Wells, 1 Mill Const. 314 (declaration, by one admitting a shooting, that he did not mean to kill, taken as a whole); 1821, Smith *v.* Hunt, 1 McC. 449.

Contra, semble: 1830, Barber *v.* Anderson, 1 Bail. 358, 360 (trover, resting upon a demand and refusal; defendant on demand failed to return the slave, but said that he had sent her home; the latter statement held to be matter of defence, provable by defendant).

§ 2118. [1] *Accord:* ENGLAND: 1701, Darston *v.* Oxford, 1 Eq. Cas. Abr. 10 ("Where a man was charged only by an oath, or a book, the same should be his discharge"); 1842, Rowland *v.* Blaksley, 1 Q. B. 403 (set-off; the defendant, putting in the plaintiff's bill of particulars to prove the items set off, held bound to take the whole document).

IRELAND: 1828, L. C. Hart, in Kilbee *v.* Sneyd, 2 Moll. 186, 193 ("If you use one side of an account produced by the adversary, you must take both; you must take it altogether, or reject it 'in toto'").

CANADA: 1849, Palmer *v.* Gilbert, 1 All. N. Br. 505 (account rendered); 1893, [illegible] *v.* O'Brien, 27 N. Br. 145, 156, Can. Dig., in Cassels' Dig. 1893, p. 297 (defendant's books of account having been offered by the plaintiff as showing admissions of knowledge [illegible] solution of a partnership, the defendant was allowed to offer other entries in the same books to explain away the apparent inference from the former entries).

UNITED STATES: *Fed.* 1806, Morris *v.* Hurst, 1 Wash. C. C. 433 (good opinion by Washington, J.); 1818, Bell *v.* Davidson, 3 Wash. C. C. 328, 333; 1904, Simpson *v.* First Nat'l Bank, 129 Fed. 257, 264, C.C.A. (banking account); *Ga.* 1900, Bridges *v.* State, 110 Ga. 246, 34 S. E. 1037 (a whole book, containing certain relevant entries, allowed to go to jury under instructions, the detaching of the irrelevant parts being impossible without mutilation); *Ill.* 1901, Boudinot *v.* Winter, 190 Ill. 394, 60 N. E. 553; *Ia.* 1859, Withs *v.* Hagge, 8 Ia. 163, 189 (when charge items are offered, credit items to the same party in the same book are equally made evidence); *La.* 1826, Wakeman *v.* Marquand, 5 Mart. La. N. s. 265, 272; Rev. Civ. C. 1920, § 2248 (merchant's books are usable against them, though not in their favor; "but if used as evidence, the whole must be taken together"); *Md.* 1824, King *v.* Maddux, 7 H. & J. 467 (all the entries in the same book against the same party, admitted); *N. H.* 1907, Page *v.* Hazelton, 74 N. H. 252, 66 Atl. 1049 (other items in an account-book, admitted); *N. Y.* 1818, Walden *v.* Sherburne, 15 Johns. 409, 424 (whole of an account admitted); 1858, Pendleton *v.* Weed, 17 N. Y. 72, 76 ("the whole relating to the same matter is admissible"); 1864, Dewey *v.* Hotchkiss, 30 N. Y. 497, 502 (quoted *supra*); *N. C.* 1826, Turner *v.* Child, 1 Dev. 133; *Pa.* 1821, Withers *v.* Gillespy, 7 S. & R. 10, 14 (admissible not for "matter impertinent to the issue," but "for all purposes of explanation, . . . everything necessarily connected with the entries relied on by the plaintiff which their books contained at the time the suit was brought"); 1824, Thommon *v.* Halbach, 12

1864, HOGEBOOM, J., in *Dewey* v. *Hotchkiss*, 30 N. Y. 497, 502: "The books constituted one entire series of accounts between these parties, and, for the purposes of this case, may be regarded as if they contained nothing else whatever — indeed, as if they had all been presented in court by the plaintiffs on a single paper or account current. In such case could the defendant be permitted to cull particular entries from the account and exclude the residue? I think not. The rule that a party whose oral declarations, in a conversation, are improved in evidence by his adversary, is not thereby permitted to introduce in his own favor disconnected portions of the same conversation having reference to distinct and independent matters, has no close application to such a case; 1st, Because the account must be regarded as the single, entire, and continuous statement of the party offering it, presenting his version of the true state of the business transactions between the parties, — not necessarily entitled to credit in every part, if discredited by other evidence, but admissible for the consideration of the jury; 2d, Because the defendant, having adopted the whole statement by ranging through its entire scope and contents, has given currency to the whole, and has made it necessary to examine and take in the whole, in order to determine how far the portions rejected by him bear upon, affect, or qualify the portions selected. There is no evidence that the portions of the account introduced by the plaintiff, after those introduced by the defendant, do not materially qualify the effect of the latter items, and do not in fact relate to the same precise subject-matter."

§ 2119. **Separate Utterances excluded; (1) Conversations, Oral Admissions and Confessions, Libels, etc.** It follows, from the general principle (*ante*, § 2113), that a *distinct or separate utterance* is not receivable under this principle. The boundary here is usually defined by saying that all that was uttered at the same time on the same subject is receivable; yet it is difficult to test the line of admissibility by any formula, and none seems to have been sanctioned by general acceptance:

1839, DENMAN, L. C. J., in *Sturge* v. *Buchanan*, 10 A. & E. 598 (assumpsit for the value of a cargo improperly sold by the defendant's agent; the plaintiff having read three letters of the defendant admitting parts of the plaintiff's case, the defendant was not allowed to read other letters of his in the same letter-book dealing with the same correspondence): "This is a series of copies of letters written from time to time, on principle exactly the same thing as if they had been kept in his counting-house on a file; it is like proving what

S. & R. 238; *Vt.* 1846, Mattocks *v.* Lyman, 18 Vt. 98, 103 (payment allowed to be shown by the same books); 1900, State *v.* Powers, 72 Vt. 168, 47 Atl. 830 (entire page of a book bearing a certain entry, admitted to show the character of the book and the time of entries); *Va.* 1808, Waggoner *v.* Gray, 1 Hen. & M. 603, 608; 1809, Jones *v.* Jones, 2 id. 447; *W. Va.* 1901, Rowan *v.* Chenoweth, 49 W. Va. 287, 38 S. E. 544.

Contra, semble: 1820, Catt *v.* Howard, 3 Stark. 6 (the whole of a single entry in an account-book read, but not "distinct entries in different parts of the book").

But it is a proper qualification to exclude *entries made after suit begun:* 1821, Withers *v.* Gillespy, 7 S. & R. Pa. 10, 15; and the following ruling seems sound: 1893, Doolittle *v.* Stone, 136 N. Y. 613, 616, 32 N. E. 639 (defendant's book of accounts having been put in by plaintiff as an admission, a "distinct and separate book [of the defendant], making no reference to any other, not even bringing down a balance of account," not admitted in his favor).

The following case, making an exception to the general rule for *executors* and other *fiduciaries*, probably rests directly on the rule for chancery answers, *post*, § 2121, and should therefore be applied only to pleadings rendering an account: 1827, Robertson *v.* Archer, 5 Rand. Va. 319, 324 (excluded, because such persons are obliged "to furnish those to whom they are accountable the means of charging them to the full extent of their liabilities").

Where an entry in a book of entries is offered under the principle of § 1551, *ante* (regular entries), the jury may examine *the whole* of the book in order to determine *from its appearance* whether it is what it purports to be: 1904, Hauser *v.* People, 210 Ill. 253, 71 N. E. 416 (hotel-register).

a party said in one conversation; one of these letters or one of these conversations may be proved without authorizing the opposite party to bring forward for his own benefit what he himself said or wrote in another conversation or a different letter."

1824, HOSMER, C. J., in *Stewart* v. *Sherman*, 5 Conn. 244, 245 (rejecting a subsequent conversation concerning the ownership of a note): "It is a correct principle that the whole of a conversation must be taken together, in order to show distinctly the full meaning and sense of the party. . . . The question is merely this, whether a particular conversation is part of a preceding conversation because a negotiation begun was still pursued. . . . [Here] the conversation, in the manner above-mentioned, was not the same. The past and future cannot thus be brought together in order to form an artificial identity. The law never intends that a party may make evidence for himself from his own declarations, but merely that the meaning of a conversation shall not be perverted by proof of a part of it only."

The application of this principle to *conversations*, including *oral admissions and confessions*, depends almost entirely on the circumstances of each case;[1] what is a separate utterance can ordinarily not be the subject of fixed definition; so also for utterances charged as *libellous* or *seditious*.[2]

§ 2119. [1] With the following rulings should be compared those already cited under § 2115, admitting the remainder of the same admission or confession; the present principle is there constantly mentioned: *Fed.* 1808, Blight *v.* Ashley, 1 Pct. C. C. 15, 20 (statement on another day, excluded); *Ala.* 1842, Lee *v.* Hamilton, 3 Ala. 529, 533; *Conn.* 1824, Stewart *v.* Sherman, 5 Conn. 244; 1836, Robinson *v.* Ferry, 11 Conn. 460, 462; *Ill.* 1912, Norton *v.* Clark, 253 Ill. 557, 97 N. E. 1079 (admitting the statements made by the other conversant when useful for explaining the sense of the statements of the other conversant already admitted); *Ia.* 1856, Dougherty *v.* Posegate, 3 Ia. 88, 90 (separate conversation or declaration, admissible only when it is necessary to explain the first or make it fully understood; under the Code); 1859, Williams *v.* Donaldson, 8 Ia. 108, 112 (principle applied); 1864, State *v.* Vance, 17 Ia. 138, 140 (principle applied); 1904, State *v.* Leuhrsman, 123 Ia. 476, 99 N. W. 140 (prior statement, excluded); *La.* 1895, State *v.* Jones, 47 La. An. 1524, 18 So. 515; 1906, State *v.* Thompson, 116 La. 829, 41 So. 107 (accused); *Mass.* 1871, Adam *v.* Eames, 107 Mass. 275 (statement "at another interview," excluded); *S. D.* 1906, State *v.* Kapelino, 20 S. D. 591, 108 N. W. 335 (assault with intent; conversations between other persons, at a prior time, the defendant and the injured person being present, excluded); *Tex.* 1921, Williams *v.* State, 89 Tex. Cr. 334, 231 S. W. 110 (accused's exculpatory declarations made at a later time, held admissible on the facts, under C. Cr. P. § 811, quoted *ante*, § 2113).

Whether the statement is a separate one is of course for the *judge* to determine (*post*, § 2550) before it is offered to the jury: 1836, Robinson *v.* Ferry, 11 Conn. 460, 463.

Distinguish the question whether a *witness* who has been discredited by *inconsistent statements* may be supported by evidence of other *consistent statements* (*ante*, § 1122), and whether a *party* whose inconsistent claims have been used against him as *admissions* may show that at other times he has made the *same claim* as now (*ante*, § 1133); both these things are generally forbidden; yet they might be received as corroborating, even though inadmissible under the present principle of Completeness.

[2] From the following rulings distinguish those already cited under §§ 195, 369, 403, where the object is, not to show the total sense of a specific utterance, but to show the general state of opinion or feeling of an accused as being loyal, revolutionary, malicious, or the like; under the latter principle the allowable range of utterances would obviously be greater than under the present one, but the rulings are sometimes difficult to classify; compare also the statements admissible under the Hearsay exception (*ante*, § 1732), and the citations under the present principle (*ante*, § 2099).

England: 1683, Sidney's Trial, 9 How. St. Tr. 817 (quoted *ante*, § 2094); 1789, Stockdale's Trial, 22 How. St. Tr. 257 (quoted *ante*, § 2094); 1810, R. *v.* Lambert, 2 Camp. 398, 400 (libel in a newspaper; passages "of the same paper upon the same topic with the libel, or fairly connected with it, although locally disjoined from it," entitled to be read by defendant, "to show the intention and mind of the defendant with respect to this specific paragraph"); 1832, Pinney's Trial, 3 State Tr. N. S. 11, 464 (riot and sedition; after part of a speech, the other part may be shown, and after a speech having one tendency, another by the same person to the contrary may be shown); 1843, R. *v.* O'Connell, 5 State Tr. 1, 289, *semble* (sedition; a

§ 2120. **Same: (2) Utterances incorporated by Reference, Other Letters of a Correspondence, etc.** (*a*) Where the utterance first offered includes by reference a *concurrent* or *prior* utterance, the one thus referred to (no matter by whom made) becomes a part of it. Nevertheless, what is thus incorporated may be only a portion of the prior utterance, *i. e.* the portion referred to; and thus that portion only should be put in which is useful as completing the sense of the later one:

1860, HOAR, J., in *Trischet* v. *Ins. Co.*, 14 Gray 457: "Where a letter is written in answer to another, it may often be unintelligible without referring to the previous one. By referring to the letter to which he is replying the writer to that extent makes it a part of his own communication. Suppose that the first letter contained a question; and the reply was, 'To the question contained in your letter, I answer "Yes."' How could the meaning of the answer be ascertained by the jury without knowing the question? We can perceive no just distinction between oral conversation and written correspondence in this respect. Where a statement is made in the course of a conversation or correspondence, which is itself admissible in evidence, the rest of the conversation or correspondence must be admitted, so far as it is connected with and necessary to a full understanding of what follows."

This principle applies to admit a prior *oral* utterance [1] as well as a prior *writing*.[2] It should be noted, however, that in neither case is it essential

speech published in a certain newspaper being read by the prosecution as seditious, the defence were allowed to read an article by the same person on "The morality of war"; good opinion by Crampton, J.); 1848, R. v. Martin, 6 State Tr. 925, 998 (seditious article; another in the same paper, not received in his favor, because not explaining the one charged); 1856, Darby v. Ouseley, 1 H. & N. 1, 7, 11 (libel in a newspaper; extract in another number, not having "a tendency to explain, exculpate, modify, or control the other paragraph," excluded); 1888, Parnell Commission's Proceedings (quoted *ante*, § 2099).

United States: 1914, Clark v. U. S., 8th C. C. A., 211 Fed. 916 ("The question then presents itself, whether when an indictment charges that a certain book is obscene, the passages which the prosecutor claims to be obscene may be introduced in evidence and submitted to the jury, and the remaining portion of the book excluded?" The question is then answered, No. The odd thing about it is that neither counsel nor judges, so far as the opinion or the printed briefs show, had an inkling that a great principle was involved over which our forbears in the law had contended in notable political and historic struggles at different times going back three centuries. It is a discouraging hint of the ignorance and indifference of our intelligent bench and bar to the importance of historical knowledge and professional biography that a case involving this principle could reach and pass through the appellate court of the United States without any of the participants discovering that the principle involved had been made immortal in our legal history by the names of Sidney and Erskine).

§ 2120. [1] 1908, Sears v. Howe, 80 Conn. 414, 68 Atl. 983 (letters referred to in replies thereto, held admissible as a part of the replies); 1906, Proctor v. Cable Co., 145 Mich. 503, 108 N. W. 992 (salary contract; series of letters, admitted); 1904, Gosnell v. Webster, 70 Nebr. 705, 97 N. W. 1060 (rest of a correspondence, admitted); 1844, Barker v. Barker, 16 N. H. 333, 339 (former expressions referred to, "which imparted any significance to the remarks of either beyond their ordinary and obvious meaning," admissible); 1866, Judd v. Brentwood, 46 N. H. 430 (preceding case approved); 1909, People v. Schlessel, 196 N. Y. 476, 90 N. E. 44 (the witness' mere avowal of ignorance of a document's contents when asked on cross-examination, is not a reference sufficient to admit the document in rebuttal).

[2] *Fed.* 1874, Insurance Co. v. Newton, 22 Wall. 32, 35 (insurer's admission of sufficiency of proof of death, held not separable from his claim at the same time that the death was by suicide); 1877, Mutual Benefit L. Ins. Co. v. Higginbotham, 95 U. S. 380, 390 (preceding case approved); *Ala.* 1899, Amos v. State, 123 Ala. 50, 26 So. 524 (false pretences; defendant represented that M. had money of his; M. wrote to B. that he had not; B. handed the postal card to defendant, who read it and then said "I have lied to you about this"; the postal card admitted as a part of defendant's admission); *Ill.* 1903, Morris v. Jamieson, 205 Ill. 87, 68 N. E. 742 (letter accompanying a statement of account, received;

that the reference to the prior utterance be *express;* for, especially in a correspondence, the reference may be implied only. Perhaps, for letters, the rule should be that by an express reference the whole of the prior utterance becomes admissible, but otherwise, only that portion of a prior letter which tends to explain the later one; yet no definite rule seems to be judicially agreed upon.

(*b*) A *subsequent* utterance by another person can hardly be conceived as incorporated by reference. Hence, when B puts in A's admission, B cannot put in at the same time his own reply, since the sense of A's utterance can hardly be qualified by what B may later say of it.[3] Nevertheless, when A's utterance has in some way referred to an utterance of B's, the latter's subsequent utterance may be useful to explain;[4] as in the following case:

1836, *Roe* v. *Day*, 7 C. & P. 705; after several letters of each party had been put in by the defence, the last being a letter of the plaintiff, the defendant offered his reply to the plaintiff's last. Mr. *Thesiger*, arguing *contra:* "It is a letter written by the defendant and not answered by the plaintiff. It frequently happens that a person may receive a letter from another, containing all sorts of absurd statements and assertions, and may throw it into the fire and take no further notice of it, and it is rather too much to say that all those statements and assertions may be given in evidence against him." PARK, J.: "I shall

The Queen's Case, quoted *ante*, § 2113, followed); *Ia.* 1871, Brayley *v.* Ross, 33 Ia. 505, 508; 1872, Collins *v.* Bane, 34 Ia. 385, 389; *Mass.* 1860, Trischet *v.* Ins. Co., 14 Gray 457 (quoted *supra*); 1900, Buffum *v.* York Mfg. Co., 175 Mass. 471, 56 N. E. 599; 1919, Sargent *v.* Lord, 232 Mass. 585, 122 N. E. 761 (services as an architect; prior letter of plaintiff held not made admissible by a later one of defendant, on the facts); *N. D.* 1915, Guild *v.* More, 32 N. D. 432, 155 N. W. 44 (deceit; remainder of correspondence introduced); *Okl.* 1915, Tishomingo El. L. & P. Co. *v.* Gullett, 52 Okl. 180, 152 Pac. 849 (entire correspondence admitted); *Or.* 1901, Sturgis *v.* Baker, 39 Or. 541, 65 Pac. 810 (cashier's indorsement on a note, held explainable by his account-entries, under Code § 690, quoted *ante* § 2113); *S. C.* 1819, M'Grath *v.* Isaacs, 1 N. & McC. 563, 573 ("In all cases where papers are called for, which are in the possession of one party, by another, they ought not to be garbled, but the whole produced"; here, a letter called for referred to another, and the latter's production was held proper).

For other rulings, sometimes hard to distinguish, see the citations under *admissions by reference, ante*, § 1070; the distinction of principle has already been explained in § 2114.

A letter inadmissible under the present rule may be made admissible by the receiver's silent assent, or *failure to answer* (*ante*, § 1073).

For the question whether the prior letter *must be offered* by the party offering the later letter, see *ante*, § 2104.

Distinguish the question of the *legal effect of the execution* of document A referring to document B; 1859, Ingoldsby *v.* Juan, 12 Cal. 564, 577.

[3] *Accord:* 1853, Collins *v.* Todd, 17 Mo. 537, 540; 1913, Mulroy *v.* Jacobson, 24 N. D. 354, 139 N. W. 697 (not clear); 1915, Blunt *v.* Montpelier & W. R. Co., 89 Vt. 152, 94 Atl. 106 (conversation between the plaintiff and the defendant's conductor; the latter's reply held not admissible on the facts).

[4] *Fed.* 1909, Crawford *v.* U. S., 212 U. S. 183, 29 Sup. 260 (an accused having surreptitiously taken away certain correspondence apparently inculpating, the custodian wrote him charging him with the act; this letter being admitted, the answer was held also admissible; no authority is cited; but the ruling rests properly on the principle of § 281, *ante*); 1909, Perrin *v.* U. S., 9th C. C. A., 169 Fed. 17 (contracts by the defendant made on Oct. 31, 1903, Nov. 20, 1903, and Feb. 4, 1904, forwarded by the defendant in a letter of Sept. 14, 1905; the contract of Oct. 31, 1903, being offered by the prosecution as an admission, the defendant was held entitled to introduce the other contracts; Gilbert, J., diss.); *Conn.* 1905, Hoggson & P. Mfg. Co. *v.* Sears, 77 Conn. 587, 60 Atl. 133 (plaintiff's reply-letter admitted for him, on the facts); *Ia.* 1883, Burlington C. R. & N. R. Co. *v.* Sherwood, 62 Ia. 309, 314, 17 N.W. 564; 1904, Robertson *v.* Vasey, 125 Ia. 526, 101 N.W. 271.

Distinguish the following: 1858, Bradley *v.* Gardner, 10 Cal. 371 (slander; the "reply made by the plaintiff when the defendant uttered the words." admitted; it "might have qualified or explained the words, or shown in what sense they were used, or even admitted their truth").

receive the letter in evidence; it is an immediate answer to the letter of the plaintiff"; the letter was read. PARK, J.: "We now see the importance of this letter. In a former letter the defendant says to the plaintiff, in substance, 'You tried to entrap me into admissions,' and to this the plaintiff answered, 'I could not have so intended, because I could not be a witness to prove them'; and then the defendant explains that in the last letter by saying, 'I did not mean that, but I meant that you tried to entrap me into giving you a guarantee.'"

§ 2121. **Chancery Answer: (1) Used at Law as an Evidential Admission.** It was perfectly settled at common law that, when an answer obtained from a defendant in chancery proceedings was offered in evidence in a *trial at law*, as containing an admission, the *whole must be used*, and not merely such part as the proponent might choose:

Ante, 1726 Chief Baron GILBERT, Evidence, 50: "When you read an answer [at law], the confession must be all taken together, and you shall not take only what makes against him, and leave out what makes for him; for the answer is to be read as the sense of the party himself, and if it is to be taken in this manner, you must take it entire and unbroken."

It did not become of practical importance to settle whether the proponent of it must at the outset read it all, or whether the opponent was to read later the remainder left at first unread; this more or less academic question, often raised for writings in general (*ante*, § 2102), was apparently left here unsettled, or at least was stated indifferently in one way or the other. The important thing was that the opponent whose answer was thus used had the right to have the whole, or none, laid before the Court; and no doubt has ever existed on this point.[1]

§ 2121. [1] *England:* 1695, Bath *v.* Bathersea, 5 Mod. 9; 1697, Lynch *v.* Clerke, 3 Salk. 154 (L. C. J. Holt "said that if the plaintiff will read the defendant's answer in chancery against him in evidence, the defendant may likewise take advantage thereof; for all is evidence, or none"); 1767, Buller, Trials at Nisi Prius, 237; 1781, Bermon *v.* Woodbridge, 2 Dougl. 781, 788 (L. C. J. Mansfield: "Though the whole of an affidavit or answer must be read, if any part is, yet you need not believe all equally"); 1806, Ormond *v.* Hutchinson, 13 Ves. Jr. 47, 53 (the whole of an answer in discovery must be read at law); 1808, Butterworth *v.* Bailey, 15 Ves. Jr. 358, 362 (same).

United States: 1792, Benedict *v.* Nichols, 1 Root Conn. 434 (account; the defendant's examination on citation before a probate court, required to be read as a whole); 1803, Hoffman *v.* Smith, 1 Cai. N. Y. 157 (not decided); 1814, Lawrence *v.* Ins. Co., 11 Johns. N. Y. 241, 260 ("It is an invariable rule that where an answer is given in evidence in a court of law, the party is entitled to have the whole of his answer read"; here applied to a production under rule of Court "analogous to an answer in chancery").

Contra: 1909, Colby *v.* Reams, 109 W. Va. 308, 63 S. E. 1009 (citing merely a treatise, on the general principle of § 2113, *ante*, and apparently unaware of the specific rule here applicable).

The rule was equally applied to a *document produced* in the answer: 1836, Brown *v.* Thornton, 1 Myl. & Cr. 243, 246 (discovery with document produced; L. C. Cottenham: "The rule stated to prevail at law [that a party shall not be at liberty to read a part only of an answer] does prevail there; and where a party produces at law a document which he has obtained by means of a bill of discovery only, the judges at common law will not allow him to use it without using the answer also; . . . [unless] this Court has made an order for the production of the document").

The practice for *separate* answers seems to have been various: 1826, Roberts *v.* Tennell, 3 T. B. Monr. Ky. 247, 248 (after an answer in another suit, a second answer to an amended bill in the same suit, excluded); 1829, Duncan *v.* Gibbs, 1 Yerg. Tenn. 256 (bill against D. and others; after a reading of the bill and one answer, the opponent was allowed to read D.'s answer).

§ 2122. **Same: (2) Used in Chancery as a Pleading; Charge and Discharge Clauses.** But an answer in chancery, when used in the same *chancery cause*, stands upon a radically different footing. When used at law, it is offered merely as his opponent's admission in writing, and goes in like any other informal admission offered in evidence; *i. e.* it is not conclusive, like a judicial admission (*post*, § 2590), but merely a piece of discrediting evidence, which may be explained away or otherwise overthrown (*ante*, § 1058). But in the chancery cause in which it is filed it has a double character; it is the defendant's pleading in defence, and it is also his evidential admission by way of compulsory discovery under oath as demanded by the plaintiff.[1] Consequently, it is subject to certain rules of Pleading, as well as to rules of Evidence, according as it is used by the plaintiff in one character or another.

1. Let us suppose now that it is to be used *as a pleading*. As such, it might of course contain allegations both denying the plaintiff's charges and affirming new matter in avoidance, or allegations admitting the charges but affirming matter in avoidance. The answer might be met by the plaintiff in one of two ways; either he might demur to its sufficiency in law, or he might take issue of fact upon its allegations.

(*a*) The former object was accomplished in chancery, not by a demurrer so called, but by an analogous process called "setting the cause down for a hearing upon bill and answer."[2] This of course admitted the truth of the defendant's allegations, while claiming them insufficient in law; hence, on the hearing, the *whole of the answer* might be used *by the defendant* as being conceded true by the plaintiff. This much follows necessarily as a rule of pleading, and has not been questioned.[3]

(*b*) But suppose the plaintiff takes the other course, and *puts the answer in issue*. It is here that the controversy arises. Upon this issue, there is no such clear separation of pleadings as at common law; *i. e.* in chancery, at the same hearing, the plaintiff must prove the allegations pertaining to his case, and the defendant must prove the allegations made in affirmative avoidance.[4] But since the defendant (as above noted) is in chancery not obliged to separate his pleas into negative and affirmative ones (as he must at common law, by a traverse and a confession and avoidance), and may thus put into his single answer a denial as to part and a confession and avoidance as to part,

§ 2122. [1] Langdell, Summary of Equity Pleading, § 68 ("In chancery, these two things, so different in their nature, are indiscriminately blended in the answer. . . . The answer has generally been treated as if it were homogeneous, and every part of it subject to the same rules. At one time, indeed, it has been assumed to contain the defendant's examination under oath [as an admission]; at another, to contain his defence; but the fact has seldom been intelligently recognized that it contained both of these; and the failure to do this, and to apply to it different rules, according as it was presented to the Court in the one aspect or the other, has caused infinite confusion in equity pleading"); and the authorities cited in note 119 of Mr. Gest's article cited *ante*, § 2032, note 1. Compare a similar ambiguity in common-law pleadings (*ante*, §§ 1063–1067).

[2] Langdell, *ubi supra*, § 83.

[3] Professor Langdell, indeed (*ubi supra*, § 83), questions the soundness of this so far as concerns the statements not constituting defensive allegations; but this is not material to the present controversy.

[4] Langdell, *ubi supra*, § 90.

it follows that the plaintiff may be able to find some part of his claim confessed in the defendant's pleading. This part he may therefore take as admitted, *i.e.* not in issue, and therefore not necessary to be evidenced by the plaintiff, — a consequence parallel to that which ensues at common law. But, on the other hand, there is no such allowance to the defendant; for, as to his mere affirmations in avoidance, they are but his pleading, and in his turn he must prove them. It would be absurd to say that, by merely alleging certain affirmative facts, and though these very facts have been put in issue by the plaintiff, the defendant could insist on having them taken for true in his own favor without evidence. They are mere pleading-statements of what he expects to prove, and he is bound to prove them, — precisely as the plaintiff is bound to prove whatever of his own case has been put in issue.

The orthodox rule, then, has always been that, upon *a hearing in chancery*, the *plaintiff may use* as judicial admissions *whatever admissions he can find in the defendant's answer*, but *the defendant may not use the remainder of the answer in his own favor:*

1707, *Anon.*, reported in *Gilbert*, Evidence, 52; bill of account against an executor, who answered that £1100 was deposited with him by the testator, but that afterwards he settled by giving bond for £1000 and receiving the remaining £100 for his trouble and pains; the answer being put in issue, it was argued that the whole should be taken as true for the defendant; but the Court held that, "When an answer was put in issue, what was confessed and admitted need not be proved [by the defendant], but it behoved the defendant to make out by proofs what was insisted upon by way of avoidance; . . . where the defendant admitted a fact, and insisted on a distinct fact by way of avoidance, there he ought to prove the matter of his defence; . . . but if it had been one fact, as if the defendant had said the testator had given him £100, it ought to have been allowed, unless disproved [by the plaintiff], because nothing of the fact charged is admitted."

1806, Mr. *W. D. Evans*, Notes to Pothier, II, 135 (No. XVI, § 4): "The above decision [quoted in Gilbert] is principally referable to the course of proceeding in courts of equity. A bill is filed, an answer is put in, the plaintiff either sets down the cause for hearing upon bill and answer (which is an admission of the truth of the whole [of the answer]) and merely brings the sufficiency of it into contest; or he replies to the answer, putting the whole in issue generally, whereupon the defendant must substantiate by proof all the facts upon which he means to insist, whilst the plaintiff may rely upon every fact admitted which he conceives to be material, without being bound to the admission of any others. Upon this proceeding no questions of credit, no inferences of fact, can regularly occur; . . . if a real disputable question occurs respecting a matter of fact, it is referred to the examination of another tribunal. . . . If my ideas upon the general subject are correct, the distinction in this matter is not between courts of law and equity, but between pleadings and evidence; and that if an answer in chancery was introduced incidentally and merely by way of evidence [in another suit] in a court of equity, it ought to be treated precisely in the same manner as in a court of law; on the other hand, it is very clear that if in a court of law a plea confesses the matter in demand but avoids it by other circumstances, the proof of the avoidance is incumbent on the defendant."

1816, KENT, C., in *Hart* v. *Ten Eyck*, 2 John. Ch. 62, 90: "When the answer is put in issue [in chancery], the defendant must support by proof all the facts upon which he means to insist; while the plaintiff may rely upon every fact admitted which he conceives material, without being bound to the admission of any others. But when the answer is offered in evidence at law, no part of it is immediately in issue, [and therefore no question arises as

to the defendant's having to prove it]; it is only parcel of the evidence, and if one side introduce it, the other may insist upon the whole being read; and if read, it does not necessarily follow that it must be wholly admitted [*i. e.* believed] as true or wholly rejected as false. . . . The distinction, therefore, as Evans says, is not between Courts of law and equity, but between *pleadings* and *evidence*. If an answer is introduced collaterally, and merely by way of evidence, in chancery, it ought to be treated precisely as in a Court of law."

(*c*) But the present principle of Compulsory Completeness (*ante*, §§ 2094, 2103) here came into play. It created a restriction for a plaintiff reading a defendant's answer as a pleading in the same cause, namely, that he could not misrepresent the tenor of the admission, or could not represent as an admission that which was not really an admission when the sense of the immediate context was taken. In other words, the plaintiff was required to use, additionally, *whatever was grammatically connected* with the part he desired to offer; but this only; and it came in, according to the general principle (*ante*, § 2113, par. (*c*)), not as independent evidence for the defendant, but merely as explanatory of the tenor of his alleged admissions against himself:

1826, ELDON, L. C., in *Bartlett* v. *Gillard*, 3 Russ. 149, 157 (a passage read began, "Before such demand was made," and the preceding passage relating to the demand included other circumstances in the same sentence): "Where a plaintiff chooses to read a passage from a defendant's answer, he reads all the circumstances stated in the passage. If the passage so read contains a reference to any other passage, or to a fact stated in any other passage, that other passage must be read also. But it is to be read only for the purpose of explaining, so far as explanation may be necessary, the passage previously read in which reference to it is made. If, in the passage thus referred to, new facts and circumstances are introduced in grammatical connection with that which must be read for the purpose of explaining the reference, the facts and circumstances so introduced are not to be considered as read."

The application of this restriction was attended with some controversy. In particular, it was long in dispute whether the plaintiff's use of a clause admitting (for example) the receipt of money required him to use also another clause in the same or ensuing sentence alleging a payment, — in other words, whether a *clause of discharge* must be read with a *clause of charge*. The liberal view prevailed in the end; but the question was merely as to the application of the general principle, and never as to the undoubted principle itself.[5]

[5] *England:* 1690, Awdley *v.* Awdley, 2 Vern. 194 (the Court said that Howard *v.* Brown, unreported, was the first case "where, because a man had charged himself by answer, that his answer should be allowed as a good discharge; and it ought to be the last"); 1693, Hampton *v.* Spencer, 2 Vern. 288 (bill for reconveyance under a mortgage agreement; the answer admitting that the conveyance was in trust for the plaintiff's family but denying the mortgage agreement, the Court decreed upon the trust without further proof); *ante*, 1726, Gilbert, Evidence, 52 (quoted *supra*); 1748, Kirkpatrick *v.* Love, Ambl. 589 (account of merchandise; the plaintiffs in their examination admitted the receipt of one parcel and said that they had paid for it; held that the plaintiffs need not prove payment, as they "charged and discharged themselves in the same sentence; otherwise it had been, if the discharge or avoidance had been in a distinct sentence"); 1792, Blount *v.* Burrow, 1 Ves. Jr. 546 (defendant, charged with having four bonds of the testator,

2. But suppose, now, that, in a chancery cause, an answer is offered in the ordinary way of an *evidential admission*, not as a pleading defining the matters at issue; this would in effect be the case of an *answer in another chancery cause*. Here no rule of pleading would apply; the plaintiff cannot treat this answer as being in one aspect a pleading to his bill, admitting the truth of some of its allegations; he must use it as he uses any other written admission offered in evidence. In other words, it must be treated precisely as when offered in a trial at law, and the *whole must be read* (*ante*, § 2121). This rule also was unquestioned,[6] and it brings out clearly that the distinction lay not between a rule in chancery and a rule at law, but between a rule of Pleading and a rule of Evidence:

1813, *Boardman* v. *Jackson*, 2 Ball & B. 382; bill for accounting; the plaintiff produced an old account furnished to him by the defendant, and the latter insisted on using the discharging items in evidence; arguing as follows: "The distinction is this: . . . Where a plaintiff refers to an answer [of the defendant] as constituting *part of the pleadings* in the cause, the defendant cannot by any separate passage of the answer discharge himself from any admission he may there have made; that he can do only by producing evidence. But when a plaintiff refers to an answer in *another cause*, by way of *evidence*, he makes the whole answer evidence, and the defendant may then read any part of it in his defence. The same distinction exists at law between pleadings and evidence; if a plea confess a fact, but at the same time avoids it by other circumstances, the defendant must substantiate the avoidance by proof." L. C. MANNERS: "The account which is the subject of this exception forms no part of the pleadings in this cause; . . . [then] the question is

answered on examination that he had received them, but with a direction to keep them if the donor died; held sufficient; L. Com'r Eyre: "The examination is evidence in discharge of the party who is charged by it; the modern cases have gone that far, and rightly"); 1802, Ridgeway *v.* Darwin, 7 Ves. Jr. 404 (L. C. Eldon said that "the discharge following immediately in the same sentence, that would do," but not in a separate affidavit); 1802, Thompson *v.* Lambe, 7 Ves. Jr. 587 (L. C. Eldon ruled that an answer admitting receipt of money on one day and alleging payment on another day could not suffice, as it was "a distinct transaction"); 1806, Ormond *v.* Hutchinson, 13 Ves. 47, 53 (L. C. Erskine; on reading in chancery an answer put in issue by replication, the plaintiff "cannot . . . stop at the end of a sentence, but must proceed to the completion of the immediate subject to which the defendant is answering; as at law a witness cannot be stopped where the party wishing to elicit from him particular facts finds it convenient to stop him, but must be allowed to finish the particular subject and to proceed to state anything with reference to it, . . . but that does not apply to distinct matter"); 1816, Robinson *v.* Scotney, 19 Ves. Jr. 582 (answer alleging a set-off diminishing a balance due, treated in the same way); 1829, Davis *v.* Spurling, 1 Rus. & M. 64, 68 (mere connection by "but" or "and," not sufficient, unless the subsequent matter was "explanatory"); 1830, Rude *v.* Whitechurch, 3 Sim. 562 (subsequent qualifying sentence, not referred to in the first, but connected in meaning, allowed to be read); 1832, Nurse *v.* Bunn, 5 Sim. 225 (plaintiff compellable to read "all other passages . . . explanatory of the passages read"); 1841, Connop *v.* Hayward, 1 Y. & C. 33, 34 ("such a connection between the passages as to render it necessary to read the latter with the former," here applied as the test); 1841, Miller *v.* Gow, 1 Y. & C. Ch. 56, 59, V. C. Bruce ("The practice at law is clearly established that when an answer [to a relief-bill] is used, the whole must be read; it is different in this Court; but the rule here is that you cannot in reading sever parts that in substance are connectedtogether").

United States: 1904, Stewart *v.* N. C. R. Co., 136 N. C. 385, 48 S. E. 793; Hedrick *v.* Southern R. Co., ib. 510, 48 S. E. 830; 1905, Reager's Adm'r *v.* Chappelear, 104 Va. 14, 51 S. E. 170 (administrator's answer).

[6] *Accord: Eng.* 1806, Ormond *v.* Hutchinson, 13 Ves. 47, 53 (the Solicitor-General had argued: "The rules of evidence in equity and at law are not different; . . . upon a bill for discovery only, the answer being produced as evidence, the whole of it must be read, not a part only"; L. C. Erskine: "As to the answer, I agree to what has been stated by the Solicitor-General"); *U. S.* 1816, Kent, Ch., in Hart *v.* Ten Eyck, 2 Johns. Ch. N. Y. 62, 90 (quoted *supra*); 1823, Taylor, C. J., in Jacobs *v.* Farrall, 2 Hawks N. C. 570.

whether the same rule of evidence is to be adopted by this Court as would be by a Court of law, or whether there is anything to take it out of the rule of law? It is quite clear that, where a party produces a letter or other document, he cannot use it partially; he is not permitted to garble it; and if he by his own act makes that evidence which otherwise would not be, he makes the whole of it evidence and it must be taken together. I have not been able to find even a 'dictum' that the rule of evidence in this Court in this respect differs from what it would be at law. . . . In this Court, as well as in a Court of law, where the answer of a party in another cause is resorted to, as evidence, the whole of it becomes admissible; and so, I conceive, with respect to any other document made evidence in the cause."

§ 2123. **Same: (3) Anomalous New York Rule; "Responsive" Parts may be Read.** How then could any confusion or change of practice arise, these principles being so well settled? Partly because of a strong and constant pressure on the part of defendants to use their answers in their favor, partly because of the mixed and misleading nature of a chancery answer as to traverses and avoidances, and partly because of the rule requiring two witnesses for a responsive denial, and the misuse of the term "responsive" in applying it out of its proper sphere.

1. *The defendant's motive to use his answer.* Notice first that the importance of the question in a chancery hearing is far greater than at a common-law trial. In the latter case it is simply a question whether a certain additional piece of evidence shall or shall not go in with the rest to the jury. If the defendant succeeds in having read to the jury an additional sentence in his answer, he nevertheless goes on with his other evidence as before. By receiving it, the Court does not add to the allegations which the plaintiff must prove, nor by rejecting it does the Court add to the allegations which the defendant must prove. But in chancery, on the other hand, the whole state of the pleadings is involved. If, for example, the answer admits receiving one hundred dollars, but asserts its payment, the plaintiff, by appealing to the first statement in the defendant's pleading, relieves himself of that issue and needs no evidence upon it. If, now, the defendant can oblige the plaintiff either to take the two together or none at all, he changes the whole effect of the pleadings; for if the plaintiff accepts the first alternative and uses the whole, he has a pleading-admission that no money is due, *i. e.* he has no confession at all, and consequently he has obtained no profit from this pleading and must still prove his claim by other means. If he accepts the second alternative, and uses none of the statement, he is in the same position, and must prove as before. But if the defendant cannot put the plaintiff in this dilemma by forcing the two statements upon him together, the defendant must himself prove his affirmative fact of payment pleaded in discharge, and has relieved himself of no burden.

It is thus apparent that the defendant had always the strongest motive to enlarge the scope of the passages which he could compel the plaintiff to use as an admission. In fact, the incidence of the whole burden of proof was at stake. A defendant ought not to be allowed to change, and to throw upon

the plaintiff, the burden of proof of the facts forming an affirmative defence. But still, there was a motive for him to try to do so; and it was the striving after this improper advantage which finally led to the anomalous rule now under consideration.

2. *The mixed nature of a chancery answer as to traverses and avoidances.* An answer in chancery, as already noted, does not separate its pleas distinctly according to their negative or affirmative nature; *i. e.* there needs no separate count or plea for a traverse or denial as distinguished from a confession and avoidance; either of these follows the other indiscriminately, pursuant to the order in which the charges are made and replied to. Accordingly, the nature of a particular part of the answer, whether as being in denial or in affirmative avoidance, can only be ascertained by comparing its terms with that of the corresponding charge in the bill. Its form as an affirmation is immaterial, if in reality it is a traverse, and 'vice versa.' Thus, in ascertaining the burden of proof, the form of the defendant's statement is not decisive; a source of inextricable confusion, and an opportunity for erroneously changing that burden, is amply furnished. If, then, any rule of evidence should exist, peculiar to the case of a plaintiff having the burden of proof, and not applicable to the defendant at all, it would be easy, by juggling with the really affirmative allegations of fact and by giving them a negative form, to make it appear that this rule of proof was applicable to the plaintiff on a point stated negatively by the defendant.

3. *The rule of two witnesses for responsive denials.* Such a rule did exist, namely, the rule already examined (*ante*, § 2047) that the plaintiff must prove by two witnesses every allegation explicitly denied on oath in the defendant's answer. In invoking this rule, defendants naturally tried to state in negative form every fact which they were able conscientiously to assert. The Chancellor might rule that the fact was genuinely an affirmative defensive one; but still there was a constant effort to get whatever advantage might accrue in a doubtful case. Now the effect of this rule was to lead to a deceptive form of expression, historically unsound but empirically accurate, namely, that the *defendant's answer on oath was evidence.* Less erroneously expressed, it was said that the answer was "equivalent to" the oath of one witness,[1] *i. e.* on the theory that it nullified one witness for the plaintiff and thus required him to produce a second. The result indeed was that the answer on oath compelled the plaintiff to produce a second witness; yet this was far from making the defendant's answer evidence. It was not and never had been considered as testimony,[2] except for the purpose of the above rule,[3] which could be more properly stated in another form. Nevertheless, the notion thus became common in some quarters, through

§ 2123. [1] See the quotations under that rule (*ante*, § 2047).

[2] Langdell, Summary of Equity Pleading, § 56; and Lord Brougham's passage in Attwood *v.* Small, quoted *ante*, § 2047.

[3] "In equity, by answer, he is a witness only to deny affirmative allegations" (Lampton *v.* Lampton's Ex'rs, 6 T. B. Monr. Ky. 616, 620).

the formula above, that a defendant's answer had some quality of testimony receivable on his own behalf. Hence, when a defendant denied an allegation in a bill, and so far as he denied it, two thoughts would be associated with this fact, first (as above noted), that the plaintiff was put to his proof by two witnesses, and secondly, that the defendant's answer in denial was evidence for himself. Notice, however, that both of these notions have relation to evidence, and have nothing to do with the question of pleading or burden of proof; for the ignoring of this led to the later fallacy.

The result (to sum up) of the above rule of two witnesses was that, for the purpose of enforcing it against the plaintiff, it became highly important to decide whether a given allegation of the answer, negative in form, was genuinely a denial or only a new affirmation, or whether, though apparently a denial, it was truly an argumentative admission. The inquiry thus came to be whether the answer was "responsive," *i. e.* whether it directly met and controverted some allegation essential to the bill;[4] for if it did, the rule applied, otherwise not.

4. We are now prepared to understand the appearance of the main fallacy in question. (*a*) In the first place, the function of the "responsive" denial-answer as putting in force a rule of two witnesses for the plaintiff came to be given a *pleading-sense*. For example, Messrs. Cowen and Hill (both judges in New York), in their notes to Mr. Phillipps' treatise on Evidence,[5] stated that "though the answer be affirmative, if it be responsive to an inquiry in the bill, it will *conclude*, unless overcome by more than one witness"; here the fallacy is apparent that the defendant by an affirmative answer can somehow relieve himself of the burden of making out his defence. (*b*) Again, this rule about two witnesses, forced upon the plaintiff by the answer, came to be misused as legitimately including the defendant's *matter in affirmance* and not merely *matter in denial*. Thus Mr. Justice Thompson, in Clason *v.* Morris,[6] declared that "it is an undeniable rule in chancery that the answer to a bill for discovery, being under oath, must be taken as true, unless disproved by two witnesses." This ignoring of the vital difference between denial and affirmance, between putting in issue the plaintiff's allegations and setting up defensive affirmations, was here applied merely to the two-witness rule. But as the term "responsive" was used to express the test for that rule, "responsive" came to be understood as legitimately covering not merely ordinary denials, but also truly defensive affirmations answering questions of discovery on the defendant's own case.

The net consequence of these hazy confusions was as follows: (*a*) The effect of "responsive" answers was *extended to the pleading rule* about the plaintiff's use of the defendant's admissions in the answer, instead of being confined

[4] No precedents for English usage have been found, but this sense of "responsive" occurs frequently in the United States from an early date: 1798, Maupin *v.* Whiting, 1 Call. Va. 224; 1810, Paynes *v.* Coles, 1 Munf. Va. 373, 393, 395; 1812, Russell *v.* Clark's Ex'rs, 7 Cr. 69, 92; 1826, Ringgold *v.* Ringgold, 1 H. & G. Md. 11, 81.

[5] Ed. 1843, I, 154, note 292.

[6] 10 John. 524, 542.

to the two-witness rule of evidence; and (*b*) the term "responsive" was enlarged to include *affirmative*, as well as negative matter. For example, if the plaintiff had brought a bill against a vendor, alleging a contract to convey and asking specific performance, and incidentally seeking discovery on the anticipated defence that the premises had been destroyed by fire, and the defendant had answered to the contract-charge, admitting the terms of the contract, and had also answered stating how the house was burned, the orthodox ruling would be that the plaintiff might make use of the defendant's pleading so far as it admitted the contract, but need use it no further than he chose, leaving the defendant with the burden of proving his affirmative defence. But under the erroneous notions now introduced, the answer would be held "responsive" to the bill, since it gave discovery to a question asked therein, and consequently the plaintiff, by using the admission of the contract, must also use the affirmation of the burning, set up in excuse, and must therefore either take it for true or disprove it by two witnesses. In other words, the plaintiff, to get the benefit of a pleading-confession, became obliged to assume to *disprove the very fact which the defendant set up in avoidance.*

5. This singular and illogical rule, almost incredible in its twistings of principle, was nevertheless sought to be defended on grounds of policy, in a specious argument which in fact persuaded the Court of Errors of New York and led it to repudiate even Chancellor Kent's orthodox doctrine:

1816, Mr. *Thomas Addis Emmet*,[7] arguing in *Hart* v. *Ten Eyck*, as reported in 1 Cow. 744, note: "We contend that where the answer is a direct and proper reply to the interrogatories of the bill, it is 'prima facie' evidence for the defendant, if in his favor; and our adversaries contend that, where the answer affirms a matter in avoidance, the defendant must prove his affirmation. . . . [Their position] would be universally true if qualified by ours, that the defendant must prove his affirmation unless it be a direct and proper reply to an interrogation of the defendant. . . . [There is] justice in giving to the defendant the benefit of those parts of the answer which are mere evidence, because the extent to which they go must entirely depend on the complainant's election. Such responsive *affirmations* on the part of the defendant [as distinguished from *denials*, which concededly put the plaintiff to proof by two witnesses], can only arise out of the charging part of the bill, which sets forth what are supposed to be the defendant's pretensions, or from the breadth of the interrogatories. Neither of these are necessary parts of a bill; . . . they are voluntary, and calculated only to elicit evidence; they are therefore often dangerous, and perhaps imprudently used; . . . [they] may undoubtedly be restricted by the pleader's prudence. Where the complainant has such entire control as to the extent of the defendant's answer, with what truth can it be said that to allow his answer, where it states an affirmative fact in precise reply to the complainant's bill, to be 'prima facie' evidence 'would render it absolutely dangerous to employ the jurisdiction of the Court of chancery, inasmuch as it would enable a defendant to defeat the complainant's just demands by the testimony of his own oath setting up a discharge or matter of avoidance'?[8] . . . It is the choice or ignorance of the complainant's pleader only, that can afford the defendant such an opportunity. If he does not choose to appeal to the defendant's oath, he may shape his bill for effectual relief without enabling him [the defendant] to make any affirma-

[7] Then Attorney-General; brother to Robert Emmet, the Irish leader; himself an exile from Ireland.

[8] Quoted from the opinion of Chancellor Kent, *infra*.

tive averment which would be evidence. . . . . A doctrine contrary to what we contend for would stretch the defendant's conscience on a moral rack, and receive nothing for proof but confessions of guilt."

Of this remarkable argument it need only be said, so far as its principle is concerned, that it is utterly irreconcilable with the fundamental principle of a bill of discovery in equity, namely, to give a plaintiff this very benefit of such admissions as he can extract from the defendant's conscience, without imposing any burden of using it unless and so far as the plaintiff sees fit; and, furthermore, that this principle could equally be availed of by the plaintiff even where seeking discovery to disprove the defendant's defence.[9] However unfair the advantage may once have been [10] (and modern statutes have dealt out a fairer justice by affording the opportunity equally to both parties), the principle was clear enough. Mr. Emmet's argument invited practically a repudiation of this fundamental principle. As for policy, the unsoundness of his claim seems even plainer. The notion that a fact which, by all rules of pleading and of good sense, constituted an affirmative defence could be, by the defendant's own unsupported affirmation of it, so twisted from its natural place as to fall within the plaintiff's sphere of proof, and that the plaintiff should be obliged, at the risk of failing, to disprove whatever the defendant has selected for assertion, is preposterous. The circumstance that the plaintiff has appealed for discovery on the point is no excuse for overturning rooted principles of pleading. The practical consequence would be that defences whose proof was chiefly in the power of the defendant could be made invulnerable by his mere assertion of them; and that, in particular, trustees and other persons having a fiduciary account to render could find absolute immunity by giving any explanation that a false imagination might suggest and then challenging the plaintiff to the impossible task of disproof. It seems entirely likely that the general modern disinclination in this country (otherwise difficult of explanation) to ask for chancery discovery on oath, is due mainly to the dilemma between the futility and the risk created for plaintiffs by the wide vogue of this rule.

The practical injustice of the proposed innovation was foreseen by more than one judge repudiating it at the time of its inception:

1816, KENT, C., in *Hart* v. *Ten Eyck*, 2 John. Ch. 62, 90: "I am satisfied that the [orthodox] rule is perfectly just, and that a contrary doctrine would be pernicious and render it absolutely dangerous to employ the jurisdiction of this Court, inasmuch as it would enable the defendant to defeat the plaintiff's just demands by the testimony of his own oath setting up a discharge or matter in avoidance."

1826, ARCHER, J., in *Ringgold* v. *Ringgold*, 1 H. & G. 11, 82 (after declaring Chancellor Kent's opinion preferable to that of the Court of Errors): "The establishment of a contrary doctrine would lead to dangerous consequences, and would be calculated to render trusts valueless, by giving to trustees, executors, and guardians the power on their own oaths to exempt themselves from responsibility. The [orthodox] rule then may be stated . . . that in all cases where a complainant seeks a discovery and relief, and to make out

[9] Langdell, *ubi supra*, §§ 85, 87, 88.

[10] No doubt the use of cross-bills mitigated it.

his case applies himself to the conscience of the defendant, if in his answer the liability is once admitted, there can be no escape from it but by proof [by the defendant himself]."

This anomalous doctrine allowing the use of "responsive" affirmations of defence is not to be found in the earliest New York rulings,[11] and seems to have been introduced in 1816,[12] and to have thenceforth exercised wide influence elsewhere,[13] — chiefly, it may be supposed, through the approval of the fallacy in the learned editorial notes above cited.[14] In the earlier rulings of other jurisdictions, the fallacy did not appear.[15] How far it prevails

[11] That the defendant must prove all matters of avoidance of the above sort had been clearly the early rule: 1805, Bush *v.* Livingstone, 2 Cai. Cas. N. Y. 66 (the bill alleged a security to have been given "on good and valuable consideration"; the answer alleged the consideration to have been usurious; counsel for defendant admitted that the answer could not be used to support matter of avoidance, but maintained that this was not avoidance but denial; the case was decided upon another point); 1806, Green *v.* Hart; 1 Johns. 580, 582, 590 (per Spencer, J., for the Court of Errors, "This is a well established principle in chancery proceedings, and will be found recognized in every treatise on that subject"; here usury was treated as an affirmative fact in avoidance of a note, "although in answer to the complainant's allegation of a pre-existing 'bona fide' debt").

[12] 1816, Hart *v.* Ten Eyck, 2 Johns. Ch. N. Y. 62, 87 (bill for account against administrators; discharging items in the answer, held not admissible, per Kent, Ch.; said, in 1 Cow. N. Y. 743, 744, to have been reversed in the Court of Errors, in an opinion unreported; quoted *supra*); 1823, Woodcock *v.* Bennet, 1 Cow. N. Y. 712, 743 (bill for specific performance; a part of the answer alleging cancellation by mutual consent was held "legal and competent evidence, because it is responsive to the bill and within the discovery sought; . . . whatever may be the rule in the English courts, this question is at rest with us"; following Hart *v.* Ten Eyck); 1834, Bartlett *v.* Gale, 4 Paige N. Y. 503, 508 (mortgage bill; an unsworn answer held to be no evidence at all for the defendant; as to a sworn one, "except as to those parts of it which are responsive to the bill," the complainant need not take the whole "as evidence" nor is "bound" by the parts not used by him).

[13] *Columbia* (*Dist.*): 1918, Bradley *v.* Davidson, 47 D. C. App. 266, 277; *Florida:* 1906, Mayo *v.* Hughes, 51 Fla. 495, 40 So. 499 (failure of consideration); 1906, Southern Lumber & S. Co. *v.* Verdier, 51 Fla. 570, 40 So. 676 (creditor's bill to set aside a voluntary conveyance; an answer upon facts "inseparably connected . . . is responsive to the bill as well when it discharges as when it charges the defendant"); 1921, Johnson *v.* Sumner, 82 Fla. 377, 90 So. 171 (cause set down for hearing on bill and answer, plaintiff waiving answer under oath; "in such cases the rule is that where answer is made under oath the averments contained in it which are responsive to the bill and which set up facts to which other testimony could be received are to be taken as true, unless disproved by evidence of greater weight than the testimony of one witness); *Georgia:* 1877, Heard *v.* Russell, 59 Ga. 25, 51 (answer given not under oath; defendant may put in the remainder "as evidence," though not as having the effect of requiring two witnesses to overcome; no authority cited); 1878, Armstrong *v.* Lewis, 61 Ga. 680, 688 (similar, such other parts "as bear directly on the subject-matter of the admissions" may be read); *Ohio:* 1831, Methodist Ep. Ch. *v.* Wood, 5 Oh. 283, 285 (assumpsit; "the answer [in discovery] of the defendant is evidence for him so far as it is responsive to the call in the bill for discovery or connected necessarily with the responsive matter or explanatory of it; . . . [otherwise] it cannot be used in evidence by the party making it"; no authority cited); *Tennessee:* 1874, Beech *v.* Haynes, 1 Tenn. Ch. 569 (the rule of the N. Y. Court of Errors accepted; careful opinion by Cooper, C.); *Virginia:* 1867, Fant *v.* Miller, 17 Gratt. 187, 206, 211, *semble* (New York rule followed); 1869, Mayo's Ex'r *v.* Carrington's Ex'r, 19 Gratt. 74, 116, *semble;* 1873, Morrison's Ex'rs *v.* Grubb, 23 Gratt. 342, 349 (Fant *v.* Miller followed); 1874, Statham *v.* Ferguson, 25 Gratt. 28, 39; 1895, Clinch River M. Co. *v.* Harrison, 91 Va. 122, 129, 21 S. E. 660 (preceding cases approved).

Cases are often cited for this fallacious rule which do not countenance it; for example: 1827, M'Caw *v.* Blewit, 2 McC. S. C. 90, 102; 1827, Branch Bank *v.* Black, 2 McC. S. C. 344, 350. Distinguish also the occasional rule (Fant *v.* Miller, Va., *supra*) that the accounts of *executors* and *trustees* are taken as 'prima facie' correct; this leads to the same consequences as the New York rule.

[14] Their treatment of this whole subject is hopelessly confused and misleading; see, for example, their note 646, *ubi supra*.

[15] *Fed.* 1850, McCoy *v.* Rhodes, 11 How. 131, 140 (admission of a liability, with averment of payment in discharge; "[the answer's statements] are not responsive to charges

to-day is a question which would require an examination of the contemporary chancery practice, not within the present purview.[16]

§ 2124. **Same: (4) Party's Answers to Statutory Interrogatories.** Keeping in mind the orthodox difference between the use of an answer as a pleading in chancery and its use in a trial at law as evidence (*ante*, §§ 2121, 2122), the proper treatment of an opponent's answers to interrogatories authorized by statute ought not to be difficult to determine.

(1) If, as in some jurisdictions, the statute authorizes these to be used as an *answer to a bill of discovery* could be used,[1] then the plaintiff who uses any part *must put in the whole*, and cannot stop with the parts grammatically connected; in other words, the rule applies for using answers as evidence at law (*ante*, § 2121), and not the rule for using them as pleadings in chancery (*ante*, § 2122).[2]

made by the bill, but set up an independent defence; . . . as the respondents cannot make evidence for themselves, . . . the defence must fail"; following Chancellor Kent); 1867, Clements *v.* Moore, 15 Wall. 299, 315 (similar; citing Chancellor Kent); the following rule was presumably based on these rulings, but was omitted in the revised Rules of 1912: Federal Equity Rules, No. 41, as amended 1871 (if answer under oath is waived, or is required for specific interrogatories only, "the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only"); *Ky.* 1828, Lampton *v.* Lampton's Ex'rs, 6 T. B. Monr. 616, 620 ("In equity, by answer he is a witness only to deny affirmative allegations; . . . [otherwise] it places a strong temptation of interest [to executors] to defeat all claims both of legatees and creditors, and by his own swearing, and thus shield not only his proper estate but also keep the estate of his testator in his hands"); *Md.* 1826, Ringgold *v.* Ringgold, 1 H. & G. 11, 82 (quoted *supra*); *Mass.* 1829, New England Bank *v.* Lewis, 8 Pick. 113, 120 ("If the defendants saw fit to go further, as they had a right to do, and aver additional matter on which they rely in their defence, they must prove the additional matter, it being traversed by the general replication"); *Va.* 1793, Beckwith *v.* Butler, 1 Wash. 224 (bill for distribution; an executor may not use his answer to prove a gift to him by the deceased); 1810, Paynes *v.* Coles, 1 Munf. 373, 395 ("The rule is well-settled that the answer of a defendant in chancery is not evidence where it asserts a right affirmatively in opposition to the plaintiff's demand, but that in such case is as much bound to establish it by independent testimony as the plaintiff is to sustain the bill").

[16] A partial collection may be found in a note to Hart *v.* Ten Eyck, *supra*, 2 Johns. Ch. N. Y. 62, ed. Lawyers' Coöp. Pub. Co., Book I, and in Beech *v.* Haynes, Tenn., *supra;* Roach *v.* Glos, 6 Am. & Eng. Dec. in Eq. 65; 1905, Ocala F. & M. W. *v.* Lester, 49 Fla. 347, 38 So. 56; 1922, Woodyard *v.* Sayre, — W. Va. —, 111 S. E. 313 (bill of discovery by an administrator; the answer held to be evidence; disapproving Knight *v.* Nease, 53 W. Va. 51); and in Mr. Gest's interesting and learned article (cited *ante*, § 2032, n. 1) on The Responsive Answer in Equity.

The following statutes deal with the rule: *Fla.* Rev. G. S. 1919, § 3136 (like Fed. Eq. Rule 41); *Ga.* Rev. C. 1910, § 4547 ("The petitioner is not bound to read any portion of the answer, except that responsive to the petition"); *Pa.* St. 1913, May 28, P. L. 358 (abolishes the rule); 1914, Thomas *v.* Herring, 244 Pa. 550, 91 Atl. 500 (statute noted); *Va.* Code 1919, § 6128 (like Fed. Equity Rules).

§ 2124. [1] The statutes will be found cited without quotation, *ante*, § 1856 (discovery before trial), *post*, § 2218 (party's privilege abolished); they are strictly legislative adaptations of the equitable bill for discovery, and hence are without the present purview.

[2] In *Alabama*, the chancery-pleading rule was at first erroneously adopted, but the correct rule was afterwards substituted, for a while: 1845, Lake *v.* Gilchrist, 7 Ala. 955, 959 (ordinary Chancery rule for relief-answers, applied to an answer obtained by statutory discovery on interrogatories, so as to exclude a "totally distinct matter"); 1853, Pritchett *v.* Munroe, 22 Ala. 501, 507 (same; the answer "becomes evidence so far as it is responsive to the call for discovery or is necessarily connected with the responsive matter"); 1853, Saltmarsh *v.* Bower, 22 Ala. 221, 230 ("If he offers a portion of it [the discovery], he makes the whole evidence, and submits for the jury to determine what weight they will give it";

(2) If, however, the statute does not put such answers on the footing of an answer of discovery in chancery, but treats them merely as *depositions of a party-witness* who has by statute been deprived of his privilege (*post*, § 2218), the analogy of ordinary depositions (*ante*, § 2103) and of admissions in testimony (*ante*, § 2098, note 7) would seem to apply, and therefore *the whole need not be put in*, according to the better view; though there appears sometimes an inclination to adopt and adapt the chancery rule and require so much of the answers as is inseparably connected with the part offered.[3]

even though the answering party goes beyond the specific interrogatories and answers with affirmative matter as he could have done to a bill for discovery; repudiating Lake *v.* Gilchrist); 1853, Crocker *v.* Clements, 23 Ala. 296, 307 (answer in another chancery suit; "the whole answer, if pertinent, must be taken together"); 1897, Southern R. Co. *v.* Hubbard, 116 Ala. 387, 22 So. 541 (approving the preceding case, where the answers were offered to disprove the party's facts stated by him on the stand; whether the same would be required for answers offered merely as inconsistent with his testimony, undecided); 1899, Bank *v.* Leland, 122 Ala. 289, 25 So. 195 (a defendant's answers not responsive may be stricken out; reverting to the original rule); 1904, Garrison *v.* Glass, 139 Ala. 512, 36 So. 725 (following Bank *v.* Leland); 1909, Sullivan Timber Co. *v.* Louisville & N. R. Co., 163 Ala. 125, 50 So. 941 (the foregoing two cases overruled; Saltmarsh *v.* Bower followed); 1911, Birmingham R. L. & P. Co. *v.* Bush, 175 Ala. 49, 56 So. 731 (the original rule again; part may be used without making the whole evidence; foregoing cases not cited); 1913, Southern R. Co. *v.* Hayes, 183 Ala. 465, 62 So. 874 (Sullivan T. Co. *v.* L. & N. R. Co. followed).

In *Louisiana*, the rule is peculiar. By what seems to have been the original ecclesiastical and later civil-law rule, each answer to each interrogatory was considered as a whole, not blended all into one document called an "answer" as in chancery; and to each answer the rule was applied that the whole must be taken: *Ante* 1635, Hudson, Treatise of the Court of Star Chamber, 221 ("If the plaintiff read a defendant's examination to convict any, the defendant may read at the same examination to all that interrogatory to excuse him, for perhaps he explaineth his own meaning in some other part of the interrogatory"); Pothier, Obligations, I, 827, Evans' ed. ("Observe, that a party who would take advantage of the confession made by the opposite party upon his interrogatories cannot divide the answer but must take it altogether"); Wood's Civil Law, ed. 1760, p. 305, b. IV, c. 2, cited by Mr. Gest; this principle has been followed in the Code: La. C. Pr. 1894, § 353 (a party in answering interrogatories "may state some other facts tending to his defence, provided they be closely linked to the fact on which he has been questioned and an appeal made to his conscience," such declarations to be evidence; see also ib. § 356, quoted *ante*, § 2113); the Code has been construed in the following cases: 1811, Read *v.* Bailey, 2 Mart. 67, 75, *semble* (interrogatory charging a letter admitting the receipt of money; answer admitting it but asserting a payment, received); 1823, Crummen *v.* Cavenah, 1 Mart. N. S. 532, 534, *semble* (qualifying parts must be considered); 1877, McLear *v.* Hunsicker, 29 La. An. 540 (citing cases); 1879, Auge *v.* Variol, 31 La. An. 865, 869 (citing cases).

[3] ENGLAND: 1883, Rules of the Supreme Court, Order XXXI, rule 24 (a party may use "one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer; provided always that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in").

CANADA: *Alta.* Rules of Court 1914, No. 250 (like Ont. Rule 330); *B. C.* Rules of Court 1912, Rules 366, 370 *r* (like Eng. Ord. 31, Rule 24); 1896, Lyon *v.* Marriott, 5 Br. C. 157 (applying the rule of Court which lets the judge's discretion control in putting in the remainder of the opponent's examination); *Man.* R. S. 1913, c. 46, Rules 419–421 (like Ont. Rule 330); *Newf.* Consol. St. 1916, c. 83, Rules of Court 28, par. 18 (like Ont. Rule 330); *N. W. Terr.* Consol. Ord. 1898, c. 21, Rule 224 (like Ont. Rule 330); St. 1902, c. 5, § 1, amending Rules of Court 224 (special Rules prescribed when a part of the examination of a corporate officer is used); *N. Sc.* Rules of Court 1900, Ord. 30, Rule 23 (substantially like Ont. Rule 330); *Ont.* Rules of Court 1914, Rule 330, § 461, par. 1 (a party may use "any part" of his opponent's examination; but the judge, "if he is of opinion that any other part is so connected with the part to be so used that the last-mentioned part ought not to be used without such other part," may order it put in); Rule 327 (examination of a corporate officer or agent is not to be used); 1921, Capital Trust Co. *v.* Fowler, 64 D. L. R. 289,

In any event, the decision is of little practical consequence, because not only may the opponent put in the remainder of the document [4] (*ante*, §§ 2099, 2103) and no question of admission by pleading is involved, but he may also take the stand on his own behalf if he desires.

§ 2125. **Inspection of Opponent's Document, as making the Whole of it admissible.** An anomalous doctrine, requiring the whole of document to be treated as evidence, though no part of it had been offered, appears in some rulings of the early 1800s in England.[1] The operation of the rule is to be seen in this colloquy:

1836, *Calvert* v. *Flower*, 7 C. & P. 386. Mr. *Kelly*, for the defendant, having called for the plaintiff's ledger, due notice to produce having been given, Mr. *Campbell*, for the plaintiff, said: "I will produce it, if it is called for as your evidence." Mr. *Kelly:* "I call for it, but subscribe to no condition." DENMAN, L. C. J.: "If it is produced and given to Mr. Kelly, it will be for me to decide whether Mr. Kelly makes such use of it as will compel him to use it as his evidence." The book was produced, and Mr. Kelly turned over several pages of it, so as to look at the contents of them. DENMAN, L. C. J.: "I ought now to say that if Mr. Kelly looks at the book, he will be bound to put it in as his evidence."

Ont. (stock bought on false representations; the plaintiff having used part of the defendant's answers against him, the defendant was held entitled to use the remainder affecting the admission); *Sask.* 1921, Houlding *v.* Canadian Credit Men's T. Ass'n, 60 D. L. R. 533, Sask. (examination in bankruptcy; "the whole must be put in evidence"); *Yukon:* Consol. Ord. 1914, c. 48, Rule 224 (like Ont. Rule 330).

UNITED STATES: *Alabama:* Code 1896, § 680, Code 1907, § 3117 (the sworn answer must be taken to be true, so far as responsive; but where the bill is sworn to, the two-witness rule "is abolished," and the answer has "only such weight as evidence" as replies to "interrogatories"); *Georgia:* 1914, Hope *v.* First National Bank, 142 Ga. 310, 82 S. E. 929 (answers on supplemental proceedings to execution; "the entire evidence of the witness" need not be offered); *Iowa:* 1882, Van Horn *v.* Smith, 59 Ia. 142, 148, 12 N. W. 789 (defendant reading plaintiff's deposition is not obliged to read the whole); *Maine:* 1847, Hammatt *v.* Emerson, 27 Me. 308, 335 (deposition by plaintiff in a different suit, required to be used as a whole by defendant; on the theory that it was a "judicial document," like an answer in chancery, and could not be separated); *Massachusetts:* Gen. L. 1920, c. 231, § 89 (demandant may read answers to interrogatories "as evidence at the trial"; "the party interrogated may require the whole of the answers upon any one subject inquired of to be read, if a part of them is read; but if no part is read, the party interrogated shall in no way avail himself of his examination, etc."); 1900, Demelman *v.* Burton, 176 Mass. 363, 57 N. E. 665 (statute construed); *North Carolina:* 1897, Gossler *v.* Wood, 120 N. C. 69, 27 S. E. 33 (part of an answer admitting the first five allegations of a complaint, admitted, without reading the remainder setting up a counterclaim); 1921, White *v.* Hines, 182 N. C. 275, 109 S. E. 31 (personal injury; defendant's answer admitting that plaintiff was a passenger and that the train was derailed, received without reading the remaining clause denying negligence); *Washington:* 1899, Allend *v.* R. Co., 21 Wash. 324, 58 Pac. 244 (need not all be read, unless inseparable in regard to a particular matter); *Wisconsin:* 1899, Wunderlich *v.* Ins. Co., 104 Wis. 382, 80 N. W. 467 (whole need not be offered).

[4] *Contra:* 1921, Thomas *v.* Lockwood Oil Co., 174 Wis. 486, 182 N. W. 841 (death by wrongful act of defendant's agent F.; plaintiff having read parts of F.'s answers taken adversely by way of discovery under Stats. § 4096, as amended by St. 1913, c. 246, quoted *ante*, § 1416, defendant was not allowed to read other relevant parts of F.'s deposition; clearly unsound, through proceeding upon the literal words of the statute).

Compare the rule for an *opponent putting in his own answers* of discovery when not used by the party taking (*ante*, § 1416).

§ 2125. [1] The rule was apparently invented by Lord Ellenborough: 1805, Wharam *v.* Routledge, 5 Esp. 235 (book produced by plaintiff; Ellenborough, L. C. J., ruled that if the defendant inspected it, it became evidence, whether he used it or not); 1823, Wilson *v.* Bowie, 1 C. & P. 8, 10 ("if it is at all material to the case," but not otherwise).

Originally, it would seem, the rule applied only when the calling party "made use" of some part of it, and then on the present principle (*ante*, § 2113) the other party could use the remainder; 1795, Sayer *v.* Kitchen, 1 Esp. 209.

Mr. *Kelly:* "Certainly, I am fully aware that I must do so." DENMAN, L. C. J.: "I have mentioned this because it has been supposed by some, that an opposite counsel may look at the papers or books called for under a notice to produce, and then not use them."

The motive for this peculiar rule seems not to have been any direct bearing on the present principle of Completeness; for that would only come into application (*ante*, §§ 2102, 2113) when some part, at least, of the document had been put in evidence. The real motive seems to have been a desire to penalize indirectly the attempted evasion of another fundamental doctrine of the common law, namely, that a party is not entitled to know beforehand the tenor of evidence in his opponent's possession (*ante*, § 1845). The opponent was privileged not to produce any document in his possession (*post*, § 2219); yet, if he did not do so upon notice, the party desiring to prove its contents would be allowed to do so by a copy or other secondary evidence (*ante*, § 1199). Hence, to evade allowing this, the opponent would usually have the document ready in court, in case the first party should desire to put it in as evidence. If the first party, however, should on coming to that stage of the evidence, call for the document with the supposed purpose of putting it in, and receive it in his hands for the purpose, he might on perusal find that it was not suitable and decline to put it in. Nevertheless he would thus have become aware of its contents, without the obligation of using it. This might not in itself be a serious matter; but obviously he might, on the mere pretext of intending to prove documents as a part of his case, give notice to produce sundry documents whose contents were unknown to him, on the chance that they might be useful to him or might at least reveal important parts of the opponent's case, and then on perusing them when produced, he might hand them back without putting them in, — having thus in effect conducted a fishing expedition under the cover of a notice to produce for proof. This neat evasion of the fixed principle that a party was to be kept entirely in the dark as to the tenor of evidence in his opponent's possession was thereupon struck at by this present rule. It obliged him to take the risk of putting all the document in evidence if he even perused it on production; for this would prevent him from perusing any documents except those of whose contents he was already fairly certain that they would be favorable and would be put in evidence by him:

1803, RADCLIFF, J., in *Lawrence* v. *Van Horne*, 1 Caines 276, 285: "A party who gives notice to produce a paper in evidence must be supposed to know its contents. If he does not, he ought not to be permitted to speculate through the forms of law and obtain from his adversary the inspection of any paper or document he may choose to demand. Such a privilege would be liable to abuse."

1861, BIGELOW, C. J., in *Clark* v. *Fletcher*, 1 All. 53, 57: "A party cannot require his adversary to produce a document, and after inspecting it insist on excluding it from the case altogether. Such a course of proceeding would give one party an advantage over the other. He would gain the privilege of looking into the private documents of the other party, without any corresponding obligation or risk on his own part. It is therefore generally deemed a just and wise rule that in such cases the paper called for and produced,

after it has been seen and examined by the party calling for it, becomes competent evidence in the case for both parties. It is manifest that this rule would be of little use if the paper can be excluded on the allegation that the party calling for it mistook the nature of its contents."

The answers to this plausible suggestion were plain. (1) The very principle whose evasion was thus penalized was itself unfair and reprehensible. Its vices have been already considered (*ante*, § 1847); it is enough here to repeat that the common-law notion of keeping a party entirely ignorant of the evidence possessed by his opponent was one to be discountenanced, not maintained. Moreover, by a bill of discovery in equity such documents could have been obtained even under the common-law system; and similar statutory proceedings at law now are authorized almost everywhere (*ante*, § 1859). Thus, by the judgment of posterity, and by the contemporary standards of equity, the penalty of the present rule was in truth imposed upon a party who was attempting to do no more than justice and good sense entitled him to do, namely, inform himself at the trial of the documentary evidence available against him. (2) Furthermore, the opponent in this kind of case was in no situation to complain, because he had only himself to thank for the disclosure of the evidence. The opponent was not compellable to produce the document; he did so voluntarily. The charge of speculative tactics with the rules of evidence was rather, under the supposed rule, to be laid to the opponent who produced; because, not being obliged to produce, he still did so, knowing that their contents were unfavorable to the first party, in the hope that the first party would have to risk their perusal and thus be compelled to put them in evidence.

There is, then, not only no sound reason for establishing such a penal rule, but it is itself open to abuse, and merely adds to the sportsmen's rules elsewhere noticeable in the common-law system. Moreover, it is totally out of harmony with the modern statutory procedure for discovery at law:

1803, THOMPSON, J., in *Lawrence* v. *Van Horne*, 1 Caines, 276, 286: "The practice of giving notice to produce papers, as in the present case, has been introduced to save the expense of going into chancery for a discovery; and I can see no good reason why the party ought not to be entitled to all the advantages he would have, had he resorted to his bill in equity; in that case, after a discovery, he might exercise his discretion whether to use it as evidence or not. I do not think this right of inspection would be liable to the abuses suggested by the plaintiff's counsel, that it might lead to an impertinent inspection of papers having no relevancy to the controversy; . . . it would be competent for the party having the paper to object against the introduction, or the proof of its contents, as being illegal or irrelevant, in the same manner as if the party calling for the paper had been in possession of it, or as might be done with respect to every other piece of testimony."

1863, BARTLETT, J., in *Austin* v. *Thomson*, 45 N. H. 113, 117: "The only reason given for the supposed rule is [the unconscionable advantage of prying without responsibility]. . . . But as the party notified is not obliged to produce the papers, and as he may if he produce them decline to allow them to be examined except upon condition that if examined they shall be read in evidence, parties notified seem amply protected from any such unconscionable advantage, and the reason stated entirely fails; and we see no sufficient

reason for a rule that is at variance with the general course of our practice and that can hardly facilitate the administration of justice, since, if it has any practical effect in addition to the rules for the admission of competent evidence, it must be to compel the Court to allow incompetent evidence to go to the jury."

The rule that the whole document must be put in, if merely perused or inspected by the party calling for it, even though he does not desire to use it, was clearly the orthodox English practice;[2] but it seems to have been properly abandoned in more recent times.[3]

In the United States, the earlier English rule was in a majority of jurisdictions followed;[4] while in others it has been repudiated, sometimes by express statute.[5]

[2] Cases cited *supra*, note 1.

[3] 1888, Parnell Commission's Proceedings, Times' Rep. pt. 26, p. 169 (President Hannen: "The important fact of their having called for it does not alter the matter at all. You produce it; if they do not put it in, you are not on that account entitled to put it in. You have met their challenge; that is what it comes to").

But even the reading of a single word entitles the opponent to put in the whole; see an extreme instance of this technicality in Steinie Morrison's Trial, 1911, p. 61 (Notable British Trials Series, 1922).

[4] *Federal:* 1811, U. S. *v.* Mitchell, 2 Wash. C. C. 478 (mere calling for the document does not make it evidence); 1811, Jordan *v.* Wilkins, 2 Wash. C. C. 482 (mere inspection requires the demandant to read in evidence); 1891, Edison El. L. Co. *v.* U. S. El. L. Co., 45 Fed. 55, 59 (same); *Delaware:* 1832, Randel *v.* Chesap. & Del. Canal Co., 1 Harringt. 233, 284 (mere calling for papers does not make them evidence, but inspection does); 1837, Hutchinson *v.* Gordon, 2 Harringt. 179, *semble* (same); 1839, Read *v.* Randel, 2 Harringt. 500 (same); *Georgia:* 1855, Wooten *v.* Nall, 18 Ga. 609, 614 ("With the wisdom of this rule, we have nothing to do"); 1893, Cushman *v.* Coleman, 92 Ga. 772, 19 S. E. 46; *Maine:* 1839, Penobscot B. Co. *v.* Lamson, 4 Shepl. 224, 233; 1851, Blake *v.* Russ, 33 Me. 360; *Maryland:* 1913, Eckels & S. I. M. Co. *v.* Cornell E. Co., 119 Md. 107, 86 Atl. 38; *Massachusetts:* 1848, Com. *v.* Davidson, 1 Cush. 33, 44 ("The result of the examination of the cases seems to be: 1. That all the authorities agree that mere calling for the books is not enough to make them evidence; 2. That whether calling for the books of the opposite party and inspecting them, and doing nothing more, makes the book evidence is a mooted point; 3. That the books, when produced upon notice, if inspected by the party calling for them and actually used as evidence by him, are thereby made evidence for the other party"; "all irrelevant matter would of course be properly excluded"); 1853, Reed *v.* Anderson, 12 Cush. 481 (the second question above, answered affirmatively; but here not applied because the document produced was not the one called for); 1861, Clark *v.* Fletcher, 1 All. 53, 57; 1873, Long *v.* Drew, 114 Mass. 77, 80 (made evidence for both parties); 1911, Boyle *v.* Boston Elevated R. Co., 208 Mass. 41, 94 N. E. 247 (rule properly held not applicable to admit a document which though called for and produced was not otherwise admissible for the calling party; whether the rule itself should be regarded as now valid, not decided); 1921, Capodilupo *v.* Stock, 237 Mass. 550, 130 N. E. 65 (rule of Clark *v.* Fletcher assumed to be law); *Mississippi:* 1847, Anderson *v.* Root, 8 Sm. & M. 362, 364; *Pennsylvania:* 1821, Withers *v.* Gillespy, 7 S. & R. 10, 14 (rule laid down, but doubted); *Texas:* 1857, Saunders *v.* Duval, 19 Tex. 467, 472, *semble*.

The rule, however, ought not to extend to a *second trial* so as to admit documents inspected at the first: 1893, Cushman *v.* Coleman, 92 Ga. 772, 19 S. E. 46. *Contra:* 1855, Wooten *v.* Nall, 18 Ga. 609, 614.

Nor does it apply where no formal *demand for production* has been made: 1820, Farmers' & M. Bank *v.* Israel, 6 S. & R. Pa. 293, 296 (rule not applicable where inspection is allowed merely as an act of courtesy).

[5] *Cal.* C. C. P. 1872, § 1939 ("Though a writing called for by one party is produced by the other and is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the case"); *Conn.* 1897, Laufer *v.* Traction Co., 68 Conn. 475, 37 Atl. 379 (reports made to the defendant by its employees as to an accident, called for by plaintiff but not used); *Ida.* Comp. St. 1919, § 7963 (like Cal. C. C. P. § 1939); *Ia.* Code 1897, § 4567, Comp. C. § 7364 ("though a writing called for by one party is by the other produced," the party calling need not use it as evidence); *Mont.* Rev. C. 1921, § 10587 (like Cal. C. C. P. § 1939); *Nebr.* Rev. St. 1921, § 8907 (like Ia. Code, § 4567); *N. H.* 1863, Austin *v.* Thompson, 45 N. H. 113, 116 (repudiating the "supposed English rule"; quoted *supra*); *N. Y.* 1803, Lawrence *v.*

Distinguish two superficially related situations. (1) When on *cross-examination* a document is offered to a witness for authentication, to be put in later by the cross-examiner, the other counsel is entitled then and there to inspect it, so as to be prepared to re-examine upon it (*ante*, § 1861). Since he is entitled to do so, and since the document is not desired by him for his own case, and since his inspection is a mere precaution to protect him against the cross-examiner, he is of course not obliged, through this inspection, to put in the document.[6] (2) When a document is called for and the opponent produces it from his possession, the *execution* of it remains to be proved. This mere production by the opponent is not a waiver of proof of execution, and the party calling for it is still obliged to prove its execution (*ante*, § 1298). There was, however, some controversy at one time on that question, and in the course of it the precedents were sometimes confused with those of the present rule; but there is no connection whatever of principle between them.

Van Horne, 1 Caines 276, 277, 285, 287 (inspection does not oblige the inspecting party to read, per Thompson, J., and Lewis, C. J., against Radcliff, J.; though Lewis, C. J., seemed to think that there was no "essential difference" between the other two judges' opinions; quoted *supra*); 1806, Kenny *v.* Clarkson, 1 Johns. 385, 395 (calling for and perusing a document does not oblige the party to read it); 1890, Carradine *v.* Hotchkiss, 120 N. Y. 608, 611, 24 N. E. 1020; *Or.* Laws 1920, § 783 (like Cal. C. C. P. § 1939); *P. I.* C. C. P. 1901, § 323 (like Cal. C. C. P. § 1939); *P. R.* Rev. St. & C. 1911, § 1454 (like Cal. C. C. P. § 1939); *Utah:* Comp. L. 1919, § 7109 (like Cal. C. C. P. § 1939).

So far, however, as a statute has not made production compulsory, it is obvious that the opponent may produce only upon an *express stipulation* that the document shall be read, and this if accepted would be binding: 1855, Huckins *v.* Ins. Co., 31 N. H. 238, 240, 247 ("The plaintiff was not obliged to produce his ledger, and could attach to it the condition which he did").

[6] 1827, R. *v.* Ramsden, 2 C. & P. 603.

Sub-title IV: AUTHENTICATION OF DOCUMENTS

CHAPTER LXXII.

I. In General

II. Specific Rules of Sufficiency for Circumstantial Evidence

1. Authentication by Age of Document

2. Authentication by Contents

3. Authentication by Custody

4. Authentication by Purporting Official Seal or Signature

§ 2128. **Nature of these Rules.** The control given to the judge over the jury appears usually in the form later examined (*post*, §§ 2494, 2551), namely, in his power to pass upon the sufficiency of a party's evidence, after all is offered, to go to the jury on the entire issue. This general power, being exercised in each case according to the whole mass of evidence as there pre-

sented, ordinarily does not result in abstract rules; each ruling stands by itself, and can form no precedent. But for many classes of issues, experience has dictated definite rules, which may be invoked to control all cases. Here there is a genuine rule of Evidence, *i. e.* declaring that a certain group of data is or is not sufficient to send the case to the jury. It is not a rule of admissibility as to any one piece of the evidence, for each is at least admissible; but a rule of final admissibility as to the group of facts, *i. e.* that it is or is not, taken all together, sufficient to go to the jury. Such rules are therefore of the present type, Quantitative or Synthetic (*ante*, § 2030). In fact, all of the preceding rules of this type may be regarded as the concrete expressions of this general power of the Court to declare a quan ity of evidence insufficient.

For certain sorts of these rules, it is often difficult to separate in them their character as rules of the present sort and their character as rules of presumption affecting the burden of proof (*post*, § 2490); for they often embody both. For example, when the rule is named that a man's absence, unheard of, for seven years, raises a presumption of his death, it is obvious that two rules are in effect involved, first, a rule that this fact of absence with these accompanying circumstances is *sufficient* to go to the jury on the issue of death, and, secondly, that it also raises a presumption of death, *i. e. requires* a verdict of death unless the opponent offers evidence in explanation. In one and the same formula, two steps are accomplished with reference to the duty of proof as between the parties, namely, relieving one's self of the duty and also shifting it to the opponent (*post*, § 2494). Yet there may be rules of sufficiency which remain merely such, and are not given the added force of rules of presumption. Such are those which have preceded in this Title. For example, the rule that two witnesses are necessary for certain facts admits the evidence by two witnesses to go to the jury; but it does not declare that two witnesses raise a presumption and shift the duty of proof. No one has ever contended that it should go so far. There, then, the emphasis is solely on the insufficiency of certain evidence, and the rule marks the line where the evidence becomes sufficient, but does not attempt to declare that it passes the further line where it would raise a presumption. It is perfectly apparent that most of the other preceding rules have the one character only.

But we now come to a particular class of rules in which the emphasis on the one or the other character is doubtful. They are neither clearly rules of sufficiency alone, nor clearly rules of presumption. The emphasis seems to be sometimes on the one, sometimes on the other character, according to the particular facts of the litigation. For example, that identity of name is some evidence of identity of person is in general unquestioned; but is it a rule of sufficiency, *i. e.* that identity of name, with nothing more, is sufficient to go to the jury and thus needs no other evidence first to be coupled with it; or is it a rule that identity of name raises a presumption of identity of person, so as to require a verdict unless the opponent takes up the duty of disproof? This question, when discriminated at all, is variously answered (*post*, § 2529).

Wherever there has been any claim for this double character to such a rule, it is more practicable to consider it with Presumptions.

But one particular sort of such rules may more suitably be considered here, because the emphasis has generally been upon their character as rules of sufficiency, namely, the rules relating to the *authentication of documents, i. e.* proving their genuineness or execution. This has probably been due to the tangibleness of the line marking sufficiency from insufficiency, as compared with the line marking a presumption. The stage when the counsel desiring to introduce a document has accumulated sufficient evidence of its execution to be allowed to read it or hand it to the jury is dramatically marked and apparent; and thus the emphasis of the rule of Evidence has come to be placed on the question whether the proof has reached that stage, *i. e.* on the question of sufficiency. The struggle centres about this point; what happens afterwards is less tangible and less worth arguing over; and thus the question of a presumption has received comparatively little emphasis. It will be proper, therefore, to treat the rules for authenticating documents as having the essential character of rules of sufficiency, although they may sometimes be accorded also the quality of rules of presumption.

§ 2129. **General Principle of Authentication; Chattels.** The foundation on which rests the necessity of authentication is not any artificial principle of Evidence, but an inherent logical necessity. For example, when Doe is charged with the murder of Roe, and it is evidenced that some one murdered Roe, but the person killing is not shown to be the accused, the failure of the prosecution is not due to any rule of Evidence, but to the absence of a fact logically inherent in its claim, namely, Doe's identity with the murderer. So, when a knife is offered as J. S.'s knife, with which he did the killing, the proof of the knife's use, and of its finding, leaves unsupplied an essential element in the assertion, namely, J. S.'s use or ownership.

In short, when a claim or offer involves impliedly or expressly any element of *personal connection with a corporal object,* that connection must be made to appear, like the other elements, else the whole fails in effect. Thus, then, if as a part of some facts asserted Doe's letter is offered, what is involved in the assumption of the offer is (a) a letter written (b) by Doe; thus, *a* letter alone, without the fact that it is Doe's, is not receivable, simply because it is not the thing offered. By one of the many rules of Evidence, Doe's letter may be admissible; but, whatever the particular rule of Evidence may be, the element of Doe's connection with the letter is logically assumed in all.

Beyond all this, there is a general mental tendency, when a corporal object is produced as proving something, to *assume, on sight of the object, all else that is implied in the case* about it. The sight of it seems to prove all the rest. Thus, it is easy for a jury, when witnesses speak of a horse being stolen from Doe by Roe, to understand, when Doe is proved to have lost the horse, that it still remains to be proved that Roe took it; the missing element can clearly be kept separate as an additional requirement. But if the witness to the

theft were to have the horse brought into the court-room, and to point it out triumphantly, "If you doubt me, there is the very horse!", this would go a great way to persuade the jury of the rest of his assertion and to ignore the weaknesses of his evidence of Roe's complicity. The sight of the horse, corroborating in the flesh, as it were, a part of the witness' testimony, tends to verify the remainder. This tendency, illogical though it be, is deeply rooted in all persons, even the most intelligent and reflective; it has been already specially noticed with reference to the propriety of using autoptic proference (or, real evidence) as a source of proof (*ante*, §§ 1157, 1158). The great dramatist [1] has satirized it in his scene with Jack Cade's mob, where their leader proclaims himself, to the questioning magistrate, as the descendant of Earl Mortimer, whose son

> "Was by a beggar woman stol'n away,
> And, ignorant of his birth and parentage,
> Became a bricklayer when he came to age.
> His son am I! deny it if you can!";

to which his follower, Smith the Weaver, adds vehemently the following strong confirmation:

> "Sir, he made a chimney in my father's house; *and the bricks are alive at this day to testify it;* therefore, deny it not!"

This logical element, and also the mental tendency to forget the importance of proving it, exists wherever any personal connection with a corporal object is assumed in the offer. The necessity of authentication, therefore, applies equally well to *chattels*, — to a knife, a horse, a coat, or a machine, whenever it is asserted to be connected with a person; and this authentication of objects other than writings is a common necessity of every day's trial practice.[2]

§ 2129. [1] Henry VI, pt. II, Act IV, Sc. 2.

[2] The following list includes casual instances only: *Fed.* 1909, Hauger *v.* U. S., 4th C. C. A., 173 Fed. 54, 60 (coins, in a counterfeiting charge); *Cal.* 1909, People *v.* Muhly, 11 Cal. App. 129, 104 Pac. 466 (keys, clothes, etc., held not sufficiently connected with the defendant); *Ia.* 1902, State *v.* Hossack, 116 Ia. 194, 89 N. W. 1077 (hairs on an axe); 1905, State *v.* Seery, 129 Ia. 259, 105 N. W. 511 (weapon); 1921, State *v.* Kingsbury, 191 Ia. 743, 183 N. W. 325 (intoxicating liquor; contents of bottles produced and analyzed were testified to be intoxicating; excluded, because of insufficient evidence that the bottles were the very ones taken from defendant, and that the contents were unchanged in the meantime; the ruling is artificially over-strict on the latter point, ignoring the principle of § 2530, *post*); 1921, State *v.* Walker, 192 Ia. 823, 185 N.W. 619 (burglary; certain automobile tires said to have been stolen from the building in question, held improperly exhibited to the jury, because not shown to have been in defendant's possession and not sufficiently identified as the stolen ones); *Ky.* 1898, Parrott *v.* Com., — Ky. —, 47 S.W. 452 (club used in killing, required to be authenticated); *La.* 1904, State *v.* Aspara, 113 La. 940, 37 So. 883 (pistol); 1905, State *v.* Gordon, 115 La. 571, 39 So. 625 (pistol); *Mass.* 1867, Com. *v.* Bently, 97 Mass. 551, 554 (samples of liquor analyzed by a witness and said to be that kept by the defendant); *Mo.* 1919, State *v.* Powell, — Mo. —, 217 S. W. 35 (murder; defendant's shirt and hat as worn by him at the time of the affray, not admitted, for lack of evidence authenticating it); 1920, State *v.* Smith, — Mo. —, 222 S. W. 455 (viscera of deceased, on a charge of murder by poison); *Mont.* 1895, State *v.* Cadotte, 17 Mont. 315, 42 Pac. 857 (knife introduced as accused's); 1921, State *v.* Davis, 60 Mont. 426, 199 Pac. 421 (pistol used in homicide); *N. J.* 1901, State *v.* Hill, 65 N. J. L. 626, 47 Atl. 814 (cartridges found in a coat); 1852, People *v.* Larned, 7 N. Y. 445, 451, 452 (tools, offered with connecting evidence); *N. Y.* 1866, People *v.* Gonzalez, 35 N. Y. 49 (clothes worn by the accused); *Tex.* 1921, Davis *v.* State, 89 Tex. Cr. 411, 231 S. W. 784 (larceny of wheat).

This process of *authenticating* chattels is ordinarily referred to as *identifying* them; but the two ideas are distinct, and different principles of Evidence are applied. *Identification* presupposes that two objects, apparently different, have been referred to, and the issue is whether they are in fact one and identical, not separate objects. Thus, the existence of specific marks, essential to the one, and found also in the other, becomes significant, and the admissibility of this evidence of identity may come into question (*ante*, § 415), as well as the presumption of identity (*post*, § 2529). *Authentication*, however, presupposes a single object only, and refers to it as associated with a person, a time, a place, or other known conditions. Thus, the object itself, when offered, is not relevant unless it is the object that was in fact thus associated with those conditions. Hence, the evidencing of those conditions is necessary; and the principle of Authentication requires that some evidence connecting the object with those conditions be introduced before or at the time of offering the object itself.

Nevertheless, no specific rules have grown up about the authentication of such objects, chiefly because the variety of circumstances involved is so great that no specific rules would be suitable.

§ 2130. **Same: Documents.** How, then, have such specific rules come to exist particularly for documents? Chiefly through two reasons:

(1) Most documents bear a signature, or otherwise purport on their face to be of a certain person's authorship. Hence, a special necessity exists for separating the external evidence of authorship from the mere existence of the purporting document. A horse or a coat contains upon itself no indications of ownership; when it is claimed that Doe wore it or rode it, all can appreciate that this element is missing and must be supplied by evidence. But a document purports in itself to indicate its authorship; and the perception that this element is nevertheless missing, and must still be supplied, is likely not to occur. There is a natural tendency to forget it. Thus it has constantly to be emphasized by the judicial requirement of evidence to that effect.

(2) The original of a writing is usually presented to the tribunal 'in specie,' while other material objects are not required to be and seldom are brought into court (except such articles as the tools of a crime or the clothes of a victim); so that, in practice, the most common opportunity for the operation of this aberrant tendency occurs for writings, visibly in existence and mutely suggesting that they *are* all that they purport to be. Thus the mental tendency is especially forcible, frequent, and misleading where documents are involved.

For these two reasons, then, it has happened that the specific rules that have grown up concerning modes of authentication have come to relate to writings alone.

Thus it is that in the traditions of the common law a wise emphasis has been placed upon the necessity of supplying the logical element of authenticity for writings. The general principle has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly

genuine, merely on the strength of this purport; *there must be some evidence of the genuineness* (or execution) of it: [1]

1794, *Horne Tooke's Trial*, 25 How. St. Tr. 78; Mr. (later L. C.) *Erskine*, arguing against the reading of a treasonable paper not authenticated: "Would it be said that this should be read as evidence against the prisoner before his connexion with it is proved to have had an existence? I take the reason of that to be this — and I take the reason of it to be founded in great wisdom, in that which in my opinion forms the glory of the English law in all its parts, in an acquaintance with the human character, in the recognition of all that belongs to the principles of the human mind, in the recollection of our wise ancestors that men are not angels, that they carry about them (and your lordships even carry about you) all the infirmities of humanity, and that it therefore shall not be permitted to make a strong impression upon the minds of men by reading matters at which . . . the mind of man revolts, and so in the course of a long trial the jury afterwards cannot discharge from their recollection what they have heard. They do not remember with precision whether that which was read was brought home to the prisoner; and then they mix up in their imagination and recollection matters which they may disapprove with disapprobation of the person who is on trial before them. I take that, with humility, to be the principle. . . . It must first of all be brought home to the person who is to be affected by it, before it is suffered to be read; for after it is read, the effect is had, and that is the danger I complain of." L. C. J. EYRE: "If the question is whether it is now to be read, I think the objection is good. If the question is whether it is evidence admissible, not yet to be read, but to be read or not as other evidence shall bring the matter of it sufficiently home to the prisoner, then the objection is ill-founded."

1847, BRONSON, C. J., in *Willson* v. *Betts*, 4 Den. 201, 213: "In the ordinary affairs of men, it is very often assumed, without proof, that he whose name has been affixed to a written instrument placed it there himself. But when the signing becomes a matter of legal controversy, it must be established by proof."

1856, BENNING, J., in *Stamper* v. *Griffin*, 20 Ga. 312, 320: "No writing can be received in evidence as a genuine writing until it has been proved to be a genuine one, and none as a forgery until it has been proved to be a forgery. A writing, of itself, is not evidence of the one thing, or of the other. A writing, of itself, is evidence of nothing, and therefore is not, unless accompanied by proof of some sort, admissible as evidence."

§ 2130. [1] *Eng.* 1810, Pfial *v.* Vanbatenberg, 2 Camp. 439 (the mere possession by defendant of a receipt, in unproved handwriting — here on a bill of exchange — not evidential; Ellenborough, L. C. J.: "A man cannot be allowed to manufacture evidence for himself at the risk of being convicted of forgery; . . . [moreover,] these receipts may have been fraudulently indorsed without the plaintiff's privity"); *U. S. Fed.* 1913, Oregon & Cal. R. Co. *v.* Grabissich, 9th C. C. A., 206 Fed. 577 (answer filed in a prior suit); 1918, McGowan *v.* Armour, 8th C. C. A., 248 Fed. 676 (alienation of husband's affections; a letter found by plaintiff in the husband's pocket signed by defendant's name, excluded on the facts); *Conn.* 1794, Neil *v.* Miller, 2 Root 117 (receipt; "if the defendant had produced any evidence, though ever so small, of its being the plaintiff's signature, it would have been proper to have left it to the jury to weigh; but there being no evidence at all of its being genuine, it would be improper to let it go to the jury"); *Haw.* 1918, Terr. *v.* Alohikea, 24 Haw. 570 (cheating; a check purporting to be indorsed by defendant, not received; cases collected); *Mich.* 1875, McHugh *v.* Brown, 33 Mich. 3 (note and mortgage not shown, executed, excluded); *Mo.* 1881, State *v.* Albert, 73 Mo. 347, 360 (letter found on A. purporting to be from B.); *Okl.* 1918, Columbian Nat'l Life Ins. Co. *v.* Wirthle, — Okl. —, 176 Pac. 406 (receipts for payment of premium, with lithograph signature of secretary and treasurer, but no countersign as required, excluded for lack of evidence of genuineness); *P. I.* 1906, Nonan *v.* Salas, 7 P. I. 1; *W. Va.* 1922, Woodrum H. O. Co. *v.* Adams Ex. Co., — W. Va. —, 110 S. E. 549 (purporting receipts for goods, returned to plaintiff shipper by drayman, excluded for lack of evidence of genuineness).

Add the authorities cited in § 2134, n. 1, *post*.

For the *presumption of genuineness* from *recording*, *possession*, *delivery*, etc., see *post*, §§ 2516, 2520.

For the necessity of *pleading a denial* of genuineness, see *post*, § 2596.

§ 2131. **Modes of Authenticating Documents.** Some of the various possible modes of evidencing a document's genuineness are, of course, never questioned to be sufficient to entitle it to go to the jury. Those about which question has arisen are only certain kinds of circumstantial evidence. It will be necessary therefore to eliminate at the outset the kinds of evidence as to which there is no dispute from the present point of view.

Evidence may be of three different sorts (*ante*, § 24); namely, autoptic proference (or, real evidence), testimonial evidence, and circumstantial evidence:

(1) Autoptic proference (or, real evidence), occurs, for the execution of writings, when the *act of writing* is done *in the presence of the tribunal.* The sufficiency of this is plain.[1]

(2) *Testimonial evidence* is always regarded as sufficient; the only questions being the ordinary ones as to the qualifications of the witness by knowledge.[2] Ordinary *admissions* of a party are a sort of evidence always regarded as sufficient to admit a document to the jury;[3] but they are to be distinguished from judicial admissions (*post*, § 2132).

(3) *Circumstantial evidence* is of various sorts; and first, of those not here involved:

(*a*) *Style of handwriting, i. e.* similarity between that of the document and that of the person alleged as its maker, is a sort of circumstantial evidence (*ante*, § 383) undisputed in its sufficiency; the controversies have arisen over the proper modes of proving the fact of similarity.[4]

(*b*) *Sundry circumstances* preceding or following the *act of writing* may be appealed to as evidence.[5] For example, if an unsigned writing is left in a

§ 2131. [1] It is ordinarily available only when a person is required to write his name as a specimen for comparison; its genuineness is then beyond dispute, and the only question that arises concerns entirely different principles, and has been already examined (*ante*, § 2015, *post*, § 2264). The other possible case is that of a *recognizance* entered into *before the Court*, and this becomes unimpeachable as a part of the record (*post*, § 2450).

[2] Note that in strictness the only kind of direct testimonial evidence to execution is that of a witness who saw the very *act of writing;* for testimony based on the style of handwriting is in strictness testimony to a circumstantial fact. An *attesting witness* is one of the two chief instances of those who in practice speak directly to the act of execution; the use of his hearsay attestation has been already examined (*ante*, §§ 1505, 1511); it is generally held that the signature of attestation implies testimony to the act of execution. The use of *official certificates or records* of acknowledgment or execution is the other chief class; these have been already considered (*ante*, §§ 1648, 1676); but their relation to the present subject is briefly noted *post*, § 2162.

[3] Such admissions may not suffice to dispense with the *production of the original* (*ante*, §§ 1255–1259), nor with the calling of an *attesting witness* (*ante*, § 1300); but, supposing these other rules not to stand in the way, an ordinary admission suffices as evidence of execution; though there may be a question as to identity (*post*, § 2156). Furthermore, a *judicial admission*, or formal waiver of proof, suffices, for this as for every other issue, to dispense entirely with evidence (*post*, §§ 2132, 2595).

[4] The type of handwriting may be evidenced by *persons familiar* with it (*ante*, §§ 693, 2008); or it may be evidenced by *specimens* produced to instruct the tribunal directly (*ante*, § 2016). With this subject we are not here concerned.

[5] The following are instances: ENGLAND: 1849, R. *v.* James, 4 Cox Cr. 90 (at 6 P. M. the defendant had a bill without an indorsement; at 6.30, he presented it with a forged indorsement; held, evidence of forgery).

UNITED STATES: *Alabama:* 1902, Woodruff *v.* Hundley, 133 Ala. 395, 32 So. 570 (analogous instance); 1920, Chisolm *v.* State, 204 Ala. 69, 85 So. 462 (robbery; the defendant's identity being in issue, an anonymous threatening letter was offered; assuming that de-

room with pen and ink, and Doe goes alone into the room, then comes out with fresh ink-marks on his hand, and the writing is then found to bear his name in signature, this would be regarded, no doubt, as sufficient evidence to go to the jury; it is the same sort of evidence that might be used to prove a murder or any other act done in that room. For evidence of this sort there seem to be no specific rules of sufficiency.[6]

It is the remaining sorts of Circumstantial Evidence which give rise to rulings of sufficiency. They consist of groups of circumstances, each by itself perhaps insufficient, but all combined amounting in common experience to a sufficiency. They fall, roughly, under four heads: (*c*) age; (*d*) contents; (*e*) custody; (*f*) signature or seal.

(*c*) *Age.* An *ancient document, i. e.* one having existed for a generation or more, coming from a natural place of custody, and not bearing a suspicious appearance, may on these circumstances, with perhaps others combined, be taken to be sufficiently evidenced as to its genuineness (*post*, §§ 2137–2146).

(*d*) *Contents.* A *letter*, coming in *answer by mail*, and corresponding in time and contents to a prior letter sent to the purporting writer, may be regarded as sufficiently evidenced; and in other ways a document's contents may serve the purpose (*post*, §§ 2148–2156).

(*e*) *Custody.* A document purporting to be *official*, and found in its natural

fendant had handed to the victim an envelope containing this letter, held, by the majority, that the delivery of the envelope, and certain other circumstances sufficed to admit the letter; the minority holding that apart from handwriting, "the possession or delivery of an unsigned writing is no evidence whatsoever that the person . . . himself put the writing on it"; the minority view seems unsound, first in stating so extremely that these facts are "no evidence whatsoever"; secondly, in making a general rule out of what was really only a specific situation where the accused's color seemed to call for special protection against prejudice); *California:* 1904, Bauer *v.* State, 144 Cal. 740, 78 Pac. 280 (testimony by one who had not seen the actual signing of the document, held sufficient on the facts); *Georgia:* 1886, Smith *v.* State, 77 Ga. 705, 710 (receiving a letter handed to the witness by the person purporting to have written it); 1907, Proctor & Gamble Co. *v.* Blakeley O. & F. Co., 128 Ga. 606, 57 S. E. 879 (arbitration contract in the custody of a third party out of the State; handwriting testimony not being accessible, and a sworn copy being in evidence, the execution was held sufficiently evidenced by the parties' prior conduct, etc.); *Kentucky:* 1830, Fleming *v.* Thomas, 4 J. J. Marsh. 47 (lost receipt for part payment on a note; the fact of some payment on that date, together with the absence of an indorsement on the note, held sufficient to evidence the receipt's genuineness); *New York:* 1916, People *v.* Manganaro, 218 N. Y. 9, 112 N. E. 436 (wife-murder; a writing called a will, purporting to be the defendant's, held not sufficiently authenticated by the mere fact that it was found on a dresser in the room occupied by him; the question of admissibility of the inference from possession was not involved); *Washington:* 1906, State *v.* Dilley, 44 Wash. 207, 87 Pac. 133 (murder; a letter containing suggestions for shaping testimony was seen to fall out of the window where one defendant was confined in the upper story of the jail, the other defendants being confined in a room below; admitted against the former defendant, with other evidence of handwriting).

[6] There are, however, rulings of admissibility as to certain kinds of facts; for example, whether a *plan* or design to execute a contract (*ante*, §§ 104, 376) or a *habit* of executing a certain kind of contract (*ante*, §§ 94, 95, 96, 377, 380) is receivable, — the question, however, being the same whether the alleged contract is written or oral; whether a *motive* existed for executing a certain kind of contract (*ante*, §§ 391, 392); whether the subsequent *possession* or *use of a document* is admissible to show its execution (*ante*, § 157). In some of these rulings, particularly of the last sort, a question of sufficiency may be involved; but ordinarily the question is merely one of the admissibility of the specific evidence to add to other evidence; and it does not appear whether it would by itself have been regarded as sufficient to go to the jury. With this sort of evidence, therefore, the present class of rules is practically not concerned.

place of *official custody*, may be regarded as sufficiently evidenced (*post*, §§ 2158, 2159).

(*f*) *Purporting Official Signature or Seal.* A document purporting to be *official*, and bearing a *signature or seal* or *other mark* purporting to be that of the purporting official, may be regarded as sufficiently evidenced (*post*, §§ 2161–2169).[7]

Before examining these four circumstances in detail, certain distinctions must be noted.

§ 2132. **Authentication not Necessary, when not in Issue or when Admitted; Judicial Admission; Opponent's Spoliation.** (1) When the execution of a document is *not in issue*, but *only the contents* or the fact of the existence of a document of such a tenor, no authentication is necessary.[1] This occurs chiefly where a deed is used as constituting *color of title*, *i. e.* as being by implication a part of the act of adverse occupation and thus exhibiting the boundaries or quality of the occupier's estate; for there it is immaterial by whom the deed was executed.[2] The same principle, dispensing altogether with evidence of execution, dispenses with calling the attesting witness (*ante*, § 1293).[3]

[7] All these modes, so far as the relevancy, or logical course of inference, is concerned, rest on the principle of circumstantial evidence treated *ante*, §§ 148–160. But the question there was merely of the relevancy of specific facts; here it is of the sufficiency and necessity of groups of facts.

§ 2132. [1] 1864, Hicks *v.* Coleman, 25 Cal. 122, 129 (a deed conveyed "all my right, etc., in the property described in the foregoing instrument"; proof of the execution of the other deed, held unnecessary; "the only office the H. deed performs is to furnish a description of the land, and for that purpose it is not a matter of the slightest consequence whether it was genuine conveyance or not"); 1869, Neuval *v.* Cowell, 36 Cal. 648 (so for a contract referred to for specifications in another contract); 1893, Barber's Appeal, 63 Conn. 393, 411, 415, 27 Atl. 973 (letters to a testator, admitted without proof of genuineness, because his use of them under the rule of § 234, *ante*, bore on the question of sanity); 1879, Skinner *v.* Brigham, 126 Mass. 132 (conversion of goods, exchanged for a void deed; deed admitted without proof of execution, as being the document actually exchanged); 1905, State *v.* Waldrop, 73 S. C 60, 52 S. E. 793 (murder; a rent-contract in the deceased's pocket; "formal proof of the execution" not required).

[2] *Alabama:* 1892, Alabama State L. Co. *v.* Kyle, 99 Ala. 474, 479, 13 So. 43 (certificate of entry used as color of title); 1904, Dorlan *v.* Westervitch, 140 Ala. 283, 37 So. 382 (deed not acknowledged nor attested nor recorded, admitted); 1905, Brannan *v.* Henry, 142 Ala. 698, 39 So. 92; *Missouri:* 1881, Alexander *v.* Campbell, 74 Mo. 142, 147 (existence of power of attorney to execute deed); *Oregon:* 1905, Leavitt *v.* Shook, 47 Or. 239, 83 Pac. 391 (bill of sale of a mare, used to show the circumstances of obtaining possession); *South Carolina:* 1828, Forrest *v.* Trammell, 1 Bail. 77 (where the extent of possession only is to be shown, as in a claim for dower, and the deed to the husband is offered only as coloring such possession, execution need not be proved, and therefore copies are receivable without any evidence of execution); 1872, Stewart *v.* Blease, 4 S. C. 37, 40, 44 (same; copies receivable without the statutory notice); 1902, Turner *v.* Poston, 63 S. C. 244, 41 S. E. 296 (deed not properly authenticated, admitted for defendant in mitigation of damages in an action for trespass); *Vermont:* 1909, Hassam *v.* Safford, 82 Vt. 444, 74 Atl. 197 (deed defectively sealed and acknowledged, used as color of title).

Some Courts, however, seem to require proof of execution: 1869, Hightower *v.* Williams, 38 Ga. 597, 601. The matter obviously depends much on the substantive law as to the requisites of adverse possession, and cannot be further examined here; see Sedgwick & Wait, Trial of Title to Land, § 761.

The use of deeds in color of title has also to be considered from other points of view in the rules of evidence, namely, the Hearsay rule, as admitting *verbal acts* (*ante*, § 1778), and *possession of a part* as circumstantial evidence of *possession of the whole* (*ante*, § 378).

[3] The instances cited there under § 1293 are equally applicable here.

In certain parts of the substantive law or of the law of pleading may be found rules declaring the execution of documents *not to be in issue* on a certain state of facts, — for ex-

(2) When the execution of a document, though claimed by one party, is *judicially admitted* by the other, and thus the issue is waived, there is no necessity for evidence of the execution. Such a judicial admission may be of the ordinary sort, *i.e.* by a *stipulation* for the purposes of the trial in hand.[4] Or it may consist in a *failure to plead in denial* of execution; the range of this sort of admission has been much enlarged by modern statutes declaring that execution need not be evidenced unless by affidavit or other sworn denial (equivalent in effect to a pleading) the opponent raises an issue of genuineness.[5] Where the *opponent claims under the instrument*, or where he merely *produces the instrument on notice*, this would equally suffice, so far as it amounts to a judicial admission.[6] When the opponent *fails to object* to the admission of the document, this is, of course, on general principles (*ante*, § 18) a waiver as to the need of any evidence authenticating its genuineness; and this waiver is commonly held to extend to the fact of *authority of an agent* purporting to sign the document for a principal, but not as to the *legal sufficiency* of the instrument for any purpose.[7]

(3) An ordinary *informal* or *extrajudicial admission* differs wholly in its nature from a formal or judicial admission of the above sort; it is merely a piece of circumstantial evidence impeaching the party (*ante*, § 1048). It is regarded by some Courts as insufficient for certain purposes, — in particular, for dispensing with the attesting-witness rule (*ante*, § 1300) and for dispensing with the production of the original of the document (*ante*, §§ 1255–1259). But for the purpose of evidencing execution, where no requirement as to the attesting witness is involved, an extrajudicial admission of the party

ample, the rule that a plaintiff in ejectment or the like need not prove the prior deeds forming his *chain of title:* 1794, Thompson *v.* Miles, 1 Esp. 184 (action for refusing to complete the purchase of premises; as to showing the plaintiff's title, Kenyon, L. C. J., said "he would never allow it, where the question was respecting a title, that the party should be called upon to prove the execution of all the deeds, deducing a long title"); or the rule that a *common source of title* may suffice, unless the opponent denies on oath: 1884, Thatcher *v.* Olmstead, 110 Ill. 26.

Distinguish the question whether a *trustee's* or *administrator's accounting* may be sufficiently made by producing *vouchers purporting to be signed* by third persons, without evidencing the genuineness of the vouchers: 1917, Wylie *v.* Bushnell, 277 Ill. 484, 115 N. E. 618.

[4] 1881, Jones *v.* Henry, 84 N. C. 320; 1856, Miller *v.* Hale, 26 Pa. 432, 435. For this kind of admission in general, see *post*, § 2588.

[5] These are noticed *post*, § 2596.

The same principles exempt from calling the *attesting-witness* (*ante*, §§ 1294-1296), and the cases cited under that head are here applicable.

The following statute seems to belong either here or under § 1211, *ante: S. C.* St. 1910 No. 361, p. 695, Code 1922, C. C. P. § 728 (one may introduce "any instrument purporting to be the original or copy of any waybill, receipt, bill of lading, or similar instrument issued by a common carrier as 'prima facie' evidence that the same is genuine or is a true and correct copy; provided the adverse party shall fail upon due notice given to produce the original instrument").

[6] The cases are collected *ante*, §§ 1297, 1298, under the attesting-witness rule.

[7] 1860, Lowe *v.* Bliss, 24 Ill. 168 (note not objected to; its execution held to be admitted, but not its validity); 1822, Birney *v.* Haim, 2 Litt. 262, 268 (deed purporting to be by town trustees); 1880, Bartlett *v.* O'Donoghue, 72 Mo. 263 (unacknowledged deed not objected to; execution held to be admitted, but not its legal effect as a conveyance); 1905, McClung *v.* McPherson, 47 Or. 73, 82 Pac. 13 (notice of termination of tenancy, not objected to; the attorney's authority to sign, held to be admitted, but not the legal sufficiency of the notice).

Compare the doctrine for *ancient documents* (*post*, § 2144).

has always been regarded as sufficient; [8] the only question could be whether the party's words or conduct under the circumstances amounted to an admission (*ante*, §§ 1060–1067).[9] It is upon this principle that the *acknowledgment of a deed*, being an admission of genuineness, may always be used as against the party acknowledging, even where the record is not regarded as an admissible official statement to prove the execution (*ante*, §§ 1650, 1653, 1676).

(4) A circumstance sometimes treated as an extrajudicial admission, though in theory distinct in nature, is the *opponent's destruction or suppression of the instrument* in question. This is one sort of circumstantial evidence, already examined (*ante*, § 291) in its use to evidence a document's contents. It remains only to note here that this circumstance is uniformly treated also as sufficient evidence of execution to go to the jury.[10] The mode in which this doctrine is to be applied in connection with other principles affecting execution is sufficiently illustrated in the following opinion:

1837, GIBSON, C. J., in *M'Reynolds* v. *M'Cord*, 6 Watts 288, 290: "Preliminary to proof of contents [of a lost document], and involving proof of execution, stands proof of the preëxistence in the state of a valid instrument. This is a rudimental principle, which

[8] 1895, Dunbar *v.* U. S., 156 U. S. 191, 15 Sup. 325 (defendant's oral admission of the genuineness of a telegram, sufficient; "an admission as to a writing is like an admission of any other fact"); 1863, Hilborn *v.* Alford, 22 Cal. 482 (oral admissions, sufficient; here, a note); 1863, Wright *v.* Carillo, 22 Cal. 595, 606 (same, for a deed); Cal. C. C. P. 1872, § 1942 (confused language; quoted *post*, § 2137); 1879, Smith *v.* Wilton, 69 Mo. 458, 460; 1832, Kingwood *v.* Bethlehem, 13 N. J. L. 221, 227 (pauper settlement; the deceased pauper's acknowledgment of an indenture of apprenticeship, sufficient); 1878, Bardin *v.* Stevenson, 75 N. Y. 164, 168 (an admission of the genuineness of a document of that description does not suffice); 1890, Dakota *v.* O'Hare, 1 N. D. 42 (the defendant handed an unsigned communication to the witness; sufficient); 1870, Krise *v.* Neason, 66 Pa. 253, 258 ("If the party . . . should himself hand the paper as genuine to a copyist, that certainly would be such an unequivocal acknowledgment of its genuineness as to dispense with any other evidence"; here, the written acknowledgment of the party's agent was sufficient); P. I. C. C. P. 1901, § 326 (similar to Cal. C. C. P. § 1942, but revised; quoted *post*, § 2137).

On the principle that proof of loss does not exempt from proof of execution (*ante*, § 1188), an admission of the loss or of the *correctness of a copy* may not be an admission of execution: 1840, Sharpe *v.* Lamb, 3 Perry & Dav. 454 (copy of a letter, admitted by the opponent to be a true copy; held, that proof of the sending of the letter was necessary; Patteson, J.: "It has been often objected before me at chambers that an admission could not safely be made that such a paper is a copy, because it would admit that there was an original; I have always said that there is no danger in that, because the copy cannot be read unless the party were entitled to read the original").

[9] There may, however, be the further question, when the admission did not relate to a *specific piece of paper*, whether the paper offered is the one thus admitted to be genuine; here it would seem that an inference from identity of tenor might usually suffice, in analogy to other principles (*post*, § 2148); but the Courts seem inclined to be strict: 1897, Mann *v.* Forein, 166 Ill. 446, 46 N. E. 1119 (admission of "a note for $5,000" not sufficient to prove execution of a note dated April 6, 1882, due at death); 1895, People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066 (the defendant had admitted writing a letter not otherwise identified as the one offered; excluded, by a divided Court); 1910, In re Pirie, 198 N. Y. 209, 91 N. E. 587 (recital of a note in a mortgage is not an admission that a specific note offered is the note so described; other evidence of genuineness is needed; People *v.* Corey approved; this seems overcautious).

[10] 1893, Lambie's Estate, 97 Mich. 49, 55, 56 N. W. 223 (destruction of a second testamentary paper by the parties benefited by the first, held evidence of due statutory execution); 1837, M'Reynolds *v.* M'Cord, 6 Watts Pa. 288, 290 (quoted *supra*); 1852, Cheatham *v.* Riddle, 8 Tex. 162, 166 (defendant's principal had fraudulently absconded with plaintiff's title-document; direct proof of execution not required).

is not contested. Now there was no specific proof of execution; and what was there also? [The other party to the alleged agreement had burnt the paper.] Everything is to be presumed 'in odium spoliatoris'; and had it certainly appeared that the destroyed paper purported to be an agreement such as is attempted to be established, it would have sufficed for the admission of subsequent evidence of its contents. . . . It seems clear on principle that, if there be no subscribing witness, the act of destruction is itself the best evidence of which such a case is susceptible, because it has put it out of the party's power to submit the paper to witnesses of the handwriting; and the act of a spoiler 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; . . . there are few men who have not papers which it would be not only innocent but prudent to destroy. . . . If the paper destroyed were shown to have been an agreement for the land, it would raise a presumption of identity, sufficient to dispense with the ordinary proof of execution, and let in the contents of the paper [as proved by another witness]. . . . [But the witness to destruction appeared not to have read the paper destroyed, and thus to be unable to identify it.] It would seem, therefore, that the plaintiffs, in making out a circumstance to stand for proof of execution, ought to have shown a competent degree of knowledge [of identity] in the witness, drawn from the declarations of him who destroyed the paper or from some other source equally satisfactory if such there were. Had that been done, it would have produced a presumption of identity and consequent execution."

§ 2133. **Other Principles affecting Execution of Writings, discriminated (Rules as to Possession of Documents; Identity of Name; Order of Proof of Execution; Lost Will; Attesting Witness; Number of Witnesses; Presumption of Delivery; Alterations; Lost Grant).** (1) It may be desired to show a person's privity to or *knowledge of the contents* of a document, without regard to its authorship; and for this purpose his *possession* of it may be offered as evidence (*ante*, § 260). So, also, whether *possession* of a document — such as a matured note — is evidence of its payment, or justifies other such inferences, is a different question (*ante*, § 156).

(2) The execution of a document by one J. S. being sufficiently evidenced, it may remain to be shown whether that J. S. is identical with the J. S. in the case at bar; for this purpose the presumption from *identity of name* to *identity of person* may be appealed to (*post*, §§ 2156, 2529); the question is the same whether the execution of a document or any other issue is involved.

(3) Whether the *order of evidence* should be, in the case of a document produced, first to prove *execution* and then to prove *contents*, has been elsewhere considered (*ante*, § 1189).

(4) Whether the execution of a *lost will* or other document is required to be proved by *one who has read it* is a question as to qualifications of witnesses (*ante*, §§ 1278, 2090).

(5) Whether *more than one witness* is required to prove the execution of a *will*, involves the general rule as to a required number of witnesses (*ante*, §§ 2048–2051).

(6) Whether an *attesting witness* is required to be called to prove execution involves the general rule of preference (*ante*, § 1287).

(7) What *degree of proof* of the *execution of* a *lost will* — whether it is to be

"clear and satisfactory" — has already been noticed in dealing with proof of a lost will's contents (*ante*, § 2106); the two questions are seldom discriminated.

(8) Whether proof of *signing* raises a presumption of *sealing and delivery* is a question of the presumption of delivery (*post*, § 2520).

(9) That proof of *loss*, allowing the use of a copy, does not dispense with proof of *execution* of the lost original is an important rule already noticed (*ante*, § 1188).

(10) That the *witness* to execution must *have the document before him* involves the rule for production of originals (*ante*, §§ 1185, 1248).

(11) Whether an *alteration* is to be treated as made *before* or *after execution* is a question of the presumption as to alterations (*post*, § 2525).

(12) Whether a *recital* in an *ancient deed* is admissible to prove the execution of a *lost deed* thus recited, is a question of an exception to the Hearsay rule (*ante*, § 1573).

(13) The presumption of a *lost grant* involves a rule affecting both execution and contents (*post*, § 2522).

§ 2134. **Authentication as involving either Signature or Contents.** (1) When a person is charged with executing a *signed document*, for the purposes of affecting him with certain legal consequences, the act which suffices to charge him is any act by which he adopts and makes his own the terms of the writing. It is therefore, in general, immaterial whether he has himself written the body of the document or not, if he has signed it. It is even immaterial whether he has signed it, if he has otherwise acknowledged or adopted it. Hence, *proof of the signature of the document is sufficient* to charge him;[1] precisely as proof of the oral acknowledgment would suffice (*ante*, § 2132, par. 3).

But this is a consequence of the substantive law, not of a rule of Evidence.[2] Thus, so far as there are any exceptions to the general rule — as, for example, in the question whether one may be charged on a contract which he has signed but not read — they are doctrines of the substantive law, not rules of evidence (*post*, § 2415). In the field of Evidence, they receive frequent application — as where a party writing a letter referring to another letter may be charged with its contents, which become by adoption part of his admission (*ante*, §§ 1070, 2120). But it is by some act of adoption — such as signing or acknowledging the writing of another — that he becomes thus chargeable; and hence it is this act of adoption which constitutes the execution. Hence, proof of execution involves merely proof of signature or of *whatever else constitutes the act of adoption*.[2]

§ 2134. [1] 1909, Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, *semble* (telegram delivery sheet); 1845, Pullen *v.* Hutchinson, 12 Shepl. Me. 249, 254 (note and letter; signature sufficient, where there are no indications of falsity as to date).

[2] Hence the question may arise what constitutes, in the substantive law, the document in question; *e. g.* whether a will written on separate sheets and signed on the last is a single document (*post*, § 2452).

If an *alteration* appears in the body of docu-

(2) Conversely, where the document *lacks a signature*, no rule of Evidence prevents the proof of its execution in some other way. Some rule of the substantive law may require a signature; for example, it may be required that a will shall be signed at the end and not merely bear the name in the midst or at the beginning or on a superscription (*post*, § 2456); or a corporate or judicial record may be required to be signed;[3] or a deed may be required to be not merely signed but also acknowledged (*ante*, § 1653). With such rules the law of Evidence is not concerned. It accepts them as otherwise determined. Accordingly, if there is no signature, and the substantive law makes no requirement as to a signature, the execution may be established by evidencing the *handwriting of the contents*,[4] as in the case of records (*post*, § 2164), or by evidencing some oral act of acknowledgment or assent.[5]

§ 2135. **Authentication as a Rule of Presumption.** We are now in a position, after this survey of the various modes of authentication and its incidental questions, to consider whether, for authentication in general, the rules are properly rules of presumption or merely rules of sufficiency. It has been noticed (*ante*, § 2129) that they may partake of the double character, but that the emphasis has in general been thrown on the latter aspect. Remembering, however, the variety of modes in which authentication may properly be evidenced, it would seem that the situation does not, as a whole, admit of a clear-cut rule of presumption easily defined and applied. The possible combinations of evidence are too many to make such a rule practicable. It is better to treat the question, in general, merely as one of sufficiency (*post*, §§ 2487, 2494), *i. e.* to allow the writing, upon the evidence in question, to go to the jury, without any rule of law strictly binding them to presume its execution:

1820, DUNCAN, J., in *Siegfried* v. *Levan*, 6 S. & R. 308, 311: "All that is done by the Court, in admitting the deed in evidence, is this, that if the execution of the deed is proved by the subscribing witness, the party has made out a 'prima facie' case, not a conclusive one, or, in cases where recourse is had to the secondary evidence, the collateral proof is such that a jury might presume [*i. e.* infer] the execution; and then these facts are submitted to the jury to exercise their own judgment, to draw their own conclusion of the sealing and delivery. . . . If the bond is proved by the subscribing witness, it is read in evidence; why? Not because the Court pronounce, by admitting it in evidence, that it *is* the deed of the party; but because the party has given evidence of its execution. So,

ment, the question whether it affects the liability of the signer is a question of substantive law; the question whether the alteration was made before or after signing is a mere question of fact, upon which however there may be a further question as to the burden of proof (*post*, § 2525).

Upon proof of the signature of an *agent*, no presumption as to his *authority* arises (*post*, § 2521, par. *b*); otherwise, for ancient documents (*post*, § 2144). As to the effect in this respect of an *admission*, see *ante*, § 2132, par. (2).

[3] 1874, People *v.* E. L. & Y. Co., 48 Cal. 143, 146 (under a statute requiring a public board's proceedings to be signed by chairman and clerk, these signatures are not essential to validity, but mere aids to authentication).

[4] 1834, Nichols *v.* Alsop, 10 Conn. 263, 268.

[5] For example, an assent by silence, under the principle of § 1071, *ante*. That it is essentially a question of the substantive law is illustrated in the statutes forbidding any acknowledgment of a debt to suffice to take the case out of the statute of limitations unless made in writing signed by the debtor.

where the execution is to be made out by facts and circumstances, it is admitted, not because the Court draw any conclusion of the fact in issue, but because some evidence is offered from which the jury might presume [*i. e.* infer] the fact in issue, the sealing and delivery of the bond. If there be no evidence of the execution, the Court will not permit the bond to be read in evidence; but if there be any fact or circumstance tending to prove the execution or from which the execution might be presumed, then like other presumptive evidence it is open for the decision of the jury."

This seems to be the view generally taken.[1]

It follows, that, after a ruling in favor of the sufficiency of the evidence by the party offering the document, it goes to the jury, before the opponent can offer evidence in denial;[2] and the opponent's evidence in denial, when it comes, is to be addressed to the jury, not to the judge, for the judge has ruled as matter of law upon the sufficiency of the evidence, and the question rests now with the jury.[3] Conversely, if the opponent offers no evidence in denial, nevertheless there is no rule of law requiring the jury to presume execution; they are to weigh the evidence without any compulsory rule of law.[4]

Yet, though this may be so for authentication in general, as provable by sundry sorts of evidence, there may conceivably occur a specific rule of presumption for specific kinds of evidence, — for example, for ancient documents (*post*, § 2146), or for officially sealed documents (*post*, § 2161).

II. Specific Rules of Sufficiency for Circumstantial Evidence

1. Authentication by Age of Document

§ 2137. **Ancient Documents; General Principle.** For three centuries the rule has existed, unquestioned in its general validity, that an ancient document, under certain conditions, is to be taken as sufficiently evidenced, in regard to its genuineness of execution, to be submitted to the jury.[1]

The reasons for this specific and simple rule are twofold. First, after a long lapse of time, ordinary testimonial evidence from those who saw the document's execution or knew the style of handwriting or heard the party admit the execution, is practically unavailable, and a necessity always exists for resorting to circumstantial evidence. Secondly, the circumstance of age — or long existence — of the document, together with its place of custody, its unsuspicious appearance, and perhaps other circumstances, suffice, in combination, as evidence to be submitted to the jury. Whether the mere age is itself an evidential circumstance at all has been judicially doubted; though it may be argued that men would hardly undertake the risk of forgery for

§ 2135. [1] 1849, Hicks *v.* Chouteau, 12 Mo. 341.

[2] 1863, Verzan *v.* McGregor, 23 Cal. 339; 1853, Flournoy *v.* Warden, 17 Mo. 435, 441.

[3] Verzan *v.* McGregor, *supra*.

[4] 1877, Scott *v.* Delany, 87 Ill. 146, 150.

§ 2137. [1] 1648, Anon., in Styles' Pract. Reg. 175 ("An ancient writing, that is proved to have been found amongst deeds and evidences of land, may be given in evidence to a jury, though the execution of it cannot be proved"); 1666, Wright *v.* Sherrard, 1 Keb. 877 ("An auncient deed is good evidence, without proving, or seal on it, as [in a case in] 44 Eliz. [1602]"); 1696, Lynch *v.* Clerke, 3 Salk. 154, Holt, C. J. ("An old deed is good evidence, without any witness to swear it was executed").

the sole use of posterity, and thus the circumstance of age alone is some evidence; but it has never been suggested to be sufficient of itself.

The reasons judicially advanced may be gathered from the following passages:

1806, ELLENBOROUGH, L. C. J., in *Roe* v. *Rawlings*, 7 East 291: "Ancient deeds proved to have been found amongst deeds and evidences of land may be given in evidence, although the execution of them cannot be proved; and the reason given is, 'that it is hard to prove ancient things, and the finding them in such a place is a presumption that they were fairly and honestly obtained and reserved for use, and are free from suspicion of dishonesty.'"

1840, COWEN, J., in *Northrop* v. *Wright*, 24 Wend. 221, 228: "When the primary evidence is gone, you resort to what good fortune enables you to lay hold of as a substitute. This is often merely circumstantial."

1847, BRONSON, C. J., in *Willson* v. *Betts*, 4 Den. 201, 213: "The mere fact that the instrument has existed for more than thirty years, unaided by other proofs, cannot be enough to establish it in a Court of justice. . . . Showing that the instrument is thirty years old has no greater tendency to prove it genuine than would the fact that it had existed for a single day. The mere fact of existence, whether the time be long or short, has no tendency whatever, in a legal point of view, to prove the due execution of the instrument. . . . Indeed, when nothing has ever been done [by way of possession] under the deed, the lapse of time tends to discredit it. Courts have not relaxed the rules of evidence in relation to ancient deeds because time alone furnishes any presumption in their favor, but because the lapse of time renders it difficult, and sometimes impossible, to give the usual proof of execution."

The rule itself is simple enough, although the legislative attempts to re-declare it have sometimes disfigured its native simplicity.[2] But there

[2] *California:* C. C. P. 1872, § 1942 ("Where, however, evidence is given that the party against whom the writing is offered has at any time admitted its genuineness, no other evidence of execution need be given when the instrument is one mentioned in § 1945, or one produced from the custody of the adverse party and has been acted upon by him as genuine"); § 1945 ("Where a writing is more than thirty years old, the comparisons [of handwriting, allowed under C. C. P. § 1944] may be made with writings purporting to be genuine, and generally respected and acted upon as such by persons having an interest in knowing the fact"); § 1963, par. 34 (there is a presumption "that a document or writing more than thirty years old is genuine, when the same has been since generally acted upon as genuine by persons having an interest in the question, and its custody has been satisfactorily explained"); *Georgia:* Rev. C. 1910, § 4190 (a deed "more than thirty years old, having the appearance of genuineness on inspection, and coming from the proper custody, if possession has been consistent therewith," is admissible without proof of execution); § 5736 ("conclusive presumptions" are stated to include that of "ancient deeds, and other instruments more than thirty years old, when they come from the proper custody, and possession has been held in accordance with them"); § 5771 ("ancient documents, purporting to be a part of the transaction to which they relate," are admissible); *Montana:* Rev. C. 1921, § 10606, par. 34 (like Cal. C. C. P. § 1963); *New Mexico:* Annot. St. 1915, § 2186 ("all church records," admissible to show dates of marriage, etc., provided they are, "first, more than thirty years old; second, shall come from the proper custody; and third, shall be examined and inspected by the Court, and upon such examination and inspection shall be found by the Court to be free from all suspicion of fabrication, alteration, or fraud of any kind"); *North Dakota:* Comp. Laws 1913, § 7936, par. 34 (it is presumed "that a document or writing more than thirty years old is genuine when the same has been since generally acted upon as genuine by persons having an interest in the question and its custody has been satisfactorily explained"); *Oregon:* Laws 1920, § 799, par. 35 (like Cal. C. C. P. § 1963); *Philippine Isl.* C. C. P. 1901, § 326 ("where a writing is more than 30 years old and evidence is given that the party against whom the writing is offered has at any time admitted its execution, or where the writing is one produced from the custody of the adverse party and has been acted upon by him as genuine, no other evidence of execution need be given"; this is a re-casting of Cal. C. C. P. §§ 1942, 1945, but merely makes worse its confusion of principles); § 334, par. 32 (like Cal. C. C. P. § 1963, par. 34); Civ. C. § 1221 (like P. R. Rev. St. & C. 1911, § 4295); *Porto Rico:* Rev. St. & C. 1911, § 1460 (like Cal. C. C. P. § 1945); § 1470 (like ib. § 1963); § 4295 (copies 30 years old; quoted in full *ante*, § 1225).

have been controversies over some of its details; and these may now be considered.

§ 2138. **Age; Thirty Years of Existence; Mode of Reckoning.** (1) Since the chief reason for the rule is the impossibility of obtaining living testimony to the signing or to the handwriting, the necessity does not arise until time has made such testimony unavailable. At first, this requirement was satisfied by the simple and indefinite notion that the deed must be "ancient." [1] But a more definite standard naturally became desirable. Since the lack of living witnesses to the document was the justifying fact, and since such witnesses might be assumed to have been at least of age at the time of execution, they would presumably have disappeared from the stage of life after the lapse of forty or at most fifty years.[2] Accordingly, the period of forty years came, by the 1700s, to be taken as the time when a document was treated as "ancient" under this rule.[3] But this reckoning was too strict, because the witnesses were more likely to have been mature persons, and therefore at least thirty years of age; and another thirty years would suffice to bring them near the end of their span. Ever since the second half of the 1700s, therefore, the *period of thirty years* [4] has sufficed to constitute an "ancient" document; except under some special statutory rules.[5]

(2) It is immaterial that an *attesting witness* is *in fact alive* at the time of trial, or even that he is in court. The rule is for convenience' sake a rule of thumb. Neither the attesting witness need be called nor other usual testimonial evidence be offered.[6]

§ 2138. [1] The quotations *ante*, § 2137, note 1, show this for the 1600s.

[2] 1726, Gilbert, Evidence, 100 ("for the witnesses cannot be supposed to live above forty years; . . . for the age of a man is no more than sixty years, and a man is supposed to be twenty years before he is of age sufficient; . . . and therefore since no person living can be supposed to be coeval with such deeds, therefore they may be offered in evidence without proof").

[3] 1730, Benson *v.* Olive, Bunbury 280 (a supposed deed of 1694 was offered; but "though sometimes thirty-five or even thirty years has been thought sufficient, yet not where it is objected to; but the usual rule is forty years"); 1782, Clarkson *v.* Woodhouse, 3 Doug. 169 (the latest of some alleged leases received was dated 1702 or 1703; one dated 1730 was excluded).

[4] 1740, Dean of Ely *v.* Stewart, 2 Atk. 44 (document of copyhold, of thirty years' age, received); 1744, Omychund *v.* Barker, 1 Atk. 21, 49, Hardwicke, L. C.; 1788, Buller, J., in R. *v.* Farringdon, 2 T. R. 466, 471 ("It is an established rule, which holds in the case of every deed, that if it be above thirty years' standing, it proves itself"); 1793, R. *v.* Ryton, 5 T. R. 259 (certificate of pauper settlement); 1795, Chelsea Waterworks *v.* Cowper, 1 Esp. 275 (bond; Kenyon, L. C. J., "said that all deeds above thirty years' date proved themselves"); 1798, Marsh *v.* Collnett, 2 Esp. 665 (Yates, J., *ex rel.* Kenyon, L. C. J.).

This period has been accepted in almost every American ruling: 1828, Waldron *v.* Tuttle, 4 N. H. 371, 377; 1843, Homer *v.* Cilley, 14 N. H. 85, 98; 1808, Jackson *v.* Blanshan, 3 Johns. N. Y. 292. Occasionally, traces are seen of the earlier English rule: 1839, Crane *v.* Marshall, 4 Shepl. Me. 27, 29 (a deed more than forty years old, admitted); 1800, Gittings *v.* Hall, 1 H. & J. Md. 14, 18, *semble* ("upwards of thirty-nine or forty years"). Occasionally, also, Courts have intimated that they would be satisfied with a shorter period, but these rulings are anomalous: 1856, Boykin *v.* Wright, 11 La. An. 531, 533 (deed twenty-seven years old, admitted on the facts); 1784, Burke *v.* Ryan, 1 Dall. Pa. 94 (twenty years, *semble*, but here said of possession accompanying a sheriff's deed); 1814, Shaller *v.* Brand, 6 Binn. Pa. 435, 439 (thirty years; here applied to a will); 1823, McGennis *v.* Allison, 10 S. & R. Pa. 197, 199 (Duncan, J.: "Thirty years seems the fixed time; a shorter period, twenty-five, perhaps twenty-one, the period of limitation, might be sufficient; but of this I give no opinion").

[5] These are collected *post*, § 2143.

[6] The authorities have been considered under the attesting-witness rule, *ante*, § 1311.

(3) The period of thirty years signifies of course the period in which the specific document has been *in existence*.[7] The purporting date is of itself nothing; for anybody may have forged the written date but yesterday. Accordingly this existence of the document thirty years ago must be somehow shown.[7]

(4) The period is to be reckoned backwards from the *time of offering* the deed, not from the time of suit begun or any earlier period; [8] and, forwards, from the time of existence or purporting *execution* of the document, and not from the time of its taking effect in law (as, in a will, from the death of the testator).[9]

§ 2139. **Natural Custody.** The document, at the time of its original discovery, must have been in some place where it would be natural to find a genuine document of such a tenor as the one in question.[1] A forger can usually not secure the placing of the document in such a custody; and hence the naturalness of its custody, being relevant circumstantially (*ante*, §§ 148, 157), is required in combination with the document's age:

1850, EASTMAN, J., in *Gibson* v. *Poor*, 21 N. H. 440, 446: "The reason why it is required that an ancient document shall be produced from the proper depository is that thereby credit is given to its genuineness. Were it not for its antiquity, and the presumption that consequently arises that evidence of its execution cannot be obtained, it would have to be proved. It is not that any one particular place of deposit can have more virtue in it than another, or make true that which is false; but the fact of its coming from the natural and proper place tends to remove presumptions of fraud and strengthens the belief in its genuineness."

[7] *Eng.* 1764, Forbes *v.* Wale, 1 W. Bl. 532 (a bond bearing the date 1732; objected that "if the length of the date was alone sufficient to establish it, a knave has nothing to do but to forge a bond with a very ancient date"; whereupon Mansfield, L. C. J., "directed the bond to be proved"); *U. S.* 1814, Yeates, J., in Shaller *v.* Brand, 6 Binn. Pa. 435, 444 ("A paper cannot be read because it is dated back thirty or forty years, or because it carries with it the appearance of time"). *Accord:* 1853, Jones *v.* Morgan, 13 Ga. 515, 523; 1888, Pridgen *v.* Green, 80 Ga. 737, 739, 7 S. E. 97 (deed bearing affidavit of the subscribing witness before a justice; age sufficiently shown); 1906, Bower *v.* Cohen, 126 Ga. 35, 54 S. E. 918 (map dated 1859, but not shown to exist till later); 1874, Whitman *v.* Heneberry, 73 Ill. 109 (kind of evidence sufficient, examined); 1883, Quinn *v.* Eagleston, 108 Ill. 248, 253 (age of deeds sufficiently proved); 1859, Fairly *v.* Fairly, 38 Miss. 280, 290 (thirty years' existence required; unless thirty years' possession of the property is shown; anomalous doctrine); 1833, Robinson *v.* Craig, 1 Hill S. C. 389 ("I think a jury ought always to be satisfied in some way that it has been in existence for the length of time required").

[8] *Eng.* 1844, Man *v.* Ricketts, 7 Beav. 93, 101; *U. S.* 1870, Gardner *v.* Grannis, 57 Ga. 539, 554 ("A witness once incompetent may become competent; a document not well authenticated may become better authenticated") ; 1899, Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014; 1883, Bass *v.* Sevier, 58 Tex. 567, 569.

[9] *Eng.* 1803, M'Kenire *v.* Fraser, 9 Ves. Jr. 5 (a will thirty years old, the testator dead twenty years ago; Sir W. Grant, V. C.: "I do not see how a will can be distinguished from a deed," yet seemed doubtful; but here, after proof of two witnesses' handwriting, the paper was admitted); 1826, Doe *v.* Deakin, 3 C. & P. 402 (will dated more than thirty years ago, the testator dead less than thirty years, admitted); 1828, Doe *v.* Wolley, 8 B. & C. 22 (will); 1844, Man *v.* Ricketts, 7 Beav. 93, 101 (will).

Contra: U. S. 1808, Jackson *v.* Blanshan, 3 Johns. N. Y. 292, 298 (will; but here the doctrine was applied as a part of the rule about possession; Savage, J., diss.); 1814, Shaller *v.* Brand, 6 Binn. Pa. 435, 439, per Tilghman, C. J. (will; holding that the period can begin only after death, because possession is also required).

§ 2139. [1] This requirement seems to have been originally not insisted upon: 1730, Benson *v.* Olive, Bunbury 280 (an alleged deed was old enough, but "Baron Carter objected that the plaintiff should give some account how he came by it; but the Lord Chief Baron said he could not see the use of that, and it would be very inconvenient; . . . the rest of the Barons seemed to be of opinion with the Lord Chief Baron").

The important feature of this requirement is that *no one custody* is to be esteemed *the* necessary one. All that is required is that it be *a* natural one: [2]

1836, TINDAL, C. J., in *Meath* v. *Winchester*, 3 Bing. N. C. 183; 200: "It is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question as to their authenticity. But it is when documents are found in other than the proper place of deposit that the investigation commences whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they are actually found. For it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable though differing in degree, some being more so, some less. And in these cases the proposition to be determined is whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine."

1839, COLERIDGE, J., in *Doe* v. *Pearce*, 2 Moo. & Rob. 240: "It is not necessary that the custody from which an ancient document comes should be strictly according to the legal right; it is enough if it be brought from a place of deposit where in the ordinary course of things such a document, if genuine, might reasonably be expected to be found."

The question is therefore especially one to be left to the determination of the trial Court on the circumstances of the particular case.[3] Various phrasings of definition have been suggested by way of guidance; [4] but none can be regarded as fixed.[5] The general principle is conceded on all hands, and has received varied application according to the facts of each case.[6]

[2] *Accord: Eng.* 1843, Croughton *v.* Blake, 12 M. & W. 205, 208 (Parke, B.: "It is not necessary to show that it has come from the *most* proper custody; it is sufficient if it come from a place where it might reasonably be expected to be found"; admitting ancient terriers); 1845, Denman, L. C. J., in Doe *v.* Phillips, 8 Q. B. 158; 1848, Wightman, J., in Doe *v.* Keeling, 11 Q. B. 884, 889; *U. S.* 1847, Collier, C. J., in Doe *v.* Eslava, 11 Ala. 1028, 1040; 1850, Eastman, J., in Gibson *v.* Poor, 21 N. H. 440, 446.

[3] *Eng.* 1848, Denman, L. C. J., in Doe *v.* Keeling, 11 Q. B. 884 ("The [trial] judge is in the situation of a jury; . . . Courts ought to be liberal in this respect. . . . [The question is] whether the learned judge was here so far wrong that we ought to set aside his ruling"); *U. S.* 1905, Campbell *v.* Bates, 143 Ala. 338, 39 So. 144 (the proper custody will be presumed in favor of the ruling below).

[4] *Eng.* 1838, Doe *v.* Samples, 3 Nev. & P. 254, 8 A. & E. 151, 154 (whether "the custody was not so improper or improbable as to require proof of the execution of the deed"; "proper custody means . . . the custody of any person so connected with the deed as that his possession of it does not excite any suspicion of fraud"); [*Ky.* 1881, Harlan *v.* Howard, 79 Ky. 373 ("produced by those whose custody affords a reasonable presumption of their genuineness").

[5] From the present requirement for ancient documents should be distinguished the use of *custody of official records* as evidence of genuineness, *post*, § 2158.

[6] ENGLAND: 1753, Jones *v.* Waller, 2 E. & Y. 141 (collector of tithes); 1783, Clarkson *v.* Woodhouse, 5 T. R. 412; 1794, Atkins *v.* Hatton, 2 Anstr. 386 (parish terrier); Miller *v.* Foster, 2 Anstr. 387, note (same); 1795, Lygon *v.* Stuart, ib. 601 (list of a monastery's possessions); 1801, Earl *v.* Lewis, 4 Esp. 1 (documents possessed by a parish rector); 1810, Swinnerton *v.* Stafford, 3 Taunt. 91 (a grant of common); 1816, Bertie *v.* Beaumont, 2 Price 303, 307 (receipt for tithe-payments); 1816, Bullen *v.* Michel, 4 Dow 297 (chartularies of abbey-lands); 1817, Armstrong *v.* Hewitt, 4 Price 216, 218 (vicar's books of tithes); 1818, Randolph *v.* Gordon, 5 Price 312, 315 (book of tithe-payments); 1823, Pulley *v.* Hilton, 12 Price 625, 626, 630, 637 (sequestrator's tithe-account); 1828, Rowe *v.* Brenton, 8 B. & C. 737, 747 (extent of a manor); 1829, Brett *v.* Beales, M. & M. 416, 419 (town tax-table); 1836, Meath *v.* Winchester, 3 Bing. N. C. 183, 197, 202 (case stated by a former Bishop for the opinion of counsel, found in a family mansion); 1838, Doe *v.* Samples, 8 A. & E. 151, 3 Nev. & P. 254 (deed of settlement); 1838, Rees *v.* Walters, 3 M. & W. 527, 531 (lease); 1839, Doe *v.* Pearce, 2 Moo. & Rob. 240 (will); 1842, Doe *v.* Pulman, 3 Q. B. 622 (counterpart

§ 2140. **Unsuspicious Appearance.** A third requirement is that the document must in appearance be unsuspicious. No clear definition of the marks of suspicion which will exclude its use seems to have been agreed upon; but the general notion is conceded: [1]

1877, JACKSON, J., in *Hill* v. *Nisbet*, 58 Ga. 586, 589: "On inspection it must exhibit an honest face; otherwise it is not such an ancient document that its countenance will pass muster. Age will not sanctify ear-marks of fraud."

§ 2141. **Possession of the Land, for Deeds and Wills.** Whether a fourth requirement is to be made for deeds and wills of land, namely, that the party claiming under the instrument should have been (by himself or his predecessors) in *occupation of the land since the time of the document's purporting execution*, has been the subject of one of the longest and most widespread controversies in the law of Evidence. The case in favor of such a requirement has rested partly, it is true, upon misunderstanding of the precedents for a totally different doctrine about possession (*post*, § 2142). But, in the course of speculation, genuine arguments of policy were found for requiring possession under the present principle. The process of thought has thus been somewhat vacillating and elusive.

(1) In *England*, the original foundation for requiring possession seems not to have rested on any element of execution at all. The age and custody of a deed sufficed for the genuineness of execution; but there remained, as neces-

of a lease, found in the lessor's possession); 1845, Doe *v.* Phillips, 8 Q. B. 158 (deed creating an attendant term, in an attorney's custody); 1846, Slater *v.* Hodgson, 9 Q. B. 727 (bond to indemnify parish officers); 1848, Doe *v.* Keeling, 11 Q. B. 884 (lease).

CANADA: 1835, R. *v.* Wilson, Ber. N. Br. 1 (old plan annexed to a grant); 1873, Walker *v.* Bayers, 9 N. Sc. 270 (old plans in the Crown land-office, rejected on the facts); 1872, Thompson *v.* Bennett, 22 U. C. C. P. 393, 401.

UNITED STATES: *Federal:* 1886, Applegate *v.* Lexington & C. C. M. Co., 117 U. S. 255, 261, 6 Sup. 742 (deeds in the county record-office; custody held proper); 1889, Baeder *v.* Jennings, 40 Fed. 199 (deeds); 1896, Templeton *v.* Luckett, 21 C. C. A. 325, 75 Fed. 254 (following Applegate *v.* Mining Co., and receiving a deed, found in the Texas general land-office, of land in Texas issued on military scrip); 1905, McGuire *v.* Blount, 199 U. S. 142, 26 Sup. 1 (certain probate records of Spanish Florida, in the custody of the U. S. Surveyor-General, received); *Georgia:* 1846, M'Cleskey *v.* Leadbetter, 1 Ga. 551, 558; 1857, Adams *v.* Dickson, 23 Ga. 406, 410 (marriage settlement); *Massachusetts:* 1817, Stockbridge *v.* W. Stockbridge, 14 Mass. 257, 261 ("in the possession of the party claiming under it"); 1826, Tolman *v.* Emerson, 4 Pick. 160, 163 (book of records of proprietors of common lands); 1896, Whitman *v.* Shaw, 166 Mass. 451, 44 N. E. 333 (old plan); 1904, Re Butrick, 185 Mass. 107, 69 N. E. 1044 (possession of a grantee's heir, held sufficient); *New Hampshire:* 1850, Gibson *v.* Poor, 21 N. H. 440, 445 (old plan in the town-clerk's records); 1854, Whitehouse *v.* Bickford, 29 N. H. 471, 480 (old plan in the custody of a corporation's agent, admitted as part of its records); *Ohio:* 1911, Wright *v.* Hull, 83 Oh. 385, 94 N. E. 813 (receipt's custody by the party here held insufficient, in view of suspicious discrepancies); *South Carolina:* 1892, Martin *v.* Bowie, 37 S. C. 102, 110, 117, 15 S. E. 736.

§ 2140. [1] *Eng.* 1726, Gilbert, Evidence, 100 ("any blemish in the deed, by rasure or interlineation," makes proof necessary; also, "if the deed imports a fraud; as where a man conveys a reversion to one, and after conveys it to another, and the second purchaser proves his title, there the first deed must be proved"); 1838, Mayor *v.* Craven, 2 Moo. & Rob. 140 (the absence of a seal, on a document purporting to need a seal — here an exemplification — will not be fatal); *U. S.* 1895, Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13 (discretion of trial Court); 1905, Campbell *v.* Bates, 143 Ala. 338, 39 So. 144 (rule applied); 1876, Gardner *v.* Grannis, 57 Ga. 539, 554 ("fair on its face"); 1881, Harlan *v.* Howard, 79 Ky. 373 ("unblemished by any alterations"); 1847, Green *v.* Chelsea, 24 Pick. Mass. 71, 76 ("unaccompanied by any circumstances of suspicion").

sary elements to give legal effect, either seisin of the land or (in its place) delivery of the deed; and, unless the delivery of the deed could be shown, of course the seisin must be shown.[1] This was intelligible; and it clearly did not look upon possession as having anything to do with genuineness. In the course of time, however, doubts arose, and Chief Baron Gilbert's reasoning was lost sight of. Nevertheless, the doubts seem not to have prevailed; and the English rulings, though they served to introduce the controversy to American courts, appear to have repudiated the necessity of a possession.[2]

(2) In the *United States*, the controversy appears in the rulings of almost all the older States, and long vacillation is sometimes found, especially in New York. The greater number of Courts seem to have settled, with fair certainty, upon the proposition that possession is not necessary as an absolute requirement; but that either this or some other circumstance giving an equivalent inference of genuineness must appear as additional to those of age, appearance, and custody. There are further minor variations in some of the jurisdictions;[3] but the general result is represented by these three dis-

§ 2141. [1] 1628, Coke upon Littleton, 6, *b* ("In the case of a charter of feoffment, if all witnesses to the deed be dead (as no man can keep his witnesses alive, and time weareth out all men), then violent presumption, which stands for a proofe, is continuall and quiet possession. . . . In ancient charters of feoffment, there was never mention made of the delivery of the deed, or any livery of seisin indorsed, for certainly the witnesses named in the deed were witnesses of both"; it appears from the above that the "violent presumption" raised by possession was of the livery); 1726, Gilbert, Evidence, 101, 102 ("If a deed of feoffment be proved, and the possession has gone along with the deed, there the livery shall be presumed, though it be not proved; . . . but if possession hath not gone along with the deed, then the livery must be proved upon the feoffment; . . . [the Court] cannot conclude there was a lawful conveyance, unless the jury find the delivery of the deed").

[2] 1764, Forbes *v.* Wall, 1 Esp. 278 (Mansfield, L. C. J., approved an objection to an old bond that "possession or something equivalent" was necessary; afterwards he said that "if proof had been made that the bond had been found among the papers of the deceased," he would have received it; here his "possession" seems to be the "proper custody" of other judges); 1795, Chelsea Waterworks *v.* Cowper, 1 Esp. 275 (objection being made to an old bond produced, it was said that as to deeds of land, "there, possession, having gone with the deed, confirmed it"; but Kenyon, L. C. J., "said that all deeds above thirty years' date proved themselves," particularly when, as here, coming from the proper custody); 1817, Rancliffe *v.* Parkyns, 6 Dow 149, 202 (Eldon, L. C., said that in a court of law "a will thirty years old, if the possession has gone under it, and sometimes without the possession, but always with the possession, if the signing is sufficiently recorded, proves itself; but if signing is not sufficiently recorded, it would be a question whether the age proves its validity; and then possession under the will, and claiming and dealing with the property as if it had passed under the will, would be cogent evidence to prove the duly signing, though it should not be recorded"); 1826, Doe *v.* Passingham, 2 C. & P. 440 (both counsel agreed that according to Rancliffe *v.* Parkyns, a will thirty years old, and from the proper repository, and accompanied by possession under it, "proves itself"; but the necessity of the latter requirements was denied by one side, and Burrough, J., approved this denial, on the ground that "after the will is read, it may be seen whether the possession of the estate has followed the will, but that can hardly be known till it is read"); 1845, Lord Gosford *v.* Robb, 8 Ir. L. R. 217, 219, per Pennefather, C. J. (possession necessary).

[3] For example: The possession need not be *continuous* during the whole time since the alleged execution: 1871, Matthews *v.* Castleberry, 43 Ga. 346, 351, and other cases. *Contra:* 1808, Jackson *v.* Blanshan, 3 Johns. N. Y. 292, 298. The possession of a *part of the land* suffices: 1825, Jackson *v.* Davis, 5 Cow. N. Y. 123, 127; 1825, Jackson *v.* Luquere, 5 Cow. N. Y. 221, 227 (by each devisee under a will, not necessary). The *non-possession* of the land *by any other person* suffices: Turner *v.* Tyson, and other Georgia cases. The possession need not be shown if *no evidence* about it is *attainable:* Harlan *v.* Howard, Ky., and other cases. The requirement applies to *deeds* only, not to *wills:* Duncan *v.* Beard, and other South Carolina cases.

tinct forms, namely, requiring possession absolutely, requiring it alternatively, and not requiring it at all.[4] The effect of a *recording* of the deed would serve sometimes to supplant other requirements (*post*, § 2143).

[4] UNITED STATES: *Federal:* 1819, Barr *v.* Gratz, 3 Wheat. 213, 221 (possession not required); 1830, Watson *v.* Coulson, 1 McLean, 120, 124 (assertion of a claim, without possession, here held sufficient); 1831, Clarke *v.* Courtney, 5 Pet. 319, 344 (possession assumed necessary); 1886, Applegate *v.* Lexington & C. C. M. Co., 117 U. S. 255, 263, 6 Sup. 742 (admissible "if either possession under it is shown, or some other corroborative evidence of its authenticity, freeing it from all just grounds of suspicion"; deed-record in the proper office, with other circumstances, held sufficient); 1902, Hodge *v.* Palms, 54 C. C. A. 570, 117 Fed. 396(possession not indispensable); *Alabama:* 1847, Doe *v.* Eslava, 11 Ala. 1028, 1040 ("If proof of possession cannot be had, the deed may be read, if its genuineness is satisfactorily established by other circumstances"); 1852, Carter *v.* Doe, 21 Ala. 72, 91 (requiring "enjoyment under it, or other equivalent explanatory proof"); 1883, Bernstein *v.* Humes, 75 Ala. 241, 244 (ancient deeds received on the facts; no principle laid down); 1884, Beard *v.* Ryan, 78 Ala. 37, 43, *semble* (required); 1900, White *v.* Farris, 124 Ala. 461, 27 So. 259 (not required on the facts); *Arkansas:* 1871, Peay *v.* Capps, 27 Ark. 160, 162, 165 (not required);
Columbia (Dist.): 1913, Lane *v.* Watts, 41 D. C. App. 139, 156 (requirement not mentioned); *Connecticut:* 1806, Mallory *v.* Aspinwall, 2 Day 280, 287, 290, 293 (not required); 1917, Jarboe's Appeal, 91 Conn. 265, 99 Atl. 563 (will of 1860; possession not required);
Georgia: 1846, M'Cleskey *v.* Leadbetter, 1 Ga. 551, 558 ("early possession and enjoyment" or "modern possession and user" are "desirable"; but if they cannot be had, other circumstances may suffice); 1851, Beverly *v.* Burke, 9 Ga. 440, 443 (acting on the deed, or taking possession of land by grantee, said to be necessary); 1852, Jordan *v.* Cameron, 12 Ga. 267, 269 (not clear); 1853, Jones *v.* Morgan, 13 Ga. 515, 523 (some possession apparently required); 1859, Bell *v.* McCawley, 29 Ga. 355, 360 (possession assumed necessary); 1860, Doe *v.* Roe, 31 Ga. 593, 599 (assumed not necessary); 1863, Webb *v.* Wilcher, 33 Ga. 565, 568 (same); Code 1860, § 2658, Code 1895, § 3610, Rev. C. 1910, § 4190 (admissible, "if possession has been consistent therewith"); 1871, Mathews *v.* Castleberry, 43 Ga. 346, 350 (under the Code, possession need not be continuous); 1871, Payne *v.* Ormond, 44 Ga. 514, 526 (payment of taxes, and other circumstances, held sufficient on the facts); 1873, Turner *v.* Tyson, 49 Ga. 165, 168 (suffices if there has been no inconsistent adverse possession); 1876, Gardner *v.* Granniss, 57 Ga. 539, 555 (necessary perhaps "if the good appearance, the date, and the custody of the paper were all"; but here other circumstances sufficed); 1876, Thursby *v.* Myers, 57 Ga. 155, 157 (similar); 1879, Weitman *v.* Thiot, 64 Ga. 11, 17 (possession apparently not necessary); 1888, Pridgen *v.* Green, 80 Ga. 737, 739, 7 S. E. 97 (deed bearing affidavit of a witness, received, though without possession, the land having been wild); 1893, King *v.* Sears, 91 Ga. 577, 586, 18 S. E. 830 (deed of 1852, with possession, received); 1900, Williamson *v.* Mosley, 110 Ga. 53, 35 S. E. 301 (Code § 3610 applied); 1909, Leverett *v.* Tift, 6 Ga. App. 90, 64 S. E. 317 (deed of 1843, recently recorded, admitted without proof of possession);
Illinois: 1858, Smith *v.* Rankin, 20 Ill. 14 (possession probably not necessary; circumstances here not sufficient); 1899, Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014 (not necessary for the entire period, if other circumstances exist);
Indiana: 1822, Henthorn *v.* Doe, 1 Blackf. 157, 162 (possession assumed not necessary);
Kentucky: 1835, Ross *v.* Clore, 3 Dana 189, 196 (not clear); 1836, Bennett *v.* Runyon, 4 Dana 422, 424 (possession assumed necessary); 1838, Cook *v.* Totton, 6 Dana 108 (document admissible, "especially when it has accompanied the possession"); 1839, Thruston *v.* Masterson, 9 Dana 228, 233 (possession assumed necessary); 1842, Taylor *v.* Cox, 2 B. Monr. 429, 434 (not clear); 1847, Winston *v.* Gwathmey, 8 B. Monr. 19, 20 (not clear); 1848, Burgin *v.* Chenault, 9 B. Monr. 285, 287 (expressly not decided); 1853, Dickerson *v.* Talbot, 14 B. Monr. 60, 69 (not clear); 1854, Hedger *v.* Ward, 15 B. Monr. 106, 114 (insufficiently recorded deed, received, without possession); 1881, Harlan *v.* Howard, 79 Ky. 373 (not required, at least when not available since "until the Court is made acquainted with the tenor of the instrument, the natural order of introducing the evidence would be reversed by requiring proof of corresponding possession"); 1901, Thompson *v.* R. Co., 110 Ky. 973, 63 S. W. 42 (deed forty years old, accompanied by possession, admitted); 1915, Everidge *v.* Martin, 164 Ky. 497, 175 S. W. 1004 (requirement mentioned); 1916, James *v.* Davis, 172 Ky. 381, 189 S. W. 440 (deed of 1849, accompanying possession, admitted);
Maryland: 1800, Gittings *v.* Hall, 1 H. & J. 14, 18, *semble* (possession necessary); 1801, Carroll *v.* Norwood, 1 H. & J. 167, 174 (same);
Massachusetts: 1817, Stockbridge *v.* W. Stockbridge, 14 Mass. 257, 261 (admissible, "when the possession of the thing conveyed has followed the conveyance"); 1826, Tol-

The *policy* of thus requiring possession as a fourth circumstance (additional to age, appearance, and custody), and the probative importance of that circumstance, may be indicated by putting a question: If this document can

man *v.* Emerson, 4 Pick. 160, 162, *semble* (same); 1847, Green *v.* Chelsea, 24 Pick. 71, 76 (same); 1900, Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2 (not necessary);
Mississippi: 1858, Nixon *v.* Porter, 34 Miss. 697, 706 (possession, with other things, here held sufficient); 1859, Fairly *v.* Fairly, 38 Miss. 280, 290 (possession not necessary, if the deed is shown to have existed for thirty years; a peculiar doctrine, apparently based on a misunderstanding of the precedents);
Missouri: 1872, Crispen *v.* Hannavan, 50 Mo. 415, 418 (age not sufficient; it must "be otherwise accounted for" or proper custody shown); 1872, Ryder *v.* Fash, 50 Mo. 476 (possession of document for thirty years, and payment of taxes, here held sufficient); 1872, Wheeler *v.* Standley, 50 Mo. 508 (similar); 1874, Shaw *v.* Pershing, 57 Mo. 416, 421 (custody of deed and payment of taxes, sufficient, no one being in possession of the land); 1885, Long *v.* McDow, 87 Mo. 197, 201 (possession not necessary, if evidence of it is unavailable);
New Hampshire: 1828, Waldron *v.* Tuttle, 4 N. H. 371, 377 (possession necessary); 1843, Homer *v.* Alley, 14 N. H. 85, 98 (same);
New Jersey: 1856, Osborne *v.* Tunis, 25 N. J. L. 633, 663 (possession "or other collateral proof," required); 1890, Havens *v.* Sea Shore L. Co., 47 N. J. Eq. 365, 379, 20 Atl. 497 (possession not required, on the facts);
New York: 1803, Jackson *v.* Laroway, 3 John. Cas. 283, 286 (admissible "where no possession has accompanied it, if such account be given of the deed as may be reasonably expected under all the circumstances of the case and will afford the presumption that it is genuine"; Kent, J., diss.); 1804, Jackson *v.* Bradt, 2 Cai. 169, 174 (possession assumed necessary, per Kent, J.); 1808, Jackson *v.* Blanshan, 3 Johns. 292, 298 (possession necessary; Kent, C. J.: "It is the accompanying possession alone which establishes the presumption of authenticity in an ancient deed"; Savage, J., dissented as to the time of possession only); 1812, Doe *v.* Phelps, 9 Johns. 169 (possession assumed necessary); 1813, Doe *v.* Henry, 10 Johns. 475, 477 (preceding case approved); 1825, Jackson *v.* Davis, 5 Cow. 123, 127 (possession necessary); 1825, Jackson *v.* Luquere, 5 Cow. 221, 225 (same; applied to a will; yet "where no possession appears, other circumstances are admitted to account for it"; Jackson *v.* Laroway approved); 1827, Jackson *v.* Lamb, 7 Cow. 431, *semble* (possession required); 1830, Jackson *v.* Christman, 4 Wend. 278, 282, *semble* (same); 1831, Hewlett *v.* Cock, 7 Wend. 371 (going back to Laroway's case; either possession or other circumstances, *i. e.* proper custody and fair appearance, must be shown); 1832, Jackson *v.* Chamberlain, 8 Wend. 620, 624, *semble* (same); 1834, Fetherly *v.* Waggoner, 11 Wend. 599, 602 (custody and regular appearance sufficient; here of a will); 1840, Northrop *v.* Wright, 24 Wend. 221, 228 (a will from the proper registry received; possession not necessary); on app. s. c. 7 Hill 476, 485 (possession apparently held necessary; the same will held not receivable); 1847, Willson *v.* Betts, 4 Den. 201, 213 ("It now seems to be settled that other facts besides possession may be sufficient to raise the presumption that the deed is genuine"; approving Jackson *v.* Luquere); 1858, Clark *v.* Owens, 18 N. Y. 434, 438 (either possession or "other circumstances" suffice; here a deed); 1859, Hunt *v.* Johnson, 19 N. Y. 279, 285 (ancient field-notes, produced from the town records, received); 1864, Enders *v.* Sternbergh, 40 N. Y. (Keyes) 264, 268 (possession not necessary, if "such an account of it be given as may under the circumstances be reasonably expected and will afford the presumption that it is genuine"; here said of a will); 1869, Enders *v.* Sternbergh, 2 Abb. App. Cas. 31 ("possession or other circumstances" suffice; "it was never absolutely indispensable that possession . . . should be shown"); 1890, Sanger *v.* Merritt, 120 N. Y. 109, 114, 24 N. E. 386 (town records of 1792, granting land, admitted as genuine, the custody being proper and no suspicion of non-genuineness being raised; none of the preceding cases are cited; perhaps decided on the principle of § 2158, *post*);
North Carolina: 1911, Nicholson *v.* Eureka L. Co., 156 N. C. 59, 72 S. E. 86 (certificate of survey of 1841, admitted without evidence of possession);
Pennsylvania: 1811, Garwood *v.* Dennis, 4 Binn. 314, 326 ("possession is a circumstance of great importance"); 1814, Shaller *v.* Brand, 6 Binn. 435, 439, 444 (Tilghman, C. J.: "Although the antiquity of the writing affords some evidence in its favor, yet the main ingredient is possession. Both, however, are necessary"; here, of a will); 1823, McGennis *v.* Allison, 10 S. & R. 197, 199 (Duncan, J.: "It is the accompanying possession which establishes the authenticity of an ancient deed"); 1829, Arnold *v.* Gorr, 1 Rawle 223, 226 (same); St. 1841, Mar. 26, § 2, Dig. 1920, § 8819 (certain old unrecorded deeds, to be provable if "the actual possession of the land has accompanied the said deed"); 1846, Williams *v.* Hillegas, 5 Pa. St. 492, 494 ("In Pennsylvania the leaning of the determination is in favor of the more rigid rule [requiring possession] . . .; still I think the precise point has never been expressly decided with us in a case necessarily

be shown to have been in existence for thirty years, and therefore presumably to have been known to the parties benefiting by its provisions, why have they not acted upon its provisions during all this time, either by taking possession of the land granted or at least by bringing suit to dispossess the usurpers if any?

The argument from the implied answer to this question has been the chief persuading one for those judges who have attempted to establish the rule upon a basis of reason:

1811, TILGHMAN, C. J., in *Garwood* v. *Dennis*, 4 Binn. 314, 327: "If the deed had not been executed, it is to be presumed that the persons entitled to the land would not have suffered the possession to remain out of them. But where possession has not gone along with the deed, the presumption is against it; because, if the deed is genuine, it is difficult to account for the want of possession."

calling for it"; left undecided, but payment of taxes upon wild land held equivalent to possession); St. 1851, Apr. 15, § 10, etc., Dig. 1920, §§ 8753, 8754 (ancient deeds executed without the State to land in the State, and recorded for 30 years, but defectively acknowledged, etc., to be admissible if claimant has had possession); 1867, Bowser *v.* Cravener, 56 Pa. 132, 142 (it "in some circumstances proves itself; certainly it does so where there is possession under it"); 1870, Walker *v.* Walker, 67 Pa. 185, 193 ("Where proof of possession cannot be had, the deed may be read in evidence if its genuineness is satisfactorily established by other circumstances"; here the living on the land with the owner as manager for him, the partial evidence of signatures, etc., was held sufficient); *South Carolina:* 1794, Thompson *v.* Bullock, 1 Bay 364 ("some reasonable proof of possession" required); 1819, Middleton *v.* Mass, 1 N. & McC. 56 (possession necessary; but intimating that the rule applies to deeds only); 1820, Duncan *v.* Beard, 2 N. & McC. 400, 406 (possession necessary; but, *semble*, held applicable to deeds only, and doubted as to wills; where not applicable, it is enough "if they be found in the place in which they should be deposited in pursuance of their object"); 1827, Sims *v.* DeGraffenreid, 4 McC. 253 (possession required for a deed); 1833, Robinson *v.* Craig, 1 Hill 389 ("If there are other circumstances which exempt it from suspicion, . . . with no inconsistent possession in the meantime, . . . slight evidence of possession, even of recent date, might be sufficient"); 1838, Wagner *v.* Aiton, Rice 100, 106, *semble* (possession necessary, but not for the whole of the time); 1840, Edmonston *v.* Hughes, Cheves 81, 83 (possession "or other circumstances accompanying them and showing their authenticity," required; here, recording, and the witness' handwriting thus sufficed); 1842, Eubanks *v.* Harris, 1 Speer 183, 191, *semble* (possession necessary); 1844, Swygert *v.* Taylor, 1 Rich. L. 54, 56 (possession "not indispensably necessary"; proper custody in a registry would suffice; the opinion is useless, however, because it treats these facts as simply evidence to show the document's age, — a fallacy pointed out by Wardlaw, J., diss.); 1853, Brown *v.* Wood, 6 Rich. Eq. 155, 164 (old deed received, though not from natural custody and not accompanied by possession; but one of the witnesses swore to it before the Recorder, and the hands of all were proved); 1880, Thompson *v.* Brannon, 14 S. C. 542, 550 (possession apparently held unnecessary, citing four of the above cases);

Texas: 1866, Stroud *v.* Springfield, 28 Tex. 649, 663 (when possession cannot be had, other circumstances may suffice); 1878, Gainer *v.* Cotton, 49 Tex. 101, 118 (not decided); 1878, Johnson *v.* Timmons, 50 Tex. 521, 534, *semble* (possession not necessary); 1879, Hollis *v.* Dashiell, 52 Tex. 187, 194 (not decided); 1883, Holmes *v.* Coryell, 58 Tex. 680, 688 (possession not required);

Vermont: 1850, Williams *v.* Bass, 22 Vt. 353, 355 ("At the present time the balance of authority seems to be the other way [against requiring possession], and that the presumption may be raised when sufficiently corroborated by other circumstances"; here nothing else appeared, the question being whether a missing seal could be presumed); 1856, Colchester *v.* Culver, 29 Vt. 111, 113 (preceding case approved; but here in a similar case the fact of a preceding contract to convey sufficed to admit); 1859, Townsend *v.* Downer, 32 Vt. 183, 199, 213 (necessity of possession, not clear);

Virginia: 1811, Roberts *v.* Stanton, 2 Munf. 129, 135, *semble* (possession necessary); 1824, Ben *v.* Peete, 2 Rand. 539, 543 (same); 1842, Dishazer *v.* Maitland, 12 Leigh 524, 529 (same); 1848, Shanks *v.* Lancaster, 5 Gratt. 110, 116, *semble* (same); 1855, Caruthers *v.* Eldridge, 12 Gratt. 670, 686 (possession not essential; "other evidences . . . equally capable of producing the same degree of belief," sufficient; careful examination of authorities and final settlement); 1881, Nowlin *v.* Burwell, 75 Va. 551, 553 (possession not indispensable; preceding case followed; several other circumstances here held sufficient on the facts).

1819, JOHNSON, J., in *Middleton* v. *Mass*, 1 N. & McC. 56: "The only reason which I have seen in opposition to it . . . is because old things are hard to be proved. Now, if this be a good reason, it operates with a twofold force on the opposite side of the question; for it is certainly more difficult, to say the least of it, to disprove an old thing than to prove it, especially when in most cases the party would be called on to do so without notice of its antiquity or the necessity of doing it. . . . No such indulgence [as to presume due execution] is due to him who, as in the present case, neglects for almost a century to assert his claim by one single act of ownership. The doctrine contended for on the part of the motion might in its consequences be productive of incalculable mischiefs; for, although it is not now usual to enter upon a course of villainy the fruits of which are not to be reaped for thirty years to come, yet establish the rule contended for, and it opens the door, and many will no doubt find an easy entry."

But there is a weakness in this argument. In the first place, it is in its nature an argument in rebuttal; it ought to come from the opponent of the deed. An inference is sought to be drawn from non-possession by the claimant; and it would therefore seem to be more properly a part of the opponent's case to show that non-possession as the foundation for his inference. This is especially true where (as often happens) no evidence one way or the other as to the possession is available; for then the burden of not being able to prove would fall justly on the opponent. In the next place, the inference is not always a legitimate one; the deed or will may have been in existence but its contents unknown to the beneficiaries under it; or circumstances may have prevented their acting upon it; or some other explanation may be available. Instead of making possession, therefore, an invariable requirement, it would seem better to lay down no fixed rule, but to let the circumstances of each case indicate whether there is any additional corroboration of genuineness:

1855, DANIEL, J., in *Caruthers* v. *Eldridge*, 12 Gratt. 670, 687: "A presumption may be the result of a single circumstance or of many circumstances. Why say that in the case of an ancient deed there must be a departure from the general rule in respect to presumptions, and that its authenticity may be presumed from the single circumstance of possession, but may not be presumed from other circumstances the existence of which is equally inconsistent with any other hypothesis than that of the genuineness of the instrument? The direct evidences, the positive proofs by which the execution of the deed is established, being no longer attainable, and the rule which requires their production being dispensed with, it seems to me wholly at war with the spirit of the law, which under such exigency allows a resort to circumstantial or presumptive evidence, to hold that a corresponding possession shall be the only evidence from which the authenticity of the deed may be presumed."

This result, accepted by the greater number of Courts, seems to avoid rigid technicality, while amply protecting against fraud.

§ 2142. **Same: Doctrine of Inferred Possession under Leases, distinguished.** It so happens that there is a doctrine of Relevancy by which an inference precisely the reverse of the present one may under certain circumstances be drawn. Instead of inferring, as here, the execution of a document from the possession of the land, the *possession* of land *may be inferred* from the *execu-*

tion of the document (*ante*, § 157). Naturally enough, the precedents under the latter principle (which are almost exclusively English ones) have sometimes been misused by our own Courts in dealing with the present principle. The superficial features and the terms of discussion have much in common; but the principles are wholly unconnected, and it is necessary to note here the practical distinctions.

(*a*) When Doe claims title by prescription against J. S., Doe may rest on long *possession under claim of title*, and, for showing this, may prove acts of occupation under claim by ancestors or other predecessors. In so doing he may produce a lease or a license to the land in question by the ancestor. The question then arises whether the mere act of execution of the lease suffices, with nothing more, to evidence that occupation. Such an act is clearly a claim of title, but that is not enough in the substantive law; there must be accompanying possession. Now, may not possession be inferred from the act of execution? Or must there be, additionally, express evidence of possession of the land by the lessor or lessee? For ancient matters this would be often impossible. Hence, it has been settled, by a long line of decisions in England, that an *ancient lease* or license, otherwise proved genuine, may serve as an *act of exercise of possession* under claim, the possession being supplied by inference from the act of execution; since (in the words of Lord Blackburn) "men do not generally execute leases unless they are in possession" (*ante*, § 157).

(*b*) Under the present principle, on the contrary, the whole situation of the parties, the nature of the documents, and the inference to be drawn, are different. Suppose, as before, Doe to be claiming by prescription against J. S.; and suppose J. S. to set up a title by grant. J. S. produces an ancient deed or will from Roe to J. S.'s ancestor; the question arises whether the document is genuine. J. S. proves its age, custody, and fair appearance; must he *also prove possession* by his ancestor under Roe's grant? That is the question just examined (*ante*, § 2141).

It is obvious that the two principles are so distinct that they cannot come up for application in the same connection, the marks of difference being as follows: (1) In (*a*), the genuineness of execution of the document is assumed somehow to be *settled*, in (*b*), that is the question at *issue;* (2) in (*a*), the document is supposed to be made *by* the offeror's predecessor, granting out a temporary part of his estate; in (*b*) it is supposed to have been made *to* the predecessor, by which he receives an estate; (3) in (*a*), the document purports to be a *lease* or license, in (*b*), a *deed* or will; (4) in (*a*), the predecessor does not claim title *under the document*, but only under prescriptive possession, in (*b*), he does claim title under it as *grantee;* (5), in (*a*) the possession which it is objected ought to be proved is the *lessor's* possession, by himself or by his lessee, in (*b*) it is the *grantee's* possession. It is apparent, therefore, that there is no connection between the principles, and that the precedents cannot be used in any way interchangeably. It may also be added, not only that the lines of precedents have been kept separate in England, but further-

more that the English rulings under (*a*) *supra* assume in effect the negative of the possession-doctrine under (*b*); since, if the ancient leases were allowed to be used as themselves evidence of possession by the lessor, obviously the Court could not have required proof of possession as a preliminary (additional to age and custody) to presume them genuine; for if it had, the very question decided by the Court could never have arisen.

§ 2143. **Old Recorded Deeds and Old Copies.** The use of a copy of an old deed, instead of the original, raises two or three questions somewhat different in their bearings; the significance, moreover, of the circumstance that an old original deed offered has been recorded is connected with the question of record-copies; and the two sets of questions may best be considered together.

It may be assumed at the outset, that the general principle (*ante*, § 1192) requiring the original to be produced or else accounted for as lost or the like, has been satisfied; because, if it is not, a copy is of course inadmissible on grounds irrespective of the present question.[1] It may further be kept in mind that, by statute or otherwise, the official record (or a copy therefrom) of a lawfully recorded deed, the original having been accounted for or dispensed with (*ante*, §§ 1224–1226), is receivable to prove the execution and contents of the original (*ante*, §§ 1648–1649), but that this rule does not enable us to use an unauthorized record. Thus, when the record is unauthorized, some other mode of proving the deed must be resorted to; and the question will arise how far the present ancient-document rule can serve the purpose.

With these principles in mind, the various situations may be distinguished into four: (1) an *alleged ancient original lost;* the contents testified to orally, or *copy proved*, by a competent witness on the stand; (2) an *alleged ancient original lost;* an alleged *ancient non-official copy* offered; (3) an *alleged ancient original lost;* an alleged *official record-copy* offered, though not made in pursuance of law; (4) an *ancient original produced;* the official record, *not made in pursuance of law*, offered in corroboration.

(1) Where the alleged ancient *original* is *lost*, and proof of its contents (including the purporting signatures) is offered to be made by one who, having seen it before its loss, *recollects its contents or took a copy*, the difficulty in assuming genuineness is that the third element, of unsuspicious appearance (*ante*, § 2140), can never be furnished, since the original is lacking; perhaps also the second, that of natural custody (*ante*, § 2139), will usually also be lacking. It may be said to be doubtful, therefore, whether a Court would consider the rule as satisfied.[2]

§ **2143.** [1] 1882, Dotson *v.* Moss, 58 Tex. 152, 154 (excluding a land-office copy of an old grant there belonging). Distinguish the odd rule of the following case, which is apparently designed merely to exempt from accounting for the original under the peculiar New England rule (*ante*, § 1224): 1897, New York, N. H. & H. R. R. Co. *v.* Benedict, 169 Mass. 262, 47 N. E. 1027 ("an office copy of an ancient [lawfully] recorded deed" is admissible).

[2] *Can.* 1841, Doe *v.* Stiles, 1 Kerr N. Br. 338, 346 (doubted whether the presumption applies unless the document itself is produced); *U. S.* 1853, Bryan *v.* Walton, 14 Ga. 185, 188, 195 (lost will dated 1812, offered by testimony to contents; an objection that "it must itself

Nevertheless, this of course is not because of the general rule (*ante*, § 1192) requiring an original's production (for that rule excuses production of a lost original), but only because an important circumstance (namely, unsuspicious appearance) evidencing genuineness cannot be furnished. The lack of it might perhaps be dispensed with, by reason of necessity; but at any rate, if in place of this circumstance some other confirming circumstance can be furnished, it would seem that the absence of the original need be no fatal defect. Such a circumstance seems to be presented in the following two situations.

(2) Where the alleged ancient *original* is *lost*, and an *ancient purporting copy* is offered, made by a private hand, and the purporting maker being unknown or deceased, it seems to have been long accepted that this suffices, and that the copy may be received under the ancient-document rule:[3]

1726, Chief Baron GILBERT, Evidence, 97: "Where the possession has gone along with any deed for many years, there a very old copy of the deed may be given in evidence, with proof also that the original is lost; and that is according to the rule of the civil law, 'si vetustate temporis et judiciaria cognitione sint roboratæ'; for possession could not be supposed to go along in the same manner unless there had been originally such a deed and so executed as the copy mentions."

be present to establish its presumed proper execution and probate," sustained on the authority of Jones *v.* Morgan, *infra*, note 4, and also because the copy ought to be established by a special proceeding to establish lost documents); 1904, Carter *v.* Wood, 103 Va. 68, 48 S. E. 553 (a county-court entry of a deed in 1859, and a copy of the deed made in 1866–72 by one who knew nothing of its genuineness, excluded); 1907, Dickinson *v.* Smith, 134 Wis. 6, 114 N. W. 133 (an ancient copy of a recorded map, the copy coming from the register's custody, and generally reputed as correct, admitted).

Of course where the witness to contents is also competent to *verify the lost signatures* and does so, this furnishes ample proof of the ordinary sort to execution, and the copy can be used independent of the deed's antiquity: 1874, Shaw *v.* Pershing, 57 Mo. 416, 421 (examined copy allowed, the witnesses' handwriting being proved); 1835, Winn *v.* Patterson, 9 Pet. 663, 675 (old power of attorney, now lost, proved by a witness who had seen the signature; record of it admitted).

[3] *Accord: Eng.* 1705, Anon., 6 Mod. 225 ("All the Court held that the counterpart of an ancient deed which might be lost was good evidence with other circumstances, but not of itself without other circumstances," except for a deed accompanying a fine); 1726, Gilbert, Evidence, 22 ("Where a record is lost, . . . the copy must be admitted without swearing any examination concerning it; since there is nothing with which the copy can be compared, and therefore it must be presumed true without examination. But . . . they must be 'vetustate temporis judiciaria cognitione roborata'"); 1867, Buller, Trials at Nisi Prius, 254 (like Gilbert, as quoted in the text); 1816, Bullen *v.* Michel, 4 Dow 297, 321, 333 (transcriptions in ancient abbey-books of instruments affecting land, admitted, the originals being lost; Lord Redesdale: "This appears to be the best evidence after the originals"; L. C. Eldon: "The entry appears to be a transcript of the original instrument, and within the scope and principle of all the authorities ought to be received as evidence"); *Can.* 1858, Songster *v.* Payzant, 3 N. Sc. 408 (certain copies of plans, acted on, held admissible on proof of loss of the original); *U. S.* 1914, Prince *v.* Prince, 188 Ala. 559, 66 So. 27 (acknowledgment not presumed; see the comment on this case *post*, § 2520); 1917, Baber *v.* Baber, 121 Va. 740, 94 S. E. 209 (counsel's copy of a contract now lost, the copy being filed in a lawsuit of 1878, and the original's existence being otherwise evidenced, admitted).

Contra: 1901, Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884 (map by one H., dated 1886, copied in 1891, and destroyed in 1892; the copy held not admissible under the rule of ancient documents).

This result might be justified on the following grounds: The purporting copy, being ancient, may be presumed genuine, *i. e.* to be a correct copy of a once existing original; since, then, the ancient correct copy has been treated and acted upon precisely as the original would have been, it should have the benefit of the rule which would have applied to the original; the elements of unsuspicious appearance and the like, being duly supplied.

Compare here the general doctrine excluding *ordinary hearsay copies* (*ante*, § 1281); and the doctrine admitting *recitals in an ancient deed* of the contents of a prior deed (*ante*, § 1573).

(3) Where the alleged ancient *original* is *lost* (or otherwise unavailable), and a purporting *official record* is offered, made more than thirty years before, and certifying the deed's contents and execution, but inadmissible as an official record (*ante*, §§ 1648–1649), because not made in accordance with statutory provisions, may not this ancient record-copy serve as sufficient evidence of genuineness? It is apparent that the case is not only as strong as the preceding one, but is stronger in two respects, namely, the defects of the record are in a measure technical only and it still is entitled to some consideration as an official statement, and the long publicity of it has given ample opportunity for correction and opposition if any just ground existed for doubting the original's authenticity. Accordingly, there has been a general disposition, on one ground or another, to accept such an ancient record, though otherwise inadmissible, as sufficient, after the lapse of time:

1726, Chief Baron GILBERT, Evidence, 99 (after stating that an unauthorized enrolment or 'inspeximus' is in general not receivable): "But the 'inspeximus' on an ancient deed may be given in evidence, though the deed needs no inrolment; for an ancient deed may be easily supposed to be worn out or lost, and the offering the 'inspeximus' in evidence induces no suspicion that the deed is doubtful, for it hath a sanction from antiquity, and if it had been ill executed, it must be supposed to be detected when it was newly made."

1850, EASTMAN, J., in *Gibson* v. *Poor*, 2 N. H. 440, 447 (holding admissible a copy of an ancient official survey): "Ancient plans must at some time become worn out by age and use, and the necessity of the case seems to require that their place be supplied by copies. After these copies have been kept among the records, and used by the inhabitants a sufficient number of years to raise the ordinary presumption of genuineness, can they not be used as substitutes for the originals, without resorting to proof of being true transcripts, if the originals cannot be found or have become defaced and unintelligible by use? If the originals should be lost, there would be no doubt of the competency of the copies as secondary evidence; and the reason would seem to be quite as cogent for the admission of copies after the originals had become defaced by age and use."

1883, STAYTON, J., in *Holmes* v. *Coryell*, 58 Tex. 680, 688 (admitting a copy of a deed-record of 1843, the record not being usable as an official registry under the terms of the statute): "The fact that it was recorded raises a presumption that it was delivered. The record made in 1843 evidences with more certainty than the original deed would if produced that the deed was more than thirty years old; for skilful indeed would be the spoliation of a record book which could not be detected. It comes free from suspicion upon any just ground, with strong facts corroborative of its genuineness. . . . [After noting in detail the facts of payment of taxes, etc., as corroborating,] the certified copy of the deed, coming surrounded with such facts, was properly admitted in evidence, for under the common-law rules of evidence the deed would prove itself."

This conclusion has been usually accepted.[4] The rulings to the contrary seem rarely, if ever, to have gone upon any supposition that the ancient-

[4] ENGLAND: 1675, Green *v.* Proude, 1 Mod. 117 (an exemplification of a recovery being offered, the original being ancient and burned in the wars, no proof of authenticity was required); 1773, Ludlam's Will, Lofft 362 (will of land of an ancestor of the previous century, now lost, and offered by copy of the spiritual Court's record, objected to because "the hand and seal of that Court is not the proper evidence to prove the authenticity of a will by copy"; but admitted as the best evidence).

CANADA: 1848, Doe *v.* Turnbull, 5 U. C. Q. B. 129, 131 (a "memorial," or recorded-copy, of a lost ancient deed, admitted; the acknowledgment for record suffices as against the party acknowledging, without other proof of

document rule was in itself impossible to apply to a copy, but rather upon the lack of confirming circumstances in the case in hand. Moreover, the

execution; but this limitation, as to using it against the party only, is unsound, as may be seen *ante*, § 1650).

UNITED STATES: *Federal:* 1826, Stokes *v.* Dawes, 4 Mason 268, Story, J. (office copy of deed recorded in 1765, admitted without other proof of execution); 1889, Baeder *v.* Jennings, 40 Fed. 199 (old unauthorized record, admitted); 1892, Van Gunden *v.* V. C. & I. Co., 3 C. C. A. 294, 52 Fed. 838, 8 U. S. App. 229, 251 (certified copy of old record of deed, recorded too late and in the wrong county, received in corroboration of other evidence); 1911, Northrup *v.* Columbian Lumber Co., 5th C. C. A., 186 Fed. 770, 774 (certified copy of a deed to Georgia land irregularly recorded in South Carolina in 1868, admitted the original being lost); *Alabama:* 1844, Beall *v.* Deering, 7 Ala. 124, 127 (unlawfully recorded old deed, lost; record held, on the facts, to be sufficient evidence of deed's existence to go to the jury); 1866, White *v.* Hutchings, 40 Ala. 253, 257 (record more than 20 years old in the proper office, but not showing due probate, admissible on the presumption that execution was legally proved for record, if the original is lost; no possession need be shown); 1885, England *v.* Hatch, 80 Ala. 247, 249 (preceding principle affirmed; but here a record less than 20 years old was excluded); 1888, Allison *v.* Little, 85 Ala. 512, 516, 5 So. 221 (principle affirmed); *Arkansas:* 1856, Trammell *v.* Thurmond, 17 Ark. 203, 219 (certified copy of an old unauthorized record of deed; the original deed was lost; though such a record might with corroborating circumstances have been used "as a link in a chain," it was here excluded, such circumstances being lacking); 1904, Arbuckle *v.* Matthews, 73 Ark. 27, 83 S. W. 326 (certified copy of official record, made in 1885, of a purporting original land-patent certificate of 1860 not entitled to record, excluded; preceding case not cited); *Georgia:* 1853, Jones *v.* Morgan, 13 Ga. 515, 523 (defective record in 1827 of a deed dated 1820; insufficient on the facts, chiefly because the old deed could not be assumed to exist until 1827, less than 30 years before); 1885, Patterson *v.* Collier, 75 Ga. 419, 426 (old record, if not usable as statutory evidence of execution of the lost original, because of affidavit of forgery, is not usable as an ancient copy to prove execution); 1904, Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645 (a certified copy of the record, insufficient here under § 1651, *ante;* the record-book itself lost, and the record purporting to be of a deed of 1846; these facts were held insufficient to authenticate); *Illinois:* 1903, Bradley *v.* Lightcap, 201 Ill. 511, 66 N. E. 546 (certified copy of a deed, recorded more than thirty years, but not duly acknowledged, admitted); *Kentucky:* 1907, Ball *v.* Loughridge, — Ky. —, 100 S. W. 275 (record of 1853 of unlawfully recorded power of attorney, not admitted; "this rule has never [!] been applied to a copy"); *Louisiana:* 1856, Boykin *v.* Wright, 11 La. An. 531, 533 (ancient record-copy of a lost deed, apparently not legally registered, admitted); *Maine:* 1908, McCleery *v.* Lewis, 104 Me. 33, 70 Atl. 540 (here the record-copy was over 50 years old, and was regular, but under the Maine rule (*ante*, § 1225), could not be used because the offeror was the grantee in the deed; excluded, but erroneously, on the ground that the original was not shown to have been executed; yet that is precisely the fact which the present doctrine purports to facilitate; moreover, the learned Court seems to have forgot that the grantee-rule (§ 1226, *ante*) is aimed merely to account for the original, and that, if the original is duly accounted for, a regular record-copy is admissible in Maine to prove execution, on the principle of § 1651; the ruling produces an insurmountable impossibility of proof where none need ever exist, nor was meant to, by any rule of law); *Michigan:* 1906, Murphy *v.* Cady, 145 Mich. 33, 108 N. W. 493 (bill for accounting for pension moneys; exemplified copies of pension vouchers of about 1873, admitted under U. S. Rev. St. § 882, quoted *ante*, § 1680, held to admit the originals purporting to be signed by the party charged, without proof of the signatures on the latter; it is difficult to see why the exemplified copy was not sufficient, on the principle of § 1680, *ante*, without the aid of the ancient-document rule); *New Hampshire:* 1850, Gibson *v.* Poor, 21 N. H. 440, 447 (quoted *supra*); *Ohio:* 1827, Allen *v.* Parish, 3 Oh. 107, 112 (old unauthorized notarial copy of lost dead, admitted, "after a sufficient foundation had been laid from which to infer its existence"); 1847, Webster *v.* Harris, 10 Oh. 490, 499 (certified copy of a record of 1805, of a deed purporting to be of 1804, admitted on the facts; good opinion by Birchard, C. J.); *South Carolina:* 1905, Lancaster *v.* Lee, 71 S. C. 280, 51 S. E. 139 (deed of 1864, not legally recorded, and now lost; the record, sworn to by the transcribing clerk on the stand, was admitted to prove contents and apparently execution also); *Tennessee:* 1916, Fielder *v.* Pemberton, 136 Tenn. 440, 189 S. W. 873, *semble; Texas:* 1883, Holmes *v.* Coryell, 58 Tex. 680, 688 (quoted *supra;* old record-copy admitted); 1883, Belcher *v.* Fox, 60 Tex. 527, 530 (similar; but only with strong corroborative evidence); 1887, Brown *v.* Simpson, 67 Tex. 225, 231, 2 S. W. 644 (similar; provided the recording is shown to have been ancient); 1887, Shifflet *v.* Morelle, 68 Tex. 382, 388, 390, 4 S. W. 843 (bond for title; unauthorized record-copy of 1837, excluded; "it stands like any other

fact of possession of the land, as a confirming circumstance, seems often to be here insisted upon, irrespective of its general requirement (*ante*, § 2141). It may be added that the analogies of the presumption of regularity in official transactions (*post*, § 2534), as well as of the presumption of a lost grant (*post*, § 2522), may be traced in some of the rulings. In a few jurisdictions the problem has been solved by statutes, applicable to specific kinds of deeds and defining various shorter periods of antiquity.[5]

unauthorized copy"; yet "if the clerk had been living and had made the record, he could have testified to it"; preceding cases not cited and ancient-document rule not considered); 1890, Hill *v.* Taylor, 77 Tex. 295, 299, 14 S. W. 366 (unauthorized record-copy of 1842, the original deed being lost; excluded because the original was not sufficiently shown to be lost; preceding cases not cited); *Vermont:* 1859, Townsend *v.* Downer, 32 Vt. 183, 211 (old record-copy of a deed, the record not being lawful and therefore not sufficing 'per se'; possession, together with this recorded copy, sufficient).

It must be remembered that, although what is actually offered is a copy recently taken from the record, yet this copy merely proves the record (*ante*, § 1655), so that the real question is, after all, whether the record is sufficient evidence.

[5] Some of these statutes seem equally to sanction the use of the record when the original is produced, thus covering also the case of the next paragraph of the text above; comparison should also be made with the respective recording-statutes (*ante*, §§ 1225, 1651):

CANADA: *Ont.* Rev. St. 1914, c. 122, § 2 (contracts for sale of land; grantor's recorded memorial twenty years old, admissible; quoted *ante*, § 1225); 1877, R. *v.* Guthrie, 41 U. C. Q. B. 148 (memorial over thirty years old, executed by the grantor, held admissible); 1881, Allan *v.* McTavish, 28 Grant U. C. 539, 548, 8 Ont. App. 440, 444 (mortgage more than twenty years old, presumed genuine under the statute); 1883, Van Velsor *v.* Hughson, 9 Ont. App. 390, 397 (memorial over sixty years old, but executed by the grantee, and without proper possession, not admitted; Gough *v.* McBride approved); 1884, Mulholland *v.* Harman, 6 Ont. 546, 561 (memorial by the grantee, not admitted where possession had not followed the deed); 1888, McDonald *v.* McDougall, 16 Ont. 401 (memorial of a will, twenty years old, executed by a devisee, with consistent possession, held sufficient).

UNITED STATES: *Alabama:* Code 1907, § 3382 (defectively acknowledged and recorded instrument being 20 years of record in the proper court of record; duly certified transcript is admissible); St. 1911, No. 191, p. 192, Apr. 4, § 2 (certified copy of defectively executed conveyance of State lands, prior to Feb. 12, 1879, and recorded for 20 years in the probate court, admissible);

Colorado: Comp. L. 1921, § 4906 (deeds, etc., affecting real estate, defectively recorded for a period of 20 years, or certified copies, are admissible "without additional proof of the execution");

Florida: Rev. G. S. 1919, § 3250 (certified copy of a lost or destroyed deed defectively recorded for twenty years, admissible in proceedings to re-establish); 1907, Campbell *v.* Skinner, 53 Fla. 632, 43 So. 874 (statute held constitutional);

Georgia: In this State the rule about proving execution when an *affidavit of forgery* is filed by the opponent (*post*, § 2146) should be consulted;

Indiana: Burns' Ann. St. 1914, § 398S (a certified record-copy of certain deeds executed more than twenty years before the date of this act and recorded in the wrong county, is receivable);

Missouri: Here a series of statutes must be collated in order to ascertain the law: Rev. St. 1919, § 5363 (a deed duly acknowledged or proved and recorded according to the law then in force, "though not declared by such law to be evidence," shall be received if appearing to have been duly recorded within one year after date and more than twenty years before the time of offering); § 5364 (such a recorded deed, though "not recorded within one year after date nor twenty years before it is offered, may be read in evidence upon proof of such facts and circumstances as, together with the certificate of acknowledgment or proof, shall satisfy the Court that the person who executed the instrument is the person therein named as grantor"); § 5365 (when the original of such a deed "has been lost or destroyed, or is not in the power of the party who wishes to use it," a certified copy of the record and certificate is admissible); § 5369 (certified copy of a record, made one year before this law's taking effect, of a deed, will, etc., not duly acknowledged or proved, to be admissible only when the execution of the original is proved, "except where such record shall have been made thirty years or more prior to the time of offering it in evidence"); § 5373 (when in a county recorder's office the record exists of a writing affecting realty, and the interest was claimed or enjoyed under the writing for ten consecutive years, the writing, "and a certified copy thereof, and of the time of its record, shall be 'prima facie' evidence of the execution of such writing," provided the record was made ten

(4) When the *original* is *produced*, and also an official *record* of it, made more than thirty years before, but inadmissible of itself as an official record

years before the offering in evidence); § 5398 (an instrument purporting to convey or affect land, "executed and acknowledged in conformity with the provisions of any law in force" at the time in this State, Louisiana, or Missouri, and duly recorded for more than thirty years before March 28, 1874, is admissible "without further proof of the execution thereof"); § 5399 (on proof that the original is lost or not within the party's power, a certified copy is admissible); 1842, Moss *v.* Anderson, 7 Mo. 337, 341 (certified copy of record of lost original, defectively recorded thirty-three years before, admitted under statute); 1872, Briggs *v.* Henderson, 49 Mo. 531, 534 (record-copy of deed more than thirty years old, not being admissible as a lawfully recorded copy; the age, record, and other circumstances, together with the death of the parties and witnesses, held sufficient); 1878, Smith *v.* Madison, 67 Mo. 694 (by statute a certified copy of a deed recorded thirty years is receivable, whether defectively acknowledged or not); 1880, Crispen *v.* Hannavon, 72 Mo. 548, 552 (same; but the original must be shown lost or destroyed); 1898, Rigney *v.* Plaster, — C. C. A. —, 88 Fed. 688 (applying R. S. § 4865, now § 3119, to a deed corresponding to R. S. § 4859, now § 5363, *i. e.* acknowledged under a repealed law); 1899, Plaster *v.* Rigney, 38 C. C. A. 25, 97 Fed. 12 (Mo. Rev. St. § 4865, now § 5369, admits a certified copy of a deed proved properly when taken but not when recorded);

New Jersey: Comp. St. 1910, Conveyances, § 57 (deeds recorded more than ten years after date of acknowledgment, and certain ancient deeds; a certified copy may be used if the original "has been destroyed, lost, or taken out of the office" of the proper clerk); § 64 (deeds defectively acknowledged, if recorded more than six years, may be received in evidence, either by original or by certified copy, without other proof, if "corroborated by evidence of corresponding enjoyment or other equivalent or explanatory proof"); § 68 (certified copy of record of exemplified copy of deed recorded out of the State in the U. S. more than twenty years, admissible though defectively acknowledged);

New Mexico: 1915, Union Land & G. Co. *v.* Arce, 21 N. M. 115, 152 Pac. 1143 (certified copy of an unacknowledged deed recorded in 1877, admitted, the original being lost; citing the above text with approval);

New York: Cons. L. 1909, Real Property § 306 (validates acknowledgments of deeds recorded for 30 years);

North Carolina: Con. St. 1919, § 1776 (will proved and ordered recorded, but "destroyed during the war between the States" before record; a copy, "though not certified by any officer, shall, when the Court shall be satisfied of its genuineness, be ordered to be recorded," and be admissible);

Pennsylvania: St. 1851, Apr. 15, § 10, etc., Dig. 1920, §§ 8753, 8754 (deeds of lands within the State, purporting to be executed, etc., but not as required by law, and recorded; record receivable if recorded for thirty years before the act's date and accompanied by possession);

Philippine Islands: Civ. C. § 1221 (like P. R. Rev. St. & C. § 4295);

Porto Rico: Rev. St. & C. 1911, § 4295 (where the original instrument and record are lost, copies 30 years old are evidence on certain conditions; quoted in full, *ante*, § 1225);

Tennessee: Shannon's Code 1916, § 3761 ("Whenever a deed has been registered twenty years or more, the same shall be presumed to have been upon lawful authority"); § 3762 ("Where a deed has been registered more than 30 years, but the register has failed to register the name of the grantor or bargainor," the name shall be presumed to have been subscribed, etc.); § 3763 (provisions for presuming genuine instruments authorized to be registered and in fact registered before 1839, though defective in specified details); 1899, Perry *v.* Clift, — Tenn. Ch. —, 54 S. W. 121 (statute applied);

Texas: Rev. Civ. St. 1911, § 3700, an instrument lacking in due acknowledgment or proof but recorded for 10 years or more, or a certified copy if the original is lost or not procurable, is admissible "without the necessity of proving its execution"); in this State consult the rule (*post*, § 2146) about proving an issue of forgery;

Virginia: St. 1912, c. 235, p. 524 (deeds, etc., recorded before 1865 and made under a statute or decree providing for conveyance; if the proceedings under which it was made are "lost or destroyed or cannot be produced," the deed or a certified copy of the record shall be evidence of the authority, due compliance, etc.); St. 1914, c. 100, p. 186 (repealing the foregoing); 1917, Virginia & W. V. Coal Co. *v.* Charles, D. C. W. D. Va., 251 Fed. 83, 123 (Va. St. 1912, Mar. 13, providing a presumption of due execution for certified copies of ancient official deeds recorded before 1865, whose record is lost, was repealed by St. 1914, Mar. 14, being an impolitic and dangerous rule, tending to unsettle thousands of titles, and the rule for trials after 1914 applied equally to claims acquired in the period 1912–1914 while St. 1912 was in effect); St. 1922, Mar. 24, c. 391 (Commonwealth grants recorded but lacking the governor's signature; Code § 417 amended, in unspecified details);

West Virginia: St. 1907, c. 76, p. 291, § 2 Code 1914, § 4944 (certain judicial deeds recorded for 10 years or more, presumed to be made on due authority);

of execution because it was not made in accordance with statutory provisions (*ante*, § 1648), the record may nevertheless be treated as a confirming circumstance in lieu of possession of the land.[6]

§ 2144. **Authority to Execute.** Whether the circumstances of age, custody, and the like will suffice as evidence not only of genuineness of execution by the person purporting to execute, but also, when he purports to act only as agent for another, of the existence of due *authority to execute* given by that other, has been a matter of some difference of judicial opinion. The general consensus is that a mere authority as agent or attorney will be thus assumed to have existed.[1] Any other result would practically nullify the utility of the whole doctrine in its application to such instruments, since the same lapse of time that has removed the evidence of execution will equally have removed (in the usual case) the evidence of authority to execute.[2]

But when the missing element is anything beyond an agent's authority there is in some Courts a hesitation; it may be said that they distinguish, in effect, between a matter of mere authority and a matter of title in the estate.[3]

Wisconsin: Stats. 1919, §§ 2216 *a*, 2216 *b* (certain specified documents, otherwise defectively acknowledged, etc., to be admissible if recorded for twenty years, and to be provable by the record or a certified copy); 1897, Gratz *v.* Land & R. I. Co., 27 C. C. A. 305, 82 Fed. 381 (Wisconsin statute applied to a bill to quiet an action begun before its enactment).

[6] A few cases of this sort have been collected under § 2141, *ante;* the statutes are in note 5, *supra*.

§ **2144.** [1] 1882, Hogans *v.* Carruth, 19 Fla. 84 (ancient deed of 1834; the signature of one party being in the handwriting of a witness not interested, and the party not being able to write, and "there is neither charge nor evidence of fraud," the authority of the signer to sign by direction of the party was presumed); 1899, Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014 (existence of a power of attorney will be presumed; distinguishing the case *infra* of an administrator's power of sale); Minn. Gen. St. 1913, § 7372 (deed of executor, etc., recorded more than 6 years, the probate court records being destroyed; authority presumed); 1812, Doe *v.* Phelps, 9 Johns. N. Y. 169, 171 (a power of attorney "will be equally embraced by the presumption"); 1813, Doe *v.* Campbell, 10 Johns. N. Y. 475, 477 (same); 1833, Robinson *v.* Craig, 1 Hill S. C. 389 ("Antiquity and other circumstances dispense with the necessity of any proof by witnesses, of handwriting, when the deed purports to be executed by the grantor personally, and there seems to be no good reason why they should not have the same effect when it purports to be executed by attorney; the proof of the power would be only one of the facts to make out a due execution"); 1856, Watrous *v.* McGrew, 16 Tex. 506, 513 (the rule covers "in most cases" the authentication of a power under which it purports to be made); 1874, Johnson *v.* Shaw, 41 Tex. 428, 436 (power recited in a deed, presumed on the facts); 1878, Johnson *v.* Timmons, 50 Tex. 521, 534 ("in most cases," the power's execution will be presumed); 1882, Storey *v.* Flanagan, 57 Tex. 649, 654 (power's execution presumed); 1890, O'Donnell *v.* Johns, 76 Tex. 362, 364, 13 S. W. 376 (power of attorney presumed on the facts). *Contra:* 1866, Jones *v.* McMullen, 25 U. C. Q. B. 542 (ancient deed purporting to be executed under a power of attorney, held not to prove the power).

Compare the use of *recitals in ancient deeds*, to prove the contents of a prior deed, *ante*, § 1573.

[2] Consequently, when the document of authority has in fact survived, it must be proved: 1912, Butterfield *v.* Miller, C. C. A., 195 Fed. 200, 208 (recital in an ancient deed of a power of attorney, held not sufficient, when the power is matter of record, without producing the original or a copy or accounting for failure to produce); 1826, Tolman *v.* Emerson, 4 Pick. Mass. 160, 162 (a deed executed by a legislative committee under a power in 1744; the power being of record, the deed was not admitted without it).

[3] *England:* 1897, Airey *v.* Stapleton, 1 Ch. 164 (authority as attorney to exercise a special power of appointment, not presumed); *United States:* 1872, Fell *v.* Young, 63 Ill. 106, 109 (an ancient deed still requires evidence of power to convey of an administrator making it); 1908, Koch *v.* Streuter, 232 Ill. 594, 83 N. E. 1072 (deed of State public land trustees; State title from the United States, not presumed); 1826, Innman *v.* Jackson, 4 Greenl. Me. 237, 253 (certain assessors' deeds, under a special mode of divesting a proprietor of his property; statutory directions not presumed to have been followed); 1856, Osborne *v.*

Nevertheless, the other Courts seem to set no definite limits, and to be liberal in assuming all the elements necessary to authenticate and to constitute a due execution.[4]

§ 2145. **Kinds of Documents covered by the Rule.** The probative value of the circumstances of age, custody, and the like, as evidence of genuineness, exists equally for all sorts of documents, as does also the necessity for being satisfied with such evidence (*ante*, § 2137). For grants of land, the additional circumstance of possession of the land may be required (*ante*, § 2141). Apart from that requirement, however, it is universally conceded that the rule applies alike to all sorts of documents whatever, — in particular, to wills,[1] as well as to letters, records, contracts, maps, certificates, and whatever other writings may need authentication.[2]

Tunis, 25 N. J. L. 633, 663 (deed of commissioners of loan office; due statutory advertisement, etc., not presumed unless possession "or other collateral proof" appears); 1873, State *v.* Jersey City, 36 N. J. L. 188, 195 (same); 1915, Carmichael *v.* Reed, 76 W. Va. 672, 86 S. E. 662 (Code 1913, c. 132, § 4944, as to deeds recorded for 10 years, held not applicable).

[4] ENG. 1808, Doe *v.* Thynne, 10 East 206, 210 (books alleged to be those of rent-collecting agents; to show the character of the author as collector, other similar books, duly authenticated, held not sufficient, but the internal evidence of the books held sufficient to consider); CAN. 1866, Monk *v.* Farlinger, 17 U. C. C. P. 41, 51 (regularity of certificate of married woman's acknowledgment, presumed); U. S. *Fed.* 1913, Wilson *v.* Snow, 228 U. S. 217, 33 Sup. 487 (a will was probated in 1858, but there was no record of the executrix having qualified; a deed was made in 1865, by a grantor as the executrix under a power to this will; held, that the fact of the grantor's authority to sell as executrix was sufficiently evidenced by the deed's recital of such authority, and by the circumstance of possession for 40 years under the deed; the opinion does not carefully distinguish the hearsay exception for deed-recitals and the rule for authenticating ancient deeds; either of them might suffice for the present case; but the opinion cites cases from both, without noting that there are two; it also ignores the limitations on the deed-recital rule, though citing Carver *v.* Jackson, *ante*, § 1573, which established them); 1920, Smythe *v.* New Providence, 3d C. C. A., 263 Fed. 481 (town bonds of 1868; registration and other facts, presumed); *Me.* 1829, Battles *v.* Holley, 6 Greenl. 145 (administrator's authority, etc., to make an inventory and schedule of claims, presumed on the facts); *Mass.* 1848, King *v.* Little, 1 Cush. 436, 440 (records of "the Lower Housatonic Propriety," admitted without showing the organization of that body); 1866, Berry *v.* Raddin, 11 All. 577, 578 (ancient copies of depositions 'in perpetuam memoriam'; the antiquity held to presume due taking, etc.); *N. H.* 1852, Adams *v.* Stanyan, 24 N. H. 405, 416 (the due holding of a corporation meeting whose minutes were offered in an ancient book of records); 1858, Little *v.* Downing, 37 N. H. 355, 365 (corporation record; the due holding of the meeting); *Wis.* 1907, Dickinson *v.* Smith, 134 Wis. 6, 114 N. W. 133 (plat and survey certificate, more than 30 years old, held sufficient evidence of necessary authority from the city council).

For instances of old documents used as containing *statements against interest* (receipt of money, etc.), under an exception to the Hearsay rule, see *ante*, § 1472.

§ 2145. [1] *Eng.* 1803, M'Kenire *v.* Fraser, 9 Ves. Jr. 5 (cited *ante*, § 2138); 1817, Rancliffe *v.* Parkyns, 6 Dow 149, 202 (quoted *ante*, § 2141); 1826, Doe *v.* Passingham, 2 C. & P. 440 (quoted *ante*, § 2141); 1826, Doe *v.* Deakin, 3 C. & P. 402; 1827, Holton *v.* Lloyd, 1 Moll. 30, 32; *Can.* 1898, Roman Catholic Episcopal Co. *v.* Murphy, 8 Newf. (Morris & Browning) 96; *U. S.* 1917, Jarboe's Appeal, 91 Conn. 265, 99 Atl. 563; 1852, Jordan *v.* Cameron, 12 Ga. 267, 269; 1803, Jackson *v.* Laroway, 3 Johns. Cas. N. Y. 283, 286; 1808, Jackson *v.* Blanshan, 3 Johns. N. Y. 292, 295; 1814, Shaller *v.* Brand, 6 Binn. Pa. 435, 439, 447; 1842, Eubanks *v.* Harris, 1 Spear S. C. 183, 191; 1843, Giddings *v.* Smith, 15 Vt. 344, 348, *semble*; and additional instances cited *ante*, §§ 2139, 2141.

[2] Besides the following, the cases cited *ante*, §§ 2139, 2141, 2144, exhibit other kinds of documents:

ENGLAND: 1814, R. *v.* Netherthong, 2 M. & S. 337 (certificate of pauper settlement); 1816, Bertie *v.* Beaumont, 2 Price 303, 308 (receipt for tithe-money); 1821, Wynne *v.* Tyrwhitt, 4 B. & Ald. 376 ("The rule is not confined to deed or wills, but extends to letters and other written documents coming from the proper custody"; here applied to the books of a manor-steward); 1831, R. *v.* Bathwick, 2 B. & Ad. 639 (papers of ordination, sealed by the archbishop, admitted under the rule; whether a document sealed by a corporation or court would in general not be included in it, because of the presumable extancy of proof, undecided);

§ 2146. **Presumption created; Statutory Denial of Genuineness.** (1) That this rule about ancient documents is not merely a rule of sufficiency, but also a *rule of presumption* (*ante*, § 2135) is often implied in judicial language, and has sometimes been distinctly decided.[1] There seems no reason against giving it this additional quality, at any rate wherever the requirement of possession (*ante*, § 2241) is exacted.

(2) In a few jurisdictions, a statute provides that, upon *affidavit* of the opponent *denying the genuineness* of a deed pleaded, the proponent of the deed cannot evidence its execution by a record-copy or cannot raise a presumption thereby. The effect of such a statute upon the presumption ordinarily raised by the ancient-document rule depends chiefly on the terms of the local statute.[2]

1835, Doe *v.* Burdett, 4 A. & E. 1, 19 ("any instrument of that age, whether deed or will or other instrument, proves itself"); 1840, Doe *v.* Benyon, 4 P. & Dav. 193, 196, 198 (letters); 1899, Blandy-Jenkins *v.* Dunraven, 2 Ch. 121 (agreement in settlement of litigation).

CANADA: 1848, Robinson, C. J., in Doe *v.* Turnbull, 5 U. C. Q. B. 129, 131 ("the principle . . . is not confined to the deeds themselves . . ., but extends to any written documents whatever, even to letters").

UNITED STATES: *Fed.* 1899, Smith *v.* New Orleans C. & B. Co., 35 C. C. A. 646, 93 Fed. 899 (certain ancient Spanish and French archives); 1905, McGuire *v.* Blount, 199 U. S. 143, 26 Sup. 1 (Spanish probate proceedings); *Conn.* 1896, Enfield *v.* Ellington, 67 Conn. 459, 34 Atl. 818 (lists and books of election found among the records of a town, purporting to be 29 years old and upwards, held admissible if the circumstances indicated authenticity); *D. C.* 1910, Cole *v.* Lea, 35 D. C. App. 355 (account-books); *Fla.* 1894, Sullivan *v.* Richardson, 33 Fla. 1, 18, 31, 111 (certain old Spanish documents admitted on the facts); *Ill.* 1897, Cooney *v.* Packing Co., 169 Ill. 370, 48 N. E. 406 (abstract of title, in vogue in a certain office, and 30 years old, received; compare the statute *ante*, § 1705); *Mass.* 1828, Rust *v.* B. M. Co., 6 Pick. 158 (records of the town of Boston, preserved in the archives); 1849, Boston *v.* Weymouth, 4 Cush. 538, 542 (selectmen's book of accounts with the town, found in the town's custody); 1866, Berry *v.* Raddin, 11 All. 577, 578 (ancient copies of depositions 'in perpetuam memoriam' recorded); *Oh.* 1887, Bell *v.* Brewster, 44 Oh. St. 690, 694, 10 N. E. 679 (letter and payroll); *Pa.* 1898, Smucker *v.* Penns. R. Co., 188 Pa. 40, 41 Atl. 457 (old official map in proper custody); *R. I.* 1893, Almy *v.* Church, 18 R. I. 182, 26 Atl. 58 (ancient proprietary and public records); *S. C.* 1906, McCreary *v.* Coggeshall, 74 S. C. 42, 53 S. E. 978 (letter found among the papers of the addressee); 1918, Goings *v.* Mitchell, 110 S. C. 380, 96 S. E. 612 (plat made in 1851; Gage, J.: "the plat was of age and could speak for itself"); *Vt.* 1893, Aldrich *v.* Griffith, 66 Vt. 390, 404, 29 Atl. 376 (ancient field book; kept by a town clerk).

Of course, the doctrine cannot avail to introduce a document which would *not be valid*, even if genuine: 1904, O'Neal *v.* Tennessee C. D. & R. Co., 140 Ala. 378, 37 So. 275 (deed without acknowledgment or witnesses, and purporting to be signed by mark; the statute at that time requiring either attestation or acknowledgment for validity of a deed, the document was rejected).

§ 2146. [1] 1868, Chamberlain *v.* Torrance, 14 Grant Ch. U. C. 181, 182; 1895, Wisdom *v.* Reeves, 110 Ala. 418, 428, 434, 18 So. 13 (treated as a strict presumption, shifting the duty of going forward).

Of course the presumption cannot be *conclusive*, as the Georgia Code declares it (*ante*, § 2137); this error probably arose from Professor Greenleaf's unaccountable lapse in classifying the rule under that head (Evidence, § 21). But distinguish the effect of a statute declaring a defective ancient certificate "conclusively" presumed to be regular (the theory of these is examined *ante*, § 1345): 1857, Mathewson *v.* Spencer, 4 Sneed Tenn. 383 ("after the lapse of twenty years, . . . all inquiry upon that subject [of regularity of probate] is cut off").

[2] The statutes affecting the question have been collected *ante*, § 1651; for their judicial interpretation applying them to ancient deeds, see the following cases: *Georgia:* 1871, Matthews *v.* Castleberry, 43 Ga. 346, 351, 525; 1877, Hill *v.* Nisbet, 58 Ga. 586, 587; 1888, Parker *v.* Waycross & F. R. Co., 81 Ga. 387, 393, 8 S. E. 871; 1898, Albright *v.* Jones, 106 Ga. 392, 31 S. E. 761; 1899, McArthur *v.* Morrison, 107 Ga. 796, 34 S. E. 205 (explaining preceding cases); 1904, Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645 (cited *ante*, § 2143, n. 4); 1907, Chatman *v.* Hodnett, 127 Ga. 360, 56 S. E. 439; 1909, Leverett *v.* Tift, 6 Ga. App. 90, 64 S. E. 317 (explaining McArthur *v.* Morrison); *Texas:* 1883, Holmes *v.* Coryell, 58 Tex. 680, 688; 1921, Emory *v.* Bailey, — Tex. —, 234 S. W. 660 (title to land; certified copy of deed recorded in 1862, admitted as sufficiently evidenced by age, even as against an affidavit raising the issue of forgery).

2. Authentication by Contents

§ 2148. **Authentication by Contents; in general.** If Doe is the sole person who knows the circumstances of a certain event, and if a letter arrives purporting to be from Doe and stating those circumstances, and the statement appears by subsequent developments to be accurate, it would be a simple matter, for the law as well as for common sense, to deem that sufficient evidence (*ante*, § 171) of Doe's authorship had been furnished. But as there can seldom be a sole person knowing the circumstances of events, and as it could seldom be proved (if it were the case) that no other person had the knowledge, it is obvious that there are here multiple opportunities for a different authorship. Moreover, the other persons knowing the same facts are often persons hostilely interested, who thus have a motive for fabrication; and, if it were once laid down, as a general rule of law, that the contents of a letter might be taken as evidencing its authenticity, too many would be found to take fraudulent advantage of this rule. It is true that, in the vast majority of transactions in everyday life, persons do act upon just such evidence of authenticity and no more; and it might be supposed that the law could well follow this practice.[1] But, in the first place, it is also true that frauds are constantly perpetrated in this very manner (as in obtaining goods by forging the name and letter-heads of reputable merchants); and, secondly, there is little necessity for relying upon such evidence, in view of the ample opportunities of proof afforded by witnesses to handwriting.

Accordingly, it seems generally conceded that the mere *contents of a written communication*, purporting to be a particular person's, are of themselves not sufficient evidence of genuineness.[2] Only in special circumstances, where the contents reveal a *knowledge* or other trait peculiarly referable to a single person, could the contents alone suffice.[3]

§ 2148. [1] 1827, Bentham, Rationale of Judicial Evidence, b. VII, c. III, Bowring's ed., vol. VII, p. 179 ("When from an individual more or less known to me in person or by reputation, I receive a letter bearing his signature — that is, when I receive a letter with a signature purporting to be that of a person known to me as above, — on what supposition can such a letter have emanated from any other hand than his? On no other than that of forgery, — a crime not to be presumed, or so much as suspected, without special ground, in any single instance: much less, in a number of unconnected instances").

[2] 1895, Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165; also the cases cited *ante*, § 2130.

[3] In a few rulings, some force has been allowed for such evidence: *England:* 1758, William Barnard's Case, 19 How. St. Tr. 824 (anonymous letters sent to the Duke of Wellington; one of the most remarkable and puzzling cases on record; quoted in full in the present writer's Principles of Judicial Proof, § 38); 1805, R. *v.* Johnson, 7 East 65 (a publisher in M. received an anonymous letter notifying him that the writer would send to him a paper of a certain description; subsequently such papers, in the same hand, came to him by mail, and were published; the question being whether this publication in M. was authorized by the defendant, the correspondence of the papers with the description, and the defendant's handwriting's similarity to that of the libels, and the similarity of the handwriting of the libels and the original letter, was held sufficient); *United States:* 1896, Thalheim *v.* State, 38 Fla. 169, 20 So. 938 (mere possession of a letter, not enough; but here other facts, such as the letter's references to acts of his, sufficed to authenticate; perhaps, as mere knowledge of contents was involved, the case belongs rather under § 260, *ante*); 1910, People *v.* Adams, 162 Mich. 371, 127 N. W. 354 (letters and telegrams of a seducer, admitted);

But where the necessity above-mentioned does in fact exist, namely, the impossibility of obtaining handwriting-testimony, it would seem to follow that resort must be had to the evidence from contents, — at any rate, in some circumstances or upon the facts of a particular case. Such an impossibility may exist for three sorts of writing, (a) an illiterate's writing by amanuensis, (b) a type-written letter, (c) printed matter.

§ 2149. **Illiterate's Letter; Typewriting.** It ought to be conceded that, where there is no direct testimony to the act of execution or sending by an *illiterate*, the evidence to be drawn from the contents should, in some situations, be allowed to suffice to go to the jury:

1824, NOTT, J., in *Singleton* v. *Bremer*, Harp. 201, 209: "The usual method of proving an instrument of writing, where there is no subscribing witness, is by proof of handwriting. But that could not be expected in this case, as the party cannot write. Even if her name had been subscribed to the letters, the difficulty would not have been lessened. Some other method must therefore be resorted to, and why may not the letters be looked into? If they furnish internal evidence of the source from whence they were derived, I can see no reason why we may not avail ourselves of that evidence. Thus, for instance, if they relate to facts which cannot be known to any other person, it will be presumed that they were written by her authority. If they embrace a number of facts which relate to her and her situation, and which cannot apply to any other person, each of those facts constitutes a link in the chain of circumstances which go to strengthen the presumption. In ordinary cases such evidence will not be allowed, because the writing is always presumed to be by the person by whom it purports to be written, and proof of the handwriting therefore is higher evidence. But in the present case the evidence offered was the best which the nature of the case could afford." [1]

The case of an amanuensis, using a *typewriting-machine*, presents a similar impossibility, whenever the signature (as sometimes happens) is also typewritten or stamped; and it would seem that a similar necessity justifies a resort to evidence from contents.[2] If there were a serious possibility of abuse, this step would not be advisable. But in fact there is also a danger of abuse in the opposite direction; for the difficulty of authenticating such a docu-

1915, People *v.* Dunbar Contracting Co., 215 N. Y. 416, 109 N. E. 554 (typewritten letter, referring to telephone conversation, admitted); 1906, International Harv. Co. *v.* Campbell, 43 Tex. Civ. App. 421, 96 S. W. 93 (letter admitted, on the above principle).

The following case has special reasons: 1824, Truelove *v.* Burton, 9 Moore 64 (signature of an attorney's agent to a judicial admission need not be proved).

But the *marks of cancellation on a will* found in the testator's custody may be presumed genuine: 1906, Wikman's Estate, 148 Cal. 642, 84 Pac. 212.

Compare the citations *ante*, § 87 (physical marks of identity), § 270 (personal knowledge as a mark of identity), § 2024 (spelling as a mark of identity), and the Minnesota statute in § 2596 (pleading denial of execution).

§ 2149. [1] *Accord:* 1909, Whalen *v.* Gleeson, 81 Conn. 638, 71 Atl. 908 (illiterate's letters by an amanuensis).

[2] 1906, Sprinkle *v.* U. S., C. C. A., 150 Fed. 56, 59 (typewritten letter signed with a stamp or stencil, held not sufficiently authenticated on the facts; an example of over-strict ruling); 1900, Re Deep River Nat'l Bank, 73 Conn. 341, 47 Atl. 675 (letters typewritten, and signed by a rubber stamp, held sufficiently proved by the person's custom as to authorizing a stenographer to stamp, etc.); 1906, State *v.* Freshwater, 30 Utah 442, 85 Pac. 447 (typewritten letters, sufficiently evidenced by contents, etc.; Singleton *v.* Bremer, *supra*, approved); 1920, Maynard *v.* Bailey, 85 W. Va. 679, 102 S. E. 480 (typewritten letter proposing a bribe, admitted as by the plaintiff, on evidence of its contents, etc.).

Compare also the cases cited *ante*, §§ 87, 270, 2024, 2148, 2149.

ment is sometimes taken advantage of by those who wish to be able to disavow their authorship. It is, no doubt, a question of experience, *i. e.* which danger is actually the greater. On the whole it would seem safe to authorize the trial Court, in discretion, to allow to go to the jury a typewritten communication bearing sufficient indication of authenticity in its contents and letterhead. Today, however, in view of the scientific development of the study of documents by microscopy and other arts,[3] the authorship of typewritten documents can often be traced with certainty to the specific machine used; so that this mode of authentication does not then in principle differ from that of using the handwriting.

§ 2150. **Printed Matter**; (1) **Newspapers.** Printed matter in general bears upon itself no marks of authorship other than contents. But there is ordinarily no necessity for resting upon such evidence, since the responsibility for printed matter, under the substantive law, usually arises from the act of causing publication, not merely of writing, and hence there is usually available as much evidence of the act of printing or of handing to a printer as there would be of any other act, such as chopping a tree or building a fence. There is therefore no judicial sanction for considering the contents alone as sufficient evidence:

1696, *Maule's Trial*, Mass., 5 Amer. St. Tr. 85; prosecution of a Quaker at Salem for blasphemy; a printed book was introduced; the accused, arguing for himself, said: "You must go to the printer for satisfaction, for I am ignorant of any such matter in the book; my hand is only to my copy, which is in the hands of the printer in another government, and my name in the printed book does not in law prove the same to be Thomas Maule." The jury returned a verdict of Not Guilty. The Court, "after expressing much dissatisfaction at the result, asked the jury how they could return such a verdict with the book before them," and was answered by the jury, "The book was not sufficient evidence, for Thomas Maule's name was placed there by the printer."

For newspapers and the like, special questions arise. Suppose, for example, that the publication of a libel is to be proved, and that the libel is alleged to have been communicated to J. S. It is simple enough to prove that J. S. read a copy of the paper containing the libel; but how shall the defendant's publication of that copy be proved? Here the process would be to bring home to him the issuance on that day of a certain copy (either by the testimony of one who bought at an office proved to be the defendant's [1] or by some statutory method); then the identity between that copy and the one read by J. S. will suffice as evidence that the two issued from the same press, *i.e.* the defendant's:

1846, ALDERSON, B., in *Gathercole* v. *Miall*, 15 M. & W. 319, 336: "The question is whether there is reasonable evidence that this is a copy of the individual paper which has been produced and which has been shown to have been published by the defendant. . . . We must use our own common sense, and remember that, with respect to newspapers, not one, but a great variety of copies, are published for general circulation among the public

[3] Osborn, Questioned Documents (1910), The Problem of Proof (1922), passim; and cases cited *ante*, § 2024.

§ 2150. [1] This could not be used as the basis of the libel, because its publication is invited by the plaintiff's agent; 'volenti non fit injuria.'

at large. If you compare an instrument in one or two parts, and find the one is an exact copy of the other, you would have no difficulty in saying it was printed from the same materials and from the same type. . . . So I say here with respect to a newspaper. If you find it in general corresponds, it is evidence from which the jury may infer that the paper is printed from the same type as the paper which is produced, and if so, it is printed by the defendant."

This is but one of the various questions that arise;[2] their solution depends chiefly on the application of ordinary principles of Evidence to the varying substantive law.[3]

§ 2151. **Same: (2) Official Printer; Statute-book; Reports of Decisions.** The intolerable inconvenience of having to prove the genuineness of printed matter purporting to be published by the Government has led to a general concession, by judicial decision or by statute, that such purporting publications, at least when in the form of the standard official documents constantly issued and referred to, are to be assumed genuine. Two principles, however, are in fact usually involved, first, the admissibility of a copy, proved to be printed by official authority, as hearsay evidence of the contents of the original, and, secondly, the presumption of genuineness of a particular printed document purporting to be of such official origin. The two questions are seldom separated, either in decisions[1] or in statutes; a sanction of the former principle has usually been regarded as carrying with it a sanction of the latter also.[2]

[2] 1922, Saenger Amusement Co. *v.* Murray, — Miss. —, 91 So. 459 (issue as to who was principal of plaintiff employee in a theatre; newspaper advertisements giving defendant's name, not admissible).

Distinguish the following: 1902, State *v.* Dixon, 131 N. C. 808, 42 S. E. 944 (murder; the gun-wadding was a piece of paper from a printed periodical; a duplicate of the same periodical was admitted to identify the piece, without other evidence of genuineness).

[3] Statutory facilitation has sometimes been given:

ENGLAND: 1798, St. 38 Geo. III, c. 78, re-enacted in 6 & 7 Wm. IV, c. 76 (requires a daily deposit of a newspaper copy at the Stamp Office, with an affidavit of authenticity, and on production of the affidavit and any newspaper corresponding with this copy, the defendant's responsibility for its publication need be no further proved); 1835, Watts *v.* Fraser, 7 A. & E. 223, 232 (deposit of a copy of newspaper at the Stamp Office as required by statute is not sufficient evidence that others of that issue were circulated; this is absurd); 1843, R. *v.* O'Connell, 5 State Tr. N. S. 1, 538 (copy of newspaper signed by printer and filed at Stamp Office under statute, admitted in favor of the registered proprietor).

CANADA: *Alta.* St. 1913, 2d sess., c. 12, § 15 (newspaper libel; "the production of a printed copy of a newspaper" to be evidence of publication); *Newf.* Consol. St. 1916, c. 69, §§ 8, 11 (similar to Eng. St. 6 & 7, Wm. IV, c. 76); *P.E.I.* St. 1889, § 54 (in libel trials the production of a printed copy purporting to be published by the defendant shall suffice, on certain conditions); *Sask.* Rev. St. 1920, c. 56, § 15 (libel; printed copy of newspaper to be evidence of publication).

In the United States no similar statutes appear to exist, though they are needed; but the following may be noted: *Ala.* Code 1907, § 5192 (newspapers containing advertisement of notices "shall be received as evidence of publication"); *N. Y.* St. 1914, c. 113 (illegal advertisement; "the placing of an advertisement" etc. is evidence that the person named as vender etc. "caused or procured the same to be so placed" etc.); the same purpose is generally accomplished by statutory affidavit; *ante*, § 1710.

Whether one or another copy of a newspaper is the *original required* to be produced has been elsewhere considered (*ante*, §§ 1234, 1237), as also the question of *identification by contents* (*ante*, §§ 415, 440).

§ 2151. [1] In the following case the distinction was recognized: 1814, R. *v.* Forsyth, R. & R. 274 (to prove the publication of a notice in the Gazette, "a printed paper purporting to be the Gazette was put in," no evidence of its authenticity being offered; "the Judges seemed to think that the production of the Gazette would be sufficient, without proof of its being bought of the Gazette printer, or where it came from").

[2] The statutes and cases are collected *ante*, § 1684.

§ 2152. **Same: (3) Postmark; Brand.** The use of a *postmark* in evidence may involve at least three distinct principles, only one of which concerns the principle of Authentication:

(*a*) In the first place, the question arises, May it be inferred from the presence of the purporting official mark that the mark was *genuinely affixed* by the purporting official? This is a question of Authentication, and may well enough be answered in the affirmative. This may be regarded on the whole, as to-day conceded, though there was some fluctuation in the English rulings.[1] But assuming it not to be conceded, the question may arise, Who is qualified to testify to its genuineness? On general principles (*ante*, §§ 699, 705) it would seem that any official of the post-office, or any person familiar with the mark of the particular post-office, would be sufficient.[2]

(*b*) If the postmark be taken as genuine, it is evidence that the letter bearing it was stamped on the purporting *date*.[3] This signifies that the post-officer need not be called to make proof, and that his postmark, being an implied assertion that the date of the mark is the date of affixing it, is receivable under the Hearsay exception (*ante*, § 1674) for statements made under official duty.

(*c*) Upon the same principle, the postmark is evidence that the purporting *place* or office is the one at which it was actually affixed.[4]

§ 2152. [1] *England:* 1805, R. *v.* Johnson, 7 East 65, 66, 70 (an objection to the use of an Irish postmark as evidence of a posting in Ireland, that "there was no evidence that either of the papers was received from the Post-office, which might have been ascertained by persons employed in that office," was not sanctioned); 1808, R. *v.* Watson, 1 Comp. 215 (postmark not sufficient to show posting at the place named); 1811, Arcangelo *v.* Thompson, 2 Comp. 620, 623 (postmark assumed genuine, in proving receipt of a letter in a certain year); 1814, R. *v.* Plumer, R. & R. 264 (post-office marks, and other customs, used to show that the letter came to that office); 1819, Hitchon *v.* Best, 2 B. & B. 299, *semble* (postmark presumed genuine); 1821, Fletcher *v.* Braddyll, 3 Stark. 64, *semble* (postmistress called to identify); 1829, Abbey *v.* Lill, 5 Bing. 299 (not decided; Gaselee, J., said: "Where it is disputed, it ought perhaps to be proved, though what might be deemed to amount to proof is not clear"); 1834, Warren *v.* Warren, 1 C. M. & R. 250 (here the postmaster of one of the offices was called); 1836, Shipley *v.* Todhunter, 7 C. & P. 680, 686 (postmark presumed genuine); 1841, Stocken *v.* Collin, 7 M. & W. 515 (same); 1846, Woodcock *v.* Houldsworth, 16 M. & W. 124, *semble* (postmark not sufficient; some witness must prove it; citing R. *v.* Watson and Abbey *v.* Lill, but no other cases).

United States: 1904, Kirkland *v.* State, 141 Ala. 45, 37 So. 352 (postmark in another State presumed genuine); 1842, New Haven Co. Bank *v.* Mitchell, 15 Conn. 206, 225 (postmark presumed genuine); 1851, Burgess *v.* Clark, 3 Ind. 250 (postmark presumed genuine).

[2] 1821, Fletcher *v.* Braddyll, 3 Stark. 64 (postmistress at L., called to prove a mark purporting to be at W.); 1829, Abbey *v.* Lill, 5 Bing. 299, 303 (Best, C. J., thought that the officer making it should be called; Gaselee, J., thought that persons "who live in London and see the mark every day" were at least as competent as an officer not making it).

[3] *Eng.* 1754, Canning's Trial, 19 How. St. Tr. 370 (postmark, verified as authentic by the clerk, admitted to show that the latter passed through the office on the date of the mark); 1821, Fletcher *v.* Braddyll, 3 Stark. 64 (to show that the letter existed at that date); 1829, Abbey *v.* Lill, 5 Bing. 298, *semble* (to show that the enclosed letter was misdated); 1841, Stocken *v.* Collin, 7 M. & W. 515 (to show the hour of posting a notice); *U. S.* 1842, New Haven Co. Bank *v.* Mitchell, 15 Conn. 206, 225 (indicates that the letter was mailed and sent, not merely put into the office, on that date); 1851, Burgess *v.* Clark, 3 Ind. 250, *semble;* 1906, Beeman *v.* Supreme Lodge, 215 Pa. 627, 64 Atl. 792 (postmark, used to show the time of arrival at a post-office).

Contra: 1846, Woodcock *v.* Houldsworth, 16 M. & W. 124, *semble.*

[4] *Eng.* Canning's Trial, and most of the other cases *supra*, note 3; 1805, R. *v.* Johnson, 7 East 65, 66 (Irish postmark, admitted to show a posting in Ireland); *U. S.* 1904, Kirkland *v.* State, 141 Ala. 45, 37 So. 352 (postmark in

The use of *brands*, on cattle or on timber, is somewhat different, because it is usually desired to infer from the presence of the brand, not merely that it was affixed by the person commonly using or legally entitled to use it, but also that he was the owner of the cattle or logs.[5]

§ 2153. **Reply-Letter received by Mail.** When a letter is received by due course of mail, purporting to come in answer from the person to whom a prior letter has been sent, there are furnished thereby, over and above mere contents showing knowledge of facts in general (*ante*, § 2148), three circumstances evidencing the letter's genuineness: First, the tenor of the letter as a reply to the first indicates a knowledge of the tenor of the first. Secondly, the habitual accuracy of the mails, in delivering a letter to the person addressed and to no other person (*ante*, § 95), indicates that no other person was likely to have received the first letter and to have known its contents. Thirdly, the time of the arrival, in due course, lessens the possibility that the letter, having been received by the right person but left unanswered, came subsequently into a different person's hands and was answered by him. To this may be added the empirical argument that in usual experience the answer to a letter is found in fact to come from the person originally addressed:

1906, NEILL, J., in *International Harvester Co.* v. *Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 92: "'The second assignment of error is that 'the Court erred in permitting plaintiff to testify, over the objections of defendant to a letter alleged to have been written by defendant to J. D. Cameron as follows, viz.: "We have received your letter, also Mr. Campbell's references which are good. You are on the ground, employ him" — as appears more fully by defendant's bill of exceptions No. 1.' The bill of exceptions discloses a number of objections to the testimony, but as the proposition under the assignment embraces only one, it alone will be considered. It is: 'In order to admit parol evidence of the contents of a letter, its genuineness must be established.' The genuineness of a writing may be proved by indirect or circumstantial evidence, as other facts; and in some instances, this is the only character of evidence that can be adduced. Before the testimony complained of was introduced, it was shown by the testimony of appellee that the letter in question was written on one of the International Company's letterheads; that Mr. Cameron, the agent of the company, showed him the letter about the first of June, 1903; that the signature was the same as that affixed to a letter he had received from the company a few days before and to other letters of the company written to Mr. Boldic, its traveling agent. The defendant and its attorney had been duly notified to produce the letter upon the trial, or that secondary evidence would be introduced to prove its contents. It was not denied by defendant or its counsel that such letter had been written, or was in their possession. The only challenge to plaintiff was: 'You must show the genuineness of such letter before you can prove its contents.' These circumstances, when taken in connection with the contents of the letter, fully meet the challenge. Campbell was seeking employment from the company; its agent, Cameron, had written informing the company of the fact; Campbell's references had been sent to the company; a letter is received in reply written from the company's office in Chicago, on one of its

Florida, admitted to show that the witness was there).

Contra: 1846, Woodcock v. Houldsworth, *supra*, *semble*.

The following rules might equally well be made judicially: *Eng.* St. 1908, 8 Edw. VII, c. 48, §§ 8, 9 (post-office stamp to be evidence that an addressee of packet has refused it or is dead or cannot be found; also that the sum marked due is due).

[5] The cases and statutes are placed *ante*, § 150.

letterheads, bearing the same signature as other letters of the company to its agent, in which it is said: 'We have received your letter, also Mr. Campbell's references, which are good.' As no one, save the company, could have received the letter and references mentioned in the letter received by Cameron, and shown to plaintiff, its contents, when taken in connection with other facts, are, under the principle quoted, cogent evidence of its genuineness. We by no means wish to be understood as holding that the mere contents of a written communication, purporting to be a particular person's, are of themselves, sufficient evidence of genuineness, for the contrary is the rule."

There seems to be here adequate ground for a special rule declaring that these facts, namely, *the arrival by mail of a reply purporting to be from the addressee of a prior letter duly addressed and mailed*, are sufficient evidence of the reply's genuineness to go to the jury. Such a rule — varying slightly in the phraseology of different judges — seems now to be universally accepted.[1]

§ 2153. [1] ENGLAND: 1824, Harrington *v.* Fry, 1 C. & P. 290 (that letters purporting to be signed by S. F. were received in answer to letters sent to S. F., and that there was only one person of that name in the place, sufficient); 1845, Ovenston *v.* Wilson, 2 C. & K. 1 (letter coming in answer to a letter addressed to the defendant at his residence and put into the post, admitted as the defendant's, by Pollock, C. B.); 1875, R. *v.* Saunders, L. R. 1 Q. B. D. 19 (false pretences by advertising to give work by mail and requesting stamps in the answer; to show repeated acceptances of this advertisement, evidence was received of 281 letters, answering the advertisement, having been received at the post-office addressed to the defendant, no other evidence authenticating their genuineness being offered).

CANADA: 1889, McDonald *v.* Gilbert, 16 Can. Sup. 700 (whether M. and K. constituted a partnership; letters admitted, bearing on them the printed names of M. and K., and received in answer to letters addressed to that firm).

UNITED STATES: *Fed.* 1894, Scofield *v.* Parlin & O. Co., 10 C. C. A. 83, 61 Fed. 804 ("a letter received in due course of mail, and especially if it be in response to a letter sent by the receiver, is presumptively the letter of the one whose name is signed to it"); 1897, National Acc. Soc. *v.* Spiro, 24 C. C. A. 334, 78 Fed. 775 (letter on letter heads of the defendant and stamped with a fac-simile signature of its officers, received in the mail in reply to one addressed to the defendant, held sufficiently proved); 1910, Consolidated Grocery Co. *v.* Hammond, 5th C. C. A., 175 Fed. 641 (letter received by mail, and purporting but not otherwise evidenced to have been elicited by a prior letter from the addressee, excluded); 1918, Holsman *v.* U. S., 9th C. C. A., 248 Fed. 193 (using the mails to defraud; answers made to decoy letters, and purporting to come from the defendant's office, admitted); *Ala.* 1898, White *v.* Tolliver, 110 Ala. 300, 20 So. 97 (letter received, in answer to another, properly postmarked and in due course of [illegible] referring to the first, admitted); 1904 [illegible] State, 141 Ala. 32, 37 So. 435 (let[illegible]wn to have been received in reply, [illegible]); *Ark.* 1910, Barham *v.* Bank of Delight, [illegible]. Ark. 158, 26 S. W. 394; *Ga.* 1897, Ragan *v.* Smith, 103 Ga. 556, 29 S. E. 759; *Ia.* 1877, Lyon *v.* Ass. Co., 46 Ia. 631, 637 (letters received in reply, assumed genuine); 1885, Davis *v.* Robinson, 67 Ia. 355, 363, 25 N. W. 280 (letters purporting to be in answer to an offeror's, assumed genuine; here typewritten letters); 1905, Dorr Cattle Co. *v.* Chicago & G. W. R. Co., 128 Ia. 359, 103 N. W. 1003 (notice of quarantined cattle, received by mail, not presumed genuine); *Kan.* 1893, Norwegian Plow Co. *v.* Munger, 52 Kan. 371, 373, 35 Pac. 11 (letters by mail from a non-resident corporation, presumed genuine); *Ky.* 1916, Louisville & N. R. Co. *v.* O'Brien & Co., 168 Ky. 403, 182 S. W. 227 (shipping-contract); *La.* 1898, Boykin *v.* State, — La. An. —, 24 So. 141 (receiving an answer in due course to a letter duly addressed, sufficient); *Md.* 1907, American Bonding Co. *v.* Ensey, 105 Md. 211, 65 Atl. 921 (letter received in reply, and purporting to be signed by the C. H. T. Co., admitted as genuine and duly authorized); *Mass.* 1817, Connecticut *v.* Bradish, 14 Mass. 296, 300 (that the letter in question had been received by mail in answer to one addressed to the signer, held sufficient for admission); *Minn.* 1885, Melby *v.* Osborne, 33 Minn. 492, 24 N. W. 253; *Nebr.* 1882, Gartrell *v.* Stafford, 12 Nebr. 545, 554; 1898, People's Nat'l Bank *v.* Geisthardt, 55 Nebr. 232, 75 N. W. 582 (receipt by mail in answer, sufficient); 1901, Whitwell *v.* Johnson, — Nebr. —, 96 N. W. 272 (letter not received in response to another, excluded); 1903, Peycke *v.* Shinn, 68 Nebr. 343, 94 N. W. 135 (letters received not in answer to others, excluded); 1909, Helwig *v.* Aulabaugh, 83 Nebr. 542, 120 N. W. 162 (reply-letters purporting to come from defendant, followed by plaintiff's employment by defendant, admitted); *N. C.* Cons. St. 1919, § 1785 (actions involving a

§ 2154. **Reply-Telegram.** That a telegram not following a previous one calling for a reply should sufficiently authenticate itself by its contents, any more than any other communication (*ante*, § 2148), seems never to have been contended.[1]

But may not a *reply-telegram* thus authenticate itself, as well as a reply-letter received by mail, on the conceded principle of the preceding section? This question has usually been answered in the negative, for the following reasons:

1869, SARGENT, J., in *Howley* v. *Whipple*, 48 N. H. 487, 488: "It is claimed that, as in the case of a letter, so in case of a telegraphic despatch, the person who answers a despatch is so generally and uniformly the person to whom the communication was addressed that it may be safely acted upon, and that it is thus acted upon in all the business arrangements of the country. But there is a difference in principle between the two cases. . . . There is nothing about the handwriting here that could indicate that the message came from Gould, nor is there anything in the case to make this message evidence any more than there would be if Gould had sent a verbal message by one man who had communicated it to another, and the latter had at length conveyed the message to the party for whom it was designed and to whom it was originally sent. This message might be received as it was sent, and would ordinarily be acted on in the business of life; but the only way to prove such a message in a court of law would be to summon both the intermediate agents or bearers of the message and in that way trace the message from the lips of the one party until it was received in the ear of the other party. Anything short of that would be to rely upon hearsay evidence of the very loosest character."

1885, Mr. *Morris Gray*, Communication by Telegraph, § 135: "It is true that the person who answers a telegram is usually the person to whom it is addressed. It is also true, however, that while it is unnecessary to disclose the intelligence contained in a letter to anyone to effect its transportation by mail, it is absolutely necessary to disclose intelligence to at least two operators to effect its transmission by telegraph. Consequently

common carrier's bill of lading; an original or duplicate bill of lading, "received in due course of mail from consignor or agent of said carrier" or "delivered by said carrier to the consignee," etc., if first shown to opponent 10 days before trial, is admissible and "the due execution thereof shall be 'prima facie' established") · *N. D.* 1918, Koale *v.* Keane, 39 N. D. 560, 168 N. W. 74; *S. C.* 1906, Leesville Mfg. Co. *v.* Morgan W. & I. Wks., 75 S. C. 342, 55 S. E. 768 (reply-letter presumed genuine); *S. D.* 1894, Armstrong *v.* Advance T. Co., 5 S. D. 12, 17, 57 N. W. 1131 (letter received by mail in due course in answer to a mailed letter, presumed genuine; here from a corporation manager); *Tex.* 1906, Taylor *v.* State, 50 Tex. Cr. 381, 97 S. W. 474 (letter received by mail, but not a reply, excluded); *W. Va.* 1906, Loverin & D. Co. *v.* Bumgarner, 59 W. Va. 46, 52 S. E. 1000 (reply-letters admitted without proof of handwriting).

The following statute carries the inference further: *Eng.* St. 1908, 8 Edw. VII, c. 48, § 8 (in proceeding to recover goods sent by post and undelivered, the person from whom the packet "purports to have come" shall be presumed to be the sender).

For the *qualifications of a handwriting-witness*, based upon *correspondence by mail*, see *ante*, § 702.

For the rule that the *arrival of a letter in the hands of the addressee* is sufficiently evidenced by its due mailing, see *ante*, § 95.

Distinguish the use of a *party's admissions* to evidence merely the *sending* or the *receipt* of a letter: 1839, Sturge *v.* Buchanan, 10 A. & E. 598, 604 (the copying of letters in a letter-book "clearly shows that they were sent," as an admission by the party keeping the book); 1845, Ovenston *v.* Wilson, 2 C. & K. 1, 3 (letter to which defendant had answered, held sufficiently proved, as to delivery to him, by his answering it).

§ 2154. [1] 1902, Distad *v.* Shanklin, 15 S. D. 507, 90 N. W. 151 ("Undoubtedly, there should be some evidence" of authenticity; here held sufficient on the facts); 1903, Reynolds *v.* Hinrichs, 16 S. D. 602, 94 N. W. 694 (telegram merely found in an office, not assumed genuine).

But by statute such a rule has been introduced: Miss. St. 1916, c. 133 (telegram as delivered is "best evidence" of the filing by the sender; quoted *ante*, § 1236, n. 1).

the telegraph offers far greater opportunity to deliver fraudulent answers to inquiries than the mail does. This distinction renders the principle at present under consideration inapplicable to communications by telegraph, however sound its application to communications by mail may be deemed to be."

The only valid objection here advanced seems to be that the opportunity furnished to the operators to learn the contents may enable a forger to return a purporting reply. Even this objection does not apply to a cipher-telegram. But in any case, regard being had to the busy routine of a telegraph-office, the slight motives for fraud, the penal liability for disclosure, and the small contingency of acquaintance or co-operation between operator and interested forger, it would seem that too much stress is laid on this circumstance of distinction. The empirical argument, that telegraphic answers are in fact commonly genuine, also deserves here great weight.[2] Moreover, the handwriting of the original of the reply would usually afford sufficient means for defence against forgery. There seems to be no sound reason why the same rule as for mail-replies should not obtain.[3]

[2] The following incident illustrates that it is a question of experience:

New York "Times," Aug. 5, 1920: "The National Surety Company discovered yesterday that the name of the company had been forged to a telegram which was sent to Snyder Owen Lybrand of Oklahoma City, Okla., in the interest of a man named Salisbury, apparently either to save the credit of Salisbury or to stop some proceeding against him. . . . Mr. Lybrand took the precaution to ask the Oklahoma City branch of the Western Union to verify the telegram. General Manager Joel Rathbone of the Surety Company notified the Western Union that the company had sent no such telegram and then wired to Mr. Lybrand that the message had not been sent or authorized by the company.

"'The telegraph used to be widely used by swindlers,' said President Joyce of the company, 'but, for several years, they seemed to abandon this method. Today there are a great many smart men engaged in dishonest tricks of all kinds, and it would be well for business men to be on their guard against new schemes for making the telegraph an instrument in frauds. I am surprised that its use has not been attempted more often. There should be some method by which financial institutions would have a check against the fraudulent use of their signatures.'"

[3] *Accord: Canada:* N. Br. Consol. St. 1903, c. 127, § 35 (ten days' notice and a copy of the message having been served, a telegraphic message shall be received as being "dated, directed, written and signed" as it purports); § 36 (a message produced on notice by the opponent shall be similarly received); N. Sc. Rev. St. 1900, c. 163, § 30 (quoted *ante*, § 1236); *United States:* 1903, People *v.* Hammond, — Mich. —, 43 N. W. 1085 (telegraphic answer, admitted without other authentication); 1855, Taylor *v.* Steamer Robert Campbell, 20 Mo. 254 (plaintiff sent a telegram to the defendant steamer, and received an answer apparently sent by the captain; testimony that the former was delivered by the telegraph-officer to the steamer and that an answer was next day left at his office, held sufficient; carefully reasoned opinion); Nev. Rev. L. 1912, §§ 4615–4617 (certain instruments, when sent by telegraph, presumed to be genuine on certain conditions); 1921, State *v.* Rothrock, — Nev. —, 200 Pac. 525 (embezzlement; telegram sent by defendant to C. and acknowledged and acted upon by C. as genuine, admitted); 1899, Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942 (telegraphic answer, presumed genuine); Utah Comp. L. 1917, §§ 6119, 6120 (similar to the Nevada statute); Wash. R. & B. Code 1909, §§ 9309–9313, Stats. 1897, §§ 4364–4366 (similar); 1905, Cobb *v.* Glenn B. & L. Co., 57 W. Va. 4[illegible] 9 S. E. 1005 (certain reply-telegrams not assumed genuine).

Contra: Eng. 1887, R. *v.* Regan, 16 Cox Cr. 203, *semble* (receipt of telegram purporting to be from the defendant, no evidence of his authorship); *U. S.* 1873, Lewis *v.* Havens, 40 Conn. 363, 369 (telegram not sufficiently authenticated on the facts); 1861, Matteson *v.* Noyes, 25 Ill. 591 (said *obiter* that the original's "execution must be proved, precisely as any other instrument"); 1880, Smith *v.* Easton, 54 Md. 138, 146 (telegram not presumed to have been sent by defendant or by his authority, though received in reply to one addressed to him dealing with the same subject; Howley *v.* Whipple, N. H., followed); 1884, Burt *v.* R. Co., 31 Minn. 472, 18 N. W. 285, 289 (unauthenticated telegram-copy, excluded); 1884, Adams *v.* Lumber Co.;

§ 2155. **Reply-Telephone.** In proving the receipt of a communication by telephone, any one of several distinct principles of Evidence may be involved and give rise to distinct objections, whose validity may rest on different considerations.

(1) B asserts that certain words (assumed to be receivable as admissions or the like) were uttered to him by A over the telephone; how can B testify that the antiphonal speaker was A? This involves genuinely the principle of Authentication; [1] and three situations are to be distinguished:

(*a*) It is generally conceded that a person may be recognized and *identified by his voice*, if the hearer is acquainted with the speaker's voice.[2] Assuming, then, that B is thus acquainted with A's voice, and that voices can sometimes be distinguished on the telephone, and that B did in this instance distinguish A's voice, then B's belief that A was the speaker is founded on sufficient evidence. This much seems to be generally accepted.[3]

(*b*) But if there is *no recognition of voice*, what can supply sufficient evidence to authenticate the antiphonal speaker? In a given case, no doubt, sundry circumstances (including other admissions, and the like) may suffice.[4] But, apart from special circumstances, can any rule be laid down?

No one has ever contended that, if the *person first calling up* is the very one to be identified, his mere purporting to be A is sufficient, any more

32 Minn. 216, 19 N. W. 735 (same); 1903, Yeiser *v.* Cathers, — Nebr. —, 97 N. W. 840, *semble;* 1869, Howley *v.* Whipple, 48 N. H. 487 (quoted *supra*); 1877, State *v.* Hopkins, 50 Vt. 316, 332 (obscure).

For the question whether the *original* is the writing received or the one sent, see *ante*, § 1236.

§ 2155. [1] It may also be stated as a question of testimonial qualification, *i. e.* whether B is qualified (*ante*, § 659) to testify to A's identity; but this in the end also resolves itself into the question whether the data observed by B were sufficient evidence of identity.

[2] *Ante*, §§ 222, 413, 660.

[3] *Ia.* 1900, Shawyer *v.* Chamberlain, 113 Ia. 742, 84 N. W. 661 (testimony to a conversation, held admissible; "identity may be established by means of the hearing or other circumstances"); 1907, State *v.* Usher, 136 Ia. 606, 111 N. W. 811 (conversation by telephone with the defendant, identified by his voice, admitted); *Mass.* 1901, Lord Electric Co. *v.* Morrill, 178 Mass. 304, 59 N. E. 807; *Minn.* 1897, Deering *v.* Shumpik, 67 Minn. 348, 69 N. W. 1088 (conversation admitted, the speaker's voice being identified as that of the person in question); *N. Y.* 1908, People *v.* Strollo, 191 N. Y. 42, 83 N. E. 573 (detective's testimony to a telephone conversation with the accused, admitted, the detective subsequently recognizing the voice); 1915, People *v.* Dunbar Contracting Co., 215 N. Y. 416, 109 N. E. 554 (the hearer of a message purporting to be from D. received other such messages, and later met D. personally and identified his voice with the telephone speaker, admitted); 1920, Woodruff *v.* Benesch, App. T., 182 N. Y. Suppl. 880 (defendant's witness to telephone conversation with plaintiff, admitted, the witness not knowing plaintiff nor his voice at the time but hearing his voice at the trial and identifying it; as the trial took place a year or so later, this testimony was far-fetched; it is of a type easily manufactured; better to give up the requirement, and estimate the actual value of the testimony in each case); *Tex.* 1892, Stepp *v.* State, 31 Tex. Cr. 349, 352, 20 S. E. 753 (defendant's admissions; identity of voice sufficient); 1915, Collins *v.* State, 77 Tex. Cr. 156, 178 S. W. 345 (robbery).

[4] *Ia.* 1886, Davis *v.* Walter, 70 Ia. 466, 30 N. W. 804 (receiving admissions, where identity appeared by testimony of the other defendant); *Ky.* 1907, Holzhauer *v.* Sheeny, 127 Ky. 28, 104 S. W. 1034 (admitted where the conversation's details helped to identify the party); *Minn.* 1908, Barrett *v.* Magner, 105 Minn. 118, 117 N. W. 245 (voice-recognition is not the exclusive means; here the plaintiff's conversation with a person purporting to be Z., at Z.'s office telephone-number, was admitted on the facts); *Mo.* State *v.* Vickers, 209 Mo. 12, 106 S. W. 999 (identification in part by voice); *N. Y.* 1894, People *v.* McKane, 143 N. Y. 455, 38 N. E. 950 (admitting a conversational admission over the telephone where the speaker's voice was not known to the witness but the latter had since heard read an affidavit of the former admitting his identity as the person conversing).

than the mere purporting signature of A to a letter would be sufficient (*ante*, § 2148).[5]

The only case practically presented therefore is that of B's calling up A and being *answered by a person purporting to be A*. There is much to be said for the circumstantial trustworthiness of mercantile custom (*ante*, § 95), by which, in average experience, the numbers in the telephone-directory do correspond to the stated names and addresses, and the operators do call up the correct number, and the person called does in fact answer. These circumstances suffice for some reliance in mercantile affairs; and it would seem safe enough to treat them in law as at least sufficient evidence to go to the jury, just as testimony based on prices-current is received (*ante*, § 719). This view has received some judicial support:[6]

1886, THOMPSON, J., in *Globe Printing Co.* v. *Stahl*, 23 Mo. App. 451, 458 (the plaintiff's agent called up the defendant in the ordinary way, and asked "if that was S.," the defendant, and was answered "Yes"; then he asked why the defendant did not pay the bill in question, and was answered that the defendant would attend to it soon; the agent did not know the defendant personally and was not acquainted with his voice): "All these decisions [concerning identity] proceed upon the principle that those evidentiary

[5] *Accord:* 1915, Carroll v. Parry, 43 D. C. App. 363, 375; 1919, Com. v. Harris, 232 Mass. 588, 122 N. E. 749 (receipt of stolen goods; conversation reported by telephone without evidence of identity, excluded; approving the text above); 1921, Miller v. Kelly, 215 Mich. 254, 183 N. W. 717.

[6] The rulings are variant:

CANADA: 1916, Fidelity Oil & Gas Co. v. Janse Drilling Co., 27 D. L. R. 651, N. Sc. (payment of a claim; to prove notice given to defendant that the money had been paid to a bank, the bank clerk's testimony to an admission on the telephone by the purporting manager of defendant was received, without further evidence to identify the person answering; here the telephone system used was the "automatic").

UNITED STATES: *Ala.* 1901, Vaughn v. State, 130 Ala. 18, 30 So. 669 (telephone message to a physician, who did not identify the voice, excluded, the sender not being otherwise identified); *Conn.* 1907, General Hospital Soc'y v. New Haven R. Co., 79 Conn. 581, 65 Atl. 1065 (the failure to identify the voice does not necessarily exclude); *Ia.* 1916, Barber v. City Drug Store, 173 Ia. 651, 155 N. W. 992 (illegal sale of liquor; issue whether O. or R. was lessee; telephone conversation calling up the store and asking for O. and being answered by a person purporting to be O. who said that he operated the place, excluded, the witness not knowing the voice; on the other evidence in this case, the way of the transgressor is made easy and the lions in the path of the righteous are not caged); *Md.* 1909, Miller v. Leib, 109 Md. 414, 72 Atl. 466 (conversation by telephone with a party called up and responding as the plaintiff, whose voice was not known to the speaker, admitted; following Knickerbocker Ice Co. v. Gardiner D. Co., *infra*, n. 6); *Minn.* 1921, Re Delinquent Real Estate Taxes, 149 Minn. 335, 183 N. W. 671 (conversation of M. with plaintiff, admitted, M. having called for plaintiff and the answering party purporting to be plaintiff); *Mo.* 1888, Wolfe v. R. Co., 97 Mo. 481, 11 S. W. 49 (like Globe P. Co. v. Stahl, *supra*); 1907, Kansas City S. Co. v. Standard W. Co., 123 Mo. App. 13, 99 S. W. 765 (admissions heard over the telephone from one representing himself as defendant's agent, received); *Nebr.* 1903, Lincoln Mill Co. v. Wissler, — Nebr. —, 95 N. W. 857 (not decided); *Pa.* 1906, Dunham v. McMichael, 214 Pa. 485, 63 Atl. 1007 (telephone conversation alleged to be with the defendant, excluded, because neither the witness knew defendant's voice nor did defendant's admissions identify her; no authority cited); *R. I.* 1902, Deluglio v. Barney, 23 R. I. 626, 51 Atl. 425 (whether a telephonic communication was admissible, "without evidence of the identification of the defendant or his agent," not decided).

Distinguish the following cases, not concerned strictly with *testimony to a jury;* the standard of certainty or sufficiency may well be a different one: 1889, Banning v. Banning, 80 Cal. 273, 22 Pac. 210 (acknowledgment of deed received by notary over telephone; question expressly reserved); 1894, Murphy v. Jack, 142 N. Y. 217, 36 N. E. 882, 31 Abb. N. C. 207 (information as the basis of an affidavit; there must be some evidence of identity besides the mere assertion of the informant); 1896, State v. Nelson, 19 R. I. 467, 34 Atl. 990 (information received by an officer of the court, on the telephone, that a juror was ill, held insufficient).

matters upon which men are compelled to act in the ordinary affairs of life and in the usual transactions of business ought to be allowed to go to the jury in cases where they become material to the issues on trial. . . . The use of this instrument facilitates business to such an extent that it would be very prejudicial to the interests of the business community if the Courts were to hold that business men are nc entitled to act upon the faith of being able to give in evidence to juries replies which they receive to communications made by them to persons at their usual places of business in this way."

(*c*) An additional element enters where the antiphonal speaker does *not* purport to be *a particular person*, but merely some *member of the office-staff* authorized to make a contract or an admission. Here the question is whether there is sufficient evidence that he was really a person acting in the opponent's office and authorized for such transactions, or was a mere intruder, or by-stander, or unauthorized clerk. On the principle above suggested (though not with the same force) mercantile experience may well suffice, by which customarily the person who is in fact summoned to the telephone and proceeds to conduct the negotiation is 'prima facie' a person authorized to do so, precisely as a person receiving money at the cashier's desk is presumably authorized to do so:

1918, FELLOWS, J., in *Theisen* v. *Detroit Taxicab & Transfer Co.*, 200 Mich. 136, 166 N. W. 901 (personal injury in a collision with the defendant's taxicab; P. was defendant's manager; to prove the taxicab to be defendant's, a witness testified "that he called up the defendant by telephone, using the telephone directory, and asked for the manager; that he 'got hold of' Mr. P., who said he was the manager; and that he had never talked with Mr. P. before): "The important questions presented on this record are the admissibility of the telephone conversation and its effect. Upon these questions the authorities are not in harmony. This Court has already held that a telephone conversation is admissible where the identity of the persons communicated with by telephone is established. The contention here goes further, and we are now called upon to determine the admissibility and effect of a telephone conversation conducted in the usual manner in the business world, by ascertaining through the directory the number of the subscriber and then being connected with that subscriber through 'central' and conducting such conversation.

"Courts must take judicial knowledge of modern discoveries and inventions that have become of general and almost universal use in our commercial life. The telephone is no longer a luxury or even a mere convenience, but is a necessity in the conduct of business, especially in our large cities. We cannot close our eyes to the fact that a very large and considerable portion of the business of the country is transacted over it and by its use, nor that mistakes in connections are infrequent, and when they occur the party calling is at once informed of the mistake by the party at the other end of the line. We cannot close our eyes to the fact that business transactions of large moment and private affairs daily depend upon the presumption and inference that by the use of the telephone parties have conversed with the actual party called, and that the party answering was, in the absence of a mistaken connection, the person called for and was the person whom he represented himself to be. The business man who installs a telephone in his office invites the public to transact business with him by its use, and he extends such invitation with the knowledge that such presumptions and inferences exist in the business world. . . . We are persuaded that those cases holding such conversations admissible are by far the better reasoned, and that the weight of authority sustains the admissibility of such proof. . . . None of the cases sustaining the admissibility of such conversations, so far as we can ascertain, lose sight of the rule that agency may not be proved by statements of the agent.

nor the rule that the authority of the agent must be established to bind the principal by his acts; but proceed upon the theory, based upon business experience, that when one in the usual manner obtains the office of another on the telephone a presumption or inference arises, sufficient to make a 'prima facie' case, that the person who is in fact summoned to the telephone and who conducts the negotiations is authorized so to do, rather than to assume until the contrary is proved that he is an officious intermeddler with the affairs of others. . . . We do hold, that, where both parties are subscribers to the same telephone exchange, and one party, using the telephone directory to ascertain the number of the other party, calls for such other party, and is connected by central with such other party, and a conversation ensues in which the party called responds and informs the party calling that he is the party called, upon proof of such facts, a rebuttable presumption or inference arises sufficient to make a 'prima facie' case of identity."

Upon this point there is a marked judicial inclination to take the liberal view.[7]

In any event, particular additional circumstances may always suffice to complete the gap.[8]

[7] *Fed.* 1920, Merritt *v.* U. S., 9th C. C. A., 264 Fed. 870 (hoarding food; witness to a telephone order "from some one at the home of M." whose voice was recognized as that of one giving prior orders, admitted); *Cal.* 1912, Union Construction Co. *v.* Western U. Tel. Co., 163 Cal. 298, 125 Pac. 242 (conversation with a purporting agent at the purporting office of the defendant, by telephone call in the usual way, admitted; careful opinion by Shaw, J.); *Conn.* 1907, General Hospital Soc'y *v.* New Haven R. Co., 79 Conn. 581, 65 Atl. 1065 (on the facts, a conversation from an unidentified person in the office, apparently having charge, was admitted); *Ill.* 1890, Obermann Brewing Co. *v.* Adams, 35 Ill. Ap. 540 (supposed admissions of the authority of O. as agent were rejected, the only evidence of identity being that a telephonic answer was received, to the inquiry about O.'s authority, from what purported to be the defendant's office, but the voice of no employee or firm-member of the defendant being known or recognized by the plaintiff; the Court's reason was that some person not having authority to answer might have answered); 1889, Rock Island & P. R. Co. *v.* Potter, 36 Ill. 592 (admitting a telephonic admission, as to receipt of stock, purporting to come from some one in the defendant's office); 1907, Godair *v.* Ham Nat'l Bank, 225 Ill. 572, 80 N. E. 407 (conversation by telephone, purporting to come from G. in his office, received, though the voice was not identified); *Md.* 1908, Knickerbocker Ice Co. *v.* Gardiner Dairy Co., 107 Md. 556, 69 Atl. 405 (testimony to sales of ice by defendant, based on telephone conversations with a person responding for the defendant and purporting to be a sales agent, admitted; approving the doctrine in the text above); *Mass.* 1921, Larner *v.* Massachusetts B. & I. Co., — Mass. —, 130 N. E. 92 (whether defendant's agent B. had visited plaintiff to consult on proofs of loss on a policy; defendant denied that he had any such agent; a telephone message purporting to come from defendant's office, stating that agent B. was coming, excluded); *Mich.* 1918, Theisen *v.* Detroit T. & T. Co., 200 Mich. 136, 166 N. W. 901 (quoted *supra*); *Tex.* 1906, St. Louis S. W. R. Co. *v.* Kennedy, — Tex. Civ. App. —, 96 S. W. 653 (testimony of an offer of wages received by telephone, excluded).

Where the person answering from an office gives no name, it will usually be sufficient to identify him with some employee authorized to make such admissions. But where he gives a name, and the name is that of a person having no authority to make admissions, it is useless to offer evidence of identity or to consider that question at all, because the statements of that person, even if made as alleged, would be irrelevant; an instance of this is found in Morrell *v.* Lumber Co., 15 Mo. App. 595 (1892).

[8] 1906, Fitzgerald *v.* Benner, 219 Ill. 485, 76 N. E. 709 (certain telephone inquiries of the opponent's agent, admitted as part of the 'res gestæ,' on the principle of § 1777, *ante*); 1906, Harrison G. Co. *v.* Pennsylvania R. Co., 145 Mich. 712, 108 N. W. 1081 (conversations by telephone, admitted, the identity and the authority of the speakers being otherwise shown); 1901, Herendeen Mfg. Co. *v.* Moore, 66 N. J. L. 74, 48 Atl. 525 (conversation with defendant's agent received, where defendant admitted that he heard and authorized the agent's reply); 1891, Missouri P. R. Co. *v.* Heidenheimer, 82 Tex. 201, 17 S. W. 608 (here the opponent's admissions were received, the witness having recognized the voice as that of an employee, not known by name, of the opponent, and the details of the conversation further indicated that the answering person was at the opponent's office and familiar with the matter).

The exact nature of the thing to be proved is

(2) The matter of identity or authority not being in dispute, there may still be a question of the Hearsay rule. If B, for example, instead of speaking directly to A, *converses with a clerk or telephone-operator* at the other end of the line, and the latter reports to B the alleged statements of A just communicated to him, then B is no longer in any view a witness to A's remarks, but only to the operator's or clerk's assertion of what A said to him (*ante*, § 659), and we are in truth asked to receive the hearsay (*i. e.* extrajudicial) testimony of the operator or clerk. This situation has elsewhere been examined (*ante*, § 669).

(3) Occasionally still other principles may be involved, — for example, whether a person may *corroborate himself* by telling what he stated at the time to be a message received by him; as in an instance elsewhere cited (*ante*, § 1124).

§ 2156. **Presumption of Identity of Person from Identity of Name.** The case of a telephone-reply, examined in the preceding section, brings us to the point where the question ceases to be one of authenticating a document and begins to be one of authenticating any parol act purporting to have been done by a given person; and here the presumption of *identity of person* from *identity of name* (*post*, § 2529) plays a most important part. It may always come in question for the general authenticating of documents (*ante*, § 2133, par. 2); but it is of most frequent application to oral admissions and to grantees and grantors in deeds. The rulings may be of equal service in proving a telephone-answer or a document seen to be signed by one calling himself by a certain name.[1]

3. Authentication by Custody

§ 2158. **General Principles, as applied to Judicial Records and Files.** When in a government office are kept permanent records under the custody of an officer appointed to that duty, there is commonly little danger in assuming that records found there existing are genuine. It would be difficult as well as criminal to substitute or insert false records. Moreover, the usual mode of authenticating such documents (as by proving the clerk's or officer's not always kept in mind. Thus, in Wolfe *v.* R. Co., Mo., *supra*, note 6, Barclay, J., says, of a supposed admission purporting to come from the plaintiff's office: "When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on." Here the learned judge is assuming the very fact in controversy, viz., whether the communication *did in fact come from* a clerk in the plaintiff's office.

Again, in Gzowski *v.* Forst (1910), 22 Ont. L. R. 441, the plaintiff testified to a contract-conversation over the telephone with the defendant, then the defendant testified to a different version; witnesses who overheard the defendant's utterances, being present in the room, were received; here the only question could be whether the occasion was the same as that testified to by the plaintiff, and the defendant's testimony was some evidence of that.

§ 2156. [1] For the question whether an opponent's admission of the *execution of a writing* named is sufficient, see *ante*, § 2132, par. 3; the missing element might there be supplied by an inference from identity of contents.

handwriting) would be both highly inconvenient, on account of its repeated necessity, and also often impossible, on account of the change of officials as well as the antiquity of many portions of the records. It seems, therefore, never to have been doubted that the *existence of an official document in the appropriate official custody* is sufficient evidence of its genuineness to go to the jury.[1]

The forms in which the testimony to this fact may be presented are four, according as the witness is the official custodian himself or some other person, namely, A, (*a*) the official custodian bringing the record into court and identifying it, (*b*) the official custodian certifying a copy from it, B, (*a*) a private person bringing the record into court and identifying it, (*b*) a private person proving a sworn or examined copy of it.

A (*a*) As to the first method, the identifying of the original by its *official custodian bringing it into court*, the only question here arising is based on the impolicy of allowing official records to be taken out of the office (*post*, § 2182).

(*b*) When the official custodian *certifies a copy* to be used in evidence, and such a copy is admissible under the Hearsay Exception for Official Statements, the certificate also testifies, expressly or by implication, to the genuineness of the original in his custody from which the copy is made (*ante*, §§ 1677, 1680).

B (*a*) When a *private person* identifies the *original, brought into court* by him, there arise two difficulties. The first is analogous to that already noticed A (*a*) (*supra*), namely, that, even though the production of the original by the official custodian himself may be allowable, yet the taking of it from official custody by a private person exceeds all bounds of propriety and safety, and no testimony obtained in that way can be received. This consideration has weighed with some Courts; but there is no generally accepted distinction of the sort.[2] The second difficulty arises from the necessity of the witness'

§ 2158. [1] Compare the doctrine allowing an officer to testify to a predecessor's official handwriting from acquaintance with the records of the office (*ante*, § 704).

[2] With the following compare the cases cited *ante*, §§ 1186, 1244, 1677, and *post*, § 2182:

Inadmissible: Ark. 1905, Junior *v.* State, 76 Ark. 483, 89 S. W. 467 (magistrate's record of conviction, one witness having received it from the magistrate's successor, and another identifying the handwriting, excluded: no authority cited; McCulloch, J., diss.; the ruling is unsound); *Pa.* 1840, Devling *v.* Williamson, 9 Watts 311, 317 (a paper found in the Court files of another county and brought away by a member of the bar, excluded; such papers should be authenticated by production by the custodian or by his certificate); 1841, Hockenbury *v.* Carlisle, 1 W. & S. 282 (good opinion); 1851, Garrigues *v.* Harris, 16 Pa. 344, 351, *semble* (records brought from the Court by the custodian-clerk; admitted); 1856, Miller *v.* Hale, 26 Pa. 432, 435 (if the opponent admits genuineness, the official custodian need not attend to authenticate); *S. Car.* 1833, Perry *v.* Mays, 1 Hill S. C. 76 (a schedule and assignment offered as a record of the court; there being no intrinsic evidence, such as the seal of court, it must be authenticated by being produced in court by the keeper of the court records, or by his official certificate).

Admissible: Ga. 1897, Columbus *v.* Ogletree, 102 Ga. 293, 29 S. E. 749, *semble* (city council minutes sufficiently authenticated by an officer, other than the clerk, having temporary custody); *Me.* 1860, Hathaway *v.* Addison, 48 Me. 440, 443 (town records identified by another than the clerk; "we know of no rule of law which requires the identification of such a record by any officer of the town; it is sufficient if it be proved by any competent

testifying to finding the records in the appropriate custody; he must clearly know and show that its place of origin was the proper one. This question is identical with that arising under the next mode.

(*b*) When a *private person* testifies to a *sworn* or *examined copy* of a *public record, i. e.* a record examined by him for the purpose of making the copy, it is obvious that proving the copy includes not only proof that its contents are a correct transcription of the original, but also that the original was the genuine one it purported to be; here certain details develop:

(1) A witness to a copy must of course speak from personal knowledge (*ante*, § 1278), and the witness' personal knowledge can here extend only to the fact of official custody. This fact (as above noted) suffices to authenticate, but it must be clearly made to appear. Accordingly, some strictness is shown in testing the proof of this fact:[3]

1816, ELLENBOROUGH, L. C. J., in *Adamthwaite* v. *Synge*, 4 Camp. 372, 1 Stark. 183 (rejecting a witness to a copy of an Irish judgment, who was taken by an attorney to the court-record room, and shown a parchment; but he did not see whence it was obtained nor know who produced it for him). . . . "It must in the first place be proved by the witness that the original came out of the proper custody; this cannot be shown by any

witness who knows the fact"); *Va.* 1868, Bullard *v.* Thomas, 19 Gratt. 14, 18 (record-book from another Court is sufficiently proved by one who knows it to be such, whether clerk or not); and the cases cited *infra*, note 3, and *post*, § 2159, note 1, where the present difficulty was not raised.

Some Courts reach the result by declaring *judicial notice* of their own records, at least in the same suit, when produced: *post*, § 2579; but this is really a ruling that the custody is sufficient evidence of genuineness, for the real question is whether a particular piece of paper is what it purports to be.

Statute sometimes provides for the anomalous process of producing an official record itself *without the custodian*, and *without testimony of the party producing: Nev.* Rev. L. 1912, § 5409 (custodian's certificate; quoted *ante*, § 1680).

[3] The principle has been applied to judicial records in the following cases, which include instances of the production of the original: *Ill.* 1844, Williams *v.* Jarrot, 6 Ill. 120, 127 (judicial records in the proper custody; authentication not required); *Ind.* 1828, Modisett *v.* Governor, 2 Blackf. 135, 137 (receipts in the reputed docket of a justice, which was in the possession of another justice, not assumed genuine); *Kan.* 1906, State *v.* Schaeffer, 74 Kan. 390, 86 Pac. 477 (Federal revenue collector's records, proved by an examined copy); *Me.* 1841, Vose *v.* Manly, 1 Appl. 331, 332 (original record of a court-martial; admitted, being produced from the Adjutant-General's office); 1920, Audibert *v.* Michaud, 119 Me. 295, 111 Atl. 305 (town record of marriage, produced by the wife of the town clerk, acting as deputy; in his absence, admitted; "the person who produces the record in court is important only as proving that the book produced is the identical record"); *Mich.* 1901, McLeod *v.* Crosby, 128 Mich. 641, 87 N. W. 883 (files obtained from the clerk of the court, held sufficiently authenticated); *Pa.* 1826, Eisenhart *v.* Slaymaker, 14 S. & R. 153, 155 (an original record of a judgment formerly rendered in the same court, identified as coming from the Supreme Court, received); *S. Car.* 1831, Browning *v.* Huff, 2 Bail. 174, 180 (proof of signature of the Ordinary in a probate book, and that the book was his original record, sufficient); *Tex.* 1906, Smithers *v.* Lowrance, 100 Tex. 77, 93 S. W. 1064 (examined copy of land-office records, made by one to whom the land-commissioner pointed out the records in his office, admitted).

Compare the citations *ante*, § 1273 (examined copies).

Where *one part of a record* is sufficiently authenticated, the remainder may sometimes be received when it is referred to in the authenticated part and its identity can be ascertained by inspection: *Eng.* 1800, Jackson *v.* Burleigh, 3 Esp. 34 (malicious arrest; the writ was produced by a witness who said "it had been sent up to him in a letter"; it was excluded; but on proving the warrant founded on it, the writ was admitted); *U. S.* 1807, Stevelie *v.* Lowry, 2 Brev. S. C. 135 (original execution with a copy of the judgment, in another court-district; execution objected to as "only admissible when offered to a court of which it is of record, and can only legally be known to form a part of the record exemplified when certified" by the proper keeper; received, when found by inspection to be a part of the proceedings under the judgment).

light reflected from the record itself, which may have been improperly placed where it was found. . . . If the witness had stated that the record came out of the hands of the proper officer, it would have been sufficient. The evidence must be launched by proving that the document came either from the proper person or proper place."

(2) By *statute*, an express form is often laid down for an examined copy of a judicial record, and sometimes it is required anomalously to bear the Court seal.[4]

(3) The case of papers purporting to be executed by another person than the official, but *filed with the record* as a part of it, is a difficult one to resolve, and there seems to be little authority regarding it;[5] but it may be suggested that the test should be whether it is made the duty of the custodian to satisfy himself of the genuineness of the document before filing it, or whether in a subsequent part of the judicial proceedings the document in question has been treated as genuine by the Court or by the party now charged. A document satisfying either of these tests should be received as sufficiently evidenced, if it is found filed in the appropriate place.[6] The case of a *bill* or *answer* or *affidavit* in chancery has often been passed upon in rulings which seem to justify some such generalization.[7]

[4] *Cal.* C. C. P. 1872, § 1907 (a copy of a judicial record of a foreign country is admissible on proof, "1, that the copy offered has been compared by the witness with the original and is an exact transcript of the whole of it; 2, that such original was in the custody of the clerk of the court or other legal keeper of the same; 3, that the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be a court of record, or, if there be no such seal or if it be not a record of a court, by the signature of the legal keeper of the original"); *Colo.* Comp. St. 1921, C. C. P. § 395 (like Cal. C. C. P. § 1907); *Ida.* Comp. St. 1919, § 7951 (like Cal. C. C. P. § 1907); *Mich.* Comp. L. 1915, § 12504 (record of a court in a foreign country, provable by sworn copy by one who compared the copy with the original in custody of the clerk or legal custodian, the copy being attested by seal proved to be that of the court); *Mont.* Rev. C. 1921, § 10557 (like Cal. C. C. P. § 1907); *Nev.* Rev. L. 1912, § 5412 (like Cal. C. C. P. § 1907); *N. Y.* C. P. A. 1920, § 396 (an attested copy of a foreign judicial record is provable by an examined copy, with the examiner's testimony to the legal custody of the original and the genuineness of its attestation); *Or.* Laws 1920, § 755 (like Cal. C. C. P. § 1907, omitting the clause about a record not of a court); *P. I.* C. C. P. 1901, § 305 (like Cal. C. C. P. § 1907); *Utah:* Comp. L. 1917, § 7090 (like Cal. C. C. P. 1907).

[5] 1821, Wood *v.* Fitz, 10 Mart. La. 196, 201 ("the bonds taken by the officers of the court, in pursuance to law, are matters of record, when put on the files of the court, and need no proof of the officer's signature"); 1903, Craw *v.* Abrams, 68 Nebr. 546, 94 N. W. 639; 97 N. W. 296 (official bond, in the proper custody and recorded as approved, held not sufficiently authenticated); 1835, Kello *v.* Maget, 1 Dev. & B. N. C. 414, 422 (guardian's bond taken by a Court and preserved among its records; authenticity presumed); 1860, Boyd *v.* Com., 36 Pa. 355, 359 (trustee's bond approved and filed in Court, admitted; "it might and ought to be inferred in such a case that its genuineness had been inquired of and passed on by the Court").

[6] Compare the precedents on a similar question, *ante*, § 1677, where the effect of a *certified copy*, as evidence of the genuineness of filed documents, is considered.

[7] *England:* 1689, R. *v.* James, 1 Show. 397 (perjury upon an affidavit in Chancery; held in answer to an objection that there was no proof that it was really the defendant's, that the affidavit being of the defendant in the cause and used by him upon motion in Court, it's enough; . . . a copy of an affidavit only, produced against a man, without proof that he made it, used it, or was concerned in the cause, that would be insufficient"); 1726, Gilbert, Evidence, 49 (chancery papers filed, admissible; unless there have been no proceedings on the bill; for such a bill "is of no use to the party, and therefore must be supposed rather to be filed by a stranger to do him an injury"); 1777, Cameron *v.* Lightfoot, 2 Wm. Bl. 1191 (affidavit in the same court in a former suit now the subject of an action for malicious prosecution, admitted without proving signature, "being filed in the very court where the action was tried"); 1817, Hennell *v.* Lyon, 1 B. & Ald. 182, 185 (admitting a copy

§ 2159. **Same: Application to Sundry Official Records.** The same general principles apply to official records of all sorts.[1] The fact of the document

of a bill and answer in Chancery; "the answer, being a proceeding in a court of justice, must have been received there in the usual course, and verified by the person putting it in, as the answer of the person sustaining the character which it imparts him to bear"); 1824, Dartnall *v.* Howard, Ry. & Mo. 169 (examined copy of answer in Chancery, admitted); 1825, Rees *v.* Bowen, 1 McCl. & Y. 383, 389, 391 (affidavit in another suit, offered as an admission, without evidence that it had ever been used in the other suit; excluded; "it appears to have been found in the office, but there is no proof by whom it was put there, or that it was used"); 1827, Highfield *v.* Peake, M. & M. 109 (deposition, admitted by examined copy); especially as the trial was on an issue out of Chancery); 1849, R. *v.* Turner, 2 C. & K. 732, 736 (affidavit; proof of handwriting of the witness and of an officer signing "By the Court"; the proper swearing, and presence of the officer in Court, held sufficiently shown).

United States: 1837, Doughton *v.* Tillay, 4 Blackf. Ind. 433 (purporting answer in chancery, not shown to be filed, excluded).

For the question whether on proof of the answer's genuineness, *identity of name* suffices to show the identity with the party charged, see *post*, § 2529.

§ 2159. [1] CANADA: 1850, Wiggins *v.* McLean, 1 All. N. Br. 671 (surveyor's return, admitted; "it is filed in a public office and purports to be an official return").

UNITED STATES: *Ark.* 1903, Miller *v.* Johnston, 71 Ark. 174, 72 S. W. 371 (deposition stating that "a copy is attached" of the rules of a cotton exchange, held insufficient, for lack of any statement as to the place of custody or other circumstance indicating the genuineness of the original); *Fla.* Rev. Gen. St. 1919, § 3832 (a record in the appropriate book of an instrument required or authorized to be recorded is "presumed to have been made by the officer whose duty it was to make it"); *Ill.* 1871, Rockford *v.* Hildebrand, 61 Ill. 155, 159 (city records from clerk's office, admitted on the facts); *La.* 1881, Hebert's Succession, 33 La. An. 1099, 1105 (entry in a marriage register in official custody, assumed genuine); *Me.* 1824, Sumner *v.* Sebec, 3 Greenl. 223 (town record of marriages, received from former town clerk, admitted); *Mass.* 1886, Com. *v.* Richardson, 142 Mass. 71, 72, 7 N. E. 26 (lease of a pond purporting to be executed by public commissioners with authority, not received without proof of authenticity; here the commissioners were to have custody of leases so granted, and this document came from other custody); *Minn.* 1866, Sanborn *v.* School District, 12 Minn. 17, 28 (book of school-records in clerk's custody, sufficiently proved on the facts); 1875, Board *v.* Smith, 22 Minn. 97, 102, 115 (entries "paid," with defendant's signature, on town assessment-books, the existence of the entries when the books were in the defendant's custody as treasurer not being shown; genuineness not presumed); *Mo.* 1881, Alexander *v.* Campbell, 74 Mo. 142, 147 (book of deed records, custody not shown, excluded); *N. H.* 1858, Ferguson *v.* Clifford, 37 N. H. 86, 95; 1858, Little *v.* Downing, ib. 355, 364 ("official books, or books kept by persons in public office, in which they are required to write down the proceedings of some public body or corporation, . . . where the books themselves are adduced, and it is proved or admitted that they come from the proper depository, are received as evidence without further attestation"); *N. J.* 1897, Schubert Lodge *v.* Schubert Verein, 56 N. J. Eq. 78, 38 Atl. 347 (printed copy of the constitution of a secret order, the State-lodge secretary receiving it from the supreme lodge secretary; genuineness of the original presumed); *N. Y.* Laws 1884, c. 376, § 1, C. P. A. 1920, § 336 (municipal corporation's payments; receipt for money is provable by the fact of production from official files, if purporting to be given six years before commencement of proceedings); *Okl.* 1921, Bradshaw *v.* State, — Okl. Cr. —, 197 Pac. 715 (document purporting to be a school census, excluded because not shown to come from the proper custody); *Pa.* 1820, Miller *v.* Carothers, 6 S. & R. 215, 221 (survey-draft found in the office among the official papers of a deputy-surveyor, presumed genuine, if the official had received orders on that matter); 1821, Leazure *v.* Hillegas, 7 S. & R. 313, 317 (survey in the handwriting of a deputy-surveyor, though not found among official papers, admitted); 1835, Snyder *v.* Bowman, 4 Watts 132 (survey in the handwriting of a deputy-surveyor, found among official papers, excluded); 1836, Com. *v.* Alburger, 1 Whart. 469, 473 (ancient official plan of Philadelphia, found in the surveyor-general's office, accredited by the officers as authentic, received); 1841, Hockenbury *v.* Carlisle, 1 W. & S. 282 (tax-books provable by exemplified copies, but if not, then by one who has the keeping of them officially; here, not by an ex-clerk of the office); 1869, Baird *v.* Rice, 63 Pa. 489, 497 (like Com. *v.* Alburger); *S. C.* 1901, Steen, Ex parte, 59 S. C. 220, 37 S. E. 829 (books conceded to be those of the sheriff's office, admitted, as made by his authority); *Tex.* 1849, Houston *v.* Perry, 5 Tex. 462, 465 (land-office book, proved genuine by custody).

For the peculiar case of a *Spanish 'testimonio,'* see the following rulings: 1851, Paschal *v.* Perez, 7 Tex. 348; 1860, Word *v.* McKinney, 25 Tex. 258, 268.

purporting to be an official document and being found in the appropriate custody suffices to evidence its genuineness. An occasional apparent opposition of rulings indicates that perhaps the rule is one which is and ought to be more or less affected in its application by the circumstances of each case and the customs of official care and strictness in each locality. The rule may even be applied to admit entries made or documents filed *by third persons* in official records,[2] within the limits already suggested (*ante*, § 2158, par. *bb*). But a purporting official record, *lacking the signature* or other verifying attestation, will usually be treated with strictness, so that the appropriate custody alone will not suffice to authenticate it.[3]

§ 2160. **Documents produced from Private Custody**; (1) **Opponent producing on Notice**; (2) **Indorsements on Negotiable Instruments**. During the vogue of the attesting-witness rule, an unsound doctrine obtained a partial vogue that an opponent producing a document from his possession on notice admitted its genuineness, so that the attester need not be called (*ante*, § 1298). Obviously the mere possession of any document, especially one purporting to be signed by a third person, should not be treated as an admission of genuineness.

But, apart from any principle of Admissions, and looking only at the circumstantial value (*ante*, § 2131) of the party's possession, may it not fairly be said that a *party's possession of documents purporting to be made by himself*, and, particularly, of documents *used and acted on by him in the ordinary conduct of his business*, is sufficient evidence of their genuineness to justify their reception? This rule would be justified, not only by the inference thus drawn from daily experience, but also by the fact that the burden of disproof of genuineness, if it is actually disputed, can the more readily be placed in such a case on the party himself.

[2] 1866, Rice *v.* Cunningham, 29 Cal. 492, 498 (entry of release or discharge on the margin of a mortgage record, to be assumed genuine; "the presumption of law is that the discharge has been regularly and honestly entered"); 1846, Bouchaud *v.* Dias, 3 Den. 238, 241 (release of a Government claim by the secretary of the treasury, deposited in the department, not assumed genuine as a public document).

[3] 1870, Hall *v.* People, 21 Mich. 456, 460 (alleged records of township officers, not assumed official from the recitals merely); 1878, Wilt *v.* Cutler, 38 Mich. 189, 195 (record of a deed; presence in the proper office, though unsigned, may suffice); 1860, Hall *v.* Manchester, 40 N. H. 410, 413 (a deceased town-clerk's supposed copy of a record of the selectmen, not attested by him; the genuineness of the entry being shown, the place of the copy in the clerk's book was held sufficient evidence of its being intended as a true copy); 1795, Penn *v.* Hartman, 2 Dall. Pa. 230 (old survey, in the surveyor-general's office, but not signed or otherwise authenticable, not received as official); 1830, Booge *v.* Parsons, 2 Vt. 456, 459 (record of a lost deed nearly 40 years old, received; the clerk's attestation of record being lacking, but his handwriting being proved); 1832, Johnson *v.* McGuire, 4 Vt. 327 (clerk's certificate of a record, unsigned in part, proved by handwriting); 1848, Northfield *v.* Plymouth, 20 Vt. 582, 588 (old record of marriage in town records; no attestation appearing, proof of handwriting of the clerk sufficed).

The case of a *marriage certificate* handed over by the celebrant official to the parties is generally treated as sufficiently authenticated by that circumstance (though it may perhaps better be justified on the principle noted *ante*, § 2131, par. 3 (*c*)): 1855, Northrop *v.* Knowles, 52 Conn. 522, 525 (marriage certificate; that it was given by the officiating magistrate, sufficient); 1894, Fratini *v.* Caslani, 66 Vt. 273, 274, 29 Atl. 252 (certificate of marriage; authenticity evidenced by fact that it was given to parties at time by celebrant priest). Compare the cases cited *ante*, § 1644.

For *corporate records*, which raise certain complications of the substantive law, see Thompson on Corporations, § 7737; 1905, Lowry Nat'l Bank *v.* Fickett, 122 Ga. 489, 50 S. E. 395; and cases cited *post*, § 2169.

Such a rule has thus far formed acceptance in two classes of cases only:

(1) Where *one party calls upon the opponent* (either by discovery, *ante*, § 1859, or at the trial, *post*, § 2219) *to produce documents* made and possessed by the latter, and the latter does produce the described documents, this is sufficient evidence of genuineness, by statute in at least one State,[1] — a statute which might well be imitated.

(2) Where a *negotiable instrument* is produced from the *custody of the obligee* or his successor, an *indorsement of payment* thereon is presumed to have been made by the obligee or by his authority.[2]

4. Authentication by Official Seal or Signature

§ 2161. **General Principle.** The history of the seal is the history of an epoch in our law. It is the source of rules distinguishing the Anglo-American system of law from its predecessors. Out of the use of the seal grew the two great doctrines of the authenticity and the indisputability of written instruments. It is with the former that we are here concerned.[1]

As the doctrine survives to us to-day, it is in the shape of a settled rule that the *genuineness of certain purporting official seal-impressions need not be evidenced otherwise than by the production for inspection of the document* bearing them.

1. *The History.* The various stages of development, in more primitive times, need not be here rehearsed.[2] It is necessary only (in these days of the extinct vogue of private seals) to notice enough of the history to appreciate how this doctrine, now accepted on mere tradition, once rested upon reasons so practical and so convincing that its living force was apparent to all:

1894, M. *Arthur Giry*, Manuel de Diplomatique, c. IX, pp. 622, 649, 836: "Of all the methods used in the Middle Ages to validate written instruments, the most common was

§ 2160. [1] *La.* St. 1915, No. 11 (trusts and monopolies; defendant's books and documents shall be received in evidence "without other formality than proof of their having been in the archives or in the possession or under the control of the defendant").

Compare the doctrine about *corporate records* (*post*, § 2169).

[2] 1886, Chamberlain *v.* Chamberlain, 116 Ill. 480, 484 (an indorsement of payment on a note is presumed to have been made by the payee or on his authority, when the note is produced from the custody of the party entitled under him; otherwise, when produced by the obligor); 1827, Stocking *v.* Fairchild, 5 Pick. Mass. 181 (action on a mortgage-title; a condition of mortgage, written on the back of the deed, presumed to be "a part of the original contract"); 1862, Turrell *v.* Morgan, 7 Minn. 372, 375 (note offered, containing indorsements of payment; proof of the note does not raise a presumption of the genuineness of the indorsements); 1881, Bailey *v.* Danforth, 53 Vt. 504 (promissory note given by the deceased payee to the plaintiff, and bearing an indorsement of payment of date before the statute had run; *semble*, the indorsement presumed to be in the payee's hand and of the purporting date).

Compare the *presumption of delivery* from possession (*post*, § 2520), the *presumption of payment* from possession (*post*, § 2518), and the rule for admitting *indorsements of payments* as statements against interest (*ante*, § 1466).

§ 2161. [1] The history of the latter is examined *post*, § 2426.

[2] The following works contain the history on the Continent: 1877, Ficker, Beitraege zur Urkundenlehre, I, §§ 57–59; 1887, Posse, Die Lehre von Privaturkunden; 1889, Bresslau, Handbuch der Urkundenlehre, 501–555, especially 517–520, 539–544 ("the law was as expressed by the Zurich writing-master Konrad V. Mure in 1275, that 'the whole credibility of a document rests upon an authentic, well-known, and notorious seal'"); 1894, Giry, Manuel de diplomatique; 1920, Tout, cited above: and sources cited *post*, § 2426.

the affixing of the seal. In general vogue under the Roman Empire, its use fell away in the period of the Germanic conquests, and was limited for several centuries to the royal chancelleries only. After the close of the 900s, its vogue began once more to spread; and from the 1100s to the 1400s inclusive the seal was the most generally used mark of validation. Then the rise of the written signature, and the employment of paper as a material, once more diminished the vogue of the seal; but it remained in use, nevertheless, in its pristine form, for formal documents of the royal chancelleries, and, in the form of a signet, for private individuals. . . .

"The seals of sovereigns, barons, prelates, churches, and municipalities were from the very beginning used to guarantee the authenticity, not only of those instruments in which the owner of the seal bound himself or was otherwise a party; but also of all documents to which it was desired to give (in legal phraseology) an 'authentic' character, — including contracts and deeds of private persons (other than the owner of the seal). It was natural, particularly in the regions where notaries public were unknown, for such private persons to have recourse, when executing documents that affected legal rights, to those superior authorities whose seals could give authenticity to the document. For it must not be supposed that, even after the general spread of the seal in the 1200s, all seals alike were credited with equal value for this purpose. Though any one whosoever could possess a seal, yet these private persons' seals had no other credit than to-day is accorded to a personal signature or seal. They were indeed used, in executing documents, to indicate one's personal sanction or liability, and to supplement an 'authentic' document with one's personal guarantee, for example, on private letters, receipts, orders, and the like. But deeds, or like instruments, which bore no other mark of validation than the seal of a private individual were not deemed to be drawn in 'public form,' and were treated in law as merely 'documents under private signet,' — as the modern expression has it. Beaumanoir, for example, speaking of the authority of seals, guards his statement thus: 'However, it is not meet that the seals of a common subject should be of so great authority that it will be credited in any case without other testimony. . . . The seal of a gentleman is not authentic, nor has credit in court.' Ever since the beginning of the 1200s we find the laws and treatises using the expression 'authentic seal' ('sigillum authenticum'); under this term the lawyers recognized only the seals of persons or groups having a legal jurisdictional authority, viz., sovereigns, feudal lords, bishops, churches, and municipalities.

"Such a prerogative naturally tended to be exploited to the profit of its possessors; and sovereigns were not slow in providing, each in his jurisdiction, special kinds of seals, known as 'contract-seals,' and in appointing an official as keeper of this seal, whose duty was to give to the deeds of private persons the guarantee of the royal seal. . . . In the course of the 1200s, bishops, archdeacons, and abbots came also to possess seals of jurisdiction in the exercise of their ecclesiastical powers. In France, it does not appear that the seals of any other ecclesiastical officials had the force of authenticity. But in England, in 1237, by the Council of London, the right to validate contracts by their seals was accorded not only to bishops and their deputies, but even to priors, deans, chapters, and others. Matthew Paris, in his Chronicles, thus records the ordinance: 'Of those who can have authentic seals: Inasmuch as notaries are not in vogue in England, and for this reason it is the more needful to resort to authentic seals, and an abundance of such should be available, now therefore we ordain that seals may be possessed, not only by archbishops and bishops, but also by their deputies, also by abbots, priors, deans, archdeacons and their deputies, rural deans, and also chapters of churches, and all other bodies, with their rectors or separately, according to their usage or ordinance. For distinguishing them, furthermore, each of the said bodies or persons shall have a seal graved, in known and legible characters, with the name of the title, office, or body, and also the individual name of those who enjoy the honor of the permanent title or office. And this their seal shall be authentic.' . . .

"This principle of conferring 'authenticity' on the documents of private persons by giving them the guarantee of the seal of a superior jurisdictional authority, was of general

application during the Middle Ages in the northern (or 'customary') regions of France. The usual way to provide this proof for a contract was for the party to present himself before the judge and there to make acknowledgment ('recognitio,' 'confessio') of the execution of the contract, which acknowledgment the judge recorded in the form of a letter, validated by his seal, — generally termed 'letter of acknowledgment.' This custom dates from the beginning of the 1200s, — the period in which the theory of the 'authentic document' took on that form in northern France which it had reached after passing through successive phases. . . . This custom, spreading down from the sovereign chancelleries to the feudal lords and the bishops, with the spread of the seal, became an everyday affair. . . . The bishops seem to have been the first to regularize the exploitation of their seal of office, by establishing in their ecclesiastical courts of justice, what might be called a special service for this voluntary jurisdiction; and it would seem that more than one feature of the bishops' system was borrowed by the royal and the baronial administrations. . . . In France, the loss caused to the royal treasury by the increasing resort to the church's officials for authenticating deeds and contracts, led not only to competition but also to restriction, and royalty sought to establish the principle that this right of authentication by seal was a royal prerogative."

1920, Professor *T. F. Tout*, The King's Seal, and Sealing as the Means of Authentication (Chapters in the Administrative History of Mediaeval England, c. IV, p. 121): "The multiplication of royal seals towards the end of the twelfth century was a result of the process, completed somewhat earlier, by which the apposition of a seal became for the greater part of Western Europe the most general method of proving the authenticity of all public and private documents. As far as England and Northern France were concerned, the only way by which a man could validate his documentary acts was by sealing them with his seal.

"Elsewhere, notably in Italy, there was an alternative to sealing, in the public notarial act, drawn up in rigidly formal fashion by a class of scribes styled notaries. These notaries, sometimes also called 'tabelliones,' practised on their own account, but were authorized by emperors, popes, princes, bishops and towns in such a fashion that their acts were recognized as possessing a public and official character. Organized in corporations with a strong professional tradition, and a systematic training, the Italian notaries drew up most private and many public acts, which owed their validity partly to the technical form of their composition, and partly to the characteristic 'signa,' or signs manual, affixed by each authorized notary with his own hand. These marks constituted evidence of authenticity corresponding to the seal of the north and west. During the period with which we are dealing, the notarial system was extended from Italy to southern France, where it became very firmly established. At an early date notaries began to win a footing in some parts of northern France, notably in the county of Flanders, and even in Normandy. Somewhat later, also, they began to establish themselves in Germany. But their influence in these regions remained restricted.

"When in the thirteenth century northern France began to establish its authority over the south, sealed acts tended to replace notarial acts. Along with Gothic architecture, the 'langue d'oil', customary law, and monarchical centralisation, so authentication by seal was to the 'langue d'oc' one of the many signs of the preponderance of northern influence. The triumph of the seal over the notarial act came out decidedly in the edict of 1291, in which Philip the Fair ordered that no credit was henceforth to be given to any notarial instrument unless it received the additional validation of an authentic seal. In England, also, the notarial system began to appear in the course of the thirteenth century, but it was always there an exotic and foreign custom, and notaries were never much employed, save in the drawing up of certain restricted types of diplomatic documents, and some sorts of private contracts of international character which perforce had to assume a form in which they were acceptable in lands where notarial acts were more usual than sealed documents.

"As a result, England ever remained emphatically a land of seals, the employment of which became essential to the authentication of all public and private documents. It followed from this that every person of property or official position, down to the humblest, ultimately felt bound to provide himself with a seal. For us, however, it is more important that the immense development of administrative centralisation during the Angevin period resulted in an enormous demand upon the royal seal, and practically required its reduplication.

"The continuous history of sealing in England only begins on the eve of the Norman conquest. Even on the continent the usage of signet seals, common all over the Roman empire, almost died away in the dark ages, when documents were validated by signatures, crosses of witnesses, and other marks of 'signa.' Even when seals were employed, as they were by the Merovingian sovereigns, the subscription of the 'referendarius,' who composed the document, seems to have been regarded as better evidence of its validity than its seal. The revival of seals was, like the revival of the notarial system, a symptom of the Carolingian renascence, and by the tenth and eleventh centuries not only sovereigns, but every great baron and bishop, had his seal. The seals of the Carolingian monarchs differ in type from the signet rings of antiquity. Following their fashion, lay and ecclesiastical magnates, who had from early times had signets of their own, began also to use seals which were different in type from the ancient signet. During the eleventh century the use of seals as evidence of the validity of documents became so common that they gradually pushed into the background, and ultimately made obsolete, in all western lands, the earlier methods of attesting the authenticity of documents."

1867, Mr. *J. C. Jeaffreson*, A Book about Lawyers, I, 21: "The Great Seal. In days when writing was an art almost entirely confined to religious persons, sealing was a far more important and efficacious means of testifying the genuineness of documents than it is at present. . . . In the feudal ages any needy clerk who had turned his attention to caligraphy could have perpetrated forgeries in perfect confidence that they would endure the scrutiny of the most accurate and skilful of living readers. But the necessity for sealing placed almost insuperable obstacles in the way of those who were best qualified and most desirous to triumph over right by fictitious deeds. It was no easy matter to procure seals of any kind; it was very difficult to obtain for dishonest ends the temporary possession of well-known seals. . . . . Great barons, ecclesiastical dignitaries, secular and religious corporations, had distinctive seals at an early date; but they were confided to the care of trusty keepers, and were guarded with jealousy. When an official seal was used, its keeper brought it with reverential care from its customary place of concealment, and it was not applied to any document without satisfactory cause shown why its sanction was required. An obscure tamperer with parchments could not hope to lay his hands on one of these important seals. If he procured an impression of a respected seal, he could not obtain a fac-simile of the original. Seal-engraving was an art in which there were but few adepts; and the artists were for the most part men to whom no rogue would dare propose the hazardous task of counterfeiting an official device. . . . The forger of deeds in older time had not overcome all difficulties, when he had surreptitiously obtained a seal. The mere act of sealing was by no means the simple matter that it is now-a-days. To place the seal on fit labels rightly placed, and in all respects to make the fictitious deed an accurate imitation of the intended deeds to which the particular seal of a particular great man was applied, were no trifling feats of dexterity, ere scriveners had congregated into fraternities and law-stationers had been called into existence. To get a supply of suitable wax was an undertaking by no means easy in accomplishment. Sealing-wax was not to be bought by the pound or stick in every street of feudal London. 'Cire d'Espagne' — sealing-wax akin to the bright vermilion compound now in use — was not invented till the middle of the sixteenth century. William Howe assures his readers that 'the earliest letter known to have been sealed with it was written from London August 3, 1554, to Heingrave Philip Francis von Daun, by his agent in England, Gerrand Herman,' and long after that date the manufacture of sealing-wax was a secret known to com-

paratively few persons. In feudal England there were divers adhesive compounds used for sealing. Every keeper of an official seal had his own recipe for wax. Sometimes the wax was white; sometimes it was yellow; occasionally it was tinged with vegetable dyes; most frequently it was a mess bearing much resemblance to the dirt-pies of little children. But its combination was a mystery to the vulgar; and no man could safely counterfeit a sealing-impression who had not at command a stock of a particular sealing-earth or paste or wax. Eyes powerless to detect the falsity of a forger's handwriting could see at a glance whether his wax was of the right colour. Moreover, this practice of attesting private deeds by public or well-known seals gave to transactions a publicity which was the most valuable sort of attestation. A simple knight could not obtain the impression of his feudal chieftain's seal without a formal request, and a full statement of the business in hand. The wealthy burgher, who obtained permission to affix a municipal seal to a private parchment, proclaimed the transaction which occasioned the request. The thriving freeholder who was allowed the use of his lord's graven device had first sought for the privilege openly. 'Quia sigillum meum plurimis est incognitum' were the words introduced into the clause of attestation; and the words show that publicity was his object. And to attain that object the seal was pressed in open court, in the presence of many witnesses."

2. *The Rule.* The rule has been phrased in various terms. But the same policy, in modern times, has always served as the foundation of it, namely, the great inconvenience, amounting sometimes to practical impossibility, of furnishing any further evidence, as well as the slight danger of forgery in such cases. The kinds of seals to which this rule applies have never been the subject of uniform judicial enumeration; but the general principle has been universally accepted:

1726, Chief Baron GILBERT, Evidence, 19: "Here the distinction is to be made between seals of public and seals of private credit; for seals of public credit are full evidence in themselves, without any oath made; but seals of private credit are no evidence but by an oath concurring to their credibility. Seals of public credit are the seals of the king, and of the public courts of justice, time out of mind."

1816, GOULD, J., in *Griswold* v. *Pitcairn*, 2 Conn. 85, 90: "In the proof of foreign documents, there must from the nature and necessity of the case be some ultimate limit, beyond which no solemnity of authentication can be required. And the public national seal of a Kingdom or sovereign State is, by the common consent and usage of civilized communities, the highest evidence and the most solemn sanction of authenticity, in relation to proceedings either diplomatic or judicial, that is known in the intercourse of nations. . . . But there is no evidence, it is said, that the seal was affixed by a proper officer. Assuming the seal to be genuine, that fact must of course be presumed, unless the contrary is shown. For any higher evidence of the fact, appearing upon the face of the record, than the seal itself imports, is impossible, and to require extrinsic evidence of it would be to subvert the rule itself that a national seal is the highest proof of authenticity."

3. *The Theory.* What is the significance of this rule? What is it that Courts actually do, evidentially, when they accept such seals with no further evidence? The theory of the matter has been so overlaid with conventional phrases about "judicial notice" and "presumptions," and is so closely related in practice to the Hearsay exception admitting official statements (*ante*, §§ 1630–1638), that it is necessary at the outset to analyze the precise nature of the process:

When a document bearing a purporting official seal — a notary's certificate

of protest, for example — is offered in court, the acceptance of it for the offered purpose involves the assumption of four things, namely, (1) that there is an official of that name, (2) that this is genuinely his seal's impression, (3) that this seal-impression was affixed by him; and, furthermore, (4) that it is allowable to receive his hearsay official statement as testimony to the fact stated by him. The first three of these elements go to the matter of the genuineness of the document; that is to say, the document purports to be that of J. S., a notary, asserting a certain fact, and the net result of the first three elements is that we accept as a fact that J. S., a notary, did make this written assertion. If there were a signature only, with no seal, and the document was similarly accepted, the second and third elements would merge (*i. e.* the purporting J. S.'s signature is accepted as written by him); it is only in the case of a seal that they are distinct (for it might be his seal's impression and yet another person might have affixed it). Thus it is that the second and third elements are always judicially united, *i. e.* any presumption of genuineness, whenever made, covers both elements; there is no case presuming the seal's impression to have been of his seal but not affixed by him, nor 'vice versa.' Hence, in effect, the situation, for seal or signature alike, is reducible to the following elements and is so in practice treated: (1) that there is an *official of that name;* (2) (3) that this document was genuinely *executed by him.* Now the remaining element (4), that this hearsay statement of his is admissible, is obviously concerned with the Hearsay rule only, and may therefore be dismissed as having no present relation with the principle of Authentication. There remain therefore to be considered the first three (or two) elements above noted.

Of these, the elements (2) (3) are obviously pure questions of Authentication; *i. e.* the acceptance of the document signifies that we have somehow assumed that this document was genuinely executed by one J. S. What is the true nature of this process? Is it the process of Judicial Notice? It is sometimes dealt with in these terms.[3] But this seems clearly unsound. In the first place, the principle of judicial notice, *i. e.* of assuming the truth of an allegation without any evidence (*post,* § 2565), rests on the conceded notoriety of the fact alleged, as being too well known to need evidence; obviously this can never be the case with the specific act of executing a particular document. In the next place, the doctrine of judicial notice applies as soon as the allegation is made, without any evidence whatsoever in its support (*post,* § 2565); it would follow that, as soon as the party alleged by counsel that J. S. had executed an alleged document, the Court must notice that as a fact, and no production of a purporting seal or signature would be necessary; but this is obviously not the practice. Furthermore, it is conceivable that a Court might judicially know what the design of a certain public seal was, but this would not of itself enable the judge to declare that

[3] For example: "The seal of a notary public is judicially taken notice of" (Greenleaf, Evidence, § 5).

the specific impression offered in court was genuine or forged. It would seem, then, that what is actually done is not done by virtue of any doctrine of judicial notice. It is, on the contrary, a simple instance of declaring that sufficient evidence of genuineness exists, on the general principle of Authentication (*ante*, § 2130). The fact constituting this sufficient evidence is the existence upon the document of an impression or writing purporting to be the official seal or signature; and this may well serve as sufficient evidence because the forgery of the seal or signature would be a crime, and detection would be fairly easy and certain.[4]

On the other hand, the element (1) noted above, namely, that the J. S. who has thus genuinely executed this document *is* the official that he purports to be, is a real result of the principle of Judicial Notice. This element is wholly separable from that of the authenticity of the paper. Whether by witnesses or otherwise we prove the paper genuine, we arrive simply at the fact that a certain J. S. executed this as an official paper. It is thus genuinely all that it purports to be, and its authentication is complete. But that J. S. is the officer that he claims to be is still a fact external to the document, and must be reached by some other principle than that of authentication. That principle is here judicial notice. So far as the incumbent of any office is judicially noticed, when his acts are in question, this notice of him when he executes a document is merely an application of the general principle to a particular variety of act; the same thing would have been done had his act not been a documentary one. It seems, then, that the satisfaction of this element (1) — namely, that J. S., the purporting notary, is actually the lawful incumbent of that office — is reached by a true application of the principle of judicial notice.[5]

What we find, then, is this general rule: *So far as a particular seal or signature is held to admit a document, the purporting impression of a specific seal or signature evidences the document as genuinely executed by the purporting person, and his official character is assumed without evidence.*

§ 2162. **Same: Mode of Authenticating when Genuineness is not Presumed; Certificates of Attestation; Statutes presuming Genuineness.** Suppose, now, that the seal or signature is one of a kind which does not sufficiently evidence its own genuineness, — a tax-collector in another State, for example. Its genuineness therefore remains to be proved by testimony. The inconvenience of producing a witness who of his knowledge can testify to the genuineness of the seal or signature would be intolerable, and a resort to hearsay testimony in the shape of official statements has long been accepted as proper. But who is the appropriate officer to make such statements? Naturally, at common law, that chief officer at the source of executive power, who knows what persons have been appointed and what are their seals or

[4] This true process is seen in the forms of expression of the statutes cited *post*, § 2162, from England, Colorado, Florida, United States, West Virginia, and Wisconsin.

[5] It follows that a Court might presume the document genuine, and still decline to notice the official character of the writer, — as in some of the cases cited *post*, § 2165.

signatures. He must also know their duties, and be authorized to certify to these, because the document, being usually offered as a hearsay statement, must appear to have been made under an official duty (*ante*, § 1633). Finally, the certifying officer must himself have such a seal as is presumed genuine, because otherwise the process of certifying would only have to be repeated anew. Such a seal, at common law, would practically be the seal of State only (*post*, § 2163), for foreign officers at least, though for domestic officers it might be one of a lower grade.

It will thus be seen that at common law, whenever a seal not itself presumed genuine is to be authenticated otherwise than by testimony on the stand, *two distinct rules are always involved* in practice, namely, the *admissibility of the hearsay certifying officer's statement*, and the *genuineness of his own purporting certificate*. In other words, two questions must be answered: (1) *What higher officer is authorized to certify* to the authority of the lower office, the official incumbency of the person exercising it, and the genuineness of the document purporting to be executed by him; and (2) *Is this higher officer's purporting certificate to be presumed genuine?* [1] The one requirement might be satisfied without the other; for example, (1) a judge of court might be a proper officer to certify to a clerk's authority to copy the records and to the genuineness of a copy purporting to be by the clerk; but (2) the judge's own purporting certificate might not be sufficiently authenticated by his seal if from a foreign State, though it might be if from the domestic jurisdiction; and resort might further be required to the seal of State, which would be presumed genuine. Now it is the Authentication principle which answers the second question, and the Hearsay exception which answers the first question. Practically, it is natural to answer the second one first, because this narrows the scope of the search for the answer to the first; for example, in the above instance, if the law declines to presume genuine any foreign seal less than the seal of State, it is at once obvious that such a seal must ultimately be obtained, and the remaining question is merely as to the proper intervening certifying officers.

In dealing, therefore, with the principle of Authentication by official seal, it is impossible to treat of all the elements practically required to exist for the admissibility of a hearsay official document, because the Authentication principle merely tells what seals will be presumed genuine; and if the seal in question is of an inferior grade, resort must be had to the Hearsay exception to determine what officer has authority to certify to it; and the rules of that exception are so distinct and detailed that it would be impracticable to deal with them apart from their general principle.

Statutes have copiously intervened to liberalize the rules of the common law on both subjects.[2] But the matter is further complicated by the cir-

§ 2162. [1] This distinction has already been examined, *ante*, § 1679; but it seems desirable to note it again here.

[2] For convenience, all statutes of this double composite character have been placed under the Hearsay exception (*ante*, §§ 1680–1682),

cumstance that most statutes dealing with the subject provide in the same section for both sets of rules, *i. e.* they not only declare the higher officers

classified according as they deal with judicial records or other kinds of official documents. Under the present head are placed only such statutes as deal exclusively with the principle of Authentication, *i. e.* expressly and merely declaring that *certain kinds of seals shall be presumed genuine*, and therefore shall need no further certifying of genuineness; as well as judicial rulings interpreting these statutes. Besides the following statutes, which deal with seals only, or seals and signatures, may be consulted those dealing with *signatures* only, collected *post*, § 2167:

ENGLAND: 1845, St. 8 & 9 Vict. c. 113, § 1 ("Whereas it is provided by many statutes . . . [that various official documents, corporation proceedings, certified copies, etc., shall be admissible when duly authenticated], and whereas the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine, and it is expedient to facilitate the admission in evidence of such and the like documents," it is enacted that whenever any certificate, official document, etc., is receivable in evidence, it shall be admitted if it "purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts . . . , without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence"); § 2 (judicial notice to be taken of the signatures of the judges of the superior courts at Westminster); 1851, St. 14 & 15 Vict. c. 99, § 7 (presuming genuine the purporting seal or signature and official character of a person certifying a copy of a foreign statute, judgment, etc.); § 11 (every document admissible in England, Wales, or Ireland, "without proof of the seal or stamp or signature authenticating the same," or of the official character of the signer, shall equally be received in the colonies); St. 1905, 5 Edw. VII, c. 15, § 52 (trade-marks; documents purporting to be orders of the Board of Trade and to be under Board seal or to be signed by its secretary, etc., admissible without further proof); 1918, Permanent Trustee Co. *v.* Fels, A. C. 879 (marriage-settlement in Poland; cited more fully *ante*, § 1681).

CANADA: *Dominion:* Rev. St. 1906, c. 139, § 94 (affidavits, etc., before the Supreme Court; purporting seal and signature of commissioner, notary public, judge or court, etc., etc., is presumed genuine); c. 144, § 146 (winding-up of companies; seal of any court, etc., on any document, to be judicially noticed); Order-in-Council, Aug. 5, 1916, issued under War Measures Act 1914 (desertion; enlistment paper and officer's certificate of absence; purporting signatures suffice); *Alberta:* St. 1910, 2d sess., Evidence Act, c. 3, § 41 (like Ont. Rev. St. 1897, c. 76, § 39); *British Columbia:* Rev. St. 1911, c. 78, § 44, c. 127, § 147 (land registrar; quoted *ante*, § 1651); c. 78, § 57 (depositions; like Ont. R. S. c. 76, § 39); *Manitoba:* Rev. St. 1913, c. 65, § 53 (documents certifying the making of an affidavit, and purporting to bear the signature or seal of the commissioner, judge, notary, consul, or other authorized officer as specified, shall be received without proof of signature, seal, or official character); c. 171, § 90 (title-registrar's certificate of registration, admitted "without proof of the signature or seal"); § 81 (purporting certificate of registered land-title, presumed genuine, "without proof of signature or seal"); c. 47, § 5 (purporting Surrogate Court's seal need not be proved); *New Brunswick:* Consol. St. 1903, c. 62, § 7 (commissioners to administer oaths, etc., out of the Province; affidavit, etc., admissible without proof of signature or seal); § 3 (commissioner's acts in taking affidavits must be authenticated in the same manner as for conveyances); c. 127, § 59 (all documents admissible by the law of England without proof of seal, stamp, signature, or official character, are here also thus admissible); *Newfoundland:* Consol. St. 1916, c. 83, Ord. 34, Rule 6 (judicial notice is to be taken of the seal or signature of any judge, notary, consul, etc., authorized to take examinations, etc., in other British possessions or in foreign States); c. 91, § 17 (like N. Br. Consol. St. 1877, c. 127, § 59, substituting "British" for "England"); *Nova Scotia:* Rev. St. 1900, c. 163, § 18 (like N. Br. Consol. St. c. 127, § 59, adding Ireland); § 48 (any document purporting to bear the seal or signature of one of the specified officials authorized to administer and certify to oaths in or out of the Province shall be admitted without proof of the seal, signature, or official character); Rules of Court 1900, Ord. 59, Rule 2 ("all copies, certificates and other documents, appearing to be sealed with a seal of the Court, used by the prothonotary, shall be presumed to be authenticated"); *Ontario:* Rev. St. 1914, c. 76, § 39 (signature of a judge, or signature and seal of a foreign notary, corporation, mayor, chief magistrate, governor, judge, consul, vice-consul, or consular agent, appended to a certificate of administration of an oath, etc., shall be admitted "without proof of such signature or seal and signature" or official character); *Prince Edward Isl.* St. 1889, § 25 (the seal of any foreign State and the certificate of a Secretary thereof, when offered to prove "the existence and compe-

authorized to certify to other official documents, but also declare how far up the process must be continued before reaching a seal which will be presumed

tency" of any court, officer, or clergyman, "shall be deemed authentic without proof thereof," whether it be an independent State or one of a federation); § 38 (affidavits taken without the province; the officer's "signature and official character" must be certified by a notary public under seal or a judge or clerk of a court of record or superior or county court under court seal, or the mayor of a city or town and the corporate seal, or a British consul under seal; the certifier's signature and seal taken for genuine without other proof); *Quebec:* 1915, Chiniquy *v.* Begin, 24 D. L. R. 687 (certified copy, by clerk of the county court, of a record of marriage at Kankakee, Ill., admitted without proof of seal or signature, under Que. Civ. C. Art. 1220; also a copy of a register of baptisms at St. Anne, Ill., signed by the pastor); *Saskatchewan:* Rev. St. 1920, c. 44, § 44 (like Ont. Rev. St. c. 76, § 39); *Yukon:* Consol. Ord. 1914, c. 30, § 18 (like Eng. St. 14 & 15 Vict. c. 99, § 11, omitting "Wales"); ib. § 46 (like N. Sc. Rev. St. 1900, c. 163, § 48).

UNITED STATES: *Federal:* Rev. St. 1878, § 1750, Code § 3304 (on a prosecution for perjury, any document "purporting to have affixed, impressed, or subscribed thereto or thereon the seal and signature of the officer administering or taking the same in testimony thereof, shall be admitted in evidence without proof of any such seal or signature being genuine or of the official character of such person"); Code 1919, § 683 (original application for entry in general land-office; cited more fully *ante*, § 1680); § 1387 (comptroller of the currency; his certificates, etc., "sealed with his seal of office," admissible); §§ 8071, 8122 (U. S. shipping commissioner; "any instrument, either printed or written, purporting to be the official act of a shipping commissioner and purporting to be under the seal and signature of such shipping commissioner," admissible); *Arizona:* Rev. St. 1913, Civ. C. §§ 1765, 1766 (certificates of administration of oath by certain officers without the State, with seal affixed, may be read in evidence); *Arkansas:* Dig. 1919, § 6594 (seal of commissioner of State lands, to be sufficient authentication); §§ 4212–4214 (official character of a judicial officer in a State or Territory of U. S., to be authenticated by certificate under seal of clerk of a court of record in county; of officer without the U. S., by seal of State of the government; within this State, need not be authenticated); § 667 ("every paper executed" by State bank commissioner under official seal "shall be received in evidence"); *California:* C. C. P. 1872, § 1875 ("Courts take judicial notice of . . . the seals of all the Courts of this State and of the United States; the accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this State and of the United States; the existence, title, national flag, and seal of every State or Sovereign recognized by the executive power of the United States; the seals of Courts of admiralty and maritime jurisdiction, and of notaries public"); § 2015 (judge's certificate of affidavit in a foreign country or domestic State, attested by clerk of Court under its seal, to be admissible); *Colorado:* Comp. L. 1921, § 4331 (State industrial commission; Courts shall take judicial notice of its seal); *Delaware:* Rev. St. 1915, § 579 (State insurance commissioner's instruments under official seal, admissible); *Florida:* G. S. 1919, § 2726 ("the impression of the seal" of the commissioner of agriculture on a deed or contract purporting to have been made by trustees of an internal improvement fund, or members of a board of education, or the commissioner of agriculture, "shall entitle the same to be received in evidence"); § 3798 (similar, for deeds of certain State lands, under seal of State department of agriculture, attested by the commissioner); *Georgia:* Rev. C. 1910, § 5734 (seals of admiralty and maritime Courts "of the world" and of States of the Union and departments of the U. S. Government, are noticed without proof); *Hawaii:* Rev. L. 1915, § 2593 (quoted *ante*, § 1680); § 2605 ("Whenever by any law now or hereafter to be in force, any certificate, official or public document or documents, or proceeding of any corporation, or joint stock, or other company, or any certified copy of any document or by-laws, entry in any register or other book, or of any other proceeding shall be receivable in evidence of any particulars, the same shall respectively be admitted in evidence in any court, and by any person having by law or by consent of parties authority to hear, receive and examine evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone as required, or impressed with a stamp, and signed as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record or document could have been received in evidence"); *Idaho:* Comp. St. 1919, § 7933 (like Cal. C. C. P., § 1875); *Illinois:* Rev. St. 1874, c. 101, § 6 (certificate under official seal of an officer out of the State is 'prima facie' evidence of his authority to administer oaths); *Iowa:* Code 1897, § 4679, Comp. Code § 7386 (signature and seal of an officer author-

genuine. For example, they may provide that a city tax-collector's certified copy may be authenticated by the mayor's certificate under city seal, and this in turn by the seal of the governor, or chancellor, or secretary of State under seal of State. Every such statute includes a declaration of the Authentication rule as well as of the rule of the Hearsay exception.

§ 2163. **Seal of State.** The purporting *seal of State* of a *foreign nation*, by universal concession, at common law, is presumed genuine;[1] though it is difficult to say how far the rule would apply to a colony or other dependency having a seal of its own.[2]

The principle is in the United States conceded to apply to the purporting seal of the *United States* and of any *one of the States*,[3] and presumably also

ized to take depositions and affidavits are presumed genuine; Comp. Code § 6375 (notarial seal on extra-State certificate is 'prima facie' evidence that recital on seal conforms to extra-State law); § 7411 (made of authenticating a deposition); *Louisiana:* Rev. L. 1897, § 1436 (attestation and seal of an American consul, consul-general, vice-consul, or commercial agent, to be proof "that it emanated from said consul," etc.); *Maryland:* Ann. Code 1914, Art. 68, § 3 (administration of an oath, provable by "a certificate under the notarial seal of a notary public"); *Michigan:* Comp. L. 1915, § 588 (land-office seal, to be "'prima facie' evidence of the due execution" of a certificate of purchase, etc.); *Mississippi:* Code 1906, § 1973, Hem. § 1633 ("any certificate, attestation, or authentication purporting to have been made or given by any person as an officer of any State or of the United States, shall be 'prima facie' evidence of the official character of such person"); Code § 590, Hem. § 350 (same for certificate of officer administering oath out of the State); *Montana:* Rev. C. 1921, § 10532 (like Cal. C. C. P. § 1875); *Nevada:* Rev. L. 1912, § 3213 (impression of seal of the State land-office "shall impart verity" to papers "emanating from such office"); *New Hampshire:* Pub. St. 1891, c. 167, § 8 (insurance commissioner; no further proof than his official seal "shall be required to authenticate" his official certificates, etc.); *New York:* C. P. A. 1920, § 330 (certified copies by officers having seals must bear the seal, except for use in the same Court); *North Dakota:* Comp. L. 1913, § 299 (State land commissioner's seal is "'prima facie' evidence of the due execution" of any contract or other paper of the State board of university and school lands); § 7902 (authentication of depositions by seal); *Oregon:* Laws 1920, § 729 (like Cal. C. C. P. § 1875); *Pennsylvania:* St. 1840, Apr. 3, § 1, Dig. 1920, § 8685, Evid. (certificate under seal of an acknowledgment of a recordable deed, etc., is receivable "without requiring proof of the said seal," whether made within or without the State); St. 1869, Mar. 12, Dig. § 13000, Just. Peace (public seal of certain aldermen, presumed genuine); St. 1901, May 21, Dig. § 8731 (official character of an officer taking an acknowledgment in Cuba, Porto Rico, or the Philippines, to be evidenced by his official seal, and if he has none, by the certificate of a U. S. officer there who has one); *Tennessee:* Shannon's Code 1916, § 3273 *a*19 (State bank superintendent's seal; any paper executed by him under seal is admissible); *Utah:* Comp. L. 1917, § 7076 (like Cal. C. C. P. § 1875); *Virginia:* Code 1919, §§ 6197–8 (certified copy or certificate purporting to be by a clerk of court and certain public officers in the State and in West Virginia, receivable without proof of seal or signature or official character); *West Virginia:* Code 1914, c. 130, § 5 (certified copy or certificate purporting to be signed or sealed by court clerk, Secretary of State, treasurer, auditor, or county surveyor, need not be proved genuine); c. 130, § 31, as amended by St. 1917, c. 48 (affidavit before an officer of "another State or country," authenticated by official seal, or if he have none by "some officer of the same State or country under his official seal"); *Wisconsin:* Stats. 1919, § 4149 (quoted *ante*, § 1680).

§ 2163. [1] *Eng.* 1724, Anon., 9 Mod. 66 (exemplification of a judgment "under the common seal of the States" of Holland, admitted); 1825, Yrisarri *v.* Clement, 2 C. & P. 223, 225 (foreign State seal will be assumed genuine, if the State is one recognized); *U. S.* 1816, Griswold *v.* Pitcairn, 2 Conn. 85, 89 (foreign judgment under great seal of Denmark, received); 1851, Watson *v.* Walker, 23 N. H. 471, 496 (seal of England, presumed genuine).

[2] 1803, Henry *v.* Adey, 3 East 221 (seal of the island of Granada, not accepted); 1807, Buchanan *v.* Rucker, 1 Camp. 63 (judgment sealed with the seal of the island of Tobago; the judge's handwriting proved).

[3] Besides the following rulings, many statutes, cited *ante*, §§ 2162, 1680–1682, expressly recognize this rule: *Fed.* 1826, U. S. *v.* Amedy, 11 Wheat. 392, 407 (exemplification of incorporation-act of Massachusetts, under

to that of a Territory organized by Congress. But whether the Court, for the purposes of substantive law, will treat as an independent State any community not already so treated or *recognized by the Executive* is a different question (*post*, § 2566).[4]

§ 2164. **Seal of Court; Clerk's Signature; Justice of the Peace.** (1) At common law, it would seem that the purporting seal of *no court* of a *foreign State* would be presumed genuine,[1] except that of a court of *admiralty;*[2] the distinction depending, not perhaps upon any greater ease of detecting a forgery of the latter, but rather upon the general and peculiar position of an admiralty court as applying the common law of nations and therefore as partaking by comity of the nature of a domestic court. Statutes have, however, in some jurisdictions amplified the scope of the common-law rule (*ante*, §§ 2162, 1681).

(2) The purporting seal of any court *within the jurisdiction* is presumed to be genuine.[3] Under this principle, in the United States, would be included

purporting signature of Secretary of State and seal of State, received, as under Fed. St. 1790, quoted *ante*, § 1680; the seal of State suffices under the statute, and "the annexation [of it] must, in the absence of all contrary evidence, always be presumed to be by a person having the custody thereof and competent authority to do the act"); *Cal.* 1859, Yount *v.* Howell, 14 Cal. 465, 467 (U. S. land-patent, with signature of President and seal of U. S., received as genuine); *Ga.* 1897, Reppard *v.* Warren, 103 Ga. 198, 29 S. E. 817 (an original grant and plat from a State, authenticated by the State seal; unless the seal is in such a condition that its genuineness cannot be determined); *Ill.* 1894, Chicago & A. R. Co. *v.* Keegan, 152 Ill. 413, 416, 39 N. E. 33 (Governor's deed, under seal of State; genuineness presumed); *Me.* 1841, Robinson *v.* Gilman, 7 Shepl. 299 (seal of Massachusetts, affixed to the exemplification of a law, presumed genuine); *N. H.* 1831, State *v.* Carr, 5 N. H. 367, 370 (seal of Connecticut); *Va.* 1831, Ex parte Povall, 2 Leigh 816, 817 (record of a domestic State, sealed by a judge of probate, attested by the Governor under State seal, received).

[4] *Eng.* 1825, Yrissari *v.* Clement, 2 C. & P. 223 (cited *supra*); *U. S.* 1818, U. S. *v.* Palmer, 3 Wheat. 610, 635, 642 (seal of a foreign government not acknowledged by our Executive does not prove itself).

§ 2164. [1] *Eng.* 1803, Henry *v.* Adey, 3 East 221 (judgment of the island of Grenada; "the Court held the nonsuit proper for defect of the proof of the seal; they said that they could not take judicial notice that the seal affixed was the seal of the island, which was necessary to be shown"); *U. S.* 1807, De Sobry *v.* De Laistre, 2 H. & J. Md. 191, 218 (seal of a foreign court does not prove itself); 1852, Pickard *v.* Bailey, 26 N. H. 152, 167 (seal of a Canadian Court required to be proved); 1808, Delafield *v.* Hand, 3 Johns. N. Y. 310, 314 (exemplification of a French judgment not assumed authentic. "Of what notoriety can such a seal be in this country? The extension of the rule insisted on by the plaintiff would open the avenues of fraud and imposition"). *Contra, semble: Can.* 1853, Cyr *v.* Sanfacon, 2 All. N. Br. 641 (purporting seal of Supreme Court of Maine, shown to be used by the District Court, received); 1863, Junkin *v.* Davis, 22 U. C. Q. B. 369 (judgment in the tenth judicial district of California; exemplification under seal purporting to be of the fourteenth district, excluded).

If the court is proved to have *no seal*, then some other seal that can be presumed genuine is necessary: 1827, Packard *v.* Hill, 7 Cow. N. Y. 434, 443, app. 2 Wend. 411, 5 Cow. N. Y. 375, 384 (copy of a Spanish judgment at Havana, signed by the clerk who kept the records, the seal of the Royal College of Notaries being used and the Court having no seal, held sufficiently authenticated).

[2] 1713, Stennil *v.* Brown, 10 Mod. 108 (copy of a sentence of a French admiralty court, "subscribed by the officer of the court," excluded; the seal of the court required); 1819, Thompson *v.* Stewart, 3 Conn. 171, 181 (seal of any Admiralty Court, but not an ordinary foreign Court, presumed genuine).

Not decided: 1811, Gardere *v.* Ins. Co., 7 Johns. N. Y. 514, 519 (certified copy of a British Vice-Admiralty judgment, with Court seal; whether assumed authentic, left undecided).

Contra: 1826, Catlett *v.* Ins. Co., 1 Paine C. C. 594, 613 (judgment of Vice-Admiralty Court of Isle of France; seal does not prove itself).

[3] *Eng.* 1658, Olive *v.* Gwin, 2 Sid. 145 ("We ought to take notice of a seal created generally by act of Parliament"; noticing the seal of a Welsh court); 1702, Green *v.* Waller, 2 Ld.

the seal of a *Federal* court,[4] as well as that of the court of *another State* of the United States.[5] That this was the accepted common-law rule is of particular importance in view of the varying forms of authentication sanctioned by many statutes, especially the Federal statute (*ante*, §§ 2162, 1681); because, since such statutes merely sanction the form specified therein and do not forbid the use of any form otherwise receivable (*ante*, § 1681), a document may be sufficiently authenticated by judicial seal on common-law principles, though it may not satisfy the statute.

(3) The *signature* of the *clerk alone*, without the court seal, has been by most Courts regarded as sufficient to be presumed genuine, for any certified copy of the records of a court *within the jurisdiction*,[6] though not of a court

Raym. 891, 893 (judgment of an admiralty court, proved by exemplification under its seal); 1844, Bailey *v.* Bidwell, 13 M. & W. 73 (petition in bankruptcy, sealed by the Court, sufficiently authenticated); *U. S.* 1831, Com. *v.* Phillips, 11 Pick. Mass. 28, 30 (to a certified copy of a record in Middlesex Co. under the purporting clerk's hand and court seal, it was objected that the judges of another court had "no means of knowing whether he is the clerk lawfully appointed or a usurper of the office, and that the seal of the court without a clerk's signature is insufficient, for a stranger might get possession of the seal"; held, that a certified copy "by the clerk of such court [of record] under the seal thereof" was sufficient "in every other judicial tribunal of the Commonwealth"); 1869, Kingman *v.* Cowles, 103 Mass. 283 ("The clerk is the proper custodian of the records; and the seal of the Court attached to his certificate attests the possession of the record in the person who certifies; records so certified are always received as true 'prima facie,' without proof in the first instance of their genuineness or of the official character of the person who assumes to act in such official capacity").

[4] 1838, Womack *v.* Dearman, 7 Port. Ala. 513, 516 (seal of a Federal court in a Territory, presumed genuine); 1866, Adams *v.* Way, 33 Conn. 419, 429 (seals of a Federal court assumed genuine, and not treated as foreign); 1850, Williams *v.* Wilkes, 14 Pa. St. 228 (seal of U. S. circuit court proves itself, as that of a domestic court).

[5] 1903, Ford *v.* Nesmith, 117 Ga. 210, 43 S. E. 483 (but here under statute); 1841, Steamboat Thames *v.* Erskine, 7 Mo. 213, 217 (certificate of clerk under court seal to deposition without the State, sufficient); 1833, Dunlap *v.* Waldo, 6 N. H. 450 (signature of a county clerk under county seal in New York, assumed genuine, as being the seal of the county court).

Contra, semble: 1857, Behn *v.* Young, 21 Ga. 207, 213 (jurat of affidavit by purporting judge of probate in Florida, not recognized without proof of official character).

It may be added that the effect of a judicial seal, with respect to raising the presumption of genuineness for the document, is to be distinguished from its effect as importing also an *order by the Court to the clerk to make the specific copy* sealed; for only by such a specific order, in the English rule, does a certified copy of a judicial record become admissible as a hearsay statement (*ante*, § 1681). The distinction is neatly brought out in the case of Henry *v.* Adey, *supra*, note 1, where a judgment of the island of Grenada was offered; the judge's signature to a certified copy of the clerk was proved by testimony on the stand, so that the document was sufficiently authenticated; but the clerk's copy was inadmissible unless he had authority to make it, and the order to do so could be implied only from the seal; thus, a seal was necessary, and the purporting seal of a foreign court does not authenticate itself and hence had to be otherwise proved.

[6] 1888, Ponder *v.* Shumans, 80 Ga. 505, 507, 5 S. E. 502 (signature of a probate clerk, assumed genuine); 1918, Ames Evening Times *v.* Ames Weekly Tribune, 183 Ia. 1188, 168 N. W. 106 (affidavit sworn before clerk of court); 1816, Rowland *v.* M'Gee, 4 Bibb Ky. 439 (certified copy of a will by a clerk of a court without seal, receivable because of the general authority in clerks to certify such copies); 1901, Marsee *v.* Middlesborough T. L. Co., — Ky. —, 65 S. W. 118 (county court clerk's signature and name will be noticed as genuine; "though generally Courts will require" some evidence of identification, — whatever this inconsistent pronouncement may mean); 1897, Com. *v.* Kennedy, 170 Mass. 18, N. E. 782 (certified copy of a domestic record need not be under seal); 1854, Major *v.* State, 2 Sneed Tenn. 11, 15, *semble* (certified transcript by a clerk of a domestic court, authenticated without official or court seal, admissible).

Contra, semble: 1853, Thomasson *v.* Driskell, 13 Ga. 253 (clerk's certificate from a local court, not under court or private seal, excluded); 1843, Chambers *v.* People, 5 Ill. 351, 355 (clerk of another court's signature without

without the jurisdiction.[7] This question could not arise at common law in England, because it was there maintained that the clerk had no authority, merely from his office, to certify copies, and the court seal was necessary as importing a specific order to him (*ante*, § 1681); but in the United States it was early conceded that the clerk had by his office an implied authority to furnish copies, and thus the only question remaining was that of presuming his signature genuine, and this was not a difficult step to take for clerks of domestic courts. By statute, however, this rule has been sometimes amplified (*ante*, §§ 1681, 2162, *post*, § 2167).

(4) The case of a *judge's signature* alone seems rarely to have arisen for express decision at common law.[8] It may be supposed that, wherever it could have any legal force, it would be presumed genuine for the judge of a domestic court.

(5) A *justice of the peace's court* is not at common law a court of record, nor does it possess a seal. It has therefore generally been held that a purporting signature of a justice of the peace, even within the jurisdiction, is not presumed genuine; though the practice is not uniform.[9] A justice's authority to take a *deposition* is always a creature of statute (*ante*, §§ 1376, 1330–1382), and hence the mode of authenticating his certificate must be sought thereunder. On these points the statutes are elsewhere referred to in dealing with the authentication of the taking of depositions (*ante*, § 1676), and with the admissibility of copies of judicial records in general (*ante*, § 1681) and official signatures (*post*, § 2167). The presumption of *official character* (as where the certificate is merely signed "J. P.") is elsewhere noticed (*post*, § 2168); and the authentication of a justice's *docket* by proving its *custody* has already been considered (*ante*, § 2158).

seal, but the signature proved; official character must be shown; same for a justice of the peace of another county).

Not clear: 1830, Burton *v.* Pettibone, 5 Yerg. Tenn. 443 (copy of a record; the clerk's name need not be signed at the end, if it appears somewhere, at least when the Court seal is added).

Compare the cases cited *post*, § 2578 (judicial notice).

[7] 1825, Allen *v.* Thaxter, 1 Blackf. Ind. 399 (clerk of probate court of another State; certificate without court, seal not presumed genuine).

[8] 1796, Alston *v.* Taylor, 1 Hayw. N. C. 381, 395 (Virginia record-copy certified by clerk and presiding justice without seal; excluded; "where there is no seal it should be certified there was none").

[9] *Ala.* 1874, Holleman *v.* De Nyse, 51 Ala. 95, 100 (one signing as J. P. during a rebel occupation, presumed to have held over in the office); *Ark.* 1876, Jenkins *v.* Tobin, 31 Ark. 306, 308 (justice of the peace in another State; certificate of deposition does not prove itself); 1888, Moore *v.* State, 51 Ark. 130, 10 S. W. 22 (justice's docket entry does not prove itself); *Cal.* 1860, Ede *v.* Johnson, 15 Cal. 53, 57 (justice of the peace's certificate of acknowledgment, assumed genuine); *Ind.* 1837, Doughton *v.* Tillay, 4 Blackf. 433, 434 (signature of justice's jurat in adjoining State, not assumed genuine; nor his authority to administer oaths assumed); 1892, Bridges *v.* Branam, 133 Ind. 488, 496, 33 N. E. 271 (justice's record not presumed genuine); *Ky.* 1811, Talbott *v.* Bradford, 2 Bibb 316 (justice of the peace within the Commonwealth; office presumed); 1815, Geohegan *v.* Eckles, 4 Bibb 5 (copy of a record attested by a justice, not admissible except under seal of court, or except when acting under statutory authority to give copies); 1847, Winston *v.* Gwathmey, 8 B. Monr. 19, 20 (justice of the peace of another State, authenticable by the clerk of the county court or of the city hustings court); *Mass.* 1855, Com. *v.* Dowring, 4 Gray 29, 30 (no seal required, for a copy of a record coming up from a justice of the peace); *N. Car.* 1826, Hamilton *v.* Wright, 4 Hawks 283, 285 (official character and signature must be authenticated).

Compare the cases cited *post*, § 2578 (judicial notice).

§ 2165. **Seal of Notary.** (1) Other than a foreign seal of State (*ante*, § 2163), the only foreign official seal presumed at common law to be genuine, by universal concession, was that of a *notary*. The notary's hearsay certificate was at common law not admissible except for the single purpose of evidencing the fact of demand and non-payment (protest) of a foreign bill of exchange (*ante*, §§ 1675, 1676); but, so far as it was thus receivable, the purporting notary's seal sufficiently evidenced its genuineness. The reason for the exceptional recognition of this officer's seal was undoubtedly the necessity for prompt action in fixing the liabilities accruing on commercial paper, and the consequent impossibility of securing further certification of the document under the seal of State; this consideration sufficing to override the risk of forgery:

1699, *Anon*, 12 Mod. 234: "Plaintiff, to show a protest, produced an instrument attested by a notary public; and though it was insisted on that he should prove this instrument, or at least give some account how he came by it, HOLT, [L. C. J.] ruled it not to be necessary; for that, he said, would destroy commerce and public transactions of this nature."

1821, TILGHMAN, C. J., in *Browne* v. *Philadelphia Bank*, 6 S. & R. 484: "Public convenience requires that a certificate under a seal of this kind shall be 'prima facie' evidence, without proving that the person who used it and signed the certificate was a notary commissioned by the governor. It ought to be presumed, till the contrary be proved, that no man would dare to assume the office without proper authority."

1840, MURPHY, J., in *Waldron* v. *Turpin*, 15 La. 552, 555: "The Courts of one State can have or be presumed to have no more knowledge of the signature and capacity of the public officers of another State than of any other foreign country. To the above rule there exists an exception as regards notarial protests of foreign bills of exchange. It has been introduced in aid of commerce, founded wholly upon the custom of merchants and public convenience; it has been acknowledged and maintained by the Courts of law, and such protests receive credit everywhere without any auxiliary evidence. . . . The importance and almost universal use of bills of exchange as the means of remittances from one country to another; the great commercial facilities they have been found to offer; and the delay and trouble of procuring evidence from distant places are among the grounds upon which this exception has grown up."

This rule seems never to have been disputed, and its universal concession has caused the precedents to be few in number.[1] The only question seems

§ 2165. [1] *Eng.* 1725, Walrond *v.* Van Moses, 8 Mod. 322 (notary in Holland); 1802, Hutcheon *v.* Mannington, 6 Ves. Jr. 823 (certificates of a notary public and a magistrate in an East Indian colony; Eldon, L. C., observed "that a notary public by the law of nations has credit everywhere; the Court therefore will give credit to him; but that it was necessary to prove that the other person was a magistrate"); 1816, Kinnaird *v.* Saltoun, 1 Madd. 227 (French notarial seal, without magisterial authentication, but certified by a London notary, received).

U. S. 1840, Dunn *v.* Adams, 1 Ala. 527, 530; 1877, Hart *v.* Ross, 57 id. 518, 520; 1795, Spegail *v.* Perkins, 2 Root 274; 1901, Barber *v.* International Co., 73 Conn. 587, 48 Atl. 758 (a foreign notary's seal is judicially noticed, "whenever it is used to attest a document which by the usages of nations may be so attested"; yet the opinion afterwards inconsistently refers to a consular certificate as evidencing the notary's official character); Ind. Burns' Ann. St. 1914, § 476 (a certificate purporting to be under seal of a notary in the U. S. is presumptive evidence of official character); Ia. Code 1897, § 4624, Rev. C. § 7331; 1903, Metcalfe *v.* Carr, 133 Mich. 123, 94 N. W. 734 (sworn probate petition; notary's seal is presumed genuine in negotiable instruments only); 1846, McGarr *v.* Lloyd, 3 Pa. St. 474, 482.

Compare the statutes cited *ante*, §§ 1675, 1680, dealing with the history and admissibility of notaries' certificates.

to have been as to the *form* of the seal; and this was properly held to depend upon the law of the place of purporting execution.[2]

(2) It followed that the purporting notary's certificate, *lacking the seal*, could not be presumed genuine, and his signature and official character must be otherwise evidenced;[3] except that, by local statute or practice, a domestic notary's signature alone has sometimes been presumed genuine.[4] The lack of the seal, therefore, merely deprives the offering party of the advantage of thereby evidencing genuineness. The purporting seal is not essential, as a matter of technical form (unless by some doctrine of substantive law or by express statute[5]), to the acceptance of the certificate as a hearsay official statement; it is merely a circumstance which enables the document's genuineness to be presumed:[6]

[2] 1837, Tickner *v.* Roberts, 11 La. 14 (seal of Alabama notary, not in the form there prescribed, held insufficient to authenticate); 1838, Carter *v.* Bailey, 9 N. H. 558, 568; 1842, Bank of Rochester *v.* Gray, 2 Hill N.Y. 227, 230.

[3] *Ala.* 1894, Alabama Nat'l Bank *v.* Chattanooga D. & S. Co., 106 Ala. 663, 665, 18 So. 74 (Tennessee notary's certificate of affidavit, lacking seal, rejected); 1894, Bayonne K. Co. *v.* Umbenhauer, 107 Ala. 496, 499, 18 So. 175 (same, for Georgia affidavit); 1902, Hayes *v.* Bank, 132 Ala. 354, 31 So. 464 (certificate of acknowledgment by a "chancery clerk" in another State, styling himself "'ex officio' notary public," but lacking a notarial seal, excluded); *Conn.* 1871, Ashcraft *v.* Chapman, 38 Conn. 230 (notary's appointment and signature, proved by certificate of Secretary of State, the seal not being attached to the notarial certificate); *Ind.* 1888, Pape *v.* Wright, 116 Ind. 508, 19 N. E. 462 (New York notary's jurat to a deposition, lacking seal, authenticated by certificate of the county clerk under seal); *Ia.* 1859, Rindskoff *v.* Malone, 9 Ia. 540 (seal necessary); *Mo.* 1906, Gharst *v.* St. Louis T. Co., 115 Mo. App. 403, 91 S. W. 453 (Michigan notary's jurat to a deposition, lacking a seal, authenticated by certificate of the circuit court clerk under seal); *Nebr.* 1907, Sheridan Co. *v.* McKinney, 79 Nebr. 220, 112 N.W. 329 (a certificate lacking the date of expiration of the notary's commission as required by Comp. St. 1903, c. 73, § 14, is not self-authenticating; the recital of date being equally essential with the seal itself); *N.H.* 1838, Carter *v.* Bailey, 9 N.H. 558, 567 (if a foreign certificate of protest lacks the notarial seal, the official character of the notary, and the law stating the due manner of making, must be expressly evidenced); *N. Y.* 1842, Bank of Rochester *v.* Gray, 2 Hill N. Y. 227, 230 (foreign notary's protest without seal, not receivable "as evidence 'per se'").

The modes of *certifying* to it by some *other official* may be ascertained from the common-law principle (*ante*, § 2163), and from the statutes collected *ante*, §§ 1675, 1680.

The *recital*, by the officer certifying a copy, that the notary's certificate of acknowledgment bore seal, may suffice, even though the notarial certificate as copied *shows no seal*: 1912, Davis *v.* Seybold, C. C. A., 195 Fed. 402 (collecting authorities).

[4] *Alabama:* 1876, Harrison *v.* Simons, 55 Ala. 510, 516 (notary acting under local statute as justice of the peace; presumed genuine without seal); *Illinois:* 1850, Stout *v.* Slattery, 12 Ill. 162, 164 (domestic notary's jurat to an affidavit, bearing the signature only; genuineness and official character presumed, within the same county); 1850, Rowley *v.* Berrian, 12 Ill. 198, 200 (similar; *semble* otherwise for a notary out of the State, by statute); 1859, Dyer *v.* Flint, 21 Ill. 80, 82 (similar); 1888, Schaefer *v.* Kienzel, 123 Ill. 430, 434, 15 N. E. 164 (Stout *v.* Slattery "still applies," in spite of the subsequent statutes about notaries' seals, c. 101, § 6, and c. 99, § 7, relating to oaths and notaries; here, a jurat of an affidavit of non-residence); 1896, Hertig *v.* People, 159 Ill. 237, 42 N. E. 879 (preceding case approved; here, a jurat to an affidavit of publication).

For the statute in this State as to the mode of certifying a *foreign notary's seal*, see *ante*, § 1676, and *infra*, § 2165, note 9.

[5] See examples in the following cases: 1873, Donegan *v.* Wood, 49 Ala. 242; 1848, Fund Com'rs *v.* Glass, 17 Oh. 542 (certificate of a deed's acknowledgment).

[6] 1841, Lambeth *v.* Caldwell, 1 Rob. La. 61 (domestic notary's protest without seal, received; "we are acquainted with no law requiring notaries to furnish themselves with seals; . . . this practice [of using them] is certainly laudable, but nothing authorizes us to say that the absence of a seal on the certificate of a notary can prevent its admission when offered in evidence"); 1842, Bank of Rochester *v.* Gray, 2 Hill N. Y. 227, 229 ("There is considerable doubt whether any seal is strictly requisite, — whether the notary's signature alone, that being proved in the ordinary way, would not be enough anywhere"); 1904, Kinkade *v.* Howard, 18 S. D. 60, 99 N. W. 91 (lack of a notary's seal to a certificate of deposi-

1850, TREAT, C. J., in *Stout* v. *Slattery*, 12 Ill. 162 (admitting a notarial jurat to a petition for 'certiorari,' the seal lacking): "The failure of the notary to annex his official seal to the jurat does not vitiate the proceedings based on the petition. Within the county of Adams the addition of the seal was not necessary [even to evidence genuineness]. If the petition was to be used in another county, the seal of the notary, or some other evidence of his official character, would be indispensable. . . . The power to administer oaths is expressly conferred by statute and is not one of the incidents of office. The affixing of the notarial seal is not essential to the validity of his acts, except in cases where it is required by some rule of the common law or some provision of the statute. In all other cases his official acts, at least within the State, are none the less valid because they are not authenticated by his notarial seal. The only difference relates to the proof of his authority. If the act is not evidenced by the seal of the notary, his signature and official character must be established by some other legitimate evidence. . . . It is only when it becomes necessary to *prove* the making of the oath that the seal of the officer or some competent evidence of his authority must be produced."

(3) But by *statute* the power of a notary has been everywhere enlarged, not only as to certifying other kinds of commercial paper and other acts relating to it (*ante*, § 1675), but also as to certifying acknowledgments of deeds, swearing of oaths, taking of depositions, and the like (*ante*, § 1676). Suppose now that a notary's certificate is offered, purporting to represent his act under this *broader statutory authority*, and to bear his seal, does the purporting seal sufficiently evidence the genuineness of such a document and of his official character as notary? It has been by some Courts contended that, so soon as the common-law scope of his functions is exceeded, his seal loses the benefit of the common-law presumption:

1816, MATTHEWS, J., in *Las Caygas* v. *Larionda's Syndics*, 4 Mart. La. 283 (admitting a power of attorney executed before a Trinidad notary, bearing a seal, and certified as to his office by three other officers): "In cases of protested bills of exchange, the certificate of a notary public, authenticated by his seal of office, is received in courts of the United States as full proof of the drawer's refusal to accept or pay the bill. . . . This is perhaps allowed for the benefit of commerce, as the delay necessary to obtain authenticity to the protest under the great seal of the nation may be considered as incompatible with the dispatch required in aid of fair and profitable commerce. . . . Whatever may be the reason for it, it is in such case an established rule of evidence; but we believe it does not extend further. Are we in the present case bound to require other testimony of the truth and genuineness of the instrument under consideration than that which it bears on its face? . . . We are of opinion that the only thing necessary to give the certified copy of the power of attorney (the subject of the present contestation) the same credit in our courts of judicature which it would have in those of Spain, is proof that the person who certifies it is a notary public of the place from whence it comes, and that the certificate attached to it is really his. This evidence might be had by a certificate under the national seal, attesting that the person certifying the instrument is a notary public for Trinidad by the king's appointment; and if the dispute had any relation to his right to fulfil the duties of the office claimed by him, it would be the best evidence admissible in the case. But for all other purposes it appears to us that proof of his being a notary 'de facto' is sufficient; this may be made by witnesses, as well as by a certificate under the national seal. Therefore, if the witness offered by the plaintiff knows and will prove the person who authenti-

tion does not exclude it, "if the authority of the officer is otherwise sufficiently shown," and if no express statutory requirement prescribes the contrary); also Ashcraft *v.* Chapman, Conn., Pape *v.* Wright, Ind., Gharst *v.* St. Louis T. Co., Mo., cited *supra*, note 3.

cates the power of attorney to be a notary public in the city of Trinidad, and that from a knowledge of his handwriting it is he who certifies and signs it, he ought to be received to verify these facts."

This reasoning is supported by the consideration that the peculiar necessity for speedy informality in commercial matters does not apply to certificates of oaths, acknowledgments, and the like; and a few Courts have accepted this result.[7] But even the argument just named does not apply to a notary's certificates of notice to indorsers or of protest of promissory notes or inland bills, each of which has been made receivable by statute (*ante*, § 1675) and each of which equally needs speedy informality. Moreover, it is notable that the common law raised the presumption of genuineness to the full extent that the notary's certificate was admissible at all; and it might be argued that in the same way the presumption should be kept parallel with the statutory extension of authority. This view has apparently been favored by the majority of Courts.[8] Though it creates an anomaly, in contrast to other official certificates, it is perhaps preferable as maintaining uniformity for notaries' certificates in general.

(4) In such a case — the notary purporting to act under an enlarged statutory authority — may we go even further, and from the purporting seal presume not only the document's genuineness and the notary's incumbency, but also his *authority to do the act* in question and to certify it?[9] To

[7] *Eng.* 1854, Haggitt *v.* Iniff, 5 DeG. M. & G. 910 (affidavit with a jurat of a New York notary, certified to be a notary by the British consul under seal, received); 1858, Re Earl's Trust, 4 K. & J. 300 (affidavit with a jurat of a notary of Ohio under seal; not allowed to be filed as genuinely made by a person who was notary public); 1869, Re Davis' Trusts, L. R. 8 Eq. 98 (jurat of affidavit, purporting to be by a notary of West Virginia, with seal and signature; signature required to be otherwise evidenced); *U. S.* 1816, Las Caygas *v.* Larionda's Syndics, 4 Mart. La. 283 (quoted *supra*); 1821, Ferrers *v.* Bcsel, 10 Mart. La. 35; 1907, Washburn L. Co. *v.* Swanby, 131 Wis. 1, 110 N. W. 806 (notary's certificate under seal to a deed without the State; additional evidence not required, under statute).

[8] *Cal.* 1906, Pardee *v.* Schanzlin, 3 Cal. App. 597, 86 Pac. 812 (notary's certificate of jurat of affidavit, under seal, presumed genuine); *D. C.* 1876, Denmead *v.* Maack, 2 McArth. 475 (affidavit's jurat, by a purporting Maryland notary, presumed genuine, the law of Maryland authorizing notaries to administer oaths); *Md.* 1846, Barry *v.* Crowley, 4 Gill 194, 202 (by statute the notary's certificate was made evidence of demand and notice, thus enlarging the common law; held, that "no proof is necessary that the seal attached is the notary's seal or that the handwriting signed thereto is the proper signature of the notary"); *N. C.* 1912, Nicholson *v.* Eureka Lumber Co., 160 N. C. 33, 75 S. E. 730 (Texas notary's seal with signature "Delia Sadler," held to presume lawfulness of appointment of a woman); *Pa.* 1821, Browne *v.* Phila. Bank, 6 S. & R. 484 (certificate of notice to indorser, under statute, with notarial seal; presumed genuine); *P. R.* 1914, Bigelow *v.* Porto Rico Planters' Co., 7 P. R. Fed. 386 (Porto Rican notary's signature and seal verifying a pleading, admissible without further proof); *Va.* Code 1919, § 5680 (notary's seal presumed genuine for certificate of protest to domestic instrument); *Wis.* 1882, Hayes *v.* Frey, 54 Wis. 503, 521, 11 N. W. 695 (deposition certified by a notary out of the State; by statute, no other certificate to his official character is needed); 1883, Sleep *v.* Heymann, 57 id. 495, 504, 16 N. W. 17 (same).

[9] *Illinois:* St. 1861, p. 79, Rev. St. 1874, c. 101, § 6 (oath required to be taken out of the State may be administered by any officer there authorized; and "his certificate under his official seal shall be received as 'prima facie' evidence without further proof of his authority to administer oaths"); 1895, Ferris *v.* Commercial Nat'l Bank, 158 Ill. 237, 241, 41 N. E. 1118 (Canadian notary's jurat to an affidavit; excluded because no recital of authority was included); 1899, Trevor *v.* Colgate, 181 Ill. 129, 54 N. E. 909 (notary's seal out of the State, under this statute, does not raise a presumption of authority to administer oath; the jurat must

presume this would be apparently to transgress the general principle of the common law that no official, merely from his office, has an implied authority to furnish certificates (*ante*, § 1674), and that somehow a specific duty must first appear (*ante*, § 1632). If a foreign statute creates such a specific enlarged duty, it would seem that the statute must be expressly shown, not presumed; and it has been already noted (*ante*, § 2161) that the elements of genuineness and of official character are distinct from that of authority to make official statements. No doubt a statute may expressly create a presumption of such authority from the purporting seal; but otherwise it could not be conceded.

§ 2166. **Sundry Official Seals.** Other than the seal of State, of an admiralty court, and a notary, and, by extension in the United States, as already seen (*ante*, § 2164), the seal of a Federal court or that of a State of the Union, no purporting seal of a *foreign officer* will be apparently presumed genuine at common law; though occasionally the purporting eal of the Secretary of State or of Foreign Affairs seems to have been treated on the same footing as the seal of State.[1] But the purporting seals of *local State officers* and, within a county, of local *county officers*, would probably always be presumed genuine;[2] and the seal of a *municipal corporation* should probably receive similar treatment. The purporting seals of *Federal officers*, or at least, where the office is subdivided into districts (as the land-office), the officer of a Federal district lying within the State jurisdiction, will be treated like the seals of domestic officers.[3] Apparently the purporting seals of officers of

recite expressly the possession of such authority); 1900, Desnoyers Shoe Co. *v.* First Nat'l Bank, 188 Ill. 312, 58 N. E. 994 (jurat of affidavit of proof of execution of warrants of attorney, by a Missouri notary; foregoing cases approved); 1901, Bell *v.* Farwell, 189 Ill. 414, 59 N. E. 955 (foregoing cases approved); 1906, Williams *v.* Williams, 221 Ill. 541, 77, N. E. 928 (Virginia justice's jurat, with clerk of circuit court's certificate of justice's authority, admitted); 1907, Bishop *v.* Hilliard, 227 Ill. 382, 81 N. E. 403; 1913, Tompkins *v.* Tompkins, 257 Ill. 557, 100 N. E. 965 (holding that the foregoing line of decisions does not apply to a notary's authority to administer the oath in a deposition taken by commission; the court's appointment by commission is an implied authority to administer the oath; hence the foreign statutory authority need not be shown nor presumed); *Indiana:* 1920, Kwiatkowski *v.* Putzhaven, 189 Ind. 119, 126 N. E. 3 (notary's recital of authority to take oaths of witnesses in a foreign state, held sufficient, under Burns' Stats. 1914, § 476, cited *supra*, n. 1).

§ 2166. [1] 1820, Garvey *v.* Hibbert, 1 Jac. & W. 180 (a paper made at Washington, authenticated by a notary with his seal and signature, with a certificate from the clerk of the circuit court and the court seal, and a certificate of the secretary of State with his official seal, received; an affidavit verified by a mayor of Georgetown, D. C., with nothing further, rejected); 1850, Beach *v.* Workman, 20 N. H. 379 (Canadian customs officer's commission; purporting private seal of the Governor, not presumed genuine); 1876, Evans *v.* Lee, 11 Nev. 194, 197 (sealed certificate of acknowledgment by vice-consul-general in London, assumed genuine); 1867, Stanglein *v.* State, 17 Oh. St. 453, 462 (certificate of marriage-record copy, under the Bavarian seal of foreign affairs, admitted as genuine).

A *tax-receipt* must be authenticated under general rules: 1904, Chastang *v.* Chastang, 141 Ala. 451, 37 So. 799.

[2] This may at any rate be implied from some of the rulings cited *post*, § 2167, and from most of the statutes cited *ante*, § 1680, and is expressly covered by many of the statutes cited *ante*, § 2162.

When such a statute gives authority for admitting official certificates under seal, the implication is that they will not be presumed genuine without it: 1896, Noanes *v.* State, 143 Ind. 299, 42 N. E. 609 (the custodian of a record was authorized by statute to certify to copies by affixing his seal, and the seal was omitted; excluded).

[3] 1910, Wynne *v.* U. S., 217 U. S. 234, 30 Sup. 447 (certified copy of a vessel's enrolment,

another State of the Union would not be assimilated to those of domestic officers. The precise state of the law in a given jurisdiction, however, will depend greatly on the statutory enlargements (*ante*, §§ 2162, 1680).

§ 2167. **Official Signatures.** The seal is an emblem more difficult to forge and more likely to be generally known than the signature. Hence, so far as affects the presumption of genuineness, at common law, it would seem that, for officers possessing a seal (and this circumstance can be ascertained from statute), nothing less than the seal should ordinarily suffice, even for a domestic officer.[1] Nevertheless, there has been no steady adherence to such a rule, if there is one; and by statute so many express sanctions have been given to the presumption of genuineness based on signature alone that it seems impossible to venture any generalizations as to the state of the law. The cases of a judge's signature, a court-clerk's, a justice-of-the-peace's, and a notary's, have been already noticed (*ante*, §§ 2164, 2165). It may also be supposed, as a matter of principle, that if any purporting signatures of domestic officers are to be presumed genuine, such recognition should properly include also those of commissioners of deeds appointed by the local Executive to act abroad,[2] and of the officers of a prior sovereignty in the same territory.[3]

The express statutes allowing recognition of signatures, of officers both within and without the jurisdiction, are now numerous.[4] The judicial rulings

purporting to be signed and sealed by a deputy collector of customs, assumed genuine on the facts); 1842, Nicks *v.* Rector, 4 Ark. 251, 277 (seal of U. S. land-office commissioner proves itself); 1850, McNamee *v.* U. S., 11 Ark. 148, 150 (U. S. treasury auditor's seal proves itself); 1863, Gallup *v.* Armstrong, 22 Cal. 480 (government patent, authenticated by official seal, admitted); 1883, Wilcox *v.* Jackson, 109 Ill. 261, 264, *semble* (exemplification, under land-office seal, of its records, assumed genuine); 1897, Cooney *v.* Packing Co., 169 Ill. 370, 48 N. E. 406 (certified copy of a government plat under land-office seal and commissioner's certificate, received); 1837, Harris *v.* Doe, 4 Blackf. Ind. 369, 373 (seal of U. S. land-office presumed genuine); 1898, Davis *v.* Watkins, 56 Nebr. 288, 76 N. W. 575 (U. S. acting comptroller's sealed certificate, assumed genuine); 1915, State *v.* Kilmer, 31 N. D. 442, 153 N. W. 1089 (seal of the Federal collector of internal revenue for North and South Dakota, assumed genuine).

§ 2167. [1] Distinguish the question of the *formal validity*, under statute, of a document lacking seal: 1896, Hertig *v.* People, 159 Ill. 237, 42 N. E. 879 (like the next case); 1896, Kimball *v.* People, 160 Ill. 653, 43 N. E. 710 (certificate of publication of notices by the president of a newspaper-company, under Revenue Act, § 186); 1897, Fisk *v.* Hopping, 169 Ill. 105, 48 N. E. 323 (under statute, the certificate of acknowledgment of a commissioner of deeds does not need a seal for its validity, nor to be certified by the secretary of State; the statute is intended merely to cure otherwise defective acknowledgments).

[2] 1897, Fisk *v.* Hopping, 169 Ill. 105, 48 N. E. 323, *semble* (commissioner of deeds for Illinois in another State; his signature to a certificate will be presumed genuine, and also his official character will be noticed; so far as no statute requires more).

[3] 1812, Hayes *v.* Berwick, 2 Mart. La. 138 (prior Spanish governor's signature, presumed genuine without seal); 1817, Jones *v.* Gale, 4 Mart. La. 635 (same).

[4] Not all of the ensuing statutes clearly recognize the signatures alone, but they may be so construed; to these should be added those cited *ante*, § 2162, which sometimes recognize either seal or signature; and with them should be compared the statutes cited *ante*, §§ 1676, 1680, 1681, 1683, which sanction specific modes of proving certain classes of documents:

CANADA: *Dominion:* R. S. 1906, c. 146, §§ 979, 982 (certificates of trial and of conviction; in certain cases no proof of signature or official character is needed); R. S. 1906, c. 145, Evid. Act, § 29 (like Ont. R. S. c. 76, § 24, for orders signed by the secretary of State of Canada); R. S. 1906, c. 37, §§ 68, 69 (railway board; no proof needed of certain signatures); c. 145, Evid. Act, § 31 (no proof of handwriting or official position is required for copies certified

under this Act); c. 144, § 146 (winding-up of companies, signature of any officer, etc., on any document, to be judicially noticed); *Alberta:* St. 1910, 2d sess., Evidence Act, c. 3, § 27 (like Ont. Rev. St. c. 76, § 24); ib. § 33 (like Ont. Rev. St. c. 76, § 30; applying it to any judge of any Court of Canada, Alberta, and any other province and territory in Canada, and to the Board of Railway Commissioners of Canada); *British Columbia:* Rev. St. 1911, c. 78, § 35 (like Ont. R. S. c. 76, § 24); c. 142, § 92 (similar to Ont. Rev. St. c. 215, § 105); *Manitoba:* Rev. St. 1913, c. 117, § 205 (like Ont. Rev. St. 1914, c. 215, § 105); c. 198, § 10 (like Dom. Evid. Act, § 29, applying to Manitoba only); *New Brunswick:* Consol. St. 1903, c. 127, § 45 (a contract entered into by a foreign corporation within the Province is sufficiently authenticated by proof that it was "duly signed or issued by the accredited agent or officer" of the corporation in the Province); § 75 (an act done "by any mayor or chief magistrate of a city, under the corporate seal" may be authenticated by the seal of the mayor or chief magistrate, "unless the act done be a corporate act"); *Nova Scotia:* Rev. St. 1900, c. 163, § 7 (like Dom. Evid. Act, § 29); § 8 (similar, applying it to the provincial secretary of Nova Scotia); *Ontario:* Rev. St. 1914, c. 76, § 24 (order signed by the secretary of State of Canada and "purporting to be written by command of the Governor-General shall be received in evidence as the order of the Governor-General"; so also for the provincial secretary and the Lieutenant Governor); § 30 (judicial notice shall be taken of the signatures of any judge in Canada, and of members of the Canada railway board, Ontario railway board, etc.); § 31 ("no proof shall be required of the handwriting or official position of any person certifying "to the truth of a copy, etc., of a proclamation, etc., or to any matter within his authority to certify); § 41 (copies of depositions shall be received "without proof of the signature" of the officer); c. 215, § 105 a document purporting to be a valid liquor license; its signature "shall 'prima facie' be taken to be genuine"); *Prince Edward Isl.* St. 1889, § 32 (like Ont. R. S. c. 76, § 24); § 53 (contracts of foreign corporations; like N. Br. Consol. St. c. 127, § 45); St. 1907, 7 Edw. VII, c. 3, § 25 (liquor offences; prior conviction provable by magistrate's certificate, without proof of his signature or official character); *Saskatchewan:* Rev. St. 1920, c. 44, Evidence Act, §§ 8, 9 (like Ont. Rev. St. 1897, c. 76, § 24); §§ 13–16 (certain certificates of inspection, etc., issued under the Canada Grain Act, to be received "without any proof of the signature" of the officers); c. 194, § 87 (similar, for provincial analyst's certificate of liquor analysis); c. 44, § 27 (handwriting of official certifying a copy; like Ont. R. S. c. 76, § 31); *Yukon:* Consol. Ord. 1914, c. 30, § 7 (like Dom. Evid. Act, § 29); § 8 (similar, for orders of the Territorial secretary); § 31 (like Ont. R. S. c. 76, § 31).

UNITED STATES: *Alabama:* Code 1907, § 3979 (patents issued by the U. S. or any U. S. State "must be received in evidence without further proof"); *Colorado:* Comp. St. 1921, § 6545 ("any patent" may be admitted "without further proof of its execution"); *Hawaii:* Rev. L. 1915, § 2605 (quoted *ante*, § 2162); § 2621 ("All Courts . . . shall henceforth take judicial notice of the signature of every person who is, or shall be, or shall have been, cabinet minister, judge of the supreme court or of any circuit court, of clerk or deputy clerk of the supreme court or of any circuit court, the commissioners of the board to quiet land titles, or masters in chancery, provided such signature shall be attached or appended to any decree, order, certificate, affidavit or other judicial or official document"); *Indiana:* Burns' Ann. St. 1914, § 9224 (auditor's certified copy of an officer's account, in an action against the latter, presumed genuine); § 5535 (railroad commission; schedules of rates, reports, etc., to be received in evidence "without formal proof being offered as to their authenticity"); *Iowa:* Code 1897, § 4642, Comp. Code § 7350 (signature of an officer to certificates of certified copies authorized by preceding sections of statutes, presumed genuine); *Kansas:* Gen. St. 1915, § 7287 ("the signature of the officer to any certificate or document" admissible as a certified copy or record, presumed genuine); *Kentucky:* Stats. 1915, § 1625 (official signature of any officer of this State, the U. S., or any U. S. State or Territory, to be noticed); *Massachusetts:* Gen. L. 1920, c. 159, § 10 (State department of public utilities; seal shall be judicially noticed); *Minnesota:* Gen. St. 1913, § 6907 (registration of title; owner's attested or acknowledged receipt for a duplicate in place of a lost original certificate; the signature shall be presumed genuine); *Nebraska:* Rev. St. 1921, § 8918 (signature of an officer certifying a copy or giving a certificate of the tenor of office records, presumed genuine); *North Carolina:* Con. St. 1919, § 265 (when records are destroyed, certified copies by the proper officer are admissible—"though without the seal of office"); *Oklahoma:* Comp. St. 1921, § 652 (signature of any officer to a certificate or document made admissible by foregoing sections, to be presumed genuine); *Virginia:* Code 1919, § 6194 (notice to be taken of the signature of the Governor or a domestic judge to any official or judicial document); §§ 6225–6 (certification of deposition in the State by the officer taking it; no proof of signature is necessary; certification of a deposition taken out of the State is receivable if authenticated by the officer's seal if he has one, and if not, by "some officer of the same State or country" under seal, except when taken by a justice in another domestic State or by an agreed person, when no seal or proof of signature is necessary); § 6197 (seal or signature of any officer certify-

are not in harmony, and many of them rest, either explicitly or silently, upon local statutes.[5]

ing copies specified, as quoted *ante*, §§ 1680, 1681, to be admitted without further evidence); *West Virginia:* Code 1914, c. 130, § 33 (signature of the officer taking a deposition in or out of the State need not be proved genuine); § 34 (signature, without seal, of the officer taking a deposition out of the State must be authenticated by "some officer of the same State or country" under official seal).

[5] It is not clear in all of these cases whether the document bore the signature alone, without the seal:

ENGLAND: 1855, Bruce *v.* Nicolopulo, 11 Exch. 129, 133 (on a wall in a town in Turkey in the military occupation of the Russians was a proclamation bearing the printed signature "Gortschakoff"; held sufficient authentication); 1909, Turner's Case, 3 Cr. App. 103, 155, [1910] 1. K. B. 346 (signature of Director of Public Prosecutions, not noticed as genuine; "there happens to be no statute authorizing a Court to take notice of the signature of the Director of Public Prosecutions"); 1909, Waller's Case, 3 Cr. App. 213, 222, [1910] 1 K. B. 364 (similar).

UNITED STATES: *Federal:* 1900, Apache Co. *v.* Barth, 177 U. S. 538, 20 Sup. 718 (papers purporting to be county warrants, and to be signed by certain county officers, not presumed genuine); *Alabama:* 1858, Carhart *v.* Clark, 31 Ala. 396 (certificate of insolvency-claimant's oath, in another State, by a notary, judge of a court of record, or commissioner, proves itself, under statute); 1873, Stewart *v.* Trenier, 49 Ala. 492 (land-office register's copy of a document in his office, under statute, received without seal); 1889, Hawes *v.* State, 88 Ala. 37, 43, 69, 7 So. 302 (the statute for marriage registers applies to registers kept out of the State; *semble*, a certificate of purporting custodian proves itself); *Arkansas:* 1853, Floyd *v.* Ricks, 14 Ark. 286, 293 (U. S. land-register's certificate of location proves itself); 1878, Ferguson *v.* Peden, 33 Ark. 150, 152 (certificate of acknowledgment by a clerk of court of another State proves itself under statute); *California:* 1867, Wetherbee *v.* Dunn, 32 Cal. 106, 108 (signature of county tax-collector, presumed genuine); 1872, Himmelman *v.* Hoadley, 44 Cal. 213, 226 (city deputy-superintendent's signature assumed genuine; the title need not be added where the official character of the document appears); *Connecticut:* 1873, State *v.* Dooris, 40 Conn. 145 (certificate of an Irish marriage registrar, not assumed genuine); 1885, Northrop *v.* Knowles, 52 Conn. 522, 525 (marriage certificate signed by the officiating magistrate; signature treated as genuine without further proof); 1889, State *v.* Schweitzer, 57 Conn. 533; 537, 18 Atl. 787 (same); 1892, Erwin *v.* English, 61 Conn. 502, 507, 23 Atl. 753 (same); *Florida:* 1895, Yellow River R. Co. *v.* Harris, 35 Fla. 385, 17 So. 568 (certificates of title from the land-office receiver); 1921, Cobb *v.* State, 82 Fla. 233, 89 So. 417 (purporting certificate of marriage by deputy city clerk of New York City, lacking seal, excluded); *Georgia:* 1855, Dobbs *v.* Justices, 17 Ga. 624, 629 (attachment; official attestation presumed genuine); *Illinois:* 1853, Buckmaster *v.* Job, 15 Ill. 328 (governor's certificate of justice's official character in another State or Territory must be authenticated by the State seal); 1880, Walcott *v.* Gibbs, 97 Ill. 118 (tax-collector's receipts; whether presumed genuine, undecided); 1902, Morrison *v.* People, 196 Ill. 454, 63 N. E. 989 (stamped signatures of the county civil service commissioners on a certificate, presumed genuine on the facts); *Kentucky:* 1823, Wickliffe *v.* Hill, 3 Litt. 430 (U. S. Treasury auditor's certified copy, not presumed genuine without seal); 1823, Bernard *v.* Lewis, 4 Litt. 148, 151 (jailer's receipt, not presumed genuine); 1878, Loving *v.* Warren Co., 14 Bush 316, 322 (county bonds, bearing signatures of the county clerk and the judge and seal of the county; proof of the first and third, with evidence of part payment, held sufficient to show the genuineness of the second); *Louisiana:* 1859, Grant's Succession, 14 La. An. 795 (justice's certificate subscribed by the secretary of State, excluded); 1906, State *v.* Hopkins, 118 La. 99, 42 So. 660 (deputy coroner's signature, judicially noticed); *Michigan:* 1876, Boyce *v.* Stambaugh, 34 Mich. 348 (U. S. land-patent transcript, admitted); *Mississippi:* 1846, Sessions *v.* Reynolds, 7 Sm. & M. 130, 155 (foreign mayor's certificate, assumed genuine); *Missouri:* 1835, Bryan *v.* Wear, 4 Mo. 106, 110 (U. S. land-surveyor's certificate, assumed genuine without proof of signature); *New Hampshire:* 1858, Ferguson *v.* Clifford, 37 N. H. 85, 95 (certificate of city-clerk to copy of record, not assumed genuine); *New York:* 1840, Thurman *v.* Cameron, 24 Wend. 87, 91 (certificate by a statutory officer of a certificate of acknowledgment of a deed; the official character, signature, and jurisdiction, are to be presumed, as in the case of a notary); *North Carolina:* 1894, State *v.* Behrman, 114 N. C. 797, 805, 18 S. E. 220 (Russian rabbi's certificate, not presumed genuine); *Oklahoma:* 1920, Son-se-gra's Will, 78 Okl. 213, 189 Pac. 865 (secretary and assistant secretary of the Interior; signatures noticed, on an approval of an Indian will); *Pennsylvania:* 1875, American Life Insurance Co. *v.* Rosenagle, 77 Pa. 507, 516 (certificate of a copy of a Baden law; the signer not authenticated on the facts); *Porto Rico:* 1906, People *v.* Gallart, 11 P. R. 361, 367 (revenue offense; Territorial treasurer's certificate of sums paid,

§ 2168. **Official Character and Title to Office.** It has already been noted (*ante*, § 2161) that the acceptance of a purporting official document necessarily assumes, not only that the document was genuinely executed by the person named, but that the person thus claiming to act officially was in fact the lawful official having that character. The latter element is a fact external to the document, and is not included in the process of authentication in the narrow sense; nevertheless it may be equally supplied or assumed, by the principle of judicial notice or otherwise. Certain questions that concern this element, where a document's authentication is involved, may now be examined.

Suppose that a purporting official document by J. S. under seal of office is presumed genuine; there remains to be accounted for the element of J. S. being the officer that he purports in the document to be. This element can be supplied by the principle of judicial notice. On turning to that principle, however, we find (*post*, § 2576) that in strictness it does not always extend below certain supreme or central officers; *i. e.* to accept as true, without any evidence whatever, the allegation that J. S. is the incumbent of a certain office, is a step that may be sanctioned for the President, the Governor, the judges of the highest Court, and a few other officers, but not always for officers below these. For the inferior officers, then, may be required *some* evidence. Upon slight evidence a presumption may be built — for example, so as to dispense with proof of the document of appointment; but there must be at least some evidence, as a foundation for a presumption. Accordingly, for such officers there is a *presumption of office* (*post*, § 2535). This presumption may not be raised in all kinds of issues — for example, not in a direct proceeding to try the title to the office, and perhaps not in some criminal proceedings; but in general it suffices. The official character of the person, then, is reached, either by accepting it without any evidence (judicial notice), or by raising a presumption upon certain evidence. This presumption is usually

without seal, excluded, under Evid. Act, § 69); *Tennessee:* 1825, Wilson *v.* Smith, 5 Yerg. 379, 407 (certificate of a deposition-commissioner will be assumed genuine and lawful only where he appears in it to have that character, etc.); 1827, Bennett *v.* State, Mart. & Y. 133 (the signature of an officer of government appointed by the Legislature proves itself, though not signed officially; here, an attorney-general); 1858, Fancher *v.* De-Montegre, 1 Head 40 (deed register's signature, presumed genuine); 1899, State *v.* Cooper, — Tenn. Ch. —, 53 S. W. 391 (land-register's certificate, presumed genuine); *Texas:* 1920, Langford *v.* Newsom, — Tex. —, 220 S. W. 544 (certified copy of certain Indian records, offered under U. S. St. May 27, 1908, excluded for lack of a seal); *Vermont:* 1870, State *v.* Horn, 43 Vt. 20, 23 (marriage certificate by a justice in another domestic State; signature and office must be proved); 1878, State *v.* Colby, 51 Vt. 291, 294 (certificate of marriage by a minister; signature must be proved); 1879, State *v.* Potter, 52 Vt. 33, 38 (town clerk's copy of a record including a minister's certificate, received, without authenticating the latter); *Virginia:* 1858, Ushers *v.* Pride, 15 Gratt. 190, 195 (auditor's certificate of delinquent tax-land, admitted without proof of execution or official character, though made before the statute).

For the peculiar case of a 'testimonio' in *Texas*, see the following cases: 1851, Paschal *v.* Perez, 7 Tex. 348; 1862, Andrews *v.* Marshall, 26 Tex. 212, 216; 1864, Lambert *v.* Weir, 27 Tex. 359, 363; 1867, Hatchett *v.* Connor, 30 Tex. 104, 109.

Questions of *validity* under rules of substantive law or of procedure — such as the nullity of an indictment by reason of informality in the signing — are not within the present purview.

raised whenever the person is shown to be *acting in the office* under claim of incumbency (*post*, § 2535).

Now, as applied to purporting official documents, this requirement is satisfied by the *document's purporting to be executed by him as an officer;* for this is an acting in the office. By the rule of authentication we have presumed that J. S. did actually sign and seal, purporting to do so as officer of the sort named; upon this act then, the presumption of office may be raised. Thus, for official documents the presumption of Authentication is usually found followed by the presumption of Office, though the latter presumption has an independent and larger existence of its own, and is also applied to official acts other than documentary ones. It merely follows naturally when the genuineness of the document is reached by the presumption of genuineness.

It is convenient to note here the application of the general presumption to purporting officers executing documents. The rules may be summarized as follows:

(1) Where a document *purports to be executed by an officer*, and the genuineness of the seal or signature can be presumed, the official character (or incumbency of office) of the person thus purporting to act as officer will also be presumed. This rule is amply illustrated by implication in the precedents already considered (§§ 2162–2168),[1] and is also expressly involved in some of the foregoing statutes dealing with authentication (*ante*, §§ 2162, 2167). Less frequently, but apparently without any difference of judicial opinion, it has been expressly laid down, whenever the question has been raised.[2]

(2) Where the document does *not sufficiently purport to* be executed as officer, the presumption cannot be raised, because (as above noted) it rests

§ 2168. [1] See, for example, the language of the Court in Kingman *v.* Cowles, cited *ante*, § 2164, and in Brown *v.* Phila. Bank, cited *ante*, § 2165.

[2] ENGLAND: 1813, R. *v.* Verelst, 3 Camp. 432 (Ellenborough, L. C. J.: "It is a general presumption of law that a person acting in a public capacity is duly authorized to do so"; here, the appointment of a surrogate administering an oath under which perjury was charged); 1832, R. *v.* Howard, 1 Moo. & Rob. 187 (commissioner to take affidavits); 1844, Bunbury *v.* Matthews, 1 C. & K. 380 (sheriff); R. *v.* Newton, ib. 469, 480 (commissioner for taking affidavits).

UNITED STATES: *Fed.* 1817, Willink *v.* Miles, 1 Pet. C. C. 429 (justice of the peace taking acknowledgment); 1824, Ruggles *v.* Bucknor, 1 Paine C. C. 358, 362 (officer taking a deposition); *Ala.* 1837, Bullock *v.* Wilson, 5 Port. 338, 339, 342 (receipt of U. S. receiver of public monies); 1837, Kennedy *v.* Dear, 6 Port. 90, 96 (slander by charging perjury; in proving the trial proceedings, the justice's office is provable by this presumption); 1895, Jinwright *v.* Nelson, 105 Ala. 399, 17 So. 91 (consular certificate of corporation-papers); 1904, Leech *v.* Karthaus, 141 Ala. 509, 37 So. 696 (certificate of acknowledgment by "W. S. Wells, Jr., N. P.," held sufficient); *Cal.* 1867, Wetherbee *v.* Dunn, 32 Cal. 106, 108 (tax-collector's deed); 1896, Galvin *v.* Palmer, 113 Cal. 46, 45 Pac. 172 (official character of one certifying to a copy of a map); *Ill.* 1843, Shattuck *v.* People, 5 Ill. 477, 481 (same as the next case); 1844, Livingston *v.* Kettelle, 6 Ill. 116, 119 (domestic justice of the peace certifying an acknowledgment); 1844, Vance *v.* Schuyler, 6 Ill. 160, 163 (commissioner of deeds for a domestic State in a foreign State); 1845, Thompson *v.* Schuyler, 7 Ill. 271, 280 (same); *Ind.* 1905, Old Wayne M. L. Ass'n *v.* McDonough, 164 Ind. 321, 73 N. E. 703 (a certified transcript signed with initials only of the judge's and clerk's Christian names suffices); *Me.* 1835, Cottrill *v.* Myrick, 3 Fairf. 222, 234 (persons making up records as town clerks); *Mich.* 1871, People *v.* Johr, 22 Mich. 461, 464 (official bond indorsed by S. D. B. as deputy attorney-general); *N. H.* 1866, Wells *v.* J. J. Mfg. Co., 47 N. H. 235, 254 (commissioner or notary); *Vt.* 1819, Brush *v.* Cook, Brayt. 89 (deed recorded by a clerk of the town); 1879, State *v.* Potter, 52 Vt. 33, 38 (town clerk's certified copy of a marriage-record; the signer presumed to be clerk of the town where the marriage purported to be solemnized).

upon the fact of an acting in office; hence, if the maker of the document does not clearly purport so to act, the required basis for the presumption is lacking.[3] This question is presented most frequently by documents signed by *initials only* or by some other imperfect designation of the office; here a liberal view of the principle would accept as sufficient any symbol plainly intelligible and unmistakably intended to indicate an official act; yet the tendency to follow statutory words literally, and the necessity of fulfilling forms prescribed by the substantive law, leads often to rejection on technical grounds.[4]

(3) If by seal or signature the *presumption of genuineness is not raised*, then, it has been said, the presumption of official character cannot be raised merely by proving otherwise (through handwriting-witnesses, or the like) the genuineness of the document. In other words, the testimony must be to the effect both "that the person who certifies it is really an officer of the place whence it comes" and that "the certificate is really his."[5] But this consequence is to be regarded as artificial; for there is apparently no reason of policy against raising the presumption of official character as soon as the genuineness of the document is sufficiently evidenced in any way whatever, — whether from the seal by presumption, or otherwise.[6] Yet the usual practice seems clear, from the precedents in the foregoing sections; and the reason is probably that the two presumptions were often not distinctly separated in theory, so that it was unnatural to recognize the one without the other; moreover, a person who could testify to the handwriting of the maker of the document could practically always testify to his official character, so

[3] 1821, Short *v.* Lee, 2 Jac. & W. 464, 466 (book of a tithe-collector, seventy years before; the character of the person as collector, not presumed from his acting as such, because he was acting merely as a private person).

[4] The following rulings serve as illustrations: *Ill.* 1850, Rowley *v.* Berrian, 12 Ill. 198, 200 (certificate signed "N. P.," presumed that of a notary); *Ia.* 1881, Bixby *v.* Carskaddon, 55 Ia. 533, 538, 8 N. W. 354 (certificate signed A. B. "Recorder"; office presumed); *S. C.* 1895, Miller *v.* Miller, 43 S. C. 306, 21 S. E. 254 (certificate of marriage, signed "Michael Naughton, J. P., C. Co., Ga.," excluded); *Tenn.* 1808, Donohoo *v.* Brannon, 1 Overt. 327 (certificate of acknowledgment before "J. M." received, as made by a lawful judge; "an officer ought to state the character in which he does the act; when this is done, the law will presume he possesses the character he assumes"; but express statement is not necessary if the character appears from the document; and as this certificate could not be given except by an official, his official character may be presumed; but an undated certificate by "N. M.," who was temporarily an officer, was rejected); 1809, State *v.* Manley, 1 Overt. 428 (warrant signed by A. B. "J. P.," not received); 1809, Stinson *v.* Russell, 2 Overt. 40 (certificate of deed by A. B., "C. G. C.," for "Clerk of Green Co.," received; "if from the caption and of the writing it appears to be a copy of a record or clearly intended as a certificate of an official act, and there is no reason to believe the person giving the certificate does not possess the character that would enable him to give it, it [the Court] will receive it in evidence"); *Va.* 1825, Sexton *v.* Pickering, 3 Rand. 473 (deed purporting to be by T. deputy of J. S. sheriff; proof of office required); 1845, Pollard *v.* Lively, 2 Gratt. 216, 218 (justice's attestation of a deposition, signed "J. P.," admitted); 1846, M'Neale *v.* Clarke, 3 Gratt. 299, 306 (constable's receipts signed "C.P.C." presumed official); 1848, Wynn *v.* Harman, 5 Gratt. 157, 165 (certified copy of a probated will, signed by J. H., "C.L.C.," sufficient).

Compare the cases cited *ante*, § 2159, as to authentication by *official custody* of documents lacking a purporting official signature, and *ante*, § 2133, as to authentication by proving the *handwriting* of an unsigned private document; and the Illinois cases *ante*, § 2165, notes 4, 9, as to a foreign *notary's jurat*.

[5] In the language cf. Matthews, J., in Las Caygas *v.* Larionda's Syndics, *ante*, § 2165; compare also Stout *v.* Slattery, there quoted.

[6] *Accord:* 1900, State *v.* Clough, 111 Ia. 714, 83 N. W. 727 (on proof of the officer's signature his official character will be presumed).

that no real hardship was involved. In such cases, then, a witness should testify to the general acting of the person as such officer, according to the requirements of the presumption of office as ordinarily enforced (*post*, § 2535).[7]

(4) The presumption of genuineness from *official custody* will equally serve to raise the presumption of official character, if the document purports to be official (*ante*, §§ 2158, 2159).

§ 2169. **Corporate Seal.** A document bearing a purporting corporate seal usually raises two distinct questions, somewhat different from those which arise for a purporting official document. The latter is usually offered as a hearsay statement, admissible under a special exception (*ante*, § 1630), either as a register, a report, or a certificate, to prove some act done or occurrence investigated by the officer; the former is usually a written transaction material as a part of the issue, such as a deed. Accordingly, the two questions for the former are: (1) Is the purporting seal genuine? (2) Was its affixing (*i. e.* the execution of the document) an act duly authorized by the corporation through its members or through its empowered officers? There will thus be incidentally involved some questions of substantive law affecting the validity of corporate acts (such as the implied authority of directors, the capacity of a 'de facto' corporation, and the like); so that a complete examination of the subject would be beyond the present purview. It will be enough here to note the general application of the present presumption to this class of documents.

(1) It seems clear that at common law in England the *purporting seal* of an ordinary private corporation was *not presumed genuine*,[1] although an occasional exception was made for quasi-public corporations:

1800, KINSEY, C. J., in *Den* v. *Vreelandt*, 7 N. J. L. 352, 353 (distinguishing the question whether the corporate seal implies a duly authorized corporate act): "It has been usual to allow deeds and other instruments relating to real estate to go to the jury when authenticated under the seals of the cities of London, Edinburgh, or Dublin; . . . this may be owing to the recognition of these corporations by the Legislature, or to the difficulty of making out the proof of the fact with the necessary precision, or perhaps to the almost utter impossibility of imposing a false or counterfeit for the genuine seal. . . . [But since the reason for recognizing public seals, as given by Gilbert, is their immemorial use and general familiarity,] the seals of private Courts, or of private persons are not evidence of themselves; there must be proof of their credibility. It cannot be presumed that they are universally known, and consequently they must be attested by the oath of some one acquainted with them"; and so the seal of a church corporation was treated as requiring evidence.

[7] Where the office is one whose incumbent will be *judicially noticed* without any evidence, the presumption of genuineness will be of no avail to raise the presumption of office if the purporting incumbent is judicially known not to be in fact the incumbent of the office; 1842, Follain *v.* Lefevre, 3 Rob. La. 13 (judge's signature to a bill of exceptions, "N. Jackson"; excluded, because the fact that no such judge existed was noticed); compare § 2578, *post*.

§ 2169. [1] 1799, Moises *v.* Thornton, 8 T. R. 303 (corporate seal of the Scotch University of St. Andrews, not accepted without proof; per Lawrence, J., the act of affixing need not be evidenced, but only the authenticity of the seal); 1825, Chadwick *v.* Bunning, Ry. & Mo. 306 (common seal of the Apothecaries' Company, not presumed genuine; even though a statute had provided that their seal should be "sufficient proof of the authenticity" of a certificate).

(2) But, the genuineness of the seal once evidenced, the presumption was raised that *due consent and authority* had been given to affix the seal to the document as a corporate act:

1682, *Brounker* v. *Atkyns*, Skinner 2; ejectment against a corporation; "Where there is a common seal put to a deed, that is title enough of itself, without witness to prove it or that the major part of the college be agreed; and if it be said that it was put to by the hand of a stranger, that shall be proved on the side that says so."

With this simple and safe solution, the rulings of the Courts in this country have not always agreed; and as their agreement has sometimes been in part with one or in part with the other of the two answers to the above questions, a variety of rules have come to be recognized in different jurisdictions.[2] Some-

[2] Besides the following cases, compare the citations in Cook on Corporations, 1898, 4th ed., § 722; Thompson on Corporations, 1895, §§ 5070–5084; and some of the Canadian statutes quoted *ante*, § 2162.

CANADA: *Dom.* R. S. 1906, c. 37, § 67 (railway board; documents purporting to have been issued by or for any railway company, receivable against it without further proof).

UNITED STATES: *Alabama:* 1839, Roberts v. Bank, 9 Port. 312, 317 (signature of the president of Alabama State Bank, and official character, presumed, without corporate seal); 1890, Robinson v. Cahalan, 91 Ala. 479, 481, 8 So. 415 (deed by the president under corporate seal, reciting authority; authority presumed); 1905, Collier v. Alexander, 142 Ala. 422, 38 So. 244; St. 1911, No. 52, p. 31, Feb. 20, § 1 (execution by president, etc. presumes authority); 1920, Sovereign Camp W. O. W. v. Burrell, 204 Ala. 210, 85 So. 762 (benefit certificate purporting to be executed by authorized officers under corporate seal; "this is evidence of its due execution"); *California:* 1892, Gutzeil v. Pennie, 95 Cal. 598, 30 Pac. 836 (by the vice-president and secretary with corporate seal; authority presumed); *Colorado:* 1906, Bliss v. Harris, 38 Colo. 72, 87 Pac. 1076 (corporate seal is presumed genuine, and the secretary's authority is presumed); *Georgia:* 1859, Hunter v. Blount, 27 Ga. 76 (diploma of a medical college in another State; existence of the college must be shown); 1877, Parkerson v. Burke, 59 Ga. 100, 101 (medical diploma; same ruling); *Hawaii:* 1907, Bottomley v. Hall, 18 Haw. 412 (deed bearing corporate seal, with signatures of president and secretary, admitted); *Illinois:* 1872, Sawyer v. Cox, 63 Ill. 130, 134 (corporate seal presumed genuine); 1894, Consolidated Coal Co. v. Peers, 150 Ill. 344, 358, 37 N. E. 937 (signed by the president or vice-president, with a seal; the seal presumed corporate, and authority presumed); *Indiana:* 1899, Ellison v. Branstrator, 153 Ind. 146, 54 N. E. 433 (corporate seal affixed by the secretary; authority presumed); 1908, Elkhart H. Co. v. Turner, 170 Ind. 455, 84 N. E. 812 (president's signature to note; authority not presumed); *Iowa:* 1874, Cooper v. Nelson, 38 Ia. 440, 445 (book admitted to be corporate records; secretary's signature of minutes presumed genuine); 1880, Chicago B. & Q. R. Co. v. Lewis, 53 Ia. 101, 4 N. W. 842 (seal presumed genuine, and authority presumed after proof of the officer's signature); 1902, State v. Phillips, 118 Ia. 660, 92 N. W. 876; *Michigan:* 1903, Gould v. Gould & Co., 134 Mich. 515, 96 N. W. 576 (mortgage); Comp. L. 1915, § 12537; *Montana:* 1922, Genzberger v. Adams, — Mont.—, 205 Pac. 658 (bank's assignment of a judgment); *Nebraska:* 1893, Gorder v. Canning Co., 36 Nebr. 548, 552, 54 N. W. 830 (by the president and secretary with corporate seal; authority presumed); *New Jersey:* 1800, Den v. Vreelandt, 3 N. J. L. 352 (quoted *supra*); 1893, Raub v. B. C. Ass., 56 N. J. L. 262, 28 Atl. 384 (cognovit executed by the president; seal not shown to be corporate; no presumption of authority or of seal's genuineness); 1900, Re West Jersey T. Co., 59 N. J. Eq. 63, 45 Atl. 282 (corporate seal and secretary's signature raise presumption of authority); *New York:* 1882, Trustees Canandarqua Academy v. McKechnie, 90 N. Y. 618, 629, *semble* (corporate seal raises presumption of authority); 1903, Quackenboss v. Globe & R. F. Ins. Co., 177 N. Y. 71, 69 N. E. 223; 1914, United Surety Co. v. Meenan, 211 N. Y. 39, 105 N. E. 106 (corporate seal, with signatures of president and secretary; authority presumed); *Ohio:* 1867, Sheehan v. Davis, 17 Oh. St. 571, 580 (corporate seal raises presumption of authority); *Pennsylvania:* 1821, Foster v. Hall, 7 S. & R. 156, 164 (seal of the public corporation of Belfast, not presumed genuine; but genuineness raises a presumption of due affixing by authority); 1821, Leasure v. Hillegas, 7 S. & R. 313, 318 (same rule applied to a seal of the Bank of North America); *South Carolina:* 1859, Josey v. R. Co., 12 Rich. 134, 137 (seal presumed genuine after proof of the officer's signature); *South Dakota:* Rev. Code 1919, § 545; *Texas:* 1921, Emory v. Bailey, — Tex. —, 234 S. W. 660 (deed by railroad company);

times the English rule is accepted in both respects, *i. e.* there is a presumption of authority, but not of genuineness; sometimes it is reversed, and there is a presumption of genuineness but not of authority; sometimes both presumptions are recognized, and sometimes neither. Not uncommonly one or the other presumption is raised, or both, only when the document bears a particular officer's purporting signature; or, again, only when such a signature has been proved genuine; and this effect is given or refused to certain signatures by some Courts and not by others. In some instances, moreover, a signature alone is presumed genuine. That any general consensus exists on any proposition is not apparent.

West Virginia: 1906, Deepwater Council *v.* Renick, 59 W. Va. 343, 53 S. E. 552 (deed under seal, signed by the chief officers; authority presumed).

The *mere recital* of the affixing of the seal does not suffice to evidence the existence of the seal on the document: 1919, Fischer *v.* Lukens, 41 Cal. App. 358, 182 Pac. 967 (certified copy of lost recorded deed, the certificate not mentioning the seal).

BOOK I (*continued*): RULES OF ADMISSIBILITY

PART III: RULES OF EXTRINSIC POLICY

CHAPTER LXXIII.

§ 2175. **General Nature of these Rules.** The rules of Admissibility of evidence, as already pointed out (*ante*, § 11), fall into three general groups: first, those which determine the probative value, or Relevancy, of circumstantial and testimonial evidence, — that is, the fundamental quality without which no evidential data are to be allowed to be considered by the jury (*ante*, §§ 24–1168); secondly, those Auxiliary Rules of Probative Policy which impose artificially some added conditions of admissibility, but are directed solely to improving the quality of proof and strengthening the probabilities of ascertaining the truth as the result of the investigation (*ante*, §§ 1171–2169); and, thirdly, the present group, — those rules which rest on no purpose of improving the search after truth, but on the desire to yield to requirements of Extrinsic Policy. They forbid the admission of various sorts of evidence because some consideration extrinsic to the investigation of truth is regarded as more important and overpowering.

The rules of this last class thus differ from those of the second class, in that their effect is to obstruct, not to facilitate, the search for truth, and in that this effect is consciously accepted as less harmful, on the whole, than the extrinsic disadvantages which would ensue to other interests of society if no such limitations existed. It ought to follow that no limitation of the present nature ought to be recognized unless it is clearly demanded by some specific important extrinsic policy, and that every intendment should be made against such a demand.

The most natural grouping of these rules of Extrinsic Policy is that which regards them according as they are *absolute* or *conditional*. The former class of prohibitions are enforced by the Court like other rules of Evidence; the latter are applied only on demand of the person who is supposed to be affected in his interests by the extrinsic policy in question and to be protected by the rule from an injury to that interest. The latter class of rules — the rules of

Privilege — have features in common, which sharply distinguish them from the former. The former class is small in number; indeed, it can hardly be said that there are any definite and well-established rules of exclusion of that type; they have usually been discountenanced in judicial opinion. The rules of the latter class, on the contrary, are numerous and well established, and affect in a marked degree the daily course of proof in litigation.

Title I: RULES OF ABSOLUTE EXCLUSION

§ 2180. **Indecency.** The notion of indecency is often regarded as though it were an absolute quality of words and actions. In truth, it is merely a relative term. "Unto the pure, all things are pure," said Paul. Indecency depends upon the spirit and purpose of the utterance or the act. The law punishes what it calls "indecent exposure of the person"; but it has no penalty for the very same actions when done in the presence of a physician for the purpose of obtaining his medical assistance. The utterance of vile words of slander may be indecent from the mouth of the slanderer; but the repetition of those words in a court of justice by the witness who is called by the injured person to prove them in his action for redress is in no sense indecent. What we are to conclude, then, since the process of investigating the truth in courts of justice is both an indispensable and a dignified function of life, is that *no utterances or acts called for in evidence in that process are to be prohibited because under other circumstances they might be characterized by indecency*. In other words, the general policy of discountenancing indecency does not extend to the exclusion of evidence in a court of justice.[1]

To this the only qualification can be that, if utterances or acts, which might be indecent in some circumstances and might therefore excite prurient attention among onlookers at a public occasion and lead to shame and embarrassment in the person of whom they are required in evidence, are not materially useful for the purpose of the proof in hand, they may be dispensed with and prohibited; the discretion of the trial Court to determine the exigency in each case. This limitation upon the general principle is a fair one, and would probably find general judicial recognition.[2] Its application would

§ 2180. [1] "Utilius scandalum nasci permittitur quam veritas relinquatur" (Decretalium Gregorii IX Compilatio, lib. V, tit. XLI, cap. III).

[2] *Eng.* 1765, Dacosta *v.* Jones, Cowp. 729 (action on a wager as to the sex of the Chevalier D'Eon, a French person who in male attire had frequented race-courses, fought duels, etc., in England; testimony of many who had been confidentially employed by the Chevalier was received, and a verdict for the plaintiff — who bet on the female sex — was given; but the whole inquiry was declared improper and judgment rendered for the defendant; quoted *supra*); *U. S.* 1920, Kinzell *v.* Chicago M. & St. P. R. Co., 33 Ida. 1, 190 Pac. 255 (cited more fully *ante*, § 1159); 1900, Renaud *v.* Bay City, 124 Mich. 29, 82 N. W. 617 (a wife suing for personal injury testified to a miscarriage within a week thereafter; a question whether she had intercourse with her husband during that week was excluded, on grounds of "public policy"; as to this, if it was material as being inconsistent with her testimony, it should be received, just as the fact of sexual intercourse is always provable when material; but if the fact was not relevant, it should have been excluded on that ground; the ruling is unsound); 1811, Fall *v.* Overseers, 3 Mumf. Va. 495, 502, 506 (admissible where "necessary to effectuate the purposes of justice"; here, intercourse of third persons with a bastardy

sometimes take the extreme form (as in Lord Mansfield's ruling) of refusing to entertain at all a specific plea or cause of action; but the principle would be in effect the same, whether it resulted in a rule of evidence or in a rule of substantive law. Lord Mansfield's utterance plainly lays down both the general principle and its qualification:

1765, MANSFIELD, L. C. J., in *Dacosta* v. *Jones*, Cowp. 729 (refusing to allow the trial of a wager as to the sex of the Chevalier D'Eon): "The trial of this cause made a great noise all over Europe; and, from the comments made upon it, and farther consideration, I am sorry that I did not at once yield to the consideration that it led to indecent evidence, and was injurious to the feelings and interests of a third person. I am sorry, likewise, that the witnesses subpœnaed had not been told they might refuse to give evidence if they pleased. But no objection to their being examined was made by the counsel for the defendant, nor did any of themselves apply for protection or hesitate to answer. . . . Mere indecency of evidence is no objection to its being received when it is necessary to the decision of a civil right or criminal liability. Upon this ground we think that Mr. J. Burnet was wrong in refusing to try the case before him where a young lady brought an action of slander for saying that she had a defect in her person which unfitted her for marriage, and the defendant alleged in his plea that she had such a defect; for there, if the statement was false, the plaintiff had received a grievous injury, for which she was entitled to exemplary damages; and, if it was true, the defendant ought to have been freed from the charge of a malicious lie, however he might still be liable to censure for indelicately proclaiming the truth. But if it had been merely an action on a wager whether the young lady had such a defect, it would have been nearly the present case. . . . Here is a person who represents himself to the world as a man, is stated on the record to be 'Monsieur le Chevalier D'Eon,' has acted in that character in a variety of capacities, and has his reasons and advantages in so appearing. Shall two indifferent people, by a wager between themselves, try whether he is a cheat and imposter, and be allowed to subpœna all his intimate friends and confidential attendants to give evidence that will expose him all over Europe? Such an inquiry is a disgrace to judicature."

§ 2181. **Impropriety (Judge, Counsel, Juror).** In the case of certain officers of justice, it has sometimes been argued that their appearance as witnesses would be a violation of the policy applicable to their profession or function:

(1) A *judge*, it has been argued, should not become a witness, because of the difficulty of reconciling the due exercise of his functions as judge and as witness (*ante*, § 1909).

(2) A *counsel* or *attorney*, it has been thought, should not appear as witness, except in unavoidable necessity, because (among other reasons) of the danger which this practice would involve of a loss of public confidence in the integrity of the profession (*ante*, § 1911).

(3) A *juror*, it has been argued, should not be a witness, because of the inconsistency of the two functions (*ante*, § 1910). Whether the other rule about jurors, that they shall not testify to the doings of the jury-room (if this be a rule of evidence at all), is a rule of the present sort, is open to question (*post*, § 2352).

complainant); 1909, Dunkin v. Hoquiam, 56 Wash. 47, 105 Pac. 149 (rupture of bowels, in an action for personal injury; exhibition allowed, quoting the above text).

For further applications of the principle, see the citations under autoptic proference, or real evidence (*ante*, § 1159).

§ 2182. **Inconvenience (Public Records).** The removal of public records from their proper place of custody, to be used as evidence in court, is attended with danger of loss and mutilation of the records and with delay and annoyance to those who are entitled to consult them and those who are charged with preparing them. For these reasons, and especially since the purpose of proof can usually be as well served by a copy, Courts have often laid down a rule forbidding the use, as evidence, of the originals of public records. To what extent the present rule of policy makes such a prohibition can be better examined elsewhere (*post*, § 2373), where the rule as to Official Secrets comes to be discriminated from the present rule. It is to be noted that, so far as the *illegality* of the removal of the document is concerned, there is concededly no objection on that score (*post*, § 2183).

§ 2183. **Documents, Chattels, Testimony, obtained by Illegal Search or Removal; General Principle.** Necessity does not require, and the spirit of our law does forbid, the attempt to do justice incidentally and to enforce penalties by indirect methods. An employer may perhaps suitably interrupt the course of his business to deliver a homily to his office-boy on the evils of gambling or the rewards of industry. But a judge does not hold court in a street-car to do summary justice upon a fellow-passenger who fraudulently evades payment of his fare; and, upon the same principle, he does not attempt, in the course of a specific litigation, to investigate and punish all offences which incidentally cross the path of that litigation. Such a practice might be consistent with the primitive system of justice under an Arabian sheikh; but it does not comport with our own system of law. It offends, in the first place, by trying a violation of law without that due complaint and process which are indispensable for its correct investigation. It offends, in the next place, by interrupting, delaying, and confusing the investigation in hand, for the sake of a matter which is not a part of it. It offends, further, in that it does this unnecessarily and gratuitously; for since the persons injured by the supposed offence have not chosen to seek redress or punishment directly and immediately, at the right time and by the proper process, there is clearly no call to attend to their complaints in this indirect and tardy manner. The judicial rules of Evidence were never meant to be an indirect process of punishment. It is not only anomalous to distort them to that end, but it is improper (in the absence of express statute) to enlarge the fixed penalty of the law, that of fine or imprisonment, by adding to it the forfeiture of some civil right through loss of the means of proving it. The illegality is by no means condoned; it is merely ignored.

For these reasons, it has long been established that the *admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence:*[1]

§ 2183. [1] In the following citations, the document or chattel was received, unless otherwise noted; the later citations in each jurisdiction include those which have recanted from the orthodox rule and follow the doctrine of Boyd *v.* U. S., described in § 2184.

ENGLAND: 1723, Bishop Atterbury's Trial, 16 How. St. Tr. 495, 629 (the Crown having

1841, WILDE, J., in *Com.* v. *Dana*, 2 Metc. 329: "Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded

obtained treasonable letters, imputed to the defendant, by intercepting the mails under authority of a statute, questions directed to discover whether that authority had been properly followed in so doing were not allowed); 1740, Jordan *v.* Lewis, 2 Stra. 1122, 14 East 306, note (malicious prosecution; copy of indictment admitted, though the order granting it was to another person; "nor could the Court take notice in what manner it was obtained"); 1811, Legatt *v.* Tollervey, 14 East 302 (similar; "if the officer shall, even without authority, have given a copy of the record," it is admissible, although it were "surreptitiously obtained"); 1814, Stockfleth *v.* De Tastet, 4 Camp. 11 (certain former testimony was said to have been obtained by breach of trust: "What is proved to have been written or signed by any of the defendants, I must admit as evidence against them, without considering how it was obtained"); 1826, R. *v.* Derrington, 2 C. & P. 419 (the turnkey promised to post a letter of the accused, but instead handed it to the authorities); 1827, Caddy *v.* Barlow, 1 Man. & Ry. 275, 277 (malicious prosecution; copy of an indictment receivable, though not procured according to law, "without inquiry to the mode by which he became possessed of it"); 1849, R. *v.* Granatelli, 7 State Tr. N. S. 979, 987 (document taken by the police illegally); 1854, Phelps *v.* Prew, 3 E. & B. 430, 437, 441, per Crompton, J. (preceding doctrine approved).

CANADA: 1886, R. *v.* Doyle, 12 Ont. 350 (liquors obtained by unlawful search).

UNITED STATES: *Alabama:* 1887, Chastaing *v.* State, 83 Ala. 29, 3 So. 304 (pistol found on searching defendant, admitted, irrespective of legality of search); 1893, Shields *v.* State, 104 Ala. 35, 41, 16 So. 85 (similar); 1897, Scott *v.* State, 113 Ala. 64, 21 So. 425 (carrying a concealed weapon; illegality of the search by the officer testifying to it, immaterial);
Arkansas: 1896, Starchman *v.* State, 62 Ark. 538, 36 S. W. 940 (tools found by officers, searching defendant's house, admitted irrespective of legality of search); 1921, Benson *v.* State, 149 Ark. 633, 233 S. W. 758 (violation of liquor law; testimony to the finding of liquor "without a warrant or other process," held admissible; following Starchman *v.* State);
California: 1896, People *v.* Alden, 113 Cal. 264, 45 Pac. 327 (judgment-roll improperly removed for use as evidence); 1922, People *v.* Mayen, — Cal. —, 205 Pac. 435 (larceny; documents, etc., found in defendant's house on a search-warrant invalid because not specific enough, held not inadmissible, although an application for return made on the day of trial had been erroneously denied; the party's right to the return of the articles and the State's right to use evidence being separate things; quoted *supra*);
Connecticut: 1896, State *v.* Griswold, 67 Conn. 290, 34 Atl. 1047 (seizure of papers by a trespass on premises);
Georgia: 1857, Wood *v.* McGuire, 21 Ga. 576, 582 (papers improperly ordered to be given up); 1897, Williams *v.* State, 100 Ga. 511, 28 S. E. 624 (liquors found by illegal search, admitted; repudiating the contrary obiter intimation in Rusher *v.* State, 94 Ga. 363, 21 S. E. 593; quoted *supra*); 1901, Sanders *v.* State, 113 Ga. 267, 38 S. E. 841; 1903, Jackson *v.* State, 118 Ga. 780, 45 S. E. 604 (stolen goods found by illegal search); 1899, Dozier *v.* State, 170 Ga. 708, 33 S. E. 418 (cited *post*, § 2264); 1904, Springer *v.* State, 121 Ga. 155, 48 S. E. 907 (pistol taken from the accused; this line of cases in Georgia does not carefully distinguish the present principle and that of § 2264, *post*); 1906, Duren *v.* Thomasville, 125 Ga. 1, 53 S. E. 814 (like Williams *v.* State); 1907, Hammock *v.* State, 1 Ga. App. 126, 58 S. E. 66 (carrying a concealed weapon; a deputy sheriff arrested the defendant on information and searched him without a warrant for arrest or for search, and found a concealed weapon; the deputy's testimony was excluded; this is a flat repudiation of Williams *v.* State, although the opinion endeavors to distinguish it; the opinion terms the arrest "illegal" though the defendant was certainly committing a misdemeanor in fact in the deputy's presence, and the arrest was ordinarily legal; the opinion goes on the ground that there was a compulsory self-incrimination, but this is unsound, for the deputy took the pistol out of the defendant's pocket, and the defendant himself did no voluntary act at all; the opinion frankly avows "a public policy which would rather see the guilty go unpunished than have the guilt of the accused established" in this manner; Powell, J., the writer of the opinion, is one of our most accomplished living judges; but in a country so cursed by the use of concealed weapons the "public policy" thus declared is the worst kind of a policy; and it is undoubtedly doing just what it confesses to, viz. letting the guilty go unpunished); 1907, Hughes *v.* State, 2 Ga. App. 29, 58 S. E. 390 (repeating the ruling of Hammock *v.* State; the opinion, by Russell, J., professes "the utmost abhorrence and detestation of the practice of carrying deadly weapons"; but this term "utmost" is scarcely correct; for the learned Court obviously feels a still more intense abhorrence for a zealous police officer's attempts at suppression of a detestable crime without formalities which the event shows were quite needless); 1907, Sherman *v.* State, 2 Ga.

his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done. But this is no good reason for excluding the papers seized, as evidence, if they were pertinent to the issue, as they unquestionably were. When

App. 686, 58 S. E. 1122 (foregoing cases followed); 1907, Smith *v.* State, 3 Ga. App. 326, 59 S. E. 934 (selling liquor illegally; testimony by officers arresting in the act, and seizing whisky, without a warrant: the Hughes and Hammock cases approved but distinguished; the opinion is interesting as the exhibition of an able mind unsuccessfully struggling to be consistent); 1912, Whitaker *v.* State, 11 Ga. App. 208, 75 S. E. 258 (U. S. bankruptcy petition, excluded on this ground; but incorrectly); 1913, Underwood *v.* State, 13 Ga. App. 206, 78 S. E. 1103 (illegal sale of liquor; the accused was arrested without a warrant, his safe-keys forcibly taken from his pocket, his safe unlocked, and whisky found therein; excluded, following Hammock *v.* State; careful opinion by Hill, C. J.); 1915, Heimer *v.* State, 16 Ga. App. 588, 85 S. E. 821 (liquor obtained by illegal search of property or premises is inadmissible; otherwise, as to illegal search of the person; Broyles, J., concurring, repudiates the distinction and stands upon Williams *v.* State, *supra*); 1916, Calhoun *v.* State, 144 Ga. 679, 87 S. E. 893 (liquor discovered by illegal search of the person is admissible, except so far as the privilege against self-crimination might be violated; Williams *v.* State affirmed; "the criterion is, who furnished or produced the evidentiary fact connecting the defendant with the crime?" this opinion reviews prior cases and was given in answer to a request for instruction by the Court of Appeals); 1916, Smith *v.* State, 17 Ga. App. 693, 88 S. E. 42 (pistol offense; Calhoun *v.* State applied); 1921, Johnson *v.* State, 152 Ga. 271, 109 S. E. 662 (carrying concealed weapons; the pistol was found during a search without warrant while accused was under arrest for burglary; held admissible; Calhoun *v.* State, affirmed);

Hawaii: 1903, Terr. *v.* Sing Kee, 14 Haw. 586, 588 (liquor obtained by unlawful search is admissible);

Idaho: 1906, State *v.* Bond, 12 Ida. 424, 86 Pac. 43 (letter of the accused; mode of obtaining it, held immaterial); 1918, State *v.* Anderson, 31 Ida. 514, 174 Pac. 124 (illegal carriage of liquors; liquors found by illegal search by the sheriff, on stopping the defendant's automobile, admitted; flatly approving the orthodox principle, and not taking the trouble to notice Weeks *v.* U. S.);

Illinois: 1875, Stevison *v.* Earnest, 80 Ill. 513, 517 (records illegally removed from court; quoted *supra*); 1891, Gindrat *v.* People, 138 Ill. 103, 105, 27 N. E. 1085 (larceny; articles obtained by a detective's search of defendant's rooms without a warrant, admitted); 1892, Siebert *v.* People, 143 Ill. 571, 583, 32 N. E. 431 (similar; here, letters); 1894, Trask *v.* People, 151 Ill. 523, 38 N. E. 248 (similar; here, papers); 1919, People *v.* Paisley, 288 Ill. 310, 123 N. E. 573 (Gindrat *v.* People approved); 1922, Chicago *v.* Di Salvo, 302 Ill. 85, 134 N. E. 5 (purchasing a revolver without a permit; the police took possession of the revolver at the accused's house; a motion for return of the revolver was made at the opening of the case and again at the close, but without offering any evidence in support; the revolver itself was put in evidence without objection; held that "the legality of the means by which the officers obtained possession of the revolver was immaterial" under the circumstances);

Iowa: 1897, State *v.* Van Tassel, 103 Ia. 6, 72 N. W. 497, *semble* (papers taken by illegal search); 1901, Sullivan *v.* Nicoulin, 113 Ia. 76, 84 N. W. 978 (illegal order for inspection of premises); 1922, State *v.* Rowley, — Ia. —, 187 N. W. 7 (attempt to produce a miscarriage, the defendant being apparently a professional abortionist; abortion tools obtained by the sheriff's search of defendant's house in her absence, without a search warrant, held inadmissible);

Kansas: 1905, State *v.* Schmidt, 71 Kan. 862, 80 Pac. 948 (bottle of liquor seized without a warrant, admitted); 1910, State *v.* Turner, 82 Kan. 787, 109 Pac. 654 (revolver procured from defendant by threats); 1921, State *v.* Smithmeyer, 110 Kan. 172, 202 Pac. 638, documents produced under a subpoena before the Attorney-General, under St. 1919, c. 316 (the process held not to have been a search and seizure);

Kentucky: 1920, Youman *v.* Com., 189 Ky. 152, 224 S. W. 860 (possession of intoxicating liquors; the sheriff having a warrant of arrest, but no search warrant, went to defendant's house but failed to find him; while there, they searched, found, and impounded some liquor; afterwards a motion to restore the liquor was denied, and the liquor was destroyed; on the trial, the sheriff testified to the finding of the liquor; held, that evidence thus unlawfully obtained was inadmissible, and that the condition required in Weeks *v.* U. S., viz. a prior motion to return the articles, was not necessary; quoted *supra*); 1921, Banks *v.* Com., 190 Ky. 330, 227 S. W. 455 (malicious shooting; shoes obtained by search made with consent of owner of premises, admitted; distinguishing Youman *v.* Com.); 1921, Turner *v.* Com., 191 Ky. 825, 231 S. W. 519 (chicken-stealing; taking of a sack of chickens from defendant after arrest without a search warrant, held not to make the fact of finding the chickens on him inadmissible; Youman *v.* Com. distinguished); 1921, Com. *v.* Riley, 192 Ky. 153, 232 S. W. 630 (possession of burglars' tools; Youman and Gouled cases explained and affirmed); 1921, Bruner *v.* Com., 192 Ky. 386,

papers are offered in evidence the Court can take no notice how they were obtained, — whether lawfully or unlawfully, — nor would they form a collateral issue to determine that question."

233 S. W. 795 (burglary; the police while searching under a warrant for liquor found shoes stolen; Youman *v.* Com. approved, but here defendant consented to the search; the evidence held admissible); 1922, Ash *v.* Com., 193 Ky. 452, 236 S. W. 1032 (keeping liquor; Youman *v.* Com. followed; the noble vow of the French at Verdun, "They shall not pass!" is sentimentally dragged in to protect petty lawbreakers); 1922, Bowling *v.* Com., 193 Ky. 642, 237 S. W. 381 (illegal making of liquor; seizure of a still, out of doors, seen in operation by the officers, held legal, though without a search warrant; Youman *v.* Com. distinguished); 1922, Royce *v.* Com., 194 Ky. 480, 239 S. W. 795 (liquor found in "open and obvious" possession in an automobile, and taken without a warrant, admitted);

Louisiana: 1898, State *v.* Renard, 50 La. An. 662, 23 So. 894 (letter given to a trusty in jail for mailing, and by him handed to officials, admitted);

Maine: 1876, State *v.* Gorham, 60 Me. 270, 272 (admissible, "whether it is or not improperly taken from the office where the law requires, as in this case, that it shall be constantly kept"; said of an internal revenue record-book);

Maryland: 1906, Lawrence *v.* State, 103 Md. 17, 63 Atl. 96 (conspiracy to defraud; certain shares of stock, taken by the police from a satchel at the defendant's hotel or from the defendant's person under arrest, admitted, regardless of the illegality of procuring them);

Massachusetts: 1838, Faunce *v.* Gray, 21 Pick. 243, 246 (deposition of defendant, taken 'in perpetuam,' admitted, regardless whether it has been "unfairly obtained" by a "perversion and abuse" of the statutory process); 1841, Com. *v.* Dana, 2 Metc. 329 (quoted *supra*); 1850, Com. *v.* Certain Lottery Tickets, 5 Cush. 369, 374 (approving Com. *v.* Dana); 1862, Com. *v.* Certain Intox. Liquors, 4 All. 593, 600 (officer's misconduct in executing process does not exclude his testimony based on knowledge thus obtained); 1872, Com. *v.* Welsh, 110 Mass. 359 (similar); 1882, Com. *v.* Taylor, 132 Mass. 261 (similar, for a medical officer making an unauthorized autopsy); 1885, Com. *v.* Henderson, 140 Mass. 303, 5 N. E. 832 (like Com. *v.* Welsh); 1889, Com. *v.* Keenan, 148 Mass. 470, 472, 20 N. E. 101 (similar); 1892, Com. *v.* Ryan, 157 Mass. 403, 405, 32 N. E. 349 (ballots admitted, irrespective of the process of obtaining them); 1893, Com. *v.* Tibbetts, 157 Mass. 519, 521, 32 N. E. 910 (letters obtained by search under warrant for search of husband's premises for liquor); 1893, Com. *v.* Hurley, 158 Mass. 159, 33 N. E. 342 (police officers unlawfully arresting, allowed to testify to what they found); 1893, Com. *v.* Byrnes, 158 Mass. 172, 174, 33 N. E. 343 (butter-sample, admitted, irrespective of the legality of obtaining it); 1894, Com. *v.* Brelsford, 161 Mass. 61, 36 N. E. 677 (like Com. *v.* Welsh); 1895, Com. *v.* Welch, 163 Mass. 373, 40 N. E. 103 (unlawful search of the person for liquor); 1895, Com. *v.* Acton, 165 Mass. 11, 42 N. E. 329 (illegal search for liquor by officers); 1896, Com. *v.* Smith, 166 Mass. 370, 44 N. E. 503 (unlawfully seized gaming implements); 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (officers obtaining a knife, by a trespass and search in the defendant's house; admitted);

Michigan: 1894, Cluett *v.* Rosenthal, 100 Mich. 193, 197, 58 N. W. 1009 (testimony admitted to the contents of books, by one who saw them while they were in the sheriff's possession under an unauthorized attachment); 1911, People *v.* Aldorfer, 164 Mich. 676, 130 N. W. 351 (liquors seized under a search-warrant); 1919, People *v.* Marxhausen, 204 Mich. 559, 171 N. W. 557 (liquor found by officers on defendant's premises, by search without a warrant, during his absence, held returnable to defendant, under Weeks *v.* U. S. *infra*, and Newberry *v.* Carpenter, 107 Mich. 567); 1922, People *v.* Margelis, — Mich. —, 186 N. W. 488 (unlawful possession of whisky; the officers, unlawfully arresting the defendant, "grabbed him around the arms like that, tussled around, rolled on the floor, and the bottle fell out of his pocket; when I got up my partner had the bottle"; the whisky-bottle was held not admissible in evidence; it may be wondered whether the ruling would have been different had the object been a dynamite bomb; if it would not, how are police officers going to arrest dynamiters in emergencies?);

Minnesota: 1905, State *v.* Stratt, 94 Minn. 384, 102 N. W. 913 (bank books); 1906, State *v.* Hoyle, 98 Minn. 254, 107 N. W. 1130 (gambling apparatus obtained by officers' unlawful entrance, admissible);

Mississippi: 1922, Faulk *v.* State, — Miss. —, 90 So. 481 (making intoxicating liquor; articles found without a search-warrant, admitted, the defendant consenting to the search); 1922, Tucker *v.* State, — Miss. —, 90 So. 845 (making intoxicating liquor; articles seized without a search-warrant in defendant's home and premises, held returnable on application, following Gouled *v.* U. S., 'et id omne genus'; declining to accept the principle that "the Courts will not stop to inquire into [sic?] whether evidence offered was illegally obtained," and falling back on the sentiment, "It is better that the guilty escape punishment in some instances than that these securities of liberty be violated"; has it

1875, SCHOFIELD, J., in *Stevison* v. *Earnest*, 80 Ill. 513, 518: "It is contemplated, and such ought ever to be the fact, that the records of Courts remain permanently in the places assigned by the law for their custody. It does not logically follow, however, that

occurred to these courts that there is in reality no such dilemma?);
Missouri: 1895, State *v.* Pomeroy, 130 Mo. 489, 497, 32 S. W. 1002 (lottery tickets seized by officers from defendant's desk and on his person, without a search-warrant);
Montana: 1906, State *v.* Fuller, 34 Mont. 12, 85 Pac. 369 (defendant's shoes compared with footprints); 1921, State ex rel. Samlin *v.* District Court, 59 Mont. 600, 198 Pac. 362 (writ of prohibition to stay search-warrant; the warrant being unlawfully exercised, ordered that "the whisky seized under the warrant be returned to him"; but if the articles unlawfully seized had been offered in evidence on trial, they would not have been rejected); 1917, State *v.* Reed, 53 Mont. 292, 163 Pac. 477 (pandering; documents obtained by opening defendant's premises with a key taken from his person when arrested, held admissible);
Nebraska: 1907, Younger *v.* State, 80 Nebr. 201, 114 N. W. 170 (shoes taken by force from the accused);
New Hampshire: 1858, State *v.* Flynn, 36 N. H. 64 (liquor found on defendant's premises by officers searching under a warrant, admitted, irrespective of the legality of the search); 1895, State *v.* Sawtelle, 66 N. H. 488, 32 Atl. 831, *semble* (a telegram claimed by the company to be privileged was ordered to be produced, and as to the defendant it was held that "the method of procuring the telegrams did not concern him");
New Jersey: 1915, State *v.* Mausert, 88 N. J. L. 286, 95 Atl. 991 (keeping a disorderly house; books openly displayed on the counter, and seized without a search-warrant at the time of arresting the defendant, held properly admitted, because they were "proofs of guilt found upon his arrest within the control of the accused," as defined in U. S. *v.* Weeks, and not papers secreted and obtained by search);
New York: 1903, People *v.* Adams, 176 N. Y. 351, 68 N. E. 636 (seizure of papers under a search-warrant); People *v.* Adams was affirmed on writ of error in Adams *v.* New York, U. S., cited *post*, § 2184;
North Carolina: 1912, State *v.* Wallace, 162 N. C. 622, 78 S. E. 1 (letter found by a policeman searching defendant's house, admitted, following Adams *v.* New York, U. S., *infra*); 1916, State *v.* Fowler, 172 N. C. 905, 90 S. E. 408 (burglary; property found at a sister's house, entered upon her invitation, admitted); 1922, State *v.* Simmons, — N. C. —, 110 S. E. 591 (transporting liquor; liquor taken without a search-warrant, admitted; following Adams *v.* New York, U. S.; Gouled *v.* U. S. distinguished as applying to articles evidential only; "where the article itself is the 'corpus delicti,' as illicit liquor or a weapon illegally carried, and in similar cases, the article itself however obtained is admissible in evidence");
Oklahoma: 1919, Knight *v.* State, 16 Okl. Cr. 298, 182 Pac. 736 (illegal search-warrant);
Oregon: 1901, State *v.* McDaniel, 39 Or. 161, 65 Pac. 520 (letter seized on defendant's person); 1922, State *v.* Laundy, — Or. —, 204 Pac. 958, 974 (criminal syndicalism; books and papers were taken from defendant's person and club premises without a search-warrant; held that at the time of a lawful arrest the officer may "lawfully take articles in the possession or under the control of the prisoner, if they supply evidence of guilt"; sensible opinion by Harris, J.);
Porto Rico: 1914, People *v.* Cereedo, 21 P. R. 52, 57, 60 (lottery offence; books taken under a search-warrant not objected to before trial, admitted; citing Weeks *v.* U. S.); 1915, People *v.* Diaz, 22 P. R. 177, 194; 1917, Morales *v.* Vivaldi, 25 P. R. 206 (action to restore money seized by the prosecuting attorney for use as evidence on a charge of conspiracy);
South Carolina: 1893, State *v.* Atkinson, 40 S. C. 363, 371, 18 S. E. 1021 (papers taken from defendant's house by trespass); 1916, Blacksburg *v.* Beam, 104 S. C. 146, 88 S. E. 441 (liquor obtained by illegally searching defendant for a key, while traveling, and then opening and searching his trunk, excluded); 1917, State *v.* Harley, 107 S. C. 304, 92 S. E. 1034 (lottery; articles found in a locked room adjacent to the arrest, unlocked by the accused at the officer's command, admitted, illegality being immaterial); 1918, State *v.* Quinn, 111 S. C. 174, 97 S. E. 62 (liquor found on arresting drunken man in a car without a warrant, held admissible);
South Dakota: 1909, State *v.* Madison, 23 S. D. 584, 122 N. W. 647 (liquor found under an illegal warrant); 1922, State *v.* Kieffer, — S. D. —, 187 N. W. 164 (search warrant for liquor; conditions of issuance discussed); 1922, Sioux Falls *v.* Walser, — S. D. —, 187 N. W. 821 (violation of city liquor ordinance; liquor seized under an invalid warrant, held admissible, the property seized being used in violation of law, so that "the person in possession can claim no property in it);
Tennessee: 1908, Cohn *v.* State, Perkins *v.* State, Horton *v.* State, 120 Tenn. 61, 109 S. W. 1149, illegal sale of liquor, etc.; (testimony obtained by unlawfully trespassing and making a peekhole in a wall, admitted); 1922, Hughes *v.* State, 145 Tenn. 544, 238 S. W. 588 (liquor found in an automobile when stopped by the officer and searched without a warrant, held lawfully seized by way of preventing an offense, and therefore admissible in evidence);
Texas: 1879, Walker *v.* State, 7 Tex. App. 245,

the records, being obtained, cannot be used as instruments of evidence; for the mere fact of [illegally] obtaining them does not change that which is written in them. . . . Suppose the presence of a witness to have been procured by fraud or violence, while the party thus procuring the attendance of the witness would be liable to severe punishment, surely that could not be urged against the competency of the witness. If he could not, why shall a record, although illegally taken from its proper place of custody and brought before the Court, but otherwise free from suspicion, be held incompetent"?

1897, LUMPKIN, P. J., in *Williams* v. *State*, 100 Ga. 511, 28 S. E. 624: "As we understand it, the main, if not the sole, purpose of our constitutional inhibitions against unreasonable searches and seizures, was to place a salutary restriction upon the powers of government. That is to say, we believe the framers of the constitutions of the United States and of this and other States merely sought to provide against any attempt, by legislation or otherwise, to authorize, justify, or declare lawful, any unreasonable search or seizure. This wise restriction was intended to operate upon legislative bodies, so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful; upon executives, so that no law violative of this constitutional inhibition should ever be enforced; and upon the judiciary, so as to render it the duty of the Courts to denounce as unlawful every unreasonable search and seizure, whether confessedly without any color of authority, or sought to be justified under the guise of legislative sanction. For the misconduct of private persons, acting upon their individual

264 (foot-tracks; cited *post*, § 2264, n. 3); 1920, Rippey *v.* State, 86 Tex. Cr. App. 539, 219 S. W. 463 (stolen property, recovered from defendant's premises by illegal search, held admissible; (1) rule of U. S. *v.* Weeks, 232 U. S. 383, held inapplicable; (2) stolen property found by search without a warrant is in any event admissible; distinguishing "things whose undeniable ownership and property is in the accused and which are not directly connected with the crime"); 1920, Moore *v.* State, 87 Tex. Cr. 569, 226 S. W. 415 (robbery; footprints made by defendant while under arrest, admissible, though arrest was illegally made without a warrant; Walker *v.* State adhered to);

Utah: 1922, Salt Lake City *v.* Wight, — Utah —, 205 Pac. 900 (selling liquor; money and liquor obtained by officers on search without a warrant, held admissible; the offense being committed in their presence);

Vermont: 1891, State *v.* Mather, 64 Vt. 101, 23 Atl. 590 (letter obtained surreptitiously; "the Court can take no notice of how they were obtained, whether legally or illegally"); 1899, Barrett *v.* Fish, 72 Vt. 18, 47 Atl. 174 ("A court of law will take no notice on trial of a respondent how letters or other papers offered in evidence were obtained for the purpose of determining their admissibility in evidence"); 1901, State *v.* Slamon, 73 Vt. 212, 50 Atl. 1097 (general principle conceded); 1906, State *v.* Suitor, 78 Vt. 391, 63 Atl. 182 (liquor offence; liquor, etc., obtained on a search-warrant, admitted, irrespective of the legality of the search);

Washington: 1905, State *v.* Royce, 38 Wash. 111, 80 Pac. 268 (articles obtained by illegal search of the person are admissible); 1922, State *v.* Gibbons, — Wash. —, 203 Pac. 390 (unlawful possession of liquor; the sheriff, seeing the defendant's car, telephoned to the courthouse for a search warrant, arrested defendant, drove the car to the courthouse, took whisky from the car and found the search-warrant awaiting him in his office; held that "the lawfulness or unlawfulness of the seizure of the whisky by the sheriff becomes determinative of the right of the prosecution to introduce it," and that it was unlawfully seized; following Amos *v.* U. S.; as to which it may be remarked that our constitutional forefathers would have been astonished to see the great principle twisted in this way to obstruct the vigilant administration of the law by efficient officers);

West Virginia: 1882, State *v.* Douglass, 20 W. Va. 770, 791 (improper conduct of the landlord of the defendant's counsel in searching the latter's trunk during his absence, or "any improper means they may have used," held not to exclude the fact of finding a pistol); 1897, State *v.* Cross, 44 W. Va. 315, 29 S. E. 527 (pistol discovered by illegal search of the defendant admissible); 1902, State *v.* Edwards, 51 W. Va. 220, 41 S. E. 429 ("If it was an illegal seizure, that is no objection to the use of the papers as evidence, they being proper evidence in the case in other respects");

Wyoming: 1922, Wiggin *v.* State, — Wyo. —, 206 Pac. 373 (killing cattle; articles taken in the party's immediate possession on lawful arrest are admissible; details not decided).

For an analogous principle, see the doctrine about admitting a *confession obtained by fraud*, *ante*, § 841.

For the rule as to confessions made by an accused on an *illegal examination before a magistrate*, see *ante*, §§ 849, 852.

responsibility, and of their own volition, surely none of the three divisions of government is responsible. If an official, or a mere petty agent of the State, exceeds or abuses the authority with which he is clothed, he is to be deemed as acting, not for the State, but for himself only; and therefore he alone, and not the State, should be held accountable for his acts. If the constitutional rights of a citizen are invaded by a mere individual, the most that any branch of government can do is to afford the citizen such redress as is possible, and bring the wrongdoer to account for his unlawful conduct. . . . Whether or not prohibiting the Courts from receiving evidence of this character would have any practical and salutary effect in discouraging unreasonable searches and seizures, and thus tend towards the preservation of the citizen's constitutional right to immunity therefrom, is a matter for legislative determination."

§ 2184. **Modern Federal Doctrine of Boyd v. U. S. and Weeks v. U. S.** The foregoing doctrine was never doubted until the appearance of the ill-starred majority opinion of Boyd *v.* United States, in 1885, which has exercised unhealthy influence upon subsequent judicial opinion in many States. That opinion, thoroughly incorrect in its historical assertions, and travelling outside the question at issue, advanced two fallacious conclusions, *viz.*: first, that the Fourth Amendment to the Constitution (prohibiting unreasonable search and seizure) was so related to the Fifth Amendment (prohibiting compulsory self-incrimination) that the Fifth Amendment could be invoked by an accused to withhold from surrender documents sought by even a *lawful* official search; and secondly, that documents obtained by *unlawful* official search could be excluded from evidence, as a consequence of the Fourth Amendment.

The first of these fallacies was soon afterwards fully repudiated in the court of origin; the subject is elsewhere fully considered, under the Privilege against Self-Crimination (*post*, § 2264).

The second fallacy is of course in direct contradiction to the fundamental principle here under consideration (*ante*, § 2183); and remains to be noticed.

1. The progress of this doctrine of Boyd *v.* United States was as follows: (2) (*a*) The Boyd Case remained *unquestioned* in its own Court for twenty years; meantime receiving frequent disfavor in the State Courts (*ante*, § 2183). (*b*) Then in Adams *v.* New York, in 1904, it was virtually *repudiated* in the Federal Supreme Court, and the orthodox precedents recorded in the State courts (*ante*, § 2183) were expressly approved. (*c*) Next, after another twenty years, in 1914 — moved this time, not by erroneous history, but by misplaced sentimentality — the Federal Supreme Court, in Weeks *v.* United States, *reverted to the original doctrine* of the Boyd Case, but *with a condition*, viz., that the illegality of the search and seizure should first have been directly litigated and established by a motion, made before trial, for the return of the things seized; so that, after such a motion, and then only, the illegality would be noticed in the main trial and the evidence thus obtained would be excluded. (*d*) Subsequent rulings attempted to work out this doctrine consistently.[1]

§ 2184. [1] The following Federal cases cover all four periods mentioned in the text; the State cases are all placed *ante*, § 2183:

(*a*) 1885, Boyd *v.* U. S., 116 U. S. 616, 618, 6 Sup. 524 (documents obtained from the accused, by official seizure unlawful under the

Meanwhile, the heretical influence of Weeks *v.* United States spread, and evoked a contagion of sentimentality in some of the State Courts, inducing them to break loose from long-settled fundamentals.

Fourth Amendment prohibiting unreasonable searches and seizure, not admissible; unsatisfactory opinion; the case is further examined *post*, § 2264); 1899, Bacon *v.* U. S., 38 C. C. A. 37, 97 Fed. 35 (letter of a bank-president illegally obtained by the State receiver and handed to the U. S. marshal, admitted).

(*b*) 1904, Adams *v.* New York, 192 U. S. 585, 24 Sup. 372 (seizure of papers under a search-warrant; Boyd *v.* U. S. is mentioned with respect, but Com. *v.* Dana, Mass., and the early State cases, are expressly approved, and it is said that the Amendment is intended to "give remedy against such usurpations when attempted" and "to render invalid legislation or judicial procedure having such effect," but not to "exclude testimony which has been obtained by such means, if it is otherwise competent"); 1906, Hale *v.* Henkel, U. S. (cited *post*, § 2264); 1908, U. S. *v.* Wilson, C. C. S. D. N. Y., 163 Fed. 338 (trunk and contents of defendant seized by officers on defendant's premises; motion for return of property denied, as to later admissibility on trial of the evidence thus found, the Court says: "Any objection because of trespass will be overruled. . . . This proposition is stated by the supreme Court of the United States in the case of Adams *v.* N. Y., and is so well recognized that it cannot be the subject of much discussion"; whence may be inferred that the practitioners were not the only ones surprised by the later decision in Weeks *v.* U. S., *infra*); 1910, Holt *v.* U. S., 218 U. S. 245, 31 Sup. 2 (Adams *v.* N. Y. approved).

(*c*) 1914, Weeks *v.* U. S., 232 U. S. 383, 34 Sup. 341 (use of the mails for lottery; documents found by the police and marshal in the defendant's house, entered and searched without a warrant, excluded; Adams *v.* New York distinguished on the ground that there the point was "collateral," while here the defendant had before trial moved for the return of the documents and the trial Court refused to return those used in evidence; this distinction is vain; in effect this decision violates the principle).

(*d*) 1916, Flagg *v.* U. S., 20 C. C. A., 233 Fed. 481 (fraudulent use of the mails; the defendant was arrested at his place of business, and his books and papers were seized by the police without a warrant; on his trial, the evidence obtained from them was used; reversed, on the authority of Weeks *v.* U. S., Veeder, J., concurring, with a criticism of the inconsistency between Weeks *v.* U. S. and Adams *v.* N. Y.); 1916, U. S. *v.* Friedberg, D. C. E. D. Pa., 233 Fed. 313 (the rule declaring illegality immaterial, Adams *v.* N. Y. does not apply on an application to the Court before trial for a return of books and papers unlawfully seized); 1918, Rice *v.* U. S., 1st C. C. A., 251 Fed. 778 (fraudulent use of the mails; papers obtained under a search warrant, not followed by proceedings to determine legality and obtain their return, held admissible); 1918, Re Tri-State Coal & Coke Co., D. C. W. D. Pa., 253 Fed. 605 (commercial combination to fix excessive prices; certain books, etc., seized under search-warrant, ordered returned for lack of specific description); 1919, Fitter *v.* U. S., 2d C. C. A., 258 Fed. 567, 573 (Flagg *v.* U. S. approved, but here distinguished on the ground that here the documents illegally taken without a warrant were not offered in evidence nor used as the basis of testimony; the other facts in this case were like Weeks *v.* U. S.); 1919, Schenck *v.* U. S., Baer *v.* U. C., 249 U. S. 47, 39 Sup. 247 (Holt *v.* U. S. and Weeks *v.* U. S. held not to exclude the use of documents obtained on a valid search-warrant against the headquarters of a society of which defendants were officers); 1919, Coastwise Lumber & Supply Co. *v.* U. S., 2d C. C. A., 259 Fed. 847 (seizure of defendant's papers under a search-warrant, and motion for their return; effect of the Fourth and Fifth Amendments, not decided; Manton, J., diss.); 1919, Laughter *v.* U. S., 6th C. C. A., 259 Fed. 94, 98 (documents taken from defendant's pocket without a warrant when arrested; until he had made a motion for their restoration, their use in evidence, held not error; but after such a motion was made and erroneously denied, their use in evidence was error, under U. S. *v.* Weeks, *supra*; but in this case it is astonishing to find that the search of accused lawfully arrested is deemed to be unlawful without a special search-warrant; such a doctrine will needlessly handicap the officers of the law; this point is ignored in the Court's opinion); 1920, U. S. *v.* Moresca, D. C. S. D. N. Y., 266 Fed. 713, 718 ("Since Weeks *v.* U. S. . . . it seems to be thought that if the prosecutor is found in possession of any documents, especially of evidential value, that once belonged to an accused, a motion to get them back should prevail, apparently because the U. S. attorney ought to be prevented from using the papers in violation of the Fifth Amendment. I am not advised of any holding to that effect. . . . The only ground on which this or any similar motion can rest is that the prosecutor's possession is the result of an unreasonable search and seizure (Fourth Amendment) or of a deprivation of property without due process of law (Fifth Amendment). This must always and here does present a question of fact"; a sane pronouncement refreshingly free from

In this last period, much of the effect may be ascribed to the temporary recrudescence of individualistic sentimentality for freedom of speech and

the usual cant); 1920, Youngblood *v.* U. S., 8th C. C. A., 266 Fed. 795 (perjury; the sheriff had seized alleged stolen articles in defendant's home on search without a warrant; no request had been made to a court for the return of the articles, which were afterwards admitted in evidence; objection overruled, first, because of lack of request, secondly, because the sheriff did not act under Federal authority; Weeks *v.* U. S. followed); 1920, Silverthorne Lumber Co. *v.* U. S., 251 U. S. 385, 40 Sup. 182 (S., an officer of the defendant company, was arrested under an indictment with a single charge; the marshal without a warrant searched the offices of the defendant company and took away all papers, examined them, and from their contents framed a new indictment, retaining photographic copies of the papers; on application by the defendant, the District Court ordered the return of the originals, but impounded the copies; the prosecution then subpœnaed the defendant company for the originals, and on refusal to obey the District Court ordered production, and held the defendant in contempt for refusal to obey the order; held, that the order to produce was vitiated by the illegality of the original seizure; "the knowledge gained by the Government's own wrong cannot be used by it in the way proposed"; Flagg *v.* U. S. approved, as a corollary of Weeks *v.* U. S.; the opinion becomes sentimental over the Government's "outrage"; some of the language is a virtual repudiation of the whole doctrine of Adams *v.* U. S., and imports a return to the discredited doctrine of Boyd *v.* U. S.); 1920, Haywood *v.* U. S., 7th C. C. A., 268 Fed. 795, 800 (conspiracy to prevent execution of a Federal law; the defendants were members of the Industrial Workers of the World; documents were taken by police officers from the premises of the I. W. W. on defective search-warrants; after indictment, a motion to return the property was made and overruled; held, the motion having been correctly overruled on the Fourth Amendment on the circumstances, the doctrine of Weeks *v.* U. S. did not make the use of the documents at the trial a violation of the Fifth Amendment); 1921, Gouled *v.* U. S., 255 U. S. 298, 41 Sup. 261 (charge of using the mails to defraud; a paper was surreptitiously taken from the defendant's office by a person acting under direction of the U. S. Army, Intelligence Department, and other papers were taken under a search used primarily to find evidence of the charge, and not to impound unlawful articles; held, (1) that the secret taking of the first paper was a violation of the Fourth Amendment, (2) that the search-warrant was improperly used for the other papers, and (3) therefore that since a motion for return had been duly made before trial pursuant to Weeks *v.* U. S., and erroneously denied, the papers were erroneously admitted on the trial; the principle that the illegal obtaining of evidence is no ground for its exclusion is said to be "only a rule of procedure," and therefore "not to be applied as a hard-and-fast formula to every case, regardless of its special circumstances"; inasmuch as Boyd *v.* U. S. is repeatedly referred to with approval, while Adams *v.* U. S. and Holt *v.* U. S. are not even mentioned, this imports that the Federal Supreme Court herein returned wholeheartedly to the doctrine of Boyd *v.* U. S.); 1921, Amos *v.* U. S., 255 U. S. 313, 41 Sup. 266 (charge of selling whisky illegally; whisky was found by revenue officers in defendant's house on search without a warrant; after the jury was sworn, a motion for return of the whisky was made and denied; held that the motion was not too late, and that the possession of the whisky was erroneously shown in evidence); 1921, Honeycutt *v.* U. S., 4th C. C. A., 277 Fed. 939, 941 (two cases; knowing possession of stolen goods; checks, etc., taken under a warrant not sufficiently specific, held improperly admitted; according to this ruling, prosecuting attorneys would have to qualify as telepathists); 1922, U. S. *v.* Falloco, D. C. W. D. Mo., 277 Fed. 75 (liquor seizures; the rule of Weeks *v.* U. S. construed to admit chattels seized by State officers not acting under direction of Federal officers; but here there was such direction or coöperation); 1921, U. S. *v.* Kelly, D. C. E. D. N. C., 277 Fed. 485 (stolen automobiles; the rule of Weeks *v.* U. S. held to forbid search for letters, etc., having only an evidential value); 1922, U. S. *v.* Bateman, D. C. S. D. Calif., 278 Fed. 231 (searching on the highway without a warrant an automobile entering the country from Mexico with liquor; the rule of U. S. *v.* Weeks held not to forbid; sensible opinion by Trippet, J.); 1922, U. S. *v.* Camarota, D. C. S. D. Calif., 278 Fed. 388 (motion for return of property taken on a search-warrant, denied, the defendant being absent from the premises, and the officer being lawfully there: "being lawfully there, and seeing a crime being committed, had a perfect right, and it was his plain duty, to seize the articles which were being used in committing the crime; in making such seizure, the officer could not do so by virtue of the search-warrant, but in the performance of his general duty to prevent the commission of crime"; this particular Court stands out prominently with its healthy disinclination to put a throttling interpretation on the natural and legitimate processes of law enforcement); 1922, U. S. *v.* Snyder, D. C. N. D. W. Va., 278 Fed. 650 (liquor taken from defendant, arrested without a warrant on sight by bulging pockets as he stood on the

conscience, stimulated by the stern repressive war-measures against treason, disloyalty and anarchy, in the years 1917–1919. In a certain type of mind, it was impossible to realize the vital necessity of temporarily subordinating the exercise of ordinary civic freedom during a bloody struggle for national safety and existence. In resistance to these war-measures, it was natural for the misguided pacifistic or semi-pro-German interests to invoke the protection of the Fourth Amendment. Thus invoked and made prominent, all its ancient prestige was revived and sentimentally misapplied. In such a situation, the forces of criminality, fraud, anarchy, and law-evasion perceived the advantage and made vigorous use of it. Since the enactment of the Eighteenth Amendment and its auxiliary legislation, a new and popular occasion has been afforded for the misplaced invocation of this principle; and the judicial excesses of many Courts in sanctioning its use give an impression of maudlin complaisance which would be ludicrous if it were not so dangerous to the general respect for law and order in the community.

No doubt a stage of saturation must be reached before this period of misuse of the Fourth Amendment will come to a close.

2. As to the *legal theory* of Weeks *v.* United States, there seems to be little support for it, — assuming at least that the fundamental principle of § 2183, *ante*, is accepted.

(*a*) The opinion in Weeks *v.* United States seeks to distinguish the above established principle as merely requiring "that a *collateral issue* will not be raised to ascertain the source from which testimony competent in a criminal case comes," while in the Weeks case the defendant made a formal motion before trial for the return of the seized documents. But this is an unsound use of the term "collateral." That term signifies "not relating to the main issue," and is applied to a class of facts. Now a defendant cannot turn a collateral fact into a material fact by merely making a formal motion before trial, instead of waiting till the offer of evidence. Suppose, in this lottery charge, he has made a motion that (say) the results of the last municipal lottery in Naples be sent for, to be laid before the jury; that would not turn the obviously collateral fact into a material fact. The point is that the fact of illegality of method in obtaining evidential materials *is* a collateral fact

street, held admissible; sensible opinion by Baker, J., quoted *supra*); 1921, Dillon *v.* U. S., 2d C. C. A., 297 Fed. 639 (liquor offence; whisky taken by officers at the public bar of a hotel, without a warrant, and on subsequent search with defendant's consent, admitted); 1922, Woods *v.* U. S., 4th C. C. A., 279 Fed. 706 (drug traffic; articles found on search under a warrant insufficiently descriptive, held inadmissible; the pedantic interpretation of the fullness of description here required under U. S. Rev. St. § 3462 would do credit to the medieval pleading system of the 1200s as described in Mr. H. C. Lea's Superstition and Force).

On the subject of these modern decisions, the following article ably expounds views favoring the doctrine of Weeks *v.* U. S.: Professor Z. Chafee, Jr., "Progress of the Law, 1921–1922: Evidence; Searches and Seizures" (1922; Harvard Law Rev. xxxv, 673, 694).

Whether an *indictment should be quashed* because illegally obtained evidence was produced to the *grand jury*, seems to be the same question on principle; but there is a separate line of precedents: 1920, U. S. *v.* Silverthorne, D. C. W. D. N. Y., Mar. 31, 265 Fed. 853, May 3, id. 859.

to the main issue; and all the motions in the world will not make it anything else.

(*b*) Looking still deeper, the mainstay of the special doctrine of Weeks v. United States is that the party whose documents were obtained by illegal search *has a right to obtain their return* by motion before trial. But no such consequence is implied in the Fourth Amendment. The object of the amendment was to protect the citizen from domestic disturbance by the disorderly intrusion of irresponsible administrative officials. It expressly forbids such official misconduct, and it implies both a civil action by the citizen thus disturbed and a process of criminal contempt against the offending officials. But it implies nothing at all as to the nature of the documents or chattels possessed by the citizen; and they may be treasonable, criminal, wicked, harmless, or meritorious, so far as the Amendment's tenor is concerned. And when the citizen sets up a right to a remedial process for their return, certainly the merits of the articles themselves must come into issue. If the officials, illegally searching, came across an infernal machine, planned for the city's destruction, and impounded it, shall we say that the diabolical owner of it may appear in court, brazenly demand process for its return, and be supinely accorded by the Court a writ of restitution, with perhaps an apology for the "outrage"? Such is the logical consequence of the doctrine of Weeks *v.* U. S., unless the right to return be dependent on the merits of the document or chattel as being instruments of crime or not. Yet no such issue is permitted by the doctrine of Weeks *v.* United States. — The truth is that the doctrine in question is illogical, and that the citizen has no right to claim a return of the articles taken unless their criminal or innocent nature be first determined; but as that is part of the very issue in the main charge, it cannot be determined in advance; so that the doctrine leads to impracticable results.

3. But the essential fallacy of Weeks *v.* United States and its successors is that it virtually creates a novel exception, where the Fourth Amendment is involved, to the fundamental principle (*ante*, § 2183) that *an illegality in the mode of procuring evidence is no ground for excluding it.* The doctrine of such an exception rests on a reverence for the Fourth Amendment so deep and cogent that its violation will be taken notice of, at any cost of other justice, and even in the most indirect way.

The following opinion contains the best that can be said from this point of view:

1920, CARROLL, C. J., in *Youeman* v. *Com.*, 189 Ky. 152, 224 S. W. 860: "It stands admitted that the evidence offered on the trial, and to the introduction of which objection was then made, was obtained in an unlawful way by a county officer charged with the duty of giving complete obedience to the Constitution and laws of the State. The officer, in violation of the Constitution and in disregard of the statute pointing out the way in which premises might be searched, took the law into his own hands, invaded the premises of and went into the buildings of the suspected offender, and without asking or obtaining his consent proceeded to and did search for and find the liquor that was seized. On these facts the question presented is: Will courts, established to administer justice and enforce

the laws of the State, receive, over the objection of the accused, evidence offered by the prosecution that was admittedly obtained by a public officer in deliberate disregard of law for the purpose of securing the conviction of an alleged offender? In other words, will Courts authorize and encourage public officers to violate the law, and close their eyes to methods that must inevitably bring the law into disrepute, in order that an accused may be found guilty? Will a high Court of the State say in effect to one of its officers that the Constitution of the State prohibits a search of the premises of a person without a search warrant, but if you can obtain evidence against the accused by so doing you may go to his premises, break open the doors of his house, and search it in his absence, or over his protest, if present, and this Court will permit the evidence so secured to go to the jury to secure his conviction?

"It seems to us that a practice like this would do infinitely more harm than good in the administration of justice; that it would surely create in the minds of the people the belief that Courts had no respect for the Constitution or laws, when respect interfered with the ends desired to be accomplished. We cannot give our approval to a practice like this. It is much better that a guilty individual should escape punishment than that a Court of justice should put aside a vital fundamental principle of the law in order to secure his conviction. In the exercise of their great powers, Courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed to him by the Constitution, and if at any time the protection of these rights should delay, or even defeat, the ends of justice in the particular case, it is better for the public good that this should happen than that a great constitutional mandate should be nullified. It is trifling with the importance of the question to say, as some Courts have said, that the injured party has his cause of action against the officer, and this should be sufficient satisfaction. Perhaps, so far as the rights of the individual are concerned, this might answer; but it does not meet the demands of the law-abiding public, who are more interested in the preservation of fundamental principles than they are in the punishment of some petty offender."

All this is misguided sentimentality. For the sake of indirectly and contingently protecting the Fourth Amendment, this view appears indifferent to the direct and immediate result, viz., of making Justice inefficient, and of coddling the criminal classes of the population. It puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer.

Among the best judicial expositions of the orthodox view, the following stands out:

1922, BAKER, J., in *U. S.* v. *Snyder*, D. C. W. D. W. Va., 278 Fed. 650 (the accused had been arrested without a warrant, on sight of bulging pockets as he stood on the street corner, and liquor was found in his pockets): "The Fourth Amendment to the Constitution contains no prohibition against arrest, search, or seizure without a warrant. That was left under the rules of common law. The amendment provides not that no arrest, search, or seizure should be made without a warrant, but prescribes that there shall be no *unreasonable* search and seizure; in other words, that the people shall be secure in their persons, houses, papers, and effects against unreasonable searches and seizures; not against all searches and seizures, but simply against *unreasonable* searches and seizures. And this brings us to the question: In what cases may arrests, searches, and seizures be made without a warrant, under the principles of the common law and statutory law

prevailing in this country? . . . It can be said to be the common law of the states, or the common law of the great majority of the states, in the Union, that a peace officer, a prohibition officer, has the right to arrest a criminal offender caught in the act of committing the crime; and when he arrests him, if he captures him with counterfeit coin, if he catches him with smuggled goods, if he catches him with stolen articles, if he catches him with liquor under the Prohibition Law, he has the right not only to arrest him without a warrant, but to search him and to retain the wet goods as evidence against him. . . . To hold that no criminal can in any case be arrested and searched for the evidence and tokens of his crime without a warrant, would be to leave society, to a large extent, at the mercy of the shrewdest, the most expert, and the most depraved of criminals, facilitating their escape in many instances."

1922, SLOANE, J., in *People* v. *Mayer*, — Cal. — 205 Pac. 435 (articles found under an invalid search-warrant on a charge of larceny had been erroneously denied to be returned and were afterwards used in evidence):

"Without at all minimizing the gravity of such offense, or the sacredness of the right of every citizen to be secure in his person, home, and property from any unlawful invasion by the state, it does not follow that the subsequent detention and introduction in evidence of the property thus wrongfully taken constituted error on the trial of the appellant. The trespass committed in the wrongful seizure of these personal effects by unauthorized officers, and the subsequent use of the same in evidence on the part of the prosecution, were in legal effect entirely distinct transactions with no necessary or inherent relation to each other. . . . No authority, so far as we have been able to discover, has suggested that the subsequent use of articles so taken as evidence is in itself any part of the unlawful invasion of such constitutional guaranty. The search and seizure are complete when the goods are taken and removed from the premises. Whether the trespasser converts them to his own use, destroys them, or uses them as evidence, or voluntarily returns them to the possession of the owner, he has already completed the offense against the Constitution when he makes the search and seizure, and it is this invasion of the rights of privacy and the sacredness of a man's domicile with which the Constitution is concerned. . . .

"Upon what theory can it be held that such proceeding [for the return of the articles] is an incident of the trial, in such a sense that the ruling thereon goes up on appeal as part of the record and subject to review by the appellate court? It seems to us rather an independent proceeding to enforce a civil right in no way involved in the criminal case. The right of the defendant is not to exclude the incriminating documents from evidence, but to recover the possession of articles which were wrongfully taken from him. That right exists entirely apart from any proposed use of the property by the State or its agents. . . . The fallacy of the doctrine contended for by appellant is in assuming that the constitutional rights of the defendant are violated by using his private papers as evidence against him, whereas it was the invasion of his premises and the taking of his goods that constituted the offense irrespective of what was taken or what use was made of it; and the law having declared that the articles taken are competent and admissible evidence, notwithstanding the unlawful search and seizure, how can the circumstance that the court erred in an independent proceeding for the return of the property on defendant's demand add anything to or detract from the violation of defendant's constitutional rights in the unlawful search and seizure?

"The Constitution and the laws of the land are not solicitious to aid persons charged with crime in their efforts to conceal or sequester evidence of their iniquity. From the necessities of the case the law countenances many devious methods of procuring evidence in criminal cases. The whole system of espionage rests largely upon deceiving and trapping the wrongdoer into some involuntary disclosure of his crime. It dissimulates a way into his confidence; it listens at the keyhole and peers through the transomlight. It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment. Thus it is that almost from time immemorial courts engaged

in the trial of a criminal prosecution have accepted competent and relevant evidence without question, and have refused to collaterally investigate the source or manner of its procurement, leaving the parties aggrieved to whatever direct remedies the law provides to punish the trespasser, or recover the possession of goods wrongfully taken."

The doctrine of Weeks *v.* United States also exemplifies a trait of our Anglo-American judiciary peculiar to the mechanical and unnatural type of justice. The natural way to do justice here would be to enforce the splendid and healthy principle of the Fourth Amendment directly, *i. e.* by sending for the high-handed, over-zealous marshal who had searched without a warrant, imposing a thirty-day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal. But the proposed indirect and unnatural method is as follows:

"Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else."

Some day, no doubt, we shall emerge from this quaint method of enforcing the law. At present, we see it in many quarters. It will be abandoned only as the judiciary rises into a more appropriate conception of its powers and a less mechanical idea of justice.

§ 2185. **Same: (2) Documents violating Stamp-Tax Laws.** By statutes existing for three generations past in England,[1] and by three Federal statutes, passed at different times for temporary purposes of revenue,[2] it was provided that a document not duly garnished with the required revenue-stamp should not be receivable in evidence. The policy of these statutes was a poor one, for the reasons already stated (*ante*, § 2183).[3] Their application depends so much upon the precise wording of the different statutes that the English

§ 2185. [1] Consolidated in 1870, St. 33 & 34 Vict. c. 97, and in 1891, St. 54 & 55 Vict. c. 39, § 14.

Newfoundland also has such a statute: Newf. Consol. St. 1916, c. 24, §§ 12, 15, c. 28, § 2.

[2] St. 1862, July 1, as amended by St. 1864, June 30, §§ 152, 158, 163; St. 1898, June 13, c. 448, §§ 6, 13, 14, 30 Stat. 448, repealed by St. 1902, April 12, c. 500, § 7, 32 Stat. 96; St. 1914, Oct. 22, St. 1917, Oct. 3 (war revenue act; failure to affix a revenue stamp is a misdemeanor); St. 1919, Feb. 24, Code 1919, § 9532 (internal revenue taxes; "no instrument, paper, or document, required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted, or used as evidence in any court until a legal stamp denoting the amount of the tax shall have been affixed"; § 9533 (record of an unstamped document, etc., "shall not be used in evidence").

In the *Philippines* also such a measure was adopted: P. I. Act 1189, July 2, 1904, § 118 (unstamped document shall not "be used as evidence in any Insular court until a legal stamp or stamps . . . shall have been affixed"); 1913, Tan Beko *v.* Insular Collector, 26 P. I. 254 (under Act 1189, a witness to alien immigration who had neglected, on reasonable notice, to bring with him his certificate of residence and his cedula, held properly excluded).

[3] See the recommendations in the Second Report, 1853, of the Common Law Practice Commission, p. 26.

rulings are of little value in the interpretation of our Statutes.[4] In the United States, the Courts of the individual States ruled with practical unanimity that the Federal statutes did not effect the exclusion of unstamped documents in trials in the State Courts, first, because the Federal Congress has no constitutional power (*ante*, § 6) to regulate the rules of Evidence in the State Courts [5] (though this was in only a few Courts made the ground of decision), and, secondly, because the statutes did not expressly purport to make a rule for any but the Federal Courts.[6] The application of the statutes has usually been sufficiently indicated by their words.[7]

§ 2186. **Discriminations**: (*a*) **Official Secrets**; (*b*) **Self-Crimination.** Two other principles, however, must be discriminated in their operation. (a) *Official records* are sometimes excluded because the matter contained in them is privileged from disclosure, or because their custodians are not amenable to process (*post*, § 2373).[1]

(b) *Self-criminating documents*, or other evidence, obtained from an accused person, may be excluded, not because of the illegal nature of the search or other act by which they were obtained, but because the privilege against self-crimination involves their exclusion (*post*, § 2264).

[4] Citations of the English cases may be found in the following places: 1825, Hawkins *v.* Warre, 3 B. & C. 690; 1872, Marine Investment Co. *v.* Haviside, L. R. 5 H. L. 624; 1914, Fengl *v.* Fengl, Prob. 274 (support of a wife; unstamped separation agreement, excluded, under St. 54 & 55 Vict., Stamp Act, c. 39, § 14; *semble*, even though the fact evidenced was a collateral one); 1868, McAfferty *v.* Hale, 24 Ia. 355; Best, Evidence, 8th ed., § 230.

[5] 1868, Craig *v.* Dimock, 47 Ill. 308; 1866, Hunter *v.* Cobb, 1 Bush Ky. 239. The only rulings of a State Court to the contrary are said to be Turnpike Co. *v.* McNamara, 72 Pa. 278 (1872), where Sharswood and Thompson, JJ., dissented, and an early series of cases in Iowa beginning with Hugus *v.* Strickler, 19 Ia. 413.

[6] For the State Courts, the following cases collect the authorities: *Colo.* 1897, Trowbridge *v.* Addoms, 23 Colo. 518, 48 Pac. 535; *Conn.* 1901, Garland *v.* Gaines, 73 Conn. 662, 49 Atl. 19; *Ga.* 1901, Small *v.* Slocumb, 112 Ga. 279, 37 S. E. 481; *Ill.* 1867, Latham *v.* Smith, 45 Ill. 29; 1902, Richardson *v.* Roberts, 195 Ill. 27, 62 N. E. 840; 1905, Thompson *v.* Calhoun, 216 Ill. 161, 74 N. E. 775; *Ia.* 1906, Phillips *v.* Hazen, 132 Ia. 628, 109 N. W. 1096; 1922, Farmers' Savings Bank, — Ia. —, 187 N. W. 555 (reviewing prior conflicting rulings; here holding that U. S. St. 1914 did not expressly prescribe inadmissibility and hence that no such rule applied); *Me.* 1902, Wade *v.* Foss, 96 Me. 230, 52 Atl. 640; *Mich.* 1869, Clemens *v.* Conrad, 19 Mich. 170, 176; 1906, Amos-Richia *v.* Northwestern M. L. Ins. Co., 143 Mich. 684, 107 N. W. 707; *Mo.* 1906, King *v.* Phœnix Ins. Co., 195 Mo. 290, 92 S. W. 892; *Nev.* 1899, Knox *v.* Rossi, 25 Nev. 96, 57 Pac. 179, 48 L. R. A. 305; *S. Car.* 1901, Kennedy *v.* Rountree, 59 S. C. 324, 37 S. E. 942.

But the Federal powers of legislation do extend to the *Territories*, and hence the tax-stamp laws are there enforced: 1903, Makainai *v.* Goo Wan Hoy, 14 Haw. 607, on rehearing, 683.

[7] 1920, Cole *v.* Ralph, 252 U. S. 286, 40 Sup. 321 (under U. S. St. 1914, Oct. 22, title-deeds lacking revenue stamps are admissible; this Act differing from prior ones in not expressly making the documents inadmissible); Gould & Tucker's Notes to the War Revenue Act, 1898; 1874, Cox *v.* Jones, 52 Ga. 437, 438; 1907, Bottomley *v.* Hall, 18 Haw. 412 (post-stamping); 1900, State *v.* Shields, 112 Ia. 27, 83 N. W. 807; 1900, Taft *v.* Simpson, 125 Mich. 206, 83 N. W. 77; 1872, Owsley *v.* Greenwood, 18 Minn. 429; 1901, Plunkett *v.* Hauschka, 14 S. D. 454, 85 N. W. 1004.

Is the act of 1898 *still in effect?* 1920, U. S. *v.* Masters, D. C. E. D. Mo., 264 Fed. 250 (under U. S. St. Feb. 24, 1919, Internal Revenue Act, § 1107, requiring documentary stamps, by effect of § 1105 providing for the retention in force of all laws for the collection of stamp taxes, the provision of U. S. St. June 13, 1898, § 14, prohibiting the admission in evidence of an unstamped document, is revived by reference).

§ 2186. [1] One practical difference is that a document might be receivable though illegally removed from another county, and yet the production could not have been compellable; *e. g.* 1848, Sayer *v.* Glossop, 12 Jur. 464, Parke, B.

TITLE II: RULES OF CONDITIONAL EXCLUSION (PRIVILEGE)

SUB-TITLE I: PRIVILEGE, IN GENERAL

CHAPTER LXXIV.

§ 2190. **History of Testimonial Compulsion, in general.** 1. In looking back over the history of the recognition of the duty to testify, it must be kept in mind that, up to the 1400s, the modern witness is practically unknown in jury trials, and that not until the 1500s is he a common figure in the trial and an important source of information for the jury.[1] Even in Coke's time, in the early 1600s, it is a comparatively recent feature that he is alluding to when he remarks "most commonly juries are led by the depositions of witnesses."[2] Up to that period the jury had fulfilled the double capacity of triers and of witnesses; their own knowledge of the affair, acquired as neighbors of the parties or by searching about for evidence before the trial, had been a chief source of that information which is nowadays furnished to them by ordinary witnesses.[3]

There were, to be sure, in certain classes of cases, persons not technically jurors, who came as witnesses, — deed-witnesses and transaction-witnesses, *i. e.* persons who at the time of signing a deed or striking a bargain or celebrating a marriage had been called upon by the parties to bear witness in case of future need. These had originally served as the very triers themselves, in the days before jury-trial, and their oaths had formed a distinct mode of trial, which survived alongside of jury-trial.[4] As the latter progressed and expanded, these deed-witnesses and transaction-witnesses became gradually obsolete as a separate form of trial, and came to be employed in connection with jury-trial. They were summoned with the jurors, and they did not testify openly in court, but went out with the jurors to deliberate and give information to them; so that they bore the character, for a long period — say, down to the end of the 1400s — of half jurors, half witnesses.[5]

§ 2190. [1] Thayer, Preliminary Treatise on Evidence, 122–134; Holdsworth, History of English Law, 3d ed., vol. III, 1923, p. 638.
[2] Coke, 3 Inst. 26.
[3] Thayer, *ubi supra*, 90–97.
[4] Thayer, 17–24.
[5] Thayer, 97–104.

Now these persons joined with and yet separate from the jurors proper, were fully recognized to be under the same liability and duty as the jurors themselves; they were summoned with the jurors, and were equally subjected to compulsory process.[6] Whether the recognition of this was felt to rest more upon the implied pledge given when the person had been formally called upon by the party to bear witness, or upon the assimilation in thought of the jurors and these persons, does not clearly appear; probably both considerations entered. Towards the end of the 1400s, it became uncommon, on account of the inconvenience of numbers, to summon them with the jurors, and their function as joint juror-witnesses fell into disuse.[7]

2. In the meantime the ordinary modern witness — *i. e.* the person who happens to know something on the matter in issue — was gradually appearing. He was asked by the party to come and contribute his help, or he came of his own motion and interest in the cause. But he *could not be compelled* to come. A marked feature of the primitive Germanic law was the failure to recognize any general testimonial duty. There must be some specific pledge of faith beforehand (as in the case of the deed-witness or transaction-witness) to bear testimony for the party when called on.[8] This tradition was inherited by our law, and was at the period in question (the end of the 1400s) still a living force.

But more than this. The ordinary witness (such as we now know him) was not only not compelled; he was not welcomed. There was a radical and strict discouragement of maintenance; and the man who comes to labor privately with his neighbors on the jury by generally urging his influence in favor of one of the parties was not carefully distinguished from the man who comes merely to tell them what he knows of the facts. He is, in either case (they thought), trying to make them decide for one of the parties rather than the other; he is a meddler; that was the law's attitude towards him. This feature of the thought of the times is perhaps difficult nowadays to conceive. But it contains the whole explanation of the ordinary witness' position in the 1400s.[9]

3. The result of this rooted opposition to whatever bore the semblance of maintenance was that anybody who was not somehow concerned as a party

[6] Thayer, 97–104.

[7] Thayer, 101.

[8] Schroeder, Lehrbuch der deutschen Rechtsgeschichte, 4th ed., 1902, pp. 86, 365 ("In order to bind document-witnesses once for all to a subsequent giving of testimony, the party had to pay document-money or give wine; for no public testimonial obligation existed [in the Frankish period], and a civil obligation could be created only by a contract entered into with a consideration"); Pollock and Maitland, 1895, Hist. Eng. Law, II, 599 ("It seems to have been a general rule that no one could be compelled, or even suffered, to testify to a fact, unless when that fact happened he was solemnly 'taken to witness'"). It has been pointed out by Professor Glasson (Histoire du droit et des institutions de la France, 1895, VI, 540) that the liability of the witness, if his oath were challenged as false by the opponent, to vindicate himself by judicial combat, was a serious one, and naturally prevented the recognition of any legal obligation to appear as a witness; and he notes the contrast in the ecclesiastical courts, where the testimonial obligation already existed.

[9] It has already been further examined in dealing with the history of disqualification by interest (*ante*, § 575) and of the Hearsay rule (*ante*, § 1364).

or a counsel in the cause ran the risk, if he came forward to testify to the jury, of being afterward sued for maintenance by the party against whom he had spoken.[10] "If he had come to the bar out of his own head and spoken for one or the other," says a judge in 1450,[11] "it is maintenance, and he will be punished for it. And if the jurors come to a man where he lives, in the country, to have knowledge of the truth of the matter, and he informs them, it is justifiable; but if *he* comes to the jurors or labors to inform them of the truth, it is maintenance, and he will be punished for it." Thus the state of things was that the person informing the jury must (if he would escape a charge of maintenance) either be an interested party, or his counsel or his servant or tenant or relative — in short, so situated that "the law presumes him bound to be with the party" [12] — or he must have been officially called upon, either by summons as juror or deed-witness, or by the express request of the jury or of the judge — in short, by "compulsion of law"; [13] since "what a man does by compulsion of law cannot be called maintenance." [14]

This state of things lasted well on into the 1500s.[15]

But gradually it became intolerable, as may be imagined. By that time the jury was less and less able to do justice to the cause through the means of its own neighborhood-knowledge. The summoning of deed-witnesses and transaction-witnesses with the jury (a method in any event available in only certain classes of cases) had through its cumbrousness fallen into disuse. No other form of compulsory summons than that appropriate to jurors and these quasi-jurors was known in tradition.[16] The doctrine of maintenance was a harsh obstacle in the way of obtaining by persuasion the attendance of any other persons capable of giving material information. In these conditions, the trend of the law was naturally marked out by the circumstances. The lead was furnished by the existing qualification, already noted, that "what a man does by compulsion of law cannot be called maintenance." Create a general compulsion of law for all persons whose information may be needed or desired as useful by the parties, and the obstacle to getting witnesses would be removed. Let an order of the judge, commanding such a person's appearance, be obtainable, as of course, before the trial, and the risk of a charge of maintenance would be removed, and no man need fear to come forward as a witness.

4. Such was the expedient which was plainly dictated by the exigency;

[10] The data are given in Thayer, 124–129; Holdsworth, History of English Law, 3d ed., vol. I, 1922, p. 335, vol. III, 1923, p. 398.

For the writ of conspiracy, in which the same attitude towards witness-informers prevailed, the authorities are given in Mr. P. H. Winfield's History of Conspiracy and Abuse of Legal Procedure, § 32, p. 71 (Cambridge Studies in English Legal History, 1921).

[11] Y. B. 28 H. VI, 6, 1; quoted in Thayer, 129.

[12] Cheyne, C. J., in Y. B. 11 H. VI, 43, 36; quoted in Thayer, 126.

[13] 1406, Y. B. 9 H. IV, pl. 24; Y. B. 8 id. 6, 8; quoted in Thayer, 125.

[14] Littleton, arguing, in 1450, Y. B. 28 H. VI, 6, 1; quoted in Thayer, 128.

[15] 1537, Y. B. 27 H. VIII, 2, 6; quoted *ante*, § 575.

[16] As late as 1481 (Y. B. 28 Ed. IV, 28, 1; quoted in Thayer, 129, note) a judge even refuses to compel a man to testify who is already in the court.

and such, beyond a doubt, was the genesis — slow though the creative process was — of the notable statute of Elizabeth, in 1562–3, by which a penalty was imposed and a civil action was granted against any person who refused to attend, after service of process and tender of expenses.[17] No doubt a process had been issued on demand, increasingly often, in the preceding generation; but this appears as the first definite recognition of the general right to have that process and the general duty implied by it.[18] This statute did for testimony at common law what the subpœna had done for testimony in chancery, more than a hundred years before, by an expedient almost precisely similar.[19]

5. This statute of Elizabeth, then, which in our day appears merely to supply a means of getting a hold upon persons who are not willing to testify, and typifies the *duty* of being a witness, appears in its inception as serving also a different and more restricted purpose. By giving a command to those who were willing enough, but were timorous, it represented their *right* to come and to testify, unmolested by the apprehension of maintenance-proceedings. Its provision for a civil action against persons refusing — a provision which at first sight gives us of to-day an incorrect impression — was intended still

[17] St. 5 Eliz. c. 9, § 12 ("If any person or persons upon whom any process out of any of the courts of record within this realm or Wales shall be served to testify or depose concerning any cause or matter depending in any of the same courts, and having tendered unto him or them, according to his or their countenance or calling, such reasonable sums of money for his or their costs or charges as having regard to the distance of the places is necessary to be allowed in that behalf, do not appear according to the tenor of the said process, having not a lawful and reasonable let or impediment to the contrary, that then the party making default" shall forfeit £10 and give further recompense for the harm suffered by the party aggrieved).

[18] That this step was taken in order to remove the obstacles which the law of maintenance otherwise presented may be easily inferred from the recorded persistence of that law down to within a few years of the statute (as shown in the case of 1537, cited *supra*). The office of the subpœna as a sort of indemnity against an action of maintenance plainly appears also in a petition in Chancery, of the prior century, where the petitioner asks for a subpœna to his witness, because "the same David will gladly knawelygge the treweth of the same matiers, bot he wald have a manndement fro yowe, for the cause that he shuld noght be haldyn parciall in the same matier" (Calendars of Proceedings in Chancery, 1450–60, 1, p. xix; quoted in Thayer, 129). Moreover, this notion that people who come forward, without compulsion, to talk to the jury are meddlers, and that a peremptory command of the Court can alone remove the stigma of impropriety, was so rooted in popular and professional feeling that it only disappeared slowly and gradually; and as late as the early 1600s a learned clerk of the Star Chamber (*ante* 1635, Hudson, Treatise of the Star Chamber, III, § 21, in Hargraves' Collectanea Juridica, II, 207) remarks that he who "comes to yield his testimony without compulsion" is "esteemed a forward witness."

[19] "John de Waltham first framed it in its present form, when a clerk in Chancery, in the latter end of the reign of Edward III [about 1375]; but the invention consisted in merely adding to the old clause 'quibusdam certis de causis,' the words 'et hoc sub pœna centum librorum nullatenus omittas'; and I am at a loss to conceive how such importance was attached to it, or how it was supposed to have brought about so complete a revolution in equitable proceedings; for the penalty was never enforced, and if the party failed to appear his default was treated (according to the practice prevailing to our own time) as a contempt of court, and made the foundation of compulsory process" (Campbell, Lives of the Chancellors, 5th ed., I, 259). The learned writer would not have been "at a loss to conceive" the importance of the expedient, if he could have been acquainted with the modern researches into the history of witnesses. There had been before that time no compulsion; and the 'pœna' of 'centum libri' effectually supplied the compulsion. We may well understand that a "revolution in equitable proceedings" was by this 'sub pœna' clause brought about. This and the statute of Elizabeth mark an epoch in the history of legal theory and practice. The history of the subpœna is further noticed *infra*, note 27.

further to counteract their fears of maintenance-proceedings by the opponent if they *did* come, by subjecting them to an action by the summoning party if they did *not* come. In other words, the exigency which the statute meant to meet was not so much the witness' insensibility to his legal duty to the party desiring his attendance as his sensitiveness to the legal claims of the opposite party to his non-attendance. Of a legal duty to attend or to give testimony, it can hardly be said that there is at this stage any settled recognition. The effort is rather merely to create a freedom to attend.

As this freedom came to be exercised more and more generally, and the ordinary witness became, by the 1600s, the chief source of the jury's information, the notion of a duty was naturally developed from and added to the notion of a freedom or right.[20] In the next century, and hardly before then, do we find a plain recognition of the duty; and it is noticeable that there are two stages of development, for the duty of attendance to be sworn comes earlier than the duty of disclosure of knowledge. The obligation to attend and bear testimony generally had been settled; but for some time afterwards there appears still to be lacking the full conception that the answer to a specific question on the stand can be compelled; and that all desired facts are bound to be disclosed.[21]

The history of the various claims of exemption, from that time onward,[22] shows that the final achievement was in the early 1600s distinctly a new one:

1612, Sir *Francis Bacon*, in the *Countess of Shrewsbury's Trial*, 2 How. St. Tr. 769, 778: "You must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and hand, but of their knowledge and discovery. If there be anything that imports the king's service, they ought themselves undemanded to impart it; much more, if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer."

6. But as yet there was one important step to be taken. The statute of Elizabeth had apparently intended to provide only for *civil* causes. In criminal causes, the date when process began to be issued for the Crown's witnesses does not appear; though presumably it preceded the time of Elizabeth's statute. But the accused in a *criminal* cause was not allowed to have witnesses at all,[23] — much less to have compulsory process for them. By the early 1600s this disqualification began to disappear, and the accused was occasionally allowed to put on witnesses, who spoke without oath. After

[20] 1599, Dobson *v.* Crew, Cro. Eliz. 705 (bond to give testimony; the Court said that, even apart from the bond, "he is compellable by the law").

[21] As late as about 1630, a clerk of the Star Chamber, Hudson, is found writing (Treatise on the Star Chamber, part III, § 21, Hargraves' Collectanea Juridica, II, 209) that "the great question hath been, whether a witness which in examination will not give any answer shall be compelled to make answer to the interrogatories; . . . [and Lord Chancellor Egerton] gave me answer, that he knew no law to compel a witness to speak more than he would of his own accord." This was certainly not the then practice of the Star Chamber (*post*, § 2250), but the statement looks like a reminiscence of the ecclesiastical law, as noticed *infra*, note 27.

[22] *Post*, § 2212 (trade secrets), § 2286 (confidences), § 2290 (attorney and client).

[23] The history of this disqualification has already been examined (*ante*, § 575).

two generations, and by 1679, under the Restoration, the judges began to grant him, by special order, compulsory process to bring them; [24] and finally, at slow intervals, in 1695 and in 1701, he was guaranteed this right by general statutes.[25] This guarantee was afterwards embodied in most of the constitutions of the United States (*post*, § 2191).

7. In the remaining important field of jurisdiction, the Court of Chancery, the general doctrine becomes a part of English history at a time when it was already in part achieved in another system of law. When the Chancellors in the 1400s were forming the procedure of their court after the model of the ecclesiastical law, they found a doctrine 'de testibus cogendis' long canvassed as a theoretic principle in the system from which they borrowed. There had indeed been a time when that system was passing through a development something like our own, — at least, when the compellability of witnesses was a new thing; the decretals of the 1200s indicate this; [26] and a final settlement had not been reached when the English Court of Chancery began to flourish, and to borrow the Continental rules.[27] But the Chancellors, without waiting, pushed the principle to the extreme test of practicality and invented the keen compulsory weapon of the subpœna writ.[28] This

[24] *Ante*, § 575.

[25] 1695-6, St. 7 & 8 W. III, c. 3, § 7 (persons indicted for treason and misprision "shall have the like processe of the court where they shall bee tryed, to compell their witnesses to appeare for them att any such tryal or tryals as is usually granted to compell witnesses to appear against them"); 1702, St. 1 Anne, c. 9, § 3 (requires that witnesses produced for the accused in felony shall be sworn); the latter statute was treated by implication as authorizing compulsory process: 1824, Starkie, Evidence, I, 86.

The earliest American colonial statute was probably that of South Carolina in 1712, now Code Crim. Pr. 1922, § 965.

[26] Corpus Juris Canonici, Decretal. II, 20 ('de testibus et attest.'), 21 ('de testibus cogendis'); Glasson, cited *supra*, note 8.

[27] That law seems to have suffered an arrest of development, and was late in reaching explicitly the complete conception of a testimonial duty. "The canon law recognized a public duty and liability to bear witness, . . . although to be sure the earlier doctrine had partially refused this recognition, for criminal cases in general, or at least for the 'accusatio'-proceeding in particular" (Hinschius, Kirchenrecht, 1897, VI, pt. 1, § 364, p. 97, note 1). The most that could be said was that the modern Church jurists, in regard to the coercion of a witness, "incline to hold it allowable, at least when proof cannot be supplied in any other manner" (Droste, Canonical Procedure, tr. Messmer, 1887, § 66). The latest revision of the modern Catholic Church procedure, however, seems to have accepted the full principle; Codex Juris Canonici Pii X, 1917, Can. 1766, § 2 ("Testis inobediens, qui nempe sine legitima causa non comparuit, aut, etsi comparuit, renuit respondere vel jusjurandum praestare vel attestationi praescribere, a judice potest congruis poenis coerceri et insuper mulctari pro rata damni quod ex eius obedientia inobedientia partibus obveniat").

Even in modern French procedure (which is founded on canon-law methods), a witness who refuses on the stand to answer a specific question cannot be compelled (Bodington, French Law of Evidence, 1904, p. 116); but see Bonnier, Traité des preuves, ed. Larnaude, 5th ed., 1888, §§ 266, 326, and Pertile, Storia del diritto italiano, 2d ed., 1903, b. V, c. III, § 1.

[28] For the history of the subpœna writ, see the quotation from Lord Campbell, *supra*, note 19, and further, Hudson, Treatise of the Star Chamber, pt. III, § 21, in Hargr. Coll. Jurid. II, 207; Leadam, Select Cases in the Star Chamber, Selden Soc. Pub. vol. XVI, p. xxii; Spence, Equitable Jurisdiction, I, 328, 345, 369; Choice Cases in Chancery, 1 (1672).

Mr. Kerly, in his Historical Sketch of the Equitable Jurisdiction of the Court of Chancery (1890, p. 45), pointed out that the tradition repeated by Campbell (*supra*, n. 19), as to John de Waltham's invention of the subpœna form about 1375 A. D. is unfounded; it existed earlier in other processes. Details as to the history will be found in the following later researches: Leadam and Baldwin, Select Cases before the King's Council, 1243–1482, Introd. p. xxxix (Selden Soc. Pub. vol. xxxvi; 1918); Holdsworth, History of English Law, vol. I, 3d ed., 1922, pp. 241, 485.

gave them more than a century's start of the common-law Courts in the recognition of a definite testimonial compulsion and duty. It may be supposed, moreover, that the rapid increase in the activity of the Chancery during the 1500s was one of the causes which contributed to the introduction at that time of compulsory process for witnesses in the common-law Courts, and was the chief influence in prescribing for that process the specific form of the subpœna writ. It may even be that the Chancery's priority in the use of compulsory process was itself one of the causes that had made it more efficient and more popular.

§ 2191. **Constitutional Guaranty of Compulsory Process.** This history of the law securing for accused persons the right to compulsory process for their witnesses shows that the purpose of the statutes was merely to cure the defect of the common law by giving to parties defendant in criminal cases the common right which was already in custom possessed both by parties in civil cases and by the prosecution in criminal cases. The Bills of Rights in most of the Constitutions have incorporated this statutory right,[1]

§ 2191. [1] The usual provision is that in criminal cases the accused shall have the right to "compulsory process for obtaining witnesses" (or, "process to compel the attendance of witnesses") "in his favor" (or, "in his behalf"); special variations are noted below; the figures first noted for each jurisdiction indicate the date, article, and section of the Constitutions; *U. S.* 1787, Am. VI: Rev. St. § 1034, Code 1919, § 1508 (in capital cases, defendant shall have the like process for witnesses as the prosecution); *Ala.* 1901, I, 6; *Ariz.* 1910, I, 24; *Ark.* 1874, II, 10; *Cal.* 1879, I, 13; *Colo.* 1876, II, 16; *Conn.* 1818, I, 9; *Del.* 1897, I, 7; *Fla.* 1887, Decl. of R. 11; Rev. G. S. 1919, § 6032; *Ga.* 1877, I, 5, P. C. 1910, § 8; *Haw.* Rev. L. 1915, §§ 3687, 3775; *Ida.* 1889, I, 13; *Ill.* 1870, II, 9; *Ind.* 1851, I, 13; *Ia.* 1857, I, 10 (for criminal cases, the usual clause; "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 cause"); *Kan.* 1859, Bill of R. 10; *Ky.* 1891, 11; *La.* 1921, 9; R. S. 1870, § 992 (every person indicted for a capital crime or one punishable with 7 years' hard labor "shall have the same process as the State to compel the attendance of witnesses"); *Me.* 1819, I, 6; *Md.* 1867, Decl. of R. 21 ("to have process for his witnesses; to examine the witnesses for and against him on oath"); *Mass.* 1780, Decl. of R. 12 ("a right to produce all proofs that may be favorable to him"); Gen. L. 1920, c. 263, § 5 (accused shall be allowed "to produce witnesses and proofs in his favor"); *Mich.* 1908, II, 19; Comp. L. 1915, § 15623; *Minn.* 1857, I, 6; *Miss.* 1890, III, 26; *Mo.* 1875, II, 22; *Mont.* 1889, I, 16; *Nebr.* 1875, I, 11; *Nev.* Rev. L. 1912, § 6855; *N. H.* 1793, Bill of R. 15 (like Mass.); *N. J.* 1844, I, 8; *N. Mex.* 1911, II, 14; *N. Y.* Cons. L. 1909, Civil Rights, § 12; *N. C.* 186S, I, 11 ("to confront the accusers and witnesses with other testimony"); *N. D.* 1889, I, 13; *Oh.* 1851, I, 10; *Okl.* 1907, II, 20; *Or.* 1859, I, 11; *Pa.* 1874, I, 9; St. 1718, May 31, Dig. 1929, Crim. Proc., § 8163; *P. I.* U. S. St. 1916, Aug. 29, c. 416, § 3, Organic Act, Code 1919, § 4112 (bill of rights); P. I. Gen. Order 58 of 1900, § 15; *P. R.* U. S. St. 1917, Mar. 2, Organic Act, § 2, Code 1919, § 4043 (bill of rights); P. R. Rev. St. & C. 1911, § 6022; *R. I.* 1843, I, 10; Gen. L. 1909, c. 354, § 65; *S. C.* 1895, I, 18; C. Cr. P. 1922, § 943 (accused's right to compulsory process); § 951 (accused's right to "produce witnesses and proofs in his favor"); *S. D.* 1889, VI, 7; Rev. C. 1919, § 4410 (an accused is entitled "to have compulsory process for obtaining witnesses in his favor"); *Tenn.* 1870, I, 9; *Tex.* 1876, Bill of R. 10; Rev. C. Cr. P. 1911, § 4; *Utah*, 1895, I, 12; Comp. L. 1917, § 8553; *Va.* 1902, I, 8 (like Vt.); *Vt.* 1793, I, 10 ("to call for witnesses in his favor"); *Wash.* 1889, I, 22 ("and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed"); R. & B. Code 1909, §§ 2132, 2307 (Criminal Code; compulsory process demandable for "all witnesses who may be necessary for his proper defence"); *W. Va.* 1872, III, 14; *Wis.* 1848, I, 7; *Wyo.* 1889, I, 10.

The Federal clause first occurs in its present form in the resolution of amendment by Congress, March 4, 1789; but it was founded on the recommendations of the Constitutional Convention of New York and of North Carolina, July 26 and Aug. 1, 1788; their proposal declared the accuser's right "to have

because those clauses of the Constitutions were intended to sanction permanently the more fundamental features of just and liberal criminal procedure, particularly in the parts which had at various times in the past been found liable to abuse. The Constitutions, in this instance, provided nothing new or exceptional; but gave solid sanction, in the special case of accused persons, to the procedure ordinarily practised and recognized for witnesses in general.

It follows that this right does not override and abolish such *exemptions and privileges* as may be otherwise recognized by common law or statute; the right guaranteed is merely the general right to the compulsory process which is required for making practical the testimonial duty, so far as that duty otherwise exists.[2] So, also, this guarantee does not define the extent to which testimonial attendance is conditional on the party's *tender of expenses;*[3] whether an accused must make such a tender remains to be determined by the law as otherwise defined.[4]

§ 2192. **Duty to give Testimony; General Principle.** For three hundred years it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. We may start, in examining the various claims of exemption, with

the means of producing his witnesses" and "to call for evidence" (Elliot's Debates, I, 328, 334, 339, IV, 243). None of the other ratifying States (except Rhode Island, after the Congress above mentioned) seem to have called for this clause.

[2] 1854, Re Dillon, 7 Sawyer 561, 569 (Hoffman, J.: "The object and effect of the constitutional provision were merely to give to the accused the right to such process as is usually granted to compel witnesses to appear on the side of the prosecution against them"; here, a foreign consul's privilege); 1897, State *v.* Wiltsey, 103 Ia. 54, 72 N. W. 415 (witness prevented by illness); 1906, State *v.* Stewart, 117 La. 476, 41 So. 798 (testimony of a proposed witness admitted to prevent a continuance; the constitutional right covers merely the right to process by subpœna, and not the further discretionary power of the Court to attach a desired witness for failure to obey the subpœna).

The contrary was maintained by the Executive, through Mr. Marcy, Secretary of State, in this matter of Consul Dillon, *supra*, so far as the consular exemption was based on a treaty made subsequent to the Federal Constitution; the authorities are cited *post*, § 2372.

It would seem that, for procuring the attendance of a *convict in prison*, process (usually provided for by statute) would be obtainable even in civil cases; but this right has sometimes been placed upon the basis of the constitutional provision: 1196, Hancock *v.* Parker, 100 Ky. 143, 37 S. W. 594.

The right to process has been construed not to include a *right of consultation* with the witness before trial: 1906, State *v.* Goodson, 116 La. 388, 40 So. 771 (defendants not allowed to obtain information from a co-indictee in jail); 1921, State *v.* Storrs, — Wash. —, 197 Pac. 17 (here the witness was in prison under sentence and on application of the accused was brought from prison to testify, but was not allowed to be interviewed by accused or his counsel, four judges dissenting). But this interpretation is thoroughly unsound. Compare the statutes for furnishing a *list of witnesses* (*ante*, § 1851).

The constitutional principle does not prevent the *limitation of number of witnesses*, wherever that is otherwise allowable (*ante*, § 1907).

[3] *Contra:* 1853, West *v.* State, 1 Wis. 209, 230 ("It would be in many cases but bitter mockery to grant the prisoner the right to have witnesses examined in his behalf, and then to deny him the necessary process of the law to procure their attendance").

[4] For these requirements as to tender of expenses, see *post*, § 2201.

For other analogies, as to constitutional provisions merely sanctioning a general principle, and not affecting its exceptions, see *ante*, § 1397.

For the question whether the statutory rule refusing a continuance, where the *accused's witnesses' desired testimony is admitted* to be as averred, is in violation of the constitutional provision guaranteeing compulsory process, see *post*, § 2595.

the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional and are so many derogations from a positive general rule:

1742, *Bill for Indemnifying Evidence*, Cobbett's Parliamentary History, XII, 675, 693 (the debate being upon a bill to pardon in advance such witnesses as should criminate themselves in testifying to the frauds of Sir Robert Walpole, Earl of Orford, the debate took a general range). *Duke of Argyle* (for the bill): "On the present occasion, my lords, I pronounce with the utmost confidence, as a maxim of indubitable certainty, 'that the public has a claim to every man's evidence,' and that no man can plead exemption from this duty to his country." L. C. *Hardwicke* (against the bill): "It has, my lords, I own, been asserted by the noble duke, that the public has a right to every man's evidence, — a maxim which in its proper sense cannot be denied. For it is undoubtedly true that the public has a right to all the assistance of every individual."

1802, SMITH, M. R., in *Butler* v. *Moore*, McNally, Evidence, 253: "It is the undoubted legal constitutional right of every subject of the realm, who has a cause depending, to call upon a fellow-subject to testify what he may know of the matters in issue; and every man is bound to make the discovery, unless specially exempted and protected by law."

1827, Mr. *Jeremy Bentham*, Draft for a Judicial Establishment (Works, Bowring's ed., IV, 320): "What then? Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves, — are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, — they and everybody! What if, instead of parties, they were witnesses? Upon business of other people's, everybody is obliged to attend, and nobody complains of it. Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly."[1]

1861, WILLES, J., in *Ex parte Fernandez*, 10 C. B. N. S. 3, 39: "Every person in the kingdom, except the sovereign, may be called upon and is bound to give evidence, to the best of his knowledge, upon any question of fact material and relevant to an issue tried in any of the Queen's courts, unless he can show some exception in his favor."

1818, TILGHMAN, C. J., in *Baird* v. *Cochran*, 4 S. & R. 397, 400: "From the nature of society, it would seem that every man is bound to declare the truth when called upon in a court of justice. . . . The general welfare will be best promoted by considering the disclosure of truth as a debt which every man owes his neighbor, which he is bound to pay when called on, and which in his turn he is entitled to receive."

1853, SMITH, J., in *West* v. *State*, 1 Wis. 209, 233: "In no just sense can the requisition upon a citizen of his attendance upon court to testify as a witness be considered as the taking of private property for public use, within the meaning of the constitution. The object of that provision in the fundamental law was to protect the citizen from the grasping demands of government, not to absolve him from any of those various personal duties which every good citizen owes to his country, such as the performance of military duty, obedience to the call of the proper authority for his personal service in suppressing a riot, the apprehension of a felon, affording assistance to officers in making arrests when resisted, and the like. There are very many instances in which the citizen is required to perform

§ 2192. [1] Bentham's illustration came very nearly true in R. *v.* Baines, [1909] 1 K. B. 258, cited more fully *post*, § 2210, note 2, and § 2371, note 1, where the Prime Minister and the Home Secretary were subpœnaed to testify as to a breach of the peace committed at a meeting where they were present.

personal service or render aid to his government, without other compensation than that of his participation in the general good and his enjoyment of the general security and advantage which result from common acquiescence in such obligations on the part of all the citizens alike and which is essential to the existence and safety of society." [2]

1856, PERKINS, J., in *Israel* v. *State*, 8 Ind. 467: "It is as much the duty and interest of every citizen to aid in prosecuting crime as it is to aid in subduing any domestic or foreign enemy; and it is equally the interest and duty of every citizen to aid in furnishing to all, high and low, rich and poor, every facility for a fair and impartial trial when accused; for none is exempt from liability to accusation and trial." [3]

1859, CATON, C. J., in *Bennett* v. *Walker*, 23 Ill. 97, 101 (compelling the heir of the grantor of a lost deed to execute another): "He says he owes the complainants no such duty. He forgets that society often imposes upon all its members the obligation to submit to inconveniences and trouble, and even expense, for the sole benefit of others. Where was the obligation resting upon R. S. to attend as a witness in this case? . . . What right have the Courts to compel any one to quit his own affairs, no matter how pressing they may be, and attend as a witness or juror in litigation between strangers? This duty to assist others who stand in need of our assistance for the maintenance of their rights necessarily flows from the relations we bear each other as members of the same community, we being mutually dependent upon each other for security and protection."

From the point of view of the *duty* here predicated, it emphasizes the sacrifice which is due from every member of the community. That sacrifice may take two forms, either of them serious enough. In the first place, it may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-requited favor. It is a duty, not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit. He is not a desirable member of society. He who will live by society must let society live by him, when it requires to.

Or the sacrifice may be of his privacy, of the knowledge which he would preferably keep to himself because of the disagreeable consequences of disclosure. This inconvenience which he may suffer, in consequence of his testimony, by way of enmity or disgrace or ridicule or other disfavoring action of fellow-members of the community, is also a contribution which he makes in payment of his dues to society in its function of executing justice. If he cannot always obtain adequate solace from this reflection, he may at least recognize that it defines an unmistakable axiom. When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when

[2] *Mass.* Const. 1780, Decl. of R. 10 ("Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of his protection; to give his personal service or an equivalent, when necessary"); so also *N. H.* Const. 1793, Bill of R. 12; *N. C.* 1906, Clark, C. J., in State v. Wheeler, 141 N. C. 773, 53 S. E. 358; *Vt.* Const. 1793, I, 9; Gen. L. 1917, § 2496. Compare the following: *Ind.* Const. 1851, Art. I, § 66 ("No man's particular services shall be demanded without just compensation").

[3] *Accord:* 1906, Washington Nat'l Bank v. Daily, 166 Ind. 631, 77 N. E. 53 (cited *post*, § 2193, note 3; good opinion by Hadley, J.).

the benefit gained by exacting it would in general be less valuable than the disadvantage caused; and the various privileges are merely attempts to define the situations in which, by experience, the exaction would be unnecessary or disadvantageous. The duty runs on throughout all, and does not abate; it is merely sometimes not insisted upon.

From the point of view of society's *right* to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole, — from justice as an institution, and from law and order as indispensable elements of civilized life. The dramatic features of the daily court-room tend to obscure this; the matter seems to be between neighbor Doe and neighbor Roe; we are prone to shape our own course by the merits of the one or the other of their causes. But the right merely happens to be exemplified in the case of Doe *v.* Roe; that is all. The whole life of the community, the regularity and continuity of its relations, depend upon the coming of the witness. Whether the achievements of the past shall be preserved, the energy of the present kept alive, and the ambitions of the future be realized, depends upon whether the daily business of regulating rights and redressing wrongs shall continue without a moment's abatement, or shall suffer a fatal cessation. The business of the particular cause is petty and personal; but the results that hang upon it are universal. All society, potentially, is involved in each individual case; because the process itself is one of vitality. Each verdict upon each cause, and each witness to that verdict, is a pulse of air in the breathing organs of the community. The vital process of justice must continue unceasingly; a single cessation typifies the prostration of society; a series would involve its dissolution. The pettiness and personality of the individual trial disappear when we reflect that our duty to bear testimony runs not to the parties in that present cause, but to the community at large and forever.

It follows, on the one hand, that *all privileges of exemption from this duty are exceptional*, and are therefore to be discountenanced. There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.

On the other hand, if this duty exists for the individual to society, so also he may fairly demand that society, so far as the exaction of it is concerned, shall *make the duty as little onerous as possible*. He may demand that the com-

pulsion be relaxed so far as it is not indispensable for the ascertainment of truth. He may demand that the situation of a witness be made as free from annoyances as is possible; that delay be diminished; that needless technicalities be ignored; that some sort of compensation for loss of time be provided; that the rules of evidence and the conduct of counsel be not such as to inflict unnecessary annoyance upon innocent persons;[4] and that the law in general be so formed as to reduce to a minimum the necessary sacrifices made by the witness in the name of duty. These just demands are too often as much ignored by the profession of the law as are the duties of witnesses by laymen. In the adjustment of the unquestioned duty of the latter to the correlative right of society, speaking through the law and its practitioners, much remains yet to be desired.

§ 2193. **Same: Testimonial Duty applied to Production of Documents.** This testimonial duty to attend and disclose all that is desired for the ascertainment of truth applies to every form and material of evidence whatever. In particular it applies to such evidential material as exists in a person's hands in the form of *documents*. "There is no difference in principle," said a great judge,[1] "between compelling a witness to produce a document in his possession, under a subpœna 'duces tecum' (in a case where the party calling the witness has a right to the use of such document), and compelling him to give testimony when the facts lie in his own knowledge." This much is unquestionable; for to give up facts possessed by physical control is no different from the giving up of data possessed as mental impressions:

1775, *Trial of Maharajah Nundocomar*, 20 How. St. Tr. 1057; Mr. *Stewart*, for the Governor and Council of the East India Company, wished not to produce the Council records, because it would lead to "many inconveniences and ill consequences to exhibit the proceedings of the Council in an open court of justice, especially as they may sometimes contain secrets of the utmost importance to the interest and even to the safety of the State." The COURT: "We are not surprised that the Governor-general and Council should be desirous to prevent their books being examined, which might tend to the consequences they mention. It would be highly improper that their books should be wantonly subjected to curious and impertinent eyes. But at the same time it is a matter of justice that, if they contain evidence material to the parties in civil suits, they may have an opportunity of availing themselves of it. Humanity requires it should be produced when in favor of a criminal, justice when against him. The papers and records of all the public companies in England — of the Bank, South Sea House, and the East India House — are liable to be called for, when justice shall require copies of the records and proceedings, from the highest court of judicature down to the court of pie-powder, and continually given in evidence. When it is necessary they should be produced, the Court will take care they are not made an improper use of."

This general and equal duty to produce documentary material is, of course, like the duty to give oral testimony, subject to various specific privileges.[2] These can be later considered in their appropriate places; for example, the

[4] Compare §§ 781, 983, *ante*.

§ 2193. [1] 1830, Shaw, C. J., in Bull *v.* Loveland, 10 Pick. 9, 14.

[2] For instances of the general rule that the *privacy of documents* is no excuse for non-production, see *post*, § 2212.

privilege as to *title-deeds* and *securities under a lien* (*post*, § 2211), *trade-secrets* (*post*, § 2212), a *civil party's documents* (*post*, § 2219), *official documents* (*post*, § 2367), *self-incriminating documents* (*post*, § 2264), and *confidential communications* of various sorts (*post*, §§ 2285–2396). Moreover, the general requirement of notice and summons by subpœna finds special application in the use of a *subpœna duces tecum* for documents (*post*, § 2200).

Distinguish, however, the question whether *before trial* a third person, not a party, can be compelled to disclose documents, — a subject already treated (*ante*, §§ 1857–1859); there may be an obligation to disclose them finally on the trial, and yet there may be no right to inspect them before trial.

§ 2194. **Same: Testimonial Duty applied to Premises, Chattels, Body, etc.** If a person, by virtue of his very existence in civilized society, owes a duty to the community to disclose for the purposes of justice all that is in his control which can serve the ascertainment of the truth, this duty includes equally the mental impressions preserved in his brain, the documents preserved in his hands, the corporal facts existing on his body, and the chattels and premises within his control. There can be no discrimination. The latter forms of disclosure, though more rarely asked for, are not a whit the less necessary or proper. They are included in the general duty.

Apart from specific privileges, then (*post*, §§ 2210–2224) a person is bound, if required, to furnish evidence by exhibiting his *corporal features*, his *chattels*, and his *premises*, to the inspection of the tribunal or its duly delegated officers, and to do or exhibit any other thing which may in any form furnish evidence.[1]

The testimonial duty also includes the auxiliary function of serving as *interpreter* of another's testimony.[2]

§ 2195. **Officers possessing Power to Compel Testimony; Depositions for Use in another State; Witness' Liability to Action, and Immunity from Arrest.** In connection with the enforcement of the testimonial duty, certain other questions arise, not concerning the admissibility of evidence or the scope of privilege, but involving independent principles of substantive and procedural law:

(1) The duty to give testimony is a duty to the State, but the function of enforcing the duty resides specifically in the *judicial branch* of the government. The constitutional question thus arises, on the one hand, whether the power of enforcement can for any purpose be exercised by the *legislative* branch, in the course of investigations which it may choose to make, either as preliminary to its decision upon legislation or as ancillary to the enforcement of its own internal order;[1] or can for any purpose be exercised by

§ 2194. [1] The authorities are collected *post*, § 2216.

For the right to inspect premises and chattels *of a party before trial*, which rests on different principles, see *ante*, § 1862; and for the *privilege* of a party, see *post*, § 2221.

[2] *S. Dak.* Rev. C. 1919, § 2733 ("Any person . . . may be subpœnaed . . . to act as an interpreter").

§ 2195. [1] Consult the following: *Federal:* 1880, Kilbourn *v.* Thompson, 103 U. S. 176, more fully in Smith's Digest of Precedents of the Senate and House, 1894, 53d Cong. 2 sess. Misc. Doc. No. 278, p. 536; 1887, Re U. S. Pacific Railway Commission, Circ. Ct. N. D. Cal., Smith's Digest, pp. 621–707; 1914, Henry *v.* Henkel, 235 U. S. 219, 35 Sup. 54 (investigation by a House Committee, under a

the *executive* branch of the government.[2] The question arises, on the other hand, whether and in what manner the power of enforcement can be delegated to *inferior judicial officers* other than the judges themselves, such as *notaries*,[3] *commissioners* to take depositions, or others;[4] or to *ad-*

resolution of authority, into the financial affairs of banks, etc., with a view to needed remedies by legislation; the appellant. being summoned and examined as to the membership in a certain syndicate, declined to answer, stating also that he "would consider it dishonorable to reveal the names of his customers unless he were compelled to do so"; after indictment by the grand jury of the District of Columbia for refusal to answer, under U. S. Rev. St. §§ 101–104, Comp. St. 1901, pp. 54, 55, he appealed from a refusal to grant a writ of habeas corpus to the New York marshal who was to remove him to Washington for trial; held that the question would not be determined on habeas corpus; incidentally, it would seem that our system of appeals contains considerable of the tweedle-dum and tweedle-dee species of law); *Mass.* 1876, Whitcomb's Case, 120 Mass. 118; *N. J.* 1916, State *v.* Brewster, 88 N. J. L. 551, 97 Atl. 60 (power of chairman of Legislative Committee); 1916, State *v.* Brewster, State *v.* Scott, 89 N. J. L. 658, 99 Atl. 339 (legislative investigation of the expenditure of State moneys; careful opinion by Minturn, J.); *S. C.* 1906, Ex parte Parker, 74 S. C. 466, 55 S. E. 122; *Tex.* 1912, Ex parte Wolters, 64 Tex. Cr. 238, 144 S. W. 531; *W. Va.* 1913, Sullivan *v.* Hill, 73 W. Va. 49, 79 S. E. 670 (legislative committee).

[2] *Canada:* 1915, Kelly & Sons *v.* Mathers, 23 D. L. R. 226, Man. (power of commissioners appointed by an Order-in-Council under the Inquiries Act, R. S. Man. 1913, c. 34, *infra*, note 5; elaborate examination of the comparative state of the law in the British Dominions, by Howell, C. J. M.).

United States: 1921, State ex rel. Wehe *v.* Frazier, — N. D. —, 182 N. W. 551, 184 N. W. 874 (Governor's power to examine witnesses).

[3] Consult the following: *Federal:* U. S. Code 1919, §§ 1369, 1370, Rev. St. 1878, §§ 868, 869 (commission to take testimony); Equity Rules 1912, Nos. 46, 51, 62 (examiners "shall not have the power to decide on the competency or materiality or relevancy of the questions"); 1875, Blease *v.* Garlington, 92 U. S. 1, 7 (under Rev. St. 1878, § 862, and Equity Rule 67, "the examiner before whom witnesses are orally examined is required to note exceptions; but he cannot decide upon their validity; he must take down all the examination in writing, and send it to the Court with the objections noted," as also when depositions are taken); 1904, Dancel *v.* Goodyear S. M. Co., 128 Fed. 753, C. C. (subpœna 'duces tecum'); 1906, Dowagiac Mfg. Co. *v.* Lochren, C. C. A., 143 Fed. 211 (collecting the cases); 1912, Young *v.* Welch Mfg. Co., D. C. Mass., 201 Fed. 563 (the rule in Blease *v.* Garlington is further subject to exception for matters improperly asked for on cross-examination beyond the scope of the direct examination; this is thoroughly unsound; it makes a fetish out of this discreditable Federal rule as to scope of cross-examination); *California:* 1903, Burns *v.* Superior Court, 140 Cal. 1, 73 Pac. 597 (overruling Lezinsky *v.* Superior Court, 72 Cal. 510, 14 Pac. 104; Court's power to punish for contempt where the subpœna issued from a notary taking a deposition); *Colorado:* 1919, People ex rel. Davis *v.* District Court, 66 Colo. 424, 182 Pac. 11; *Illinois:* 1890, Puterbaugh *v.* Smith, 131 Ill. 199, 23 N. E. 428 (notary public's subpœna; Rev. St. 1874, c. 51, § 36, authorizing the Circuit Court to punish for contempt a person disobeying such subpœna, held unconstitutional, because a court's power to use contempt proceedings cannot be used to enforce the orders of a separate tribunal); 1907, McIntyre *v.* People, 227 Ill. 26, 81 N. E. 33 (similar); 1916, Schmidt *v.* Cooper, 274 Ill. 243, 113 N. E. 641 (similar, for a master in chancery's subpœna; cited more fully *ante*, § 1856 *a*); 1920, People ex rel. Ickes *v.* Rushworth, 294 Ill. 455, 128 N. E. 555 (St. 1919, p. 710, held to cure the above defect, by providing for original proceedings in the Circuit Court on the part of the officer whose subpœna is disobeyed); *Indiana:* 1888, Keller *v.* Goodrich Co., 117 Ind. 556, 39 N. E. 196 (refusal to answer on a deposition); *Kansas:* 1887, Re Beardsley, 37 Kan. 666, 16 Pac. 153, 367; *Kentucky:* 1917, Taylor Jr. & Sons *v.* Thornton, 178 Ky. 463, 199 S. W. 40 (notary public and county judge); *Missouri:* 1879, Ex parte Krieger, 7 Mo. App. 367; *Nebraska:* 1906, Re Butler, 76 Nebr. 267, 107 N. W. 572; *New Jersey:* 1916, Conover *v.* West Jersey Mortgage Co., 87 N. J. Eq. 16, 99 Atl. 604 (receiver); *Ohio:* 1893, De Camp *v.* Archibald, 50 Oh. St. 618, 623, 35 N. E. 1056; 1906, Ex parte Schoepf, 74 Oh. 1, 77 N. E. 276, 279; 1915, Benckenstein *v.* Scott, 92 Oh. 29, 110 N. E. 633 (notary's power to imprison for contempt; De Camp *v.* Archibald followed).

[4] Consult the following: *Federal:* 1903, U. S. *v.* Beavers, 125 Fed. 778 (U. S. Commissioner); 1906, Bank *v.* Johnson, 143 Fed. 463, 466, C. C. A. (referee in bankruptcy); *Ala.* 1896, Ex parte Rucker, 108 Ala. 245, 19 So. 314 (commissioner); *Alaska:* 1907, U. S. *v.* Fairbanks, 3 Alsk. 400 (an interesting case dealing with the clerk's power to issue subpœnas under Alsk. C. C. P. § 625; able

ministrative officers, such as licensing boards, industrial commissioners, and the like.[5]

(2) The State's power to compel the performance of testimonial duty is limited to its own territory; hence, it cannot compel a *person being in another State* to give testimony there for use in litigation pending in the forum State. By immemorial comity, the Court of the other State could and would, on request from the original Court, exercise its own power to compel the testimony; the formal request was known as "letters rogatory" (*ante*, § 1411). But this formality has come to be regarded as cumbrous and inconvenient. Nevertheless, Courts timidly deemed themselves not empowered to act without it. Hence, modern statutes have almost everywhere declared that Courts may by simpler methods compel residents to *give testimony, by deposition, for use abroad* in other States. Sometimes the usual local officials are employed; sometimes a commissioner nominated by the foreign State is recognized as having the power; and local varieties of detail are found:[6]

opinion by Wickersham, J.); *Cal.* 1903, Manson *v.* Wilcox, 140 Cal. 206, 73 Pac. 1004; *Colo.* 1919, Joslyn *v.* People, 67 Colo. 297, 184 Pac. 375 (contempt proceedings for not answering in a proceeding upon petition to establish the truth of charges alleging disqualification of grand jurors); *Kan.* 1894, Re Sims, 54 Kan. 1, 37 Pac. 135; 1906, State *v.* Carter, 74 Kan. 156, 86 Pac. 138 (holding St. 1901, c. 233, to be void); *Mass.* 1904, Lawson *v.* Rowley, 185 Mass. 171, 69 N. E. 1082 (justice of the peace); *Mo.* 1906, State *v.* Standard Oil Co., 194 Mo. 124, 91 S. W. 1062 (commissioner); *Nebr.* 1904, Olmsted *v.* Edson, 71 Nebr. 17, 98 N. W. 415 (county judge); 1909, Ex parte Button, Ex parte Hammond, 83 Nebr. 636, 120 N. W. 203 (justice of the peace); *N. H.* 1910, Boston & Maine R. Co. *v.* State, 75 N. H. 513, 77 Atl. 996; *N. Y.* 1843, People *v.* Cassels, 5 Hill N. Y. 164, 167 (justice of the peace); 1901, Re Davies, 168 N. Y. 89, 61 N. E. 118 (attorney-general, and justices of the Supreme Court); *Okl.* 1916, Waugh *v.* Dibbens, 61 Okl. 221, 160 Pac. 589 (judge of county court); *P. I.* 1912, Narcida *v.* Bowen, 22 P. I. 365, 369 (justice of the peace).

Upon the general question of the jurisdiction and power of various officers to use *process of contempt* in compelling testimony, consult the following: Rapalje on Witnesses, §§ 303 ff.

[5] ENGLAND: 1921, St. 11 Geo. V, c. 7, Tribunals of Inquiry (Evidence) Act (declares the testimonial powers of tribunals of inquiry in general, whenever created).

CANADA: *Manitoba*, Rev. St. 1913, c. 34, Public Inquiries (similar to Eng. St. 1921); *Nova Scotia:* St. 1919, c. 23, Public Inquiries, §§ 4, 5; *Prince Edward Isl.* St. 1914, c. 2, Public Inquiries, §§ 4, 5.

UNITED STATES: *Fed.* 1894, Interstate Commerce Com'n *v.* Brimson, 154 U. S. 447, 472, 485, 155 U. S. 3, 14 Sup. 1125; 1897, Re Chapman, 166 U. S. 661, 17 Sup. 677; 1909, Harriman *v.* Interstate Commerce Commission, 211 U. S. 407, 29 Sup. 115; *Ga.* 1911, Plunkett *v.* Hamilton, Hamilton *v.* Plunkett, 136 Ga. 72, 70 S. E. 781 (police commission); *Ida.* 1914, Federal Mining & S. Co. *v.* Public Utilities Co., 26 Ida. 391, 143 Pac. 1173 (power of a public utilities commission to inspect books of a utility company); *Ia.* 1912, Witmer *v.* District Court, 155 Ia. 244, 136 N. W. 113 (whether certiorari is a proper mode of trying the order of commitment); *Kan.* 1920, State ex rel. *v.* Howat, 107 Kan. 423, 191 Pac. 585 (Kan. St. 1920, c. 29, establishing the Industrial Relations Court, held constitutional in respect to powers of summoning witnesses); affirmed in Howat *v.* Kansas, 258 U. S. 181, as to the nonprivilege to refuse because of the unconstitutionality of the grant of jurisdiction; *Mo.* 1911, Ex parte Sanford, 236 Mo. 665, 139 S. W. 376 (State board of equalization); 1918, State ex rel. Stroh *v.* Klene, 276 Mo. 206, 207 S. W. 496 (commissioner); N. D. 1919, Wallace *v.* Hughes Electric Co., 41 N. D. 418, 171 N. W. 840 (order by the State tax commission to officers of a public utility company, under Comp. L. 1913, § 2088, amended by St. 1917, c. 232, directing production of documents showing earnings, etc., held not valid); *Wis.* 1913, State *v.* Lloyd, 152 Wis. 24, 139 N. W. 514 (State fire-marshal).

[6] ENGLAND: St. 1856, 19–20 Vict. c. 113.

CANADA: *Dom.* R. S. 1906, c. 145, Evid. Act, §§ 41–46; *B. C.* Rev. St. 1911, c. 78, § 52; *Man.* Rev. St. 1913, c. 46, Rules 519–524; *N. Br.* Consol. St. 1903, c. 127, §§ 23–25; *Ont.* Rev. St. 1914, c. 73, § 50; *Sask.* R. S. 1920, c. 44, §§ 45–47; *Yuk.* Consol. Ord. 1914, c. 30, § 49.

UNITED STATES: *Federal:* Rev. St. 1878,

1920, STONE, J., in *People ex rel. Ickes* v. *Rushworth*, 294 Ill. 455, 128 N. E. 555: "It was long the practice in cases where the testimony of a witness residing in a foreign jurisdiction was desired, for the Court in which the case was pending to issue letters rogatory requesting the aid of the foreign Court within whose jurisdiction the witness was to be found to obtain such evidence. In later years, however, there has been developed the practice of authorizing by statute the appointment of a commissioner by a foreign Court, whose appointment fills the purpose of letters rogatory. These statutes have been passed and sustained on the principle of comity between states and nations. It has been generally held that where such a statute exists letters rogatory need not and should not be issued. Such statutes have been generally recognized as binding and valid.

"The Act of the Legislature [of 1919] in amending section 36 was an act of the legislative department of this State directing that the Circuit Courts of the State shall extend judicial comity to the orders of foreign Courts pertaining to the taking of depositions. Comity, in a legal sense, is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, and is universally extended to all cases where to do so would not conflict with international duty and convenience or with the rights of persons under the protection of its own laws. Comity rests upon the well-settled principles of expediency and convenience. These principles will be recognized and given force in cases where they do not conflict with the local law, inflict injustice on our own citizens or violate the public policy of the State. The act of the Legislature in amending section 36 and giving to a commissioner appointed by a foreign Court authority

§§ 871, 874, Code 1919, §§ 1373–1376 (U. S. State or foreign deposition by witness in the D. of Columbia); R. S. § 875, Code § 1377 (letters rogatory to a U. S. district court); Code § 6275 (letters rogatory from foreign country for deposition of a witness residing within the U. S.); *Uniform Act:* Uniform Foreign Depositions Act, 1920, § 1 ("Whenever any mandate, writ or commission is issued out of any court of record in any other State, territory, district or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this State, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this State"); *Ariz.* Rev. St. 1913, Civ. C. § 1720; St. 1921, c. 3 (following the Uniform Foreign Depositions Act); *Cal.* C. C. P. 1872, §§ 2035–2038; *D. C.* Code 1919, § 1062 (commission from any U. S. or State, etc. court to take testimony in the District; proceedings to be as in U. S. Rev. St. §§ 868, 869); *Conn.* Gen. St. 1918, §§ 5715, 6582; *Del.* St. 1919, April 21, c. 230; *Ida.* Comp. St. 1919, §§ 8026–8029; *Ill.* 1920, People ex rel. Ickes *v.* Rushworth, 294 Ill. 455, 128 N. E. 555 (St. 1919, p. 710, amending Rev. St. 1874, c. 51, § 36, extending the power of the Circuit Court to enforce attendance and testimony so as to include witnesses summoned before a commissioner for a foreign State in a cause pending abroad, held constitutional; distinguishing Marshall *v.* Irwin, 280 Ill. 90, 117 N. E. 483, which was decided on the principle of § 2195, note 3, *supra*, before the statutory amendment of 1919 changed the procedure as to contempt proceedings to enforce testimony on subpœna by a commissioner); *Ia.* Comp. Code 1919, § 9466 (criminal cases); *Me.* Rev. St. 1916, c. 134, § 12 (witness may be ordered to appear and testify in any court in any other New England state); *Md.* Ann. Code 1914, Art. 35, § 36; *Mass.* Gen. L. 1920, c. 233, § 12 (for a criminal prosecution pending in Maine or adjoining State, witness may be required to attend); c. 233, § 45 (for a cause pending in another State or Government, witness may be required to depose as if for cause pending within the State); 1865, Com. *v.* Smith, 11 All. 243, 250 (statute construed); *Minn.* Gen. St. 1913, § 8398; *N. H.* Pub. St. 1891, c. 224, §§ 8, 9; *N. J.* Comp. St. 1910, Evidence § 58; *N. Mex.* Annot. St. 1915, §§ 2160–2162 (for a case pending outside the State, any judge may order attendance of a witness to depose; on refusal, he may be proceeded against in the usual manner; perjury to be punished as usually); *N. Y.* C. P. A. 1920, §§ 310–312; *N. C.* Con. St. 1919, § 1822; *Pa.* St. 1833, Apr. 8, Dig. 1920, § 21876; *P. I.* C. C. P. 1901, §§ 365–368; *P. R.* Rev. St. & C. 1911, §§ 1513–1516; *R. I.* Gen. L. 1909, c. 292, §§ 16, 17; *S. Car.* C. C. P. 1922, §§ 692, 693; *S. D.* St. 1921, c. 413 (following the Uniform Foreign Depositions Act); *Tenn.* Shannon's Code, §§ 5664–5668; *Utah:* Comp. L. 1917, §§ 7128, 7185; *Va.* Code 1919, § 6217; *Wash.* R. & B. Code 1909, §§ 1236–1238; *Wis.* Stats. 1919, §§ 4109, 4109 *a*.

The power of a State to use testimonial process against a *foreign corporation* doing business within the State is noticed in Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541, 28 Sup. 178 (1908).

to issue subpœnas and take testimony within this State, and giving to the Circuit Courts of this State authority to hear and determine whether or not a citizen of this State should appear before such commissioner and give evidence, should, under the principles of comity, be sustained where to do so will not conflict with the rights of citizens of this State or the constitutional limitations placed upon the Legislature."

A further application of the same power and duty, calculated to aid efficiency in doing justice, consists in *sending a resident out of the State*, to attend court and give testimony 'viva voce' at a trial in another State. This exercise of the power will naturally be restricted to urgent situations of need; and its recognition is still incipient only. The following report (though over-conservative) sets forth the professional attitude to this measure:

1922, *National Conference of Commissioners on Uniform State Laws; Report of Committee on Securing Compulsory Attendance of Non-Resident Witnesses:*

"1. It would not be wise to attempt to provide by uniform legislation for the compulsory attendance of non-resident witnesses in *civil* cases. While unquestionably at times cases arise in which the personal attendance of witnesses in civil cases is highly important, and their absence interferes with the proper administration of justice, yet in the large majority of cases statutes which provide for the taking of depositions of non-resident witnesses, which are in force in most of the States, would seem to afford sufficient protection to the rights of the litigants.

"2. In *criminal* cases, by the Sixth Amendment to the Federal Constitution, it is provided that the accused shall have the right to be 'confronted with the witnesses against him.' While it has been held that this provision does not apply to State Courts, yet in many of our States either by Constitutional or Statutory provision this right is granted to the one charged with a crime. Accordingly depositions of non-resident witnesses could not be taken or used against the accused unless the accused were personally present at the taking of the depositions. Therefore, to make such depositions available it would be necessary to provide for the transportation of the accused to the place where the deposition is to be taken. This would be difficult and expensive and would, of course, require legislation whereby the accused, while in transit, outside of the State wherein he has been indicted would remain in the legal custody of the officers of the State who had him in charge. The only other method of getting the advantage of the testimony of non-resident witnesses is to compel their attendance [as here proposed] by uniform or reciprocal State statutes. At the present time, so far as we have been able to find out, there are statutes of this character in force in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, New York and Pennsylvania. In most, if not all of these Statutes there is a provision limiting compulsory attendance of witnesses to criminal cases pending in adjoining States. This character of legislation is not free from constitutional difficulties, and the only case which we have found in which the constitutionality thereof has been directly upheld is the case of Commonwealth of Massachusetts *vs.* Klaus, 130 N. Y. Supp. 713. In the case cited the constitutionality of the New York statutes was upheld in an opinion by Judge Scott, but there is a strong dissenting opinion by Judge Laughlin.

"We have prepared a uniform State statute, based on the New York State statute, which is appended hereto. It is to be noted that in the draft of the statute we have provided that attendance of a person as a witness in a criminal trial can not be enforced if such person is more than five hundred miles from the place of trial."

(3) The testimonial duty, like other fundamental duties, may subject the violator of it to an *action by the person injured* by the violation, that is, by the party whose cause fails to be duly vindicated in court for lack of the

testimony. Ordinarily, the plaintiff at common law in such an action on the case would have the difficult task of proving that his loss of his rights was caused specifically by the defendant's failure to bear testimony. The statute of Elizabeth (*ante*, § 2190) attempted to ease this difficulty by providing also that a person *failing to obey a summons* to testify should *forfeit* a specific sum of money to the party summoning him; the latter expedient has usually been imitated in modern statutes.[7] The action against one whose *false testimony* has resulted in the unjust loss of a party's cause seems to rest equally, in principle, upon a violation of the testimonial duty; but the doctrine of privilege in substantive law has erroneously been thought to protect against such claims.[8]

[7] For examples, see the following cases: *Eng.* Yeatman *v.* Dempsey, 7 C. B. N. S. 628, and annotation in 97 Eng. Com. L. R.; *U. S.* 1834, Wilkie *v.* Chadwick, 13 Wend. N. Y. 49; 1836, Smith *v.* Merwin, 15 Wend. N. Y. 184; 1838, Mattocks *v.* Wheaton, 10 Vt. 493, 494.

The statutes (which are rarely invoked) are as follows:

CANADA: *N. Br.* Consol. St. 1903, c. 127, § 21 ("any damage"); *Ont.* Rev. St. 1914, c. 76, § 16; *Yuk.* Consol. Ord. 1914, c. 48, Rule 287 (costs).

UNITED STATES: *Ala.* Code 1907, §§ 4025, 4035, 4061 (forfeits $100, and for depositions; is also liable in damages); § 7891 (criminal cases; forfeits $100); *Alaska:* Comp. L. 1913, § 1465 (forfeits $50 and all damages); *Ariz.* Rev. St. 1913, P. C. § 1232 (forfeits $100, in case of damage); *Ark.* Dig. 1919, §§ 4162, 4164 (party's costs up to $20, and "any damages occasioned"); *Cal.* C. C. P. 1872, § 1992 (forfeits $100 and damages); *Conn.* Gen. St. 1918, § 5703 ("pay all damages"); *Del.* 1916, State ex rel. Wolcott *v.* Biedler, 6 Boyce Del. 262, 99 Atl. 278 (quo warranto against persons present in the State as witnesses; well-reasoned opinion by Pennewill, C. J.); *Fla.* Rev. G. S. 1919, § 2708 ("any damage sustained"); *Ga.* Rev. C. 1910, § 5852 (finable not exceeding $300, and "liable in damages"); *Ida.* Comp. St. 1919, § 7988 (forfeits $100 and all damages); *Ia.* Comp. Code 1919, § 7371 (civil cases; liable "for all consequences," with $50 additional damages); § 9460 (criminal cases; liable for "the amount of damages"); *Kan.* G. S. 1915, § 7232 (liable for "any damages"); 1922, Davies *v.* Lutz, 110 Kan. 657, 205 Pac. 637; *Ky.* C. C. P. 1895, § 536 (costs up to $20, and any damages); *La.* C. Pr. 1870, § 137 ("damages for the loss"); *Me.* Rev. St. 1916, c. 87, § 120 (liable for "all damages"); *Md.* Ann. Code 1914, Art. 35, § 8 ("the damage sustained"); *Mass.* Gen. L. 1920, c. 233, § 4 ("all damages"); *Mich.* Comp. L. 1915, § 12562 (all damages and $50); *Minn.* Gen. St. 1913, § 8372 (all damages); *Mo.* Rev. St. 1919, § 5427 ("all damages sustained"); *Mont.* Rev. C. 1921, § 10625 ($100 forfeit, and "all damages"); § 12184 (criminal cases; $100 forfeit); *Nebr.* Rev. St. 1922, § 8865 (forfeits fine to the party, and also pays "any damages"); *Nev.* Rev. L. 1912, § 5439 ($100 forfeit, and "all damages"); § 7363 ($100 forfeit, in a criminal case); *N. H.* Pub. St. 1891, c. 924, § 6 ("all damages"), § 9 (forfeit of $300, for summons to testify out of the State); *N. J.* Comp. St. 1910, Evidence § 12 (forfeit of not more than £50, and "damages equivalent to the loss sustained"); *N. Y.* C. P. A. 1920, §§ 405, 406 ("damages sustained" and $50 more); *N. C.* Con. St. 1919, § 1807 (forfeits $40, and is further liable for "the full damages"); *N. D.* Comp. L. 1913, § 1079 (contested elections to legislative assembly; $20 forfeiture); § 11036 ($50 liability); *Oh.* Gen. Code Ann. 1921, § 11513 ("any damages," and sometimes the fine goes to the party injured); *Okl.* Comp. St. 1921, § 598, 978; *Or.* Laws 1920, § 821 (forfeits $50 and pays all damages); *Pa.* St. 1831, Feb. 26, St. 1833, Apr. 8, Dig. 1920, §§ 10304, 10308; *P. I.* C. C. P. 1901, § 409 ("all damages"); *P. R.* Rev. St. & C. 1911, § 1485 (forfeits $100, and all damages); § 6457 ($100 forfeit to defendant in criminal cases); *R. I.* Gen. L. 1909, c. 292, § 10 ("all damages"); *S. Car.* C. C. P. 1922, § 680 ("all damages"); *S. D.* Rev. C. 1919, § 2742 (civil case; liable for "any damages"); § 5005 (criminal cases; liable to defendant for $50); § 7356 (legislative election contest; $20 forfeit); *Tenn.* Shannon's Code 1916, §§ 5609, 5610 (forfeits $125, and pays "full damages"; in criminal cases, $250); *Utah:* Comp. L. 1917, § 7134 (forfeits $100 and damages); *Vt.* Gen. L. 1917, §§ 1906, 1920; *Wash.* R. & B. Code 1909, § 1220 ("all damages"); *Wyo.* Comp. St. 1920, § 5820 (fine not exceeding $50, for the use of the party in certain cases, and liable "for any damages occasioned").

[8] The cases are collected in Ames' Cases on Torts, I, 618, note 6; Wigmore's Select Cases on Torts, II, pp. 736–743.

(4) The testimonial duty is temporarily paramount to other considerations; moreover, subjectively, the witness should be encouraged, by the removal of all obstacles, to fulfil it freely and promptly; hence, an *immunity from arrest on civil process* is conceded to him, pending his travel to and from the place of trial and his stay at the place. This immunity, as affecting a number of rules of legal procedure and substantive right,[9] is beyond the scope of the rules of Evidence.

§ 2196. **Privilege personal to the Witness; Party's Objections.** The grounds for exemption from the testimonial duty are entirely extrinsic to the purpose of ascertaining the truth (*ante*, § 2175). They are based on a policy of dispensing with the compulsion of attendance and disclosure wherever it is not necessary, or is more disadvantageous in respect to other interests of the community (*ante*, § 2192). The exemptions are therefore in no sense provided for the *benefit of the party* whose opponent is deprived by them of the evidence which he desires. They are not intended to secure for him a better likelihood of demonstrating the truth of his cause; on the contrary, they constitute so many obstacles to the ascertainment of the truth, and these are suffered only because the several extrinsic policies are deemed to be in these respects paramount to the purpose of ascertaining the truth. For example, if Doe offers to prove the contents of a document, the rule that he must produce the original is a rule intended to secure a better likelihood of learning the contents accurately, and the invocation of it by his opponent Roe is the invocation of a rule which is directly intended to assist Roe in the establishment of the facts of the case. But, when Doe calls a witness who is exempted by illness from attendance, or is privileged not to disclose his title-deeds, it is

[9] Greenleaf, Evidence, §§ 316–318, and cases cited; Rapalje on Witnesses, § 305; *Can.* 1906, Gibbons *v.* Tuttle, 9 Newf. Browning 186; *U. S. Fed.* 1917, Central Railway S. Co. *v.* Jackson, D. C. E. D. Pa., 238 Fed. 625: 1917, Stewart *v.* Ramsay, 242 U. S. 138, 37 Sup. 44 (plaintiff-witness in a civil action); 1919, Filer *v.* McCormick, U. S. D. C. N. D. Cal., 260 Fed. 309; *Alaska:* Comp. L. 1913, §§ 1509–1511; *Ariz.* Rev. St. 1913, Civ. C. § 1681; *Ark.* Dig. 1919, §§ 4159, 4171; *Cal.* C. C. P. 1872, §§ 2067–2070; *Ga.* Rev. C. 1910, § 5854; *Ida.* Comp. St. 1919, § 8045; *Kan.* G. S. 1915, § 7237; 1917, Eastern Kansas Oil Co. *v.* Beutner, 101 Kan. 505, 167 Pac. 1061 (applying Gen. St. 1915, § 7237); *Ky.* C. C. P. 1895, § 542; *Md.* 1911, Long *v.* Hawken, 114 Md. 234, 79 Atl. 190; 1920, Minch & Eisenbrey Co. *v.* Cram, 136 Md. 122, 110 Atl. 204 (civil party plaintiff); *Mo.* Rev. St. 1919, § 5431; 1921, Groce *v.* Skelton, 206 Mo. App. 471, 230 S. W. 329; *Mont.* Rev. C. 1921, §§ 10676–10679; *Nebr.* Rev. St. 1922, § 8869; *Nev.* Rev. L. 1912, § 5445; 1920, State ex rel. Gunn *v.* Superior Court, — Nev. —, 189 Pac. 1016 (party defendant in civil action); *N. J.* Comp. St. 1910, Evidence § 14; *N. Y.* Cons. L. 1909, Civil Rights § 25; C. P. A. 1920, § 408; *N. C.* Con. St. 1919, § 1808; 1921, Winder *v.* Penniman, 181 N. C. 7, 105 S. E. 884 (rule applied, where party had given bond to release attachment); *N. D.* Comp. L. 1913, § 7880; 1914, Hendersen, In re, 27 N. D. 155, 145 N. W. 574; *Oh.* Gen. Code Ann. 1921, § 11519; *Okl.* Comp. St. 1921, § 605, Rev. L. 1910, § 5064; 1916, Commonwealth Cotton Oil Co. *v.* Hudson, 62 Okl. 23, 161 Pac. 535 (applying Rev. L. 1910, § 5064); 1918, Bearman *v.* Hunt, — Okl. —, 171 Pac. 1124; 1918, Lonsdale Grain Co. *v.* Neil, — Okl. —, 175 Pac. 823; *Or.* Laws 1920, §§ 872–874; *P. I.* 1913, U. S. *v.* Jaca, 26 P. I. 100, 109; *P. R.* Rev. St. & C. 1911, §§ 1534–1537 (like Cal. C. C. P. §§ 2067–2070); 1915, Wilson *v.* Cody, 8 P. R. 271; *R. I.* 1912, In re Greene, 35 R. I. 67, 85 Atl. 552; *S. C.* C. C. P. 1922, § 271; *S. D.* Rev. C. 1919, § 2747; *Tenn.* Shannon's Code 1916, § 5616; 1908, Sewanee C. C. & L. Co. *v.* Williams, 120 Tenn. 339, 107 S. W. 968; *Tex.* Rev. Civ. St. 1911, § 3646; *Utah*, Comp. L. 1917, § 7143 (civil actions); *Wyo.* Comp. St. 1920, § 5825.

obvious that this rule is in no sense directed to the better ascertainment of the facts, nor intended to safeguard Roe in his interest as a suitor entitled to a careful investigation of the facts. It concerns solely the interests of the witness, in his relation to justice and the State, — his interests not to have his testimonial duty enforced against him where paramount considerations of policy prevail over the purpose of judicial investigation.

Three consequences follow: (1) The *claim of privilege* can be made solely by the *witness himself;* the privilege (as the common phrasing runs) is purely personal to himself. Whether he chooses to fulfil his duty without objection, or whether he prefers to exercise the exemption which the law concedes to him, is a matter resting entirely between himself and the State (or the Court as its representative). The party against whom the testimony is brought has no right to claim or to urge the exemption on his own behalf; and, on the witness' behalf, the Court is to be left to accord the protection if it is a proper one.[1]

(2) (*a*) An *improper ruling* by the Court, upon a question of privilege, *cannot be excepted to by the party* as an error justifying an appeal and a new trial, if the ruling *denies the privilege* and compels the witness to testify. By hypothesis, the privilege does not exist for the benefit of the party nor for the sake of the better ascertainment of the truth of his cause. The offered testimony is relevant, and is, in all other respects than the privilege, admissible. The admission of it, by denying the privilege, has not introduced material which in any way renders less trustworthy the finding of the verdict; on the contrary, only the exclusion of it could have been an obstacle to the ascertainment of the truth. The only interest injured is that of the witness himself, who has been forced to comply with a supposed duty, which as between himself and the State did not exist; his remedy was to refuse to obey, and to appeal for vindication if the Court had attempted improperly to use compulsory process of contempt. This view has been accepted by some Courts.[2] But the opposite view naturally possesses attraction for those

§ 2196. [1] This is conceded with practical unanimity. Its application to the *privilege against self-crimination*, the *privilege against anti-marital testimony*, and the privilege for *client's communications to attorneys*, where special questions arise, is treated *post*, §§ 2270, 2241, 2321.

[1] Its application to other privileges in general is seen in the following cases:

England: 1841, Doe *v.* Egremont, 2 Moo. & Rob. 386 (on counsel appearing for a witness claiming privilege for documents, Rolfe, B., refused to hear him, ruling that the witness should state the reasons for his claim, and then the judge is "to give to the witness the protection claimed, if he finds him to be entitled to it").

Canada: 1877, Laliberté *v.* R., 1 Can. Sup. 117, 131, 139, 140, by three judges.

United States: 1822, Treat *v.* Browning, 4 Conn. 408, 418 (self-disgracing testimony); 1910, McCray *v.* State, 134 Ga. 416, 68 S. E. 62 (party held not entitled to claim the privilege against disgracing facts, where the witness had not claimed it); 1890, Boyer *v.* Teague, 106 N. C. 576, 625, 11 S. E. 665 (voter's privilege); 1890, State *v.* Kraft, 18 Or. 550, 556, 23 Pac. 663, 665 (voter's privilege); 1842, Ralph *v.* Brown, 3 W. & S. Pa. 395, 400; 1902, State *v.* Hill, 52 W. Va. 296, 43 S. E. 160 (self-disgracing facts); 1902, State *v.* Prater, 52 W. Va. 132, 43 S. E. 230 (similar); 1868, State *v.* Olin, 23 Wis. 309, 318 (voter's privilege).

[2] *Eng.* 1834, Marston *v.* Downes, 1 A. & E. 31, 34 (the mortgage of a third person having been proved to the jury, against his protest and in supposed violation of his privilege, held that "the defendants were not a privileged party, and they therefore had no right of objection, even on the supposition that the learned judge

Courts — and they are in the majority — who cannot evade the Anglo-Norman instinct to look upon litigation as a legalized sport, of orthodox respectability, with high stakes, the game to be conducted according to strict rules under judicial supervision, and to be won or lost according as these rules are observed or disregarded (*ante*, §§ 21, 1845). From this point of view, plainly, the trial Court's erroneous denial of privilege is a proper subject for exception and forms 'per se' a reason for putting the opposing party, irrespective of the truth of the cause, to the delay, expense, and risk of a new trial. Upon the sporting theory of litigation there is no escape from this conclusion; though it is impossible to reach that conclusion upon any other theory. The sporting theory maintains thus far the upper hand, and by most Courts the party is to-day allowed the right to except to a ruling erroneously denying a privilege.[3]

(*b*) If, however, the ruling erroneously *affirms the privilege*, the case is different; for here the party who desired the testimony has obviously lost evidence which by hypothesis is relevant and might have assisted the establishment of the truth of his cause. Hence, the deprival of this evidence is for him as proper a ground of complaint and exception as it would be in any other instance,[4] and may become a ground for granting a new trial, so far as the rejection of a specific item of evidence can ever be properly so considered.[5]

(3) The privilege being purely personal to the witness, it follows, conversely, that the *irrelevancy* of a fact inquired about can never justify a privilege of refusing to answer. As the party has no concern with privilege proper, so the witness has no concern with anything but privilege. Irrelevancy is a ground for objection by the party alone.[6]

had done wrong"); *U. S.* 1922, People *v.* Gonzales, — Cal. App. —, 204 Pac. 1688 (rape; a witness claimed privilege, but the judge overruled it; the defendant held not entitled to raise the question of error; "had the witness stood upon her refusal to answer and been committed for contempt in consequence, the question . . . would be presented"); 1842, Ralph *v.* Brown, 3 W. & S. Pa. 395, 400 (Gibson, C. J.: "Nor is the violation of his right a subject of exception, for no one else is injured by it"); 1863, People *v.* Pease, 27 N. Y. 45, 72, per Selden, J.

[3] The cases applying it to the *privilege against self-crimination* and the *privilege against anti-marital testimony*, which involve special questions, are collected under those heads, *post*, §§ 2241, 2270. The following cases apply it to other privileges: *Eng.* 1854, Phelps *v.* Prew, 3 E. & B. 430; *U. S.* 1922, Ex parte Lipscomb, — Tex. —, 239 S. W. 1101 (action by G. against T. for title to land; L. as former attorney for G. refused to testify to a deed; held, that he was properly committed for contempt, because the party G. was the only person interested and had ample remedy by appeal); 1868, State *v.* Olin, 23 Wis. 309, 318.

[4] This is conceded in all the cases cited *supra*, note 1; 1842, Coleridge, J., in Doe *v.* Date, 3 Q. B. 609, 621: "There is a very broad distinction between cases where the privilege had been [erroneously] allowed and those where it has been [erroneously] disallowed. In the former case, a party has been precluded from proving that which he was entitled to prove. In the latter case, the party [person] whose privilege has been disallowed has no 'locus standi' in banc. . . . Legitimate evidence has been produced against him [the party]; he is not prejudiced by that, and can have no ground for complaint." *Contra:* 1853, Dickerson *v.* Talbot, 14 B. Monr. Ky. 49, 53 (title-deeds of third person).

[5] For these considerations, see *ante*, § 21.

[6] This doctrine is examined in detail *post*, § 2210.

Is a witness *entitled to have counsel present* to advise? 1917, Re Emigh, D. C. N. D. N. Y., 243 Fed. 988 (bankruptcy proceedings; at certain private hearings, the witness is not entitled to counsel).

§ 2197. **Kinds of Privilege, summarized.** The kinds of exemption which are accorded to a person in respect of his testimonial duty may be grouped under two heads, according as they exempt him either merely from the task of travelling to and attending the court where his testimony is desired, or, having attended, from disclosing a certain part of his knowledge. An exemption of the first sort — which may be termed *viatorial privilege* — may and sometimes does result in an exemption also of the second sort, *i. e.* from giving any testimony whatever; but this is rather an accidental and not an intended effect — as appears when a witness is exempted from attendance at the court-room, but is nevertheless still liable to testify before a commissioner sent to take his deposition at his residence. An exemption of the second sort, which may be termed *testimonial privilege*, or Privilege proper, never includes or effects an exemption of the first sort.

The *Viatorial Privilege* consists in exempting the witness from attendance until three conditions are fulfilled: first, he is to have *notice* that his testimony is required, and be *summoned* to attend; secondly, he is, in some cases, to receive in advance an *indemnity for his expenses;* and, thirdly, he is to be excused where his health or other sufficient circumstance constitutes an *inability to attend.*

The *Testimonial Privileges* fall naturally under two heads, according as the disclosure which they affect is a *topic* or class of facts in his knowledge, or is a *communication* from or to another person, irrespective of its subject. The concededly *privileged topics* are some half-dozen in number, although others have been from time to time sought to be added to the list. The *privileged communications*, as universally conceded, are those made by persons holding a certain confidential relation, — in particular, that of husband and wife, attorney and client, fellow-jurors, and government and informer; to these are added, in some jurisdictions, the relations of priest and penitent, and physician and patient; and occasionally sundry other additions have been attempted.

TITLE II (*continued*): PRIVILEGE

SUB-TITLE II: VIATORIAL PRIVILEGE

CHAPTER LXXV.

§ 2199. (1) **Notice and Summons; Subpœna.** (*a*) Common fairness prescribes that, before the witness be enforced to perform his testimonial duty, adequate and express notice be given him that the testimony is likely to be needed, and a *formal summons* be issued by the Court to him to attend for the purpose. This process secures the effect, not only of notifying him when and where and in what sort of cause his testimony is wanted, but also of assuring him that the authority of State has sanctioned the demand, of furnishing him a voucher for proving his claim to indemnity (where it is not demandable in advance), as well as of satisfying the Court, in case the witness is not present when called to the stand, that due diligence has been used by the party to procure him and (in a contempt proceeding) that a default appears 'prima facie' on his part.

(*b*) The *form of document* traditionally used for this purpose is the writ of *subpœna*,[1] which commands the witness to appear at a certain court on a

§ 2199. [1] So called from the closing words of the writ, which commanded the party to attend in person, on a penalty for disobedience; for the history of the *subpœna* see the citations *ante*, § 2190, note 28.

The original Latin form of the writ of subpœna was as follows (Holdsworth, Hist. of English Law, I, 3d ed., 1922, p. 661): "Edwardus etc. dilecto sibi Ricardo Spynk des Norwyco, salutem. Quibusdam certis de causis, tibi praecipimus firmiter injungentes, quod sis coram consilio nostro apud Westmonasterium, die Mercurii proximo post quindenam nativitatis Sancti Johannis Baptistae proximo futurum: ad respondendum super hiis quae tibi objicientur ex parte nostra, et ad faciendum et recipiendum quod curia nostra consideraverit in hac parte. *Et hoc sub poena centum librarum nullatenus omittas.* Teste meipso apud Westmonasterium, tercio die Julii, anno regni nostri tricesimo septimo."

The *subject of testimony* must be in some way indicated: 1909, In re Shaw, C. C. S. D. N. Y., 172 Fed. 520 (a subpœna must notify the witness of the matter on which he is called to testify, by stating either the name of the parties or the subject of the investigation; a clause requiring him to tell "what you may know generally" is invalid). Compare the same principle for the subpœna 'duces tecum' (*post*, § 2200).

That a *judicial* order, apart from a subpœna, is a proper mode of compelling attendance, is sometimes but erroneously denied: 1906, Re Depue, 185 N. Y. 60, 77 N. E. 798.

Whether a particular *officer* has *power to compel* testimony is often a question (*ante*, § 2195).

The witness may before trial be detained

certain day to testify what he knows in a cause between certain parties and to attend the court for that purpose until discharged. Common modern forms are as follows:

1. "The People of the State of New York, to.....and..... We command you, that, all and singular business and excuses being laid aside, you and each of you be and appear in your proper persons, before one of our justices of our Supreme Court of judicature, or one of our circuit judges, at a circuit court to be held at the court-house in the village of Ballston Spa, in and for the county of Saratoga, on the last Tuesday of November next, by ten of the clock in the forenoon of the same day, to testify all and singular those things which you or either of you know, in a certain cause now depending in our said Supreme Court, between John Doe, plaintiff, and Richard Roe, defendant, of a plea of trespass on the case, and on that day to be tried by a jury of the country, on the part of the plaintiff. And this you, or any of you, shall by no means omit, under the penalty upon each of you of fifty dollars. Witness, John Savage, Chief Justice, at the capital in the city of Albany, the thirtieth day of October, in the year of our Lord one thousand eight hundred and thirty.

PAIGE, *Clerk*."

"W. L. F. WARREN, *Att'y*."

(Phillips on Evidence, Cowen and Hill's Notes, 4th Am. ed. 1859, c. IX, p. 806.)

"In the High Court of Justice,
—— Division.
Between ....., Plaintiff
and
....., Defendant.

2. "GEORGE THE FIFTH, by the grace of God of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith,
to ..... greeting: We command you to attend before ..... at ..... on ..... day the ..... day of ..... 19.., at the hour of ..... in the ..... noon, and so from day to day until the above cause is tried, to give evidence on behalf of the plaintiff (or defendant).

"Witness, ... Lord High Chancellor of Great Britain, the ..... day of ..... in the year of Our Lord One thousand nine hundred and ....."

(White, Stringer, & King's Annual Practice, 1921, vol. II, p. 1625).

3. "STATE OF ILLINOIS,
.....County. } ss. The People of the State of Illinois to.....
City of.....
.....**You are Hereby Commanded** To appear before me, at my office, in the City of .....in said County, on the.....day of.....19.., at..... o'clock,..M., then and there to testify the truth in a matter in suit wherein ..... plaintiff, and ..... defendant, and this you are not to omit, under the penalty of the law.

"**Given** under my hand and seal, this.....day of.....A. D. 19..
".....**Seal.**
Police Magistrate."

for appearance on the trial; and the *power to commit* for this purpose, in default of bail, is inherent in a court, irrespective of statutory grant: 1910, Crosby *v.* Potts, 8 Ga. App. 463, 69 S. E. 582 (liberal opinion, by Powell, J.).

Statutes usually provide for the form, as well as for issuance, service, and the other details now to be mentioned.[2]

Where the witness is desired to bring *documents*, a specific clause to that effect is additionally required to be inserted (*post*, § 2200).

(*c*) The *notice* conveyed in the subpœna is secured by reading or showing it to him and furnishing him with a copy,[3] the original being taken back by the process-server for filing in court with his indorsement or affidavit of service. The *service* is sometimes made by leaving the copy at the witness' place of abode or of business, although a personal service into the witness' hands may in strictness be required. The service should be made a reasonable time before the day specified for attendance; and the witness is ordinarily not deemed to be in default unless the service conforms to these requirements. The sufficient question in all cases should be, Has the person in all probability had actual knowledge, a reasonable time beforehand, that his

[2] The following statutes cover the subject in general:

CANADA: *Dom.* R. S. 1906, c. 146; Crim.C. §§ 671–677, 971–976; *Alta.* Rules of Court 1914, Nos. 378–389; *B. C.* Rules of Court 1912, Nos. 508–516; *Man.* Rev. St. 1913, c. 46, Rules 470–475; *Newf.* Consol. St. 1916, c. 83, Ord. 33, Rules 26–33; *N. Sc.* Rules of Court 1919, Ord. 35, Rules 25–33; *Ont.* Rules of Court 1913, Nos. 228, 272, 273; Rev. St. 1914, c. 63, §§ 114–117 (division courts); *Yuk.* Consol. Ord. 1914, c. 48, Rules 298, 299.

UNITED STATES: *Fed.* Equity Rules (1912), Nos. 12–15; *Ala.* Code 1907, §§ 4020–4029 (civil cases; subpœna); §§ 4060–4062 (subpœna d. t.); §§ 7877–7885 (criminal cases); *Alaska:* Comp. L. 1913, §§ 1456–1468 (civil cases); § 2360 (criminal cases); *Ariz.* Rev. St. 1913; Civ. C. §§ 1682–1687; P. C. §§ 1230–1238; *Ark.* Dig. §§ 4150–4168; *Cal.* P. C. 1872, §§ 1326–1331; C. C. P. 1872, §§ 1985–1994; *Colo.* Comp. L. 1921, C. C. P. § 478, Gen. St. § 6569; *Conn.* Gen. St. 1918, §§ 5703–5704; *Fla.* Rev. G. S. 1919, §§ 2707–2709, 6013–6021; *Haw.* Rev. L. 1915, §§ 2552–2562; *Ida.* Comp. St. 1919, §§ 7981–7990 (civil cases); §§ 9132–9136 (criminal cases); *Ind.* Burns' Ann. St. 1914, §§ 507–510; *Ia.* Comp. Code 1919, §§ 7365–7376 (civil cases); §§ 9456–9460 (criminal cases); *Kan.* Gen. St. 1915, §§ 7224–7234 (civil cases); §§ 8080–8082 (criminal cases); *Ky.* C. C. P. 1895, §§ 528–539; C. Cr. P. 1895, §§ 150–152; *La.* C. Pr. 1870, §§ 134–145, 473–475; *Me.* Rev. St. 1916, c. 87, § 110, c. 134, § 10; *Md.* Ann. Code 1914, Art. 35, §§ 8–15, Art. 75, §§ 159, 160; *Mass.* Gen. L. 1920, c. 233, §§ 1–13; *Mich.* Comp. L. 1915, §§ 12562–12567; *Minn.* Gen. St. 1913, §§ 8370–8374 (civil cases); *Miss.* Code 1906, §§ 3948–3956; Hem. §§ 2955–2963; *Mo.* Rev. St. 1919, §§ 4177–4182, 5420–5431; *Mont.* Rev. C. 1921, §§ 10618–10630 (civil cases); §§ 12179–12186 (criminal cases); § 79 (legislature); *Nebr.* Rev. St. 1922, §§ 8857–8873; *Nev.* Rev. L. 1912, §§ 5431–5441 (civil cases); §§ 7348–7356 (criminal cases); *N. H.* Pub. St. 1891, c. 224, §§ 1–9; *N. J.* Comp. St. 1910, Evidence, §§ 12–14; *N. Y.* C. P. A. 1920, §§ 403–414; J. C. A. §§ 190–201; *N. C.* Con. St. 1919, §§ 1456, 1496, 1497, 1535 (Nos. 26, 27, 28, forms of subpœna in justice court); §§ 1803–1807 (in general); *N. D.* Comp. L. 1913, §§ 11023–11031; St. 1919, Feb. 14, c. 209 (service of subpœna by telegraph, etc., amending Comp. L. §§ 7875, 7877); *Oh.* Gen. Code Ann. 1921, §§ 11501–11516, 13664; *Okl.* Comp. St. 1921, §§ 590–604, 972–978; *Or.* Laws 1920, §§ 812, 824 (civil cases); §§ 1683–1695 (criminal cases); *Pa.* St. 1831, Feb. 26, Dig. 1920, §§ 10302–10305; *P. I.* C. C. P. 1901, §§ 402–411; *P. R.* Rev. St. & C. 1911, §§ 1478–1490 (civil cases); §§ 6453–6459 (criminal cases); *R. I.* Gen. L. 1909, c. 292, §§ 7–13; *S. C.* C. C. P. 1922, §§ 676–681; *S. D.* Rev. C. 1919, §§ 2734–2744 (civil cases); §§ 4992–5005 (criminal cases); *Tenn.* Shannon's Code 1916, §§ 5602–5615, 7358–7366; *Tex.* Rev. Civ. St. 1911, §§ 3640–3646; Rev. C. Cr. P. 1911, §§ 525–550; *Utah:* Comp. L. 1917, §§ 7127–7139 (civil cases); §§ 9284–9289 (criminal cases); *Va.* Code 1919, §§ 6217–6221; *Wash.* R. & B. Code 1909, §§ 1215–1224 (civil cases); §§ 1898–1901 (justice courts); *W. Va.* Code 1914, c. 130, §§ 25–28, c. 162, § 1; *Wyo.* Comp. St. 1920, §§ 5812–5822.

[3] It has long been settled that an abstract of the writ, or "*subpœna-ticket*" suffices: 1639, Goodwin *v.* West, Cro. Car. 522, 540.

The service cannot be made on the witness *by attorney:* 1906, Re Depue, 185 N. Y. 60, 77 N. E. 798.

Modern methods may well be applicable here: Ark. St. 1907, No. 260, Dig. 1919, § 4158 (service of subpœna by telephone, valid).

testimony would be lawfully required at the time and place specified?[4] Upon principle, therefore, where a person already *in court* is desired as a witness, and is then and there called by order of the Court, no subpœna or other formal summons is needed, for it would be the merest technical formality.[5] If the desired witness is *confined in jail*, a subpœna would be of no avail, since he could not obey it and his custodian would still lack authority to bring him; accordingly, a writ to the custodian is necessary, ordering the prisoner to be brought to give testimony; this writ of 'habeas corpus ad testificandum,' grantable in discretion at common law, is now usually authorized by statute as a matter of course.[6]

[4] This question depends rather upon general principles as to the service of process, and not upon any peculiarity of the law of Evidence; moreover, it usually arises in contempt proceeding where the trial Court's determination depends so much on the facts of each case that it hardly creates a precedent; and the rulings are therefore not here collected; consult the following: *Eng.* 1736, Wakefield's Case, Lee t. Hardw. 313; *U. S.* 1834, Wilkie *v.* Chadwick, 13 Wend. N. Y. 49; 1922, Sellers *v.* State, — Miss. —, 90 So. 716 (there must be process of summons before a witness can be guilty of contempt; authorities collected; interesting opinions, with Ethridge, J., diss.); 1906, Ex parte Terrell, — Tex. Cr. —, 95 S. W. 536 (reading over the telephone does not suffice); 1838, Mattocks *v.* Wheaton, 10 Vt. 493; 1899, Chambers *v.* Oehler, 107 Ia. 155, 77 N. W. 853; 1902, Re Haines, 67 N. J. L. 442, 51 Atl. 929; Greenleaf, Evidence, §§ 309, 314, 315; Tidd, Practice, II, 806; Chitty, Practice, III, 829; Rapalje, Witnesses, § 302; and a note in 22 Harvard Law Review 376.

[5] *Eng.* 1830, R. *v.* Sadler, 4 C. & P. 218 (for criminal cases); *U. S.* 1886, U. S. *v.* Sanborn, 28 Fed. 299 (collecting the cases as to the right to fees); 1889, Eastman *v.* Sherry, 37 Fed. 844 (right to fees); 1859, Goodpaster *v.* Voris, 8 Ia. 334 ("The object of the summons is only to give notice and to call the witness in, and if he is already in court, he requires no further notice"); 1836, Leckie *v.* Scott, 10 La. 412, 417 ("Any person within the verge of the court during the trial may be called upon to disclose the truth"); 1831, Farmer *v.* Storer, 11 Pick. Mass. 241 (taxation of costs).

A general provision to this effect is sometimes made by statute: *Can.*: *Newf.* Consol. St. 1922, c. 91, § 6; *U. S. Ark.* Dig. 1919, § 4192; *Cal.* C. C. P. 1872, § 1990; *Ky.* C. C. P. 1895, § 602; *Nev.* Rev. L. 1912, § 5435; *Or.* Laws 1920, § 819; *P. I.* C. C. P. 1901, § 407; *P. R.* Rev. St. & C. 1911, § 1483; *Wash.* R. & B. Code 1909, § 1219.

[6] Starkie, Evidence, I, 81; Greenleaf, Evidence, § 312.

CANADA: *Dom.* R. S. 1906, c. 146, Crim. C. § 977; *Alta.* Rules of Court 1914, No. 389; *Man.* 1915, R. *v.* Kuzin, 21 D. L. R. 378, Man. (murder; the judge held to be in error, under Can. Cr. Code, § 977, in refusing an order to call as a witness a person convicted of murder and confined under sentence of death; the above statute overriding id. § 1064 as to mode of confinement of person sentenced); *N. Br.* Consol. St. 1903, c. 127, § 22; *Ont.* Rules of Court 1913, No. 230.

UNITED STATES: *Fed.* 1908, In re Thaw, O'Mara *v.* Lamb, 3d C. C. A., 166 Fed. 71 (writ held not to be of right, but of discretion; here refused for bringing to a bankruptcy proceeding a witness confined in a State asylum for criminal insane, the witness being presumably incompetent); *Ala.* Code 1907, § 6560; *Alaska:* Comp. L. 1913, § 1468; *Ariz.* Rev. St. 1913; P. C. § 1236; *Ark.* Dig. 1919, § 4169; *Cal.* C. C. P. 1872, §§ 1995–1997; P. C. 1872, § 1333; *Ga.* Rev. C. 1910, §§ 5844–5848, 5849–5855; P. C. § 1306; *Ida.* Comp. St. 1919, §§ 7991, 9139; *Ill.* 1915, People *v.* Kersten, 269 Ill. 597, 109 N. E. 1012 (statute applied); *Ind.* Burns' Ann. St. 1914, §§ 2131–2133; *Ia.* Comp. Code 1919, § 7377; *Kan.* G. S. 1915, § 7235 (civil cases); §§ 8135, 8136 (criminal cases); *Ky.* C. C. P. 1895, § 540; *Me.* Rev. St. 1916, c. 104, § 37; *Mass.* Gen. L. 1920, c. 248, § 25; *Mo.* Rev. St. 1919, § 5432; *Mont.* Rev. C. 1921, §§ 10628, 12186; *Nebr.* Rev. St. 1922, § 8867; *Nev.* Rev. L. 1912, §§ 5442, 7363; *N. Y.* C. P. A. 1920, §§ 297, 415–420; C. Cr. P. 1881, § 10 *c*, as added by St. 1920, c. 920; *N. D.* Comp. L. 1913, § 11399; *Oh.* Gen. Code Ann. 1921, §§ 11517, 13665; *Okl.* Comp. St. 1921, § 601; *Or.* Laws 1920, § 824; *P. I.* C. C. P. 1901, § 411; *P. R.* Rev. St. & C. 1911, §§ 1488, 6459; *S. C.* C. C. P. 1922, § 682; *S. D.* Rev. C. 1919, §§ 2745, 2746 (civil cases); § 5016 (criminal cases); *Tenn.* Shannon's Code 1916, §§ 7574–7576; *Utah*, Comp. L. 1917, §§ 7137, 9293; *Wash.* R. & B. Code 1909, § 1223; *W. Va.* Code 1914, c. 111, § 14; *Wyo.* Comp. St. 1920, § 5823.

The following ruling is unsound: 1921, State *v.* Brown, — Ala. App. —, 89 So. 862 (B. was under life-sentence and had a suit against M. for damages; a writ of 'habeas corpus ad testificandum' directing production

(*d*) The *official source* of the subpœna is the Court itself; the power to compel an answer being a part of the judicial power. But modern demands for convenience and informality have resulted in the issuance of the subpœna, by practice in many States, from the clerk of court alone, or even by the party himself; so that the name of the Court thereon is a mere form in such cases. Ultimately, this goes back to the modern custom of granting the subpœna without any conditions imposed and without any showing of necessity; so that the Court's discretion is not invoked and thus the judge's intervention would be needless. However in some States and courts, and in some classes of cases, the judge must still perform the judicial act of issuing the subpœna only upon application and a showing of cause by the party; but this feature has left its mark, for the most part, only in statutory rules denying reimbursement of costs for witness-fees where such sanction has not been obtained.

This whole modern development, *i. e.* the reduction to automatism of the issuance of the subpœna, is itself a natural result of the partisan principle of the Anglo-American law, which, in contrast to the Continental system, relegates to the parties themselves the search for evidence and the selection and production of witnesses (*post*, § 2483). This fundamental principle, depriving the judge of responsibility and initiative, has its advantages and its disadvantages, and leaves its marks deeply in many other peculiarities of our law of Evidence.

§ 2200. **Same: Subpœna duces tecum for Documents.** (1) A doubt was once raised as to the existence at *common law* of adequate *process*, comprehensive and unlimited, which should serve to enforce the testimonial duty as effectively *for documents* as for oral testimony. This doubt was repudiated as soon as raised, by an opinion which has ever since been accepted as final:

1808, *Amey* v. *Long*, 9 East 473, 479 Mr. *Gibbs*, Attorney-General, and Mr. *Garrow*, arguing against the issuing of such process: "The writ of subpœna 'duces tecum' only lay to public officers for the production of the public documents in their custody, in which all persons had or might have an interest, and could not properly be extended to private persons." ELLENBOROUGH, L. C. J., repudiating this argument: "The right to resort to means competent to compel the production of written, as well as oral, testimony seems essential to the very existence and constitution of a Court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them. And it is not possible to conceive that such Courts should have immemorially continued to act upon both, without great and notorious impediments having occurred, if they had been furnished with no better means of obtaining written evidence than what the immediate custody and possession of the party who was interested in the production of it, or the voluntary favor of those in whose custody the required instruments might happen to be, afforded." Messrs. *Park*, *Marryat*, and *Pell* (arguing for the doctrine approved): "This writ is of essential importance to the due administration

of B. to testify in the suit was refused on the ground that the statutes authorizing a deposition to be taken where the witness was in jail provided an exclusive method; unsound, because those statutes merely cured a defect in another part of the law, *ante*, § 1411).

of justice, oftentimes as much so as the common writ of subpœna to compel the attendance of witnesses; for where a matter depends upon written evidence in the possession of another than the party in the cause who is interested in its production, it would be nugatory to enforce his personal attendance without the document by which the truth of the fact in issue can alone be proved." LAWRENCE, J., said "this was one of the greatest questions he had ever heard agitated in Westminster Hall, — one which most deeply affected the administration of justice both civil and criminal. He could not reconcile it to his mind to suppose that the innocence of a person accused might depend on the production of a certain document in the possession of another, who had no interest in withholding it, and yet that there should be no process in the country which could compel him to produce it in evidence."

1834, BAYLEY, B., in *Summers* v. *Moseley*, 2 Cr. & M. 477: "The origin of the subpœna 'duces tecum' does not distinctly appear. It has been said on the part of the defendant that it was not introduced or known in practice till the reign of Charles II, and it may be that in its present form the subpœna 'duces tecum' was not known or made use of until that period. But no doubt can be entertained that there must have been some process similar to the subpœna 'duces tecum' to compel the production of documents, not only before that time, but even before the statute of 5 Elizabeth. Prior to that statute, there must have been a power in the Crown (for it would have been utterly impossible to carry on the administration of justice without such power) to require the attendance in courts of justice of persons capable of giving evidence, and the production of documents material to the cause, though in the possession of a stranger. The process for that purpose might not be called a subpœna 'duces tecum,' but I may call it a subpœna to produce. The party called upon in pursuance of such a process, not as a witness, but simply to produce, would do so or not, and if he did not, I can entertain no doubt that it would have been open to the party for whom he was called to make an application to the Court in the ensuing term to punish him for his contempt in not producing the document in obedience to such subpœna."

So the process for documents will be implied wherever *testimonial compulsion in general* is predicated by a statute.[1]

§ 2200. [1] ENGLAND: 1908, R. *v.* Daye, 2 K. B. 333 (a sealed packet deposited with a banker is a subject for subpœna under a statutory term "produce documents"; this was the celebrated Lamoine diamond-formula fraud, and the packet was said to contain the pretended formula).

UNITED STATES: *Fed.* 1879, U. S. *v.* Tilden, 10 Ben. 566, 578 (under U. S. Rev. St. § 863, making a witness, when beyond the district of personal attendance, compellable to give a deposition, the witness is equally liable to produce documents on subpœna d. t. for the deposition; good opinion by Choate, J.); 1904, Dancel *v.* Goodyear S. M. Co., 128 Fed. 753, C. C. (U. S. *v.* Tilden followed); 1904, Crocker-Wheeler Co. *v.* Bullock, 134 Fed. 241, C. C. (following the rule of U. S. *v.* Tilden, on authority); 1916, Re Subpœnas Duces Tecum, D. C. E. D. Tenn., 248 Fed. 137 (no order is necessary for the issuance of a subpœna 'duces tecum'); *Ala.* 1920, Vaughn *v.* State, — Ala. App. —, 84 So. 879 (official stenographer's transcript of former testimony, paid for by defendant and retained by him; stenographer's notes not being available, the defendant's counsel was held compellable to deliver the transcript in court to the State's counsel for use); *Ky.* 1915, Equitable Life Assur. Soc. *v.* Hardin, 166 Ky. 51, 178 S. W. 1155 (whether an insured's beneficiary was entitled to participation in profits; the beneficiary being entitled to inspection of the insurer's books, which were kept in another State, the proper mode of securing inspection was considered); *N. Y.* 1861, Mitchell's Case, 12 Abb. Pr. 249, 262 (production of documents is obtainable from a party-opponent under a statute making him compellable like any other witness; good opinion by Daly, J.); *P. I.* 1918, Liebenow *v.* Philippine Veg. Oil Co., 39 P. I. 60, 68 (careful and sensible exposition by Street, J.; motion to order production upon conditions may be used instead of subpœna d. t.).

A statute may therefore create *new forms of process:* 1906, Washington Nat'l Bank *v.* Daily, 166 Ind. 631, 77 N. E. 53 (a statute empowering an assessor to obtain a writ of inspection of documents in possession of any person containing evidence of the unlawful omission of a third person from the taxable-property list is constitutional, the process being analogous to a subpœna 'duces tecum').

(2) The *form* of the subpœna, when the production of documents is desired, is varied by the insertion of a special clause adapted to the purpose, and requiring the witness to bring with him — 'duces tecum' — the desired document.[2] The ordinary clause 'ad testificandum' is, however, at the same time commonly preserved; and the question is thus raised whether the summoning party can *require the production of a document without also putting the producer on the stand* to speak as to his general knowledge of the case. It would seem that the two forms of testimony are separable, and that the summoning party may therefore elect to have the one without the other; and this is the generally accepted opinion,[3] — a result harmonizing with the solution of the analogous question (*ante*, § 1894) whether the calling of the witness merely to produce a document makes him the party's own so as to subject him to cross-examination by the opponent.

(3) The *time* and *mode of service* would ordinarily be regulated by the general principle applicable to an ordinary subpœna (*ante*, § 2199).[4] In particular, no subpœna would be required for documents already in court in the witness' control.[5] Statutes sometimes regulate the subject in full detail.[6]

(4) A peculiarity of the subpœna 'duces tecum' is that, in the nature of things it must *specify*, with as much precision as is fair and feasible, the

But see the virtually contrary holding on an analogous proceeding in the form of *discovery from a third person*, *ante*, § 1859 *f*.

[2] The command then is to appear "to testify all and singular those things which you or either of you know in a certain cause," and also "that you do diligently and carefully search for, examine, and inquire after and bring with you and produce" a specified document, "together with all copies, drafts, and vouchers relating to the said documents and letters, and all other documents and paper writings whatsoever that can or may afford any information or evidence in this cause; then and there to testify and show all and singular those things which you or either of you know, or the said documents, letters, or instruments in writing do import, of and concerning the said cause now depending" (Chitty's Practice of the Law, III, 829).

For the question whether a subpœna 'duces tecum' is a proper form of process for obtaining documents from a *party-opponent*, see *post*, § 2219.

[3] *Eng.* 1830, Davis *v.* Dale, 4 C. & P. 335; 1834, Summers *v.* Moseley, 2 Cr. & M. 477 (the witness had refused to produce unless he was also sworn for the party calling him; Bayley B.: "We are clearly of opinion that he has no right to require that a party bringing him into court for the mere purpose of producing a document should have him sworn in such a way as to make him a witness"); *U. S.* 1850, Martin *v.* Williams, 18 Ala. 190, 193; 1858, Hall *v.* Young, 37 N. H. 134, 142, *semble;* 1845, Aiken *v.* Martin, 11 Paige N. Y. 499, 502; 1918, Liebenow *v.* Phil. Veg. Oil Co., 39 P. I. 60 (cited *supra*, note 1); 1841, Sherman *v.* Barrett, McMullen, S. C., 147, 163; 1920, Duncan *v.* Carson, 127 Va. 306, 103 S. E. 665, 105 S. E. 62 (on subpœna 'duces tecum' to a party, the opponent may examine the books without making the producing party a witness, even though the same subpœna contain both the testifying and the producing clauses; provided however the books produced are admitted or otherwise evidenced to be the books called for; the proviso seems needless, for the production would of course ordinarily be an admission of identity). *Contra:* 1872, Murray *v.* Elston, 23 N. J. Eq. 212, 214, *semble* (holding that subpœna d. t. without a clause 'ad testificandum' is void).

But where the demand for the witness' oral testimony is made, not by the opponent, but by the *witness himself*, in order to prove his *non-liability to produce* the document, it is of course a proper one; 1858, Hall *v.* Young, *supra*, *semble* (for a peremptory order, subjecting to contempt proceedings, possession must be clearly shown, and for this purpose the witness should be sworn); 1845, Aiken *v.* Martin, *supra* (claim of privilege).

[4] 1835, Chitty, Practice of the Law, III, 829 ff.

[5] 1908, Kincaide *v.* Cavanaugh, 198 Mass. 34, 84 N. E. 307; 1898, Hunton *v.* Hertz & H. Co., 118 Mich. 475, 76 N. W. 1041; 1863, Boynton *v.* Boynton, 16 Abb. Pr. N. Y. 87.

[6] The citations *post*, § 2219, will serve here also.

particular documents desired; because the witness ought not to be required to bring what is not needed, and he cannot know what is needed unless he is informed beforehand.[7]

(5) It often happens, however, that the party desiring the evidence does not precisely know what documents exist in the hands of the witness or what existing documents contain relevant material; or that a document, if of a certain tenor, would be privileged from disclosure, on one or another ground (*post*, §§ 2210–2223). In such a situation, it is obviously not for the witness to *withhold the documents upon his mere assertion* that they are not relevant or that they are privileged. The question of relevancy is never one for the witness to concern himself with (*post*, § 2210); nor is the applicability of a privilege to be left to his decision. It is his duty to bring what the Court requires; and the *Court* can then to its own satisfaction *determine* by inspec-

[7] ENGLAND: 1866, Lee *v.* Angus, L. R. 2 Eq. 59 (a subpœna d. t., in a suit concerning a mortgage, to produce accounts relating to rents etc., "and all other books, accounts, letters, papers, and documents in your possession or power, in any wise relating to the affairs and concerns of the said plaintiffs, or either of them, or the said H. L., and all books, accounts, letters, papers, and documents received by you from H. E. S. as solicitor of M. C.," held too broad; Page-Wood, V. C.: "He must speak the truth within his knowledge; but he is not bound to make this burdensome search for evidence at his own expense").

UNITED STATES: *Fed.* 1876, U. S. *v.* Babcock, 3 Dill. 566, 570 ("The papers are required to be stated or specified only with that degree of certainty which is practicable considering all the circumstances of the case, so that the witness may be able to know what is wanted of him and to have the papers on the trial so that they can be used if the Court shall then determine that they are competent and relevant evidence"; the person summoned is bound to make reasonable search for the documents); 1882, U. S. *v.* Hunter, 15 Fed. 712 (rules prescribed as to the particularity of the notice); 1904, Dancel *v.* Goodyear S. M. Co., 128 Fed. 753, 762, C. C. (an application for "all books of account, minutes," etc., etc., of the G. S. M. Co., and a long list of other documents named generally, held too broad on the facts); 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370 (a call for all the correspondence, etc., between the defendant's corporation and six others, all correspondence since its date of organization between itself and thirteen others, etc., held to be unreasonably broad; McKenna, J., diss.); 1906, McAlister *v.* Henkel, ib. 90, 26 Sup. 385 (here the subpœna was held specific enough); 1906, U. S. *v.* American Tobacco Co., 146 Fed. 557, C. C. (a subpœna calling for the minute-books of a corporation for a period of three years and the copy-letter-books for a period of three and a half months, held not too broad); 1908, Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541, 28 Sup. 178 (notice held not too broad); *Minn.* 1901, Carson *v.* Hawley, 82 Minn. 204, 84 N. W. 746 (demand for all books and papers of a business during three months, held insufficient); *Mo.* 1880, Ex parte Brown, 72 Mo. 83, 93 (there must be a "reasonably accurate description of the paper wanted," and a showing that it is material in a pending cause here, a call for all telegrams between [illegible] dozen persons within fifteen months p[illegible] held too broad); 1910, Ex parte G[illegible] Mo. —, 132 S. W. 364 (grand jury inquiry violations of the liquor law; subpœna d. t. to the telegraph operator at Baird ordering production of all messages filed with him bearing orders for delivery of intoxicating liquors to Baird, held too broad; this paralyzing of the grand jury's function is defended by much misplaced sentimental rhetoric); *N. Y.* 1914, In re Mohawk Overall Co., 210 N. Y. 474, 104 N. E. 924, 156 App. Div. 879 (burdensome scope of a subpœna d. t., considered); *Pa.* 1908, American Car & Foundry Co. *v.* Alexandria Water Co., 221 Pa. 529, 70 Atl. 867 ("An order to produce all papers concerning the matter in dispute is not sufficiently specific"; approving the text above); *Vt.* 1907, Re Consolidated Rendering Co., 80 Vt. 55, 66 Atl. 790 (an order under St. 1906, No. 75, p. 79, directing a corporation to produce before the grand jury certain described classes of documents, held proper and not a violation of the constitutional provision against unreasonable searches).

Furthermore, on an application for a subpœna d. t., production being contested on the ground of irrelevancy, the movant must show *facts sufficient to enable the Court to determine* whether the desired documents are material and relevant to the issues: 1907, U. S. *v.* Terminal R. Ass'n, C. C. E. D. Mo., 154 Fed. 268 (collecting the cases).

Compare the general doctrines of *privilege for documents* (*post*, §§ 2211, 2219), and *discovery against a witness* before trial (*ante*, §§ 1857, 1859).

tion whether the documents produced are irrelevant or privileged.[8] This does not deprive the witness of any rights of privacy, since the Court's determination is made by its own inspection, without submitting the documents to the opponent's view; and, unless such a mode of determination were employed, there could be no available means of preventing the constant evasion of duty by witnesses:

1808, ELLENBOROUGH, L. C. J., in *Amey* v. *Long*, 9 East 473, 485: "There are circumstances in respect of which the production of an instrument required in the terms of a subpœna, would not be enforced by the authority of the Court, — which is a proposition too clear to be doubted. And to be sure, though it will always be prudent and proper for a witness served with such a subpœna to be prepared to produce the specified papers and instruments at the trial, if it be at all likely that the judge will deem such productions fit to be there insisted upon; yet it is in every instance a question for the consideration of the judge at Nisi Prius whether, upon the principles of reason and equity, such production should be required by him, and of the Court afterwards, whether, having been there withheld, the party should be punished by attachment." Messrs. *Park*, *Marryat*, and *Pell* (arguing for the successful side); "As the obligation of a witness to answer by parol does not depend upon his own judgment, but on that of the Court, the same rule must prevail with respect to his production of documentary evidence. The witness is bound at all events to bring with him the papers which he has been subpœnaed to produce; and when it is in Court, he may then state any legal or reasonable excuse for withholding it, of which the Court will judge. In this respect there can be no distinction between parol and written evidence. Proof of either kind, if within the knowledge or possession of the witness, ought to be produced if legal; and of its legality the Court and not the witness must judge."

In this respect the rule differs from that which has been applied in Chancery practice to discovery of documents by a *party-opponent* (*ante*, § 1859*d*, *post*, § 2219); but the latter rule is anomalous and rests on a peculiar tradition.

[8] *Accord:* ENGLAND: 1835, Doe *v.* Kelly, 4 Dowl. Pr. 273.

UNITED STATES: *Fed.* 1807, Aaron Burr's Trial, Robertson's Rep., I, 182 (the facts are fully stated *post*, § 2371); 1882, U. S. *v.* Hunter, 15 Fed. 712 (if the witness has a doubt as to the relevancy of the document, he should submit it to the Court); 1890, Edison El. L. Co. *v.* U. S. El. L. Co., 44 Fed. 294, 45 id. 55, C. C. (the Court will not finally determine the materiality of the documents called for upon the refusal of the witness to produce, but will inspect and determine for itself); 1904, Dancel *v.* Goodyear S. M. Co., 128 Fed. 753, C. C. (on a deposition 'de bene' under U. S. Rev. St. § 863, a subpœna 'duces tecum' does not issue from the clerk as a matter of course, but the application "is addressed to the discretion of the Court," and "before compelling the production . . . it will sufficiently inquire into the matter to determine if the evidence appears to be material"); 1906, Dowagiac Mfg. Co. *v.* Lochren, 143 Fed. 211, C. C. A. (collecting the cases); 1906, Fairfield *v.* U. S., 146 Fed. 508, C. C. A. ("The duty of a witness to obey a subpœna is not conditioned by his own or by his counsel's opinion of the materiality of his testimony"); *Miss.* 1845, Chaplain *v.* Briscoe, 5 Sm. & M. 198, 207; *Mo.* 1921, State ex rel. Tune *v.* Falkenhainer, 288 Mo. 20, 231 S. W. 255 (D. a city employee sued M. and T. for libel in a letter of complaint to the city board; the judge issued a subpœna to the board for the letter; the board held bound to produce it, leaving the claim of privilege in defamation to be determined after production); *Vt.* 1907, Re Consolidated Rendering Co., 80 Vt. 55, 66 Atl. 790.

Here compare the general rules that *irrelevancy* is not a ground for a witness' claim of privilege (*post*, § 2210); that on hearing before a *master or examiner* the power to decide may require a resort to the Court (*ante*, § 2195); and that *objections* must be taken prior to such reference to the Court (*ante*, § 18).

The Court should of course provide that the *irrelevant parts* of a book or document be not seen by the opponent; 1824, Hawkins *v.* Howard, Ry. & Mo. 64.

When the document is lawfully producible, the producer may be required to *read* it aloud: 1862, People *v.* Dyckman, 24 How. Pr. 222, 226.

(6) The requirement to produce assumes that the document is *within the control of the witness.* One who is dumb cannot be in default for not testifying orally, and one who has no lawful control over a document cannot properly be liable to produce it. Whether the witness has such a control depends upon the facts of each case.[9]

(7) When the documents desired are those of a *corporation,* its officer who is their custodian is the proper person to serve with process and to hold liable for non-production.[10] It seems highly desirable that Courts should for this purpose recognize a form of subpœna *ordering a court-official to go and*

[9] ENGLAND: 1807, Amey *v.* Long, 1 Camp. 14, 9 East 473, 483 (subpœna d. t. directed to G. and L. or one of them; it was served on L. only, but G. owned and had the document; they were partners; Ellenborough, L. C. J.: "Although a paper should be in the legal custody of one man, yet if a subpœna d. t. is served on another who has the means to produce it, he is bound to do so"; yet no man is obliged "to sue and labor in order to obtain the possession of any instrument from another for the purpose of its production afterwards by himself, in obedience to the subpœna").

UNITED STATES: *Fed.* 1904, Dancel *v.* Goodyear S. M. Co., 128 Fed. 753, 762, C. C. (the Court may require preliminary proof of the witness' possession before issuing process); 1914, Munroe *v.* U. S., 1st C. C. A., 216 Fed. 107 (a U. S. banker in N. Y. was a member of a partnership; three partners resided in Paris, France; certain paid checks were in custody of the Paris partners; the U. S. banker was subpœnaed to produce those checks; without notifying his Paris partners of the subpœna, or requesting them to forward the documents, or making any other effort to obtain them, he appeared and testified that he had not the documents; he was found guilty of contempt; held error, on appeal; unsound; the Court purports to follow Amey *v.* Long, *supra,* but the radical and practical distinction is that where the third person is within the jurisdiction, it is simple enough to require the applicant to serve the subpœna on the third person who is actual possessor of the document; otherwise when the document is without the jurisdiction); *Cal.* C. C. P. § 2064, as amended by St. 1907, c. 395 (quoted *post,* § 2210); *Mo.* 1913, Shull *v.* Boyd, 251 Mo. 452, 158 S. W. 313 (the Court, not the witness, decides); *Vt.* 1907, Re Consolidated Rendering Co., 80 Vt. 55, 66 Atl. 790 (foreign corporation, already admitted to do business in the State, and subpœnaed d. t. before a grand jury; its removal of the books out of the State, in anticipation of the inquiry, held no excuse).

The following statute provides for a special situation: *N. Mex.* St. 1907, c. 84, p. 192, § 3 (in proceedings to take testimony for use in a court outside the Territory, "no witness shall be required to deliver up any book, paper, or writing to be annexed to the said deposition and taken out of the Territory").

[10] ENGLAND: 1834, R. *v.* Woodley, 1 Moo. & Rob. 390 (a person holding documents as attorney of the lord of a borough, and also as steward of the borough, held bound to produce in the latter character, in 'quo warranto' against the bailiff of the borough).

UNITED STATES: *Fed.* 1883, Wertheim *v.* Contin. R. & T. Co., 15 Fed. 716 (a corporation not a party is compellable like other persons to produce its books; the officers of a corporation are the custodians of its books for this purpose; here the president and secretary were compelled); 1906, Nelson *v.* U. S., 201 U. S. 92, 26 Sup. 358 (corporate officers having custody of documents of the corporation are the proper persons to produce); 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370 (the Court noticed a claim by a corporation-officer that he could not "collect the documents within the time allowed," and held that this merely would entitle him to demand further time); 1906, U. S. *v.* American Tobacco Co., 146 Fed. 557, C. C. (a secretary held not liable to produce certain documents in the exclusive custody of the president of the corporation); *N. Y.* 1825, Bank of Utica *v.* Hillard, 5 Cow. 153, 158 (Savage, C. J.: "The obligation of Colling [a bank-clerk] to produce the [bank-books] upon the 'duces tecum' depends on the question whether they were in his possession and under his control. He was the mere clerk of the plaintiffs, and in that character had no such property in or possession of the books as imposed the obligation to bring them"); C. P. A. 1920, § 414 (describing the persons proper to produce corporate books). The statutes cited *post,* § 2219, sometimes cover this point.

Of course a member of a *partnership* has a control over documents of the firm: 1906, U. S. *v.* Collins, 145 Fed. 709, D. C.

Whether under U. S. Rev. St. 1878, § 724, Code § 1361 (quoted *ante,* § 1859, n. 1), authorizing an order, on motion, to "parties" to produce, the *officers of a corporation-party* are subject to such a process is an interesting question: 1907, Cassatt *v.* Mitchell C. & C. Co., 81 C. C. A. 80, 150 Fed. 32, 38 (order denied). Compare the reverse question *post,* § 2219, note 9 (whether a subpœna d. t. is appropriate for a party).

fetch the corporation-documents, and *forbidding the custodian to hinder*, but permitting the custodian to attend voluntarily with the books if he so prefers. The reason is this: Under the privilege of self-crimination, the custodian (clerk, secretary) may refuse to produce if the books tend to criminate himself as well as the corporation (*post*, §§ 2259, 2264), which will sometimes be the case; yet the corporation itself may not have the privilege (*post*, § 2259), or the prosecution may be willing to give immunity (*post*, § 2281) to the corporation but not to its officer; hence, so long as the subpœna has to be directed to the custodian when the object is merely to get the corporation-books, that object is likely to be defeated. A form of process should therefore be sanctioned which will obtain the corporation-books without involving process against the custodian-agent of the corporation.

(8) Whether the documents may be *impounded* in the court's custody pending trial, or may merely be brought there temporarily for inspection, or may otherwise be disposed of, is a matter of some difference of judicial opinion.[11] The proper disposition, in any event, should lie in the discretion of the Court; it is an error of judicial inefficiency to doubt that the judicial power exists and can be exercised to direct whatever is reasonable under the particular circumstances.

(9) From the foregoing questions, arising out of the requirement of notice and demand by subpœna 'duces tecum,' are to be discriminated the witness'

[11] ENGLAND: 1810, Beckford *v.* Wildman, 16 Ves. Jr. 438 (L. C. Eldon said that title-deeds produced for inspection would not be taken into the court's custody in the interim, without a showing "that there is reason to believe that the deed will not be produced at the hearing").

CANADA: *Dom.* R. S. 1906, c. 145, Evid. Act, § 33 ("Whenever any instrument which has been forged or fraudulently altered is admitted in evidence, the court or the judge or person who admits the instrument may, at the request of any person against whom it is admitted in evidence, direct that the instrument shall be impounded and be kept in the custody of some officer of the court or other proper person for such period and subject to such conditions, as to the court, judge or person admitting the instrument seems meet"); *B. C.* Rev. St. 1911, c. 78, §§ 49, 51 (where a document is received in evidence, the court may direct its impounding); *Ont.* R. S. 1914, c. 73, § 53 ("Where a document is received in evidence, the Court . . . may direct that it be impounded," etc.).

UNITED STATES: *Kan.* 1921, State *v.* Smithmeyer, 110 Kan. 172, 202 Pac. 638 (documents produced by employees of a corporation, under a subpœna from the Attorney-General, issued under St. 1919, c. 316, § 1, authorizing him to make inquisition, were retained by the Attorney-General with a view to use as evidence on the trial of the corporation on the charge of violating the anti-monopoly laws; application being made before trial by the corporation for the return of the documents, the order to return was affirmed, on the ground that "one who procures or compels the production of papers cannot take the custody of those papers from the person producing them"; yet the opinion, assuming that the Attorney-General in this case stood as the opposing party, says nothing as to the Court's power to direct the impounding of the documents); *N. J.* 1874, Hilyard *v.* Harrison, 37 N. J. L. 170 (tax-warrants; the opponent's inspection at the court does not entitle him to take them away in his possession); *N. Y.* 1832, Stow *v.* Betts, 7 Wend. 536 (books of account; the party-owner may withdraw them after they have been left a reasonable time in the clerk's custody for taking transcripts); *N. C.* 1825, Carter *v.* Graves, 1 Dev. L. 74 (deed; the party-owner held entitled to return after deposit for use in evidence by the opponent); 1921, Burleson Mica Co. *v.* Southern Exp. Co., 182 N. C. 669, 109 S. E. 853 (non-delivery by bailee; on plaintiff's application for inspection of papers, an order requiring defendant to file them with the clerk "within 30 days prior to the next term of this court," held too indefinite as to time and place); *R. I.* 1880, Ely *v.* Mowry, 12 R. I. 570 (the owner is required merely to produce for inspection; an order to impound or to leave on deposit will not be made).

For the impounding of *chattels*, see *post*, § 2214.

exemption from mere *attendance* with documents (not from disclosure) sometimes granted on grounds of convenience (*post*, § 2205); and also the various privileges against disclosure of documents, in particular, those affecting *title-deeds*, *securities*, and the like (*post*, § 2211), *trade-secrets* (*post*, § 2212), a *civil party-opponent's* documents (*post*, § 2219), *self-criminating* documents (*post*, § 2264), documents communicated between *attorney* and *client* (*post*, § 2307), and *official documents* (*post*, § 2373).

§ 2201. (2) **Indemnity for Expenses**; (*a*) **Tender in Advance.** 1. Ever since the statute of Elizabeth (and before that time it does not appear what the practice was [1]), the indemnity to which the witness is entitled has been required, at least in *civil causes*, to be tendered to him by the party in advance, at the time of serving the subpœna; [2] in lack of this, the witness is not compellable to attend.

2. In *criminal cases*, this condition was never imposed upon the *prosecution*. But whether it was equally dispensed with in favor of the *accused* in criminal cases was never settled at common law. So far as early precedent was concerned, the statute of Elizabeth was passed more than a century before the accused obtained the right to compulsory process for his witnesses.[3] Yet before this became his right, and while it was being permitted as a favor, the early practice seems to have applied to him the rule for parties to civil causes.[4] In later times, the tradition became uncertain, and judicial opinion left the matter in doubt.[5] Finally, by statute in most jurisdictions, the wise

§ 2201. [1] *Ante*, § 2190.

[2] 1562, St. 5 Eliz. c. 9, § 12 (penalty provided against any person who "having not a lawful and reasonable let or impediment to the contrary," fails to appear to testify in a cause after process served upon him "and having tendered unto him or them, according to his or their countenance or calling, such reasonable sums of money for his or their costs and charges as having regard to the distance of the places is necessary to be allowed in that behalf").

No exception was recognized for a party suing 'in forma pauperis': 1828, Blackburn *v.* Hargreaves, 2 Lew. Cr. C. 259.

In Tennessee, North Carolina, and Georgia no such requirement exists for civil cases: *infra*, note 6.

[3] *Ante*, § 2190.

[4] 1684, Braddon's Trial, 9 How. St. Tr. 1127, 1167 (quoted *post*, § 2202).

[5] 1814, Phillipps, Evidence, I, 9–13 (recognizes no discrimination as to defendants); 1824, R. *v.* Cooke, 1 C. & P. 322 (defendant need not tender); 1850, Pell *v.* Daubeny, 5 Exch. 955, per Alderson, B. (tender not necessary in criminal cases generally); 1806, Smith's and Ogden's Trial, Lloyd's Rep. 34, 58, 89 (the Court of two judges was divided, and gave no reasons); 1825, Ex parte Chamberlain, 4 Cow. 49 (tender not necessary by defendant in felonies); 1901, Huckins *v.* State, 61 Nebr. 871, 86 N. W. 485 (tender not necessary by defendant); 1853, West *v.* State, 1 Wis. 209, 233 (defendant need not tender; treated as a deduction from the right to compulsory process, *ante*, § 2191).

A witness who is too *poor* to pay his expenses should be exonerated from a charge of contempt: Phillipps, Evidence, I, 13; 1836, People *v.* Davis, 15 Wend. 602, *semble*.

Distinguish the following: 1917, Greene *v.* Ballard, 174 Ky. 808, 192 S. W. 841 (the Constitutional right to compulsory process does not entitle an accused to obtain witnesses at the expense of the Commonwealth; the opinion attempts to bolster its legal theory by adding that "to hold otherwise would license persons charged with crime, under pretense of poverty, to summons hordes of witnesses at the expense of the Commonwealth"; this is a childish statement and cruelly false; if no better thinking can be done than this on the public policy of the measure, the less said about policy by this Court the better; in the present case the petition stated that the accused, charged with murder, and the witnesses, were "poor people without money to defray the expenses of attending his trial," that they lived as far as 80 miles away, and that their presence was 'indispensably necessary to make his defense," and that the trial Court had allowed the claim, which totalled $190; the issue here arose on mandamus to compel payment by the State

step was taken of declaring both parties in criminal causes exempt from a tender in advance.[6]

auditor; just so long as a State regards the payment of witness' fees as a partisan duty instead of the State's, just so long will the idea of lawsuits as partisan feuds be strengthened).

[6] In the following list are collected the statutes concerning tender of expenses generally, as involved in this and the ensuing section:

CANADA: *Sask.* Rev. St. 1920, c. 44, § 43 ("No person shall be obliged to attend or give evidence" in any proceeding "unless he is first tendered his legal fees for such attendance and necessary travel"). *Yukon:* Consol. Ord. 1914, c. 30, § 39 (no person is compellable to attend in court, etc., unless on tender of fees "for such attendance and necessary travel").

UNITED STATES: *Federal:* Rev. St. 1878, § 876, Code § 1371 (fees for travel both ways and one day's attendance must be tendered to a witness summoned for 'dedimus' deposition); Code § 6150 (same, for contested patent causes); St. 1898, c. 541, § 41, July 1, 30 Stat. L. 556, Code § 8823 (no person shall be required to attend as witness before a referee in bankruptcy unless his fees, etc., are "first paid or tendered him"); 1903, Re Boeshore, 125 Fed. 651 (mere failure to demand a fee not tendered is not a waiver of the necessity of tender); 1903, Re Kerber, 125 Fed. 653 (similar);

Alabama: Code 1907, § 3678 (on non-payment of fee on demand in any civil cause, witness need not "appear again as a witness in the same cause until his fees are paid");

Alaska: Comp. L. 1913, § 1506 (like Or. Laws 1920, § 869);

Arizona: Rev. St. 1913, Civ. C. § 1685 (no attachment for contempt in a civil suit, unless there has been a tender of lawful fees);

Arkansas: Dig. 1919, § 4162 (fees for travel and one day's attendance must be tendered); § 3110 (tender not necessary in criminal causes);

California: C. C. P. 1872, § 1987 (fees for travel both ways and one day's attendance, required); Pol. C. 1872, § 4070 (witnesses summoned by county board of supervisors are "not entitled to have their fees prepaid");

Columbia (Dist.): Code 1919, § 1059 (fees for travel both ways and one day's attendance must be tendered);

Connecticut: Gen. St. 1918, § 5703 (fees for travel one way and one day's attendance must be tendered);

Florida: Rev. G. S. 1919, § 2713 (mileage and one day's fee, and thereafter in advance); Rev. G. S. 1919, § 6167 (insolvent accused persons may obtain subpœnas for necessary witnesses at cost of State, but "not more than two witnesses to prove the same fact"); 1906, Pittman *v.* State, 51 Fla. 94, 41 So. 385 (Rev. St. 1892, §§ 2867, 2875; St. 1893, c. 4120; St. 1903, c. 5132; statutes construed, as to the necessity of tender of costs by the accused);

Georgia: Rev. C. 1910, § 5850 (fees in civil cases are not demandable before attendance); 1895, Roberts *v.* State, 94 Ga. 66, 21 S. E. 132 (statute for State payment, construed);

Hawaii: Rev. L. 1915, § 2555 (in a court of record, in a civil cause, attendance is not required unless "travelling fees" be paid or tendered);

Idaho: Comp. St. 1919, §§ 7983, 8043 (fees for travel both ways and one day's attendance must be tendered); § 3453 (witnesses before county commissioners are not entitled to prepayment of fees); § 8073 (on behalf of the State witnesses are compellable "without paying or tendering fees in advance"); 1906, Anderson *v.* Ferguson-Bach S. Co., 12 Ida. 418, 86 Pac. 41 (right to compensation considered);

Indiana: Burns' Ann. St. 1914, §§ 512, 513, 515 (compellable to attend in the same county without tender; out of the county, fees for travel and one day's attendance must be tendered, and then from day to day, one day's fee in advance); § 2109 (in criminal cases, no tender necessary);

Iowa: Code 1897, § 4662, Comp. Code § 7369 (fees demandable in advance for travel both ways and one day's attendance, and, at the beginning of each day after the first, that day's fees; except for parties); § 1298, Comp. Code § 710 (fees demandable in advance by the accused's witnesses, unless subpœna is issued on order of judge); 1900, State *v.* Keenan, 11 Ia. 286, 82 N. W. 792 (statute applied);

Kansas: Gen. St. 1915, §§ 7228-9 (fees for travel and one day's attendance are demandable, and one day's fee at the beginning of each day after the first); § 8082 (in criminal cases, no tender need be made, by either State or defendant); 1910, State *v.* Kaemmerling, 83 Kan. 387, 111 Pac. 441 (rule requiring tender not applied to a State action to enjoin a nuisance);

Kentucky: C. C. P. 1895, § 536 (fees must be tendered for travel and one day's attendance); C. Cr. P. § 151 (fees need not be tendered in criminal cases); Stats. 1915, § 1734 (in a civil case, no attendance is necessary, if residing more than twenty miles away, unless tendered travel fees in advance or ordered to come without tender); 1857, Thurman *v.* Virgin, 18 B. Monr. 785, 790 (under the statutes, tender is still necessary in civil suits for witnesses residing out of the county);

Louisiana: Rev. Civ. C. 1920, § 3943, C. Pr. 1870, § 134 (a witness who has attended and obtained a certificate and demanded the fee of the party is not compellable to attend in the same case at a subsequent term until the fee is paid);

Maine: Rev. St. 1916, c. 87, § 125 (no person is obliged to attend in civil cases as a witness unless on pre-payment of fees for travel and

The requirement of a tender (in cases where it is applicable) is a continuing one, *i. e.* when the time of attendance has expired which was covered

for one day's attendance); c. 134, § 10 (a witness for the accused in a criminal case may require prepayment of fees); c. 136, § 16 (otherwise for a witness summoned for the State);
Massachusetts: Gen. L. 1920, c. 233, § 3 (fees for travel and one day's attendance must be tendered in civil cases and by defendant in criminal cases); c. 277, § 69 (witness summoned by Commonwealth is bound to attend without prepayment);
Michigan: Comp. L. 1915, § 12561 (fees for one day's attendance and travel both ways must be tendered); § 15729 (tender not necessary in criminal cases);
Minnesota: Gen. St. 1913, § 5774 (attendance is not compellable unless fees for travel both ways and one day's attendance are offered); § 5786 (in criminal cases, attendance is compellable for defendant without fees, and the attorney-general or county attorney may also compel it for State);
Mississippi: Code 1906, § 2200; Hem. § 1885 (a witness in a civil case unpaid at the end of each day is not obliged to attend further till paid, unless the party files an affidavit of inability to pay);
Missouri: Rev. St. 1919, § 3963 (in criminal cases, attendance is compellable without tender); § 5422 (not compellable to attend more than forty miles from residence, unless fees for travel both ways and one day's attendance are tendered);
Montana: Rev. C. 1921, § 10620 (fees for travel both ways and one day's attendance must be tendered); Pol. C. § 4944 (no attendance is compellable unless fees for travel both ways and one day's attendance are tendered, and thereafter each day's fees in advance);
Nebraska: Rev. St. 1921, § 8862 (fees for travel and one day's attendance are demandable in advance); § 8870 (after the first day, each day's fees are demandable in advance); § 10126 (accused shall have compulsory process for witnesses at the State's expense);
Nevada: Rev. L. 1912, §§ 2000, 2012, 5431 (fees for travel both ways and one day's attendance are demandable in civil cases in advance);
New Hampshire: Pub. St. 1891, c. 224, § 5 (fees for travel and one day's attendance are to be tendered); § 9 (on tender of double the local fees, a witness may be summoned for a Federal cause in another State); 1860, Whitney *v.* Pierce, 40 N. H. 114 (before an auditor, a party as witness is not entitled to a tender of charges);
New Jersey: Comp. St. 1910, Evidence § 12 (the witness shall pay a forfeit if he fails to appear after process served and charges "paid or tendered at the time of such service"); 1819, Ogden *v.* Gibbons, 2 South. 519, 533 (statute applied);
New Mexico: Annot. St. 1915, § 2160 (witness deposing for use in case pending outside the State; not compellable unless usual fees for attendance and mileage are paid);
New York: C. P. A. 1920, § 404 (fees for travel both ways and one day's attendance must be tendered); J. C. A. 1920, § 191 (justice courts; only attendance fee need be tendered); N. Y. City Mun. Ct. Code 1915, § 98 (no mileage need be tendered); 1906, Re Depue, 185 N. Y. 60, 77 N. E. 798 (statute applied);
North Carolina: Con. St. 1919, § 1273 (no fees are demandable in advance; but a witness in civil cases, except on behalf of the State or a municipal corporation, may leave after one day, unless tendered what is then due);
North Dakota: Comp. L. 1913, §§ 7877, 7881 (in civil cases, fees for travel and one day's attendance are demandable in advance, and after the first day, each day's fee at the beginning);
Ohio: Gen. Code Ann. 1921, §§ 11506, 11508 (not compellable to attend unless on payment of travel and one day's attendance fees);
Oklahoma: Comp. St. 1921, § 595 (civil cases; fees for travel both ways and one day's attendance are demandable in advance); § 604 (each day's fees after the first are demandable at its commencement);
Oregon: Laws 1920, § 815 (like Cal. C. C. P. § 1987); § 818 (double fees demandable for attendance out of the county and more than 100 miles, compellable only on court order); § 869 (fees may be demanded at the close of each day for attendance next day);
Philippine Islands: C. C. P. 1901, § 406 (need not attend out of the province unless place of trial is less than 30 miles from place of residence); Act 1130, § 1 (civilian witnesses before general court-martial or naval court; fees for travel both ways and attendance must be tendered);
Porto Rico: Rev. St. & C. 1911, § 1480 (travel both ways and one day's attendance);
Rhode Island: Gen. L. 1909, c. 292, §§ 8, 9 (fees for travel to court and one day's attendance must be tendered, except for summons on behalf of the State);
South Carolina: C. Cr. P. 1922, § 943 ((accused shall have compulsory process for obtaining witnesses in his favor; nothing said about a tender);
South Dakota: Rev. C. 1919, §§ 2738, 2748 (like N. D. Comp. L. §§ 7877, 7881); § 5308 (fees of "material witnesses on the part of the defendant shall be paid by the county, unless otherwise ordered by the Court");
Tennessee: Shannon's Code 1916, § 5608 (every witness subpœnaed shall appear); 1836, Smith *v.* Barger, 9 Yerg. 323 (by construction of the statute, no tender is necessary in civil cases);

by the tender, and the witness is still needed, a new tender must be made in advance, from day to day, of his cost of maintenance or daily fee.[7] On the other hand, the requirement of a tender ceases when the necessity for it ceases, for example, when the witness is already in court for another purpose.[8] Moreover, a voluntary attendance without a demand of expenses at the time of service is a final waiver of the requirement, and the witness cannot insist upon it at the moment of being called to the stand.[9]

3. The truth is that the whole doctrine of requiring a tender in advance is an unwholesome one, — a mere relic of the period when the State did not even pay the salaries of its judges but expected the parties to bear all the expense of the State's doing justice. The relic persists because there is no organized interest to demand the abolition of the anachronism.

Its defect is, in the first place, that it tends to create the false impression (*ante*, § 2192) that the witness' duty runs to the parties and not to the community, and that he is rendering his services for money to the party that

1865, Carren *v.* Breed, 2 Coldw. 465, 467 (same);
Texas: Rev. C. Cr. P. 1911, § 303 (tender of fees is not necessary where a magistrate issues an attachment); Rev. Civ. St. 1911, § 3643 (witness shall not be attached for contempt unless it appears that his "lawful fees have been paid or tendered," *i.e.* attendance and travel both ways);
Utah: Comp. L. 1917, § 7129 (civil cases; fees for travel both ways and one day's attendance must be tendered); § 2549 (similar; and each day's fee must be tendered in advance);
Vermont: Gen. L. 1917, § 1905 (fees for travel and one day's attendance must be tendered); § 2555 (criminal cases); § 2556 (when accused is poor, Court may order summons of witnesses at State's expense); § 2607 (insanity); 1907, Re Consolidated Rendering Co., 80 Vt. 55, 66 Atl. 790 (in a grand jury inquiry, the State need not tender the fees and expenses of producing documents to a witness, here a corporation; in a criminal case, "a witness has no right to refuse to attend because his fees are not tendered");
Virginia: Code 1919, § 6220 (fees for one day's attendance and mileage and tolls are demandable, a reasonable time before attendance); § 4969 (in criminal cases, attendance is obligatory without payment or tender);
Washington: Const. Art. I, § 22 (accused need not tender fees; quoted *ante*, § 2191); R. & B. Code 1909, § 1215 (not compellable in civil action unless fees for travel both ways and one day's attendance are tendered in advance, on demand); § 1900 (justice's court; similar, but reading "mileage and one day's attendance"); § 2148, as amended by St. 1915, Mar. 16, c. 83 (witnesses for either State or defendant in criminal cases are compellable to attend "without their fees being first paid or tendered");
West Virginia: Code 1914, c. 130, § 27 (one day's attendance and mileage and tolls must be paid, if required, a reasonable time beforehand); c. 162, § 1 (attendance obligatory in criminal cases without payment or tender);
Wisconsin: 1919, § 4057 (attendance not obligatory in civil action, except on behalf of the State, unless fees for one day's attendance and travel both ways are tendered); § 4058 (no tender necessary for witness summoned for the State in any civil action, or in any criminal action for either party);
Wyoming: Comp. St. 1920, §§ 5817, 7511 (substantially like Oh. Gen. Code § 11508).

[7] 1860, Bliss *v.* Brainard, 42 N. H. 255 (if notice and demand are made by the witness); 1838, Mattocks *v.* Wheaton, 10 Vt. 493, 495. This is often declared in the statutes cited *supra*.

[8] 1828, Blackburn *v.* Hargreaves, 2 Lew. Cr. C. 259 (witness also summoned for the opponent).

[9] 1894, Rozek *v.* Redzinski, 87 Wis. 525, 529, 58 N. W. 262 (the attendance is a waiver of payment in advance). *Contra:* 1684, Braddon's Trial, 9 How. St. Tr. 1127, 1167 (cited *post*, § 2202); 1768, Blackstone, Commentaries, III, 369 ("no witness, unless his reasonable expenses be tendered to him, is bound to appear to give evidence till such charges are actually paid him," except he resides and is called within the "bills of mortality"). It was even ruled that a tender at the trial could not cure the lack of a prior tender: 1748, Bowles *v.* Johnson, 1 W. Bl. 16, *semble*.

The witness may waive the tender of the entire amount by accepting less: 1639, Goodwin *v.* West, Cro. Car. 522, 540.

A voluntary attendance without subpœna or demand of expenses does not entitle the fees to be *taxed afterwards* against the other party: 1909, Atherton *v.* Atlantic C. L. R. Co., 82 N. C. 474, 64 S. E. 411.

Compare the Federal cases *supra*, note 6.

desires them. It tends to intensify the unwholesome partisan spirit of witnesses and to put them in the position of paid retainers. It lowers the moral level of litigation.

Its fault is, furthermore, that it places an unequal burden upon litigants, according as they are more or less able in advance to furnish the money for witness fees. A poor man in a criminal cause is entitled, without advances, to the testimony of those who can vindicate him, and he is equally entitled to it in a civil cause to defend him from injustice or to aid the enforcement of his right; any distinction in this respect between civil and criminal causes is a false one. Besides this, the fact that the party himself must make the tender when serving the subpœna puts even a well-to-do party in the power of a selfish witness, who resents being summoned even by a friend to sacrifice his business hours for attendance in a court-room.

Moreover, the question is not whether the parties in civil causes should ultimately bear the expenses of their litigation, and whether litigation should be absolutely free; that is a different problem; here we ask only whether payment in advance is necessary; there are other ways of securing the parties' liability for costs. Nor is it the question whether parties shall be licensed to cause inconvenience to their neighbors by summoning promiscuously a horde of unnecessary witnesses, without risk or hindrance; that abuse can be guarded against by penalties for parties who are found by the Court to have summoned witnesses with wanton superfluity; and in many jurisdictions such measures are provided. Nor is it a question whether the burden of advancing the expenses shall be thrown by the party upon the witness himself; the State should bear that burden. Moreover, the witness' actual inability to advance his own expenses is a sufficient excuse, in contempt proceedings, for his non-attendance.[10]

The real question is simply whether parties who can ill afford the expense shall be put at a relative disadvantage to their opponents who by the mere possession of money are enabled to prepare more freely and effectually for the proof of their cause; and in this aspect the requirement of tender is a plain injustice. To-day it is a harsh fact that the requirement amounts to a needless denial of justice in many cases. *The State should by its agents serve the subpœna and tender the witness' expenses.* The rule requiring tender by the party should be abolished, as an anomaly in the law and a detriment to justice, surviving by mere force of tradition.[11]

§ 2202. **Same: (*b*) Amount of Tender.** The amount of the expenses required by the statute of Elizabeth to be tendered was to be merely

[10] *Supra*, note 5.

[11] It may be added that the constitutional guaranty that property and (in a few constitutions) *services shall not be taken* by the State *without due compensation* does not create any exceptions to the recognized duty of a citizen to furnish, without tender of expenses, such testimony as he is capable of furnishing: 1907, Re Consolidated Rendering Co., 80 Vt. 55, 66 Atl. 790 (applied to a subpœna d. t. to a corporation to produce documents; West *v.* State, Wis., approved); 1853, West *v.* State, 1 Wis. 209, 233 (quoted *ante*, § 2192); 1856, Israel *v.* State, 8 Ind. 467; 1877, Buchman *v.* State, 59 Wis. 1, 14 (but distinguishing the case of an expert, *post*, § 2203).

"reasonable";[1] and the judges of England set their faces, from the beginning, against any attempt to deduce fixed rules, by nice calculations, for applying this principle:[2]

1684, *Braddon's Trial*, 9 How. St. 1127, 1167. *Witness* for defendant: "My lord, I shall not give any evidence till I have my charges." L.C. J. JEFFERIES: "Braddon, if you will have your witnesses swear, you must pay them their charges." *Defendant:* "My lord, I am ready to pay it, I never refused; but what shall I give him?" *L. C. J.:* "Nay, I am not to make bargains between you; agree as you can."

It was plain, however, that the charge should include three general items, namely, the cost of coming to court, the cost of returning home, and the cost of sojourning at the place of trial during the time required for attendance. Within these items, no further detailed rates or rules were promulgated; except that, under the statute, the reckoning of all three would vary according to the witness' "countenance or calling," — a distinction proper enough where the separation of ranks of life was so clear and fixed.[3]

But in the United States this policy has been abandoned, — partly because the theory of social democracy could hardly abide a legal discrimination based on social distinctions; but partly also, it may be presumed, because a lack of fixity in charges tends not only to create uncertainty and dispute as to the witness' obligation, but also to induce undue exactions by witnesses and undue pecuniary payments by parties under cover of the required expenses. By statute, therefore, the rates to be paid for attendance and for travel are now generally prescribed. What has thus been lost in depriving witnesses occasionally of adequate compensation for expenses of maintenance has probably been more than made up by the removal of the greater disadvantages above mentioned. The three general items, however, of travel to and fro and maintenance at the place of trial are almost universally preserved in these statutes.[4]

That the ordinary witness should be paid more than the nominal dollar, *i. e.* should be fully indemnified for sacrificing his day's livelihood in order to

§ 2202. [1] *Ante*, § 2201, note 2.

[2] 1741, Chapman *v.* Pointon, 2 Stra. 1122 ("they would not enter into any nice calculations of the expense, but confined their inquiry to the question whether the non-attendance was through obstinacy or not"). The various early English statutes extending the process of subpœna, collected in Phillipps on Evidence, I, 9–13, exhibit this same disinclination to fix the rate of charges.

[3] 1736, Wakefield's Case, Lee cas. t. Hardwicke 313 ("You must not only have an affidavit of tendering the shilling, but likewise of tender of reasonable charges"); 1741, Ryde *v.* Fletcher, 13 East 16, note (measure of reasonable travelling expenses, discussed); 1768, Blackstone, Commentaries, III, 369 (quoted *ante*, § 2201, note 9; the "bills of mortality" denoted certain boundaries in the city of London, and apparently within these limits a shilling, or nominal sum, for travel was all that was required); 1788, Fuller *v.* Prentice, 1 H. Bl. 49 ("the whole of which necessary expenses, as well of their going to the place of trial, as of their return from it, and also during their necessary stay there, ought to be tendered to them at the time of serving the subpœna"); 1815, Horne *v.* Smith, 6 Taunt. 9 (the tender must cover "sufficient for his subsistence during his probable stay there"); 1840, Newton *v.* Harland, 9 Dowl. Pr. 16 (expenses of return are to be included).

[4] The statutes cited *ante*, § 2201, and others associated with them in the statute-books, show these details.

For the witness' *action against the party to recover his expenses*, see the following cases: *Eng.* 1850, Peil *v.* Daubeny, 5 Exch. 955; *U. S.* 1860, Bliss *v.* Brainard, 42 N. H. 255.

perform his testimonial duty, is a plausible assertion. The argument against it, that the total cost of reimbursing highly paid citizens would be prohibitive, gives no real answer; for the State is bound to supply the necessities of justice however expensive. The true answer is that the testimonial duty, like other civic duties, is to be performed without pay; the sacrifice being an inherent burden of citizenship. Neither for military service nor for public office can the citizen claim that he shall be paid on a scale which will bear any equable proportion to the loss of his livelihood's income. Any other principle would be worthy only of a purely mercenary community. If the sacrifice made is a real one, the dignity of the service rendered should ennoble it. The sense of civic duty done must be the consolation.

§ 2203. **Same: Expert's Fees.** May an additional, but reasonable, charge, proportionate to the value of time spent and skill exercised, be demanded, as a condition precedent to attendance, by an expert witness, — that is (*ante*, §§ 560, 1923), by one who is called to testify, not merely to the facts of his simple observation by eye and ear, but to an opinion drawing from the facts such inferences as are receivable only from persons specially qualified by experience or study? This question, it is to be noted, is not simply whether such witnesses should ultimately be paid larger compensation for their attendance; but whether, as a matter of right and privilege, they are not liable to compulsory process unless such compensation is tendered beforehand. The regulation of the amount of charges is a large question; but the specific question whether the expert witness has any greater privilege than the ordinary witness may be determined independently of the policy of the other measure.

At first sight, it might be supposed that the exaction of the valuable special services of an expert, without other than the ordinary witness' pittance, was a hardship which ought not to be imposed:

1843, MAULE, J., in *Webb* v. *Page*, 1 C. & K. 23: "There is a distinction between the case of a man who sees a fact and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound as a matter of public duty to speak to a fact which happens to have fallen within his knowledge; without such testimony the course of justice must be stopped. The latter is under no such obligation."

1877, WORDEN, J., in *Buchman* v. *State*, 59 Ind. 1, 13: "The position of a medical witness testifying as an expert is much more like that of a lawyer than that of an ordinary witness testifying to facts. The purpose of his service is not to prove facts in the cause, but to aid the Court or jury in arriving at a proper conclusion from acts otherwise proved. . . . If physicians and surgeons can be compelled to render professional services by giving their opinions on the trial of criminal causes without compensation, then an eminent physician or surgeon may be compelled to go to any part of the State at any and all times to render such service, without other compensation than such as he may recover as ordinary witness-fees."

But this argument is specious only. The grounds upon which it may be concluded that no different privilege should be established for expert witnesses than for others, may be summarized as follows: (1) The expert is not

asked to render professional services as a physician or chemist or engineer; he is asked merely, as other witnesses are, to testify what he knows or believes. (2) The hardship upon the professional man who loses his day's fees of fifty or one hundred or more dollars is no greater, relatively, than upon the storekeeper or the mechanic who loses his day's earnings of two dollars or ten dollars; each loses his all for the day; moreover, though the recoupment of the witness-fee of one or two dollars is relatively greater for the mechanic, yet his risk of losing continued employment by enforced absence is greater than for the professional man, and more than equalizes the hardship to him. (3) It is only by accident, and not by premeditation or deliberate resolve with reference to the litigation, that either has become desirable as a source of evidence; neither the expert in blood-stains nor the bystander at a murder has expressly put himself in the way of qualifying as a witness, so that no claim based on a special dedication of services for the case can be predicated of one rather than of the other. And the main reason why some plausibility has been given to the claim for extra fees is that in some instances the expert has in fact not become desirable by accident, but has made himself the hired partisan of the party summoning him (*ante*, § 563). (4) The practical difficulty of discriminating between various kinds of experts and their earnings, and between that testimony which they give as such and that which they give as ordinary observers, would be serious, and would introduce confusion and quibbling into the law. (5) Finally, so far as concerns the policy of doing whatever should attract and not deter desirable witnesses, it would seem that no special favor need be shown to expert witnesses. No one will ever refrain from entering a professional calling because of the fear of having to spend his time gratuitously at trials; and yet an ordinary person is often deterred from observing (or disclosing his observation) of a street accident or the like, because of the apprehension of being summoned as a witness; so that the latter sort, if either, should be the one to be encouraged by special compensation.

These reasons, in one or another form, have been expounded in the following judicial utterances:

1831, TINDAL, C. J., in *Lonergan* v. *Assurance Co.*, 1 Bing. 729, 731: "There is no reason for assuming that the time of medical men and attorneys is more valuable than that of others whose livelihood depends on their own exertions." PARK, J.: "Time to a poor man is of as much importance as to an attorney."

1875, MANNING, J., in *Ex parte Dement*, 53 Ala. 389, 393: "It is not intimated by any of them [the precedents] that a physician, when testifying, is to be considered as exercising his skill and learning in the healing art, which is his high vocation; or that a counsellor-at-law, in the same situation, is exerting his talents and acquirements in professionally investigating and upholding the rights of a client. If this were so, each one should be paid for his testimony as a witness, as he is paid by clients or patients, according to the importance of the case and his own established reputation for ability and skill. But in truth he is not really employed or retained by any person; and the evidence he is required to give should not be given with the intent to take the part of either contestant in the suit, but with a strict regard to the truth, in order to aid the Court to pronounce a correct judgment. Perhaps the attitude of one testifying as an expert, of a matter in respect to which

he is made conversant or skilled by his ordinary employment, is not so different as is supposed from that of another who testifies to acts or things done by or between the parties to a cause. It generally happens that, after all the direct facts of a transaction are brought before a Court, a knowledge of other facts, not part of the dealing or affair between the litigants, is necessary to a proper understanding and decision thereupon. For instance, [in proving the value of a commodity sold or the foreign law applicable or the usage of trade in interpretation,] . . . in all these instances, persons who may be wholly unacquainted with the parties to a cause, and know nothing of the transactions between them, may be required to come from their offices and the care of their own important affairs into court to testify for the benefit of strangers, in regard to matters in which they have themselves become conversant only by attending to their own business. And why are they required to do so? Because they know things important to the right determination of a controversy pending. . . . For in fact they are all witnesses at last. And the same principle which justifies the bringing of the mechanic from his workshop, the merchant from his storehouses, the broker from 'change, or the lawyer from his engagements, to testify in regard to some matter which he has learned in the exercise of his art or profession, authorizes the summoning of a physician, or surgeon, or skilled apothecary, to testify of a like matter, when relevant to a cause pending for determination in a judicial tribunal. . . . [He] would be deposing only to things which he had learned in the course of his occupation or profession, or of the preparation for it, and the disclosure of which to the Court would conduce to a correct understanding of a cause before it. His testimony would concern the administration of justice; and of him, as of other witnesses, it could be justly 'claimed by the public as a tax paid by him to that system of laws which protect his rights as well as others'.' . . . It is therefore of vital public interest that the tribunals which pronounce these judgments shall have power to coerce the production of any relevant evidence, existing within the sphere of their jurisdiction, requisite to prevent them from falling into error."

1893, BISSELL, J., in *Board* v. *Lee*, 3 Colo. App. 177, 180, 32 Pac. 841: "It is apparently nothing but a question of relative value; and it frequently happens that the loss of time is a less serious one to the professional witness than to the person engaged in the more active business walks of life."

1897, MAGRUDER, J., in *Dixon* v. *People*, 168 Ill. 179, 48 N. E. 108: "The grounds upon which the right to such extra compensation on the part of expert witnesses has been sustained have generally been three in number: [1] The first ground is that the time of the expert witness is more valuable than the time of ordinary men, and that, by attendance at court to give his testimony, such a witness meets with a loss of time. . . . Loss of time, as a ground for claiming extra compensation for services as a witness, applies as well to all ordinary witnesses as to expert witnesses. It is conceded that when any witness, whether he is an expert witness or not, is acquainted with any facts which bear upon the matter in controversy in a litigation, he is obliged to testify; and a distinction is drawn between the testimony of an expert witness who is acquainted with the facts about which he testifies, and an expert witness who is called upon to give his opinion, in reply to a hypothetical question, without any knowledge of facts. Manifestly, the witness who goes to court and testifies as to the facts of which he knows is subjected to a loss of his time as much as a witness who goes there to testify as an expert upon a mere matter of opinion. [2] The second ground upon which the claim for such extra compensation is based is that the skill and accumulated knowledge of the expert are his property, and that a man's property should not be taken without just compensation. . . . There is no infringement here of a property right. It may be conceded that in a certain sense the knowledge of the physician, acquired by special study, is property; but the question here is, not so much whether certain knowledge is property, as whether the requirement that he shall answer a hypothetical question is a taking of his property. Where he is required to make an application of his knowledge to a particular case, so as to secure a particular result, — such as, for instance, the curing of a disease or the healing of a wound, — then

he would undoubtedly be entitled to compensation. A physician or surgeon cannot be punished for a contempt for refusing to make a 'post mortem' examination unless paid therefor; nor can he be required to prepare himself in advance for testifying in court, by making an examination, or performing an operation, or resorting to a certain amount of study, without being paid therefor. But when he is required to answer a hypothetical question, which involves a special knowledge peculiar to his calling, he is merely required to do what every good citizen is required to do in behalf of public peace and public order. . . . [3] If the precedent is once established that expert witnesses must be paid a reasonable compensation for their testimony, then it will not be long before such testimony will be offered to the highest bidder. The temptation will be to give opinions in favor of that party to the suit who will pay the highest price. The testimony of expert witnesses will thus become partisan and onesided. The theory upon which such witnesses are required to testify in cases like this is that they are 'amici curiæ,' and that, testifying under the sanction of an oath, they do so, not with intent to take the part of either contestant in the suit, but with a view to arriving at the truth of the matter, and for the purpose of aiding the Court to pronounce a correct judgment. . . . Moreover, if a physician is to be allowed extra compensation as an expert witness, then men pursuing other occupations which require special experience will have the same right to demand extra fees. A banker will claim that he has earned extra compensation, a merchant will make the same claim, and so with men engaged in other branches of business. It will be easy to say in such cases that the testimony called for is the result of special knowledge and acquired skill, and therefore should be paid for. Almost every lawsuit involves testimony which is in the nature of opinion, in addition to testimony which speaks of the mere facts within the knowledge of the witness. For instance, A sells B a certain quantity of wheat, and delivers the same, and sues for the price of the wheat. One witness testifies as to the contract, which he heard the parties make. Another testifies to the delivery of the wheat, which he saw delivered. These witnesses testify to actual facts heard and seen. But still another witness, who may know nothing about the facts, may yet be required to state the value of the wheat at the time of the contract, or at the time of the delivery; and he may be required to testify from his knowledge of the market prices of wheat, as given in the market quotations. Such a witness, however, as to the value, and as to market prices, is not regarded as an expert witness who is entitled to extra compensation. . . . [4] It can make no difference whether the suit in which the witness is called upon to testify is a suit between private parties, or is a suit between the State and an alleged criminal. In either case the object is to promote public justice, and to aid the due administration of justice. It is just as important to the peace and good order of society that private controversies should be settled upon correct proofs, and in accordance with truthful testimony, as that criminals who violate the laws of the State should be punished. It is the duty of the ordinary witness and of the expert witness to testify as to facts within his knowledge which bear upon the decision of controversies in the courts. Such duty devolves upon him as a citizen; and in view of the protection which he receives from the laws of the country, in the matter of his personal liberty, and in the matter of the protection of his property, this duty devolves as much upon a physician who is required to testify as an expert witness in answer to hypothetical questions as it does upon the ordinary witness testifying to facts within his knowledge."

It has therefore been generally held that an *expert witness is not entitled to demand additional compensation*, other than the ordinary witness-fees, before attending to testify on the stand.[1]

§ **2203**. [1] In the following list are included the few cases which do concede such a privilege, as well as cases sometimes cited upon this point but really not involving it:

ENGLAND: 1831, Lonergan *v.* Assur. Co., 7 Bing. 729 (rule allowing the taxation of special compensation to medical men and attorneys, acknowledged, but disapproved;

But from this result certain other questions are to be distinguished:

(*a*) *Special services other than attendance to give testimony on a trial* are not within the duty of any witness; hence, a professional man is entitled to demand special compensation for such services as a chemical analysis, a

quoted *supra*); 1831, Collins *v.* Godefroy, 1 B. & Ad. 950, 956 (plaintiff, "a professional man," not allowed to recover special fees in assumpsit, because he was under "a duty imposed by law to give evidence"; the practice of taxing such costs notwithstanding); 1843, Webb *v.* Page, 1 C. & K. 23, Maule, J. (witness to value of cabinet-work, not bound to testify without pay for loss of time; quoted *supra*).

CANADA: 1905, Butler *v.* Toronto Mutoscope Co., 11 Ont. L. R. 12 (medico-electric experts, called to give an opinion as to the capability of a medicine to cause an injury, held not privileged to require extra fees before testifying).

UNITED STATES: *Fed.* 1854, Re Roelker, 1 Sprague 276 (an expert is not compellable to testify to professional opinion without extra compensation; here applied to an interpreter of German); 1881, Parker, J., U. S. *v.* Howe, U. S. Dist. Ct. W. D. Ark., 12 Cent. L. J. 192 (expert may demand extra compensation for professional opinion); *Ala.* 1875, Ex parte Dement, 53 Ala. 389 (no extra compensation demandable as a condition by any professional person); *Ark.* 1895, Flinn *v.* Prairie Co., 60 Ark. 204, 207, 29 S. W. 459 (every citizen is bound to testify without requiring extra compensation; here applied to a physician); *Colo.* 1893, Board *v.* Lee, 3 Colo. App. 177, 179, 32 Pac. 841 (experts must testify to professional opinion without extra compensation); *Ida.* 1898, Fairchild *v.* Ada Co., 6 Ida. 340, 55 Pac. 654, *semble* (extra fees for medical opinion at an inquest, not demandable; otherwise for an autopsy); *D. C.* 1918, Bradley *v.* Davidson, 47 D. C. App. 266, 285 (real estate broker; rule of Dixon *v.* People, Ill., approved); *Ill.* 1884, Wright *v.* People, 112 Ill. 540 (a physician testified to the mental condition of a person examined by him, but refused to answer a hypothetical question without an extra fee; held not privileged, because pertinent to the preceding matters); 1897, Dixon *v.* People, 168 Ill. 179, 48 N. E. 108 (physician summoned as an expert; no greater fee than the ordinary one is demandable, in either civil or criminal cases; quoted *supra*); 1899, North Chicago S. R. Co. *v.* Zeiger, 182 Ill. 9, 54 N. E. 1006 (Dixon case approved); 1915, O'Day *v.* Crabb, 269 Ill. 123, 109 N. E. 724 (People *v.* Dixon affirmed); *Ind.* 1856, Israel *v.* State, 8 Ind. 467 (under a constitutional provision that "no man's particular services shall be demanded without just compensation," the services of witnesses in criminal cases may still be required); 1877, Buchman *v.* State, 59 Ind. 1, 14 (physicians and surgeons need not testify as to professional opinions without extra compensation, under the above clause; preceding case distinguished; quoted *supra*); Burns' Ann. St. 1914, § 528 ("A witness who is an expert in any art, science, trade, profession, or mystery, may be compelled to appear and testify to an opinion, as such expert, in relation to any matter, whenever such opinion is material evidence, relevant to an issue on trial," without payment of other than usual fees, the same as he can be compelled to "testify to his knowledge of facts relevant to the same issue"); *Mass.* 1896, Barrus *v.* Phaneuf, 166 Mass. 123, 44 N. E. 139 (action for expert's fees promised; the Court 'obiter' remarked that it would be "slow to admit that the Court would be without power to require the attendance of a professional or skilled witness upon a summons duly served and with payment of the statutory fees," merely to give testimony of opinion); *Mich.* St. 1905, No. 175, Comp. L. 1915, § 12557 (forbids the payment of special fees even by the parties; cited more fully *ante*, § 563; *Minn.* 1883, LeMere *v.* McHale, 30 Minn. 410, 15 N. W. 682, *semble* (accepts the distinction of Webb *v.* Page, Eng.; here applied to physicians); 1887, State *v.* Teipner, 36 Minn. 535, 32 N. W. 678 (expert compellable to testify to a professional opinion without extra compensation; applied here to a physician); *N. Y.* 1872, People *v.* Montgomery, 13 Abb. Pr. *N. S.* 207, 238 (physician may not be required to examine an accused as to sanity and to listen to testimony, so as to form an opinion, without extra compensation; but, *semble*, he may be required to attend and "give proper impromptu answers"); *Mont.* Rev. C. 1921, § 4947 ("an expert is a witness, and receives the same compensation as a witness"); *Ore.* 1886, Daly *v.* Multnomah Co., 14 Or. 20, 12 Pac. 11 (services as an ordinary witness are not within a constitutional provision similar to that of Indiana; as to experts, no decision); *Pa.* 1846, Allegheny Co. *v.* Watt, 3 Pa. St. 462, 464 (attendance as an expert witness may not be conditional on extra compensation); 1856, Northampton Co. *v.* Innes, 26 Pa. 156 (preceding case approved); 1889, Com. *v.* Higgins, 5 Kulp 269 (physician not privileged to demand special compensation for a professional opinion on the stand); *Tex.* 1879, Summers *v.* State, 5 Tex. App. 365, 377 (expert must testify to a professional opinion without extra compensation); *Wis.* 1909, Philler *v.* Waukesha Co., 139 Wis. 211, 120 N. W. 829 (expert must testify without extra compensation).

The *Scotch* law appears to justify the privilege of an extra fee: 1903, Turnbull *v.* North British R. Co., 5 Ct. Sess. Cas. 5th ser. 944.

'post mortem' autopsy, or any work necessary to qualify expressly to furnish testimony.[2]

(*b*) The rate of charge which may be made for a professional man, not as a privilege or condition precedent, but as the *measure of the fee due him after testifying* — *i. e.* the ordinary question of the amount of costs taxable to the party liable or claimable by the witness — depends usually upon the statutes prescribing the rate of compensation for witnesses. In England, by the original statute of Elizabeth and its successors (*ante*, § 2202) no attempt was made to fix the rates; the charges were to be "reasonable"; and under these statutes it came to be accepted (although the judges differed somewhat in their understanding of the practice) that no allowance should be made for loss of time to any witness, expert or lay, foreign or domestic.[3] To this rule, a little later, an exception was conceded for medical men and attorneys.[4] But in the United States, the practice of fixing definite rates for witnesses' compensation was early introduced by statute; and in some of these statutes a difference is now authorized in favor of expert witnesses.[5]

[2] *Fed.* 1898, Northern P. R. Co. *v.* Keyes, — C. C. A. —, 91 Fed. 47 (witness not compellable to prepare voluminous and expensive tabulations, without a tender of expense); 1908, Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541, 28 Sup. 178 (extra expense of collecting documents of a foreign corporation; *semble*, not decided); *Ala.* 1875, Ex parte Dement, 53 Ala. 389, 397 (question reserved, as to compensation for work done to qualify as a witness); *Ark.* 1895, Flinn *v.* Prairie Co., 60 Ark. 204, 207, 29 S. W. 459 (making preliminary examination, or attending to listen to testimony, not compulsory); 1895, Clark Co. *v.* Kerstan, 60 Ark. 508, 30 S. W. 1046 (similar); *Colo.* 1893, Board *v.* Lee, 3 Colo. App. 177, 179, 32 Pac. 841 ('post mortem' examination, etc., not compellable without extra compensation); *Ida.* 1898, Fairchild *v.* Ada Co., 6 Ida. 340, 55 Pac. 654 (cited *supra*, note 1); *Mass.* 1907, Stevens *v.* Worcester, 196 Mass. 45, 81 N. E. 907 (an expert on mill rights, who had formed an opinion and recorded it in a memorandum, held compellable to examine and read the paper, though not to labor for forming an opinion); *N. Y.* 1872, People *v.* Montgomery, 13 Abb. Pr. N. S. 207, 238 (cited *supra*); *Pa.* 1846, Allegheny Co. *v.* Watt, 3 Pa. St. 462 (physician not compellable to make 'post mortem' examination); 1856, Northampton Co. *v.* Innes, 29 id. 156 (preceding case approved); *Tex.* 1879, Summers *v.* State, 5 Tex. App. 365, 378 ('post mortem' examination not compellable without special compensation); *Wis.* 1909, Philler *v.* Waukesha Co., 130 Wis. 211, 120 N. W. 829 (medical examination of an accused in jail).

[3] *Eng.* 1815, Tremain *v.* Barrett, 6 Taunt. 88, C. P.; 1816, Moor *v.* Adam, 5 M. & S. 158, K. B.; 1822, Lopes *v.* De Tastet, 3 B. & B. 293; *U. S.* 1910, Gordon *v.* Conley, 107 Me. 286, 78 Atl. 365 (experts retained to investigate, etc.).

[4] 1816, Moor *v.* Adam, *supra*, per Ellenborough, L. C. J.; 1820, Willis *v.* Peckham, 1 B. & B. 516, K. B., per Park, J.; 1821, Severn *v.* Olive, 3 id. 72 (where the time and expense of making costly experiments, as well as of attendance to testify, were allowed for medical men); 1831, Lonergan *v.* Assur. Co., 7 Bing. 725, C. P. (exception conceded, but disapproved); 1831, Collins *v.* Godefroy, 1 B. & Ad. 950, 956, K. B. (but not allowing any legal claim for these fees in assumpsit against the party); 1843, Webb *v.* Page, 1 C. & K. 23, Maule, J. (exception applied to value-witness); 1862, Parkinson *v.* Atkinson, 31 L. J. N. S. C. P. 199.

For the English rule to-day, see Rules of Court 1883, Ord. 37, Rule 9; Ord. 65, Rule 27.

[5] *Ia.* Code 1897, § 4661, Comp. C. § 7368 (expert witnesses, as defined, are to receive "additional compensation to be fixed by the Court, with reference to the value of the time employed and the degree of learning or skill required," but not to exceed $4 per day); 1875, Snyder *v.* Iowa City, 40 Ia. 646 (statute applied); *La.* St. 1884, No. 19 (witnesses called only as experts are to receive additional compensation, fixed by the Court, "with reference to the value of the time employed and the degree of learning or skill required"; see also C. Pr. 1870, § 462); *Minn.* Gen. St. 1913, § 5777 (for "an expert in any profession or calling," the judge may allow such fee as "in his judgment may be just and reasonable"); *N. H.* 1917, State *v.* Weeks, 78 N. H. 408, 101 Atl. 35 (experts examined defendant before trial on his behalf as to sanity; their bill for special fees, not allowed, for lack of express statutory authority); *N. Y.* 1882, Mark *v.* Buffalo, 87 N. Y. 189; *N. Car.* Cons. St. 1919,

(*c*) Whether a *contract to pay more than the legal fees* is valid, depends upon certain larger considerations involving other principles.[6]

§ 2204. (3) **Inability to Attend; in General.** The witness' duty to attend is subject to a third limitation, namely, his inability to do so without direct and serious *danger to his health or his family's welfare or his livelihood*, sufficient to overbalance the need for his personal presence in court. This excuse does not exempt him from giving testimony. It is a viatorial privilege only; and the question which it raises is merely whether he is compellable to attend court or whether, instead, a commissioner is to be sent (if the party desires to take that step) to the witness at his domicile to take his testimony there. A proper regulation of the practice in this respect would establish identical rules for the witness' excuse for non-attendance (as here) and for the party's excuse for not producing him and for offering his deposition instead (*ante*, §§ 1402–1414); but the two sets of rules are not usually made uniform in the statutes, and the precedents applying them must therefore be kept distinct.

In general, at common law, the concessions made to a witness on the ground of inability to attend were limited, but reasonable, in scope. The duty of attendance presupposes some sort of sacrifice, and the hardship of this sacrifice is in itself no excuse for failing to attend; it is the witness' just contribution to the demands of social order. Nevertheless, there must be, in fairness, some concession to temporary and pressing exigencies. The following passages illustrate the range of judicial opinion in applying this concession:

1836, COWEN, J., in *People* v. *Davis*, 15 Wend. 602, 608: "The process of subpœna demands great and extraordinary efforts on the part of the witness to obey. It commands him expressly to lay aside his business and excuses; and, while it lays him under severe obligations, it clears away obstructions in the path of obedience; the witness was always privileged from arrest on civil process in going, staying, and returning. It is not denied that serious sickness in his family, such as would prevent a prudent father or husband from leaving home on his own important business, would save him from the imputation of a contempt and, perhaps, from an action. But such a cause ought clearly to be shown to the Court. . . . Above all, where the summons allows him full time, he should struggle to get ready, as he would to go abroad on his own pressing business. If inevitably disappointed, after exhausting every reasonable expedient, he ought certainly to be excused

§ 3893 ("experts, when compelled to attend and testify, shall be allowed such compensation and mileage as the Court may in its discretion order"); 1872, State *v.* Dollar, 66 N. C. 626 (statute considered); *S. Car.* St. 1905, No. 457, Civ. C. 1922, § 5972 ("physicians and surgeons bound over or summoned by the State to testify as experts in any case in the Court of General Sessions, or actually bound over at the instance of the defendant to testify as experts in any case of felony" in that Court, shall receive five dollars besides the usual witness fees; provided the judge certify the testimony to be material); *Tenn.* Shannon's Code 1916, §§ 7281, 7282 (coroner may summon a surgeon or physician to give a professional opinion, "whose fee shall not exceed the coroner's"; may summon chemist to examine for poison, whose fee shall not exceed twenty dollars).

On the general question of taxing experts' fees, see also the following rulings: 1889, Faulkner *v.* Hendy, 79 Cal. 265, 21 Pac. 654; 1870, Clark's Petition, 104 Mass. 537, 542.

[6] 1921, Thatcher *v.* Darr, 27 Wyo. 452, 199 Pac. 938 (contract to purchase stock in consideration of giving testimony to perfect a patent to public lands, held valid on the facts; elaborate opinion by Potter, C. J., covering the whole subject).

from the payment of a penalty which presupposes some degree of neglect, at least. Witnesses are the summary instruments of investigation in all our common-law courts. It is not until a positive disability is apparent that their domestic examination will be received as a substitute for their actual presence. The important right of oral examination and cross-examination is at stake; and every good citizen, if he could be supposed to regard nothing beyond his own rights, should struggle for the front rank in the order of obedience."

1851, GRIER, J., in *Ex parte Beebees*, 2 Wall. Jr. 127: "Where the witness who has been subpœnaed shows no disposition to treat the process of the Court with contempt, the issuing of an attachment is always a matter of discretion with the Court. Where the witness is sick, where a member of his family is dangerously ill, where age or infirmity or any other reason which would render his compulsory absence from home dangerous to his health or oppressive, the Court will not compel his attendance, but will either postpone the cause or order the deposition of the witness to be taken. In the present case there is no physical disability alleged to excuse the attendance of the witness. But under the circumstances in evidence we think it would be a great hardship and would probably cause derangement and injury to the business of the witness. . . . Must the witness be dragged from his counting-house, to the great injury of his business, and compelled to transport himself and a cartload of books of account to Philadelphia for the mileage and daily pay allowed by the law? Shall he shut up his bank, suspend his business, merely to save a little expense to the party who wants his evidence? If there was an absolute necessity for such a sacrifice on the part of the witness, if there would be a failure of justice unless his attendance at this place were enforced, the Court would be bound to issue this compulsory process. But where, as in the present case, it is but a question of convenience and expense between the party and the witness, we think that the witness may justly demur to an application which is to transfer the burthen to his shoulders."

§ 2205. **Same: (*a*) Illness, and the like; Merchants' Books.** It has always been recognized, at common law, that *serious illness* furnished a sufficient excuse for non-attendance.[1] Beyond this, it can hardly be said that any rules have been formulated. The matter has been left almost entirely to the trial Court's discretion, — especially because the propriety of punishing for contempt depends somewhat upon the wilfulness of the disobedience of the Court's order and thus introduces a personal element distinct from the

§ **2205.** [1] 1852, Maclin *v.* Wilson, 21 Ala. 670 (statute excusing for "incapacity to attend" includes all cases where "he was not guilty either of negligence or wilful disobedience"); Ga. Rev. C. 1910, § 5920 (in injunction, etc. cases, "the condition of his health" justifies taking a deposition at the witness' residence); 1873, Cutler *v.* State, 42 Ind. 244, 246 ("severe sickness," held a sufficient excuse); 1880, State *v.* Hatfield, 72 Mo. 518 (illness preventing attendance, held sufficient); 1829, Jackson *v.* Perkins, 2 Wend. N. Y. 308, 317 ("No witness is bound to endanger his life by his attendance at court"); 1836, People *v.* Davis, 15 Wend. N. Y. 602 (illness of the family, held insufficient on the facts; quoted *ante*, § 2204); 1842, Eller *v.* Roberts, 3 Ired. N. C. 11 (witness disabled by a wound from walking; "this inability must be passed upon and decided by reference to the modes of travelling which are in use in the community," so that if some other mode of conveyance was practicable, no excuse existed); 1788, Butcher *v.* Coats, 1 Dall. Pa. 340 (witnesses excused, who were "so much indisposed as to be utterly incapable of attending"); 1858, Slaughter *v.* Birdwell, 1 Head Tenn. 341, 345 (dangerous sickness of wife or family, held not sufficient under the old statute, excusing for "incapacity to attend"); 1874, Foster *v.* McDonald, 12 Heisk. Tenn. 619 (serious illness of wife or family, held sufficient under a statute requiring "sufficient cause").

It would seem absurd to suppose that precisely the contrary objection should be raised, *i. e.* that the witness was entitled *not to be examined at his home*, on account of disturbance to his family, etc.; but such an objection was sustained in McSwane *v.* Foreman, 167 Ind. 171, 78 N. E. 630 (1906).

abstract duty of the witness.[2] Nevertheless, it may be assumed that a *hardship to one's livelihood*, such as might be involved in the summons of a very poor man having a family dependent on his scanty wage,[3] or of a merchant called upon for a long withdrawal of the essential *books of his daily accounting*,[4] should in some instances be treated as a sufficient ground for exemption.

§ 2206. **Same**: (*b*) **Sex**; **Occupation**; **Officers and Official Records.** For the sake of convenience only, certain innovations have been introduced in some jurisdictions by statute, excusing specific classes from attendance, and conceding a privilege, subject usually to the trial Court's discretion:

(1) For reasons which can best be appreciated by those familiar with the Southern ideal of womanhood, "*females*" have been in a few Southern States exempted from attendance as witnesses in the court-room.[1]

(2) In a few jurisdictions, an exemption has been accorded to persons of *specific occupations*, — presumably such as would be frequently liable to a call for testimonial services and would also be specially injured by the difficulty of delegating the conduct of their occupation to other hands.[2]

[2] 1853, Smith, J., in West *v.* State, 1 Wis. 209, 235 ("The award of the attachment rests in the sound discretion of the Court to whom application is made; . . . the refusal of which is not necessarily error, and only becomes so when that discretion is clearly abused").

[3] 1814, Phillipps, Evidence, I, 13; 1836, People *v.* Davis, 15 Wend. 602 (poverty, held insufficiently shown on the facts).

[4] 1851, Ex parte Beebees, 2 Wall. Jr. 127 (attendance from New York before a Master in Philadelphia, with large quantities of documents, not compelled on the facts: quoted *ante*, § 2204).

This privilege is sometimes expressly declared by statute: Ga. Rev. C. 1910, § 5847 (on service of a subpœna d. t., a witness making affidavit "that he cannot produce the books required without suffering a material injury in his business," may furnish a transcript and not produce the originals); § 5848 (the opposite party may have inspection if not satisfied with the transcript); Wis. Stats. 1919, § 4182 *a* (certain insurance companies' books, not required to be produced except by special order); § 4189 *b* (so also for bankers' books).

There are also statutes, which, though they do not expressly confer upon the witness the privilege of not producing such books, yet do *exempt the party to the cause* from offering the original and thus often practically obviate the inconvenience; these have been already examined (*ante*, §§ 1223, 1683, 1710).

For the witness' privilege as to not disclosing *title-deeds* and other private documents (which does not exempt him from bringing them to court), see *post*, § 2211.

§ **2206.** [1] *Ala.* Code 1897, § 1833 (in civil cases, evidence may be taken by deposition, "1, when the witness is a woman"); 1892, Ex parte Jenks, 101 Ala. 429, 13 So. 564 (attendance may be required by order, under the Code); 1894, Ex parte Branch, 105 id. 231, 16 So. 926 (same; except when the witness resides out of the county); *Ga.* Rev. C. 1910, § 5886 ("all female witnesses" may be examined by commission); § 5896 ("no female witness shall be required to leave her home to appear" before commissioners); § 5920 (similar, for injunction cases, etc.); 1871, City Fire Ins. Co. *v.* Carrugi, 41 Ga. 660, 672; 1886, Powell *v.* R. Co., 77 Ga. 192, 198, 3 S. E. 757; 1889, Western & A. R. Co. *v.* Denmead, 83 Ga. 351, 356, 9 S. E. 683; 1890, Augusta & S. R. Co. *v.* Randall, 85 Ga. 297, 315, 11 S. E. 706 ("The statute does not exempt females from attendance upon court; it simply permits their interrogatories to be taken"; nevertheless, their attendance should not be compelled without good reason); *La.* C. Pr. 1870, § 349 (no order shall be made "requiring a female [party] to answer interrogatories on facts and articles in open Court," unless on affidavit "to the materiality of the interrogatories, and that they are not propounded for the purpose or in the hope of having them taken for confessed, but with the 'bona fide' desire to have them truly answered by the party interrogated"); Ann. Rev. L. 1915, § 3942 (no member of religious order of Saint Ursuline Nuns, in New Orleans, compellable to appear in court to give testimony); *Tenn.* Shannon's Code 1916, § 5625 (female witness not compelled to attend "unless upon sufficient cause shown").

[2] CANADA: *Man.* Rev. St. 1913, c. 95, § 46 (superintendent of an insane asylum, if he does not refuse to depose at the asylum, is not compellable to attend court in any civil case, on affidavit that it would be "seriously detri-

(3) Rarely, a *voter* is exempted from attendance on election day;[3] but by law the day of election is generally a holiday and courts are not in session.

(4) In a few states, certain *public officers* are expressly exempted by statute from attendance; moreover, at common law it is a question whether the Crown or the Executive is bound to attend court, or at least is liable to compulsory process.[4]

(5) The *irremovability of public records* concerns several principles which need to be discriminated. The rule requiring the party to produce a documentary original is dispensed with for public records, and a *copy may be used* (*ante*, §§ 1215, 1218). As a general rule of convenience, intended to preserve them from harm and keep them available constantly for consultation, the originals are generally *forbidden to be removed* for evidence (*ante*, § 2182). If, however, they are unlawfully removed, the illegality does not of itself exclude them (*ante*, § 2183). Those principles involve no question of privilege. But a few statutes expressly provide that the *custodian of public records* is *not compellable* to remove and produce them; moreover, the testimonial privilege as to *official secrets* operates sometimes to prevent the disclosure of the contents of such documents.[5]

§ 2207. **Same: (*c*) Distance from Place of Trial.** The jurisdiction of a court may cover an extensive territory; but at common law no discrimination was made in regard to the distance of the witness' residence from the place of trial where his testimony was needed. He was not exempted by distance, if he was within reach of the court's process. Inordinate hardship was thus constantly caused to witnesses by the necessity of travelling a long distance and absenting themselves for a tedious period from their occupations, perhaps after all for no important benefit to justice. Modern statutes have usually remedied this hardship by limiting the distance from which a witness is compellable to come to the place of trial.[1]

mental and hazardous to the welfare of the inmates or some of the inmates").

UNITED STATES: *Ala.* Code 1907, § 875 (superintendent and physicians of State insane hospitals are privileged from attendance to testify as experts, but their depositions may be taken, in civil cases, and by the defendant in criminal cases and by the State with the defendant's consent); *Ark.* Dig. 1919, § 4206 (quoted *ante*, § 1411); *Ga.* Rev. C. 1910, §§ 5886, 5920 (deposition may be taken when from "the nature of his business or occupation it is not possible to secure his personal attendance without manifest inconvenience to the public or to third persons, such as postmasters, public carriers, physicians, school-teachers, etc."); *Ida.* Comp. St. 1919, § 8006 (practising physician or attorney-at-law, out of the county of residence); *Ind.* Burns' Ann. St. 1914, § 439 (practising physician or attorney-at-law); *La.* St. 1877, No. 103 (cited *post*, § 2207, note); *Ky.* Stats. 1915, § 217 *a*, par. 17 (officers etc. of State insane hospitals not required to attend court out of the county as witnesses in civil suits); *N. C.* 1913, In re Pierce, 163 N. C. 247, 79 S. E. 507 (a lawyer has no exemption as such; fine opinion by Clark, C. J.); *S. C.* C. C. P. 1922, § 688 (State insane hospital officer; cited *ante*, § 1411); *Tenn.* Shannon's Code 1916, §§ 5624–5628.

[3] Mich. Const. 1908, Art. III, § 5 ("No elector shall be obliged . . . on the day of election . . . to attend court as a suitor or witness").

[4] These questions, however, have to be discriminated from that of the testimonial protection given to *official secrets;* and hence the precedents and statutes are better dealt with in one place (*post*, § 2371).

[5] The last two principles are sometimes confused in the precedents, and accordingly the authorities are better examined in one place, *post*, § 2373.

§ 2207. [1] From the following statutes, dealing with this privilege, are to be distinguished those which prescribe the conditions on which a deposition is receivable (*ante*,

Any such fixed rules must of course operate somewhat arbitrarily and therefore unjustly. They have no reference to the importance of the cause or

§§ 1411–1413); the two sets of rules, as already noted (*ante*, § 2204), should properly coincide but in fact that is not always the case: for depositions needed for use in a *trial outside of the State*, see *ante*, § 2195 (power to take testimony for use outside of the State). *Federal:* Rev. St. 1878, § 870, Code § 1371 (no witness is compellable to attend for a 'dedimus' deposition "out of the county where he resides, nor more than 40 miles from the place of his residence"); § 876, Code § 1379 (in civil cases, a subpœna shall not run more than 100 miles from the place of the court, if the witness lives out of the district of the court); 1898, Davis *v.* Davis, 90 Fed. 791 (R. S. § 863, construed with the foregoing; a witness may be compelled to appear for deposition outside the district of the court); St. 1898, c. 541, § 41, July 1, 30 Stat. L. 556, Code § 8823 (before a bankruptcy referee, attendance as witness is not required "at a place outside of the State of his residence, and more than 100 miles from said place of residence"); § 6148 (in contested patent causes, the limit is 40 miles); § 7133 (anti-trust laws; subpœnas "may run into any other district," but in civil cases for a witness living out of the district more than 100 miles away the Court's permission must be obtained); § 8043 (U. S. shipping board investigations; subpœna may compel attendance "from any place in the U. S."); § 8973 (U. S. employees' compensation commission; subpœnas may compel attendance "within a radius of 100 miles"); St. June 4, 1920, ch. V, subchapter II, Articles of War, art. 22 (judge advocate may issue process to compel attendance, and "such process shall run to any part of the United States, its Territories, and possessions"); 1903, U. S. *v.* Beavers, 125 Fed. 778 (range of distance covered by a subpœna of a U. S. Commissioner acting under N. Y. Statutes in criminal cases); 1902, Re Hemstreet, 117 Fed. 568, D. C. (bankruptcy; the effect of Bankruptcy Act, § 41, and Rev. St. § 876, determined; a witness need not leave his State to attend before a referee); 1906, Re Cole, 133 Fed. 414, D. C. (similar);

Alabama: Code 1909, § 4021 (no subpœna is to issue for a witness residing more than 100 miles distant, unless on affidavit that his personal attendance is "necessary to a proper decision of the cause, and that his deposition would be sufficient for that purpose"); 1894, Ex parte Branch, 105 Ala. 231, 233, 16 So. 926 (under Code § 2793 — in the prior Code — a witness residing more than 100 miles from the court-house is not compelled to attend; under §§ 2793, 2800, and 2813, a witness who is a woman or disabled by illness, etc., and resides without the county, is not compellable to attend);

Alaska: Comp. L. 1913, § 1462 (like Or. Laws 1920, § 818);

Arizona: Rev. St. 1913, Civ. C. § 1237 (attendance out of the county of residence or of subpœna-service is not obligatory, unless by judicial order indorsed on a subpœna, made on affidavit, that "the evidence of the witness is material, and his attendance at the examination or trial necessary"); Civ. C. § 1682 (subpœna runs to any part of the State, but justice's subpœna within the county only); § 1710 (attendance for a deposition is compellable within 20 miles of one's abode);

Arkansas: Dig. 1919, § 4161 (attendance at trial is not obligatory in a civil action "except in the county of his residence or an adjoining county," nor attendance at a deposition out of the county of residence or of service on 3 days' notice); § 3110 (in criminal causes, no such limitation exists); § 4207 (not compellable to attend where his deposition is allowable, unless he has failed to give it after summons); § 1258 (party residing in the same or adjoining county, compellable to attend); § 4208 (Court may order personal attendance in spite of the ordinary exemption, on affidavit that his testimony "is important, and that the just and proper effect of his testimony cannot, in a reasonable degree, be obtained without an oral examination before the jury");

California: Cal. C. C. P. 1872, § 1989 (attendance out of county of residence, not compellable, unless within 50 miles); P. C. § 1330 ("No person is obliged to attend" out of the county of residence or of service of subpœna, unless a subpœna is indorsed by the trial judge's order, or a judge of the supreme or superior court, on affidavit of the party "stating that he believes" the evidence to be material and attendance necessary);

Columbia (Dist.): Code 1919, § 1059 (no witness need attend for depositions out of the county of residence nor more than 40 miles from his residence);

Florida: Rev. G. S. 1919, § 2707 ("Except in justice of the peace courts," a witness subpœnaed "must reside within 25 miles of the place where the Court sits");

Georgia: Rev. C. 1910, § 5896 (no witness, whose deposition is to be taken, need "go out of the county or more than 10 miles from his residence");

Idaho: Comp. St. 1919, §§ 7985, 8007 (like Cal. C. C. P. § 1989); § 9136 (like Cal. P. C. § 1330, substituting probate judge for superior court);

Indiana: Burns' Ann. St. 1914, § 440 (witness need not go out of county of residence for a deposition);

Iowa: Code 1897, § 4660, Comp. Code § 7367 (attendance not compellable (1) out of the State where served, or (2) more than 100 miles

of the individual witness' testimony; nor to his ability to absent himself without serious hardship; nor to the facilities available for travel. Moreover,

from the residence or place of service, except in the same county and except on Court order or (3) except in a district or superior court, more than 30 miles "from his place of residence, or of service, if not in the same county");
Kansas: Gen. St. 1915, § 7228 (witness compellable in civil cases to attend outside the county of his residence by tendering fees for one day's attendance and mileage); § 8079 (in criminal cases, witness must attend from any county in the State); § 10424 (witness summoned by State commissioner of labor and industry need not attend outside the county of residence);
Kentucky: C. C. P. 1895, § 534, C. Cr. P. § 151 (witness need not attend if residing more than 20 miles from the place of trial, or if residing, or being when served, out of the county; except in criminal cases); C. C. P. § 149 (party residing within 20 miles may be compelled to attend like any other witness);
Louisiana: Rev. Civ. C. 1920, §§ 3941, 3943 (attendance "out of the parish" of residence, not compellable); § 3959 (personal attendance of any witness, compellable on affidavit that "the personal attendance of such witness in open court on the trial of the case is necessary in order to elicit the truth from such witness, which cannot be done by taking his deposition out of court"; and in all jury cases, the same may be done on request in writing without affidavit); St. 1877, No. 103 (physicians living more than 10 miles distant, not compellable to attend in a civil case "whenever in their opinion the life of any of their patients might be endangered by their attendance," a sworn certificate of the facts to be forwarded by the physician; provided that at either party's request the Court may order the testimony "to be taken summarily in due course after notice" to the opponent); Rev. L. 1897, § 3960 (in Orleans parish any party "shall have the right to have the personal attendance of any witnesses" by subpœna, unless such testimony has been "taken contradictorily with the parties" under St. 1868, Sept. 16); C. Pr. 1894, §§ 351, 352 (party residing out of the parish not compellable to answer interrogatories in open court); R. S. 1870, § 1036 (in prosecutions for a crime punishable with death or imprisonment at hard labor in penitentiary, attendance is compellable from any parish, if in judge's discretion indispensable); 1844, Crocker *v.* Turnstall, 6 Rob. La. 354, 355 (preceding sections applied); 1846, Walker *v.* Copley, 1 La. An. 247 (same);
Maine: Rev. St. 1916, c. 49, § 11 (witnesses before State labor commissioner need not go outside county of residence); c. 112, § 11 (deponent need not travel more than 30 miles);
Maryland: Ann. Code 1914, Art. 75, § 159 (civil cases; witness must attend in any county);
Massachusetts: Gen. L. 1920, c. 233, §§ 38, 39 (depositions; deponent is compellable to go 20 miles from his abode; if a non-resident but within the State, only 10 miles);
Missouri: Rev. St. 1919, § 5422 (not compellable in a civil suit to go more than 40 miles from residence without tender of fees);
Montana: Rev. C. 1921, § 10622 (like Cal. C. C. P. § 1989); § 12183 (like Cal. P. C. § 1330);
Nebraska: Rev. St. 1921, § 8861 (attendance is not compellable in a civil action out of the county of residence, nor for a deposition out of the county of residence "or where he may be" when served);
Nevada: Rev. L. 1912, § 5431 (like Cal. C. C. P. § 1989); § 7359 (like Cal. P. C. § 1330, substituting "district" for "county," and omitting "judge of the superior court");
New Jersey: Comp. St. 1910, Evidence § 12 (witness must attend out of the county);
New Mexico: Annot. St. 1915, § 2160 (witness deposing for use in a case pending outside the State, not to be compelled to attend outside the judicial district of residence or sojourn);
New York: C. P. A. 1920, § 300 (depositions; witness resident need not attend out of his county of residence or office; others, out of the county of service, except where order specifies another county); J. C. A. 1920, § 190 (before justice court witness need not go outside the county of the justice or adjoining county);
North Dakota: Comp. L. 1913, §§ 7864, 7876 (not compellable in civil cases to attend trial out of his judicial district or county of residence or to give a deposition out of the county of residence or service); § 11034 (criminal cases; like Cal. P. C. § 1330); § 1078 (similar for contested elections to legislative assembly); § 7878 (person confined in prison cannot be taken to court outside of the county for examination as witness);
Ohio: Gen. Code Ann. 1921, § 11506 (no person compellable in a civil case to attend out of the county where he resides or is subpœnaed, except to the adjoining county, or to the county where venue has been changed; nor when he is custodian of an irremovable official document, unless the Court orders its removal);
Oklahoma: Comp. St. 1921, § 594 (witness not obliged to attend in civil trials out of the county of residence, nor to attend for a deposition out of the county of residence or of service of subpœna); § 2837 (criminal cases; not obliged to attend out of the county of residence or service of subpœna, except as in Cal. P. C. § 1330);
Oregon: Laws 1920, § 818 (not compellable to attend out of the county of residence or service

when they regulate the exemption merely by political subdivisions — as by counties — they even fail to take account of the very reason for their enactment, since the county line may be but a few miles from the place of trial. Such statutes are therefore ill-advised and defective, whenever they do not leave it always to judicial discretion to obviate their arbitrariness by compelling attendance beyond the usual distances when this measure seems necessary. Nevertheless, these statutes represent a just need in legislation and rest on a sound general policy, as set forth in the following passage:

1848, *New York Commissioners (David D. Field and others) of Practice and Pleading*, First Report, 250: "Can there be a doubt that, under our present system, the rights of witnesses are grossly disregarded? Why should the law permit a person to be taken from Suffolk to Niagara against his will, and at great sacrifice, because two persons in Niagara have a legal dispute? The loss to the witness may be more than the whole subject of litigation. Does not the law in this case inflict a greater wrong that it may redress a less? We think it does; and we propose to prevent it hereafter, by declaring that no person shall be taken hereafter out of his own county for another person's civil action. . . . There should seem, moreover, to be no good reason to require the personal attendance of a witness at so great a sacrifice. No doubt, his appearance upon the stand, where the testimony may be taken from his lips, is preferable to a written deposition, taken at a distance. But that is not the only question. The point is this, whether the increased advantage to the parties of having the judge and jury see the witness, is more than a counterpoise to the in-

unless the residence is within 100 miles; except in a court of record, upon the Court's order indorsed on subpœna and made on affidavit that "the testimony of the witness is material and his oral examination important and desirable"); § 1693 (similar for criminal cases, the distance being only 30 miles; but Court may order attendance from anywhere in the State);
Pennsylvania: St. 1836, June 16, § 22, Dig. 1920, § 18322, Oyer and Terminer (Courts of common pleas and of oyer and terminer may issue subpœna into any county);
Porto Rico: Rev. St. & C. 1911, § 1482 (attendance out of the district of residence, unless less than 30 miles distant, is not obligatory);
South Carolina: C. C. P. 1922, § 687 (deponent must attend Court if within the county or not more than 30 miles away); § 689 (deponent must attend commissioners if not more than 15 miles away);
South Dakota: Rev. C. 1919, §§ 2715, 2737 (like N. D. Comp. L. §§ 7864, 7876); § 5003 (like Cal. P. C. § 1330, omitting mention of supreme and superior court judges); § 2738 (not obliged to attend in civil cases outside county of residence; for deposition, not outside county where he resides or is served); § 7355 (legislative election contests; no witness need attend outside the county of residence or service); St. 1919, Feb. 21, c. 164 (amending Rev. C. § 2738; in civil cases, judge may order attendance out of the county of residence or service);
Texas: Rev. Civ. St. 1911, § 3640 (subpœnas issue for witnesses, residing or being in the county); Rev. C. Cr. P. 1911, § 539 (witness residing out of the county may be summoned in criminal cases);
Utah: Comp. L. 1917, § 7131 (before a district court, a witness must attend "at any place in this State"; before a city court, etc., not out of the county of residence, unless within 30 miles); § 9289 (like Cal. P. C. § 1330, substituting "a magistrate" for "a justice of the supreme court," etc., and "showing" for "stating that he believes");
Vermont: Gen. L. 1917, § 9120 (travel for attendance for deposition not compellable for more than 10 miles);
Virginia: Code 1919, § 6218 (witness may be summoned from outside the city or county, if the Court considers it necessary);
Washington: R. & B. Code 1909, § 1215 (witness is not compellable to attend out of the county of residence unless within 20 miles, nor before a justice of the peace unless the residence is within 20 miles whether within the county or not); § 1235 (attendance for deposition, compellable at any place within 20 miles); § 1898 (before justice of the peace: subpœna is valid, if the witness "be within 20 miles");
Wisconsin: Stats. 1919, § 4056 (attendance before a justice of the peace is obligatory when the witness resides not more than 30 miles distant from his office); § 4096 (opponent examined by deposition cannot be required to go out of the county of residence); § 4100 (witness compellable to give deposition anywhere "within 20 miles of his abode");
Wyoming: Comp. St. 1920, §§ 5816, 7511 (witness not compellable to go out of the county of residence or service of subpœna).

creased injury to the witness from being brought so far, and at so great a loss. We think the question can be answered in only one way. In his own county let him be called to the stand. If it be wanted in another, let it be taken in his own, and transmitted thither. Should there be a really urgent occasion for the personal attendance of the witness, there can be little doubt that the party may be able to induce him to attend, by compensating him for his expenses and time. So it is now, where a witness is wanted from another State; the party makes an arrangement with him to come, in many cases where his attendance is important. If a witness in Jersey City be wanted for a trial in New York, he can generally be induced to attend, though he cannot be compelled to do so. So it will happen, we doubt not, if our plan be adopted."

SUB-TITLE III: TESTIMONIAL PRIVILEGE

TOPIC A: PRIVILEGED TOPICS

SUB-TOPIC I: SUNDRY PRIVILEGED TOPICS

CHAPTER LXXVI.

The first group of Testimonial Privileges (*ante*, § 2197) protect from disclosure a certain *topic*, or class of facts. The concededly privileged topics are half a dozen only, though others have from time to time been proposed and rejected.

The privileged *topic* is to be distinguished from the privileged *communication* (*post*, §§ 2285, 2396); in the former, the protection is limited to a generic fact, but is irrespective of the person possessing it; in the latter the protection is unlimited as to the topic of fact, but is limited to communications made between persons having a specific relation to each other.

§ 2210. (1) **Irrelevant Matters.** The witness has no privilege to refuse to disclose matters irrelevant to the issue in hand, — first, because irrelevancy is a concern of the parties alone, and may be obviated, as a ground for exclusion, by their consent or failure to object, and, secondly, because there is in the mere circumstance of irrelevancy nothing which creates for the witness a detriment or inconvenience such as should suffice (*ante*, § 2192) to override his general duty to disclose what the Court requires. Moreover, the recognition of a privilege of this sort would add innumerable opportunities to make a claim of privilege, and would thus tend to complicate a trial and add to the uncertainty of the event. Accordingly, it has always been accepted, at common law, that no privilege of this sort existed: [1]

§ 2210. [1] *Accord:* ENGLAND: 1683, Ashton, 1 Vern. 165 (probate of will; a witness demurred to one of the interrogatories "as not pertinent to the matter in issue; the Lord-

1794, *Walker's Trial*, 23 How. St. Tr. 1098. Mr. *Erskine*, cross-examining *Thomas Dunn:* "Who gave you the [glass of] shrub the next day?" *Witness:* "Suppose a gentleman was so friendly as to give me a glass of shrub, is that anything?" *Counsel:* "I am not finding fault with it; who was it?" *Witness:* "I do not know whether that is to be answered or not. . . . I do not suppose that is any material matter." Mr. Justice HEATH: "You have nothing to do whether it is material or no; answer the question."

1849, NISBET, J., in *Williams* v. *Turner*, 7 Ga. 350: "It will not do to permit a witness to judge what questions he shall answer and what not; unless the questions are such as by law he is not bound to answer, he must answer all."

1853, GAMBLE, J., in *Ex parte McKee*, 18 Mo. 599, 601: "The opinion of the witness that the question is irrelevant is entitled to no consideration. If a merely frivolous or impertinent question were asked of a witness, the officer taking the deposition might not feel himself called upon to compel an answer; but it would only be in a very plain case of impertinence that he would undertake to decide that the witness should be allowed to avoid answering. The Court in which the cause is pending will at the trial reject irrelevant evidence; and it would greatly detract from the value of our statutes which authorize

Keeper overruled the demurrer, because he would not introduce such a precedent as for a witness to demur; it did not concern a witness to examine what was the point in issue").

UNITED STATES: *Fed.* 1901, People's Bank *v.* Brown, 50 C. C. A. 411, 112 Fed. 652, *semble;* 1904, Crocker-Wheeler Co. *v.* Bullock, 134 Fed. 241, 244 C. C. ("It seems to be settled that, ordinarily at least," no such privilege exists); 1906, Dowagiac Mfg. Co. *v.* Lochren, 143 Fed. 211, C. C. A. (collecting the authorities); 1906, Nelson *v.* U. S., 201 U. S. 92, 26 Sup. 358; *Haw.* 1906, Anin's Petition, 17 Haw. 339 ("a witness is not privileged to decline to answer an immaterial question"); *Ill.* 1899, Harding *v.* American Glucose Co., 182 Ill. 551, 55 N. E. 577; *Ia.* 1909, Finn *v.* Winneshiek Dist. Court, 145 Ia. 157, 123 N. W. 1066; *Me.* 1860, Bradley *v.* Veazie, 47 Me. 85, 87 ("If questions are improperly asked, they must be answered as the justice or presiding judge in his discretion shall dictate"); *Mo.* 1853, Ex parte McKee, 18 Mo. 599 (quoted *supra*); 1906, Ex parte Gfeller, 178 Mo. 248, 77 S. W. 552 (Ex parte McKee followed); *Nebr.* 1909, Ex parte Button, Ex parte Hammond, 83 Nebr. 636, 120 N. W. 203 (not clear); *N. H.* 1910, Boston & Maine R. Co. *v.* State, 75 N. H. 513, 77 Atl. 996; *N. Y.* 1865, Porter, J., in Great Western Turnpike Co. *v.* Loomis, 32 N. Y. 127, 138 ("When the question is irrelevant, the objection properly proceeds from the party, and the witness has no concern in the matter unless it be overruled by the judge"); 1922, Powelson *v.* Procter & Gamble Co., Sup. App. Div., 193 N. Y. Suppl. 94; *Oh.* 1893, De Camp *v.* Archibald, 50 Oh. St. 618, 626, 35 N. E. 1056 (apart from privilege, the Court's determination of relevancy controls); . 1901, Re Rauh, 65 Oh. 128, 61 N. E. 701 (a witness giving a deposition refuses at his peril on the ground of the incompetency of the evidence).

Add the cases cited *ante*, § 2200, note 8 (documents).

The following case shows the sensible way of dealing with a witness summoned who has no relevant testimony: 1909, R. *v.* Baines, 1 K. B. 258 (subpœna to the Prime Minister and the Home Secretary to give evidence as to a breach of the peace by woman suffragists; the subpœnaed persons were present on the occasion, but moved to set aside the subpœnas on the ground that they were "wholly unable to give any evidence which can possibly be relevant" and that the writs were served "for the purposes of vexation and to bring the defendants and their agitation into further notoriety"; held, that both the grounds set forth were in fact true, that "therefore it would be an idle waste of time and money to require them to go down to Leeds to give evidence," and that the subpœna should be set aside).

The ruling in Holman *v.* Austin, 34 Tex. 668, 673 (1870), went chiefly on the ground of the mayor's lack of jurisdiction; and the remark that, "if the question be 'improper,'" the refusal to answer is no contempt, was an 'obiter' interpolation based on no authority. The ruling in Ragland *v.* Wickware, 4 J. J. Marsh. Ky. 530 (1839), held the question there put to be relevant, without saying that it would have been privileged if irrelevant. The remark in Roberts *v.* Garen, 2 Ill. 396 (1837), that a witness "is bound to state all the facts in his knowledge that are applicable to the case" was not meant to limit his duty, but to express its extension beyond the mere case of the party calling him. The ruling in Ex parte Krieger (1879), 7 Mo. App. 367, purging of contempt a witness who refused as deponent to answer questions before a notary in a proceeding which should properly have been brought as a bill of discovery against him as a party, goes partly on the limited statutory powers of a notary and partly on the abuse of the process; the headnote, referring to the "irrelevancy" of the questions as a ground, is incorrect.

the taking of depositions, if the question of relevancy was to be raised before and decided by every justice of the peace or other officer who takes a single deposition in the cause, when he cannot know the aspect which the case will probably assume at the trial. To allow the witness himself to pass upon the question of relevancy and refuse to answer such questions as he thought irrelevant, would be to deprive the party of the testimony of every unwilling witness. . . . [The statute authorized the committal of any person refusing to give evidence] 'which may lawfully be required to be given.' It is sufficient to say in general terms that, so far as the witness himself is concerned, he may lawfully be required to answer any questions which it is not his personal privilege to refuse to answer. . . . All evidence which is not of this character the witness may lawfully be compelled to give, even though it may not prove to be relevant and competent in the particular cause in which it is sought to be obtained. The objection to the relevancy or competency of evidence is for the parties litigant to make, and not for the witness."

Unfortunately, the compilers of the code of California, two generations ago, inserted a provision — by what authority or reasoning does not appear — which expressly affirmed such a privilege, and this provision has since found its way, by imitation, into a few other codes;[2] though little practical application of it seems to have been invoked. It is an unsound and impolitic rule. That a witness has no concern with Relevancy ought to be the firm

[2] *Alaska:* Comp. L. 1913, §§ 1506–1508 (like Or. Laws 1920, §§ 869–871; *California:* C. C. P. 1872, §§ 2064, 2065, 2066 (a witness must answer questions "legal and pertinent to the matter in issue"; it is his "right to be protected from" irrelevant questions, and "to be examined only as to matters legal and pertinent to the issue"); 1886, Ex parte Zeehandelaar, 71 Cal. 238, 12 Pac. 259 (under Code §§ 2065, 2066, "the refusal to answer a question not pertinent to the issue was not contempt"); 1900, Re Rogers, 129 Cal. 468, 62 Pac. 47 (opinion not clear, but apparently sanctioning a refusal to answer an irrelevant question); 1903, People *v.* Glaze, 139 Cal. 154, 72 Pac. 965 (prosecution held not compellable to produce at the trial a paper which would not be admissible); 1904, Rogers *v.* Superior Court, 145 Cal. 88, 78 Pac. 344 (grand jury; privilege exists for matters not pertinent); St. 1907, c. 395, p. 735, Mar. 20 (a witness must attend "with any papers under his control lawfully required by the subpœna, and answer all pertinent and legal questions"; being C. C. P. § 2064 amended); *Georgia:* Rev. C. 1910, § 5870 ("It is the right of a witness to be examined only as to relevant matter, and to be protected from improper questions"); 1905, Fenn *v.* Georgia R. & E. Co., 122 Ga. 280, 50 S. E. 103 (refusal to answer irrelevant questions before a commissioner, privileged); *Idaho:* Comp. St. 1919, §§ 8043–44 (a witness is compellable to answer all "pertinent and legal questions"); *Iowa:* 1919, Eller *v.* Eller, 185 Ia. 1053, 171 N. W. 579 (divorce; S. intervened in respect to the custody of a child; application for interrogatories to perpetuate their testimony were resisted by them as not necessary; held, that since they were no more than witnesses, an order compelling answer was not appealable, in the absence of any claim of specific privilege); *Kentucky:* C. C. P. 1895, § 593 (subject to trial Court's control, "the parties may put such legal and pertinent questions as they may see fit"); 1922, Gordon *v.* Tracy, 194 Ky. 166, 238 S. W. 395 (witness before a grand jury inquiring into gambling offences); *Mississippi,* Code 1906, § 1923; Hem. § 1583 (a witness is not to be "excused from answering any question, material and relevant," unless self-criminating); *Montana:* Rev. C. 1921, §§ 10673–10675 (like Cal. C. C. P. §§ 2064–2066); *New Jersey:* Comp. St. 1910, Evidence § 8 (like Miss. Code 1906, § 1923; quoted *post,* § 2252); *Nevada:* Rev. L. 1912, §§ 5436, 5437 (like Cal. C. C. P. §§ 2065, 2066); *Oregon:* Laws 1920, §§ 869, 870, 871 (like Cal. C. C. P. §§ 2065, 2066); *Philippine Isl.* P. C. 1911, Gen. Order 58 of 1900, § 56 (like Cal. C. C. P. § 2065); *Porto Rico:* Rev. St. & C. 1911, §§ 1531, 1532, 1533 (like Cal. C. C. P. §§ 2064, 2065, 2066); *Utah:* Comp. L. 1917, §§ 7141, 7142 (like Cal. C. C. P. §§ 2065, 2066); § 7140 (a witness served must attend and "answer all pertinent and legal questions").

The following ruling was improperly influenced by the above code-rulings: 1899, Ex parte Jennings, 60 Oh. St. 319, 54 N. E. 262 (refusal to answer upon irrelevant facts, privileged; here, before a notary taking a deposition; but the principle is stated broadly; citing Ex parte Zeehandelaar, *supra:* Minshall, J., diss.). The following ruling rests on a special wording: 1896, Ehrmann *v.* Ehrmann, 2 Ch. 826 ("privilege" in Ord. 31. r. 19 a, sub-rule 2, includes any ground, even irrelevancy, on which discovery is resisted).

correlative of the doctrine that a party has nothing to do with Privilege (*ante*, § 2196).

Distinguish the questions as to the *power* of a *deposition-officer* to compel an answer (*ante*, § 2195) and the necessity of *taking objections* to relevancy before such officers (*ante*, § 18).

Distinguish also the *party's objection* to *interrogatories of discovery;*[3] and the judge's *power to disallow* any irrelevant question, under the modern English and Canadian practice (*ante*, § 986).

Distinguish also the question of materiality in a *legislative investigation*, for there it may involve the powers of that body (*ante*, § 2195).

Distinguish, further, the question of a *grand jury investigation;* here there are no pleadings to define the issues of materiality, and there is no judge to take the responsibility of restraining the inquiries within the issues; hence it may properly be held that a witness refusing to answer before a grand jury may not be held in contempt without a showing of materiality,[4] though he may not question the jurisdiction.[5]

§ 2211. (2) **Documents of Title, Lien, etc.** The mere fact that a document concerns the private affairs of the witness, or that its disclosure would in his opinion inconvenience him, does not create a privilege; the duty to assist the truth (*ante*, § 2192) is paramount, and indeed presupposes some sort of sacrifice by the witness:

1842, DENMAN, L. C. J., in *Doe* v. *Date*, 3 Q. B. 608, 617 (compelling an executor of defendant's lessor to produce a rent-book): "[The executor] possessed it in the character of executor of the late tenant for life; when produced, it proved the fact of payment of rent to his testator. Why was the witness not to prove that fact, either by his personal knowledge, if the party calling him chose to question him, or by any paper which he might possess? Such a paper was not a title-deed, nor within the protection of the rule which exempts witnesses from producing documents in the nature of title-deeds. The production of the paper was a mode of proving a fact; that this fact might be injurious to some interest of his own furnishes no reason for his not producing the book."

1879, CHOATE, J., in *U. S.* v. *Tilden*, 10 Ben. 566, 578: "While the law jealously protects private books and papers from unreasonable searches and seizures, and from unnecessary exposure, even when necessarily produced in court, yet the principle is equally strongly held that parties litigant have the right to have private writings, which are competent for proof in their cause, produced in court; and to this imperative demand of

[3] 1905, Perry *v.* Rubber T. W. Co., 138 Fed. 836, C. C. (depositions; "the general rule is that the witness should be required to answer all questions which may possibly be material"); Ala. Code 1909, § 4057 (opponent questioned on interrogatories "is bound to answer all pertinent questions"); 1838, Walworth, C., in Gihon *v.* Albert, 7 Paige N. Y. 278, 279 (when the party is "advised by his counsel that questions put to him are improper or irrelevant to the matters referred to the master, but which the master decides it is proper for him to answer, he is to refuse to answer; which refusal is in the nature of a demurrer to the interrogatory"); and citations *ante*, §§ 1856–1859, and *post*, §§ 2218, 2219.

[4] 1920, Hobson *v.* District Court, 188 Ia. 1062, 177 N. W. 40.

[5] 1919, Blair *v.* U. S., 250 U. S. 273, 39 Sup. 468 (grand jury inquiry into corrupt electoral practices; a witness is not entitled to question the constitutionality of the statute defining such offenses, nor the jurisdiction of the court or the grand jury; the general duty to testify has no exception based on such limitations); 1922, Ex parte Miller, — Tex. Cr. —, 240 S. W. 944 (collecting authorities; here, a Ku Klux Klan investigation).

justice all scruples as to the confidential character of the writings as private property (except in certain well ascertained exceptions growing out of professional employment) must yield from considerations of public policy."

Subject, then, to a general discretion in the Court to decline to compel production where in the case in hand the document's utility in evidence would not be commensurate with the detriment to the witness, any and every document may be called for, however personal and private its contents may be.[1] To this conceded general rule, two exceptions have been urged:

(*a*) The *title-deeds to land* were in England always a secret of extraordinary importance. The landed interests, at the time of the common law's formation and until recently, were overwhelmingly dominant in politics, religion, and social intercourse. The safety of those interests was a paramount object. Now, under any title-system not founded on compulsory public registration, the secrecy of the title-instruments comes to be a vital (if selfish) consideration for the occupants of the land. Their possession may be unquestioned; but the instruments under which they claim are constantly defective in some important feature. A boundary may vary, a release be missing, a recital be incorrect, — a score of defects of one sort or another might be discoverable in the chain of title. But the possession and the title are as yet unquestioned, and thus the security of title depends practically on preserving these defects from ascertainment by persons opposed in claim, who

§ **2211.** [1] Add the citations *ante*, § 2193, and *post*, § 2286:

ENGLAND: 1702, Geery *v.* Hopkins, 2 Ld. Raym. 851 (action for money received; books of East India Company required to be produced, since, if the transfers of stock were made only by entry therein, "it is reasonable that they should be produced for the benefit of the party"); 1808, Amey *v.* Long, 9 East 473 (quoted *ante*, § 2193); 1824, Hawkins *v.* Howard, Ry. & Mo. 64 (action against bankrupt; assignees, not being parties, required to produce the bankrupt's books); 1834, Doe *v.* Seaton, 2 A. & E. 171, 175, 178 (account books in possession of the attorney for a deceased third person not a party, compelled to be produced, the entries affecting the title of the party calling for them); 1842, Doe *v.* Date, 3 Q. B. 608, 617 (executor of G., lessor of defendant, compelled to produce for the plaintiff a rent-book, the executor not being a party, and the book not a title-deed).

UNITED STATES: *Fed.* 1879, U. S. *v.* Tilden, 10 Ben. 566, 578 (quoted *supra;* but here production was not required merely upon the chance of refreshing the witness' memory); 1883, Wertheim *v.* Continental R. & T. Co., 15 Fed. 716 (the president and secretary of a corporation, compelled by subpœna d. t. to produce the books and papers of the corporation in a suit to which the corporation was not a party); 1898, Goss P. P. Co. *v.* Scott, 89 Fed. 818 (contracts showing the precise extent of a witness' pecuniary interest in suit; production not required); *Mass.* 1859, Burnham *v.* Morrissey, 14 Gray 226, 240 ("We know of no rule of law which exempts any person from producing papers material to any inquiry in the course of justice merely because they are private"); *Pa.* 1815, Gray *v.* Pentland, 2 S. & R. 23, 31 (Tilghman, C. J.: "When a paper is in the hands of a third person who is not willing to part with it, the Court will sometimes compel its production by subpœna 'duces tecum'; but this is not to be obtained without special permission, and the Court always exercises its discretion in granting or refusing it"); *S. Car.* 1814, Hawkins *v.* Sumter, 4 Dess. Eq. 446 (surety for a sheriff required to produce sheriff's books); *W. Va.* 1881, Moats *v.* Rymer, 18 W. Va. 642, 645 (Amey *v.* Long, *ante*, § 2200, approved; here applied to a document showing the amount of an attorney's fee).

Distinguish the process of obtaining *discovery before trial* from a witness not a party (*ante*, §§ 1857, 1858).

The following ruling is anomalous: 1886, Masters *v.* Marsh, 19 Nebr. 458, 467, 27 N. W. 438 (account-books of third persons were excluded, on the theory that it would be absurd to suppose that "the private account-books of every person" could be compelled to be shown and "subjected to the espionage of the parties"; no authority is cited, nor could be).

might be only too glad to take advantage of them.[2] It comes therefore to be a fundamental maxim of the dominant class that each occupant is entitled to keep secret his documents of title. Without this, almost any title in the country might lie in jeopardy. It is an absolute demand of self-interest that the appearance shall pass for the reality, and that land-possessors shall not be obliged to occupy and to invest on sufferance, in the constant risk of an overturn through the disclosure of their defective title in the course of testimony casually required for the benefit of strangers litigant. This principle, then, that the disclosure of title-deeds in litigation between other parties was not compellable, appears to have been always accepted in English courts, coming down as an unquestioned tradition; and it was occasionally extended to documents other than those affecting land; though it seems ever to have been regarded as limited by the trial Court's discretion.[3]

In the United States and Canada, however, no reason exists for perpetuating such a privilege. The ethics of it, indeed, may be questionable, for the law hardly does well in lending aid to protect one who is by hypothesis not a lawful owner; nevertheless, in England, the law's failure to protect titles adequately by registration, and the inevitable risks which were thereby created for even 'bona fide' titles, furnished a sufficient explanation, and justification. But under a system of compulsory public registration of titles or of conveyances there is in such a privilege neither necessity nor utility. Those who do not register their deeds are few in number; they voluntarily take the risk of loss; and their situation does not justify special protection. Those who do register their deeds have no need for such protection; their

[2] Mr. Samuel Warren's novel, Ten Thousand A Year, turns on such a situation.

[3] 1796, Miles *v.* Dawson, 1 Esp. 405, Kenyon, L. C. J. (a witness not compelled to produce a warrant of attorney, on the analogy of Chancery's not compelling a 'bona fide' equitable owner to produce); 1815, Copeland *v.* Watts, 1 Stark. 95 (a lease belonging to a third person, produced and read, the judge believing that its production would not be prejudicial to the third person's interests); 1815, Reed *v.* James, 1 Stark. 132 (a petitioning creditor summoned for assignees in bankruptcy to bring a bill of exchange; Ellenborough, L. C. J.: "You cannot with propriety withhold the instrument; I cannot, however, do more than advise you to exercise a sound discretion on the subject"); 1816, Corson *v.* Dubois, Holt 239 (Gibbs, C. J., compelled the production of papers of bankruptcy assignees not parties, the production not being prejudicial to them); 1817, Roberts *v.* Simpson, 2 Stark. 203 (trustee, being grantee of the plaintiff, not compelled to produce his title deeds for the defendant); 1822, Harris *v.* Hill, 3 Stark. 140 (composition deed between a third person and his creditors, held privileged); 1829, R. *v.* Hunter, 3 C. & P. 591, 592 (forgery; as to deeds in a witness' possession, "if these deeds form a part of the evidence of this lady's title to any part of her own estate, you cannot compel her to produce them"); 1834, Mills *v.* Oddy, 6 C. & P. 728, Parke, B. (lease not compelled to be produced); 1848, Doe *v.* Langdon, 12 Q. B. 711, 719 (an abstract held not privileged, where no injury could be apprehended by its production).

The privileged witness would of course not be compelled to *testify to contents:* 1842, Davies *v.* Waters, 9 M. & W. 608, 612; though he could be required at least to *describe his deed for identification:* 1847, Doe *v.* Clifford, 2 C. & K. 448; 1854, Phelps *v.* Prew, 3 E. & B. 430, 438 (on claim of privilege for a title-deed, the party then proposing to give other evidence of contents by one who had seen the alleged deed, held not an infringement of the privilege to compel the deed's production for identification by the witness, the outside alone being perused; Wightman, J.: "His privilege is only not to produce the instrument for the purpose of disclosing its contents").

But the party could prove the contents by any *other evidence* available: 1826, R. *v.* Upper Boddington, 8 Dowl. & R. 726; 1834, Marston *v.* Downes, 6 C. & P. 381, 382; 1850, Newton *v.* Chaplin, 6 C. B. 356, 367; and the third person's claim of privilege was an excuse for the party's *not producing the original: ante,* § 1212.

title, in general, stands or falls by what is publicly recorded, not by what they privately possess; and there is no appreciable motive for demanding a privilege of secrecy for that which can neither hurt nor help them. Accordingly, in the United States, this exceptional privilege has not only not been judicially sanctioned, but does not appear even to have been claimed.[4]

(*b*) Where a person holds a document, not his own, but subject to a *lien* which would be lost by his surrender of possession, or owns and holds a document, such as a bill of exchange, whose *continued possession is necessary* for the enforcement of his right under it, he may fairly claim not to be compelled to surrender it for evidential purposes in litigation between other parties. This privilege, however, it will be observed, is not to withhold disclosure of contents, but only to *retain possession;*[5] although in a few instances there has been an ill-considered suggestion (due probably to a confusion of this rule with the rule in England for title-deeds to land) that disclosure was not compellable.[6]

Nevertheless, there is one situation in which with propriety the Court may decline even to compel disclosure, namely, the case in which the litigant party seeking to compel it is the *person against whom the lien* of the witness runs. Here his right to use the document evidentially might, on the facts, practically annul the value of the lien, and there is no reason why this should be permitted him:[7]

[4] The following Canadian statutes appear also to negative it: *B. C.* Rev. St. 1911, c. 127, § 87; *Man.* Rev. St. 1913, c. 171, §§ 54–56 (privilege apparently abolished, under the system of title-registration).

The following statute gives a limited recognition: *Conn.* Gen. St. 1918, § 5767 (party answering on discovery need not disclose "his title to property the title whereof is not material to the trial").

[5] *Eng.* 1818, Commerell *v.* Poynton, 1 Swanst. 1 ("A solicitor cannot by virtue of his lien prevent the King's subject from obtaining justice"); 1818, Mayne *v.* Hawkey, 3 Swanst. 93, 95; 1830, Hunter *v.* Leathley, 10 B. & C. 858, 862 (action against underwriters; a broker compelled to produce the policy, though he had a lien upon it); 1833, Thompson *v.* Mosely, 5 C. & P. 501 (one claiming a lien on a bill was required to produce, but not to surrender it; "you can stand by the witness while he looks at it"); 1848, Ley *v.* Barlow, 1 Exch. 800 (action between allottee of shares and director of a company; document in the hands of defendant's attorney who had a lien for charges due from the company; Parke, B.: "The lien cannot defeat the right to inspect the documents; the case of Hunter *v.* Leathley was a solemn decision"); *Can.* 1868, Deadman *v.* Ewen, 27 U. C. Q. B. 176 (attorney having a lien, held bound to produce the deed; the Court "would have protected any lien he had"); *U. S.* 1844, Morley *v.* Green, 11 Paige N. Y. 240 (witness claiming a lien must produce the document as evidence, but need not surrender it to the Court's custody, even though the lien be deemed by the Court not to exist); 1845, Aiken *v.* Martin, 11 Paige N. Y. 499, *semble* (same).

[6] *Eng.* 1842, Kemp *v.* King, 2 Moo. & Rob. 437 (a deed of assignment held by an attorney under his lien for costs; privileged); 1847, Doe *v.* Clifford, 2 C. & K. 448 (attorney holding a deed as mortgagee of defendant not compellable to produce it); *U.S.* 1830, Bull *v.* Loveland, 10 Pick. Mass. 9, 14 (action on a note; the possessor of the note had received it from the plaintiff for collection and a sum was due him for advances made under the agreement; held privileged from production; when the retention is on a claim of "legal or equitable interests of his own, it is a question to the discretion of the Court under the circumstances of the case whether the witnesses ought to produce or is entitled to withhold the paper"); 1855, White *v.* Harlow, 5 Gray Mass. 463, 466 (attorney held on the facts not to have such a lien on a note as to be entitled to withhold it).

[7] 1898, Davis *v.* Davis, 90 Fed. 791 (attorney claiming a lien on papers as against the party summoning him, held not compellable, since "the value of the lien often lies almost altogether in the power to withhold the papers from use as evidence"; otherwise, where the

1922, ROGERS, J., in *The Flush*, 2d C. C. A., 277 Fed. 25, 30: "As a matter of principle, and without regard to authorities, it seems to us that a client's right to inspect the papers upon which the attorney's lien exists should be denied. His lien is a mere retaining lien, and gives him only a right to retain them until his charges are paid. He has no right of sale, and his right of retention is valuable only in proportion as the papers are valuable to his client. The leverage which the possession of the papers affords depends upon how embarrassing to the client the possession of them by the attorney is. If the client is given the right to inspect the papers or to compel their production while the lien continues, it certainly impairs the value of the lien, as it diminishes the embarrassment caused by the attorney's retention of them, and might make them valueless to the attorney, and the lien nugatory. At the argument counsel gave a homely, but effective, illustration of this. He said that a blacksmith has a lien on a horse for its shoeing, and can retain possession of the horse. If he were compelled to let the owner have the use of the horse whenever he so desired, the blacksmith would simply be left with the privileges of feeding and caring for the horse."

From the foregoing exceptions to the general doctrine must be distinguished those cases in which a privilege has been asked for a document held by the witness as *attorney* and thus governed by the principles of a special exemption (*post*, § 2307); those cases, also, in which the document is held by a trustee or other person as the *agent of the party opponent*, and is thus at common law privileged from production except upon a chancery bill of discovery (*post*, § 2219); and those cases, finally, in which the document is desired to be held back as a *confidential communication* in general (*post*, § 2286).

§ 2212. (3) **Trade Secrets and Customers' Names; Official Secrets.** In a day of prolific industrial invention and active economic competition, it may be of extraordinary consequence to the master of an industry that his process be kept unknown from his competitors, and that the duty of a witness be not allowed to become by indirection the means of ruining an honest and profitable enterprise. This risk, and the necessity of guarding against it, may extend not merely to the chemical and physical composition of substances employed, and to the mechanical structure of tools and machines, but also to such other facts of a possibly private nature as the names of customers, the subjects and amounts of expense, and the like. Accordingly, there ought to be and there is, in some degree, a recognition of the privilege not to disclose that class of facts which, for lack of a better term, have come to be known as *trade secrets*.

Nevertheless, the occasional necessity of recognizing it should not blind us to the danger of such a measure, or entice us into an unqualified sanction for

party summoning is not the lienee); 1921, The Flush, Appeal of Thompson, 2d C. C. A., 277 Fed. 25 (attorney's lien upon client's papers; collecting the English cases; quoted *supra*); 1886, Cobb *v.* Tirrell, 141 Mass. 459, 5 N. E. 828 ("The plaintiffs claimed a right to put the note in evidence as that declared upon by them and as the foundation of their suit, and requested the Court to order the witness to produce the note for these purposes aforesaid, the witness contending and claiming that it was his own property [and not the plaintiff's property]. This was in effect to ask the Court to decide, in a suit to which F. [the witness] was not a party, that a valuable piece of property belonged to the plaintiffs, and not the witness in whose possession it was. . . . The rights of one actually in possession of property, and claiming to be lawfully so, cannot be dealt with in this summary manner").

such a demand. In the first place, in an epoch when patent-rights and copyrights for invention are so easily obtained and so amply secured, there can be only an occasional need for the preservation of an honest trade secret without resort to public registration for its protection. Such instances do occur, but an object of the patent and copyright laws is to render them as rare as possible, and the presumption should be against their propriety. In other words, a person claiming that he needs to keep these things secret at all should be expected to make the exigency particularly plain.[1] In the next place, the occasion for demanding such a privilege arises usually in actions where the party claiming it is one charged with infringing the rights of another by fraudulent competition in business, and the existence of the fraud can be proved only by investigating the claimant's methods of business; in such cases, it might amount practically to a legal sanction of the fraud if the Court conceded to the alleged wrongdoer the privilege of keeping his doings secret from judicial investigation. No privilege at all should there be conceded, although as much privacy as possible might be preserved by compelling disclosure no farther than to the judge himself, or to his delegated master or auditor, if (as is usual) the cause is tried by chancery procedure. Finally, even where the claimant of the privilege is not a party charged with fraud, no privilege of secrecy should be recognized if the rights of possibly innocent persons depend essentially or chiefly, for their ascertainment, upon the disclosure in question.

In short, the privilege should be conceded in those cases only where the disclosure of the facts by the particular channel of the witness in question is but a subordinate means of proof, relative to the other evidence available in the case; for without some such limitation the general principle cannot be enforced (*ante*, § 2192) that testimonial duty to the community is paramount to private interests, and that no man is to be denied the enforcement of his rights merely because another possesses the facts without which the right cannot be ascertained and enforced. The simple expedient of restricting the disclosure to the judge or his delegate will usually prevent whatever detriment might otherwise be incurred by forcing a public revelation of the trade secret:

1870, HATHERLEY, L. C., in *Moore* v. *Craven*, L. R. 7 Ch. App. 94, note: "The Court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the questions of materiality or immateriality; but where the nature of the discovery required is such that the giving of it may be prejudicial to the defendant, the Court takes into consideration the special circumstances of the case, and whilst, on the one hand, it takes care that the plaintiff obtains all the discovery which can be of use to him, on the other, it is bound to protect the defendant against undue inquisition into his affairs. The question of materiality must be tested by reference to the case made by the plaintiff's pleadings, and to what will be in issue at the hearing."

§ 2212. [1] The arguments of policy against fostering such secrecy are powerfully set forth, from the point of view of the industrial scientist, by Mr. James Douglas, of New York, in a paper entitled "Secrecy in the Arts" (Trans. of the American Institute of Mining Engineers, July, 1907).

What the state of the law actually is would be difficult to declare precisely.[2] It is clear that no absolute privilege for trade secrets is recognized. On the

[2] It should be noted that in those of the ensuing cases which arose on interrogatories of discovery to a party the traditions of chancery might make more of a concession to the privilege than otherwise:

ENGLAND: 1726, Shelling *v.* Farmer, 1 Stra. 646 (trespass against one who had been governor of a factory of the East India company; defendant called for the company's books to prove his orders; the company objected that "it might be of mischievous consequence if, in every action wherein the company is not concerned, they should be obliged to lay open the secrets of their trade," but "submitted to the directions of the Court"; Eyre, C. J., said he "would not oblige the company to produce them," and so left us to our liberty); 1775, Maharajah Nundocomar's Trial (quoted *ante*, § 2193); 1834, R. *v.* Webb, 1 Moo. & Rob. 405, 412 (manslaughter by the use of a noxious pill; the proprietor of the pill, which was not patented, on being asked whether it contained gamboge, was not allowed to decline on the ground of keeping a trade secret, though the counsel was recommended to ask as little as "the ends of justice required"); 1856, Tetley *v.* Easton, 18 C. B. 643 (infringement of patent; discovery of names and addresses of vendees is not privileged merely because the customers may be exposed to action); 1857, British Empire S. S. Co. *v.* Somes, 3 K. & J. 433 (action to recover money extorted on an excessive claim; the plaintiffs held entitled to discovery as to labor and materials entering into the cost, but not as to the accounts of wages actually paid to workmen); 1860, Telford *v.* Ruskin, 1 Dr. & Sm. 148 (bill for account against a surviving partner; discovery of the account-schedule in his answer, compelled, against the objection that the private affairs of his debtors would be disclosed); 1861, The Don Francisco, 31 L. J. N. S. Adm. 205 (injury to cargo; discovery as to letters, compelled, against the objection that they would disclose "the secrets of his business"); 1862, Howe *v.* McKernan, 30 Beav. 547 (action for selling machines falsely under the plaintiff's name; discovery of prices, profits, and customers' names, compelled, against the objection that the secrets of his trade would be disclosed); 1864, Renard *v.* Levinstein, 10 L. T. R. N. S. 94 (infringement; defendant compelled to answer as to his secret processes; "the Court will be able at the proper time to protect the defendant from any improper disclosure of his secret"); 1870, Moore *v.* Craven, L. R. 7 Ch. App. 94, note (like the next case); 1871, Carver *v.* Pinto Lette, L. R. 7 Ch. App. 90, 96 (infringement of trademark; discovery as to defendant's customers' names, addresses, and prices, not required where it was "likely to be injurious to the defendant" and not likely to help the plaintiff's proof of his case); 1873, Great Western Colliery Co. *v.* Tucker, L. R. 9 Ch. App. 376 (bill founded on the defendant's agency for the plaintiff; discovery as to the defendant's sales and profits and other "private transactions," not compelled); 1875, Heugh *v.* Garrett, 44 L. J. Ch. 305 (bill for account against an agent for the sale of a patent; discovery compelled as to quantities and prices of goods sold, but not as to customers' names and addresses); 1883, Badische A. & S. Fabrik, L. R. 24 Ch. D. 156, 157, 159, 169, 176 (infringement of patent; the defendant objecting to a cross-examination upon his secret process, "Mr. Justice Pearson considered this objection to be reasonable, and allowed the examination to be continued upon that principle"; afterwards the defendant elected to disclose, and the evidence was heard 'in camera'; the shorthand notes were impounded, and the judge refrained from stating the process in his opinion; sensible opinion by Pearson, J.; concerning this case, Lord Alverstone in his Recollections of Bar and Bench (1915, p. 189) says that this incident, which he describes somewhat differently, was "although not altogether unprecedented, at the same time comparatively rare"); 1890, Ashworth *v.* Roberts, L. R. 45 Ch. App. 623 (bill for account against the licensee of a patent, the defendant claiming non-user of the plaintiff's process and user of a secret process of his own; "the mere plea of secret process does not preclude an answer"; here he was compelled to answer as to his customers, though not as to his secret process); 1890, Mistovski *v.* Mandleberg, 6 Times L. Rep. 207 (action for breach of contract in improperly waterproofing cloth; answers to interrogatories compelled; Denman, J.: "It must not be supposed that there is an absolute privilege as to disclosure of a trade secret; it is a question of the exercise of judicial discretion; . . . the fact that it is a trade secret is not legally material"); 1900, Sacharin Co. *v.* Chemicals & D. Co., 2 Ch. 557 (infringement of patent; disclosure compelled of names and addresses of customers).

CANADA: 1883, Star Kidney P. Co. *v.* Greenwood, 3 Ont. 280 (secret medical formula of plaintiff, held privileged, in an action on a note for the purchase price, the defendant setting up fraudulent representations as to the curative qualities of the goods; an instructive case and a careful opinion).

UNITED STATES: *Federal:* 1886, Robinson *v.* Philadelphia & R. R. Co., 28 Fed. 340 (corporation-books; "care must be exercised to avoid unnecessary and improper inquiry into private affairs"; an answer will be demanded only where it is likely to be relevant); 1888, Moxie Nerve Food Co. *v.* Beach, 35 Fed. 465 (a witness for the complainant was asked on

other hand, Courts are apt not to require disclosure except in such cases and to such extent as may appear to be indispensable for the ascertainment of truth. More than this, in definition, can as yet hardly be ventured.

The boundaries of this privilege run close to certain others. Distinguish the limitation of *materiality* in discovery by a *party* (*post*, § 2219), and the privilege for communications to an *attorney*, or to an expert witness acting

cross-examination for the ingredients of the preparation; privilege allowed, because the commercial value of proprietary articles depended on the secrecy of their composition; Tetlow *v.* Savournin, *supra*, approved); 1889, Dobson *v.* Graham, 49 Fed. 17 (infringement of patent; the defendant's workmen not obliged to state wherein the defendant's machine differed from the plaintiff's, and inspection of the defendant's machinery not ordered; but otherwise, "if it were shown that these secrets were used as a cloak to cover an invasion of the plaintiff's right, or if there were reliable evidence tending to show it"); 1891, Johnson Steel Rail Co. *v.* North Branch Steel Rail Co., 48 Fed. 191 (infringement of patent; the manager of a corporation not a party to the suit was subpœnaed to produce certain drawings and templates; the defence being insufficiency of invention and public use, the Court held that the drawings in question were material as tending to prove this issue and that the witness must produce them); 1899, Gorham Mfg. Co. *v.* Emery R. T. D. Co., 92 Fed. 774 (manufacturer seeking to enjoin the sale by the defendant of goods said by the plaintiff to be imitations of his goods, but said by the defendant to be genuine; the defendant not bound to give the name of the intermediate vendor, where the plaintiff's only use of the fact could be to decline to sell further to such vendor); 1904, Herreshoff *v.* Knietsch, 127 Fed. 492, C. C. (rule for cross-examining to a secret invention in an interference case, considered); 1904, Crocker-Wheeler Co. *v.* Bullock, 134 Fed. 241, 245, C. C. (Cochran, J.: "It should be accepted, therefore, as correct law, that a witness should not be compelled to disclose trade secrets embedded in his head or in documents in his possession, when their disclosure will be prejudicial to him or his company, and they are not relevant to the controversy in the suit or action in which he is a witness, or otherwise admissible in evidence therein"; applied to a claim made on subpœna d. t. in a suit on a contract for exchange of shares of stock); 1910, In re Grove, 3d C. C. A., 180 Fed. 62 (infringement of patent on engines for torpedo-boat destroyers; some of the documents being apparently material, the Court ordered them to be produced before the examiner, subject to later determination by the Court); 1915, Marsland *v.* Du Pont de Nemours Powder Co., 3d C. C. A., 224 Fed. 689 (bill to enjoin disclosure by a former employee; general discussion of the terms on which a defendant should be allowed to disclose the process to expert witnesses before trial in order to prove his defence; valuable opinion by McPherson, J.); 1919, Herold *v.* Herold China & Pottery Co., 6th C. C. A., 257 Fed. 911 (disclosure of secret formula by assignor to subsequent employer; decree for defendant reversed, but subject to rehearing if plaintiff voluntarily disclosed his process to the trial judge 'in camera'); *Iowa:* 1909, Finn *v.* Winneshiek Dist. Court, 145 Ia. 157, 123 N. W. 1066 (tax assessment; plaintiff's books held not privileged, on the facts); *Massachusetts:* 1921, Gossman *v.* Rosenberg, 237 Mass. 122, 129 N. E. 424 (commissions on joint purchase of merchandise; plaintiff held not entitled to refuse to disclose the name of a purchaser; "the supposed right or privilege of the witness to refuse to disclose trade secrets however relevant to the matter . . . is essentially unsound"); *New Hampshire:* 1910, Boston & Maine R. Co. *v.* State, 75 N. H. 513, 77 Atl. 990 (tax-abatement; third person's private business, in general, not privileged; here, the value of stock in trade); *New York:* 1921, Kaumagraph Co. *v.* Stampagraph Co., Sup. App. Div., 188 N. Y. Suppl. 678, 684 (infringement of secret process by former employees of plaintiff; defendants disputed plaintiff's invention of secret process; proof 'in camera' before the judge, declared to be the suitable method); *Pennsylvania:* 1881, Tetlow *v.* Savournin, 15 Phila. 170 (bill by a manufacturer of cosmetics to restrain the defendant from using his trademarks; answer, that the plaintiff's articles, being injurious, should not be protected; discovery by the plaintiff of the ingredients of his articles, not compelled under the circumstances); *Virginia:* 1905, Worrell *v.* Kinnear, 103 Va. 719, 49 S. E. 988 (damages for breach of contract ordering the making of certain steel doors; the cost of manufacture being in issue, questions as to the plaintiff's amount of business, fixed charges, etc., were held privileged, as "unduly prying," on the suggestion that the sole business competitor of the plaintiff was in collusion with the defendant).

The following odd case belongs perhaps under this principle: 1899, Alvord *v.* Alvord, 109 Ia. 113, 80 N. W. 306 (son's petition for guardian for a mother alleged to be insane; mother not bound to disclose the terms of a will made by her). Add the Sugar Trust case in Congress: U. S. *v.* Chapman, Smith's Digest of Precedents of Congress, 1894, pp. 797, 810.

as attorney (*post*, §§ 2301, 2307). Distinguish also the substantive law as to enjoining the *unlawful disclosure* of a trade secret.[3] Distinguish further the privilege against the disclosure by an *official* of business secrets contained in a *report required by law* to be made to him; this includes reports of property made to an *assessor*, and of the details of an *unfinished invention* under caveat (*post*, § 2377), as well as information acquired by a *factory-inspector, mine-inspector, or railway-commission* (*post*, § 2377).

The question of privilege as to *bankers, telegraphers, trustees, journalists*, etc. (*post*, § 2286) involves still different principles.

Official Secrets. There must be a privilege for secrets of State, *i. e.* matters whose disclosure would endanger the nation's relations of friendship and profit with other nations. This privilege, however, has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made. In order to distinguish it from other principles justifying the exclusion of official documents, these various principles, superficially related, must be considered together and the precedents discriminated — in connection with the privilege for Communications between Government and Informer (*post*, §§ 2367–2376).

§ 2213. (5) **Theological Opinions.** That a privilege should be needed against the disclosure of one's theological opinions would have been maintainable up to three generations ago, more plausibly than it is to-day, when religious rancor is less marked and mutual toleration more general. Nevertheless, considering that the establishment of such matters can rarely be of value in the ascertainment of litigated facts, and that, whenever it is, the tenor of a man's opinions can usually be sufficiently ascertained from his voluntary extrajudicial professions, without putting him to his oath in court, it would seem wise to sanction the privilege, especially since the lack of it might lead to gratuitous attempts to annoy witnesses on cross-examination. The privilege can be recognized, subject to the judge's discretionary right to compel disclosure whenever it seems necessary to the ascertainment of the main facts in litigation:

1879, FOSTER, J., in *Free* v. *Buckingham*, 59 N. H. 219, 225: "It is not customary in modern practice to permit an inquiry into a man's peculiarity of religious belief. This is not because the inquiry might tend to disgrace him, but because it would be a personal scrutiny into the state of his faith and conscience, contrary to the spirit of our institutions. A man is competent to testify who believes in the existence of God and that divine punishment, either in this life or the life to come, will be the consequence of perjury. No judicial tribunal is bound to inquire, nor ordinarily will inquire, whether a witness be a Protestant or Romanist, Trinitarian or Unitarian, a Shaker, Mormon, Jew, or Gentile, a Spiritualist or a Materialist."

As a matter of precedent, such facts were originally privileged from disclosure so far as they involved the witness in a crime or forfeiture, in the period

[3] *Eng.* 1851, Morrison *v.* Moat, 9 Hare 241; 1857, Gartside *v.* Outram, 26 L. J. Ch. N. S. 113; *U. S.* 1903, Stewart *v.* Hook, 118 Ga. 445, 45 S. E. 369; 1868, Peabody *v.* Norfolk, 98 Mass. 452; 1897, Thum Co. *v.* Tloczynski, 114 Mich. 149, 72 N. W. 140; 1903, Stone *v.* Goss, 65 N. J. Eq. 756, 55 Atl. 736.

when the Catholic religion brought its adherents within the intolerant penalties of the law.[1] But the privilege was afterwards recognized, at least in the United States, upon the broad ground that theological opinions as such were protected from self-disclosure.[2] Furthermore, under the constitutional provisions guaranteeing freedom of religious belief and competency as a witness irrespective of theological opinion, the Courts often prohibit inquiry into a witness' opinions; but whether this is done on the ground of the irrelevancy of the matter of inquiry, or on the ground of privilege, or of both, is usually not easily ascertainable from the judicial language.[3]

§ 2214. (6) **Political Votes.** In general, there is no need of a privilege against the disclosure of political *opinion*, because it is not for the interest of the community that such beliefs should remain secret. The formation of a sound public opinion, by discussion and comparison, is essential in all representative government; and there is no good reason why any citizen should be encouraged to go through life with mute secrecy upon his political views.

But the secrecy of his *vote* is a different thing. The community's interest is that the citizen's vote, the culminating act by which his opinion is made most effective, should be absolutely sincere, *i. e.* should represent accurately his opinion upon the persons or the propositions presented for choice. At the time of voting, especial danger exists that influences of oppression will prevail to coerce the elector into an insincere vote. This danger affects the welfare of the State itself, as dependent upon freedom of political action. While, therefore, there may be no warrant for sanctioning secrecy of political opinion as such, there is a need for securing secrecy of voting, in order that the vote

§ 2213. [1] 1696, Sir John Freind's Trial, 13 How. St. Tr. 17; 1743, Craig *v.* Earl of Anglesea, 17 How. St. Tr. 1347; 1781, Lord Gordon's Trial, 21 How. St. Tr. 519.

[2] *Eng.* 1856, Darby *v.* Ouseley, 1 H. & N. 1, 10 (inquiries as to Catholic doctrines, held improper; "it is said that the answer would go to the witness' credit, but that is not so"); 1861, Maden *v.* Catanach, 7 H. & N. 360 ("a witness who does not object to take the oath can be compelled to answer" on 'voir dire' as to religious belief).

U. S. 1881, Guiteau's Trial, II, 1007 (District Attorney: "Do you believe in a God?" The Court: "You are not obliged to answer that question, doctor"; Dr. Spitzka: "I decline to answer it, on principle, as, from my point of view, an impertinent question in a country that guarantees civil and religious liberty"); 1881, Searcy *v.* Miller, 57 Ia. 613, 621, 10 N. W. 912 (witness not allowed to be cross-examined as to atheism); 1883, Dedric *v.* Hopson, 62 Ia. 562, 563, 17 N. W. 772 (similar); 1829, Com. *v.* Bachelder, Thacher's Cr. C. Mass. 197 (privilege recognized); 1854, Com. *v.* Smith, 2 Gray Mass. 516 ("The want of such religious belief must be established by other means than an examination upon the stand. He is not to be questioned as to his religious belief, nor required to divulge his opinions upon that subject in answer to questions put to him while under examination"); 1860, Com. *v.* Burke, 16 Gray 33 (even after the statute making disbelievers competent and allowing religious belief to affect credibility); 1879, Free *v.* Buckingham, 59 N. H. 219 (quoted *supra*).

The privilege, it would seem, does not sanction a general refusal to be a witness: 1793, Stansbury *v.* Marks, 2 Dall. Pa. 213 (witness refusing to be sworn, because, being a Jew, "it was his Sabbath," fined for contempt).

[3] *Ante*, § 1820 (oath).

These constitutional provisions are collected *ante*, § 1828 (oath); they sometimes provide that no witness shall be "questioned as to his religious opinions." Compare also the cases on the question whether theological opinion may be proved by other testimony to *affect his credibility* (*ante*, § 935), and on the propriety of inquiring into theological belief for the purpose of ascertaining the most *binding form of oath* (*ante*, § 1820).

may correctly represent the opinion. In short, the danger that the citizen himself may incur enmity or other detriment by the compulsory disclosure of his true opinion, at ordinary times or in court, is not to be regarded as worth attention; but the danger to the State, of obtaining a false index of his opinion, at the crucial moment of voting, is decidedly to be guarded against. The main expedient for this purpose is to provide such apparatus at the polls as secures permissive, and, under modern systems, compulsory secrecy.[1] But this expedient would be deficient if also the privilege were not conceded of being silent ever afterwards as to the tenor of the vote. Thus it is that the privilege of not disclosing, in a court of justice, a formal act of expression of the witness' political opinion done at a prior time comes to be recognized as a corollary of the secrecy of the ballot.

That a privilege exists not to disclose by the witness' own testimony the *tenor of his vote*, has not been doubted, either under the earlier American system of permissive secrecy at the polls or under the modern Australian system of compulsory secrecy: [2]

1868, CHRISTIANCY, J., in *People* v. *Cicott*, 16 Mich. 283, 297, 313: "The object of this [constitutional] requirement [providing that all votes be given by ballot], when considered with reference to the history of our country and the whole theory of popular government, where suffrage is practically universal, is too plain to be misunderstood. It was to secure the entire independence of the electors, to enable them to vote according to their own individual convictions of right and duty, without the fear of giving offense or exciting the hostility of others. And with this view the right is secured to every voter of concealing from all others, or from such of them as he may choose, the nature of his vote, or for what person or party he may have voted." CAMPBELL, J.: "Our whole ballot system is based upon the idea that, unless inviolable secrecy is preserved concerning every voter's action, there can be no safety against those personal or political influences which destroy freedom of choice."

But certain discriminations are necessary:

(*a*) If the vote was *illegal*, the privilege is not applicable, since no pro-

[1] § 2214. [1] 1889, Wigmore, Australian Ballot System, 2d ed., 50.

[2] To the following cases, add those in the ensuing note:

ENGLAND: 1872, St. 35 & 36 Vict. c. 33, § 12, Ballot Act ("No person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state for whom he has voted").

CANADA: These are like the English statute: *Dom.* St. 1920, 10–11 Geo. V, c. 46, § 93 (Dominion elections); *B. C.* Rev. St. 1911, c. 72, §§ 98, 160 (in proceedings where the scrutiny of ballots becomes necessary, "the mode in which any particular elector has voted shall not be discovered until he has been proved to have voted and his vote has been declared by a competent Court to be invalid"); *Newf.* Consol. St. 1916, c. 3, § 110; *N. Sc.* Rev. St. 1900, c. 5, § 82; *Ont.* Rev. St. 1914, c. 8, § 166.

UNITED STATES: Ala. St. 1911, No. 259, p. 249, Apr. 6, § 32 (primary elections; witness compellable "to answer if he voted . . . and to answer touching his qualifications"; and if not qualified, "he may be required to answer for whom he voted," with immunity from prosecution); St. 1915, No. 78, p. 218, § 41 (primary elections); 1887, Dixon *v.* Orr, 49 Ark. 238, 242; 1887, Pedigo *v.* Grimes, 113 Ind. 148, 150, 13 N. E. 700; 1918, Powers *v.* Harten, 183 Ia. 764, 167 N. W. 693; 1895, Com. *v.* Barry, 98 Ky. 394, 33 S. W. 400; 1892, Attorney-General *v.* McQuade, 94 Mich. 439, 444, 53 N. W. 944; 1895, Schneider *v.* Bray, 22 Nev. 272, 39 Pac. 327; 1863, People *v.* Pease, 27 N. Y. 45, 71, 81, per Selden, J., *semble*, and Denio, C. J.; 1851, Kneass' Case, Pa. Com. Pl., 2 Pars. Eq. Cas. 553, 585; Pa. St. 1874, May 19, § 34, Dig. 1920, § 10068 (contested elections); 1916, Beauregaard *v.* Gunnison City, 48 Utah 515, 160 Pac. 815 (residence).

tection is needed for any but those entitled as electors to cast a vote.[3] Nevertheless, an actual voter would be protected by the privilege against self-crimination (*post*, § 2250) from disclosing the fact of his illegal voting;[4] though not from disclosing the tenor of the vote, if the fact of voting were otherwise evidenced.[5]

(*b*) The elector may *waive* this privilege, either expressly at the trial or by conduct prior thereto.[6]

(*c*) It has been suggested that a due regard for the purpose of secrecy requires that even *other testimony* than the voter's shall also be excluded.[7]

[3] *Ida.* Comp. St. 1919, § 7290 (voter may be compelled, in an election inquiry, to disclose his qualifications; if not qualified, he must "answer for whom he voted"; no answer "shall be used against him in any criminal action"); *Ill.* 1898, Eggers *v.* Fox, 177 Ill. 185, 52 N. E. 269 (but the opinion carelessly fails to discriminate between the privilege against self-crimination, and that of electoral privacy); 1899, Gill *v.* Shurtleff, 183 Ill. 440, 56 N. E. 164; 1901, Sorenson *v.* Sorenson, 189 Ill. 179, 59 N. E. 555; 1909, Buckingham *v.* Angell, 238 Ill. 564, 87 N. E. 285; *Ind.* 1887, Pedigo *v.* Grimes, 113 Ind. 148, 151, 13 N. E. 700 (but the illegality of the vote must first be shown; here the decision followed a statute, reserving the question of the constitutionality of the statute); *Ia.* Comp. C. 1919, § 591; *Kan.* G. S. 1915, § 4276 ("if he was not a qualified voter," witness must answer "for whom he voted"; but "no part of his testimony shall be used against him in a criminal action"); *Ky.* 1899, Tunks *v.* Vincent, 106 Ky. 829, 51 S. W. 622; 1913, Vansant *v.* McPherson, 155 Ky. 34, 159 S. W. 630 (no privilege for a legal voter casting a ballot illegal because cast after the lawful hour); 1919, Black *v.* Spillman, 185 Ky. 201, 215 S. W. 28 (illegal voters may testify for whom they voted, and may decline only on the ground of self-crimination); *La.* 1893, Tullos *v.* Lane, 45 La. An. 333, 341, 12 So. 508; *Mich.* 1868, Christiancy, J., in People *v.* Cicott, 16 Mich. 283, 314; *Nebr.* Rev. St. 1922, § 2080; *Nev.* Rev. L. 1912, § 1825 (election contest; every person refusing to answer "touching his right to vote" is punishable); *N. J.* Comp. St. 1910, Elections, § 171 (the Court may require answers as to qualifications; if found not qualified, "then the Court can compel him to answer for whom he voted"; and criminating answers are not to be used against him); *N. C.* 1890, Boyer *v.* Teague, 106 N. C. 576, 625, 11 S. E. 665 (the trial judge to determine whether the vote was illegal); Cons. St. 1919, § 6096 (in election contests, "no witness . . . shall be excused from discovering whether he voted at such election, . . . and if he was not a qualified voter, he shall be compelled to discover for whom he voted"); *Or.* 1890, State *v.* Kraft, 18 Or. 550, 556, 23 Pac. 663; *Pa.* 1861, Thompson *v.* Ewing, 1 Brewst. 67, 100; *S. D.* 1895, Vallier *v.* Drakke, 7 S. D. 343, 64 N. W. 181, *semble*; *Wis.* 1868, State *v.* Hilmantel, 23 Wis. 422, 425.

Some of the statutes quoted *post*, § 2281 (privilege against self-crimination) take away this privilege by granting immunity.

[4] 1868, State *v.* Olin, 23 Wis. 309, 318.

[5] *Can.* Br. C. Rev. St. c. 72, § 160 (quoted *supra*, n. 2); *U. S.* 1901, Black *v.* Pate, 130 Ala. 514, 30 So. 434; 1909, Buckingham *v.* Angell, 238 Ill. 564, 87 N. E. 285; 1868, State *v.* Hilmantel, 23 Wis. 422, 425.

For statutes designed to take away this privilege by granting immunity, see *post*, § 2281.

[6] *Eng.* 1874, North Durham Case, 3 O'M. & H. 1 (question as to a voter's party, allowable if he has "held himself out as belonging to one party"); 1880, Harwich Case, O'M. & H. 61, 64 (same); *U. S.* 1901, Black *v.* Pate, 130 Ala. 514, 30 So. 434; 1906, State *v.* Matlack, 5 Pen. Del. 401, 64 Atl. 259 (misconduct of election officers in misreading ballots at a primary election; waiver allowed); 1868, Christiancy, J., in People *v.* Cicott, 16 Mich. 283, 314 (by declaring at the polls his intention to make his vote public and by openly showing it); Mich. Comp. L. 1915, § 3816 ("the ballot of no person shall be inspected or identified" without his written consent, unless he has been convicted of false swearing therein or was unqualified as a voter); 1904, Lane *v.* Bailey, 29 Mont. 548, 75 Pac. 191 (good opinion by Callaway, C.); 1851, Kneass' Case, Pa. Com. Pl., 2 Pars. Eq. Cas. 553, 585 (careful opinion).

Contra: 1896, Major *v.* Barker, 99 Ky. 306, 310, 35 S. W. 543 ("If he were permitted to so testify, he could then be subjected to a moral compulsion from his party associates; one party might obtain from willing witnesses testimony which the other party would be powerless to rebut because unable to compel a statement of the truth").

[7] 1868, Campbell and Christiancy, JJ., in People *v.* Cicott, 16 Mich. 283 (in the opinions partly quoted *supra*). No other sanction for this suggestion seems to have been given. The following case perhaps belongs here: 1765, R.

Theoretically such a consequence might follow; but, under the improved systems of polling-apparatus nearly everywhere now required, it is virtually impossible, except in rare instances, to identify a particular voter with his ballot; so that the question is no longer a practical one, except as concerns the use of the *voter's own hearsay statements* of the tenor of his vote; these are without the present privilege, because they represent a voluntary waiver of it (*supra*, par. (2)), and the only question can be whether they are admissible under the Hearsay rule (*ante*, § 1712).

(*d*) Where a statute expressly requires the *ballots to be destroyed unopened*, except in the case of an election-contest, the question arises whether they can be examined for any other purpose in a judicial inquiry. Here, however, the present principle is not involved, for there is no attempt to identify the ballots with a particular voter, either by asking for his own testimony or otherwise. Hence, the decision should depend solely upon the implied effect of the statutory language.[8]

(*e*) Where the *certificate of an election board* is questioned as to its correctness of enumeration, the question arises whether it is to be deemed conclusive or may be overturned by a recount of the ballots or the tally-lists; this involves the principle of conclusive testimony (*ante*, § 1351).

§ 2215. (7) **Personal Disgrace or Infamy.** The common law recognized in some degree a privilege against disclosing facts involving one's own disgrace or infamy. This privilege has already been examined, both in its history and its present scope, in considering the subject of impeaching the character of witnesses (*ante*, §§ 984, 986, 987); for it is necessary to discriminate between the judge's discretionary control over the subject of the questions to be put and the witness' privilege not to answer a question allowably put. Of this privilege (in such jurisdictions as still recognize its validity) it is enough here to recall that it does not apply to facts *material to the issue*, and that it does not extend to matters merely *tending to disgrace*, *i. e.* matters not in themselves disgraceful; and in these respects it differs from the privilege against disclosing self-criminating facts.[1]

It may be added that the term "*scandal*," as indicating matters which a party in equity, when subjected to a bill of discovery, need not answer, is

r. Vice-Chancellor, 3 Burr. 1647, 1662 (voting for the High Steward of Cambridge University; Wilmot J., said that the proctor's oath of secrecy "could not defend the taker of it from giving evidence before a court of justice").

[8] *Allowed:* 1890, Re Massey, 45 Fed. 629 (grand jury's investigation of a false return by an election officer; held that the local statutes requiring the ballots to be preserved secret, unless in case of a contested election, did not prevent their disclosure in a judicial inquiry; the local constitution and the general principle of the ballot being the foundation for this conclusion); 1892, Com. *v.* Ryan, 157 Mass. 403, 32 N. E. 349 (similar). *Contra:* 1892, Ex parte Brown, 97 Cal. 83, 31 Pac. 840 (under a statute requiring the preservation of ballots unopened for a year, and then their destruction, except only when a contest occurs as to the result of the election, the ballots cannot be examined in a criminal proceeding against an election officer; the statute having in effect made an exclusive rule of evidence).

§ 2215. [1] The detailed points in which its operation is to be discriminated from the self-crimination privilege are noticed under the latter head (*post*, § 2255).

For the witness' liability to *expose his body*, for evidential purposes, see *post*, § 2216.

not intended to correspond to the subject of the present privilege of a witness in common-law trials; it designates, by a peculiar distortion of meaning, the privilege against self-crimination.[2]

§ 2216. (7) **Witness' Body, Chattels, or Premises; Exhumation of Corpse.** The testimonial duty (*ante*, §§ 2192–2194) includes every form of disclosure which may assist in the ascertainment of the truth. It is not confined to utterances of the voice. It extends to documents (*ante*, § 2200). It extends also to the human body and to chattels and premises possessed. Apart from any one of the specific privileges already examined, is there ground for claiming a privilege to decline testimonial disclosure in any form other than that of speaking words or producing documents?

The answer must be in the negative:

1887, BREWER, J., in *U. S.* v. *Mullaney*, 32 Fed. 370 (compelling a defendant to write his name): "Then the other phrase is, whether you can compel a witness on cross-examination to do other than answer questions. This was a physical act which he was called upon to do in the presence of the jury. It is a matter of common experience in a courtroom that witnesses are often called upon either for some exposure of their person or to do some physical act supporting or contradicting their testimony. A chemist who has stated that a certain test discloses the presence of poison may be called upon to repeat that test in the presence of the jury, that they may see whether the testimony is true and the test accurate. A person who testifies to his physical condition may be compelled (there being no improper exposure of person) to uncover his body, that the jury may see whether there be such a physical condition as he has testified to. The witness may say, for instance, that he was never wounded in the arm, and on cross-examination it would be competent to compel him to lift up his sleeve, that the jury may see whether or no there was a scar or mark of wound on his arm."

Nevertheless, Courts have occasionally entertained a doubt, in this respect, of the same unfounded nature as that which was once raised (*ante*, § 2200) for the production of documents, — that is, a doubt as to the existence of appropriate process to compel this sort of testimony. Upon this ground such a compulsion has sometimes been refused. But how culpable is this self-stultifying concession by a Court of Justice that it knows of no process to execute its powers for enforcing a conceded duty! There need not be a precise precedent for everything. Were the judges of Charles II or George III, who themselves were but the followers of six centuries of royal judges, the last generation vested with the authority to apply old principles in new forms? Nobody has been able to find any definite authority for the 'duces tecum' form of subpœna; but the judges of 1808 were not moved by such trifling; such a power, they declared (*ante*, § 2193) is "essential to the very existence and constitution of a Court of common law." The mere phrasing

[2] 1831; Hosmer, C. J., in Skinner *v.* Judson, 8 Conn. 528, 533 ("The term 'scandal,' that protects a person from making answer, has a meaning limited and technical. Fraud, in the established sense of the word, is not the scandal, but this epithet is applicable to crime only. Notwithstanding the answer of the defendant, by the discovery of a private fraud, may tend to cast great reproach on his conduct and character, still he is compellable to make answer. But to the scandal and infamy arising from crime, he is never to be accessory by being compelled to make discovery").

of an auxiliary writ is not to stand in the way of inherent powers. Is there any known precedent of a writ to a court-bailiff ordering him to shut the doors to keep out an excessive throng, or to open the windows to let in fresh air? But no judge ever refrained from such orders because he had never seen such a form. The ordinary subpœna for a witness is of no avail when he is in prison; but the judges — somebody, sometime, no one knows who or when — varied the form of words and ordered the jailer 'habeas corpus ad testificandum' (*ante*, § 2199). They did not supinely sit and watch justice defrauded of testimony because the usual piece of parchment did not precisely fit the exigency. The Courts can as well command a witness to let the jury, or qualified experts, inspect his premises, his chattels, or his person, as to produce his documents. It is not to be supposed that our Courts will finally commit themselves to the denial of such a plain dictate of principle and of common sense.

(*a*) As to *chattels*, the question has seldom arisen; but the principle applies broadly to civil and criminal cases.[1] Here the additional question may be involved of the right to inspection before trial (*ante*, § 1862).

The *exhumation of a corpse*, often a material assistance in insurance or inheritance cases, is demandable on this principle; subject of course to the trial Court's discretion as to necessity and propriety.[2]

(*b*) As to *premises*, the principle can of course find application only in an order for inspection by jury or experts. Presumably its application would

§ 2216. [1] *Production compellable:* 1906, Finnick v. Peterson, 6 P. I. 172 (embezzlement of jewelry by Pascual; on the trial, the witness Peterson, in possession of the jewelry, was held bound to produce it in subpœna, under C. C. P. § 402); *Production refused:* 1880, Re Shephard, 3 Fed. 12 (subpœna will not issue to bring any but writings or books, as defined in U. S. Rev. St. § 869; here refused for patterns of stove-castings); 1891, Johnson S. S. R. Co. v. North B. S. Co., 48 Fed. 191, 194 (drawings, but not templates, held within a subpœna d. t.).

Compare the cases as to the *party-opponent's* privilege (*post*, § 2221); as to *discovery before trial* (*ante*, § 1862); and as to *view by jury* (*ante*, § 1163).

[2] *Eng.* 1907, Druce's Case, Duke of Portland's Case (cited fully, *post*, § 2221); *U. S.* 1906, Mutual Life Ins. Co. v. Griesa, C. C. Kan., 156 Fed. 398 (insured fell from the roof of a house and died; the issue was whether he had committed suicide by taking morphine and had intentionally fallen so as to conceal the suicide; the insurer's application for an order to exhume the body and to appoint a pathologist to examine it was granted; excellent opinion by Smith McPherson, J.); 1908, Gray v. State, 55 Tex. Cr. 90, 114 S. W. 635 (murder; whether two bullet-holes, one in the deceased's back and one in his breast, were made by two bullets fired by the defendant, or by a single bullet entering and leaving and fired from the front; if the former, two bullets would be found in the body; defendant applied for an order to perform an autopsy; deceased's body had been buried by his relatives, who refused to consent to an exhumation; the trial Court having refused the application, and a verdict of guilty being rendered, the judgment was set aside for that error; Ramsey, J., in an able and convincing opinion: "In legal reason, and based on public policy and enlightened justice, there can be no reasonable doubt as to what the Court should do in such a case as is here presented; . . . the power inheres in such a court; . . . if it can be said that there is no precedent for such an action, it can never be said again"; Brooks, J., diss., on the ground of the immateriality of the fact sought); 1914, State ex rel. Meyer v. Clifford, 78 Wash. 555, 139 Pac. 650 (claim of alleged children of an intestate to inherit; the opposing administrator maintained that the intestate had been castrated in infancy, and that the claimants, children of his first wife, were therefore not of his paternity; on affidavits of physicians that an examination of the body would disclose with reasonable certainty whether he had been castrated, the trial Court ordered an exhumation, in proceedings to approve the administrator's report; an alternative writ of prohibition was denied, on technical grounds).

Compare the cases cited *post*, § 2221 (party-opponent's privilege as to exhumation of corpse).

be unquestioned, at least under the broad language of some modern statutes.[3]

(*c*) As to a witness' living *body*, whether by self-exhibition to the jury at the trial, or by inspection of experts out of court, there is ample authority denying any privilege of non-disclosure; the trial Court's discretion determining the necessity and the suitable conditions. But many Courts still decline to take this liberal view, even in cases where this form of evidence is most necessary, as on a charge of rape or slander of chastity.[4] It is astonish-

[3] Compare the citations *post*, § 2221 (party-opponent's privilege), *ante*, § 1862 (discovery before trial), and *ante*, § 1163 (view by jury).

[4] The cases on both sides are as follows: the distinction between a party and a third person is here little more than technical, especially in criminal cases, and the precedents in § 2220, *post*, are therefore also relevant; the statutes and rulings as to inspection for *venereal disease* are placed in § 2220: *Alabama:* 1889, McGuff *v.* State, 88 Ala. 147, 7 So. 35 (rape under age of a child C., who testified; the defendant's request at the trial for a "committee of competent physicians to examine the person of the said C., in order that they might testify," held properly refused, on the grounds (1) that if recognized as a matter of right, "many modest and virtuous females" would be deterred from testifying; (2) that the trial Court in any event should have discretion; (3) that no necessity here existed; the first ground is inadequate, for the known readiness of some not virtuous females to make false charges of rape demands that the accused be given every safeguard; the third ground is also inadequate, for the necessity must usually exist unless there is ample other eye-witness testimony); 1893, King *v.* State, 100 Ala. 85, 14 So. 878 (assault; the person assaulted, being examined for the prosecution, was held compellable, at the defendant's instance, to exhibit his wounded arm to the jury, "no question as to the delicacy of the proposed exhibition" being involved); *Arkansas:* 1894, McArthur *v.* State, 59 Ark. 436, 27 S. W. 628 (slander of J. by charging fornication with M.; J. having testified denying fornication with M. or any one else, a motion by defendant to compel J. "to submit to an examination of her person" was held properly denied, on the ground that it "would shock the modesty of any innocent woman"; forgetting about the immodest and non-innocent woman, as in McGuff *v.* State, Ala., *supra*); *Delaware:* 1903, State *v.* Pucca, 14 Del. 71, 55 Atl. 831 (rape under age; prosecuting witness ordered to submit to physical examination by a surgeon on behalf of the defendant); *Georgia:* 1910, Crosby *v.* Potts, 8 Ga. App. 463, 69 S. E. 582 (Powell, J., approving the principle); *Kentucky:* 1920, Thomas *v.* Com., 188 Ky. 509, 222 S. W. 951 (detaining a female to have carnal knowledge against her consent; the accused having set up the female's consent and her frequent prior intercourse with him, and she having affirmed "that she had never had sexual intercourse with the accused nor any other person," defendant moved that she be subjected to a physical inspection by experts as to the fact of non-intercourse; motion denied on the ground that she was a "mere witness"; this ground was inadequate, because she was by her testimony trying to put defendant into the penitentiary, and if false she was a dangerous and wicked person; this ruling makes it a farce for this Court ever to talk about protecting the innocent accused with rules of evidence); *Michigan:* 1904, McKnight *v.* Detroit & M. R. R. Co., 135 Mich. 307, 97 N. W. 772 (physician's action for services to injured passengers at the defendant's request; one of these passengers, having testified for the defendant, was asked by the defendant to exhibit his leg to the jury, but declined; held privileged; no authority cited in support); *Oklahoma:* 1915, Walker *v.* State, 12 Okl. Cr. 179, 153 Pac. 209 (rape on a child under 14; physical examination of the child, held demandable, on the facts); *Porto Rico:* 1903, People *v.* Roman, 5 P. R. 17 (rape; the defendant's request that the Court "cause the women to appear in court that they might be recognized by the aforesaid witness," held improperly refused"); 1904, People *v.* Charon, 7 P. R. 416 (seduction; the accused called for a medical examination of the woman, to show her virginity; refused, because a physician had already examined her and reported upon it); *Texas:* 1898, Whitehead *v.* State, 39 Tex. Cr. 89, 45 S. W. 10 (slander of chastity of a woman; a motion to appoint a committee of physicians to examine the complaining witness was refused; held that such an order would be left to the trial Court's discretion); 1903, Bowers *v.* State, 45 Tex. Cr. 185, 75 S. W. 299 (slander charging unchastity; trial Court's refusal to order a physical examination of the complaining witness, held proper); *West Virginia:* 1921, State *v.* Driver, 88 W. Va. 479, 107 S. E. 189 (attempt to commit rape under age on A. B. aged 12; the defense claimed that A. B. was mentally defective and a sexual liar; a motion before trial to appoint a physician to make a complete physical examination of A. B. was held properly denied on the facts,

ing that Courts are so prone to ignore the propriety of getting at the truth by direct and simple methods, especially when modern science can here be of such peculiar assistance.

In all of the foregoing forms of disclosure by *third persons*, the considerations of personal privacy, so far as they have any value, are the same as for the *party-opponent*. In the latter case, there enters the additional element of the common-law testimonial privilege of the party-opponent; but since that has been abolished by modern legislation, the modern authorities on that point have a bearing on the present one. To that privilege we now come.

§ 2217. (8) **Party-Opponent in the Civil Suit at Bar; History and Policy of the Party's Privilege.** It is a little singular that the oldest and once the most firmly established of all the privileges should be also the most obscure in its history and precise mode of origin. That the party-opponent in a jury-trial at common law was *not compellable to be a witness* seems unquestioned, since the beginning of recorded trials, though it is not explicitly stated until the late 1700s.[1] On the other hand, that a party-opponent in chancery was compellable to answer interrogatories under oath, like any witness, is equally clear, from the beginning of systematic chancery-practice.[2] The absence of a privilege in chancery is easily explainable; because the Chancellor merely adopted the system of the ecclesiastical Courts, in this as in so many other respects; and the ecclesiastical practice regarded as compellable the party, no less than other persons.[3] But why was this not done in common-law trials also? Before the statute of Elizabeth, which virtually created compulsory process for witnesses in jury-trials,[4] it is easy to see that a party-opponent was not compellable to appear; but, after that time, from the middle of the 1500s, why were not parties summoned by subpœna like other desired witnesses, as they were in chancery? It might be thought that, under the then prevailing notions, the party's resort to his own oath, being regarded as an advantage offering too easy a mode of exoneration,[5] the first party would not care to call his opponent, and thus the question would not arise. Yet, if this were the reason, why was there such a common resort to the opponent's compulsory testimony in chancery? There seems to be no certain clue yet discovered to the incongruity, in popular and professional conceptions, of

partly on the ground that the State did not propose to prove penetration; but the other information on her physical and mental condition would have been useful; the Court expresses a doubt as to the authority to compel an examination without the female's consent; the ruling is fundamentally unsound, and especially for cases of sexual offenses of any sort); *Wisconsin:* 1902, Goodwin *v.* State, 114 Wis. 318, 90 N. W. 170 (complaining witness, held not subject on the facts to medical examination, after leaving the stand, to ascertain whether she was suffering from hysteria as affecting her credibility).

Whether a person *under arrest* (not a witness) may be measured, photographed, or physically examined, is considered *post*, § 2265, under the privilege against self-crimination.

For the privilege of a *party* in *civil* cases, see *post*, § 2220; for the *self-crimination* privilege, see *post*, § 2265; for the privilege against disclosure of *disgraceful facts*, see *ante*, § 2215.

§ **2217.** [1] Cases cited *post*, § 2218.

[2] Tothill, 71, 85, 145, 146, temp. Eliz., in the end of the 1500s.

[3] Langdell, Summary of Equity Pleading, § 15.

[4] *Ante*, § 2190.

[5] *E. g.* in 1590, a judge offers the defendant liberty to speak on oath as a notable and exceptional favor; Udall's Trial, 1 How. St. Tr. 1282. Compare the explanations *ante*, § 575.

conceding the privilege in one set of trials and ignoring it in the other. We may suppose that in some way, not now appreciable by us, the party's appearance as a witness in jury-trials was regarded as wholly inappropriate, and that his incompetence to testify for himself, which was plainly a fundamental notion (*ante*, § 575), was somehow associated with a privilege not to be called against himself. Nevertheless, how readily the two might have been severed, even at an early date, and the common-law practice have been grafted with the chancery rule, may be seen from the circumstance that this very measure was taken in Massachusetts by the colonists, two centuries before the general reform of the law in that direction.[6]

As to the policy of such a privilege, it is amazing that there should have been so long a continuance in its recognition. The very denial of it in chancery, alongside of its recognition at common law, was an anomaly and an absurdity; and this the great commentator himself had long ago pointed out:

1768, Sir *William Blackstone*, Commentaries, III, 382: "The principal defects [of the common-law trial system] seem to be, 1, The want of a complete discovery by oath of the parties. This each of them is now entitled to have by going through the expense and circuity of a court in equity. . . . It seems the height of judicial absurdity that in the same cause between the same parties in the examination of the same facts a discovery by the oath of the parties should be permitted on one side of Westminster Hall and denied on the other; or that the judges of one and the same court should be bound by law to reject such a species of evidence if attempted on a trial at bar, but when sitting the next day as a court of equity should be obliged to hear such examination read and to found their decrees upon it. In short, within the same country, governed by the same laws, such a mode of inquiry should be universally admitted or else universally rejected."

It could hardly be doubted which rule would have to yield when such a uniformity as was here recommended should come about. The benighted doctrine of the common-law Courts could not prevail, when the force of reason and common sense was once brought to bear. Yet that force was singularly slow in being put into motion. One cause, of course, was the general inertia of the end of the 1700s in the matter of legal reform, — an inertia preserved in part, no doubt, by the general and fulsome laudation of the common law in the pages of the same learned commentator who so cautiously disapproved this particular feature of it. During that period, whatever progress was made showed itself solely in the realm of silent judicial development or principles, and not in frank legislative abolitions. The energies of the Legislature were absorbed in war and political affairs; moreover, its constitution could have afforded small play for reformers' notions.[7] With the exception

[6] 1641, Mass. Body of Liberties (Whitmore's ed.), § 26 (every man may have help in pleading his cause, but "this shall not exempt the partie himself from answering such questions in person as the court shall thinke meete to demand of him").

[7] In the latter part of the period, to be sure (1800–1825), when the efforts of Romilly, Mackintosh, Taylor, and Williams might have had practical effects, it was to Lord Eldon's intolerant opposition that this failure was directly and chiefly due. "In the history of the universe, no man has the praise of having effected so much good for his fellow-creatures as Lord Eldon has thwarted" (England under Seven Administrations, I, 219; quoted in Martineau's History of England, III, 425).

of Fox's Libel Act (which, however, required a contest of twenty years' duration), no substantial improvement was made by statute for a century after Lord Hardwicke's time. After Lord Mansfield's powerful genius left the Bench, in 1788, the reactionaries under Lord Kenyon and Lord Eldon maintained almost unbroken control for more than a generation. But by the Reform Bill of 1832, when the legislative constitution was renovated, room was made for the long pent-up energy of reform.[8] In the next quarter of a century, so many statutes of improvement were enacted that the face of the law was transformed almost beyond recognition. Meanwhile the thunders of Bentham had made it certain that the rules of Evidence and Procedure would be among the first to feel the effect of the new forces. Some of his arguments on the present subject, which deserved to the full his ironies, are contained in the following passage:

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. IV, c. III (Bowring's ed., vol. VII, pp. 445 ff.): "The question is, not whether a man shall be bound to commence a suit against himself; nor yet whether, without being called (the suit being commenced by any other person), he shall be bound to come and give evidence against himself; but whether, being called, and questions being put to him, he shall be bound to make answer to such questions. . . . Let us now take a more detailed observation of the mischiefs flowing from it. 1. In the first place, in so far as it is to be had, it has already been stated as being (not only upon the face of it, but by the confession of those who, notwithstanding, have been in the habit of excluding it) the very best possible sort of evidence: the evidence the most completely satisfactory. . . . 2. Under the distress produced by the exclusion put upon the best evidence, recourse has been had (through a sense of necessity, and that the wound given to justice might not be past endurance) to bad evidence of various descriptions. . . . 3. The person whose bosom is the source of self-disserving evidence (the plaintiff, or more commonly the defendant, in the cause) is one person; that person is forthcoming of course. Whatever evidence is extractible from that source, is extractible on the spot, and without addition to the expense. . . . To the list of the uses rendered to justice by this best of all evidence, corresponds the list of the mischiefs produced by the exclusion of it: promoting, in two distinguishable ways, misdecision and failure of justice; making a factitious addition to the natural and necessary quantities of delay, vexation, and expense. To these mischiefs may be added another, the opposite of which could not so conveniently have been presented under the head of uses: I speak of the poison continually infused by the exclusionary rule into the moral branch of the public mind. . . . 'Hold nothing for base and mean, — or, holding your heads high, and speaking in a tone of firmness and defiance, maintain that to practise whatever is most base and mean, is among the Englishman's most honourable privileges. Deny your own handwriting in so many words, — or, denying it in deportment as significative as words, refuse or bear to recognize it: deny your written words; and when a question is put to you by words spoken, keep your lips close, lest the truth should make its escape, and justice be done.' Such is the exhortation which the exclusionary rule never ceases to deliver to the people. Such is the lecture delivered by the judge, by every judge, as often

[8] "For twenty-five long years did Lord Eldon sit in that court, surrounded with misery and sorrow, which he never held up a finger to alleviate. The widow and the orphan cried to him, as vainly as the town-crier cries when offered a small reward for a full purse; the bankrupt of the court became the lunatic of the court; estates mouldered away, and mansions fell down; but the fees came in, and all was well. But in an instant the iron mace of Brougham shivered to atoms this house of fraud and of delay" (Sydney Smith's Speech on the Reform Bill, 1831, Works, ed. 1869, p. 539).

as he marks with his approbation this flagitious rule. A man who, uninvested with any coercive power, should, in the character of a moral instructor — of a schoolmaster, a lecturer, or a divine — stand up and say to his auditors, 'If a man with whom you have a difference happens to have in his hands a letter or memorandum of yours that you apprehend would make against you, deny it, — do not own it, — put him to the proof of its being yours; and if he is not able, triumph over him as if he were in the wrong'; — if it were possible that a man without power for his protection should take upon him to preach such doctrines, he would be abhorred, and not without reason, as a corrupter of the public morals. What, then, shall be said of those by whom such baseness is not simply recommended, but efficaciously rewarded? Men sow vice, and then complain of its abundance! The same hands which are every day occupied in thus planting and propagating mendacity, are as constantly lifted up against it, and employed in punishing it. . . . The only sort of person to whom it is possible (speaking of suitors) to profit by the pretended tenderness of this rule, is the knavish and immoral suitor, who, being in the wrong, and knowing himself to be in the wrong, avails himself of the inability of the adversary to fulfil the conditions thus wantonly imposed upon him by the law, — avails himself of this misfortune to obtain a triumph over justice. It is for the purpose of rewarding and encouraging the inquity of one knave of this description, that the useless burthen above delineated is fastened upon the shoulders of perhaps a hundred suitors." [9]

1844, Lord LANGDALE, M. R., in *Flight* v. *Robinson*, 8 Beav. 22, 33: "According to the general rule which has always prevailed in this [chancery] court, every defendant is bound to discover all the facts within his knowledge, and to produce all documents in his possession which are material to the case of the plaintiff. However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows, believes, or thinks in relation to the matters in question. The plaintiff being subject to the like obligation, on the requisition of the defendant in a cross bill, the greatest security which the nature of the case is supposed to admit of is afforded, for the discovery of all relevant truth, and by means of such discovery, this Court, notwithstanding its imperfect mode of examining witnesses, has, at all times, proved to be of transcendent utility in the administration of justice. It need not be observed, what risks must attend all attempts to administer justice, in cases where relevant truth is concealed, and how important it must be to diminish those risks. . . . The arguments which have been used in some late cases, seem (as was observed by the counsel for the plaintiff) to have assumed, that concealment of the truth was, under the plausible names of protection or privilege, an object which it was particularly desirable to secure, forgetting, as it would seem, that the principle upon which this Court has always acted, is to promote and compel the disclosure of the whole truth relevant to the matters in question, and that every exception requires a distinct and sufficient justification."

§ 2218. **Same: (*a*) Testimony on the Stand; Discovery in Chancery; Statutory Changes.** In the *common-law* courts, the party-opponent was not compellable to be a witness at the demand of the other party; this much has never been doubted.[1]

[9] Compare the arguments in Chief Justice Appleton's work on Evidence, c. V, p. 69.

§ **2218.** [1] Besides the cases cited *post*, § 2222, which assume this principle, are the following: *Eng.* 1779, Cox *v.* Whalley, 10 East 399, note, *semble;* 1808, R. *v.* Woburn, 10 East 395, 403 (L. C. J. Ellenborough: "It is a long-established rule of evidence that a party to the suit cannot be called upon against his will by the opposite party to give evidence"); 1812, Fenn *v.* Granger, 3 Camp. 177; 1831, Worrall *v.* Jones, 7 Bing. 395.

U. S. 1827, Mauran *v.* Lamb, 7 Cow. N. Y. 174, 178.

The rule was even carried so far as to entitle one *co-defendant* to exclude the testimony of another; 1844, Frazier *v.* Laughlin, 6 Ill. 347, 360.

But in *chancery* the plaintiff (who might be identical with a defendant in some pending suit at law) was not obstructed by this privilege; by a bill of discovery he could insist on testimonial answers from his opponent:

1836, Lord LANGDALE, M. R., in *Storey* v. *Lord Lennox*, 1 Keen 341, 350: "From the mode of proceeding at common law, a man with the full knowledge of facts which would show the truth and justice of the case may, by concealing those facts within his own breast and merely for want of disclosure or evidence, succeed in recovering a demand which he knows to be satisfied or in resisting a demand which he knows to be just. This conduct is by Courts of equity considered to be against conscience; and they accordingly enable the party in danger of being oppressed by it to obtain from his adversary a discovery of the facts within his knowledge or belief by filing a proper bill for the purpose; and by the general rule the defendant to a proper bill for discovery is bound to make a complete disclosure of everything he knows or believes in relation to the matter in question."[2]

The subject of this right of discovery was, nevertheless, limited to the facts which bore upon the plaintiff's own case; he could not compel an answer upon facts affecting solely the opponent's own case. This limitation has been already examined in considering the right to discovery before trial (*ante*, § 1856); it is enough here to repeat that there is no reason for it, as applied to compelling testimony at the trial itself, nor is it apparently perpetuated under the statutory practice of to-day.

A few *statutes*, indeed, particularly in the Southern States and in special classes of litigation, had at an early date made the opponent compellable, but not competent, as a witness,[3] but the great majority employed a single enactment to declare him both competent and compellable. On the other hand, in a few statutes, the party was merely made competent (*ante*, § 488) without being expressly declared compellable also; but, in virtue of the constant association of the two principles in the history of the subject (*ante*, § 575) the Courts usually interpreted the statute to imply also the abolition of the privilege.[4] Finally, the common-law rule was abolished, by statutes dating from the second half of the 1800s, and in its stead was granted free scope for compulsory examination of the opponent as a witness.[5]

[2] There was, however, this limitation (due to nothing but a kind of perverse ingenuity), that the defendant in equity could not in turn examine the plaintiff as a witness, but must go to the formality of filing a cross-bill of his own: 1785, Hewatson *v.* Tookey, Dick. 799, per L. C. Thurlow; repudiating Troughton *v.* Getley, Dick. 382 (1766).

[3] *E. g.* in Missouri, by a statute of 1835; noted in Eck *v.* Hatcher, 58 Mo. 235, 239 (1874). So also a Federal statute of Dec. 17, 1849, antedated the English enactment.

[4] *E. g.* in Alabama, for the Code of 1867, § 2704; interpreted in Olive *v.* Adams, 50 Ala. 376 (1873).

So also the California Code and its followers; the clauses quoted *ante*, § 488, should be consulted.

[5] The following statutes are also collected *ante*, § 1856, and some of them are quoted in full *ante*, § 488; the Texas statute is here quoted in full as a typical one:

ENGLAND: 1851, St. 14 & 15 Vict. c. 99, § 2 (parties made compellable to testify).

CANADA: *Alta.* Rules of Court 1914, Nos. 234–250; *B. C.* Rules of Court 1912, Rules 343–370 *t*; *Man.* Rev. St. 1913, c. 46, Rules 398–423; *N. Br.* Consol. St. 1903, c. 111, § 240, c. 112, § 44, c. 127, § 4; *Newf.* Consol. St. 1916, c. 83, Ord. 28; *N. W. Terr.* Consol. Ord. 1898, c. 21, Rules 201–225; *N. Sc.* Rev. St. 1900, c. 163, § 35; Rules of Court 1900, Ord. 30, Rule 1; *Ont.* Rev. St. 1914, c. 76, § 6; Rules of Court 1914, Rules 327–337, 271–285; 1898, Fleury *v.* Campbell, 18 Ont. Pr. 110 (criminal conversation; defendant not compellable to be examined for discovery, under R. S. 1897, c. 73, § 7); *P. E. I.* St. 1873,

It may be noted that the statutory enactments are usually of two sorts, corresponding to the two purposes that were to be accomplished. One of these was the recognition of the right to compel the opponent to *testify at the trial;* this was in most jurisdictions provided in express terms. The other was the securing of the right to *discovery* of his evidence *before trial;* this was usually accomplished by authorizing the filing of written interrogatories, and thus transferred to common-law courts the chancery method of a bill of discovery. But this latter measure virtually accomplished also, at the same time, the former purpose; for the answers to these interrogatories could be put in at the trial as his admissions, without actually calling him to the stand; hence, in a few jurisdictions, this latter mode remains as the only one, and is regarded as sufficiently attaining both ends. In most jurisdic-

c. 22, § 245; *Yukon:* Consol. Ord. 1914, c. 48, Rules 211–235, c. 30, § 35.

UNITED STATES: *Ala.* Code 1909, §§ 4007, 4049; *Ariz.* Rev. St. 1913, Civ. C. §§ 1680, 1725–27; *Ark.* Dig. 1919, § 4144; §§ 1248–1260; *Colo.* Comp. St. 1921, § 6570; *D. C.* Code 1919, § 1063; *Conn.* Gen. St. 1918, §§ 5741, 5764; *Del.* Rev. St. 1915, § 4213; *Fla.* Rev. G. S. 1919, §§ 2734, 2735; *Ga.* Rev. C. 1910, §§ 4551, 5858; 1920, McAlpin *v.* Ryan, 150 Ga. 746, 105 S. E. 289 (under Code § 5861, a defendant in an action counting alienation of affections and criminal conversation is competent and compellable to testify to the former issue, though not to the latter); *Haw.* Rev. L. 1915, §§ 2591, 2592, 2612; *Ill.* Rev. St. 1874, c. 51, § 6; St. 1905, May 18 (Municipal Court), §§ 32, 33; *Ind.* Burns' Ann. St. 1914, § 533; *Ia.* Const. 1857, Art. I, § 4; Code 1897, §§ 3610, 3611, Comp. Code § 7247; *Kan.* Gen. St. 1915, § 7221; *Ky.* C. C. P. 1895, § 606, par. 8. §§ 143, 151; *La.* C. Pr. 1870, §§ 347–356; *Me.* Rev. St. 1916, c. 87, §§ 112, 115; *Md.* Ann. Code 1914, Art. 35, § 1; *Mass.* Gen. L. 1920, c. 231, §§ 61–67, 89; *Mich.* Comp. L. 1915, §§ 12022–12028, 12552, 12560; *Minn.* Gen. St. 1913, § 8377; 1900, Strom *v.* R. Co., 81 Minn. 346, 84 N. W. 46 (statute applied); *Miss.* Code 1906, § 1915, Hem. § 1575; Code § 1939, Hem. § 1599; *Mo.* Rev. St. 1919, §§ 5412, 5417; *Nev.* Rev. L. 1912, §§ 5420, 5421; *N. H.* Pub. St. 1901, c. 224, § 13; 1900, Whitcher *v.* Davis, 70 N. H. 237, 46 Atl. 458 (statute applied); *N. J.* Comp. St. 1910, Evidence § 9, Practice §§ 140–148; *N. Mex.* Annot. St. 1915, §§ 2169, 2171, 2172; *N. Y.* C. P. A. 1920, § 346; *N. C.* Con. St. 1919, §§ 900, 1793; *N. D.* Comp. L. 1913, §§ 7862, 7863, 7871; *Ohio:* Gen. Code Ann. 1921, § 11497, §§ 11348–11350; *Okl.* Comp. St. 1921, § 587; 1898, Re Abbott, 7 Okl. 78, 54 Pac. 319 (applying C. C. P. § 333); 1906, Re Wogan, 103 Mo. App. 146, 77 S. W. 490 (a party held compellable to depose, under the Oklahoma statutes); *Pa.* St. 1911, Mar. 30, § 1, Dig. 1920, § 21863, Witnesses; 1899, Costello *v.* Costello, 191 Pa. 379, 43 Atl. 240 (abolition of the privilege applies to divorce proceedings); *S. C.* C. C. P. §§ 667–674; *S. D.* Rev. C. 1919, §§ 2713–2716, 2717; *Tex.* Rev. Civ. St. 1911, § 3647 ("Either party to a suit may examine the opposing party as a witness, and shall have the same process to compel his attendance as in the case of any other witness. His examination shall be conducted and his testimony shall be received under the same rules applicable to other witnesses"); § 3663 ("The testimony of any witness, and of any party to a suit, by oral deposition and answer may be taken in any civil case in any of the District and County Courts of this State, in any instance where depositions are now authorized by law to be taken"); § 3679 ("The deposition of either party to a suit, who is a competent witness therein, may be taken in his own behalf in the same manner and with like effect with the depositions of other witnesses"); § 3680 ("Either party to a suit may examine the opposing party as a witness, upon interrogatories filed in the cause, and shall have the same process to obtain his testimony as in the case of any other witness; and his examination shall be conducted and his testimony received in the same manner and according to the same rules which apply in the case of any other witness, subject to the provisions of the succeeding articles of this chapter"); § 3684 ("The party interrogated may, in answer to questions propounded, state any matter connected with the cause and pertinent to the issue to be tried; and the adverse party may contradict the answers by any other competent testimony in the same manner as he might contradict the testimony of any other witness"); *Vt.* Gen. L. 1917, § 1898; *Va.* Code 1919, §§ 6208, 6213, 6214, 6225; *Wash.* R. & B. Code 1909, §§ 1225, 1903; *Wis.* Stats. 1919, §§ 4068, 4096–4098; *Wyo.* Comp. St. 1920, §§ 5689, 5808.

tions, both modes are provided for, as they should be, by separate statutes. The various enactments as to discovery before trial have been already considered (*ante*, § 1856). In their present aspect — that of the abolition of the opponent's privilege — they raise no question;[6] it is only as to the limits of discovery before trial that any difficulty still remains.

§ 2219. **Same: (*b*) Production of Documents.** At *common law* this same privilege of the opponent not to bear testimony extended to the documents in his possession. Unless in Lord Mansfield's time,[1] there seems to have been no suggestion of its denial.[2] There were, to be sure, a few classes of cases in which, before trial, one might, on motion or by demand of oyer, obtain the inspection and a copy of documents held by the opponent; and these constituted genuine exceptions to the rule, in so far as they virtually compelled the opponent to furnish to the first party the means of making proof of documents by copy at the trial; nevertheless, in form, there were apparently no exceptions to the rule that the opponent was privileged to refrain from any production or disclosure of documents at the trial.[3]

But, in *chancery*, as with oral testimony, so with documents, this privilege was not recognized. By bill of discovery, the production of documents was there compellable, — subject, indeed, to the same limitation (*ante*, § 2218) that only such documents as helped to prove the demandant's own case could be called for. In form, moreover, this was, for common-law purposes, a real nullification of the general rule, for it not only secured an inspection and copy, or an admission, before trial, of the document's contents, but it also secured, if desired, the production of the documents at the trial itself, in the hands of a court officer.[4]

[6] A few arguable points, independent of local statutory phrases, may still be raised (though their dependence on the adopted chancery methods places them without the present purview); for example, whether discovery can be had of an *infant: Eng.* 1890, Mayor *v.* Collins, L. R. 24 Q. B. D. 361; 1890, Redfern *v.* Redfern, Prob. 139, 146; and how discovery is obtained from a *corporation: Eng.* 1900, Welsbach I. G. L. Co. *v.* New Sunlight I. Co., 2 Ch. 1, 8; *U. S.* 1901, Toland *v.* Paine F. Co., 179 Mass. 501, 61 N. E. 52; 1901, Robbins *v.* R. Co., 180 id. 51, 61 N. E. 265.

For the privilege of a party not to disclose knowledge founded on *information from his attorney*, see *post*, § 2318.

§ 2219. [1] 1769, Roe *v.* Harvey, 4 Burr. 2484 (plaintiff refused to produce a deed completing his title and then in court; all the judges agreed that the refusal could be left to the jury as evidence; three of the four agreed that the plaintiff could not be compelled to produce it; Mansfield, L. C. J., declared that the Court "will force parties to produce evidence which may prove against themselves, or leave the refusal to do it, after proper notice, as a strong presumption, to the jury").

[2] *Eng.* 1800, Habershon *v.* Troby, 3 Esp. 38 (Lord Kenyon, C. J., said that a party could not be compelled to produce his books); *U. S.* 1830, Boyce *v.* Foster, 1 Bail. S. C. 540; 1832, Durkee *v.* Leland, 4 Vt. 612, 615.

[3] In Goldschmidt *v.* Marryat, 1 Camp. 559, 562 (1808), cited *ante*, § 1858, the production was at the trial itself; but this was unusual.

The history and conditions of compelling *inspection before trial* have been already fully examined (*ante*, § 1858), and need not be here repeated.

[4] Langdell, Summary of Equity Pleading, § 166. The conditions of production, under a bill of dicovery, have already been examined (*ante*, § 1857), and need not be here repeated.

It may be noted that the *privilege to withhold title-deeds*, accorded to third persons (*ante*, § 2211), gave way before the right of discovery in chancery from a party-opponent: 1855, Adams *v.* Lloyd, 3 H. & N. 351, 361 ("A man's title-deed is still protected, unless it tends to prove the case of the opposite party; if it does not, it is irrelevant").

This anomalous condition of the law had been vainly commented on by Mr. Justice Blackstone, two generations before any change took place:

1768, Sir *William* BLACKSTONE, Commentaries, III, 382: "A second defect [in the common-law mode of trial] is of a nature somewhat similar to the first [*i. e.* inability to compel an opponent to take the stand], the want of a compulsive power for the production of books and papers belonging to the parties. . . . In mercantile transactions especially, the sight of the party's own books is frequently decisive; as the day-book of a trader, where the transaction was recently entered as really understood at the time, though subsequent events may tempt him to give it a different color. And as this evidence may be finally obtained and produced on a trial at law by the circuitous course of filing a bill in equity, the want of an original power for the same purposes in the Courts of law is liable to the same observations [5] as were made on the preceding article."

This gentle criticism might almost as well never have been uttered. Nothing was done, nor even thought of being done, until Bentham's righteous indignation lashed the time-honored crudities of the ancient privilege, and stirred up the young reformers of the 1800s to aggressive action. As a part of the general movement of reform, the privilege to conceal truth by withholding documents was cut away and went by the board, along with the rest of the party's privilege. The Benthamic utterances which led to this are typified in the following passage:

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. VII, c. VI (Bowring's ed. vol. VII, pp. 193 ff.): "When the article of written evidence, which the party in question stands in need of, happens to be in the hands of a party on the other side; when an instrument which a plaintiff (for example) stands in need of, happens to be in possession of the defendant, the sort of shift that has been made is truly curious. Under a rational system of procedure, the course is plain and easy: the evidence acted upon is of the best kind imaginable. Both parties being together in the presence of the judge, the plaintiff says to the defendant, 'To make out my case, I have need of such or such an instrument,' describing it: 'you have it; have the goodness to produce it.' 'Yes,' says the defendant (unless his plan be to perjure himself,) 'and here it is'; or, 'I have it not with me at present; but on such a day and hour as it shall please the judge to appoint, I will bring it hither, or send it to you at your house, or give you access to it in mine.' Under the technical system, no such meeting being to be had, no such question can at any such meeting be put. But, at the trial (viz. under the common-law, alias non-equity, system, of which jury trial makes a part,) at the trial, that is, after half a year's, or a year's, or more than a year's, factitious delay, with its vexation and expense, — then it is, that, for the first time, a chance for procuring the production of a necessary instrument may be obtained. . . . Under the name of a *notice*, a sort of requisition in writing calling upon him to exhibit it, may be, and every now and then is, delivered. Of this notice to exhibit the instrument, what is the effect? That the defendant is under any obligation to exhibit it? No such thing. To produce any such effect would require nothing less than a suit in equity; whereupon the instrument would be exhibited or not; and if exhibited, not till the end of the greatest number of years to which the defendant (having an adequate interest) has found it in his power to put off the exhibition of it. To have enabled the party thus far to obtain justice without aid from equity, would have been robbing the Lord Chancellor and the Master of the Rolls, and the swarm of subordinates of whose fees the patronage part of their emolument is composed. What then is the effect? Answer:

[5] Quoted *ante*, § 2217.

that, after this notice, if that best evidence which is asked for be not obtainable — not obtainable, only because those on whom it depends do not choose it should be obtained, — what is deemed the next best evidence that happens to be in the plaintiff's possession is admitted. . . . Good, all this, as far as it goes, — when so it is that a man's good fortune has put into his hands any such makeshift evidence. But if not, what in that case becomes of the notice? In that case, the wrongdoer triumphs; the party who is in the right loses his right, whatever it may be; and so the matter ends."

There could be no question about the need for reform. Every argument that was maintainable for compulsory oral disclosure (*ante*, § 2218) applied with double force to the production of writings. There might be a doubt as to the conditions for requiring the discovery of evidence before the time of the trial; that involved the principle of preventing unfair surprise and promoting speedy settlement of controversies (*ante*, § 1847). But there could be no doubt that at the trial itself, the party-opponent should be placed upon the same footing with witnesses in general; for the testimonial duty to disclose all facts within one's knowledge was particularly emphatic for the very party to the controversy.

By the middle of the 1800s,[6] *statutes* began to be passed, in nearly every jurisdiction, effectually annulling the common-law privilege and providing a means for compelling disclosure. These statutes, like those compelling the opponent's oral testimony (*ante*, § 2218), of which indeed they were the historical associates, either directly required production at the trial, or authorized inspection before trial, in the manner of a bill of discovery, or made both these provisions. The effect was to destroy the common-law privilege entirely, except as far as the limitations of the chancery rule for discovery were in some statutes maintained.[7]

[6] Earlier than this, in some States, *e. g.* in Vermont: Durkee *v.* Leland (1832), cited *supra*, note 2.

[7] These statutes, and the questions that arise thereunder, have been already quoted in full (*ante*, § 1859), and need not be again set out here. The following citations of them will suffice:

ENGLAND: 1851, St. 14 & 15 Vict. c. 99, § 6.

CANADA: *Alta.* Rules of Court 1914, Nos. 238–241, 364–376; *B. C.* Rules of Court 1912, Rules 343–370*t*; *Man.* Rev. St. 1913, c. 46, Rules 424–441; *N. Br.* Consol. St. 1903, c. 111, §§ 240–255, c. 112, §§ 72–80; *Newf.* Consol. St. 1916, c. 83, Ord. 28; *N. W. Terr.* Consol. Ord. 1898, c. 21, Rules 191–200, 207, 208; *N. Sc.* Rules of Court 1900, Ord. 30, Rules 12–22; *Ont.* Rules of Court 1914, Rules 348–353, 274; *P. E. I.* St. 1873, c. 22, § 244; St. 1853, c. 12, §§ 1, 9; *Yukon:* Consol. Ord. 1914, c. 48, Rules 201–210.

UNITED STATES: *Fed.* Rev. St. 1878, § 724, Code 1919, § 1361; *Ala.* Code 1907, § 4058; *Alaska:* Comp. L. 1913, § 1322; *Ariz.* Rev. St. 1913, §§ 1759, 1760; *Ark.* Dig. 1919, §§ 4137–4141; *Cal.* C. C. P. 1872, § 1000; 1902, Morehouse *v.* Morehouse, 136 Cal. 332, 68 Pac. 976 (party compelled to produce documents in her control, and to answer questions as to their possession, under C. C. P. § 1000); *Colo.* Comp. St. 1921, § 1774, C. C. P. § 390; *Col.* (*Dist.*) Code 1919, § 1072; 1901, District of Col. *v.* Bakersmith, 18 D. C. App. 574, 580 (expounding the procedure against a municipal corporation); *Conn.* Gen. St. 1918, §§ 5764–5769; *Del.* Rev. St. 1915, § 4228; *Fla.* Rev. Gen. St. 1919, §§ 2626, 2733; *Ga.* Rev. C. 1910, §§ 5837–5842; 1904, Carrington *v.* Brooks, 121 Ga. 250, 48 S. E. 970 (Code applied); 1905, Macon *v.* Humphries, 122 Ga. 800, 50 S. E. 986 (a production under order is a waiver of the right to object to an improper order); *Haw.* Rev. L. 1915, §§ 2591, 2592; *Ida.* Comp. St. 1919, § 7193; *Ill.* Rev. St. 1874, c. 51, § 6; c. 110, § 20; 1894, Lester *v.* People, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004 (scope of documents producible, considered); *Ind.* Burns' Ann. St. 1914, §§ 502, 503; *Ia.* Code 1897, §§ 4654, 4655; Comp. C. 1919, §§ 7361, 7362; *Kan.* Gen. St. 1915, § 7269; *La.* C. Pr. 1900, §§ 140, 473; *Me.* Rev. St. 1916, c. 87, § 24; *Md.* Ann. Code 1914, Art. 75, § 99; *Mass.* Gen. L. 1920, c. 231, §§ 7, 32, 38, 61–67; *Mich.* Comp. L. 1915, §§ 12025–

(*a*) Under the principle of these statutes, it has usually and properly been held that the simple method of *subpœna* 'duces tecum' (which was indeed the earliest proceeding for this purpose),[8] instead of the more formal motion to produce, may be used for compelling production of documents by the party-opponent at the trial.[9] The principles applicable generally to the subpœna 'duces tecum' have been already examined (*ante*, §§ 1894, 2200).

(*b*) When the subpœna is returned with the documents before trial begins, a question arises whether the documents may be *impounded* pending their use in evidence (*ante*, § 2200).

(*c*) In derogation of the general statutes abolishing a party's privilege, a few modern statutes provide an exemption for records or entries *required by law to be kept*, e. g. *employer's records* of injuries to employees. The policy of these statutes is to encourage the party to keep the records for use by

12027; *Minn.* Gen. St. 1913, § 8447; *Miss.* Code 1906, § 1003, Hem. § 723; *Mo.* Rev. St. 1919, §§ 1374, 1378, 5411; *Mont.* Rev. C. 1921, § 9771; *Nebr.* Rev. St. 1922, §§ 8901, 8902; *Nev.* Rev. L. 1912, § 5416; *N. J.* Comp. St. 1910, Practice, §§ 142, 143; *N. Mex.* Annot. St. 1915, §§ 4130, 4215–4217, 4245; *N. Y.* C. C. P. 1877, §§ 803–809, C. P. A. 1920, §§ 325–328, 411–414; *N. C.* Con. St. 1919, §§ 1823, 1824; 1906, Whitten *v.* Western U. Tel. Co., 141 N. C. 361, 54 S. E. 289 (telegram in possession of counsel on trial, compelled to be produced without prior notice, under Code 1883, § 1373, Rev. 1905, § 1657); *N. D.* Comp. L. 1913, § 7861; *Oh.* Gen. Code Ann. 1921, §§ 11551–11554; *Okl.* Comp. St. 1921, §§ 587, 634, 635; *Or.* Laws 1920, § 533; *Pa.* St. 1798, Feb. 27, Dig. 1920, § 10296; *R. I.* Gen. L. 1909, c. 292, § 50; *S. C.* C. C. P. 1922, § 665; *S. D.* Rev. C. 1919, § 2712; *Tex.* Rev. Civ. St. 1911, § 7814 (specially stringent provisions for investigations into trusts and trade-conspiracies); *Va.* Code 1919, § 6237; *Wash.* R. & B. Code 1909, § 1262; *W. Va.* Code 1914, c. 130, § 43; *Wis.* Stats. 1919, § 4183; 1919, Kellner *v.* Christiansen, 169 Wis. 390, 172 N. W. 796 (plaintiff not allowed to require production by the defendant of a report of an automobile injury, made by defendant to his insurer; the opinion cites as authority Lehan *v.* R. Co. and Bell *v.* M. E. R. & L. Co., *post*, § 2319, which were cases of statements made *to* the defendant by witnesses or agents, not cases of statements made *by* defendant himself to a third person; the astonishing novelty is thus introduced of nullifying the statute and exempting a party from producing his own documentary admissions); *Wyo.* Comp. St. 1920, §§ 5855–5858.

[8] Langdell, Summary of Equity Pleading, § 166; and *ante*, § 2200.

[9] 1891, Edison El. L. Co. *v.* U. S. El. L. Co., 44 Fed. 294, 45 id. 55; 1911, American Lithographic Co. *v.* Werckmeister, 221 U. S. 603, 31 Sup. 676 ("subpœnas 'duces tecum' may run to parties, as well as to others," and U. S. Rev. St. 1878, § 724, does not alter this); 1906, Banks *v.* Connecticut R. & L. Co., 79 Conn. 116, 64 Atl. 14 (under Gen. St. 1902, § 710, Gen. St. 1888, § 1099, cited *ante*, § 2218, n. 5, making an opponent compellable "as other witnesses," production of documents at the trial on motion is included; and such production at the trial is not "set about by the same limitations" as discovery of documents before trial under Gen. St. 1902, § 732, Gen. St. 1888, § 1062, allowing discovery, in its original phrasing, "as a court of equity might order"; such production may be obtained either by subpœna 'duces tecum' or by motion for an order during trial; good opinion by Prentice, J.); 1853, Bonesteel *v.* Lynde, 8 How. Pr. N. Y. 226, 231 (the object of the statute was "to place a party to an action in the same plight and condition with any other witness who is not a party, in relation to giving evidence at the instance of his adversary"); 1862, People *v.* Dyckman, 24 How. Pr. 222, 225; 1876, Smith *v.* McDonald, 50 How. Pr. 519; 1872, Murray *v.* Elston, 23 N. J. Eq. 212 ("Whoever before the statute could be a witness could be compelled by a subpœna 'duces tecum' to attend the trial with the required instrument . . .; the language of the statute removes all disabilities and makes all witnesses alike").

Undecided: 1894, Kirkpatrick *v.* Pope Mfg. Co., 61 Fed. 46, 49 (for actions at law).

Yet, for obtaining *inspection before trial* (*ante*, § 1859), a motion may be the more proper proceeding, since the conditions may be different: 1863, Woods *v.* DeFiganiere, 16 Abb. Pr. 159; 1876, Smith *v.* McDonald, 50 How. Pr. 519.

So also the original's production may be compelled without subpœnas, if it is *in court*, and the demandant is not relegated to secondary evidence: 1908, Kincaide *v.* Cavanaugh, 198 Mass. 34, 84 N. E. 307.

Compare the reverse question, *ante*, § 2200 (whether an order to produce on motion is appropriate for a third person).

administrative agencies of the government; for this purpose the party is given assurance that the record will not be used against him in ordinary litigation. This virtually creates a privilege for *confidential communications*, considered *post*, § 2377.

(*d*) From this common-law privilege, abolished by statute, the following principles affecting the production of documents are to be discriminated: (1) The right to *inspect an opponent's documents before trial* (*ante*, §§ 1857–1859); (2) the permission to use a *copy*, if upon the *opponent's failure to produce after due notice* (*ante*, §§ 1199–1210); such a notice never had any compulsory effect, but merely served as an excuse for resorting to a copy; (3) the evidential *inference as to the contents*, from the opponent's *failure to produce* (*ante*, § 291); (4) the presumption of *authenticity*, resulting from *production by an opponent under claim of title* (*ante*, §§ 1297, 1298, 2132); (5) the penalty of *excluding a document*, or of directing a *nonsuit* or *default*, when not produced or shown on demand (*ante*, § 1859*e*); (6) the right to use the *whole of a document*, when *produced on demand and inspected* by the party calling for it (*ante*, § 2125); (7) the privilege to withhold documents constituting *communications between client and attorney* (*post*, § 2307).

§ 2220. **Same**: (*c*) **Corporal Exhibition.** (A) The duty to bear witness to the truth, by whatever mode of expression may be appropriate, includes necessarily the duty to exhibit the physical body, so far as the ascertainment of the truth requires it (*ante*, §§ 2194, 2216). When a civil party's privilege at common law is abolished, why does he not come within this application also of the general testimonial duty, and become compellable to disclose to the tribunal such facts as are ascertainable by inspection of his body?

There is no logical escape from this consequence. The only objection of principle could be that, since the statutory changes affected in terms only the party's oral testimony and the documents possessed by him, his privilege remained as to other forms of testimony. This objection might well be answered by appealing to a liberal interpretation of the principle of these statutes, whose object, as often judicially declared, was "to place a party to an action in the same plight and condition with any other witness who is not a party." But it is not even necessary to resort to this answer; for, as it happens, the common law, while maintaining the civil opponent's privilege as to documents and oral testimony, did *not* recognize it in the particular respect of corporal exhibition; so that there was here nothing to abolish. In other words, the statutes expressly abolished that only which was before then plainly established; and no argument can be drawn from the statutes' failure to mention this other form of the privilege, because in this other form it had never become established.

This prior absence of a privilege is to be gathered from two or three indubitable classes of instances. The circumstance that none others are recorded proves no more than that it had never arisen otherwise for adjudication, and does not alter the fact that in the extremest sort of instance, where with

some plausibility a privilege might have been claimed, it was never sanctioned, and that the Courts conceived themselves to have the power, and were ready enough to exercise it, whenever truth and justice required.

(1) The first of these instances was the *writ 'de ventre inspiciendo,'* available to facilitate the proof of heirship, whenever a supposititious birth was to be feared; it is thus described by the fathers of the profession:

1629, Sir *Edward* COKE, Commentary upon Littleton, 8 *b*: "When a man having lands in fee simple dieth, and his wife soon after marrieth againe, and faines herself with child by her former husband, in this case, though she be married, the writ 'de ventre inspiciendo' doth lie for the heire. . . . [But the heire apparent during the auncestor's life cannot have this writ, for divers causes, viz.,] fourthly, the inconvenience were too great if heires apparent in the life of their auncestor should have such a writ to examine and try a man's lawful wife in such sort as the writ 'de ventre inspiciendo' doth appoint; and [= for] if she should be found to be with child, or suspect, then she must be removed to a castle and there safely kept until her delivery, and so any man's wife might be taken from him against the laws of God and man."

1736, *M. Bacon*, Abridgment of the Law, "Bastard," A: "To prevent this doubtfulness in heirs, and to hinder the wife from putting false children upon her deceased husband, the law hath provided the writ 'de ventre inspiciendo' for the husband's heir; and if the wife be found with child, or suspected to be so, she must be removed to a castle and there safely kept till her delivery; and by this writ the heir may take her away from her second husband; but it lies not for the heir apparent, who hath no interest in the estate, in the life of the ancestor. This power of removing the relict of the ancestor to a castle, in case she really is or is suspected to be with child, seems only to be used where the woman still continues unmarried; for if she takes another husband, and the sheriff returns that he caused her to be searched by such women and found her to be 'ensient,' the course seems to be this, viz., for the husband to enter into a recognizance that she shall not remove from the house where they then inhabit; after which a writ is to be awarded to the sheriff to cause her to be viewed every day till her delivery, by two at least of the said women returned by him, and that three or more of them shall be present with her at her delivery."

The compulsory nature of this inspection was never doubted; and its firm place in our law is shown by the six centuries of time through which the employment of the writ persisted.[1]

§ 2220. [1] *England: Circa* 1260, Bracton, De Legibus, f. 69 (the various writs set out); Britton, f. 165 *b* (the procedure expounded); Registrum Brevium, 4th ed., 1687, f. 227 (writ set out); 1310, Batecoke *v.* Conlyng, Y. B. 3 Ed. II, No. 24 (dower; inspection of widow by judges to determine age); 1597, Willoughby's Case, Cro. Eliz. 566, Moore 523 (example of a writ granted against a widow not re-married); 1625, Theaker's Case, Cro. Jac. 656 (example of a writ granted against a widow who re-married within a week); 1731, Ex parte Aiscough, 2 P. Wms. 591 (example of a writ against a widow not re-marrying; the writ held "to be of common right," though no strong grounds for suspecting fraud were shown); 1786, Ex parte Bellet, 1 Cox Ch. 297 (writ grantable equally to a devisee by will as to an heir-at-law; "where there is 'eadem ratio,' there should be 'eadem lex'"); 1792, Re Brown, Ex parte Wallop, 4 Bro. Ch. C. 91 (writ granted against a widow re-married; writ not demandable of right, but only "wherever the justice of the case requires it"; here a hesitation, because the property was settled by will of a stranger in tail-male upon such child as the woman might have); 1845, Re Blakemore, 14 L. J. Ch. N. S. 336 (writ granted to persons entitled to remainder of personalty-trust, on a petition suggesting that the representations as to pregnancy were false); an instance of the resort to a jury of matrons occurred as late as 1879, before Mr. J. Denman; in this case he in effect directed them to accept the testimony of the expert witness: 14 Law Journ. 439.

United States: 1689, Anon., Pa. Col. Cas. 53 (fornication and bastardy).

(2) In the appeal of *mayhem* — the historical predecessor of the modern action for personal injury — an inspection of the plaintiff's body by Court, jury, and witnesses, to verify the maim, was demandable by the defendant.[2]

(3) On a bill for *divorce*, alleging *impotency* as the cause, it has always been regarded as lawful and proper to compel the party-opponent to submit to inspection for ascertaining the fact:[3]

1820, Sir *William Scott* (Lord STOWELL), in *Briggs* v. *Morgan*, 2 Hagg. Cons. 324, 329: "The usual mode of proof [of impotence, *i. e.* by inspection] is without question liable to strong objections on the ground of indelicacy; but it is the only effectual mode of proof, and the Court has already observed that it cannot, from feelings of delicacy alone, turn aside from it, if necessary, for such a result."

1881, Mr. *Joel Prentiss Bishop*, Marriage and Divorce, 6th ed., II, §§ 590, 591: "In proper cases, to aid the proofs of impotence, the Court appoints professional persons to examine the private parts of the parties and report to it whether or not they are severally capable of marriage-consummation, and whether or not the woman presents indications of her having had connection with man. It requires them to submit to such examination. The examiners are under oath, and are 'quasi' officers of the tribunal for the purpose. This is termed inspection of the person. The parts concerned in this controversy being always and properly concealed from public observation, if there was no method by which inspection could be compelled, justice would in many instances fail. Therefore, in England, Scotland, France, and probably every other country where this impediment to marriage is acknowledged, the Courts have required the parties, when necessary, to submit their persons to such an examination. . . . The necessity for this proceeding is in our States precisely the same as in England whence our laws are derived. Consequently it is adapted to our situation and circumstances; and, within the established rules, it should

[2] 1736, Matthew Bacon, Abridgment, "Trial" (A), 2, Amer. ed. 1854, vol. 9, p. 554 ("In an appeal of mayhem, the Court may at the prayer of the defendant, try, upon inspection of the part, whether there be a mayhem. . . . If the Court, upon inspecting the part in an appeal of mayhem, be doubtful whether there be a mayhem, a writ may be awarded to the sheriff, to return some able physicians and surgeons for the better information of the Court. . . . If the Court, after having inspected and receiving other evidence, be still doubtful, it has a power of refusing to determine the matter in question, and may send it to be tried by a jury," the old-fashioned "appeal" not being a jury-issue ordinarily); and authorities cited *ante*, § 1152, n. 3.

[3] *Accord: Eng.* 1613, Countess of Essex's Case, 2 How. St. Tr. 785, 803 (on the Countess' libel, charging the Earl's impotency, the Court ordered an inspection of herself by a committee of midwives and matrons; which was had); 1738, Oughton, Ordo Judiciorum, tit. 217, p. 320; 1820, Briggs *v.* Morgan, 2 Hagg. Cons. 324, 329 (quoted *supra*); 1905, W. *v.* S., Prob. 231 (order of inspection made, but not obeyed).

U. S. 1859, Anon., 35 Ala. 226, 228 (trial Court's discretion refusing it, affirmed); 1889, Anon., 89 Ala. 291, 7 So. 100 (submission to examination by plaintiff and defendant, required); 1883, Page *v.* Page, 51 Mich. 88, 16 N. W. 245 (divorce for cruelty and non-support; compulsory examination of defendant by physicians, apparently unnecessary and without authority; testimony of examiners excluded); 1919, Bolmer *v.* Edsall, 90 N. J. Eq. 299, 106 Atl. 646 (nullity for fraud; the Court may order inspection of defendant to ascertain whether marriage was consummated); 1836, Devanbagh *v.* Devanbagh, 5 Paige N. Y. 554, 558 (power of ordering inspection recognized); 1841, Newell *v.* Newell, 9 Paige N. Y. 25 (same); 1862, LeBarron *v.* LeBarron, 35 Vt. 364, 368 (general power to order examination, affirmed).

So also for other issues of chastity, etc., in divorce: 1905, Morales *v.* Rivera, 8 P. R. 442 (divorce; for unchastity prior to marriage, the husband had sent his wife back to her parents, and she now sued for divorce; the plaintiff having been examined for virginity by five physicians at her own request, all of whom agreed as to her virginity, held that a further examination by the judge should not be required).

For further details, see an article by Mr. D. M. Cloud, "Physical Examination in Divorce," 35 Amer. Law Rev. 698 (1901).

be deemed a part of our unwritten law. . . . The result is that it is acknowledged in every State from which we have decisions, except Ohio, and it may well be deemed to be American doctrine."

(4) A person sought to be restrained as *insane* is customarily subjected to medical inspection by order of the Court; [4] and no one has ever claimed that there was a privilege against such an inspection, or that such orders transgressed the bounds of judicial power or propriety. This principle has received further extension, by modern public health statutes, to persons believed to be suffering from *contagious diseases*, — in particular, *leprosy* [5] and *venereal disease*.[6] In *juvenile courts* (where under the enlightened type of procedure

[4] Cases cited *ante*, § 1160. The following statutes carry out the principle: *Cal.* Pol. C. §§ 2153, 2186 (physicians "must make a personal examination" of a person brought for committal as insane); *Ga.* Rev. C. 1910, § 3092 (commission in lunacy shall "examine by inspection the person"); *Ida.* Comp. St. 1919, § 1181 (commitment of insane; physician "must make a personal examination of the alleged insane person"); § 1222 (similar, for commitment of feeble-minded or epileptic); *Kan.* Gen. St. 1915, § 9600 (judge may require "personal examination" of alleged insane person by physicians); *Mich.* Comp. L. 1915, § 1324 (committal to insane asylum; the certifying physicians are "empowered to . . . make such personal examination of him," etc.); § 1546 (similar for committal of feeble-minded, etc.); *R. I.* Gen. L. 1909, c. 96, §§ 1, 17 (commissioners may have "personal examination" of alleged insane person); *S. D.* Rev. C. 1919, § 10071 (county board of insanity shall appoint a physician to "make a personal examination . . . touching the actual condition" of a person sought to be committed as insane); *Va.* Code 1919, § 1017 (physicians may make "personal examination" of alleged insane, etc., person).

In the statutes cited *ante*, § 2090 (expert witnesses required for committal of the insane), a few additional provisions may be found.

[5] *Cal.* Pol. C. 1872, § 2955 (State commissioner of immigration, to determine leprosy, etc., of immigrant, must make "personal inspection and examination of all persons so arriving"); § 3018 (similar, for County quarantine-officer); § 2979 (State board of health may examine "persons, places, and things"); *Haw.* Rev. L. 1915, § 1097 (committal of leper; the alleged leper may be examined by physicians).

So also for *contagious or infectious disease in general:* 1922, People ex rel. Barmore *v.* Robertson, 302 Ill. 422, 134 N. E. 815 (order of State board of health, quarantining petitioner in her own home, because of being a typhoid-carrier, held valid; here the party had submitted to analyses).

[6] These statutes are of two different sorts: (1) for examining persons already convicted of an offense; (2) for examining a person suspected of having the disease, with a view to isolating him:

CANADA: *Alberta:* St. 1918, c. 50, § 3 (person committed under arrest or conviction may be examined for venereal disease); *Manitoba:* St. 1919, c. 109, § 13 (Provincial board of health may provide for examining "persons suspected of being infected with venereal disease"); *Newfoundland:* St. 1921, c. 14, § 5 (every person under arrest is liable to physical examination for venereal disease); § 6 (if a person fails to consult a medical advisor after notice from the health officer based on credible information, he may be examined by an authorized medical person); *Saskatchewan:* R. S. 1920, c. 175, § 14 (person under arrest or committal for a criminal offence may be physically examined for venereal disease).

UNITED STATES: *Alabama:* St. 1919, No. 658, p. 909, § 15 (persons infected with venereal disease must report for treatment); § 16 (persons in prison shall be examined for venereal disease); *Colorado:* Comp. L. 1921, § 1079 (all health officers may "make examinations of persons reasonably suspected of being infected with venereal disease"); § 1080, as amended by St. 1921, p. 657, § 1 (all prisoners shall be so examined); *Iowa:* 1919, Wragg *v.* Griffin, 185 Ia. 243, 180 N. W. 400 (Code § 2565, and other laws, giving quarantine powers to the State board of health, held not to authorize physical examination of one suspected of having venereal disease); *Montana:* Rev. C. 1921, § 2566 (State and local health officers may "make examinations of persons reasonably suspected of being infected with venereal disease," and to require submission to treatment for cure); § 2569 (all persons confined in prison shall be so examined); *Nebraska:* 1919, Brown *v.* Manning, 103 Nebr. 540, 172 N. W. 522 (physical examination and quarantine of an inmate of a house of ill-fame having venereal disease, under a city ordinance, held lawful on the facts); *New Jersey:* St. 1918, c. 253, Mar. 4, §§ 1, 2 (medical examination for venereal

the juvenile is not treated as accused of crime, but as a ward of the State) provision is often expressly made for a medical or psychological examination.[7]

(5) For sundry other purposes — for example, *identification* — the inspection of a civil opponent's body, or some similar expedient, has been conceded to be properly demandable;[8] though, unreasonably enough, in actions for *slander of chastity* it has been thus far denied.[9]

disease may be made by board of health, of persons reported from army or navy, etc., or of "prostitutes or other lewd persons"); *North Carolina:* Con. St. 1919, § 4362 (prostitution, etc.; "the Court may order any convicted defendant to be examined for venereal disease"); *North Dakota:* St. 1919, Mar. 7, c. 190, § 5 (prostitution offences; "the Court may order any convicted defendant to be examined for venereal disease," when deciding upon parole or probation); *Oklahoma:* St. 1919, c. 17, Mar. 19, § 2 (infected person must "submit to examination and treatment" for venereal disease); § 9 (prescriptions and records here provided for "shall not be exposed to any person" except health authorities, or "when properly ordered by a court of competent jurisdiction to be used as evidence"); *South Dakota:* St. 1919, Feb. 21, c. 284 (all persons confined in prison shall be examined for venereal disease, and treated if infected); *Utah:* St. 1919, Mar. 20, c. 52 (municipal health officers may examine persons suspected of being infected with venereal disease; also imprisoned persons); *Washington:* 1919, Mar. 14, c. 114 (health authorities may "make examination of persons reasonably suspected of being infected with venereal disease," etc., so as to require treatment); *West Virginia:* St. 1921, c. 138, §§ 5, 16 (venereal disease; certain suspected persons may be examined "to ascertain whether in fact said party is infected"); *Wyoming:* St. 1921, c. 160, § 24 (venereal disease; health officers are empowered "to make examinations of persons reasonably suspected of being infected," with a view to suppressing the disease).

For the privileges protecting *compulsory reports of a disease* and *communications to a physician*, see *post*, §§ 2377, 2380.

Distinguish a compulsory physical examination imposed by law as a basis for *medical treatment* and not for evidential purposes.

[7] *N. C.* Cons. St. 1919, § 5056 (juvenile court; Court may "cause any child within its jurisdiction to be examined" by physicians); *Oh.* Gen. C. 1921, § 1652–1 (juvenile court; child "may be subjected to a physical and mental examination by a competent physician"); *S. D.* Rev. C. 1919, § 9998 (juvenile court "may require such child to be examined by the county physician, if of the same sex"; if not, by a physician designated); *Va.* Code 1919, § 1910 (delinquent, etc., children "may be subjected to a physical and mental examination" by a physician).

So also for the determination of *age:* N. Y. Laws 1882, c. 340, C. P. A. 1920, § 334, Cons. L. 1909, Penal § 817 (Court may order personal examination of child by physician to determine age); compare § 1154, *ante*.

[8] *England:* 1866, Lloyd *v.* Lloyd, L. R. 1 P. & D. 222 (divorce, with recrimination for adultery; order made for plaintiff to attend or give her address, in order that defendant's witnesses might identify her); 1871, Tichborne *v.* Lushington, Heywood's Rep. 398 (the presence of certain marks on the plaintiff's body being important for identification, the defendant claimed the right to have his surgeons inspect the plaintiff, alleging that "applications of this kind are granted every day in cases of railway accidents"; Chief Justice Bovill conceded the correctness of this assertion, but as the plaintiff objected merely that the application for such examination was prematurely made, the decision was reserved).

United States: 1893, Smith *v.* King, 62 Conn. 515, 521, 26 Atl. 1059 (plaintiff compellable to write his name, on demand of opponent, for comparison; but in trial Court's discretion); 1906, Seaboard Air Line R. Co. *v.* Scarborough, 52 Fla. 425, 42 So. 706 (ejection from a train; a witness for the defendant having testified that he saw a passenger ejected at the time and place in question, the defendant requested that the plaintiff be produced in court for identification, and the trial Court refused; held, that though the trial Court might have discretionary power to do this the defendant could have attained his purpose by process of subpœna, and was not injured); 1890, Rice *v.* Rice, 47 N. J. Eq. 559, 21 Atl. 286 (divorce; the defendant in chancery was held not compellable at the master's order to remove the veil from her face so as to be identified by a witness; but the ruling was based on the limited function of a master under the local statute; conceding that the possession of such a power by "every court of judicature as an indispensable attribute . . . would not seem in any degree questionable").

Compare the rulings *ante*, § 2216 (third person as witness).

[9] 1921, Mann *v.* Bulgin, 34 Ida. 714, 203 Pac. 463 (slander by charging that the plaintiff had venereal disease; an order appointing three physicians to examine the plaintiff, on a plea of truth, the plaintiff refusing to submit, held invalid; unsound); 1889, Kern *v.* Bridwell, 119 Ind. 226, 21 N. E. 664 (slander by charging the plaintiff with unchastity and abortion; the

(6) A privilege has been claimed, and in a few jurisdictions acknowledged, in a class of cases in which, above all, there is most detriment and least service in its existence, namely, actions for *corporal injuries*.

Why should all analogies fail here, and an exemption be accorded to a plaintiff seeking to conceal from the tribunal the true nature and extent of his injury? Of what little argument has ever been advanced in defence of such a privilege, the following passage is representative:

1890, GRAY, J., in *Union Pacific R. Co.* v. *Botsford*, 141 U. S. 250, 11 Sup. 1000: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country."

On such a basis of assumption, indeed, not even Iago's conclusion was more lame and impotent. "To lay bare the body, without lawful authority," we are told, "is a trespass." But this is wholly beside the point; it is precisely *with* lawful authority, to wit, that of the Court, that the plaintiff is to be inspected. Moreover, there can be no fair question as to the Court's authority and power;[10] for the immemorial practice 'de ventre inspiciendo' and in divorce establishes at least the existence of this power. Again, the "inviolability of the person" from trespasses is appealed to. But when were there not recognized exceptions? If an assault is committed, the person attacked may defend himself by laying hands on the assailant; in the present case the defendant is merely asking a similar liberty, by a peaceable 'molliter manus imponere,' to defend himself against fraud. So also an innocent person may be arrested, restrained, and searched, in the ordinary process of the Courts, for purposes of discovering crime and preventing flight. In truth, there is no "inviolability of the person" in any absolute sense; and an appeal to it is merely false rhetoric. We are further told that there are no instances of exercising this power in civil cases, except in a few cases "coming down from ruder ages, now mostly obsolete in England, and never introduced into this country." This slur upon the inherited principles of "ruder ages" would be equally applicable to the fundamental clauses of Magna Carta and the Bill of Rights — documents, be it noted, which an illustrious Court has been known to treat, in other connections, with even over-ready respect for

trial Court's refusal to order a medical inspection of the plaintiff, held proper, as against a defendant not able to prove the truth of his statement by other evidence).

[10] This was the chief objection in the Illinois, Massachusetts, and later New York cases, cited *infra*. It seems to be the least meritorious of all.

their antiquity.[11] Moreover, the significance of the writ 'de ventre' — if that is the "rude" expedient referred to — is simply this, that in an epoch and a country where landed rights were a paramount and constant concern in litigation, the Courts were not deterred by a false delicacy from taking such measures as common sense required for determining the truth;[12] and the moral is that, in our modern community, where the various mechanical applications of natural force have added a thousand dangers to life and limb, and where actions for personal injuries now fill the prominent place once occupied by 'formedon in reverter' and 'ejectio firmæ,' the same common sense of our fathers should be invoked to apply the same expedients amid our changed conditions. One might as well have argued, after Stephenson's steam monsters had just begun to travel their iron roads, that a person who was run over by a negligent driver of the new-fangled locomotives, would have no action on the case for his injuries, because there were no precedents, forsooth, except for injuries by ox-carts and hackney-coaches. There is and will be no end to the variety of frauds invented; and it will be an ill day for justice when the Courts cease to meet new frauds by new applications of old remedies. Quite apart from the general impolicy of granting to a party the license to conceal truth by any form of refusal, there is, in this class of cases, the added consideration that corporal injuries are to-day notoriously a subject of frequent fraud and misrepresentation; so that the privilege to withhold the exhibition of the alleged injury may amount in such cases to nothing less than a judicial license for fraud.

These considerations, together with the absurdity of a judicial declaration that a Court lacks the power to control those who seek for their fraud the very aid of the law itself, have weighed emphatically with our Courts and Legislatures. Subject to certain restrictions not affecting the fundamental principle, they have repudiated the existence of such a privilege in actions for *personal injuries* (including *malpractice*):[13]

[11] As, for example, in Thompson *v.* Utah, 1897, 170 U. S. 343, 18 Sup. 621, where the long exploded notion, that trial by jury is sanctioned in Magna Carta, was repeated and made a reason for holding unconstitutional a trial by less than twelve.

[12] As for the "obsolete" date of these practices, and the suggestion that they were "never introduced" into our own country, it is sufficient to point out that the above records of precedents demonstrate the contrary.

[13] The cases and statutes are as follows; compare the citations *ante*, § 2216 (third person's body inspected):

ENGLAND: 1883, Rules of Court, Order 50, Rules 3–5 (quoted *ante*, § 1163); 1868, St. 31 & 32 Vict. c. 119, § 26, Railway Act ("An order may be made, directing that a person injured by a railway accident be examined by a duly qualified medical practitioner, not being a witness on either side").

CANADA: *Alberta:* Rules of Court 1914, No. 196 (Court may order inspection of "any person . . . whose inspection may be material," by the jury or by the party or his witnesses); No. 251 (like Ont. R. S. c. 56, § 70);
British Columbia: Rules of Court 1912, No. 370 *s* (like Ont. R. S. c. 56, § 70);
Manitoba: Rev. St. 1913, c. 46, Rule 422 (similar to Ont. R. S. c. 56, § 70);
Ontario: 1891, Reily *v.* London, 14 Ont. Pr. 171 (order for inspection of the plaintiff, a woman, by the defendant's surgeons, refused, on grounds similar to those in U. S. *v.* Botsford; yet "there may no doubt be cases in which, upon the ground of plain and palpable fraud," the trial might be postponed until the plaintiff consented); 1891, Ontario St. 54 Vict. c. 11, R. S. 1914, c. 56, § 70 (ensuing upon the preceding decision: "In any action brought to recover damages or other compensation for or

1882, GUNNISON, P. J., in *Hess* v. *R. Co.*, 7 Pa. Co. Ct. 565, 566 (the plaintiff complained of an injury of the spine; and the defendant asked for an order of physical examination by means of electrical tests, etc.): "To grant the order prayed for is but to apply

in respect of bodily injury sustained by any person, a judge of the court wherein the action is pending, or any person who by consent of parties or otherwise has power to fix the amount of such damages or compensation, may order that the person in respect of whose injury, damage or compensation is sought, shall submit to be examined by a duly qualified medical practitioner, who is not a witness on either side, and may make such order representing such examination, and the costs thereof, as he may think fit; provided always that the medical practitioner named in such an order shall be selected by the judge making the order, and provided, moreover, that such medical practitioner may afterward be a witness on the trial of any such action unless the judge before whom the action is tried shall otherwise direct"); 1895, Clouse *v.* Coleman, 16 Ont. Pr. 541 (statute applied; the plaintiff held not compellable to answer questions put by the medical examiner at the time of inspection, but only to submit to inspection);

Saskatchewan: R. S. 1920, c. 39, § 32 (like Ont. R. S. c. 56, § 70).

UNITED STATES: *Federal:* 1890, Union Pacific R. Co. *v.* Botsford, 141 U. S. 250, 11 Sup. 1000 (action for injuries by concussion of the brain, etc.; order requiring the plaintiff to submit to an examination in a proper manner, the defendant alleging that he had no other evidence of the plaintiff's condition, refused; the plaintiff's person is to be maintained inviolate, and no inspection can be compelled; the precedents of impotence and 'de ventre' conceded, but treated as obsolete or not based on general principle; quoted *supra*); 1897, Illinois Cent. R. Co. *v.* Griffin, 25 C. C. A. 413, 80 Fed. 278 (rule in the Botsford case applied); 1899, Camden & S. R. Co. *v.* Stetson, 177 U. S. 172, 20 Sup. 617 (Botsford case approved; but here the New Jersey law allowing compulsory examination was held applicable to a Federal trial there); 1905, Denver C. T. Co. *v.* Norton, 141 Fed. 599, 609 (personal injuries; the inspection cannot be ordered, but the defendant may make the request and on refusal may comment thereon); 1909, Chicago & N. W. R. Co. *v.* Kendall, 8th C. C. A., 167 Fed. 62 (rule of Botsford case held not applicable where the plaintiff had waived the privilege by showing his knees; ruling more fully stated, *ante*, § 6, n. 8).

In the Federal Congress (59th Cong., 2d Sess., 1907) a bill was favorably reported by a majority of the House of Representatives' Committee on Judiciary (H. R. 10, Report No. 7587, Feb. 9) "to authorize the courts of the United States to require a party to submit to a personal physical examination in certain cases"; but no legislative action was taken on the bill. The only new argument brought out in the minority report is that the plaintiff in such cases is in fairness entitled reciprocally to an inspection of the defendant's chattels and premises to ascertain the cause of the injury and the data of negligence. This point is well taken. There ought to be no privilege on either side. But the simple answer is that in this view the minority should have insisted on adding such a provision to the bill. Moreover, the minority report assumes that no such right of inspection is now in law available for the plaintiff Yet the authorities cited *post*, § 2221, show that such a power has been recognized in Chancery for a century, and that modern American courts of law are beginning to recognize it in personal injury cases. How amply and naturally it is employed in modern English Courts may be seen by consulting the notes to Order 50, Rule 3, in Stringer, White, & King's Yearly Supreme Court Practice;

Alabama: 1889, McGuff *v.* State, 88 Ala. 147, 152, 7 So. 35 (cases in other States noted; "the authority and soundness of these cases need not be challenged"; said 'obiter'); 1890, Alabama G. S. R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90 (personal injuries by nervous shock; order for examination of plaintiff by reputable disinterested physician, granted; the trial Court having a discretion to do so when the ends of justice require the disclosure or more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination, and when it can be made without danger to life or health and without serious pain; this phrasing is often quoted by other Courts); 1891, Alabama G. S. R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722 (prior ruling affirmed; the personnel of the experts appointed is in the trial Court's discretion); 1893, King *v.* State, 100 Ala. 85, 14 So. 878, *semble* (plaintiff in civil cases, and injured witness in criminal cases, compellable to exhibit injury to the jury, where necessary and not indecent);

Arizona: St. 1921, c. 131 (personal injuries; like S. D. St. 1921, c. 179);

Arkansas: 1885, Sibley *v.* Smith, 46 Ark. 275 (internal injuries; order for examination of plaintiff by experts chosen in equal numbers by both sides, granted; the examination is of right, but the trial Court may in discretion refuse it if other expert testimony exists); 1895, St. Louis S. W. R. Co. *v.* Dobbins, 60 Ark. 485, 30 S. W. 887 (preceding case approved); 1914, Triangle Lumber Co. *v.* Acree, 112 Ark. 534, 166 S. W. 958 (injury in a logging machine; rule applied);

California: 1907, Johnston *v.* Southern P. Co., 150 Cal. 535, 89 Pac. 348 (personal

the principle of allowing the inspection of writings, fully recognized in this State, to another species of evidence. . . . The object of a trial in Court is that substantial justice may be done between the litigants. If a defendant is denied the reasonable opportunity

injuries; power to order physical examination, affirmed);
Colorado: 1908, Western Glass Mfg. Co. *v.* Schoeninger, 42 Colo. 357, 94 Pac. 342 (corporal injury; just before trial, the defendant demanded inspection by a physician; the plaintiff refused, on the ground that the lapse of 13 months since the time of injury made it unfair; held, the trial Court erred in refusing the order for inspection; model opinion, by Maxwell, J., holding that the power exists, that the trial Court's discretion controls, that prior request should be made, that the mode and conditions are determinable by the Court, and that on refusal the action may be dismissed or stayed); 1908, Denver C. T. Co. *v.* Roberts, 43 Colo. 522, 96 Pac. 186 (corporal injury; Western G. M. Co. *v.* Schoeninger followed);
Delaware: 1898, Mills *v.* R. Co., 1 Marv. (Super.) 269, 40 Atl. 1114 (injury to a leg while on the highway; plaintiff not compellable to exhibit his leg so that a physician testifying could explain the injury);
Florida: St. 1899, c. 4719, § 1, Rev. G. S. 1919, § 4968 (in actions for personal injuries "it shall be discretionary with the trial Court, upon motion of the defendant, to require the injured party, if living, either before or at the time of the trial of the cause, to submit to such physical examination of his or her person as shall reasonably be sufficient to determine physical condition at the time of trial and the nature and extent of the alleged injuries"; "the physical examination provided shall be made by a physician to be named by the Court, in the presence of one or more physicians or attendants of the injured party, if the party so desires");
Georgia: 1889, Richmond & D. R. Co. *v.* Childress, 82 Ga. 719, 9 S. E. 602 (injuries in the chest; order for examination by physicians appointed by the Court, grantable in the discretion of the trial Court; generally, a request should be made of the plaintiff before trial); 1896, Savannah, F. & W. R. Co. *v.* Wainwright, 99 Ga. 255, 25 S. E. 622 (order refused, because not requested till too late); 1900, Bagwell *v.* R. Co., 109 Ga. 611, 34 S. E. 1018 (action by a father for loss of a minor daughter's services; her refusal after majority to submit to a physical examination, held not sufficient cause for dismissing the suit); 1917, Temples *v.* Central of Georgia R. Co., 19 Ga. App. 307, 91 S. E. 502 (personal injury; a "commission of doctors" held properly appointed);
Hawaii: 1904, Fuller *v.* Rapid Transit Co., 16 Haw. 1, 12 (personal injuries; question not decided; but in any case the Court has discretion, and the request must be made before trial); 1910, Campbell *v.* Hackfeld, 20 Haw. 245 (not decided; here the plaintiff waived a prior objection to an order for examination);
Illinois: 1882, Parker *v.* Enslow, 102 Ill. 272, 279 (action on a note for an injury to the eyes by explosion of powder substituted for tobacco in the plaintiff's pipe; order for examination of the eyes by a physician in the jury's presence, refused, because of the supposed lack of power); 1887, Chicago & E. R. Co. *v.* Holland, 122 Ill. 461, 466, 13 N. E. 145 (personal injuries; refusal of an order for an examination by two named physicians, held not a material error, since the examination was later consented to); 1891, St. Louis Bridge Co. *v.* Miller, 138 Ill. 465, 471, 28 B. E. 1091 (injury to the nervous system, kidneys, etc.; order for examination by medical experts, refused, because the necessity was not shown; general principle as to power to make the order, left undecided; no precedent cited); 1892, Joliet S. R. Co. *v.* Caul, 143 Ill. 177, 32 N. E. 389 (no power to compel submission to examination by a physician; here it was not even claimed to be necessary); 1893, Peoria, D. & E. R. Co. *v.* Rice, 144 Ill. 227, 33 N. E. 951 (exhibition of an injured member to medical experts, not compellable; general principle distinctly reapproved); 1879, Freeport *v.* Isbell, 93 Ill. 381, 385 (personal injury; the plaintiff was allowed to be asked whether he would furnish some of his urine for chemical examination as to his alleged kidney disease caused by the fall in question; "it was his duty" to produce this "best evidence attainable," and his refusal was evidence against him); 1906, Richardson *v.* Nelson, 221 Ill. 254, 77 N. E. 583 (personal injury; the Court "has no power" to compel the plaintiff to submit to a medical examination); 1907, Chicago *v.* McNally, 227 Ill. 14, 81 N. E. 23 (similar; nor can the question be asked, whether the plaintiff is willing to submit to a physical examination); 1908, Pronskevitch *v.* Chicago & Alton R. Co., 232 Ill. 136, 83 N. E. 545 (personal injury; the plaintiff having removed part of his clothes and shown his injury to the jury, this entitled the defendant to an examination "under reasonable restrictions"; held that the plaintiff's refusal to be examined out of the jury's presence was not unreasonable); 1911, People *v.* Steward, 249 Ill. 311, 94 N. E. 511 (said 'obiter' that a statute might validly change the rule);
Indiana: 1889, Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156 (malpractice by a physician; order for examination of the plaintiff by the defendant's experts, refused, the application being too late and the plaintiff consenting to an examination in the presence of experts on both sides or of the jury; the opinion acknowledging the trial Court's power and

of testing the truth of the plaintiff's allegations, who alleges an injury which can only be discovered upon an examination by experts, Courts of justice may be applied to and relied upon to assist in fraudulent and unjust recoveries upon the testimony of plaintiffs and of

discretion to make the order); 1891, Terre Haute & I. R. Co. *v.* Brunker, 128 Ind. 542, 553, 26 N. E. 178 (injury to the lungs; order for examination by medical experts, on a tardy application, held properly refused in discretion); 1891, Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 409, 28 N. E. 860 (injury by a railroad accident; order for examination of the plaintiff by surgeons appointed by the Court, refused; the power to order it, independently of statute, expressly denied); 1901, South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271 (examination held improperly refused on the facts); 1903, Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462 (inspection of a knee in court, held not improperly refused on the facts); 1920, Lake Erie & W. R. Co. *v.* Griswold, — Ind. App. —, 125 N. E. 783 (corporal injury; trial court's refusal to order physical examination, here held improper);

Iowa: 1877, Schroeder *v.* R. Co., 47 Ia. 375, 376 (injury to nerves, bowels, etc.; order for examination by physicians and surgeons; defendant is not entitled as of right, but the trial Court has discretionary power to order it; quoted *supra;* this case has been the leading one against the privilege); 1896, Hall *v.* Manson, 99 Ia. 698, 68 N. W. 922 (injury to the ankle; the testimony being conflicting, a measurement by experts in the presence of the injury was held properly demandable by the opponent; such compulsory examination not being invariably demandable, but only according as it may be useful and important; Robinson, J., dissenting, on the ground that the trial Court's refusal to order an examination was on the facts not an abuse of discretion);

Kansas: 1883, Atchison T. & S. F. R. Co. *v.* Thul, 29 Kan. 466, 468 (personal injuries; order for inspection by a medical expert of the opponent, grantable; the trial Court to exercise discretion); 1896, Southern K. R. Co. *v.* Michaels, 57 Kan. 474, 46 Pac. 938 (an examination tardily applied for, held not improperly refused in the trial Court's discretion); 1901, Ottawa *v.* Gilliland, 63 Kan. 165, 65 Pac. 252 (Court may in discretion order examination by physicians appointed by Court; good opinion by Greene, J.); 1904, Atchison, T. & S. F. R. Co. *v.* Palmore, 68 Kan. 545, 75 Pac. 509 (injury in the eyes; expert examination ordered); 1906, Dickinson *v.* Kansas C. E. R. Co., 74 Kan. 863, 86 Pac. 150 (Ottawa *v.* Gilliland followed);

Kentucky: 1898, Belt E. L. Co. *v.* Allen, 102 Ky. 551, 44 S. W. 89 (action for personal injuries; plaintiff may be compelled to submit to examination; "the conclusions which the various Courts and some of the text writers have reached are these: (1) That trial courts have the power to order surgical examination by experts of the person of a plaintiff who is seeking to recover for personal injury; (2) that the defendant has no absolute right to have an order made to that end, but that a motion therefor is addressed to the sound discretion of the Court; (3) that the exercise of that discretion will be reviewed on appeal and corrected in case of abuse; (4) that the examination should be ordered and had under the direction and control of the Court, whenever it fairly appears that the ends of justice require the disclosure or more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination, and that the examination may be made without danger to the plaintiff's life or health, and without the infliction of serious pain"); 1898, Belle of N. D. Co. *v.* Riggs, 104 Ky. 1, 45 S. W. 99 (trial Court's discretion in refusing an examination, sustained); 1900, Illinois C. R. Co. *v.* Clark, — Ky. —, 55 S. W. 699 (examination held not improperly refused in trial Court's discretion); 1902, South Covington & C. S. R. Co. *v.* Stroh, — Ky. —, 66 S. W. 177 (examination held inadmissible on the ground of an informality of procedure); 1903, Louisville R. Co. *v.* Hartlege, — Ky. —, 74 S. W. 742 (trial Court's refusal in discretion, held not improper); 1901, Louisville & N. R. Co. *v.* Simpson, 111 Ky. 754, 64 S. W. 733 (following Belt E. L. Co. *v.* Allen); 1909, Keller & B. Co. *v.* Berry, — Ky. —, 121 S. W. 1009 (examination by physicians chosen by defendant, held properly refused); 1911, Illinois Central R. Co. *v.* Beeler, 142 Ky. 772, 135 S. W. 305 (personal injury; inspection ordered; general practice as laid down in Belt E. L. Co. *v.* Allen, affirmed);

Massachusetts: 1900, Stack *v.* R. Co., 177 Mass. 155, 58 N. E. 686 (corporal injury; Court has no power to compel submission to inspection by an opposing expert witness; "we put our decisions not upon the impolicy of admitting such a power, but on the ground that it would be too great a step of judicial legislation to be justified by the necessities of the case");

Michigan: 1893, Graves *v.* Battle Creek, 95 Mich. 266, 268, 54 N. W. 757 (plaintiff's injured arm compelled to be exhibited to a physician in the presence of the jury; compulsion not proper, in the trial Court's discretion, where no necessity exists, or where it would give no material aid, or where it would be cumulative only, or where delicacy would forbid); 1895, Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616 (where the use of anæsthetics for the examination would be necessary, to order it would be an abuse of discretion);

Minnesota: 1885, Hatfield *v.* R. Co., 33 Minn.

witnesses of their own selection, whose only knowledge may be derived from declarations made by the plaintiffs for the purpose of manufacturing evidence in their own favor. Impartial justice could not be expected in such cases at the hands of juries who were not

130, 22 N. W. 176 (injury said to have rendered the plaintiff lame; order by the Court for the plaintiff to walk across the room, granted; general principle of inspection, in trial Court's discretion, apparently conceded); 1899, Wittenberg *v.* Onsgard, 78 Minn. 342, 81 N. W. 14 (submission to the X-ray photographic process, held not compellable, "until it is so well established as a fact in science that the process is harmless that the Courts will take judicial notice of it"); 1899, Wanek *v.* Winona, 78 Minn. 98, 80 N. W. 851 (in the discretion of the trial Court, physical examination may be ordered, upon reasonable application, and under proper safeguards; quoted *supra*); 1901, Aske *v.* R. Co., 83 Minn. 197, 85 N. W. 1011 (approving Wanek *v.* Winona);

Mississippi: 1914, Yazoo & M. V. R. Co. *v.* Robinson, 107 Miss. 192, 65 So. 241 (U. P. R. Co. *v.* Botsford, U. S., followed); 1914, Gentry *v.* Gulf & S. I. R. Co., 109 Miss. 66, 67 So. 849 (similar);

Missouri: 1873, Loyd *v.* R. Co., 53 Mo. 509, 512, 515 (personal injuries; order for examination by two physicians and surgeons, refused, as "unknown to our practice and to the law," and not in the Court's power); 1885, Shepard *v.* R. Co., 85 Mo. 629, 632 (spinal injuries; order asked for examination by physicians and surgeons, selected one-half by each party, these to choose another if they desire; the power held to exist, the trial Court's discretion to control; here held unnecessary, as the plaintiff had offered to consent to an examination by one person); 1887, Sidekum *v.* R. Co., 93 Mo. 400, 463, 4 S. W. 701 (personal injuries; order grantable in discretion of the trial Court); 1888, Owens *v.* R. Co., 95 Mo. 169, 177, 8 S. W. 350 (same); 1894, Haynes *v.* Trenton, 123 Mo. 326, 335, 27 S. W. 622 (the plaintiff, having voluntarily exhibited his injured leg to the jury, was held compellable to submit to examination by the defendant's expert witnesses); 1897, Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053 (personal injuries; order of medical inspection granted, and no objection raised);

Montana: 1905, May *v.* Northern P. R. Co., 32 Mont. 522, 81 Pac. 328 (personal injury; order compelling the plaintiff to submit to an examination by physicians appointed by the Court, held properly denied, mainly on the ground of lack of judicial power, following the Massachusetts Court; full review of the cases and arguments in a careful opinion by Holloway, J.);

Nebraska: 1884, Sioux C. & P. R. Co. *v.* Finlayson, 16 Nebr. 578, 588, 20 N. W. 860 (personal injuries; order for inspection by medical experts of the opponent, not granted, because not needed on the facts; general principle undecided); 1885, Stuart *v.* Havens, 17 Nebr. 211, 214, 22 N. W. 419 (personal injuries; order for inspection by medical experts of the opponent, refused, because the proposed inspectors were not to be selected by the Court); 1894, Ellsworth *v.* Fairbury, 41 Nebr. 881, 60 N. W. 336 (order appointing a board of physicians to examine the plaintiff at his house, held improperly made at chambers; whether a general common-law power exists, not decided; but "the weight of authority in this country fully sustains the power"); 1895, Chadron *v.* Glover, 43 Nebr. 732, 62 N. W. 62 (undecided; but the application for an order must be made before trial); 1915, State ex rel. Parmenter *v.* Troup, 98 Nebr. 333, 152 N. W. 748 (personal injury; order of examination by appointed physicians held proper; practice confirmed, and prior cases reviewed); St. 1921, c. 116 (metropolitan cities charter; Art. VII, § 3: claimants for personal injury shall "be subject to a personal examination by the city physician," etc.; failure or refusal "prohibits the maintaining of any action");

Nevada: 1909, Murphy *v.* Southern Pacific R. Co., 31 Nev. 120, 101 Pac. 322 (power conceded; the trial Court's discretion to control);

New Jersey: St. 1896, c. 202, Comp. St. 1910, Evidence § 19 ("On or before the trial of any action brought to recover damages for injury to the person, the Court before whom such action is pending may from time to time on application of any party therein order and direct an examination of the person injured as to the injury complained of by a competent physician or physicians, surgeon or surgeons, in order to qualify the person or persons making such examination to testify in the said cause as to the nature, extent, and probable duration of the injury complained of; and the Court may in such order direct and determine the time and place of such examination; provided this act shall not be construed to prevent any other person or physician from being called and examined as a witness as heretofore"); 1899, McGovern *v.* Hope, 63 N. J. L. 76, 42 Atl. 830 (statute applied, and held constitutional; common-law power to order examination impliedly sanctioned);

New Mexico: 1919, Holton *v.* Jones, — N. M. —, 183 Pac. 395 (action for personal injury to head and eye; the trial judge's refusal to direct a physical examination of the bodily parts referred to in the plaintiff's testimony, held erroneous; the precise rule not formulated);

New York: 1868, Walsh *v.* Sayre, 52 How. Pr. 334 (Superior Court; malpractice by a surgeon; order for the plaintiff to submit to inspection by the defendant and skilful sur-

permitted to know the truth and whose sympathies were aroused by the recitation of sufferings which could not be controverted. To permit such a practice would be to encourage perjury and properly subject Courts of justice to public contempt. On the

geons selected by him, granted, on the principle of the power of compelling discovery, as given to Courts of common law; this case was for some time a leading one on the subject); 1865, Beckwith *v.* R. Co., 64 Barb. 299, 307 (Supreme Court; right to inspection affirmed); 1880, Shaw *v.* Van Rensselaer, 60 How. Pr. 143 (Common Pleas Court; Walsh *v.* Sayre approved); 1883, Roberts *v.* R. Co., 29 Hun 154 (Supreme Court; order for inspection and examination by questions, refused; Walsh *v.* Sayre disapproved); 1884, Neuman *v.* R. Co., 18 Jones & Sp. 412 (Superior Court; order for inspection refused); 1889, McSwyny *v.* R. Co., 27 N. Y. St. R. 363, 367, 7 N. Y. Suppl. 456 (Supreme Court; order for inspection refused); 1891, McQuigan *v.* R. Co., 129 N. Y. 50, 29 N. E. 235 (Court of Appeals; order for inspection by surgeons appointed by the Court, refused, as not being within the power of the Court apart from statute); Laws 1893, c. 721, amending C. C. P. 1877, § 873, now C. P. A. 1920, § 306, and N. Y. Munic. Ct. Code 1915, § 117 (in actions for personal injury, the Court may order a physical examination of the plaintiff before trial by one or more physicians or surgeons designated by the Court, under such restrictions as seem proper; where the defendant claims ignorance of the nature of the injury, the examination is a matter of right; if the plaintiff is a female, the examiners are to be of her sex); 1894, Lyon *v.* R. Co., 142 N. Y. 298, 37 N. E. 113 (under the statute, the physical examination must always be incidental to an oral examination taken by order); 1899, Cole *v.* Fall Brook C. Co., 159 N. Y. 59, 53 N. E. 670 (common-law rule of McQuigan *v.* R. Co. affirmed for a case arising before the statute; a refusal to submit to examination does not authorize the Court to strike out the testimony of the plaintiff's witnesses; whether plaintiff could be compelled to step upon a model, held to be in the trial Court's discretion); 1921, Hoyt *v.* Brewster Gordon & Co., Sup. App. Div., 191 N. Y. Suppl. 176 (personal injury; order held lawful directing that the examining physician take a sample of plaintiff's blood for examination and analysis; enlightened opinion by Hubbs, J.);

North Dakota: 1903, Brown *v.* Chicago M. & St. P. R. Co., 12 N. D. 61, 95 N. W. 153 (personal injuries; medical examination of the plaintiff, held improperly refused; good opinion by Cochrane, J.);

Ohio: 1881, Miami & M. T. Co. *v.* Baily, 37 Oh. St. 104, 107 (order for inspection by a medical expert of the opponent, held not improperly refused on the facts; the power to make the order, affirmed, but the application must come seasonably);

Oklahoma: 1903, Kingfisher *v.* Altizer, 13 Okl. 121, 74 Pac. 107 (personal injury; plaintiff held not compellable to submit before trial to an examination; U. P. R. Co. *v.* Botsford, U. S., followed as binding on the Territorial Court); 1913, Chicago, R. I. & P. R. Co. *v.* Hill, 36 Okl. 540, 129 Pac. 13 (not decided; but Kingfisher *v.* Altizer, a Territory decision, is held to be no longer binding); 1913, Atchison, T. & S. F. R. Co. *v.* Melson, 40 Okl. 1, 134 Pac. 388 (Kingfisher *v.* Altizer followed; but this rule allows the party to be asked if he will consent); 1917, Oklahoma R. Co. *v.* Thomas, 63 Okl. 219, 164 Pac. 120 (personal injury; trial Court's refusal to direct an examination of plaintiff by defendant's experts, after he had been examined voluntarily by a board appointed by the trial Court, held not improper on the facts);

Pennsylvania: 1893, Dimenstein *v.* Richardson, 34 W. N. C. 295 (good opinion by Biddle, J., citing previous similar rulings in the lower Courts of Pennsylvania; compulsory examination held proper); 1882, Hess *v.* R. Co., 7 Pa. Co. Ct. 565, 567 (Gunnison, P. J.: "Compliance with such an order has sometimes been enforced by dismissing the plaintiff's case entirely, upon his refusal to comply; and it has been said that the refusal is a contempt of Court; . . . [but] it is sufficient, to ensure that justice be done, that the Court refuse to try the case until a compliance is had with the order"; a form of order is given here; the opinion is quoted *supra*); 1915, Cohen *v.* Philadelphia R. T. Co., 250 Pa. 15, 95 Atl. 315 (personal injury; the trial Court's refusal to order a physical examination of the plaintiff, held not improper, in discretion; "we entertain no doubt of the right of the Court" to direct that an opportunity be furnished, though "the Court cannot order a plaintiff to submit to such an ordeal against his will");

Rhode Island: Gen. L. 1909, c. 292, § 20 (in actions for "injury to the body or health, physical or mental," where the Court appoints an expert, the complainant must "submit to a reasonable examination or examinations of his body and health, physical or mental," by such expert; the action to be continued until such examination is made);

South Carolina: 1901, Easler *v.* R. Co., 60 S. C. 117, 38 S. E. 258 (physical examination of the plaintiff refused, because of no statutory power to order it);

South Dakota: St. 1921, c. 179 (personal injury; on or before the trial the Court may direct an examination of the person injured by a physician, including X-ray examination, "in order to qualify the person or persons making such examination to testify in the said cause as to

other hand, if the plaintiff's claim is meritorious, if he has sustained the injuries he complains of, he has nothing to fear from the most searching examination. His case will only be strengthened by it."

1877, BECK, J., in *Schroeder* v. *R. Co.*, 47 Ia. 375, 379: "Whoever is a party to an action in a Court, whether a natural person or a corporation, has a right to demand therein the administration of exact justice. This right can only be secured and fully respected by obtaining the exact and full truth touching all matters in issue in the action. If truth be

the nature, extent and probable duration of the injury");
Tennessee: 1900, Arkansas River P. Co. *v.* Hobbs, 105 Tenn. 29, 58 S. W. 278 (not decided); 1915, Williams *v.* Chattanooga Iron Works, 131 Tenn. 683, 176 S. W. 1031 (personal injury; power to order physical examination affirmed, in a careful opinion by Neil, C. J.);
Texas: 1885, International & G. N. R. Co. *v.* Underwood, 64 Tex. 463, 466 (order for inspection by three disinterested surgeons and physicians appointed by the Court, not granted, because an inspection had been submitted to; general question reserved); 1888, Missouri P. R. Co. *v.* Johnson, 72 Tex. 95, 101, 10 S. W. 325 (order for examination by the opponent's physician, the plaintiff refusing to submit for him, but consenting to submit to a joint examination by his own and any other physician, not granted on these facts; general question reserved); 1890, Gulf C. & S. F. R. Co. *v.* Norfleet, 78 Tex. 321, 324, 14 S. W. 703 (order for inspection by physicians appointed by the Court, refused, since the plaintiff did submit to an examination in court; general question reserved); 1898, Chicago R. I. & T. R. Co. *v.* Langston, 19 Tex. Civ. App. 568, 47 S. W. 1027, 48 S. W. 610 (a plaintiff who has exhibited his limb to the jury may be compelled to submit it to inspection by defendant's expert witness); 1899, Chicago R. I. & T. R. Co. *v.* Langston, 92 Tex. 709, 50 S. W. 574, 51 S. W. 331 (defendant is entitled to inspection by experts selected by himself, the plaintiff having exhibited his injuries and offered medical testimony about them); 1903, Austin & N. W. R. Co. *v.* Cluck, — Tex. Civ. App. —, 73 S. W. 568 (R. Co. *v.* Botsford, U. S., followed); 1903, Gulf C. & S. F. R. Co. *v.* Brown, — Tex. Civ. App. —, 75 S. W. 807 (same); Austin & N. W. R. Co. *v.* Cluck, *supra*, affirmed on appeal in 97 Tex. Sup. 172, 77 S. W. 403; 1905, Houston & T. C. R. Co. *v.* Anglin, 99 Tex. 349, 89 S. W. 966 (like C. R. I. & T. R. Co. *v.* Langston); 1915, San Antonio & A. P. R. Co. *v.* Stuart, — Tex. Civ. App. —, 178 S. W. 17 (personal injury; propriety of requiring submission to a second X-ray examination considered);
Utah: 1908, Larson *v.* Salt Lake City, 34 Utah 318, 97 Pac. 483 (power denied, in the absence of statute; the opinions are a singular exhibition of that judicial "non possumus" attitude which is so blind to the true nature of law and judicial function);
Vermont: 1896, Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 285 (order refused, because not asked for till after the evidence was closed);
Washington: 1899, Lane *v.* R. Co., 21 Wash. 119, 57 Pac. 367 (examination by experts appointed by the Court, in trial Court's discretion, may be ordered; quoted *supra*); 1901, Myrberg *v.* Baltimore & S. M. & R. Co., 25 Wash. 364, 65 Pac. 539 (examination not ordered, because not seasonably asked for); 1905, Helbig *v.* Grays' Harbor E. Co., 37 Wash. 130, 79 Pac. 612 (further examination by a third physician, held not improperly refused); St. 1915, Mar. 15, c. 63 ("On or before the trial of any action brought to recover damages for injury to the person, the Court before whom such action is pending may from time to time on application of any party therein, order and direct an examination of the person injured as to the injury complained of by a competent physician or physicians, surgeon or surgeons, in order to qualify the person or persons making such examination to testify in the said cause as to the nature, extent and probable duration of the injury complained of; and the Court may in such order direct and determine the time and place of such examination");
West Virginia: 1918, Perkins *v.* Monongahela Valley R. Co., 81 W. Va. 781, 95 S. E. 79 (examination of plaintiff held not properly asked for under the circumstances, but "upon the right of the defendant to have such a physical examination in a proper case, this question we do not decide upon"; why not? What is a Supreme Court for? The profession was waiting in this State for an answer to this long-delayed question); 1920, Quinn *v.* Flesher, — W. Va. —, 107 S. E. 300 (trial Court's refusal of defendant's request to suspend the trial for taking a radiograph of plaintiff's corporal injury, held not improper);
Wisconsin: 1884, White *v.* R. Co., 61 Wis. 536, 540, 21 N. W. 524 (order for inspection by medical experts of the opponent, granted; general power affirmed); 1898, O'Brien *v.* LaCrosse, 99 Wis 421, 75 N. W. 81 (examination cannot be required as of right, but is within the trial Court's discretion; here, a refusal to order an examination of the urine and bladder by catheter-insertion was sustained); 1899, Boelter *v.* Ross Lumber Co., 103 Wis. 324, 79 N. W. 243 (plaintiff had submitted to one examination by X-ray process, and had been accidentally burned; held, no error in not compelling a second similar examination).

hidden, injustice will be done. The right of the suitor, then, to demand the whole truth is unquestioned; it is the correlative of the right to exact justice. . . . To our minds the proposition is plain that a proper examination by learned and skilful physicians and surgeons would have opened a road by which the cause could have been conducted nearer to exact justice than by any other way. The plaintiff, as it were, had under his own control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it. . . . It is said that the examination would have subjected him to danger of his life, pain of body, and indignity to his person. The reply to this is that it should not; and the Court should have been careful to so order and direct. . . . As to the indignity to which an examination would have subjected him, as urged by counsel, it is probably more imaginary than real. An examination of the person is not so regarded when made for the purpose of administering remedies; those who effect insurance upon their lives, pensioners for disability incurred in the military service of the country, soldiers and sailors enlisting in the army and navy, all are subjected to rigid examinations of their bodies; and it is never esteemed a dishonor or indignity. . . . If for this purpose [to show the nature of the injury] the plaintiff may exhibit his injuries, we see no reason why he may not, in a proper case and under like circumstances, be required to do the same thing for a like purpose upon the request of the other party."

1899, GORDON, C. J., in *Lane* v. *R. Co.*, 21 Wash. 119, 57 Pac. 367: "It is said that it is abhorrent to the principles of liberty to compel a party to submit to such an examination; that it invades the inviolability of the person, is an indignity involving an assault and a trespass, and an impertinence to which a modest woman would not consent. Courts should not sacrifice justice to notions of delicacy, and knowledge of the truth is essential to justice. The attainment of justice in the courts is of far greater importance than any merely personal consideration. . . . It is said by the majority in R. Co. *v.* Botsford that the reason for the exercise of such an authority in divorce actions is 'the interest which the public as well as the parties have in upholding or dissolving the marriage state.' But will it be said that the public has no interest in the attainment of justice between individuals? The admission that the Court has power to make the order whenever it is deemed requisite to ascertain the fact of incapacity in a divorce action seems to us an argument in favor of the existence of the power to make such an order in the present case. It exists by implication, and may be exercised in either case, whenever the demands of justice require it. Actions of this character have, in recent years, become so numerous that the question is of far greater importance than it could possibly have been twenty-five years ago, and it is not surprising that most of the cases in which the question has arisen or is discussed at all are of recent origin. In our State, counties, cities, and other municipal corporations are liable for negligence resulting in injury to the person, to the same extent as private corporations and individuals; and it becomes of the utmost importance that the question be determined with due regard for the public welfare."

1899, MITCHELL, J., in *Wanek* v. *Winona*, 78 Minn. 98, 80 N. W. 851: "[The trial Court has power] to order such an inspection, and to require the plaintiff to submit to it under the penalty of having his action dismissed in case he refuses to do so. We are aware that there are some eminent authorities to the contrary, but, with all due deference to them, we cannot avoid thinking that they base their conclusion upon a fallacious and somewhat sentimental line of argument as to the inviolability and sacredness of a man's own person, and his right to its possession and control free from all restraint or interference of others. This, rightly understood, is all true, but his right to the possession and control of his person is no more sacred than the cause of justice. When a person appeals to the State for justice, tendering an issue as to his own physical condition, he impliedly consents in advance to the doing justice to the other party, and to make any disclosure which is necessary to be made in order that justice may be done. No one claims that he can be compelled to submit to such an examination. But he must either submit to it, or have

his action dismissed. Any other rule in these personal injury cases would often result in an entire denial of justice to the defendant, and leave him wholly at the mercy of the plaintiff's witnesses. In very many cases the actual nature and extent of the injuries can only be ascertained by a physical examination of the person of the injured party. Such actions were formerly very infrequent, but of late years they constitute one of the largest branches of legal industry, and are not infrequently attempted to be sustained by malingering on the part of the plaintiff, false testimony, or the very unreliable speculations of so-called 'medical experts.' To allow the plaintiff in such cases, if he sees fit to display his injuries to the jury, to call in as many friendly physicians as he pleases, and have them examine his person, and then produce them as expert witnesses on the trial, but at the same time deny to the defendant the right in any case to have a physical examination of plaintiff's person, and leave him wholly at the mercy of such witnesses as the plaintiff sees fit to call, constitutes a denial of justice too gross, in our judgment, to be tolerated for one moment."

(7) In virtually all the modern statutes establishing a system of *industrial accident insurance*, or "workmen's compensation" (to supplant the common-law principle of employers' tortious liability for injuries to employees), provision is made to negative any privilege for the insured against physical examination to ascertain his injury.[14]

[14] ENGLAND: St. 1897, 60 & 61 Vict., c. 37, Schedule I, par. 3; St. 1906, 6 Edw. VII, c. 58, Workmen's Compensation Act, Schedule I, par. 4 (workman giving notice of accident "shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner," etc.; on refusal or obstruction, right to compensation is suspended); par. 14 (similar, for one receiving weekly payments under an award); 1900, Osborn *v.* Vickers, 2 Q. B. 9 (St. 1897 applied); 1915, Smith *v.* Davis & Sons, A. C. 528 (under Workmen's Compensation Act 1906, First Schedule, and Regulations, a claimant may be required to submit to a second medical examination); for valuable comments on the suitable modes of conducting such examinations, based on experience under the British Workmen's Compensation Act, see the following work: 1917, Sir John Collie, Malingering and Feigned Sickness, 2d ed., c. xxxvi, pp. 530–539.

CANADA: *Alberta:* St. 1918, c. 5, § 43 (workman's compensation; claimant must submit himself for examination by a medical referee); § 44 (on refusal, the right to compensation is suspended); *Manitoba:* St. 1920, c. 159, § 17 (workman's compensation; claimant must submit himself to medical examination; on refusal, the right to compensation is suspended); *Yukon:* St. 1917, c. 1, § 11 (injured workman shall "submit himself for examination by a duly qualified medical practitioner"; on refusal, right to compensation is suspended).

UNITED STATES: *Alabama:* St. 1919, No. 245, p. 206, § 18 (workmen's compensation; "the injured employee must submit himself to the examination," etc.; on refusal, the right to compensation is suspended); *Alaska:* St. 1915, Apr. 29, c. 71, § 24 (employers' liability; the injured employee shall "submit himself or herself to an examination by a physician," etc.; on refusal, the right to compensation is suspended); *Arizona:* Rev. St. 1913, Civ. C. § 3171 (workmen's compensation; claimant shall on request "submit himself for bodily examination by some competent licensed medical practitioner or surgeon"; on refusal, right to compensation is suspended); St. 1921, c. 103, § 78 (workmen's compensation; claimant must "submit himself for medical examination"; on refusal, compensation is suspended); *California:* St. 1917, p. 831, May 23, § 16 (workmen's compensation; employee injured and entitled to compensation "shall upon written request of his employer submit from time to time to examination by a practising physician," etc.; on refusal, his claim is suspended or barred; physician may testify "as to the results thereof"); 1917, May 23, p. 831, § 19 *a* (workmen's compensation, etc.; commission may direct an examination by a physician; quoted *ante*, § 4 *c*); *Colorado:* Comp. St. 1921, § 4455 (workmen's compensation; the injured employee shall "submit himself . . . to examination by a physician or surgeon"; on refusal, the right to compensation is suspended); *Connecticut:* Gen. St. 1918, §§ 5347, 5362 (workmen's compensation; physical examination required; but employee's failure to accept or provide medical service suspends compensation); *Delaware:* St. 1917, Apr. 2, c. 233, adding §§ 3193 *m*106 to the Revised Code (workmen's compensation; injured employee "must submit himself for examination . . . to a physician," etc.; on refusal, right of compensation is suspended); *Hawaii:* St. 1915, Apr. 28, No. 221, § 20

(B) The exercise of this power should no doubt be subject to certain restrictions, on the principle (*ante*, § 2192) that the testimonial duty should

(workmen's compensation; injured workman "shall submit himself to examination . . . to a duly qualified physician or surgeon"; on refusal, right to compensation is suspended); *Idaho:* Comp. St. 1919, § 6242 (workmen's compensation; injured workman shall submit himself to medical examination; compensation suspended in case of refusal); *Illinois:* St. 1921, June 29, § 12 (workmen's compensation; injured employee shall be required on request "to submit himself . . . for examination to a duly qualified medical practitioner," etc.; on refusal, right to compensation is suspended); 1920, Jackson Coal Co. *v.* Industrial Commission, 295 Ill. 18, 128 N. E. 813 (compensation suspended, and examination required, of employee under Rev. St. 1917, c. 48, § 137; no privilege to refuse on ground that employer has admitted his liability); 1922, Pocahontas Mining Co. *v.* Ind. Com., 301 Ill. 462, 134 N. E. 160 (rule of the Compensation Act applied); 1922, Paradise Coal Co. *v.* Ind. Com., 301 Ill. 504, 134 N. E. 167 (rule applies as well for ascertaining the fact of injury as for ascertaining the amount of compensation due); *Iowa:* Code 1919, § 818 (workmen's compensation; injured employee "shall submit himself for examination . . . to a physician," etc.; on refusal, right to compensation is suspended); *Kansas:* Gen. St. 1915, § 5911, St. 1911, c. 218 (workmen's compensation; employee "must submit himself for examination"; on refusal, compensation is suspended; provision for exclusion of physician's testimony unless both parties have opportunity to select physicians); 1922, Landis *v.* Wichita R. & L. Co., — Kan. —, 203 Pac. 1109 (personal injury; on application by the defendant to the trial Court to appoint physicians, the plaintiff being willing to be examined by physicians selected by defendant, the Court refused; held not error); *Kentucky:* St. 1916, Mar. 23, p. 354, Stats. § 4918 (workmen's compensation; injured workman if requested "shall submit himself to examination" by a medical man; on refusal, right to compensation is suspended); *Louisiana:* St. 1914, No. 20, § 9 (employer's liability; "an injured workman shall submit himself to examination," etc.); *Maine:* Rev. St. 1916, c. 50, § 21, St. 1919, c. 238, § 21 (workmen's compensation; injured employee shall on request "submit himself to an examination by a physician or surgeon"; certified copy of report "may be produced in evidence at any hearing," etc.); *Maryland:* Ann. Code 1914, Art. 101, § 42 (State industrial accident commission; employee is required on request "to submit himself for medical examination"; on refusal, his right to compensation is suspended); *Massachusetts:* Gen. L. 1920, c. 152, § 45 (industrial accidents; employee "shall submit to an examination by a registered physician"; on refusal, right to compensation is suspended); c. 201, § 6 (appointment of guardian for insane; the Court "may require him to submit to examination"); *Michigan:* Comp. L. 1915, § 5449 (workmen's compensation; claimant shall "submit himself to an examination by a physician or surgeon"; on refusal, right to compensation is suspended); *Minnesota:* Gen. St. 1913, § 8215 (workmen's compensation; injured employee "must submit himself to examination" by physician; on refusal, right to compensation is suspended); St. 1921, c. 82, § 23 (like the prior statute, replacing it); *Missouri:* Rev. St. 1919, § 13642 (workmen's compensation; injured employee "shall from time to time thereafter during disability submit to reasonable medical examination"; on refusal, compensation is suspended); St. 1921, Mar. 28, p. 425, § 50 (like Rev. St. § 13642, which is superseded); *Montana:* Rev. C. 1921, § 2906 (State industrial accident board; employee shall "submit from time to time to examination by a physician"; on failure or refusal, the right to compensation is suspended); *Nebraska:* Rev. St. 1922, § 3097 (employee shall on request "submit himself to an examination by a physician," etc.); 1922, O'Brien *v.* Sullivan, — Nebr. —, 186 N. W. 532 (assault and battery; trial Court's refusal to order physical examination of plaintiff, held not improper where the motion was not made until trial begun); *Nevada:* Rev. L. 1912, § 1921 (workmen's compensation; employee claiming compensation must on request "submit himself for examination" by a medical man); St. 1913, Mar. 15, p. 137, § 32 (industrial insurance; "any workman entitled to receive compensation" must if required "submit himself for medical examination"; on refusal, right to compensation is suspended; *New Mexico:* St. 1917, Mar. 13, c. 83, § 19 (workmen's compensation; injured workman shall "submit himself . . . to examination by a physician or surgeon"; on refusal, right to compensation is suspended); *North Dakota:* St. 1919, Mar. 5, c. 162, § 16 (workmen's compensation; the injured employee shall "submit himself to examination by a duly qualified physician," etc.); *Ohio:* Gen. Code Ann. 1921, §§ 1465-95 (State industrial commission; any employee claiming compensation "may be required . . . to submit himself for medical examination"; on refusal, compensation shall be suspended); *Oklahoma:* St. 1915, c. 246, Mar. 22, Art. 2, § 9 (workmen's compensation; employee on request shall "submit himself for medical examination," etc.; on refusal, his right "to prosecute any proceeding under this Act shall be suspended"); *Oregon:* Laws 1920, § 6633 (workmen's compensation; claimant must if

not be enforced any further than is necessary with relation to the ends of truth. Of such restrictions, the following seem to be those recognized by judicial authority:

(*a*) The exhibition of the body need not be *directly to the tribunal*, first, because the jury could often not comprehend the appearances without expert explanation, and, secondly, because the public exposure might be unnecessarily embarrassing. Accordingly, the exhibition is usually ordered to be made before *expert medical witnesses*. These are preferably to be appointed by the Court.[15] Nevertheless, if there has been other testimony by experts who speak from inspection and who appear as partisans of the plaintiff, it may be fair to authorize similar inspection by experts called for the defendant; the trial Court's discretion should determine. But, in any case, an exhibition directly to the judge and the jury may properly be ordered, if neither of the two considerations above mentioned are deemed by the trial Court to prevent.

(*b*) The exhibition need not be ordered at all, if in the trial Court's opinion *no sufficiently valuable evidence* is to be expected from it, having regard to the kind of injury involved, the amount of other evidence, and the inconvenience, shame,[16] or risk to health that may be involved. Nevertheless, this refusal should not be decided upon without extreme caution, for it is seldom possible, even for the opponent, to know beforehand how valuable the results of the

required "submit himself for medical examination"; on refusal, his right is suspended); *Pennsylvania:* St. 1915, June 2, § 314, Dig. 1920, § 22011, Workmen's Compensation (injured employee "must submit himself for examination" to a physician; on refusal, right of compensation is suspended);
Porto Rico: St. 1916, Apr. 13, No. 19, § 9 (workmen's compensation; the injured workman shall if requested by the commission "submit himself for examination . . . to a competent physician or surgeon"; on refusal, the right to receive relief is suspended); *Rhode Island:* St. 1912, c. 831, § 21 (employer's liability; injured employee shall "submit himself to an examination by a physician or surgeon," etc.; on refusal, the right to compensation is suspended); *South Dakota:* Rev. C. 1919, § 9463 (industrial insurance; injured employee must on request "submit himself . . . for examination to a duly qualified medical practitioner or surgeon"; on refusal, compensation is suspended); *Tennessee:* St. 1919, Apr. 15, c. 123, § 25 (workmen's compensation; injured employee "must submit himself to the examination by the employer's physician," etc.); *Texas:* Rev. Civ. St. 1911, § 5246-23, 26, 42, St. 1917, c. 103 (injured employee; provision for requiring medical examination; in case of refusal, compensation is suspended); 1920, Texas Employers' Ins. Ass'n *v.* Downing, — Tex. Civ. App. —, 218 S. W. 112, 117 (under the Workmen's Compensation Act, Vernon's Annot. Civ. St. Suppl. 1918, §§ 5246–42, 44, the order for physical examination of the plaintiff is subject to the trial Court's discretion; held here that it was error for the trial Court to refuse to direct an X-ray examination); *Utah:* Comp. L. 1917, § 3152 (workmen's compensation; employee claimant must "submit himself for medical examination" pursuant to rules of State industrial commission; compensation suspended in case of refusal); St. 1921, c. 67, Mar. 21 (amending Comp. L. 1917. § 3152); *Vermont:* Gen. L. 1917, § 5795 (employer's liability; proceeding suspended if claimant refuses or obstructs physical examination); *Wisconsin:* § 2394–12 (workmen's compensation; claimant shall submit to "examination by a regular practicing physician"; on refusal, the right to compensation is suspended); *Wyoming:* Comp. St. 1920, § 4345 (workman's compensation; workman shall on request "submit himself for medical examination" to determine removal of temporary disability; on refusal, compensation is suspended).

[15] 1921, Atkinson *v.* United R. Co., 286 Mo. 634, 228 S. W. 483 (physicians thus designated by the Court are not to be deemed witnesses of the party).

For the law as to summoning of expert witnesses *by the Court*, see *ante*, § 563, and *post*, § 2484.

[16] The so-called "indecency" of the exhibition is of itself no obstacle (*ante*, § 2180).

inspection may be; and the presumption should always be against a refusal on this ground.

(*c*) The party demanding inspection may fairly be required to give *prior notice*, in order that convenient arrangements may be made and a due selection of expert examiners be feasible.

(*d*) If the plaintiff *refuses to submit* to the examination, the usual process of contempt appropriate for a recalcitrant witness may be employed.[17] But a simpler and no less effective expedient is to order the suit dismissed; for this sufficiently prevents the party from reaping any benefit from his contumacy.[18] Furthermore, if the Court takes neither of these measures (although no Court ought for a moment to overlook in such a way so flagrant a contempt), the usual inference (*ante*, §§ 289, 291) may be advanced by counsel and drawn by the jury, from the failure to produce this evidence in the plaintiff's power, that the defendant's allegations about it are true.[19]

Under some such limitations as these, the compulsory exhibition of the party's body will be ordered, in most jurisdictions.

(C) Certain distinctions may here be noted. (1) The plaintiff may be *entitled* to exhibit his body to the jury, on the general principle of Autoptic Proference, as evidencing the injury (*ante*, § 1158). (2) In *contracts of insurance*, both life and accident, a frequent provision concedes to the insurer the right of its medical examiner to examine the insured's person in respect to an injury. Such a provision is valid, and may avail to supplant the normal rule of law (*ante*, § 7*a*).

§ 2221. **Same: (*d*) Inspection of Premises and Chattels; Autopsy; Exhumation of Corpse.** The testimonial duty for witnesses in general requires disclosure of facts in any and every feasible form, including such evidence as is available through inspection of the witness' *premises* or *chattels*, either by the

[17] Sanctioned in Schroeder *v.* R. Co., Ia., *supra*.

[18] Sanctioned in Schroeder *v.* R. Co., Ia., Shepard *v.* R. Co., Mo., Miami & M. T. Co. *v.* Baily, Oh., Hess *v.* R. Co., Pa., *supra*. It may be added that the *postponement* of the trial, until the plaintiff consents (as suggested in one case cited *supra*), is a half-hearted method which is indefensible. If the plaintiff is really privileged, it is a denial of justice to postpone the trial; if he is not, the Court has just as much power to dismiss the suit as to postpone it.

Under the industrial accident statutes, the right to compensation is suspended, so long as refusal continues.

[19] *England* (divorce cases): 1901, B. *v.* B., Prob. 39 (nullity of marriage); 1912, W. *v.* W., Prob. 78 (nullity for impotency; the respondent's refusal to submit to medical examination, taken as evidence; B. *v.* B., *supra*, is not cited, and counsel say "The nearest case is C. *v.* C., 1911, 27 Times L. R. 421"); 1913, Dickinson *v.* Dickinson, Prob. 198, Sir S. Evans, Pres., declared it "revolting" to find that where decrees were thus based on "inferred incapacity" the parties in later marriages have had children, and he ruled that absolute refusal of intercourse was of itself a ground for nullity; hence the inference of impotency will hereafter not be a mere "legal fiction," as Sir S. Evans termed it).

United States (personal injury cases): 1890, Union P. R. Co. *v.* Botsford, U. S. (cited *supra*, n. 9); 1907, Cedartown *v.* Brooks, 2 Ga. App. 583, 59 S. E. 836 (careful opinions by Russell, J., and Powell, J., respectively, taking opposite views as to the propriety of the inference in a jurisdiction where the Court has power and discretion to make an order); 1909, Murphy *v.* Southern Pacific R. Co., 31 Nev. 120, 101 Pac. 322; 1913, Chicago, R. I. & P. R. Co. *v.* Hill, 36 Okl. 540, 129 Pac. 13; 1874, Durgin *v.* Danville, 47 Vt. 95, 105; and other cases cited *supra*, n. 9.

Contra: 1903, Austin & N. W. R. Co. *v.* Cluck, — Tex. Civ. App. —, 73 S. W. 568 (purporting to follow R. Co. *v.* Botsford, U. S.).

tribunal itself or by other witnesses under order of the Court (*ante*, §§ 2194, 2216). There is no reason why a party should be privileged more than other persons in this respect. Not only, as in the case of corporal exhibition (*ante*, § 2220), is the absence of such a privilege deducible by implication from the statutes making parties compellable generally; but also it may be maintained (as in the case of corporal exhibition) that no privilege in this respect was ever established at common law:

1867, BALDWIN, J., in *Thornburgh* v. *Savage M. Co.*, 7 Morris Min. R. 667, 680: "Ought a Court of equity, in a mining case, when it has been convinced of the importance thereof for the purposes of the trial, to compel an inspection and survey of the works of the parties, and admittance thereto by means of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmative of this proposition. The very great powers with which a Court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a Court of law. That a Court of equity, having jurisdiction of the subject-matter of the action, has the power to enforce an order of this kind, will not be denied. And the propriety of exercising that power would seem to be clear, indeed, in a case where, without it, the trial would be a silly farce. Take, as an illustration, the case at bar. It is notorious that the facts by which this controversy must be determined cannot be discovered except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft and machinery operated by it. It would be a denial of justice, and utterly subversive of the objects for which Courts were created, for them to refuse to exert their power for the elucidation of the very truth — the issue between the parties. Can a Court justly decide a cause without knowing the facts"?

There are numerous instances in which the *chancery* practice plainly denied any privilege, and sanctioned the inspection of the party-opponent's premises and chattels, against his objection.[1] On the other hand, in the *common-law* courts, there was an inclination to refuse such orders, apparently on the same feeble excuse of lack of power put forward by a few Courts for refusing to compel corporal exhibition.[2] There is even more reason for denying a

§ 2221. [1] 1814, Earl of Macclesfield *v.* Davis, 3 Ves. & B. 16 (motion allowed to have inspection of a chest containing heirlooms, in order to identify and describe the articles); 1819–21, Kynaston *v.* East India Co., 3 Swanst. 248; East India Co. *v.* Kynaston, 3 Bligh 153 (quoted *ante*, § 1862; opinion by L. C. Eldon).

Numerous other cases impliedly or expressly negativing such a privilege will be found *ante*, § 1862 (Inspection before Trial), § 1162 (View by Jury), § 2212 (Trade Secrets), § 2216 (Testimonial Duty).

An officer's entry upon a party's premises or a seizure of a chattel, for preservation as evidence, under a warrant, ought to be deemed *justifiable trespass*. *Contra:* 1895, Newberry *v.* Carpenter, 107 Mich. 567, 65 N. W. 530 (impounding an exploded boiler pending trial of the liability for the explosion).

[2] Add the cases cited in the cross-references *supra*, note 1: 1848, Twentyman *v.* Barnes, 2 DeG. & Sm. 225 (inspection by experts of an alleged altered document; refused, upon an undertaking to produce at trial); 1840, Leach *v.* Swallow, 8 Dowl. Pr. 201 (work and labor on a house; order for plaintiff's witnesses to inspect the work, held not proper against the defendant's consent); 1895, Martin *v.* Elliot, 106 Mich. 130, 63 N. W. 998 (sending a veterinary surgeon to examine on the plaintiff's premises a horse said to have been warranted sound, held improper); 1860, Hunter *v.* Allen, 35 Barb. N. Y. 42 (warranty of a watch; order to produce the watch, refused; "it would be a new feature in our jurisprudence;" this unenlightened utterance was made forty years after the above ruling by Lord Eldon, the most conservative judge who ever sat on the bench). *Contra:* 1896, Groundwater *v.* Washington, 92 Wis. 56, 65 N. W. 871 (seat of a wagon injured in a highway; inspection held allowable in trial Court's discretion).

privilege in the present class of cases; and it would be regrettable if any modern Court should palter with justice by recognizing it. Occasionally statutes have come to the aid of the Courts.[3]

The *exhumation* or the *autopsy of a corpse*, when useful to ascertain facts in litigation, should of course be performed.[4] Reverence for the memory of

[3] The statutes, which usually provide also for a *view* by the jury or an *inspection* before trial, or both, are collected under those heads (*ante*, §§ 1163, 1862). Some of the statutes and of the rulings construing them point out expressly the absence of a privilege. The use of such orders of inspection in modern English practice may be seen in Stringer, White, & King's Yearly Supreme Court Practice, notes to Order 50, Rule 3.

[4] The cases and statutes are as follows. Compare also the citations *ante*, §§ 1862, 2216; the distinction between a party and a third person is here little more than technical:

ENGLAND: 1907, Re Herbert Druce, Re London Cemetery Co. (Nov. 16, Dec. 27; London "Times," Nov. 9, 16, 19, 22, 28, 30, Dec. 3, 7, 10, 14, 17, 21, 28, 30, 31. The Druce Case was a case of alleged double life. The claimant, Geo. Hollamby Druce, was the son of Thomas Charles Druce, who had lived as a furniture dealer, and died in 1864. The claim was that T. C. D. was in reality the fifth Duke of Portland; that in 1816, as Lord John Bentinck, he had married Miss Crickmer, and had lived with her and maintained a household as Thomas Charles Druce, while also living as the Duke of Portland, and that as Duke he survived till 1879; there was plausible testimony to these facts; in 1898–1901 Mrs. Anna Marie Druce brought proceedings in the Probate Court to revoke probate of the will of T. C. D., on the ground that T. C. D. had not then died, and that the funeral of T. C. D. in 1864 was a mock one, and that T. C. D. in fact lived, as the Duke, till 1879; this suit was dismissed, the Court finding that T. C. D. did die in 1864; at the 1898 proceeding, Herbert Druce, son of T. C. D., and opposed to the claimant, had made affidavit, and in the 1901 proceeding he testified, that he had lived since his birth in 1846 with his father T. C. D., that in Sept. 1864 his father fell ill and on Dec. 28, 1864, died, that he saw his father's body lying in the coffin, and saw the body buried at Highgate Cemetery; yet the testimony for the claimant was explicit that the coffin had been specially made at the Duke's order, and that only lead had been placed within, to deceive the bearers; the test of this story would evidently be the condition of the coffin, and at the 1898 proceedings by Mrs. A. M. D. the judge of the Consistory Court, Dr. Tristram, intimated that he would grant a license to open the coffin, and upon a prohibition moved in the Probate Court on the ground that the Home Secretary alone had jurisdiction, the prohibition had been refused, conceding to the Consistory Court sole jurisdiction over the removal of bodies for reinterment or other purposes (ruling reported in 1898, L. R. 2 Q. B. 371; citing In re Sarah Pope, 15 Jur. 614, before Dr. Lushington); but now in 1907 the claim was indirectly got before the Court again by a prosecution, instituted by Geo. H. D., against Herbert D., for perjury in his affidavit and testimony of 1901; new testimony was at this trial adduced for the claimant, direct and conclusive, if true; and the opening of the grave seemed now to be the only way of testing the story; Herbert D., the proprietor of the grave, had at first refused to allow it to be opened, but his counsel now declared himself ready to consent; the magistrate, Mr. Plowden, expressed the opinion that the grave ought to be opened; H. D. assented and the Home Secretary gave a license; and a petition was filed in the Consistory Court by the London Cemetery Co. (including Highgate Cem.) and the Home Secretary, for a license to open the grave; no party seems to have opposed the order, though each counsel made a speech explaining why he did not oppose it; Dr. Tristram granted the order to open the grave and "to examine and inspect the contents thereof, and to ascertain whether such last-mentioned coffin actually contains the human remains of the said T. C. D. or any human remains," etc.; on Dec. 30 the coffin, which was lead-lined, was opened, and was found to contain "the body of an aged and bearded man"; this ended the prosecution of H. D.; in the Law Journal, 1908, Jan. 11, vol. XLIII, p. 15, is a brief summary of the legal points arising at the trial, but the only reference to the exhumation is unfortunately erroneous, stating the ruling to be that there is no judicial authority to open a grave except for an inquest).

UNITED STATES: *Federal:* 1907, Mutual Life Ins. Co. *v.* Griesa, C. C. Kan., 156 Fed. 398 (bill to cancel a life insurance policy on the ground of intention to suicide; order of exhumation of the body, for examination, granted, and privilege denied; case stated more fully *ante*, §§ 1862 and 2216); 1915, Mutual Life Ins. Co. *v.* Painter, D. C. Md., 220 Fed. 998 (bill by the insurer for examination of the organs of a deceased person, the insured; the defendants were the wife and son or daughter, citizens of Florida; the death occurred apparently in Maryland, and the coroner had sent the vital organs for analysis to a Baltimore chemist; litigation arising between the defendants and the Maryland State authorities, the now plaintiff filed a bill in the Maryland

those who have departed does not require us to abdicate the high duty of doing justice to the living; and the orders of a court of justice, exercising the power of the State in the communal interest, are not to be placed on the same level with the acts of an unlicensed and self-seeking intruder upon hallowed ground.

In *contracts of insurance*, both life and accident, a frequent provision concedes to the insurer the right of its medical examiner to make an *autopsy* in case of death. Such a provision is valid, and may avail to supplant the normal rule of law (*ante*, § 7*a*).

§ 2222. (9) **Facts against One's Interest as a Witness Interested but not a Party to the Suit.** When the party's privilege not to take the stand against himself prevailed in common-law courts (*ante*, § 2218), the question naturally arose whether in civil causes a person not a party, but interested in the event of the cause, and therefore, disqualified to testify for himself (*ante*, § 576), was also, like a party, privileged from being called against himself; in other words, whether the privilege was coextensive in all respects with the disqualification, or extended to parties only. After some uncertainty in the English practice, caused by Lord Mansfield's attempt to restrict the limitations of such privileges,[1] it was finally settled in the United States, that an interested witness, as such, had not the privilege of a party; [2] though a few Courts

Circuit Court, asking for an order of examination and an injunction against taking away the remains; the defendant moved to remove the case to the Federal Court, but it was remanded; the merits of the application were not considered); *California:* St. 1917, p. 831, May 23, § 19, par. *e* (State industrial accident commission may direct an autopsy "and the exhumation of the body for such purpose if necessary"); St. 1878, p. 1050, No. 545, April 1 (local board of health may grant permit for exhumation); *Mississippi:* 1879, Grangers' Ins. Co. *v.* Brown, 57 Miss. 308 (insurance upon the plaintiff's husband; to show whether his skull had been trephined, a compulsory exhumation held proper if necessary; here held unnecessary); *Nebraska:* Rev. St. 1922, § 3097 (labor-employer's liability; in death claims, "any interested party may require an autopsy"); *New York:* 1910, Danahy *v.* Kellogg, 126 N. Y. Suppl. 444 (action for death; order for exhumation to ascertain the cause of death denied; case stated more fully *ante*, § 1862); 1922, Wnuk's Application, Sup. App. Div., 193 N. Y. Suppl. 353 (S. was injured by W., brought suit, and died; her administrator caused an autopsy to be performed and the liver to be retained; an application for inspection of the liver by an expert for the defendant was denied; plainly unsound); *Tennessee:* St. 1919, Apr. 15, c. 123, § 25 (workmen's compensation; "any interested party may require an autopsy"); *Texas:* 1908, Gray *v.* State, 55 Tex. Cr. 90, 114 S. W. 635 (murder; to obtain evidence on the accused's allegation that he had shot the deceased in self-defence and not from behind, an order of exhumation of the body was held improperly refused by the trial Court; model opinion, by Ramsey, J., Brooks, J., diss.; stated more fully *ante*, § 2216); *Washington:* 1914, State *v.* Clifford, 78 Wash. 555, 139 Pac. 650 (exhumation of an intestate's body, to ascertain whether castration had prevented paternity; stated more fully *ante*, § 2216).

§ 2222. [1] 1702, Title *v.* Grevett, 2 Ld. Raym. 1008 ("a man that conveys lands may be a witness to prove he had no title, . . . but he is not compellable to give such evidence"); 1779, Cox *v.* Whalley, cited 10 East 399 (action against four persons for a dinner bill; another of the diners, being called by the plaintiff to prove the services rendered, claimed a privilege as interested, but L. C. J. Mansfield "disallowed the objection"). Then followed, in 1795, Lord Kenyon's ruling, in Bain *v.* Hargrave, partly to the contrary (cited in the next section); and then Lord Melville's Case and the statute (cited in the next section), which restored Lord Mansfield's ruling in effect; in later cases the question could rarely be raised: 1842, Doe *v.* Date, 3 Q. B. 608, 617, per L. C. J. Denman (privilege denied); 1848, R. *v.* Vickery, 12 Q. B. 478 (collecting earlier cases at common law, and intimating that the interest of a taxable inhabitant of a parish made him privileged; here held compellable under a statute).

[2] *Connecticut:* 1787, Storrs *v.* Wetmore, Kirby 203 (joint owner, interested, held not

accorded the privilege where under reformed pleadings he was the "real party in interest," [3] and though a few Courts, conversely, recognized the privilege where he was a nominal party though not really interested.[4] The question has no importance to-day, since the enactment of statutes abolishing disqualification by interest (*ante*, § 576) and making parties compellable (*ante*, § 2218); but it needs to be mentioned in order to distinguish it from the larger doctrine examined in the next section.

§ 2223. (10) **Facts involving a Civil Liability in general, independent of the Suit at Bar.** There is also to be considered a doctrine, now completely repudiated, which once threatened to insinuate itself into the law, and survives only as a source of misunderstanding for the decisions of a century ago. That doctrine was that a privilege existed not to disclose *facts involving a civil liability of any sort.*

On the one hand, this is to be distinguished from the two preceding forms of privilege, namely, that of a party-opponent in a civil cause, and that of a witness interested in the cause. Those two might exist without the present one; yet the recognition of the present one would include the preceding ones, *i. e.* a privilege for facts involving a civil liability would exempt not only an

compellable); 1797, Starr *v.* Tracy, 2 Root 528 (similar; but an interest voluntarily acquired does not protect); *Kentucky:* 1823, Gorham *v.* Carroll,3 Litt. 221 (assignor of note in suit, held not privileged); 1823, Black *v.* Crozier, 3 Litt. 226; 1827, Robinson *v.* Neal, 5 T. B. Monr. 212, 216; 1827, Conover *v.* Bell, 6 T. B. Monr. 157; *Maryland:* 1826, City Bank *v.* Bateman, 7 H. & J. 104, 110, *semble* (president of a bank, a stockholder and nominally a party in his corporate capacity, held not privileged); 1828, Stoddert *v.* Manning, 2 H. & G. 147, 157 ("interest in the event of the suit" gives no privilege); *Massachusetts:* 1809, Webster *v.* Lee, 5 Mass. 334, 336, *semble* (an interested witness may object to testifying against that interest); 1810, Appleton *v.* Boyd, 7 Mass. 131, 134 (an assignor of a mortgage, and a partner, not compelled to testify against the mortgagee, as persons interested in the event of the cause; no authority cited); 1827, Devoll *v.* Brownell, 5 Pick. 448 (trustee of personalty, compelled to answer on 'scire facias'); 1830, Bull *v.* Loveland, 10 Pick. 9, 12 (action on a note; one holding it as security for advances, held compellable to testify against his interest; repudiating Appleton *v.* Boyd; but not clearly distinguishing between the privilege of a civil party and the privilege against self-crimination); 1839, Com. *v.* Willard, 22 Pick. 476 (preceding case approved); *Pennsylvania:* 1818, Baird *v.* Cochran, 4 S. & R. 397, 400 (interested witness, not a party, not privileged); 1821, Nass *v.* Vanswearingen, 7 S. & R. 192, 195 (same); 1842, Ralph *v.* Brown, 3 W. & S. 395, 400 (same); *South Carolina:* 1818, Lott *v.* Burrel, 2 Mill Const. 167 (privilege denied); *Tennessee:* 1808, Cook *v.* Corn, 1 Overt. 340 (interested witness, held privileged with hesitation, upon the literal words of the Constitution exempting him from giving "evidence against himself," though the clause "was particularly intended for criminal cases"); 1809, Stewart *v.* Massengale, 1 Overt. 479 ("An interested witness cannot be compelled to swear; it is a privilege as to himself, which he has a right to claim"); 1812, Tatum *v.* Lofton, Cooke 115 (foregoing doctrine held not applicable to a witness who had by his own act become interested, though at first not interested); 1834, Zollicoffer *v.* Turney, 6 Yerg. 297 (interested witness held not privileged, on the authority of Lord Melville's Case, *post*, § 2223; Cook *v.* Corn repudiated, as not being a direct decision); *Vermont:* 1828, White *v.* Everest, 1 Vt. 181, 189, *semble* (no privilege); 1843, Ward *v.* Sharp, 15 Vt. 115, 118 (same); 1844, Stevens *v.* Whitcomb, 16 Vt. 121, 123 (same).

Contra: 1849, Holmes *v.* Holloman, 12 Mo. 536 (privilege recognized).

Undecided: 1806, U. S. *v.* Grundy, 3 Cr. 337, 338, 343, 355.

[3] 1827, Mauran *v.* Lamb, 7 Cow. N. Y. 174, 177 (action on a check, for the benefit of R.; R. held not compellable, as "the real plaintiff"); 1828, People *v.* Irving, 1 Wend. N. Y. 20 ("real parties in interest," held not compellable); 1843, Henry *v.* Bank of Salina, 5 Hill N. Y. 523, 526, 541 (approving Mauran *v.* Lamb); 1828, White *v.* Everest, 1 Vt. 181, 189; 1844, Stevens *v.* Whitcomb, 15 Vt. 121, 123.

[4] 1833, Owings *v.* Low, 5 G. & J. 134, 146; 1852, Watts *v.* Smith, 24 Miss. 77, 78; 1843, Tenney *v.* Evans, 14 N. H. 343, 348.

ordinary witness from answers on incidental facts of that nature, but also a party and an interested witness from any answers in the cause. As a matter of history, the privilege for a civil party was fully recognized at common-law, as also to a limited extent the privilege for an interested witness; but this supposed privilege for facts of civil liability independent of the suit at bar never prevailed anywhere. On the other side, this supposed privilege is to be distinguished from the privilege against facts involving a criminal liability (*post*, § 2254); indeed, it may be supposed that historically it was first suggested as a sort of extension of the latter privilege. The notion of criminal liability was well settled to include not only the liability to imprisonment or fine in a prosecution under the name of the Crown or the State, but also such other liabilities as were in fact though not in form penal, — as, for example, liability to a penalty recoverable by an informer, or to a forfeiture prescribed by statute or by contract (*post*, §§ 2256, 2257); and a willing judicial mind might easily see an opportunity here for extension by analogy. The present pretended doctrine might indeed be sufficiently disposed of by treating it in the definition of matters which the crimination-privilege does *not* include. Nevertheless, whatever its origin in judicial thought, the relation in principle and precedent between this and the privileges of civil parties and interested witnesses mark it off as a separate thing. It falls naturally on the border line between the long-abolished common-law privilege of a civil party and the still vigorous privilege against self-crimination. It is to be thought of as a shadow which once hovered over this line, but has long since been dissipated.

What, then, was the history of this wraith? This much is fairly certain, that it was never seen or heard of till the end of the 1700s. By that time, the privilege against disclosing self-criminating facts had been a century under way (*post*, § 2250) and was matter of elementary knowledge; it was understood to include in its scope the protection against disclosure of matters of forfeiture (*post*, § 2256). But of any extension of this idea of punitive forfeiture, to include the idea of ordinary civil liability to perform a contract or pay damages for a tort, or the like, no trace whatever appears until 1795, when Lord Kenyon, then Chief Justice of the King's Bench (since 1788, when Lord Mansfield had retired), came forth with a broad pronouncement to that effect.[1] It does not appear that he had any authority for this notion. But

§ 2223. [1] 1795, Bain *v.* Hargrave, Peake, Evidence, 184, note (assumpsit against a collecting agent; on an issue of payment, the payee, not a party but a fellow-clerk of the defendant, was asked whether some money was not due from some person — meaning the witness — to the plaintiff; and, on objection, Lord Kenyon said "that he would not oblige him to answer any question which might tend to charge himself with a debt; a man might come voluntarily and charge himself with a debt, but he could not be compelled to charge himself civilly, any more than to make himself liable to a criminal prosecution"; no precedent cited); in the next year, he hedged slightly: 1796, Doxon *v.* Haigh, 1 Esp. 409, 411 (L. C. J. Kenyon "said that generally a witness being subjected to a civil right, in consequence of an answer to a question put to him, would not warrant him in refusing to answer, as the rule was rather confined to a criminal one; but a witness should not be asked a question which might charge himself obliquely by his answer, where there could otherwise be no direct evidence or charge against him").

naturally his view produced some effect; and that effect was increased upon the printing, in 1801 (the year before Lord Kenyon's death), of this ruling of his in Mr. Peake's influential treatise on Evidence, — the only work of its kind in England since Mr. Justice Buller's book of forty years before. Before long, however, this novel notion was fortunately forced upon the attention of the judges of England as a whole. This happened through an investigation, in 1806, by impeachment in the House of Lords, into the financial scandals connected with Lord Melville (Mr. Dundas) and the management of the war. Upon the introduction of a bill to compel answers from witnesses and to hold them harmless so far as their privilege was thus taken away — an expedient often used to annul the self-crimination privilege (*post*, § 2281) — the question naturally arose whether there existed any privilege which thus stood in the way of requiring answers on matters involving merely a civil liability. Upon this question the opinion of all the judges was formally asked.[2] Their answers were divided; but the majority of nine in fourteen included the most weighty names, together with that of Lord Eldon, then temporarily out of office but sitting as peer;[3] and the three of longest experience took occasion to express emphatically their polite astonishment at the pretension to this new privilege:

1806, L. C. ERSKINE, in the *Debate on Lord Melville's Case*, Hans. Parl. Deb. 1st ser., VI, 249, said that "he had been for seven-and-twenty years engaged in the duties of a laborious profession, and while he was so employed, he had the opportunity of a more extensive experience in the courts than any other individual of his time.[4] It was true that in the profession there had been, and there now were, men of much more learning and ability than he would even pretend to; but success in life often depended more upon accident, and certain physical advantages, than upon the most brilliant talents and profound erudition. It was very singular that, during these twenty-seven years, he had not for a single day been prevented in his attendance on the courts by any indisposition, or corporeal infirmity. Within much the greater part of this period, he had been honoured by a gown of precedency, and in consequence of this privilege, had not only been engaged in every important cause, but had conducted causes of this description during that period in the court of King's Bench. . . . Although his experience was equal not only to any individual judge on the bench, but to all the judges, with their collective practice; yet, he never knew a single objection to have been taken, to an interrogatory proposed, because

[2] 1806, Lord Melville's Trial, Peake, Evidence, 184, note (Questions put to the judges: "1. Whether according to law a witness can be required to answer a question relevant to the matter in issue, the answering which has no tendency to accuse himself, but the answering which may establish or tend to establish that he owes a debt recoverable by civil suit? 2. Whether according to law a witness can be required to answer a question relevant to the issue, the answering of which would not expose him to a criminal prosecution, but might expose him to a civil suit at the instance of His Majesty for the recovery of profits derived by him from the use or application of public money contrary to law?").

[3] 1806, Feb. and Mar., Lord Melville's Case, Witnesses' Indemnity Bill, Hansard's Parl. Debates, 1st ser., vol. VI, pp. 170, 222, 234, 243 (to the questions just quoted the answer was "Yes," by eight judges, Sutton, B., Graham, B., Chambre, J., Le Blanc, J., Heath, J., Macdonald, C. B., Ellenborough, C. J. of K. B., Erskine, L. C., with Lord Eldon; and "No," by five judges, Grose, J., Lawrence, J., Rooke, J., Thompson, B., and Mansfield, C. J. of C. P.; the opinions of this majority seem to have been treated as carrying conclusive weight; their tenor was, in general, that the privilege extended only to "such questions as would expose him to a criminal prosecution or to a penalty or forfeiture").

[4] Erskine's amiable egotism may be seen in this exordium.

the reply to it would render the witness responsible in a civil suit. It was true, that in Mr. Peake's book, which had been frequently cited on the present occasion, there was a note by which it should appear that an objection of this kind had been taken by the late Chief Justice Kenyon; but, notwithstanding his high opinion of the minute accuracy and great learning of that reporter, he thought he had, in this instance, been guilty of a mistake, on two grounds; 1st, because he [Erskine] himself had been counsel in the cause, and had no recollection of the circumstance; 2dly, because, if that note were correct, Lord Kenyon must have been guilty of an obvious contradiction of his own principles and sentiments, as they appeared even on the face of the same report. . . . Notwithstanding some difference of opinion among high authorities, among persons for whom he had the greatest veneration, yet he could not help thinking that the law itself was unembarrassed from these contradictions. He considered it so far precise, clear, and perspicuous, that it was necessary no new law should be promulgated, otherwise than in the form of a declaratory law, by which it should be announced what had been the law, what was the law, and what ought to be the law, and what shall be the law of the land as to this important particular."

These deliverances before the House of Lords disposed forever in England of the sprouting heresy.[5] Though a statute was immediately passed to remove the doubt,[6] it was plainly understood to be declarative of the law, and not alterative, and has always been so treated.[7]

In the United States, the news of the doubt came naturally enough to the Courts of some jurisdictions in the early days;[8] but, with practical una-

[5] The truth seems to have been that the minority, the supporters of this supposed privilege, reflected merely the prejudice of that reactionary and jealous portion of the profession which, led by L. C. J. Kenyon, had set itself stiffly against any doctrine bearing the approval, or put forward as settled by the sanction of Lord Mansfield; his liberal views on this subject are seen in Cox *v.* Whalley (cited *ante*, § 2222, note 1); this attitude of Lord Kenyon has been elsewhere noticed (*ante*, § 1858). In this instance, it would seem that when Lord Kenyon, in the case of Bain *v.* Hargrave (*supra*, note 1), had committed himself, probably without much reflection, to the privilege in question, his followers, notably Justices Grose, Lawrence, and Rooke, came to stand by it obstinately, as if the credit of Lord Kenyon's memory, and of the movement he represented, were involved.

[6] Sir Samuel Romilly's argument for this bill, set forth in his diary (Life, 3d ed., II, 9), was a forceful one.

[7] The act was offered as a "Bill for Declaring the Law with respect to Witnesses being Liable to Answer" (Hans. Parl. Deb., 1st ser., VI, 401, 421, 486, 502, 525, 753, 768). The statute was as follows: 1806, St. 46 Geo. III, c. 37 ("Whereas doubts have arisen whether a witness can by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to any penalty or forfeiture, but the answering of which may establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of His Majesty or of some other person or persons, Be it therefore declared, That a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever, by reason only or on the sole ground that the answering of such question may establish or tend to establish that he owes a debt or is otherwise subject to a civil suit either at the instance of His Majesty or of any other person or persons"); 1808, R. *v.* Woburn, 10 East 395 (pauper settlement; an inhabitant of the defendant parish, refusing to testify for the plaintiff parish, held not compellable; the statute declared not to apply to the party's privilege, and the inhabitant being in substance a party).

Similar statutes exist in Canada: *Dom.* R. S. 1906, c. 145, Evid. Act § 5 (no person is to be excused on the ground that his answer "may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person"; remainder as quoted *post*, § 2281); *Man.* Rev. St. 1913, c. 65, § 5 (like Can. R. S. 1906, c. 145, Evid. Act § 5); *N. Br.* Consol. St. 1903, c. 127, § 7 (similar to St. 46 Geo. IV); *Ont.* Rev. St. 1914, c. 76, § 7 (similar; quoted *post*, § 2281).

[8] The questions and the answers in Lord Melville's Case became known to the profession in America by their publication in Hall's Journal of American Law, I, 223; they appear not to have been elsewhere printed at the time, except in later editions of Peake on Evidence.

nimity, the same reception was given to it, and the supposed privilege was by the Courts wholly repudiated.[9] Statutes also have sometimes covered the subject.[10] For the past three generations, this has been a settled point in the law of Evidence.

That this is as it should be, cannot be doubted. The recognition of such a privilege would be not only an unendurable obstruction to the search for truth, but also a gross anomaly in principle:

1830, RUFFIN, J., in *Jones* v. *Lanier*, 2 Dev. 480: "Since the jurisdiction of equity hath arisen to enforce discovery, the privilege [of a party at common law] not to testify against one's self is nominal, so far as respects mere liabilities for debts. Discoveries thus obtained by compulsion and on oath are constantly used in trials at law, as other admissions of the party; and the only limitation or discovery in equity is that it shall not extend to crimes, nor to charge one with a penalty nor incur a forfeiture. If then a person may be compelled to testify indirectly against himself in a suit at law then actually pending, would it not be strange that he should be protected from doing so against another because he might thereby expose himself to a future civil action? That would make the protection operate

[9] *Ky.* 1823, Gorham *v.* Carroll, 3 Litt. 221 (liability on a note); 1827, Robinson *v.* Neal, 5 T. B. Monr. 212, 216; *La.* 1819, Planters' Bank *v.* George, 6 Mart. 670, 673 (no privilege for matters involving liability to a civil suit); *Md.* 1818, Taney *v.* Kemp, 2 H. & J. 348 (no privilege as to answers which "may expose him to a civil action"); 1826, City Bank *v.* Bateman, 7 H. & J. 104, 111 (same); 1828, Stoddert *v.* Manning, 2 H. & G. 147, 157 (same); 1829, Naylor *v.* Semmes, 4 G. & J. 273, 276 (same); *Mass.* 1827, Devoll *v.* Brownell, 5 Pick. 448 (trustee of personalty, compelled to answer as to a fraudulent conveyance, on 'scire facias,' since the privilege "does not relate to questions of property"); 1830, Bull *v.* Loveland, 10 Pick. 9, 12 (St. 46 Geo. III, treated as a declaratory act; a witness held compellable to answer any matter that may "adversely affect his pecuniary interest," otherwise than to "expose him to criminal prosecution or tend to subject him to a penalty or forfeiture"); 1839, Com. *v.* Willard, 22 Pick. 476 (preceding case approved); *N. H.* 1825, Copp *v.* Upham, 3 N. H. 159 (no privilege as to liability to a civil suit; here, the fact of a debt); 1910, Boston & Maine R. Co. *v.* State, 75 N. H. 513, 77 Atl. 996 (general principle affirmed); *N. Y.* 1827, Mauran *v.* Lamb, 7 Cow. 174, 177 (approving the statute 46 Geo. III, as declaratory); *N. C.* 1830, Jones *v.* Lanier, 2 Dev. 480 (no privilege for matters involving liability to a civil suit); 1845, Harper *v.* Burrow, 6 Ired. 30, 33 (Jones *v.* Lanier approved); *Oh.* 1828, Cox *v.* Hill, 3 Oh. 411, 424 (liability to a civil action is not the subject of a privilege); *Pa.* 1818, Baird *v.* Cochran, 4 S. & R. 397, 400, *semble* (no privilege for liability to a civil suit); 1821, Nass *v.* Vanswearingen, 7 S. & R. 192, 195 (same); 1842, Ralph *v.* Brown, 3 W. & S. 395, 400 (same); *Tenn.* 1834, Zollicoffer *v.* Turney, 6 Yerg. 297, 301 (no privilege for matters involving liability to a civil suit); *Vt.* 1843, Ward *v.* Sharp, 15 Vt. 115, 118 (Lord Melville's Case approved).

Contra: 1821, Benjamin *v.* Hathaway, 3 Conn. 528, 532 (privilege not to testify to a debt, recognized; going upon the mistaken authority of the rulings as to interested witnesses, *ante*, § 2222; here the witness, a sheriff, was asked for testimony as to his liability to a penalty for a false return, and the Court's remark was 'obiter'); 1827, Northrop *v.* Hatch, 6 Conn. 361, 364 (preceding case approved).

[10] *Alaska:* Comp. L. 1913, § 1507 (like Or. Laws 1920, § 870); *Cal.* C. C. P. 1872, § 2065 (no privilege for a question whose "answer may establish a claim against himself"); *Ida.* Comp. St. 1919, § 8044 (like Cal. C. C. P. § 2065); *Ia.* Code 1897, § 4611, Comp. Code § 7318 (no privilege for an answer merely subjecting to "civil liability"); *Mich.* Comp. L. 1915, § 12547 (no privilege for an answer tending to establish "that such witness owes a debt or is otherwise subject to a civil suit"); *Mo.* Rev. St. 1919, § 5419 (no privilege from answering a relevant question on the ground that the answer may tend to establish "that such witness owes a debt or is otherwise subject to a civil suit"); *Nebr.* Rev. St. 1921, § 8843 (no privilege "upon the mere ground that he would thereby be subjected to a civil liability"); *Nev.* Rev. L. 1912, § 5437 (like Cal. C. C. P. § 2065); *N. Y.* C. P. A. 1920, § 355 ("A competent witness shall not be excused from answering a relevant question on the ground only that the answer may tend to establish the fact that he owes a debt or is otherwise subject to a civil suit"); *Or.* Laws 1920, § 870 (like Cal. C. C. P. § 2065); *P. I.* P. C. 1911, Gen. Order 58 of 1900, § 56 (like Cal. C. C. P. § 2065); *P. R.* Rev. St. & C. 1911, § 1532 (like Cal. C. C. P. § 2065); *Utah:* Comp. L. 1917, § 7141 (like Cal. C. C. P. § 2065); *Wis.* Stats. 1919, § 4077 (substantially like N. Y. C. P. A. § 355).

quite differently from the original purpose of it. . . . The effect would be that when the protection can be of immediate and direct service to him for whom it was created, it shall be unavailing; but when it operates chiefly to the advantage of a third person, it shall be in force. This is a complete perversion of the principle, and shows that the rule of exclusion ought not to exist."

§ 2224. (11) **Prosecution in a Criminal Case; Production of Documents or Chattels.** If there is no privilege for the party opponent in a civil case, is there one for the *prosecution* in a *criminal case?* In some jurisdictions, Courts are disposed to concede one.[1]

In favor of such a privilege, it would be said that it merely balances evenly the accused's privilege to withhold documents and chattels (*post*, § 2254). On the other hand, a sense of fairness, emphatically expressed in legislation a century old, has conceded to the accused the power to obtain discovery before trial of the prosecution's list of witnesses, and this is in effect a repudiation of that much of a privilege. Yet, as against this, the experience of daily practice tells us that the unscrupulous counsel for accused is not to be trusted, and warns us that no further favors should be shown. But, once more, it may be replied that the State has already a great advantage in resources of marshalling evidence, and that the over-zealous prosecutor is often grossly unfair.

Apart from current practice, it seems wiser to stand firm upon ordinary considerations of fairness, and to hold that the prosecutor is not entitled at the trial to withhold from the inspection of the accused and the jury any documents or chattels relevant to the case.

§ 2224. [1] Add here the cases cited *ante*, §§ 1859 *g*, 1863 (discovery before trial); in point of policy, a grant of discovery before trial is necessarily a negation of privilege: *Ind.* 1883, McDonel *v.* State, 90 Ind. 320, 321 (motion for production in Court, before trial, by the prosecuting attorney, of articles in the State's possession as evidence, refused for lack of the usual affidavit); *Mo.* 1886, State *v.* Brooks, 13 Amer. St. Tr. 702, 747 (murder of P., cutting up the body and packing it in a trunk; the State having exhumed P.'s body, the defence, after trial begun, asked that opportunity be given for expert witnesses to examine the corpse; the prosecuting attorney at first declined, the judge was undecided; afterwards the proposal was abandoned by counsel for defence); *N. Y.* 1914, People *v.* Becker, 210 N. Y. 274, 297, 104 N. E. 396 (murder; testimony on commission taken for defendant and returned under seal in the Court's custody, was refused by the trial Court to be opened unless the defendant's counsel would agree to read the answers in evidence; held error); *Oh.* 1910, State *v.* Rhoads, 81 Oh. 397, 405, 91 N. E. 186 (certain notes of an interview with an intending witness, and minutes of testimony to the grand jury, held not producible on the trial by the prosecuting attorney for use by the defeadant's counsel in cross-examining; unsound); *Or.* 1921, State *v.* Yee Guck, 99 Or. 231, 195 Pac. 363 (murder; notes of interview with eye-witnesses, in possession of the district attorney, held not demandable at the trial by defendant's counsel, for use in cross-examination; unsound); 1921, State *v.* Brake, 99 Or. 310, 195 Pac. 583 (stenographic notes of an alleged second confession of an accomplice, M.; M. was on the stand, and the prosecuting attorney had the notes; on request, the defendant held not entitled to have or inspect the notes, for use in cross-examining M., the notes not being themselves usable in evidence; general principle not settled; but the ruling is unsound; if an accomplice made a confession, the accused was entitled in common fairness to see it, whether or not he could or would use it in evidence); *Pa.* 1869, Com. *v.* Twitchell, 1 Brewst. 551, 561 (bloody clothing, etc., offered by the prosecution; defendant held entitled to have his expert witnesses inspect the articles in the presence of an officer of Court; useful opinion); *P. I.* 1919, U. S. *v.* Baluyot, 40 P. I. 385, 405 (at the trial, the accused's counsel held not entitled to inspect certain written statements made by witnesses to the prosecuting officer before trial, no showing of probable self-contradictions being made).

TOPIC A (*continued*): PRIVILEGED TOPICS

SUB-TOPIC II: PRIVILEGE FOR ANTI-MARITAL FACTS (HUSBAND OR WIFE TESTIFYING AGAINST THE OTHER)

CHAPTER LXXVII.

§ 2227. **History of the Privilege.** The history of the privilege not to testify against one's wife or husband is involved, like that of civil parties (*ante*, § 2217), in a tantalizing obscurity. That it existed by the time of Lord Coke is plain enough; but of the precise time of its origin, as well as the process of thought by which it was reached, no certain record seems to have survived. What is a little curious is that it comes into sight about the same time as the disqualification of husband and wife to testify on one another's behalf (*ante*, § 600); for the two have no necessary connection in principle, and yet they travel together, associated in judicial phrasing, from almost the beginning of their recorded journey.

This much, however, may be fairly assumed, that the privilege existed before the disqualification; for in what is apparently the earliest explicit ruling, in 1580, the wife's testimony on her husband's behalf is treated as receivable, while his privilege to keep her from testifying against him is apparently sanctioned.[1] Moreover, the privilege is recognized more than

§ 2227. [1] 1580, Bent *v.* Allot, Cary 135 (a defendant having examined his wife in chancery, the plaintiff was allowed a subpœna against her, the examination for the husband to be suppressed if he did not suffer her examination for the plaintiff).

once in the next half century;[2] but there appears no ruling upon a wife's disqualification during that whole period, nor for some time thereafter.[3]

In searching for analogies to throw light upon this treatment of marital testimony, we are left without significant traces. The rules for deed-witnesses afford no precedents. The ordinary witness, who had only within two generations become a common figure in jury-trials, was plainly not subject to any disqualifications whatever before this same period of the Elizabethan reign (*ante*, § 575), though he was not compellable (*ante*, § 2190), so that it is not strange that no clue is to be found in this field. Moreover, in the testimonial rules of the ecclesiastical law, which in general obtained in chancery, and might thus have been naturally drawn upon for analogies, the disqualifications of witnesses included not only a wife but also all members of the family, together with dependents and servants;[4] yet the practice of the Chancellor and of the common-law judges never disqualified any but the wife,[5] and never privileged any but the wife.[6] To suppose, therefore, a borrowing of the ecclesiastical rule is to suppose that its naturally connected details were deliberately separated and were in part rejected; and this again compels us to account for the discrimination against a wife.

Possibly the true explanation is, after all, the simplest one, namely, that a natural and strong repugnance was felt (especially in those days of closer family unity and more rigid paternal authority) to condemning a man by admitting to the witness-stand against him those who lived under his roof, shared the secrets of his domestic life, depended on him for sustenance, and were almost numbered among his chattels. In a day when the offence of petit treason by a wife or a servant — violence to the head of the household — was still recognized, it would seem unconscionable that the law itself should abet (as it were) a testimonial betrayal which came close enough to petit treason, and should virtually permit a wife to cause her husband's death.[7] This process of thought (though it leaves unexplained the compellability of a son) is at least consistent with several features of the

[2] 1613, Anon., 1 Brownlow 47 ("By the common law she shall not be examined" against him; here, in bankruptcy proceedings). In 1623, the St. 21 Jac. 1, c. 19, § 6, expressly altered this; and its language seems to show that the privilege is a new thing: "And whereas by the former laws . . . some doubt hath been made whether the commissioners have power to examine the wives of bankrupts touching the same [concealment of goods]. . . . for clearing therefore the said doubt and avoiding the inconveniences aforesaid, . . . [the commissioners may] examine upon oath the wife and wives [!] of all and every such bankrupt for the finding out and discovery of the estate [concealed by them] . . . [and the wife] shall incur such danger and penalty for not coming before the said commissioners [as other persons do]."

[3] Coke mentions it in 1628 (quoted *infra*); but there are no rulings for some time thereafter, beginning about Charles II's reign: *ante*, § 600; *infra*, notes 8–12.

[4] *Ante*, § 600.

[5] *Ante*, § 600.

[6] 1613, Anon., 1 Brownlow 47 (a son is bound to reveal his father's treason; but a wife is not bound to discover her husband's). The following case seems to stand alone: 1631, Lord Audley's Trial, 3 How. St. Tr. 401, 402 (by the judges, "in like manner [to a wife], a villain might be a witness against his lord in such cases [of injury done to him by the lord]"; Lord Audley in his speech exclaims, "Woe to that man, whose servants should be allowed witnesses to take away his life!").

[7] Compare Lord Audley's exclamation, quoted *supra*, and the general notion then prevalent as to a privilege for confidential matters (*post*, §§ 2285, 2290).

situation, namely, with the half-recognition of a privilege against servants' testimony, with the fact that the early cases all deal with the privilege for a wife's testimony against her husband (not the husband's against the wife), and with the fact that the privilege is recorded for half a century before the disqualification is mentioned.

The disqualification is not found until Coke's treatise appears. Whether its subsequent career is to be credited wholly to his creation is perhaps a matter for speculation.[8] At any rate, in 1628 he couples in the same sentence both privilege and disqualification:

1628, Sir *Edward* COKE, Commentary upon Littleton, 6 *b*: "He that loseth 'liberam legem' becometh infamous and can be no witnesse; 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 a partie in interest, though it be proved true, shall not exclude the witnesse to be sworne. . . . Note, it hath been resolved by the justices that a wife cannot be produced either against or for her husband, 'qua sunt duæ animæ in carne una'; and it might be a cause of implacable discord and dissention between the husband and the wife, and a meane of great inconvenience; but in some cases women are by law wholly excluded to bear testimony, as to prove a man to be a villain."

In Coke's pronouncement, the privilege is stated in absolute terms. Nevertheless, it was already well understood to be subject to some exceptions in criminal cases.[9] In civil cases, it appears to have been generally assumed to be already conceded;[10] although some sort of doubt hung over it in this respect for more than a century.[11] By the end of the 1600s, the existence of the privilege in general is plain enough in both civil and criminal cases;[12] and the

[8] Because he cites as authority a ruling of 10 Jac. 1, *i. e.* 1613, which, however, was apparently the case in Brownlow, cited *supra*, and asserted the privilege alone.

[9] 1631, Lord Audley's Trial, 3 How. St. Tr. 401, 402, 414 (the judges resolved that the wife might be a witness against her husband for rape upon her, instigated by him; "for she was the party wronged; otherwise she might be abused"; "in civil cases the wife may not [witness against him], but in a criminal cause of this nature, where the wife is the party aggrieved, and on whom the crime is committed, she is to be admitted a witness against her husband"). In the following report of this case, the privilege is denied for criminal cases in general: 1631, Lord Audley's Case, Hutton 115 ("It was resolved that in case of a common person between party and party she could not [be a witness]," "but between the King and the party, upon an indictment, she may, although it concerns the 'feme' herself"). This explains the meaning of the doubts later expressed (*post*, § 2239) by some judges as to the law of Lord Audley's Case.

[10] 1580, Bent *v.* Allot; 1613, Anon.; 1631, Lord Audley's Trial; cited *supra*.

[11] 1784, Bentley *v.* Cooke, 3 Doug. 422 (assumpsit by woman as 'feme sole'; R., being called by defendant to prove her married to him, was excluded, by three judges, on the ground that there was a general rule for all cases; Buller, J., doubted, because "as to the general rule, I find it only in criminal cases").

[12] Cases cited *post*, § 2239, and the following: 1684, L. C. J. Jeffreys, in Lady Ivy's Trial, 10 How. St. Tr. 555, 644 ("By the law the husband cannot be a witness against his wife, nor a wife against her husband, to charge them with anything criminal; except only in cases of high treason. This is so known a common rule that I thought it could never have borne any question or debate"); 1688, Cole *v.* Gray, 2 Vern. 79 (bill for account by children of the defendant's wife by a former husband; the wife was examined for the plaintiff as to the amount of her first husband's estate; but L. C. Jeffreys "disallowed her evidence and declared the wife could not be a witness against her husband").

doubt, after all, never had any chance of surviving in the face of Coke's authority, and has left no mark upon the law and no serious controversy in the records.

On the whole, then, the privilege may be said to have been understood to exist in some shape before the end of the 1500s, and to have been firmly established by the second half of the 1600s.

§ 2228. **Policy of the Privilege.** 1. The record of judicial ratiocination defining the grounds and policy of this privilege forms one of the most curious and entertaining chapters of the law of Evidence. It is curious, because the variety of ingenuity displayed, in the invention of reasons 'ex post facto,' for a rule so simple and so long accepted, could hardly have been believed, but for the recorded utterances. It is entertaining (if any error in the law can ever be entertaining), because of its exhibition of the subtle power of cant over reason, and of the solemn absurdity of explanations which do not explain and of justifications which do not justify, and because of the fantastic spectacle of a fundamental rule of Evidence, which never had a good reason for existence, surviving none the less through two centuries upon the strength of certain artificial dogmas, — pronouncements wholly irreconcilable with each other, with the facts of life, and with the rule itself, and yet repeatedly invoked, with smug judicial positiveness, like magic formulas, to still the spectre of forensic doubt. No one of these supposed reasons was ever logically carried out in the enforcing of the rule; no one of them represented a sound cause for its existence; and no one of them, in all probability, reproduced the motives or sentiments which actually served for the original acceptance of the rule in the 1500s. Yet they passed current, — one here and one there; one for this judge, another for that judge. That the rule of privilege existed, all were agreed. That it had some good reason for existence, all were equally agreed. To name that good reason precisely was a matter of much less consequence. Perhaps the question did not deserve a plain answer. And so, after all, the inquisitive little Peterkin at the bar, questioning too rashly the postulated platitudes of the Caspars in the profession, had to be content with what was vouchsafed.

2. This singular condition of the law may perhaps be laid to the blame of Lord Coke. He it was who struck the first false note. He mouthed a few Latin words of mediæval scholasticism, and suggested a consideration doubtful in its morality and narrow in its view of human nature; and his successors seem to have been satisfied not to improve upon this example. Uninstructed by worthy judicial suggestions, professional and public opinion has been slow to appreciate and to repudiate the fallacies of the rule. The various reasonings by which the support of the rule has been attempted have of course had different vogues, — some rather at one time and in one court, some in others. But almost every one of the chief arguments had appeared in England by the early 1800s; after that time, there is usually mere repetition. The following passages will serve fairly to represent the leading types of argument:

1680, HALE, L. C. B., Pleas of the Crown, II, 279: "[Man and wife] are disabled in respect of the civil unity of their persons."

1696, Sir *John Fenwick's Trial*, in the House of Commons, 13 How. St. Tr. 582. Sir *T. Powis* (for the accused): "Now what any man's wife says cannot be made use of against him, as nothing that she says or does can be made use of for him; and by the same rule of justice it cannot be made use of against him, for otherwise the rule would be unequal." Sir *B. Shower* (for the accused): "The actions of a wife cannot be evidence for nor against her husband, . . . and that for the economy, the danger might follow in cases of matrimony and families."

1736, HARDWICKE, L. C. J., in *Barker* v. *Dixie*, Lee cas. t. Hardwicke, 264: "The reason why the law will not suffer a wife to be a witness for or against her husband is to preserve the peace of families."

1767, BULLER, J., Trials at Nisi Prius, 286: "Husband and wife cannot be admitted to be witness for each other, because their interests are absolutely the same; nor against each other, because contrary to the legal policy of marriage."

1768, Sir *William* BLACKSTONE, Commentaries, I, 443: "If they were admitted to be witnesses *for* each other, they would contradict one maxim of the law, 'nemo in propria causa testis esse debet'; and if *against* each other, they would contradict another maxim, 'nemo tenetur seipsum accusare.'"

1792, KENYON, L. C. J., in *Davis* v. *Dinwoody*, 4 T. R. 678: "Their being so nearly connected, they are supposed to have such a bias on their minds that they are not to be permitted to give evidence either for or against each other."

1839, IRVIN, J., in *Mills* v. *U. S.*, 1 Pinney 73, 75 (excluding a husband called on a charge of his wife's adultery): "The fact here sought to be proved by the husband, to wit, the marriage of himself and the accused (or plaintiff in error) was so important that without it the prosecution must fail, and his wife though once accused would then stand acquitted before the world. But suffer or compel him to testify, and indelible disgrace may be fixed upon his family and he be made the subject of the deepest mortification which a sensitive being can endure. . . . Is a policy so fraught with mischief to those delicate relations of society to be established? Surely not."

1867, CAMPBELL, J., in *Knowles* v. *People*, 15 Mich. 408, 413: "It is very manifest that the rule which prevents a wife from being compelled to testify against her husband is based on principles which are deemed important to preserve the marriage relation as one of full confidence and affection; and that this is regarded as more important to the public welfare than that the exigencies of lawsuits should authorize domestic peace to be disregarded for the sake of ferreting out some fact not within the knowledge of strangers. . . . The power of declining to call such a witness is not reserved to protect from awkward disclosures, but out of respect of the better feelings of humanity, which impel all right-minded persons to shrink from any needless exposure to the ordeal of a public examination of persons who would be unnatural and unworthy if they did not feel a very strong bias in favor of their consorts."

1868, SHARSWOOD, J., in *Pringle* v. *Pringle*, 59 Pa. 281, 288: "Nothing is better settled than that wherever the wife is interested, the husband cannot be a witness; not on the score of his interest, for he may preclude himself from any by a release, or may have done so by a settlement to her separate use; but entirely on the ground of public policy. It is necessary to preserve family peace and maintain that full confidence which ought to subsist between husband and wife."

1875, Mr. *Evarts*, arguing, in *Tilton* v. *Beecher*, N. Y., Abbott's Rep. II, 49 (objecting to the admission of the plaintiff in an action of criminal conversation): "The common law has said, great as is the interest of the administration of justice, all-powerful as it should be, to draw into court all evidence that can speak the truth within the rules of evidence, yet the administration of justice was made for society, not society for the administration of justice; and there are certain institutions of society lying at the base of

our civilization, sustaining the whole fabric of its prosperity, its purity, its dignity, and its strength, which must not be undermined, or corrupted, or disfigured, or defiled, under the notion that in the administration of justice the truth must be sought in every quarter and from every witness. Thus the great minds, legislative and judicial, the great moralists, the great religious teachers, have all combined to say that there are certain limits imposed by the nature of human society in the fabric as it is constituted, for our defense and protection, that cannot be overpassed. . . . When the common law says that a man and his wife are one, or, in Lord Coke's language, 'two souls in one person' — it is said no man shall put asunder those who are thus joined together, and, least of all, in the name of law, shall the administration of justice pull and tear asunder this conjugal relation by the step of the sheriff or the precept of the judge that compels one to come and betray the other. It is not, when the question comes before the Court, so much the interest, or the duty, or the particular circumstances of the individual case of marriage that are thus brought up for attention, as the institution itself."

Most of these reasons do not call for particular dissection; their very statement is void of force. Some of these utterances, such as the invocation, by Lord Coke and Lord Hale, of the unity and identity of married persons, are merely appeals to a fiction, which cannot serve as a legislative reason. Others, such as the phrase of Mr. Justice Buller about the "legal policy of marriage," are nothing but definitions of 'ignotum per ignotius.' Still others are irrelevant, — such as Mr. Justice Blackstone's reference to the privilege against self-crimination. Others, again, confuse the present privilege with the disqualification, and also with the privilege for confidential communications. The disqualification of husband and wife to testify in each other's behalf rests on reasons wholly independent of their privilege not to testify against each other (*ante*, § 601), and yet many of the earlier judges put forward some reason for the not testifying "for *or* against each other," as though the two rules were identical in policy. So, too, the privilege for confidential communications is not only quite different in scope, but stands upon its own sufficient grounds (*post*, § 2332); and yet the reason for it is often advanced as if it supported the present privilege.

3. Of the reasons which call for serious consideration, there seem to be distinguishable no more than two:

(*a*) The first of these is the argument so often repeated in the more modern opinions (though ranging back also among the oldest of the arguments), namely, the *danger of causing dissension* and of "disturbing the peace of families." Of this it may be premised, to be sure, that no manner of attempt was ever made by any Court to enforce this reason logically, and thus to test the accuracy of its utterance. For example, in the very case [1] in which Mr. Justice Grose purported by this rule to safeguard the ineffable domestic peace, the husband had long before absconded and married another wife; so that the learned judge's application of this reason exposed him to the citation of a proverbial expression about stable-doors. But, if we are to ignore the futility of appealing to a reason which is never allowed in practice

§ 2228. [1] 1788, R. v. Cliviger, 2 T. R. 263, 269.

to be logically applied, and are to treat it as a serious argument, the answer is, first, that the peace of families does not essentially depend on this immunity from compulsory testimony, and, next, that so far as it might be affected, that result is not to be allowed to stand in the way of doing justice to others. When one thinks of the multifold circumstances of life that contribute to cause marital dissension, the liability to give unfavorable testimony appears as only a casual and minor one, not to be exaggerated into a foundation for so important a rule. It is incorrect to assume that there exists in the normal domestic union an imminent danger of shattering an ideal state of harmony solely by the liability to testify unfavorably. Moreover, the significance of the argument is that if Doe has committed a wrong against Roe, and Doe's wife's testimony is needed for proving that wrong, Doe, the very wrongdoer, is to be licensed to withhold it and thus to secure immunity from giving redress, because, forsooth, Doe's own marital peace will be thereby endangered, — a curious piece of policy, by which the wrongdoer's own interests are consulted in determining whether justice shall have its course against him. This alone, without further following into the details of the reasoning, will serve to exhibit that argument's fallacy.

(*b*) A second reason, having some plausibility, and well expressed in the language of Mr. Justice Irvin and Mr. Justice Campbell, comes in substance to this, that there is a *natural repugnance* in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life-partner. This reason, if we reflect upon it, is at least founded on a fact; and it seems after all to constitute the real and sole strength of the opposition to abolishing the privilege. Let it be confessed, then, that this feeling exists, and that it is a natural one. But does it suffice as a reason for the rule? In the first place, it is not more than a sentiment. It does not posit any direct and practical consequences of evil. It is much the same reason that any one might give for abolishing the office of hangman in the jail or the business of spies in a war.[2] In the next place, it exemplifies that general spirit of sportsmanship which, as elsewhere seen,[3] so permeates the rules of procedure inherited from our Anglo-Norman ancestors. The process of litigation (many learned judges agree) is a noble kind of sport; and certain rules of fair play should never be overstepped.[4] One of these is to give something of a start to the victim of the chase, to follow him by certain rules only, and to respect his feelings so far as may be. This complicates the sport, and adds zest for the pursuers by increasing the skill and art required by them for success. The expedient of convicting a man out of the mouth of his wife is (let us say) poor sport,

[2] One may note here the inconsistency of the law in conceding the privilege for the testimony of wife or husband against each other, but in ignoring it for the testimony of parent and child, brothers and sisters, which equally involve the tender sentiments of domestic life.

[3] *Ante*, § 1845, *post*, § 2251.

[4] Such was the language of Mr. (later L. C. J.) Denman, quoted *post*, § 2251.

and we shall not stoop to it. Such is the theory and the sentiment of sportsmanship.

The answer to it is the answer that has had to be made for all the instances of its invocation, namely, that litigation is not a game, and that the law can never afford to recognize it as such; that the law, moreover, does not proceed by sentiment, but aims at justice. This generality would perhaps never be disputed; but in actual argument the constant tendency is to confuse sentiment with reason. A learned judge, for example,[5] refuses to compel this testimony for the mere sake of "ferreting out" the facts. Why sneer at the investigation of truth, by the innuendo of "ferreting," as though some petty and dishonorable practice were involved? This argument by innuendo is typical enough of much of the reasoning in support of the present privilege. Let us face the fact that when a party appears in a court of justice, charged with wrong or crime, the unavoidable and solemn business of the Court and the law is to find out whether he has been guilty of the wrong or the crime; that the State and the complainant have a right to the truth; and that this high and solemn duty of doing justice and of establishing the truth is not to be obstructed by considerations of sentiment, in this respect any more than in others.—So far as any recorded utterance has yet been found, no logical argument advanced for the present privilege has ever risen to a higher level than an appeal to these same considerations of sentiment.

4. It is with Jeremy Bentham that we begin to find (in this instance as in so many others) the reaction appearing against this illogical and unfounded doctrine of the common law; and his arguments have not failed to meet (though more slowly than in most other instances) a deserved acceptance in enlightened professional opinion. The following passages serve to illustrate the variety of reasoning that has helped thus far to bring about the abolition of the privilege in a moderate number of jurisdictions:[6]

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. IV, c. V (Bowring's ed. vol. VII, pp. 481 ff.): "'Hard,' 'hardship,' 'policy,' 'peace of families,' 'absolute necessity,' — some such words as these are the vehicles, by which the faint spark of reason that exhibits itself is conveyed. There are the leading terms, and these are all you are furnished with; and out of these you are to make an applicable, a distinct and intelligible proposition, as you can. . . . [As to the 'policy' of the situation, it is precisely the opposite; for] if a man could not carry on schemes of injustice, without being in danger, every moment, of being disturbed in them, and (if that were not enough) betrayed and exposed to punishment by his wife, injustice in all its shapes, and with it the suits and the fees of which it is prolific, would, in comparison with what it is at present, be rare. Let us, therefore, grant to every man a licence to commit all sorts of wickedness, in the presence and with the assistance of his wife; let us secure to every man in the bosom of his family, and in his own bosom, a safe accomplice; let us make every man's house his castle; and, as far as depends upon us, let us convert that castle into a den of thieves! Two men, both married, are guilty of errors of exactly the same sort, punishable with exactly the same punishment. In one of the two instances (so it happens) evi-

[5] In Knowles *v.* People, quoted *supra*.
[6] For the history of the legislation, see *post*, § 2245.

dence sufficient for conviction is obtainable, without having recourse to the testimony of the wife. While the one suffers — capitally, if such be the punishment, — to what use, with what consistency, is the other to be permitted to triumph in impunity? . . . A rule like this, protects, encourages, inculcates fraud. For falsehood, positive falsehood, is but one modification of fraud; concealment, a sort of negative falsehood, is another; I mean, concealment of any facts of which, for the protection of their rights, individuals or the public have a right to be informed. . . . By authorizing an individual to conceal it, in a case in which it is not so much as pretended that its mischievousness is in the smallest degree less than in other cases, it at once protects and encourages two different acts, of the mischievousness and criminality of which it shows itself sufficiently sensible on other occasions; — the principal crime, and that concealment of it, which, when the act so concealed is criminal, is itself a crime. . . . [As to the danger of 'dissension,'] if the dissension were, in the nature of the case, so implacable as the argument supposes, it should, consistently speaking, operate as a motive with the law to prescribe, rather than exclude, this source of information. 'If I attempt this crime, it may happen to my wife, from whom I cannot hope to conceal it, to be called upon to bear witness against me; and then, — even if I should escape from the punishment of the law, — the pain of seeing, in the partner of my bed, the once probable instrument of my destruction, will never leave me. . . . Oh! but think what must be the suffering of my wife, if compelled by her testimony to bring destruction on my head, by disclosing my crimes!' — 'Think?' answered the legislator: 'Yes, indeed I think of it; and, in thinking of it, what I think of besides, is, what *you* ought to think of it. Think of it as part of the punishment which awaits you, in case of your plunging into the paths of guilt. The more forcible the impression it makes upon you, the more effectually it answers its intended purpose. Would you wish to save yourself from it? it depends altogether upon yourself; preserve your innocence!' To the legislators of antiquity, the married state was an object of favour; they regarded it as a security for good behaviour; a wife and children were considered as being (what doubtless they are in their own nature) so many pledges. Such was the policy of the higher antiquity. The policy of feudal barbarism, of the ages which gave birth to this immoral rule, is to convert that sacred condition into a nursery of crime. The reason now given was not, I suspect, the original one. Drawn from the principle of utility, though from the principle of utility imperfectly applied, it savours of a late and polished age. The reason that presents itself as more likely to have been the original one is the grimgribber nonsensical reason, — that of the identity of the two persons thus connected. Baron and Feme are one person in law. On questions relative to the two matrimonial conditions, this quibble is the fountain of all reasoning." [7]

1838, Lord (HENRY T.) COCKBURN, Circuit Journeys (1889), p. 19: "Edinburgh, 30th April, 1838. — We had tough work at Perth, which it took four and a half days to get through. . . . Two things deserving of notice occurred in the course of the business. One was, that we had a bigamist before us. The other was, that we had an example of that horrid piece of nonsense, invented within these twenty years by the Court of Justiciary, and called by the inventors the 'Option.' The absurdity cannot possibly last long, and for the edification of posterity it may be as well to tell what it was. Some people think it cruel, and conducive to perjury, to compel parents or children to give evidence against each other; others — of whom I am one — admit it to be painful, but think that everything must yield to the necessities of justice, and that nothing is so cruel as that an innocent man should be convicted because a son is indulged in protecting his father by silence, which may happen in many ways. What is thought the humane side prevails at present in our criminal law. But it occurred to some of the judges, about twenty years ago, that,

[7] Mr. Bentham's arguments have been repeated in Chief Justice Appleton's treatise on Evidence, c. IX (1860). Another of his disciples makes also a powerful presentation: *circa* 1823, Edward Livingston, Introductory Report to the Code of Evidence (Works, ed. 1872, I, 456 ff.).

as the indulgence was granted solely from delicacy to these relations, it was competent to them to reject it if they chose. They therefore introduced the 'Option,' by which parents and children might hang each other or not, just as they pleased, unless they happened to be under pupillarity, in which case, being held incapable of discretion, they are always rejected.

"The practical operation of this folly is this: — A mother is on trial for her life. Her daughter is called as a witness against her. The Court tells her she has the option. She is a person of right feelings, and declines to testify. The possession of such feelings is a proof that she is worthy of being credited, even in the case of a parent. Nevertheless, truth is defied, and the claims of justice disregarded, for her comfort. But if she had been a monster, to whom hanging her mother was a luxury, that is, if she had been a person who exercised this option by preferring to give evidence, then she proves herself to be utterly incredible. Yet, just on this account, she is admitted to be sworn. And if the whole family be true to each other, as is commonly (but not always) the case, then all the light depending on parents and children is utterly excluded. A father may cut his wife's throat with complete safety, provided he takes care to perform the operation before nobody but her ten grown-up sons and daughters. In the case at Perth, a man called Murray was charged with having forged his son's name. But the son, who alone could prove the forgery, took advantage of this notable option, and refused to answer, on which the witness and the accused walked out of the court arm in arm. . . .

"This tissue of necessary nonsense is no part of the law of Scotland. The fear of perjury, — a foolish principle, but one that was not unnatural to superstitious barbarians, played on by cunning churchmen, — made our old law reject such testimony altogether and without distinction. But the option, by which its reception is made to depend on the pleasure or profligacy of each witness, is the production of a few judges, not at all qualified to legislate on such a subject, within these few years. The true principle is, to disregard relationship, except that of husband and wife, as an objection to the competency of any witness. . . .

"Bonaly, 11th May, 1840. — . . . I was in court the whole of three days, the 28th, 29th, and 30th. There was nothing particular in any of the cases, except that in one of them we had an excellent specimen of that beautiful 'option.' Four people were under trial for theft, and two for reset. A villain, who would have cut the throats of all his relations for a shilling, was called as a witness by the prosecutor. It was objected that, being the son of one of the thieves, he was not bound to give evidence. . . . So I was obliged to disgrace the law by explaining to him the respect paid to his sensibilities, and that in order to spare his filial piety, he had the option of defeating justice by telling the truth or not, just as he chose. No censure of this modern piece of judge-made legal nonsense could be severer than the grotesque and villainous leer with which he said: 'Odd! a' like that hoption, ma Lord!' on which he retired amidst the laughter of the prisoners, and the amazement of the jury, and saved the two resetters.

"The Lord Advocate (Rutherford) and I made out a Bill lately, which has just passed the Commons, for preventing the repetition of such disgraceful scenes by abolishing the objection of relationship. But its passage through the Peers is by no means certain; for a majority of the Faculty of Advocates is actually opposing it. They call such a blackguard's declining to speak, 'the voice of nature,' and profess to be moved by the 'metus perjurii.' The opponents always take the case in which nothing worse can happen than that a guilty man escapes. But under this rule an innocent one may be convicted. Take this case. A is on trial along with B for a murder, which *B alone* committed. He calls B's son, who saw his father alone do it. In this case the life of the innocent person is sacrificed to what, at the very best, is the filial injustice of the guilty one's relation."

1853, *Commissioners of Common Law Procedure*, Second Report, 13: "A more difficult question [than that of admitting them in each other's favor] arises when we proceed to

consider whether it should be made competent to an adverse party to call a husband or wife as witness against one another. The case would no doubt be of rare occurrence; when it did, it would in the greater number of instances be where husband and wife have separated and are on bad terms with one another. In such cases the mischief apprehended from the interruption of domestic happiness becomes out of the question. But suppose the husband and wife living together on the usual terms; here the identity of interest between them will deter an adverse party from calling one against the other, except under very peculiar and pressing circumstances and when the fact to be proved is certain in its character and clearly within the knowledge of the witness. . . . But if there be such a fact in the knowledge of one of two married persons, so material to the cause of the adverse party as to make it worth his while to run the risk of calling so hostile a witness, it becomes matter of very serious consideration whether justice should be allowed to be defeated by the exclusion of such evidence. It is clear that nothing but an amount of mischief outbalancing the evil of defeated justice can warrant the exclusion of testimony necessary to justice. What, then, is the mischief here to be apprehended? The possibility of resentment of a husband against a wife for testifying to facts prejudicial to his interest. But it is obvious that such resentment could only be felt by persons prepared to commit perjury themselves and to expect it to be committed in their behalf. Such instances, we believe, would be very rare; and we do not think that a regard to the feelings of individuals of this class, or the amount of mischief likely to arise from a disregard of them, is sufficient to compensate for the loss which in many cases may result from the exclusion of the evidence. . . . The conclusion to which the foregoing observations leads us is that husband and wife should be competent and compellable to give evidence for and against one another on matters of fact as to which either could now be examined as a party in the cause."

1875, Mr. *Beach*, arguing for the defendant, in *Tilton* v. *Beecher*, N. Y., Abbott's Rep., II, 87 (answering the argument of Mr. Evarts, quoted *supra*): "I agree, sir, that the law cherishes with tenderness the family and the home; and well it is, sir, that it should; for I agree too with my learned friend that upon them rests the true foundation of every well-regulated society and government. . . . I agree that no society or government can stand — virtuously stand — except upon the maintenance of the sanctity and the virtue of the domestic circle. So I agree too, sir, that there is much of beauty and sacredness in the idea of unity attached to the marriage relation. . . . But are we to forget that in what is called the progress of civilization that idea has been mangled and defaced? Are we to be blind to the legislation of the present? Are we to ignore the fact that all these ideas have been exploded and destroyed by what I deem the vandalism of modern legislation? In 1848 that unity was effectually impaired [by the property statutes]. . . . Now she may get out into the world and barter and trade and tussle with the energies of commercial and business life. Once her true sphere was in the domestic circle and around the hearthstone, cultivating those tender sentiments and qualities which were at once her grace and glory, but to-day by the voice and power of legislation she is ushered into the busy scenes of life, and becomes an active and independent actor in all its struggles. The counsel says this idea of unity, this consecration of the domestic circle, can not be torn by the rude hand of the law. Sir, it *has been* mangled and torn! That identity of interest, that union of soul, has been separated, not only by the voice of legal theory, but by the practical application of it to the ordinary concerns of life. My learned friends have produced here, sir, a wonderful mass of authorities gathered from adjudications under the ancient law both in England and the States of this country. . . . What need to gather those ancient authorities pronounced under a rule and a policy inapplicable to the present condition of our society, and asserting none of the rights which, by modern legislation, have been conferred mutually upon husband and wife? My friends have been digging the fossils of a past generation. They are gathering here the dead carcasses of exploded theories and adjudications, and confronting them in ghastly contrast with what professes to be the improvement of modern times. Sir, we are not governed by them."

This privilege has no longer any good reason for retention. In an age which has so far rationalized, depolarized, and de-chivalrized the marital relation and the spirit of Femininity as to be willing to enact complete legal and political equality and independence of man and woman, this marital privilege is the merest anachronism, in legal theory, and an indefensible obstruction to truth, in practice.

2. Who is Prohibited as Husband or Wife

§ 2230. **Paramour; Void Marriage.** The policy of the privilege, whatever it may be, applies at any rate to those only who profess to maintain towards each other the legal relation of husband and wife. There is therefore no privilege to withhold the testimony of a mere *paramour* or mistress.[1] Furthermore, the lofty object of protecting from invasion the sanctity of marital peace is deemed to extend to those only who legally and technically *are* husband and wife, whatever their honest and innocent belief may have been as to the validity of their relation. Hence there is no privilege to persons whose marriage is *void;*[2] their domestic peace may be shattered at any litigant's discretion. Again, as the innocent unmarried are not deemed to deserve the benefit of the rule, so too, conversely, its benefits are gained by the ingenious wrongdoer who brings himself within its formal terms by marrying the witness after service of subpœna and thus creating 'ad hoc' a domestic peace which is to be jealously safeguarded.[3]

§ 2231. **Bigamous Marriage; Disputed Marriage.** It follows, furthermore, that a second, bigamous, or plural wife, is not a person whose testimony is of the privileged class; and that, although the exposure of this marital fraud may long before have dispelled 'de facto,' from the presence of all parties, the mystic halo of domestic peace which the law so strives to preserve, or

§ 2230. [1] The first rulings on this point in England were contradictory: 1782, Anon., 3 C. & P. 238, 1 Price 83, note (by Lord Kenyon, C. J.; mistress falsely held out as wife, excluded); 1795, R. *v.* Bramley, 6 T. R. 330 (pauper settlement; persons cohabiting for 30 years; wife admitted to deny the marriage); 1814, Campbell *v.* Twemlow, 1 Price 81 (point not decided). But the privilege was then finally repudiated; 1828, Batthews *v.* Galindo, 4 Bing. 610. C. P. (a woman held out as a wife, but not lawfully so; repudiating the doubt in Campbell *v.* Twemlow; and the 'nisi prius' ruling of Best, C. J., in the case at bar, reported in 3 C. & P. 238).

So also the rulings in the United States: 1868, Robertson *v.* State, 42 Ala. 509; 1864, People *v.* Anderson, 26 Cal. 129, 133; 1880, People *v.* Alviso, 55 Cal. 230, 232; 1920, State *v.* Harris, — Mo. —, 222 S. W. 377 ("common-law wife," excluded; but on the facts the ruling is far-fetched); 1905, State *v.* Hancock, 28 Nev. 300, 82 Pac. 95.

[2] *Eng.* 1831, Wells *v.* Fletcher, 5 C. & P. 21 (the woman having married supposing erroneously that her first husband was dead); 1851, R. *v.* Young, 5 Cox Cr. 296 (wife of one who had illegally married his deceased wife's sister); *U. S.* 1901, Hoxie *v.* State, 114 Ga. 19, 39 S. E. 944 (a woman may testify that she is not a wife, though reputed as such); 1915, Jeems *v.* State, 141 Ga. 493, 81 S. E. 202 (accused's wife formerly married to a person who is still living); 1906, State *v.* Rocker, 130 Ia. 239, 106 N. W. 645 (murder; defendant being already married, the woman now living with him as wife was admitted against him); 1836, State *v.* Samuel, 2 Dev. & B. N. Car. 177 (slave wife).

On this and the preceding point, compare the rulings upon a wife's *disqualification on the husband's behalf* (*ante*, § 605). Compare also the cases concerning *abduction* (*post*, § 2239), which were sometimes placed on the ground that the marriage was void.

[3] 1829, Pedley *v.* Wellesley, 3 C. & P. 558; 1903, Moore *v.* State, 45 Tex. Cr. 234, 75 S. W. 497 (after process begun); compare the Georgia statute cited *post*, § 2239, note 11.

although the 'pax conjugaiis' may really now exist for the second purporting wife while a state of belligerency may prevail for the first wife, nevertheless these actualities count for nothing, in the theory of the law, and 'de jure' the hypothesized halo surrounds all the relations with the first wife, and never has existed for the relations with the second. Hence, in a case involving an alleged bigamy, the party alleging it is met by the privilege, if against the husband he calls the *first wife*, who is upon his own assumption the lawful one;[1] yet he is obstructed by no privilege, if he calls the *second wife*.[2]

It is true that the husband may, on the facts of the case, be disputing not the second marriage but the first one, and thus, by the husband's claim of facts, the second wife would be the lawful and therefore the privileged one; and hence the denial of the privilege as to her in that case would seem to beg the question by assuming in advance the very fact in issue; so that Courts, being hard put to it in such a situation, have occasionally allowed the claim of privilege.[3] Yet this solution, after all, merely begs the question in the converse manner, for it equally assumes the disputed fact, namely, that there was no first marriage; and it commits the solecism of recognizing the privilege, not because the witness *is* the party's wife but because she is claimed to be. The truth is that the very nature of this privilege leads to such inextricable dilemmas, in other issues[4] as well as in that of bigamy; and with such unedifying quibbles is it pretended to pursue this seductive cynosure of conjugal concord.

§ 2231. [1] *Eng.* 1672, R. *v.* Griggs, T. Raym. 1 (here a husband); 1803, East, Pl. Cr. I, 469; *U. S.* 1870, Williams *v.* State, 44 Ala. 24, 28; 1892, State *v.* Ulrich, 110 Mo. 350, 364, 19 S. W. 656; 1922, State *v.* Pinson, — Mo. —, 236 S. W. 354 (bigamy; the lawful wife not admissible for the prosecution). *Contra:* 1897, State *v.* Melton, 120 N. C. 591, 592, 26 S. E. 933 (under Code § 588). For the statutory exception for "*crimes against the other*," as including bigamy, see *post*, § 2239.

[2] *Eng.* 1680, Hale, Pleas of the Crown, I, 693; *U. S.* 1878, Johnson *v.* State, 61 Ga. 305, 306 (murder); 1894, Wrye *v.* State, 95 Ga. 466, 22 S. E. 273 (murder); 1905, Murphy *v.* State, 122 Ga. 149, 50 S. E. 48; 1894, Cole *v.* Cole, 153 Ill. 585, 589, 38 N. E. 703 (dower); 1903, Barber *v.* People, 203 Ill. 543, 68 N. E. 93 (cited *infra*, note 3); 1905, Hoch *v.* People, 219 Ill. 265, 76 N. E. 356 ("If the first marriage is admitted or is clearly proved, the alleged second wife is competent," except as to the first marriage); 1866, Kelly *v.* Drew, 12 All. Mass. 107, 109 (replevin); 1867, State *v.* Johnson, 12 Minn. 476, 486; 1867, Shark's Estate, 4 Brewst. Pa. 305, 306; 1859, Finney *v.* State, 3 Head Tenn. 544, 546.

Compare the rulings on a wife's *disqualification* on the husband's behalf (*ante*, § 605).

[3] 1880, Miles *v.* U. S., 103 U. S. 304, 313 (bigamy; C., charged and admitted to be defendant's wife, not allowed to prove his prior marriage to E.; "it is only in cases where the first marriage is not controverted, or has been duly established by other evidence, that the second wife is allowed to testify"); 1903, Barber *v.* People, 203 Ill. 543, 68 N. E. 93 (second wife held admissible to prove the second ceremony, after other evidence of the first ceremony, but not to prove the first ceremony, even after other evidence thereof); 1874, Friel *v.* Wood, 1 Utah 160 (a "plural" wife, excluded on the facts, no issue as to the validity of the first marriage being raised; McKean, C. J., diss.).

[4] *Eng.* 1784, Bentley *v.* Cooke, 3 Doug. 422 (assumpsit as 'feme sole'; R., being called by the defendant to prove the plaintiff married to R., was excluded, although it was objected that to concede R. incompetent as husband was to assume the very fact alleged by the defendant; and yet, to admit and to believe him would have been to declare him incompetent); *U. S.* 1919, Pusey's Estate, 180 Cal. 368, 181 Pac. 648 (intestacy; the appellant, a husband claiming that a divorce was valid, not allowed to object to the divorcee's testimony on the present ground); 1906, State *v.* Rocker, 130 Ia. 239, 106 N. W. 645 (murder; a woman living with defendant as his wife, admitted against him, after evidence of his and of her former marriage to another).

3. What is prohibited as Testimony

§ 2232. **Extrajudicial Admissions of Wife or Husband.** That which is privileged is testimony in any form, by the wife or husband against the other. Extrajudicial admissions are a sort of testimony (*ante*, § 1048); hence, they are equally privileged with testimony on the stand. The same result, to be sure, may be reached by another principle, for since the wife or husband is not ordinarily an agent for the other (*ante*, § 1078), the former's extrajudicial statements are mere hearsay assertions and therefore inadmissible. Whichever theory the judicial rulings may have had in mind, it is settled that such *admissions are not receivable*, either when the spouse making them is a third person as to the litigation,[1] or when he or she is a party to the cause;[2] in the latter case, they are receivable as against the maker alone.

But in the application of this principle, several things are to be discriminated:

(1) If the wife (for example) has in fact acted, for the matter in hand, as *agent* of the husband, or has a joint property-interest, and while agent or interested has made admissions or done acts creating a liability in contract or tort, those admissions and acts are receivable against him, as against any other principal or owner (*ante*, §§ 1078, 1080);[3] for not only is the privilege

§ 2232. [1] ENGLAND: 1799, Kelly *v.* Small, 2 Esp. 716 (assumpsit for money lent by one of the plaintiffs before marriage; her admissions excluded, as going "to the prejudice of the husband").

UNITED STATES: *Ala.* 1841, Hussey *v.* Elrod, 2 Ala. 339 (wife's admissions as to a battery on her); *Ark.* 1853, Funkhouser *v.* Pogue, 13 Ark. 295 (wife's admissions as to trespass done by her); *Cal.* 1861, People *v.* Simonds, 19 Cal. 276; *Ia.* 1900, Cedar Rapids N. Bank *v.* Lavery, 110 Ia. 575, 81 N. W. 775 (wife's admissions as to a fraudulent conveyance, excluded; a statutory change not being operative at the trial); *La.* 1869, Simmons *v.* Norwood, 21 La. An. 421; *Mich.* 1894, Dalton *v.* Dregge, 99 Mich. 250, 58 N. W. 57 (crim. con.; wife's admissions excluded; but her letters received by defendant are receivable as his admissions); *Minn.* 1904, Halbert *v.* Pranke, 91 Minn. 204, 97 N. W. 976 (husband's petition in bankruptcy, excluded); *Mo.* 1874, State *v.* Arnold, 55 Mo. 89; *Nebr.* 1902, Baty *v.* Elrod, 66 Nebr. 735, 92 N. W. 1032 (husband, as to the separate estate); *N. Y.* 1866, Deck *v.* Johnson, 1 Abb. App. Cas. 497, 500; *N. Car.* 1842, May *v.* Little, 3 Ired. 27; *Pa.* 1824, Smith *v.* Scudder, 11 S. & R. 325, 326; 1887, Burrell *v.* Uncapher, 117 Pa. 353, 362, 11 Atl. 619; 1889, Martin *v.* Rutt, 127 Pa. 380, 383, 17 Atl. 993 (husband's admissions as to goods levied on as his but claimed by her); 1893, Evans *v.* Evans, 155 Pa. 572, 577, 26 Atl. 755 (similar); *Tex.* 1898, La Master *v.* Dickson, 91 Tex. 593, 45 S. W. 1 (by a husband, after a perfected gift to the wife by her father, excluded); *Vt.* 1844, Churchill *v.* Smith, 16 Vt. 560; *Wis.* 1903, Baker *v.* State, 120 Wis. 135, 97 N. W. 566 (false pretences; defendant's husband's admissions, excluded).

Contra: 1899, State *v.* Bertoch, — Ia. —, 79 N. W. 378, *semble*; 1886, Cook *v.* State, 22 Tex. App. 511, 3 S. W. 749 (wife's acts and utterances as a joint principal, admitted); 1905, State *v.* Mann, 39 Wash. 144, 81 Pac. 561 (arson by a husband as accessory to the wife; the wife's confessions as principal, admitted against the husband).

[2] *Eng.* 1796, Alban *v.* Pritchett, 6 T. R. 680 (action by wife as executrix and husband jointly; her admissions not receivable against him); 1797, Denn *v.* White, 7 T. R. 112 (wife's admission of a trespass, not received in an action against them jointly); *U. S.* 1827, Com. *v.* Briggs, 5 Pick. 429 (husband and wife jointly indicted; wife's admissions receivable against herself alone); 1897, Broderick *v.* Higginson, 169 Mass. 482, 48 N. E. 269 (separate actions for personal injuries by husband and wife, tried together; admissions of one not to affect the other).

[3] *England:* 1722, Anon., 1 Stra. 527 (Pratt, C. J., "allowed the wife's declaration, that she agreed to pay 4*s.* a week for nursing a child, was good evidence to charge the husband; this being a matter usually transacted by the woman," *i. e.* so that she was his agent); 1783, Palethorp *v.* Furnish, 2 Esp. 511 (the promise

against a wife's testimony not violated (since the person here has a double capacity), but otherwise the husband could always shield himself from liability whenever he chose to make his wife an agent to transact business.

(2) Again, when statements are made by the wife *in the husband's presence*, under such circumstances that his silence would be equivalent to an admission of their truth (*ante*, § 1071), the statements are receivable, as would be those of any other person; for they are not offered as hers, but as his by assent and adoption;[4] provided, of course, that third persons were present

of a wife managing the defendant's business removes the bar of the statute of limitations); 1794, Emerson *v.* Blondin, 1 Esp. 142 (assumpsit for rent, the defendant's wife having made the bargain; Lord Kenyon, C. J., said "that where a wife acts for her husband in any business or department, by his authority and with his assent, he thereby adopts her acts, and must be bound by any admission or acknowledgment made by her respecting that business in which by his authority she has acted for him"); 1808, Gregory *v.* Parker, 1 Camp. 394 (statute of limitations); 1814, Carey *v.* Adkins, 4 Camp. 92; 1817, Anderson *v.* Sanderson, 2 Stark. 204, Holt 591 (like Palethorp *v.* Furnish); 1823, Clifford *v.* Burton, 1 B. & P. 199 (admissions of a wife tending shop, received); 1825, Petty *v.* Anderson, 3 Bing. 170 (similar); 1842, Tindal, C. J., in O'Connor *v.* Marjoribanks, 4 M. & Gr. 435, 442 ("In an action against the husband, you might prove the agency of the wife 'aliunde,' and then give her admissions or acts in evidence against the husband; . . . acts and admissions of the wife must be proved 'aliunde,' not by herself"); 1843, Meredith *v.* Footner, 11 M. & W. 202 (Alderson, B.: "A wife cannot bind her husband by admissions unless they fall within the scope of the authority which she may reasonably be presumed to have derived from him").

United States: 1871, Magness *v.* Walker, 26 Ark. 470; 1823, Turner *v.* Coe, 5 Conn. 94 (here excluded, because no agency appeared); 1842, Barton *v.* Osborn, 6 Blackf. 145; 1853, Dubois *v.* Ferrand, 8 La. An. 373; 1869, Leon *v.* Bouillet, 21 La. An. 651; 1869, Robichaux *v.* Bouillet, ib. 681 (the agency must first be evidenced by other testimony); 1900, Barker *v.* Mackay, 175 Mass. 485, 56 N. E. 614 (the agency is a question of fact for the jury); 1916, Pickard *v.* Clancy, 225 Mass. 89, 113 N. E. 838 (bill in equity against husband and wife to recover moneys obtained in fraud of creditors; the husband had been convicted of crime committed in such fraud; his testimony at his trial for the crime, held inadmissible here against the wife, apparently on the ground that no conspiracy had been otherwise evidenced); 1810, Boyles *v.* M'Eowen, 3 N. J. L. 499; 1813, Fenner *v.* Lewis, 10 Johns. N. Y. 38, 44 (here the husband had agreed that the wife should receive goods, and her admission of their receipt was admitted); 1834, Thomas *v.* Hargrave, Wright Oh. 595 (but the agency must first be otherwise proved); 1920, Steele *v.* State, 87 Tex. Cr. 588, 223 S. W. 473; 1915, Thompson *v.* State, 77 Tex. Cr. 417, 178 S. W. 1192 (felonious assault; the wife's declarations as an aider of her husband, made at the time, admitted); 1871, Goodrich *v.* Tracy, 43 Vt. 314, 319; 1862, Birdsall *v.* Dunn, 16 Wis. 235, 238; 1867, Shaddock *v.* Clifton, 22 Wis. 114, 116 (husband's admissions received in a joint action for the wife's injuries, since he had a joint property-interest in the claim); 1874, Bach *v.* Parmely, 35 Wis. 238 (wife's agency of necessity to buy necessaries).

Contra: 1901, Duncan *v.* Landis, 45 C. C. A. 666, 106 Fed. 839, 859 (Pennsylvania St. 1887 held to allow no exception for a spouse acting as agent).

Distinguish the statutes and rulings under the privilege for *communications* (*post*, §§ 2238, 2240), which expressly make an exception to the common-law privilege by allowing *testimony on the stand* from one who has acted as agent.

[4] *Cal.* 1872, People *v.* Murphy, 45 Cal. 137, 143; *Ga.* 1904, Joiner *v.* State, 119 Ga. 315, 46 S. E. 412 (wife's statements of husband's cruelty, to a third person in defendant's presence, admitted); *Mich.* 1879, People *v.* Knapp, 42 Mich. 269, 3 N. W. 927 (defendant in a prosecution for adultery; that defendant's wife had complained against the other woman for the adultery, held not to have been by the implied assent of the defendant, and hence not an admission); 1894, Dalton *v.* Dregge, Mich. (cited *supra*, note 1); 1904, People *v.* Hossler, 135 Mich. 384, 97 N. W. 754; *Mo.* 1908, State *v.* Wooley, 215 Mo. 620, 115 S. W. 417 (wife's written statement read aloud to the husband and assented to by him, admitted; distinguishing State *v.* Burlingame); *N. J.* Boyles *v.* M'Eowen, 3 N. J. L. 499; *N. Y.* 1867, M'Kee *v.* People, 36 N. Y. 113, 116 (remarks of the accused's wife); *Tenn.* 1860, Quesner *v.* Morrow, 1 Coldw. 123 (wife's statements, in husband's presence, as to money claimed to have been taken by him, admitted; "the statements of the wife are

or that in some other way the privilege against confidential communications (*post*, § 2336) is obviated.

(3) Upon a *bill in chancery* against a husband and a wife, the wife's answer, so far as it contains testimonial admissions by way of *discovery*, is inadmissible against the husband, because of this privilege;[5] yet, so far as an answer is a pleading, it can of course be compelled, and its use as a pleading is to be distinguished from its use as an admission.

(4) So far as the husband, for example, is a party in a *representative capacity* only, the admissions of the wife, as the person beneficially concerned, are receivable against herself.[6]

(5) So far as the wife's statements as to *ownership of property* are offered, not as a wife's admissions, but as *declarations of a grantor* or *possessor*, they may be received, if they satisfy the principles of that subject, already examined (*ante*, §§ 1082, 1086, 1778, 1779).

§ 2233. **Hearsay; Production of Documents.** The privilege applies to testimony in any form. Hence the production of documents from the wife or husband against the other is within the privilege.[1] So, too, it would seem that hearsay declarations by the wife or husband, such as would ordinarily be receivable under some exception to the Hearsay rule, should be excluded

not received or treated as evidence against the husband, but merely as inducement to the responsive admissions, declarations, or acts of the husband at the time; . . . an admission may be presumed, not only from the declarations of a party, but even from his acquiescence or silence"); *Vt.* 1918, Pope *v.* Hogan, 92 Vt. 250, 102 Atl. 937 (ejectment; admission by one spouse in the other's presence, received against the other; but an admission in the absence of the other, the two being tenants by entireties, not received).

Contra: 1920, People *v.* Jordan, 292 Ill. 514, 127 N. E. 117 (rape under age; defendant and his wife came to see the girl's father, who said to the wife in the defendant's presence, "Why didn't you, when you caught them at it, admit to me he was guilty, when I was there?" She replied, "If I only had!"; this reply excluded, on the theory of being a wife's testimony against her husband; unsound; it was an admission by the defendant's silence); 1898, State *v.* Burlingame, 146 Mo. 207, 48 S. W. 72.

[5] *Eng.* 1719, Rutter *v.* Baldwin, 1 Eq. Cas. Abr. 226 (money borrowed by a married woman as 'feme sole,' the marriage being concealed with the husband's connivance; in a bill to charge the husband and wife with the mortgage, a divorce having in the meantime been obtained, the wife's answer was received as evidence; but the ruling was disapproved by Lord Eldon in Le Texier *v.* Anspach, 15 Ves. Jr. 166); 1800, Le Texier *v.* Anspach, 5 Ves. Jr. 322, 329, 15 id. 159, 166 (bill for discovery of contract made by the wife as agent for the husband; the agency was admitted, and the bindingness of her acts done, but her testimony in discovery was excluded); 1803, Cartwright *v.* Green, 8 Ves. Jr. 405 (bill against husband and wife for discovery as to goods appropriated, wife's discovery excluded); 1814, Barron *v.* Grillard, 3 Ves. & B. 165 (bill for discovery against husband and wife, concerning her ante-nuptial debt; discovery not compellable, because "the wife shall not give evidence against her husband").

The privilege is here to be claimed when answer is *offered*, and not when the discovery is first sought, if it is then demandable as from a party: 1904, Olmsted *v.* Edson, 71 Nebr. 17, 98 N. W. 415.

[6] 1831, Humphreys *v.* Boyce, 1 Moo. & Rob. 140 (admitted in an action against the husband as her administrator).

§ **2233.** [1] 1897, State *v.* Durham, 121 N. C. 546, 28 S. E. 22; 1920, State *v.* Bramlett, 114 S. C. 389, 103 S. E. 755.

But testimony obtained by *information gained from the wife* would not be privileged: 1905, Com. *v.* Johnson, 213 Pa. 432, 62 Atl. 1064. Compare §§ 2261, 2325, *post*.

The following ruling, verging upon absurdity, may be noted here: 1894, Fratini *v.* Caslani, 66 Vt. 273, 276, 29 Atl. 252 (action for alienation of wife's affections; to prove the husband's assault upon the wife, a record of conviction was excluded, because, unless upon plea of guilty, it was based probably on the wife's testimony, incompetent in the present case).

when offered against the other spouse;[2] nevertheless, the early practice appears not to have gone to this extent.[3]

4. What Testimony is Anti-Marital

§ 2234. **Testimony against Husband or Wife not a Party; General Principle.** If the fear of causing marital dissension or disturbing the domestic peace were genuinely the ground of the privilege (*ante*, § 2228), then the privilege should apply to testimony which in any way disparages or disfavors the other spouse, irrespective of his being a party to the cause; for the wife's public assertion of a husband's fraud or perjury (for example) must tend plainly to that apprehended effect, even though the husband be not legally charged at the moment. On some such ground, it was early attempted to apply the privilege to all testimony thus attributing misconduct to the other spouse, or, as it was phrased, "tending" to accuse the other, *i. e.* making statements which, by exposing the misconduct, tended towards the formal institution of a suit or a prosecution:

1788, *R.* v. *Cliviger*, 2 T. R. 263; pauper settlement of M. as J.'s wife; in proving a prior marriage of J. to E., which J. had denied on the stand, E. was called in contradiction; it was argued for admission that the husband and wife were not parties nor interested in the settlement issue, and that "nothing that the woman could say could affect her husband; no prosecution could be grounded on her testimony"; this was disapproved. ASHHURST, J.: "I lay all consideration of interest out of the case. . . . But the ground of her incompetency arises from a principle of public policy, which does not permit husband and wife to give evidence that may even tend to criminate each other. The objection is not confined merely to cases where the husband or wife are directly accused of any crime, but even in collateral cases, if their evidence tends that way, it shall not be admitted. Now here the wife was called to contradict what her husband had before sworn, and to prove him guilty of perjury as well as bigamy; so that the tendency of her evidence was to charge him with two crimes. However, though what she might then swear could not be given in evidence on a subsequent trial for bigamy, yet her evidence might lead to a charge for that crime and cause the husband to be apprehended."

1846, TENNEY, J., in *State* v. *Welch*, 26 Me. 30, 32 (excluding the husband of one with whom the defendant was charged to have committed adultery): "If there is soundness in the reason which is given in the books for holding incompetent the husband or wife to

[2] 1835, Tacket *v.* May, 3 Dana Ky. 80 (wife's declarations as indicating husband's knowledge of a horse's unsoundness); 1899, National Germ. Am. Bank *v.* Lawrence, 77 Minn. 282, 79 N. W. 1016; 1920, Johnson *v.* State, 122 Miss. 16, 84 So. 140 (perjury; defendant's wife's conduct, not admitted against him, as being in effect "a confession by the wife of her husband's guilt"); 1906, State *v.* Richardson, 194 Mo. 326, 92 S. W. 649 (spontaneous declarations); 1919, State *v.* Reid, 178 N. C. 745, 101 S. E. 104 (hearsay statement by defendant's wife, 'per se' inadmissible, not received against defendant); 1915, U. S. Concepcion, 31 P. I. 183 (defendant's husband's former testimony); 1917, Bennett *v.* State, 80 Tex. Cr. 652, 194 S. W. 148 (manslaughter; the wife's diary held inadmissible against the defendant).

Contra, semble: 1920, Halback *v.* Hill, — D. C. App. —, 261 Fed. 1007 (letters written by the wife to the husband, before marriage, produced against him; more fully stated *post*, § 2235, note 6).

Distinguish the following: 1906, People *v.* Chadwick, 4 Cal. App. 63, 87 Pac. 384, 389 (perjury; the wife's testimony at the former trial, admitted on the issue of materiality).

[3] 1805, Aveson *v.* Kinnaird, 6 East 188 (cited *ante*, § 1718).

Compare the declarations admitted and excluded under the exceptions to the privilege (*post*, § 2239).

give against each other evidence, because it may be the 'means of implacable discord and dissension between them,' it is certainly difficult to perceive how that discord and dissension will fail to arise when in collateral proceedings testimony should be given by one which charges directly upon the other the same crime for the commission of which the party on trial is indicted."

But this application of the privilege was soon disowned in England; and its scope was restricted to such testimony only as disfavors the other spouse's *legal interests in the very case* in which the testimony is offered. It is not to be regretted that thus the attempt to be logical with an illogical reason came to failure, and that the privilege was wholesomely kept within some sort of bounds:

1817, ELLENBOROUGH, L. C. J., in *R.* v. *All Saints*, 6 M. & S. 195, 199: "If we were to determine, without regard to the form of proceeding, whether the husband was implicated in it or not, that the wife is an incompetent witness as to every fact which may possibly have a tendency to criminate her husband, or which connected with other facts may perhaps go to form a link in a complicated chain of evidence against him, such a decision, as I think, would go beyond all bounds." BAYLEY, J.: "There was no objection arising out of the policy of the law because by possibility her evidence might be the means of furnishing information and might lead to inquiry and perhaps to the obtaining of evidence against her husband. It is no objection to the information that it has been furnished by the wife. . . . I am not sure that the import of the expression 'tendency to criminate' was very accurately defined in that case [of *R.* v. *Cliviger*]. It was probably not understood as meaning that the wife's evidence could be used against her husband, for we know that this could not be so. . . . Nothing which the wife proved on this occasion could be the direct means of founding a prosecution against her husband, although it might afford the means of procuring evidence against him; but such a collateral consequence is not a sufficient objection." ABBOTT, J.: "It may properly be said of her evidence that it has not any tendency to criminate him, provided that expression be understood with the limitation which I affix to it, that is, to criminate him in the course of some proceeding in which a crime is imputed to him."

1806, ROANE, J., in *Baring* v. *Reeder*, 1 Hen. & M. 154, 168: "I take the rule on this subject to be that, in civil actions where the husband is no party, the wife may be called as a witness even to facts which if proved in another action to which her husband is a party, and by evidence other than her own, may go to charge him. The unavailing testimony of the wife in such a case, entirely impotent as it relates to the husband, producing him no loss, and consequently exciting in him no displeasure, will not violate the reason of that policy which, in respect to the harmony to be desired in the marriage state, has given rise to the rule in question."

1869, DURFEE, J., in *State* v. *Briggs*, 9 R. I. 361, 365: "Upon principle, we find no satisfactory ground for the distinction [between direct and indirect crimination]. The supposed disqualification of husband and wife to give, in collateral cases, testimony directly criminative of each other, is said to rest on the policy of avoiding dissensions between husband and wife; and, if so, the disqualification ought to be complete; for such dissensions, differing only in degrees of virulence, would be likely to result from testimony which tends to criminate as well as from that which is directly criminative. There are logically only two alternatives, either to exclude the testimony entirely, or to admit it to any extent in collateral proceedings provided that no use can afterwards accrue therefrom in any direct proceeding; we think it the better rule subject to such proviso to admit the testimony. . . . Neither can we perceive that any special mischief will be likely to result from it; for the testimony, being given in a collateral proceeding, could have effect only as information against the husband or wife, there being no contradiction between them,

and there is but slight reason for supposing that the witness would willingly communicate under oath any information which would otherwise be withheld; generally, indeed, it is pretty well known, either from the witness himself or otherwise, what he can testify before he takes the stand. If we accord to the witness the privilege of objecting to testify on the ground that the testimony if given will criminate or tend to criminate a husband or wife, we think that in a proceeding which can never be used against the husband or wife there is no sound principle of public policy which requires that we should go still further, and put it in the power of a third person, by objecting when the witness does not object, to defeat (it may be) a just claim or escape a merited punishment."

1883, SHARPSTEIN, J., in *People* v. *Langtree*, 64 Cal. 256, 258, 30 Pac. 813: "When may she be said to be examined for or against him? . . . No one is said to be examined for or against one not a party to the action or proceeding in which such witness is called to testify. And the testimony of a witness is not evidence for or against any one not a party to the action or proceeding in which such testimony is given."

Of these reasons, two may be noted as particularly strong. One of them is that the exclusion of a wife on the ground that her testimony may reveal his misconduct, and thus "tend" to charge him, rests on the assumption, false to fact, that her testimony on the stand would in any sense be a revelation, an unsealing of that which was secret.[1] Nothing prevents her from revealing her knowledge out of court; in most instances she has in fact done so. It would be mere hypocrisy to sanction her silence on the stand on the pretext that the husband was thus really safeguarded from her disclosure. The other argument is found in the general principle (*ante*, § 2196), that a party cannot, as such, take advantage of a witness' privilege; in other words, an opponent cannot claim that the wife of a third person should be excluded because of the privilege of her husband, so long as neither husband nor wife claims the privilege.

In examining, then, the application of the rule in this respect, it is to be understood that by the orthodox view the privilege applies only in favor of a person *against whom as a party to the cause the testimony of a wife or husband* is offered.

§ 2235. **Same: Sundry Applications of the Rule (Bankruptcy, Adultery, etc.).** In the application of the rule to the great variety of facts that naturally present themselves, not much is profitable in the way of generalization. For one thing, in *bankruptcy* proceedings, the testimony of the wife of the bankrupt, so far as it is called for by the creditors, has always been deemed privileged, whatever the status of the husband as a party may be deemed to be.[1] In *pauper-settlement* cases, the town or other corporation is in strictness

§ 2234. [1] It is to be noted that the phrase "tend to criminate," as here used, is to be distinguished in meaning from the same phrase as used for the privilege against self-crimination. In that place (*post*, § 2260), it signifies that facts not being in themselves criminal, yet forming with other facts the elements of a crime, are within the privilege; and so here also, assuming the husband to be a party, the privilege concededly covers facts "tending" in that sense to charge him (L. C. J. Tenterden, in R. *v.* Bathwick, *supra*). But when he is not a party, and the question is whether the privilege covers facts directly involving a charge, the phrase "tend to criminate" is used, in R. *v.* Cliviger, *supra*, as also describing that totally distinct problem.

§ 2235. [1] *Eng.* 1613, Anon., 1 Brownl. 47 ("By the common law she shall not be examined"); 1719, Ex parte James, 1 P. Wms.

the party charged, and the testimony of the wife of the pauper or of any other person could not properly be the subject of a privilege; the authority of the contrary ruling in R. *v.* Cliviger (above quoted) was practically repudiated by the principle laid down in R. *v.* All Saints (above quoted).[2] In a case involving a charge of *adultery*, the testimony of the wife or husband of the person, not a party, with whom the adultery is charged, is not the subject of a privilege, on the principle of R. *v.* All Saints; but here there is a decided opposition in the judicial views.[3] Where the testimony offered does

610 (wife excluded; the statute of 21 Jac. I, quoted *ante*, § 2227, extending only to the concealment of goods and no further); *U. S.* 1899, Re Jefferson, 96 Fed. 826 (wife not compellable); 1899, Re Mayer, 97 Fed. 328 (wife not compellable to testify against a bankrupt husband, by Wisconsin law); 1903, Re Worrell, 125 Fed. 159 (U. S. St. 1903, applied; inquiry into the facts allowed to determine whether the business was the wife's separate business or not). Compare the statutes cited *ante*, § 488, and the cases under the self-crimination privilege, *post*, § 2282.

But otherwise where the proceeding is a bill *against the wife herself*, to set aside a conveyance from the husband: 1899, Re Fowler, 93 Fed. 417; 1905, Wiley *v.* McBride, 74 Ark. 34, 85 S. W. 84.

[2] *Eng.* 1788, R. *v.* Cliviger, 2 T. R. 263 (pauper settlement of M. as J.'s wife; E. was called to prove that she was married to J. prior to his marriage to M.; J. had already testified denying the prior marriage; it was argued that this showed J.'s commission of bigamy and perjury, though J. was not a party; the wife was excluded; quoted *supra*); 1817, R. *v.* All Saints, 6 M. & S. 195 (pauper settlement of E., married to W.; to show this marriage void, A. was admitted to prove her prior marriage to W., W. not having testified, and the husband not being a party nor contradicted as a perjurer; quoted *supra*); 1831, R. *v.* Bathwick, 2 B. & Ad. 639 (pauper settlement of E.; after C.'s testimony to his marriage with E., the opponent, to prove the marriage invalid, called M. to prove C.'s prior marriage to her; admitted, because "the present case is not a direct charge or proceeding against her husband . . . [neither] has any interest in the decision of the question"; whether if C. had denied such a marriage, and thus the wife testified to his perjury, the result would be otherwise, left undecided; R. *v.* Cliviger disapproved); *U. S.* 1814, Canton *v.* Bentley, 15 Mass. 441 (pauper settlement; husband's testimony to wife's adultery, to prove illegitimacy, doubted).

[3] *Not privileged: Alabama:* 1904, Pruett *v.* State, 141 Ala. 69, 37 So. 343 (adultery; husband of the woman with whom it was charged, admitted); *Kansas:* 1902, Roesner *v.* Darrah, 65 Kan. 599, 70 Pac. 597 (alienation of affections of plaintiff's wife; plaintiff admitted to testify); *New Hampshire:* 1857, State *v.* Marvin, 35 N. H. 22, 28; *New Jersey:* 1906, Hill *v.* Pomelear, 72 N. J. L. 528, 63 Atl. 269 (criminal conversation; plaintiff admitted to prove the marriage, under Rev. Pub. L. 1900, p. 363, § 5); *New York:* 1845, Van Cort *v.* Van Cort, 4 Edw. Ch. 621, 623 (divorce for adultery with X; X's husband admitted for the complainant, because adultery was not a crime in New York, and he was therefore not criminating his wife); *North Carolina:* 1902, State *v.* Wiseman, 130 N. C. 726, 41 S. E. 884 (husband held admissible to prove fornication between a third person and the witness' wife, the defendant, charged as committed before their marriage, the charge against the wife having been withdrawn; Douglas, J., diss.); 1913, Powell *v.* Strickland, 163 N. C. 393, 79 S. E. 872 (husband's suit for criminal conversation; husband admitted to testify to the adultery of the wife not a party); *Pennsylvania:* 1892, Cornelius *v.* Hambay, 150 Pa. 363, 24 Atl. 515 (husband not admitted to testify to wife's adultery, in his action against a paramour for crim. con.); *Vermont:* 1876, State *v.* Bridgman, 49 Vt. 202, 206 (adultery with C.; C.'s husband allowed to testify for the prosecution, his wife not being a party); *Washington:* 1905, State *v.* Nelson, 39 Wash. 221, 81 Pac. 721 (adultery of N. with S.; the husband of S. admitted against N. for the State); *Wisconsin:* 1858, State *v.* Dudley, 7 Wis. 664 (former husband of W., admitted to prove her adultery with defendant, because his testimony "would be inadmissible in support of an indictment against her"); 1903, State *v.* West, 118 Wis. 469, 95 N. W. 521 (preceding case approved).

Privileged: Connecticut: 1793, State *v.* Gardner, 1 Root 485 (adultery with A.; A.'s husband not admitted for the prosecution); *Georgia:* 1903, Graves *v.* Harris, 117 Ga. 817, 45 S. E. 239 (alienation of affections, with an allegation of crim. con.; plaintiff husband held disqualified); *Maine:* 1846, State *v.* Welch, 26 Me. 30 (adultery with A.; A.'s husband excluded); *Massachusetts:* 1863, Com. *v.* Sparks, 7 All. 534 (adultery with D.; D.'s husband not admitted for the prosecution; by a majority, following State *v.* Welch, Me., *supra*); *Michigan:* 1895, People *v.* Fowler, 104 Mich. 449, 62 N. W. 572 (husband of A. not admitted, on a charge of defendant's

no more than *discredit the character* or disparage the veracity of the witness' husband or wife not being a party, the case is clearly without the privilege,[4] although a few Courts chivalrously proclaim here also a privilege.[5]

Further than this, it seems unsafe to attempt to classify the rulings, since so much depends upon the facts of each case.[6] On which side lies the weight

adultery with A.); *New Jersey:* 1864, State *v.* Wilson, 31 N. J. L. 77, 81 (husband not admitted to prove adultery of his wife with defendant, though the wife had been acquitted).

Compare the cases involving *co-defendants* (*post*, § 2236) and *crimes against the other* (*post*, § 2239, par. 3), which sometimes involve adultery in other aspects.

[4] 1912, People *v.* Upton, 169 Mich. 31, 135 N. W. 108 (battery upon O., after O. had assaulted defendant's wife; Mrs. O. admitted to testify for the defendant); 1871, Ware *v.* State, 35 N. J. L. 553, 555 (husband allowed to testify against wife's character for veracity as a witness).

[5] 1858, Keaton *v.* Greenwood, 24 Ga. 217, 228 (wife's testimony discrediting that of husband not a party, excluded; following R. *v.* Cliviger "with extreme reluctance and dissatisfaction"); 1839, Stein *v.* Bowman, 13 Pet. 209, 221 (wife not admitted to testify that her deceased husband, who had testified, had admitted that he was bribed; placed partly on R. *v.* Cliviger, partly on the ground of confidential communications); 1855, Smith *v.* Proctor, 27 Vt. 304, 308 (widow said to be inadmissible to "transactions affecting the character of the husband"); 1878, White *v.* Perry, 14 W. Va. 66, 81 (wife not admissible to prove facts "affecting the character" of her husband, though he is not a party; here, testimony to his admission of a false statement, excluded).

[6] Sundry rulings in the various jurisdictions are as follows; compare the statutes cited *post*, § 2245:

ENGLAND: 1684, Lady Ivy's Trial, 10 How. St. Tr. 555, 621, 628, 644 (Mrs. D. testified that her husband, now deceased, an agent of the defendant, had helped the defendant in forging certain title-deeds offered by the defendant; on objection that she could not "swear it upon him here," L. C. J. Jefferys answered: "That is not against *him*, man; he is out of the case; but against my Lady Ivy"; yet he forbade the husband's oath to be used to discredit the wife as witness); 1717, Williams *v.* Johnson, 1 Stra. 504, King, C. J. (action against a husband for goods supplied to the wife; to prove for the defendant that the goods were supplied on the credit of the wife's father, the testimony of the wife's mother, who was present at the purchase, was admitted); 1806, Vowles *v.* Young, 13 Ves. Jr. 140, 144 (issue of legitimacy on a bill of redemption by heirs; a husband's declarations as to the wife's illegitimacy, admitted, there being "no interest in the husband"); 1828, Henman *v.* Dickinson, 5 Bing. 183 (wife of the drawer, to prove a forged alteration by her husband, in an action by an indorsee against the acceptor of a bill; R. *v.* Cliviger doubted); 1832, R. *v.* Gleed, Bell Cr. C. 258, note, Littledale and Taunton, JJ. (larceny; E.'s wife not admitted to prove that E. was present at the stealing; since "her evidence cannot but facilitate an accusation against her husband"); 1843, Langley *v.* Fisher, 5 Beav. 443 (bill to reach the wife's separate estate; co-defendant's husband excluded); 1860, R. *v.* Halliday, Bell Cr. C. 257 (Court for Crown Cases Reserved; false pretences made with T.'s wife, with a count for conspiracy by the two, but the latter count was not tried; T. admitted to testify against defendant, though "his evidence tended to show that his wife had acted unlawfully and criminally").

CANADA: 1884, Millette *v.* Litle, 10 Ont. Pr. 265 (husband held not compellable to criminate his wife as co-defendant in libel).

UNITED STATES: *Federal:* 1904, Re Domenig, 128 Fed. 146, D. C. (under Pa. St. 1887, the wife is competent in bankruptcy proceedings to prove her claim as creditor);
Arkansas: 1884, Nolen *v.* Harden, 43 Ark. 307, 315 (the rule "does not extend to collateral suits between third parties");
California: 1920, Marple *v.* Jackson, 184 Cal. 411, 193 Pac. 940 (in 1906 M. deeded land to Mrs. M. for "love and affection"; in April, 1916, Mrs. B. obtained judgment against M., and proceeded to levy on this land; Mrs. M. had recorded the deed in Feb. 1916; to prove title, Mrs. M. produced the deed and rested; Mrs. B., to disprove delivery and consideration, called M.; excluded, because of anti-marital privilege); 1921, Johnston *v.* St. Sure, — Cal. App. —, 195 Pac. 947 (wife and husband defendants in suit for title, husband disclaiming any interest; neither wife nor husband entitled to claim privilege);
Columbia (Dist.): 1920, Halback *v.* Hill, — D. C. App. —, 261 Fed. 1007 (on a petition by a grandmother for custody of a child, the mother being deceased and the father being remarried, and the issue being whether the present wife was a fit person to retain the care of the child, letters written by the present wife to the father before her marriage were received for the petitioner, the husband being called upon to produce and identify one of the letters; held that, the wife not being a party to the case, the husband was not testifying against her, in the sense covered by the privilege);
Illinois: 1882, Lincoln Ave. & N. C. G. R. Co. *v.* Madaus, 102 Ill. 417, 421, *semble* (similar);

of authority in general, for the broader or the narrower view of the privilege, it would be difficult to say, since the individual Courts are not always con-

Kansas: 1874, Furrow *v.* Chapin, 13 Kan. 107, 112 (wife admitted in action of replevin against an officer seizing goods as her husband's); 1877, Higbee *v.* McMillan, 18 Kan. 133, 135 (wife of a vendor admitted for the vendee in replevin claiming goods against another vendee; the vendor not being a party nor concluded by the judgment);

Kentucky: 1831, Higdon's Heirs *v.* Higdon's Devisees, 1 J. J. Marsh. 48, 54 (husband not admitted where wife was a co-opponent); 1877, Milton *v.* Hunter, 13 Bush 163, 169 (husband of an heir not a party, not admitted on behalf of the proponent of a will);

Massachusetts: 1814, Fitch *v.* Hill, 11 Mass. 286 (surety's wife admissible in action against the maker of a note, the liability being contingent only);

Michigan: 1898, Michigan B. & P. Co. *v.* Coll, 116 Mich. 261, 74 N. W. 475 (bill against real estate owned by husband and wife as joint tenants; husband not admitted as against his own interest in the estate, because the estate was inseparable);

Minnesota: 1897, Lockwood *v.* Lockwood, 67 Minn. 476, 70 N. W. 784 (wife admissible in her suit against the husband's father and mother for alienation of affections); 1903, Evans *v.* Staalle, 88 Minn. 253, 92 N. W. 951 (the wife is compellable, if a party, where the husband is not a party);

Mississippi: 1901, Virden *v.* Dwyer, 78 Miss. 763, 30 So. 45 (not admitted upon creditors' bill against husband and wife to set aside conveyance); 1913, Strauss *v.* Hutson, 104 Miss. 637, 61 So. 594 (bill for discovery against husband and wife charging fraud against creditors; neither compellable to answer);

Nebraska: 1895, Buckingham *v.* Roar, 45 Nebr. 244, 63 N. W. 398 (admissible, where the other spouse is a nominal party only; here in an action to cancel a deed of dower); 1905, Weckerly *v.* Taylor, 74 Nebr. 772, 105 N. W. 254 (creditor's bill against the debtor, his wife as assignee, and an insurer, to reach the proceeds of an accident policy; the husband not admitted for the plaintiff);

New Jersey: 1840, Doe *v.* Johnson, 18 N. J. L. 87, 90 (suit for land, between creditor and vendee of debtor; debtor's wife admissible for three lots as to which her husband was no longer interested in the event of the suit, even though her testimony charged him with fraud; but not as to a lot in which he was interested, nor in any case to testify directly to his crime); 1895, Woolverton *v.* Van Syckel, 57 N. J. L. 393, 31 Atl. 603 (the wife defaulted in an action against a firm to which she belonged, and the husband was admitted in the action against the other partner); 1899, Munyon *v.* State, 62 N. J. L. 1, 42 Atl. 577 (attempting to produce a miscarriage; wife's testimony held on the facts not to incriminate the husband assisting the defendant); 1918, State *v.* Herbert, 92 N. J. L. 341, 105 Atl. 796 (conspiracy to obtain a divorce for H. K. from her husband; the husband's testimony not admitted for the prosecution; "the rule . . . as declared in the Ware Case [*supra*, n. 4] and the Hunter Case [*post*, § 2236, n. 5], has not been relaxed by later legislation");

North Carolina: 1878, State *v.* Parrotty, 79 N. C. 615 (on trial of W. for assaulting P., W. may call P.'s wife, P. not being "interested in the result");

Pennsylvania: 1870, Rowley *v.* McHugh, 66 Pa. 269 (ejectment by husband and wife for land claimed to be the wife's, against one claiming under a judgment sale against the husband; wife admitted for the plaintiff, because the husband did not warrant defendant's title); 1877, Greenawalt *v.* McEnelley, 85 Pa. 352 (title depending on a child's legitimacy; widowed mother admitted to testify to the date of her marriage and the child's birth); 1886, Pleasanton *v.* Nutt, 115 Pa. 266, 269, 8 Atl. 63 (replevin by a wife against the husband's vendee; the husband being interested as warrantor, the wife was not admitted for herself, nor he against her); 1887, Burrell *v.* Uncapher, 117 Pa. 353, 362, 11 Atl. 619 (action in joint names for the wife's personal injury; the husband not admissible against the wife); 1893, Johnson *v.* Watson, 157 Pa. 454, 456, 27 Atl. 772 (the husband not admitted against his wife in replevin); 1893, Norbeck *v.* Davis, 157 Pa. 399, 405, 27 Atl. 712 (under St. 1887, P. L. 158, § 2*b*, P. & L. Dig. Witnesses, § 11, the wife is competent in interpleader proceedings as claimant against a creditor);

Rhode Island: 1869, State *v.* Briggs, 9 R. I. 361 (abortion; the father of the child had procured the defendant to operate, but had afterwards married the woman; both were admitted for the prosecution; that the testimony of each charged the other with a crime did not exclude it, since it could not be used against them in another proceeding);

South Carolina: 1830, Jackson *v.* Heath, 1 Bail. 355 (wife admitted for the claimant of notes bequeathed to her husband by the defendant's testator); 1848, Edwards *v.* Pitts, 3 Strobh. 140 (husband, an idiot ward of the defendant, sued as his trustee; wife excluded); 1869, Leaphart *v.* Leaphart, 1 S. C. 199, 201, 204 (wife admitted to prove a first marriage of her husband not a party, by which his second became bigamous);

South Dakota: 1903, Aldous *v.* Olverson, 17 S. D. 190, 95 N. W. 917 (supplementary proceedings against a husband; the wife's testimony not admitted against him); 1919, Churchill & Alden Co. *v.* Ramsey, 42 S. D. 23, 172 N. W. 779 (action to cancel deed by hus-

sistent with themselves. But no Court ought to-day to lend its sanction to any expansion of the limits of this undesirable rule of privilege; and there is at least ample authority for the most rigid restriction.

§ 2236. **Same: Co-indictees and Co-defendants.** When one spouse is charged by indictment with the same crime as a party against whom the other spouse is offered as a witness, the application of the preceding principle is determined by a special set of rules. The looser view of the privilege, it is true (*ante*, § 2234), might serve to extend it to any case in which (for example) a wife's testimony involved in the crime a husband not being in any way a party to the formal charge. Nevertheless, in this field, the looser view seems to have been given little sanction, and the result is reached by following the stricter interpretation and applying the general rules which determine whether the person is technically a party to the cause. Thus, the special body of rules which served to determine whether Doe, indicted with Roe, was qualified as a witness on Roe's behalf, are also followed in passing upon the admission of Doe's wife to testify for the prosecution against Roe; just as they were also employed (*ante*, § 609) to determine whether Doe's wife was admissible on Roe's behalf. Those rules have been already examined in detail (*ante*, § 580). It is enough here to refer to their connection, and to note their application to the present privilege.

Under those rules, then, it is generally held that the privilege covers the case of the wife of a *co-defendant now on trial;*[1] but not the case of the wife of a co-defendant whose interest has been removed from the record by *con-*

band to wife; the wife allowed to be called by the plaintiff against herself as defendant claiming as sole owner; but the husband not allowed to be called against her);
Texas: 1919, Stribling *v.* State, 86 Tex. Cr. 1915, 215 S. W. 857 (disturbance of the peace by profane language is not within the exception);
Vermont: 1835, Williams *v.* Baldwin, 7 Vt. 503, 507 (wife admitted to prove receipt of money by her deceased husband as agent, his estate being settled as insolvent, and not being a party to the suit);
Virginia: 1806, Baring *v.* Reeder, 1 Hen. & M. 154, 157, 164, 171 (wife admissible to prove title not in her husband, who was not a party though he had been in possession of the goods and had sold them); 1830, Robin *v.* King, 2 Leigh 140 (widow not admitted to prove disclaimer of title by her husband, a grantor under whom defendant claimed; but here put on the ground of confidential communications); 1873, Murphy *v.* Com., 23 Gratt. 960, 966 (assault; the wife of the injured party offered to prove him the aggressor; not decided);
Washington: 1899, Frankenthal *v.* Solomonson, 20 Wash. 460, 55 Pac. 754 (creditors' proceeding against wife as holding property of insolvent debtor; debtor not privileged to exclude the wife's testimony for creditors).

§ 2236. [1] *Eng.* 1775, R. *v.* Rudd, 1 Leach Cr. L., 4th ed., 115, 128, 132 (co-defendant's wife excluded, but not the wife of a principal already convicted, even though she hopes for a pardon for her husband if the present defendant is convicted); 1860, R. *v.* Halliday, 8 Cox Cr. 298; *U. S.* 1895, Republic *v.* Kahakauila, 10 Haw. 28 (adultery; husband of one of the defendants, held improperly admitted to prove the marriage); 1871, Miner *v.* State, 58 Ill. 59 (adultery; co-indictee's husband, excluded); 1838, State *v.* Burlingham, 15 Me. 104, 107 (wife of co-defendant charged with conspiracy, excluded); 1921, Stillman *v.* Stillman, Sup. Sp. T., 187 N. Y. Suppl. 383 (divorce; letters from co-respondent to defendant wife, later delivered by her to plaintiff husband, held admissible); 1908, Canole *v.* Allen, 222 Pa. 156, 70 Atl. 1053 (trespass done by husband and wife; the husband held to be improperly called by the plaintiff to prove the husband's act as the wife's agent).

Contra: 1669, R. *v.* Buckworth, 2 Keb. 403 (perjury; "the husband of one of the defendants may be admitted to prove the issue, . . . albeit not to prove or excuse his wife's subornation of the other defendant"; by two judges).

viction,[2] or by *acquittal*,[3] or by *nolle prosequi*;[4] nor of the wife of a *co-indictee* who by severance has obtained a *separate trial*;[5] nor, of course, of the wife of one *separately* indicted though for the same offence.[6]

§ 2237. **Testimony against Spouse Deceased or Divorced.** Can there be dissension with the 'manes' of a departed? Is there for married pairs a posthumous peace, capable of fracture by service of subpœna upon the survivor, and therefore fit to be forefended by the law? If so, then the privilege should extend a 'post mortem' protection. But unless we assume such a theory, the privilege ceases upon the death of a spouse. It is true that, among the varying reasons for the privilege, one of them does suggest a rational extension beyond the life of the parties, namely, that policy of fairness which aims to exempt husband and wife from the repugnancy of being the means of condemning the other (*ante*, § 2228, p. 15); for this repugnance must exist also, in some degree, to a condemnation of the memory of the departed one. But (apart from the argument that this reason has by no means been a generally accepted one) the answer is that a detriment of such exiguous delicacy could not with propriety be allowed to stand in the way of the judicial estab-

[2] *Eng.* 1775, R. *v.* Rudd, *supra;* 1838, R. *v.* Williams, 8 C. & P. 284 (wife of a co-principal already convicted on another indictment); *U. S.* 1917, Knoell *v.* U. S., 3d C. C. A., 239 Fed. 16 (fraudulent receipt of property from a bankrupt; wife of a joint indictee who had pleaded guilty, admitted for the prosecution against the other indictees); 1904, Graff *v.* People, 208 Ill. 312, 70 N. E. 299 (the wife of a co-indictee who had pleaded guilty before trial, admitted against the defendant); 1915, State *v.* Roberts, 95 Kan. 280, 147 Pac. 828 (not decided).

[3] 1896, State *v.* Goforth, 136 Mo. 111, 37 S. W. 801 (wife of one who had been jointly indicted but acquitted).

[4] 1876, Ray *v.* Com., 12 Bush Ky. 397 (wife of co-indictee against whom a 'nolle pros.' had been entered); 1884, Woods *v.* State, 76 Mo. 35 (joint-indictee's wife, admissible, where he ceases to be a party to the record, by virtue of a 'nolle pros.'); 1898, Rios *v.* State, 39 Tex. Cr. 675, 47 S. W. 987 (separately indicted for the same offence; wife here called for the prosecution; allowed, because of an agreement by the district-attorney to dismiss the indictment against the husband). Distinguish the following: 1876, Dill *v.* State, 1 Tex. App. 278, 282 (wife of co-indictee jointly tried, inadmissible, though a 'nolle pros.' was entered as to her husband afterwards before trial ended).

[5] *Ala.* 1902, Campbell *v.* State, 133 Ala. 158, 32 So. 635 (husband admitted to prove adultery of C. with his wife, jointly indicted but separately tried); 1913, Watson *v.* State, 181 Ala. 53, 61 So. 334; *Ga.* 1882, Williams *v.* State, 69 Ga. 13, 20, 30 (wife admissible of one indicted for the same offence but not on trial, though probably she need not incriminate her husband; the result placed on the authority of Stewart *v.* State, 58 Ga. 577, 581, though not there decided); 1885, Whitlow *v.* State, 74 Ga. 819 (same); 1885, Askea *v.* State, 75 Ga. 357 (wife of an accomplice not on trial, admitted); 1903, Rivers *v.* State, 118 Ga. 42, 44 S. E. 859 (husband of a co-indictee separately tried, admitted); *Ia.* 1887, State *v.* Rainsbarger, 71 Ia. 746, 747, 31 N. W. 865 (wife of one indicted for same crime though not on trial, admitted); *Kan.* 1915, State *v.* Roberts, 95 Kan. 280, 147 Pac. 828, *semble; N. J.* 1878, Hunter *v.* State, 40 N. J. L. 495, 519, 545 (wife of accomplice, indicted and not yet tried, but testifying for the prosecution, allowed to corroborate him as to a fact not in itself criminal); 1899, Munyon *v.* State, 62 N. J. L. 1, 42 Atl. 577 (wife of a joint indictee tried separately is admissible for the prosecution); *Wis.* 1903, State *v.* West, 118 Wis. 469, 95 N. W. 521 (adultery with F., tried separately; F.'s husband, admitted for the prosecution to prove his marriage with F.).

Contra: 1855, State *v.* Bradley, 9 Rich. S. C. 168, 171 (wife of co-indictee, not on trial, not admitted for defendant to testify that her husband alone was guilty).

[6] 1877, Powell *v.* State, 58 Ala. 362 (wife of accomplice not indicted, admissible); 1883, People *v.* Langtree, 64 Cal. 256, 30 Pac. 813 (wife of one charged by separate information, admitted, though she incriminated her husband); 1900, Fuller *v.* State, 109 Ga. 809, 35 S. E. 298 (wife of one separately indicted for the same offence, admitted); 1893, Bluman *v.* State, 35 Tex. Cr. 43, 58, 21 S. W. 1027, 26 S. W. 75 (but here the husband had already testified for the State as a party to the crime).

lishment of truth. Moreover, looking back at the principle which defines testimony "against" a spouse as testimony against a spouse who is a party to the cause (*ante*, § 2234), it is obvious that, since a deceased person cannot be a party, testimony concerning the deceased person can never be said to be testimony "against" a spouse.

And what is to be said of a divorced spouse? Does the privilege there also continue? After the grave cause for dissolution — adultery, desertion, crime, or the like — has come to pass, and the parties have been not only alienated in spirit, but also solemnly freed, by judicial decree, from the obligations of mutual concord and concession, is there any longer, either in fact or in policy, a marital peace which must be kept inviolable? Or is the legal fiction so elastic and so artificial that it can afford to dispense with even a modicum of fact for its support, and can be deemed to exist even after the bonds of matrimony have been loosed? There ought to be no doubt that this would be carrying too far the fantasies of legal pretence:

1802, Messrs. *Best* and *Peake*, arguing, in *Monroe* v. *Twistleton*, Peake Add. Cas. 219: "It is true, a wife cannot, while she remains so, . . . [testify against her husband]. . . . The law precludes every inquiry from either which might break in upon the comfort and happiness of the married state. . . . But the reason why she should then have been incompetent no longer exists. The bond of marriage is broken [by divorce] and at an end; and the policy of the law no longer requires that terms of amity and friendship should subsist between them any more than between utter strangers."

1832, JOHNSON, J., in *Caldwell* v. *Stuart*, 2 Bail. 574 (admitting the widow against her husband's estate): "Neither the rule, nor any of the reasons upon which it proceeds, have any the most remote application here. The husband is no party; he has ceased to have any interest in temporal concerns. The defendant, the executor, represents the interests of the creditors, legatees, or distributees, as the case may be, and not the husband's. There is no danger of matrimonial discord; nor is there any violation of confidence."

1859, KENT, J., in *Walker* v. *Sanborn*, 46 Me. 470, 472: "There seems to be a distinction between the testimony of a wife and a widow, based on the different relations that exist. The fundamental reason for the rejection of the wife's testimony is the promotion of domestic harmony, and the danger that it may be disturbed between husband and wife if they are allowed to testify. This reason ceases on the death of one of the parties."

1. There is no privilege, then, which prevents the surviving spouse from testifying, after the *death* of the other, in disparagement of the conduct or the property of the deceased;[1] nor is it material that the testimony relates to

§ 2237. [1] ENGLAND: 1723, Dale *v.* Johnson, 1 Stra. 568 (wife of a deceased plaintiff, admitted for the defendant to prove the death); 1824, Beveridge *v.* Minter, 1 C. & P. 364, Abbott, C. J. (wife allowed to testify to admissions of debt by the deceased husband, because "she is appearing against her own interest").

UNITED STATES: *Ark.* 1902, Graves *v.* Graves, 70 Ark. 541, 69 S. W. 544 ("A widow is a competent witness against the executor of her deceased husband"); *Ind.* 1856, Jack *v.* Russey, 8 Ind. 180 (maker's wife admitted against a co-maker of a note, the maker being deceased and his estate insolvent); *Ia.* 1864, Pratt *v.* Delavan, 17 Ia. 307, 309 (widow admitted for the plaintiff in an action on a note made by the deceased husband; "testifying for or against herself and the heirs, after the death of the husband, is manifestly not the same thing as testifying for or against her husband if alive"); 1887, Parcell *v.* McRey-

matters which occurred during the marriage. The few rulings taking the contrary view [2] are misled by the analogy of a different privilege, namely, that which prohibits the disclosure of marital confidential communications. It is a legitimate corollary of that privilege (*post*, § 2341) that it prevails even after the death of one spouse. But the two privileges are entirely distinct; the former, for example, has been in many jurisdictions abolished, while the latter has been nowhere abolished. The reason of the former privilege ceases with death; that of the latter does not. Each has a separate scope; for example, a wife might be prevented from revealing a confidential communication, even though not testifying against her husband; and she might be prevented from testifying against her husband, though her testimony involved no confidences. Thus it is that a wife, after the husband's death, is not privileged to withhold facts involving disparagement of his conduct or estate during life, so long as she does not violate the other and distinct privilege against disclosing confidential communications.[3]

2. So, too, after *divorce*, there is no privilege to withhold the testimony of

nolds, 71 Ia. 623, 33 N. W. 139 (similar; Beck, J., diss.); *Kan.* 1915, State *v.* Roberts, 95 Kan. 280, 147 Pac. 828 (wife of a deceased co-indictee already tried); *Ky.* 1841, McGuire *v.* Maloney, 1 B. Monr. 224 (wife's testimony against the husband's administrator in favor of the husband's vendee, admissible); *La.* 1881, Ames' Succession, 33 La. An. 1317, 1327 (husband testifying to a debt against wife's estate); *Me.* 1859, Walker *v.* Sanborn, 46 Me. 470, 472; *N. H.* 1859, Jackson *v.* Barron, 37 N. H. 494, 500 (wife of a deceased partner, admitted in an action against the surviving partner for a firm debt); *N. Car.* 1833, Hester *v.* Hester, 4 Dev. 228 (widow admitted to testify for the contestants of a will, as to the husband's declarations, the widow having claimed dower against the will); 1851, Gaskill *v.* King, 12 Ired. 211, 215 (widow admitted for one claiming by deed of chattels against the husband's administrator); *Oh.* 1855, Stober *v.* McCarter, 4 Oh. St. 513, 516 (wife admitted to charge husband's administrator with a debt of the estate); *Pa.* 1799, Pennsylvania *v.* Stoops, Addis, 381, 382, *semble;* 1811, Wells *v.* Tucker, 3 Binn. 366 (widow admitted for a claimant of the husband's chattels by gift against his administrator; no doubt raised); 1846, Cornell *v.* Vanartsdalen, 4 Pa. St. 364, 374, *semble;* 1881, Robb's Appeal, 98 Pa. 501, 502 (widow admitted for a claimant of a debt against the husband's administration); 1881, Stephens *v.* Cotterell, 99 Pa. 188, 192 (widow admitted for defendant in an action by the husband's administrator); *S. Car.* 1832, Caldwell *v.* Stuart, 2 Bail. 574 (widow admitted for a claimant by gift against the husband's executor); 1851, Hay *v.* Hay, 3 Rich. Eq. 384, 393, 397 (similar); *Vt.* 1833, Edgell *v.* Bennett, 7 Vt. 534 (widow admitted for a creditor to prove a transfer by her husband fraudulent); 1835, Williams *v.* Baldwin, 7 Vt. 503, 507, *semble* (widow of an agent, admissible to prove his receipt of money); 1855, Smith *v.* Proctor, 27 Vt. 304 (widow admitted for a claimant against the deceased husband's estate).

[2] *Eng.* 1842, O'Connor *v.* Marjoribanks, 4 M. & Gr. 435 (trover by G.'s representatives; G.'s wife not admitted for the defendant to prove his rightful receipt of the goods as pledgee by testifying that her deceased husband "had authorized her" to dispose of his goods; the opinions show a complete confusion of the distinct reasons for the rules about testifying against the husband and about revealing confidential communications; this ruling has done much harm in the law); *U. S.* 1895, Emmons *v.* Barton, 109 Cal. 662, 42 Pac. 303 (under C. C. P. § 1881, the wife cannot be examined after the husband's death).

In the following jurisdictions the rulings leave an uncertainty: *Massachusetts:* 1850, Dickerman *v.* Graves, 6 Cush. 308, 309 (wife inadmissible even after dissolution of marriage); 1861, Dexter *v.* Booth, 2 All. 559 (wife admitted in an action against the husband's executor for the husband's debt); *Virginia:* 1811, Braxton *v.* Hilyard, 2 Munf. 49, *semble* (widow admitted to prove infancy of a surety on her deceased husband's bond); 1855, William & Mary College *v.* Powell, 12 Gratt. 372 (*contra*); 1882, Smith *v.* Bradford, 76 Va. 758, 765 (same).

[3] The statutes, in some of the Codes particularly (*ante*, § 488), have sometimes given a sanction to this confusion; so that the error has there passed beyond the power of judicial correction.

either;[4] although in a few courts[5] the same confusion has here also appeared between the present privilege and the privilege for confidential communications.

3. A *deponent's* qualifications should be determined at the *time* of the deposition's taking, not of the deposition's offer in evidence (*ante*, §§ 483, 1409). But a privilege should be determined at the *time of its claim;* for the basis of a disqualification is the testimonial trustworthiness of the person when actually speaking, while the basis of the privilege is the policy as affected by using the testimony. Hence, if a husband's deposition is taken at a time when the wife could be privileged to exclude it, nevertheless the privilege becomes unavailable if, by death or divorce intervening before offer of the deposition, the privilege has ceased at the time of the offer.[6]

5. Anti-Marital Testimony Admitted Exceptionally

§ 2239. **At Common Law, by Necessity (Injuries to the Spouse, by Battery, Abduction, Fraud, Adultery, and the like; Divorce; Desertion; "Crimes against the Other").** The common law did not fail to recognize that the rule

[4] *Ala.* 1888, Long *v.* State, 86 Ala. 36, 43; *Ark.* 1898, Inman *v.* State, 65 Ark. 508, 47 S. W. 558; *Ia.* 1900, Hitt *v.* Sterling-Goold Mfg. Co., 111 Ia. 458, 82 N. W. 919; 1906, State *v.* Mathews, 133 Ia. 398, 109 N. W. 616 (wife at the time of the homicide, but divorced before trial; not privileged); *Ky.* 1867, Storms *v.* Storms, 3 Bush 77, 79; 1903, Tompkins *v.* Com., 117 Ky. 138, 77 S. W. 712 (for occurrences subsequent to divorce; but this limitation is unsound); 1914, Rutland *v.* Com., 160 Ky. 77, 169 S. W. 585 (approving Ray *v.* Com.); *Mich.* 1878, People *v.* Marble, 38 Mich. 117, 123; 1917, Hendrickson *v.* Harry, 200 Mich. 41, 164 N. W. 393, 166 N. W. 1023 (alienation of wife's affections; the wife, not having been already divorced, was not admitted for the defendant, though her bill for divorce had been some months pending and was granted six weeks after the trial; another example of the absurdity of the privilege; on rehearing, it appeared that the divorce had in fact been granted a year before the trial, and the ex-wife was held admissible); *Or.* 1908, State *v.* Luper, — Or. —, 95 Pac. 811 (perjury committed in obtaining the divorce); *R. I.* 1905, Hartley *v.* Hartley, 27 R. I. 176, 61 Atl. 144 (wife's bill for account against a divorced husband; plaintiff not allowed to testify to a property agreement made during marriage; erroneously following Robinson *v.* Robinson, R. I., *post*, § 2341, as authority); *Tex.* 1905, Cole *v.* State, 48 Tex. Cr. 439, 88 S. W. 341; *Vt.* 1893, French *v.* Ware, 65 Vt. 338, 344, 26 Atl. 1096 (including matters during marriage); *Wash.* 1905, State *v.* Nelson, 39 Wash. 221, 81 Pac. 721; 1915, State *v.* Snyder, 84 Wash. 485, 147 Pac. 38 (statutory rape); *Wis.* 1870, Cook *v.* Henry, 25 Wis. 569; 1890, Bigelow *v.* Sickles, 75 Wis. 427, 429, 44 N. W. 761.

[5] *Eng.* 1802, Monroe *v.* Twistleton, Peake Add. Cas. 219 (assumpsit for board and lodging supplied to the defendant's child; to prove the contract, S.'s wife, who had been the defendant's wife at the time of the contract, but had been divorced and had remarried, was not admitted; the opinion confusing the question with that of confidential communications); *U. S.* 1856, Tulley *v.* Alexander, 11 La. An. 628 (excluded, even though they live apart); 1850, Dickerman *v.* Graves, 6 Cush. Mass. 308 (cited *supra*, note 2); 1900, State *v.* Kodat, 158 Mo. 125, 59 S. W. 73 (divorced wife not allowed to testify against the husband on a prosecution for assault on K. made during the marriage and arising out of a quarrel with the wife); 1897, State *v.* Raby, 121 N. C. 682, 28 S. E. 490 (excluded, as to adultery during marriage; no change made by the Code); 1803, State *v.* Phelps, 2 Tyler Vt. 374 (divorced wife, not admitted against defendant on a charge of adultery during marriage; Tyler, J., diss.).

[6] 1912, Howard *v.* Strode, 242 Mo. 210, 146 S. W. 792 (claim of widow's share in an estate; the plaintiff was married in 1883 to a man named H. H., whom she maintained to be the defendant's intestate L. J. H.; defendant maintained that the man married by the plaintiff in 1883 was not L. J. H., but was one T. J. M.; defendant offered the deposition of T. J. M., a non-resident, that he was that man, and therewith offered a decree of divorce from plaintiff granted to said T. J. M. since the date of the deposition and before its offer in evidence; the trial Court admitted the deposition; held that the divorce made T. J. M.'s testimony admissible).

of privilege was subject to some sort of exception. That exception was commonly placed on the ground of *Necessity*, — that is, a necessity to avoid that extreme injustice to the excluded spouse which would ensue upon an undeviating enforcement of the rule.[1]

The notion of Necessity, indeed, might commendably have been a broader one; the necessity of doing justice to other persons in general, when the spouse's testimony was indispensable, would have been at least as great. But the common lawyers here kept their eyes upon the ground, and did not allow their survey to exceed the range of immediate and unavoidable vision. Any one could see that an absolute privilege in a husband to close the mouth of the wife in testimony against him would be a vested license to injure her in secret with complete immunity; and this much the common lawyers saw, and were willing to concede. Just how far the concession went, in concrete cases, was never precisely settled. It was given varying definition at different times; it certainly extended to causes involving corporal violence to the wife; and it certainly did not extend to all wrongs done to the wife.[2] In modern statutes the spirit of the exception has usually been invoked to establish the exception for both husband and wife in all causes involving a "crime against the other," or a "personal wrong." [3]

But before noting the extent of this exception in detail, it is worth while to observe that the common-law cases and the statutory rules, applying this exception, are also equally open to explanation as instances in which the very reason of the privilege — at least the reason most frequently advanced (*ante*, § 2228) — is lacking. That is to say, if the promotion of marital peace, and the apprehension of marital dissension, are the ultimate ground of the privilege, it is an overgenerous assumption that the wife who has been beaten, poisoned, or deserted, is still on such terms of delicate good feeling with her spouse that her testimony must not be enforced lest the iridescent halo of peace be dispelled by the breath of disparaging testimony. And if there were, conceivably, any such peace, would it be a peace such as the law could desire to protect? Could it be any other peace than that which the tyrant secures for himself by oppression? And could the law pretend to regard the effect produced by a wife's testimony in her own redress as being worth consideration on behalf of a husband who has already grossly

§ 2239. [1] 1784, Mansfield, L. C. J., in Bentley v. Cooke, 3 Doug. 422 ("That necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where for instance the wife would otherwise be exposed without remedy to personal injury").

[2] 1767, Buller, Trials at Nisi Prius, 287 ("for a personal tort done to herself"); 1765, Blackstone, Commentaries, I, 443 ("where the offence is directly against the person of the wife, this rule has been usually dispensed with"); 1806, Evans, Notes to Pothier, II, 266 ("I believe that the evidence of a wife against her husband upon a charge for personal ill-treatment is in practice now admitted"); 1803, East, Pl. Cr. I, 455 ("I conceive it to be now settled that in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other"); 1864, Crompton and Blackburn, JJ., in Reeve v. Wood, 8 Cox Cr. 58 ("personal wrongs to the wife"; an injury which "touches the person of the wife").

[3] These statutes have been placed *ante*, § 488, with the statutes affecting qualifications of witnesses.

violated his marital duties? If there had been any reason at all for the privilege, that reason surely fell away in such cases. The common lawyers, more creditably to themselves, in point of consistency as well as humanity, might better have placed these cases upon this ground, instead of upon that of Necessity; and it is satisfactory to find that this reasoning has by some judges been appealed to for that purpose:

1828, MELLEN, C. J., in *Soule's Case*, 5 Greenl. 407, 408: "From the general rule some exceptions have been established, founded on the necessity of the case. For instance, if a wife could not be admitted to testify against the husband as to threatened or executed violence and abuse upon her person, he could play the tyrant and brute at his pleasure, and with perfect security beat, wound, and torture her at times and in places when and where no witnesses could be present nor assistance be obtained. Reasons of policy do not certainly extend so far as in such cases to disqualify her from being a witness against him. . . . So far as the general incompetency of the wife is founded on the idea that her testimony, if received, would tend to destroy domestic peace, and introduce discord, animosity, and confusion in its place, the principle loses its influence when that peace has already become wearisome to a passionate, despotic, and perhaps intoxicated husband, who has done all in his power to render the wife unhappy and destroy all mutual affection."

In view of the unsettled extent of the exception in the orthodox common law, and of the broad possibilities of the principle last mentioned, and also by reason of the frequent statutory enlargement of the exception, there has been a decided variation in judicial rulings upon specific cases. Moreover, there has too often been exhibited a narrow illiberality in not seizing the opportunities for carrying out this exception to its widest scope of principle.

(1) It seems certain that in all causes involving an *assault* or a *battery* or other *corporal violence* to the wife, or husband, committed by the other (including actions to bind over by articles of peace), the spouse alleged to be injured could not be excluded.[4] So, too, an attempt to *kill by poison* is clearly

[4] Where statutes are applied (they are collected *ante*, § 488), making an exception for "crimes against the other" or "personal injuries," the statute is noted below:

ENGLAND: 1701, Pocock *v.* Thornicroft, 12 Mod. 454 ("a wife shall be admitted to swear the peace against her husband, because a matter concerning her person"); 1725, R. *v.* Azir, 1 Stra. 633, Raymond, C. J. (assault; wife admitted); 1743, Lord Vane's Case, 2 Stra. 1202 (articles of the peace exhibited by the wife against the husband; *semble*, the wife admissible); 1758, R. *v.* Mead, 1 Burr. 542 ('habeas corpus' by the husband against the wife; *semble*, the wife admissible); 1758, R. *v.* Earl Ferrers, 1 Burr. 631, 634 (articles of the peace by the wife against the husband; *semble*, the wife admissible); 1787, R. *v.* Bowes, 1 T. R. 696, 699, *semble* (same); 1789, R. *v.* Woodcock, 1 Leach Cr. L., 4th ed., 500 (wife's dying declarations, admitted against a husband charged with her murder); 1790, R. *v.* Johns, 1 Leach Cr. L. 504, note (same); 1810, R. *v.* Doherty, 13 East 171, *semble* (like R. *v.* Bowes); 1813, Heyn's Case, 2 Ves. & B. 182 (wife's affidavit, received on articles of the peace against him).

UNITED STATES: *Alabama:* 1898, Clarke *v.* State, 117 Ala. 1, 23 So. 671 (husband charged with the murder of a child by beating the wife before its birth; wife admitted, under statute); 1907, Williams *v.* State, 149 Ala. 4, 43 So. 720 (assault by a woman on her former husband; husband admitted); *Delaware:* 1904, State *v.* Harris, 5 Pen. Del. 145, 58 Atl. 1042 (husband admitted against his wife, on a charge of assaulting him); *Georgia:* 1885, Stevens *v.* State, 76 Ga. 96 (wife admitted, under statute, in a prosecution against the husband for a battery upon her); 1912, Ector *v.* State, 10 Ga. App. 777, 74 S. E. 295 (under P. C. 1910, § 1037, par. 4, reproducing P. C. 1895, § 1011, par. 4, the husband may not testify against his wife on a charge of stabbing him; history of the legislation reviewed by Russell, J.); *Kentucky:* 1881, Turnbull *v.* Com., 79 Ky. 495 (wife's malicious wounding of a husband; the husband not admitted, the exception being ignored; no precedents cited);

within the exception.[5] It would seem plain that a *rape* of the wife, committed by the husband or at his instigation, was plainly an offence of corporal violence; and at the earliest stage of the law, the privilege was held not to apply, in the notorious case of Lord Audley.[6] But this ruling was more than once doubted;[7] and, although the doubt was apparently due to very different reasons,[8] it was duly perpetuated without regard to its grounds; and, partly in consequence of this, there appear, in modern records, a few singular rulings in which it is maintained that a rape is not "a crime against the wife" nor a "personal wrong."[9] Whether the procuring of an *abortion*

1890, Com. *v.* Sapp, 90 Ky. 580, 586, 14 S. W. 834 (statutory exception recognized, for "a crime against the person of the wife"; wife here allowed to testify on a charge of attempting to kill her by poison); *Maine:* 1828, Soule's Case, 5 Greenl. 407 (assault and battery on the wife); *Michigan:* 1887, People *v.* Sebring, 66 Mich. 705, 33 N. W. 808 (assault with intent to do bodily harm on the wife; wife admitted, under statute); *Missouri:* 1913, State *v.* Anderson, 252 Mo. 83, 158 S. W. 817 (assault with intent to kill the accused's wife; the wife admitted); *Nebraska:* 1907, Miller *v.* State, 78 Nebr. 645, 111 Nebr. 637 (wife admitted on a charge of husband's assault on herself and two others); *New York:* 1845, People *v.* Green 1 Denio 614 (wife's dying declarations, admitted, on a charge of murdering her); *New Jersey:* 1919, State *v.* Marriner, 93 N. J. L. 273, 108 Atl. 306 (assault and battery on the wife; wife admitted for the prosecution, by implied exception to Evidence Act § 5, Pub. L. 1900, p. 363); *North Carolina:* 1852, State *v.* Hussey, Busbee 123, 126 (wife not competent in a prosecution for assault and battery where no "lasting injury or great bodily harm" was inflicted or threatened); 1877, State *v.* Davidson, 77 N. C. 522 (similar; these two rulings are now probably outlawed by the existing statute); *Ohio:* 1877, Whipp *v.* State, 34 Oh. St. 87 (husband competent in a prosecution of the wife for an assault upon him, though the statute expressly makes no such exception); *Pennsylvania:* 1799, Pennsylvania *v.* Stoops, Addis. 381 ("in cases of secret personal injury" the wife is admissible; here, her dying deposition, on a prosecution for murdering her); *South Carolina:* 1811, State *v.* Davis, 3 Brev. 3 (assault and battery by the husband on the wife; wife admitted; Grimke, J., diss.); *West Virginia:* 1905, State *v.* Woodrow, 58 W. Va. 527, 52 S. E. 545 (murder of defendant's baby, the shot passing through the baby's head and wounding the mother who was holding it in her arms; the mother excluded; a singular decision; Poffenbarger and Sanders, JJ., diss.); *Wisconsin:* 1902, Goodwin *v.* State, 114 Wis. 318, 90 N. W. 170 (assault with intent to kill).

[5] *Eng.* 1796, R. *v.* Wasson, 1 Cr. & O. 197 (by all the Irish judges; administering poison to the defendant's wife; the wife admitted); 1890, Com. *v.* Sapp, Ky., *supra*, note 4; *U. S.* 1901, Davis *v.* Com., 99 Va. 838, 38 S. E. 191 (indictment for poisoning a well with intent to kill "S. and others"; the defendant's wife, being one of the others using the well, admitted under statute, as one against whom the crime was committed).

[6] Quoted *ante*, § 2227; this peer of the land employed his servants as his nefarious instruments, and stood by while they executed his commands.

[7] 1674, Hale, C. B., in R. *v.* Brown, 1 Ventr. 243 (doubted); 1661, R. *v.* Griggs, T. Raym. 1 (denied); 1725, Raymond, C. J., in R. *v.* Azir, 1 Stra. 633 (approved); 1734, Probyn, J., in R. *v.* Reading, Lee cas. t. Hardwicke 79, 83 (approved). In R. *v.* Jellyman, 8 C. & P. 604 (1838), the wife was admitted to prove an unnatural crime upon her.

[8] As pointed out *ante*, § 2227.

[9] 1898, People *v.* Schoonmaker, 117 Mich. 190, 75 N. W. 439 (rape of a woman under sixteen, being also the defendant's wife; the woman not competent against the defendant, under statute); 1905, Frazier *v.* State, 48 Tex. Cr. 142, 86 S. W. 754 (useless opinion).

Where the rape was *before marriage*, the question is arguable; but Courts have strained a point in favor of the wrongdoer: 1902, People *v.* Curiale, 137 Cal. 534, 70 Pac. 468 (construing the statute); 1904, State *v.* McKay, 122 Ia. 658, 98 N. W. 510 ("this is so plain that no amount of reasoning can make it any clearer"); 1899, State *v.* Frey, 76 Minn. 526, 79 N. W. 518 (the statute does not include a charge of rape on the woman before marriage); 1896, State *v.* Evans, 138 Mo. 116, 124, 39 S. W. 462 (rape on the wife before marriage; wife excluded; "a wife is only admitted to testify concerning criminal injuries to herself as a wife"); 1913, Norman *v.* State, 127 Tenn. 340, 155 S. W. 135 (rape under age of a woman whom defendant subsequently married so as to shield himself from prosecution; privilege held applicable; careful opinion, by Buchanan, J., but the result is none the less misguided).

To hold that the offence, when committed, was not done to the wife, so as to be a "crime against the other," is to misread the statute. The woman's consent to marriage cannot remove the crime, however much it may discredit her testimony.

comes within the spirit of the exception may perhaps be doubted, so far as the consent of the wife may be assumed.[10] An *abduction* and forcible marriage, or a *seduction before marriage*, would be a crime against the woman and sometimes also a corporal wrong; but in this instance other complications arise, first, because the marriage may be void and thus the privilege is inapplicable (*ante*, § 2230), and next, because the statutory offence may sometimes not involve violence or forcible abduction as an ingredient.[11] In various phrasings of law as to *pimping* by the husband (living on the wife's earnings as prostitute, enticing her for the purpose of prostitution, contracting for the purpose, "white slave trade"), the question of the privilege arises; the local statutory phrasings become important, but of course morally it is a shameless offence against wifehood.[12]

[10] *Not privileged:* 1921, Com. v. Allen, 191 Ky. 624, 231 S. W. 41 (abortion by defendant upon his wife, against her will; the wife held admissible against the husband); 1871, State v. Dyer, 59 Me. 303, 306 (wife admitted against husband charged jointly with attempting an abortion on her); 1899, Munyon v. State, 62 N. J. L. 1, 42 Atl. 577 (attempting to produce a miscarriage, held a personal injury, within the statutory exception). *Privileged:* 1897, Miller v. State, 37 Tex. Cr. 575, 577, 40 S. W. 313 (wife not admitted against husband on a charge of abortion done before marriage).

[11] ENGLAND: 1638, Fulwood's Case, Cro. Car. 482 (indictment for abduction and forcible marriage; the woman testified apparently without question); 1685, R. v. Brown, 1 Ventr. 243, 3 Keb. 193 (indictment for abduction and for unlawful marriage procured by duress; the woman was admitted, though "she was his wife 'de facto,' though not 'de jure,'" first, because she was married by duress, secondly, because "so hainous a crime would go unpunished, unless the testimony of the woman should be received," thirdly, on the authority of Fulwood's Case, *supra*); 1702, Swendsen's Trial, 14 How. St. Tr. 559, 575 (forcible abduction and marriage; the woman admitted without question); 1826, R. v. Serjeant, Ry. & Moo. 352, Abbott, C. J. (conspiracy by a prostitute and others to procure S. to marry her on false pretence; the husband excluded, on a false theory that the rule was the same for testimony either for or against the other spouse); 1827, R. v. Wakefield, 2 Lew. Cr. C. 1, 20, 279 (conspiring to marry an heiress against her will; the woman was admitted for the prosecution, whether the marriage was forcible or fraudulent, and whether or not it was legally void; Hullock, B.: "A wife is competent against her husband in all cases affecting her liberty and person; . . . it would be unreasonable to exclude the only person capable of giving evidence in certain cases of injury. Our law recognizes witnesses 'ex necessitate', and it would be strange indeed that the husband should be allowed to exercise every atrocity against the wife and her evidence not be admitted"); 1839, R. v. Yore, 1 Jebb & S. 563 (fraudulent enticement of heiress to marriage; the woman admitted, following R. v. Wakefield).

UNITED STATES: *Ark.* 1916, Wilson v. State, 125 Ark. 234, 188 S. W. 554 (carnal knowledge of T. under age; T. married defendant after indictment; held that the wife could not testify against the defendant, under Kirby's Digest § 3092, the alleged injury having been done prior to marriage); *Ga.* St. 1899, Dec. 20, Rev. C. 1910, P. C. § 379 (allowing a prosecution for seduction to be stopped by marriage: "In case the defendant fails to comply with the provisions of this section [as to supporting the wife and children], the wife shall be a competent witness against the husband"); 1903, Barnett v. State, 117 Ga. 298, 43 S. E. 720 (St. 1899, Dec. 20, p. 42, does not apply against one who at the time of the marriage was arrested, but not under indictment for the seduction); *Ky.* 1903, Barclay v. Com., 116 Ky. 275, 76 S. W. 4 (mock marriage, held to be within the exception of necessity).

[12] ENGLAND: Director of Pub. Pros. v. Blady, [1912] 2 K. B. 89 (charge of living on the earnings of his wife as prostitute; the wife held not admissible for the prosecution, because the offence was not against "the liberty, health, or person of the wife"; Lush, J., diss.; the reasoning of the majority might have been different and sound, but, upon its own phrasing, the English language is strangely interpreted).

UNITED STATES: *Fed.* U. S. v. Rispoli, 189 Fed. 271 (prosecution of the husband for persuading his wife to act as a prostitute ("white slave" trade); held that the privilege ceased); 1914, Cohen v. U. S., 9th C. C. A., 214 Fed. 23 (subornation of perjury on a trial of G. for bringing his wife into the State for purposes of prostitution; the wife's testimony held admissible, on the ground that the offence charged was a personal injury to her); 1915, Johnson v. U. S., 8th C. C. A., 221 Fed. 250 (white slave traffic Act; transporting a woman for purposes

(2) The husband's *desertion* or *failure to support* is plainly a wrong to the wife. But inasmuch as the fact often comes in issue in a proceeding not directly between husband and wife, this has sometimes sufficed as a loophole for escaping the application of the exception. Nevertheless, in principle, this distinction should have no effect; and modern statutes have generally declared against a privilege.[13] In orthodox practice, in proceedings involving the *custody of children*, where the issue depends partly on the husband's misconduct, the wife's testimony, at least by affidavit, was conceded to be admissible.[14]

of prostitution; the woman being the wife of the defendant, she was held not competent to testify for the State; the present exception was not considered); 1917, Pappas *v.* U. S., 9th C. C. A., 241 Fed. 665 (white slave traffic with defendant's wife; the wife admitted against the defendant; "such conduct . . . constituted a personal wrong"); 1918, Denning *v.* U. S., 5th C. C. A., 247 Fed. 463 (white slave traffic with defendant's wife; the wife admitted for the prosecution; "it is an offense against the wife"); *Ind.* St. 1911, c. 174, Burns' Ann. St. 1914, § 2356 c (pandering; cited more fully *ante*, § 488).

[13] The numerous statutes are already quoted *ante*, § 488;

ENGLAND: 1864, Reeve *v.* Wood, 10 Cox Cr. 58 (charge of desertion, preferred by the parish; wife not receivable against him, because "it is only a crime against the parish, and it is the fact of her becoming chargeable to the parish that makes the husband liable").

CANADA: 1914, R. *v.* Allen, 17 D. L. R. 719, N. S. (non-support of family; the wife of defendant not admitted for the prosecution, under Can. Evid. Act § 4, referring to Cr. Code § 244; the offence here being charged under § 242A of 1913).

UNITED STATES: *Ala.* St. 1903, No. 9, p. 32, Code 1907, § 7900 (husband charged with abandonment; "the wife shall be a competent witness against her husband"); 1905, Wester *v.* State, 142 Ala. 56, 38 So. 1010 (abandonment of family; the wife allowed to testify for the State, under St. 1903, No. 9); *Del.* 1902, State *v.* Miller, 3 Pennew. Del. 518, 52 Atl. 262 (under St. 1887, c. 230, 18 Laws, p. 447, quoted *ante*, § 488, a wife is admissible on a complaint against the husband for failure to support minors even when not under the age of ten); *Mich.* 1898, Wood *v.* Lentz, 116 Mich. 275, 74 N. W. 462 (action for loss of support by selling liquor to the plaintiff's husband; the husband not admitted against plaintiff, under the statute); 1898, People *v.* Malsch, 119 Mich. 112, 77 N. W. 638 (failure to support; interpreting the act of 1889, as affecting Act No. 136 of 1883, and 3 How. Annot. St. § 7546); 1901, Travis *v.* Stevens, 127 Mich. 687, 87 N. W. 85 (action for support furnished to defendant's wife; wife not admitted for plaintiff, under the statute); *Mo.* 1904, State *v.* Bean, 104 Mo. App. 255, 78 S. W. 640 (wife-abandonment; the wife admitted against the husband); 1869, State *v.* Newberry, 43 Mo. 429 (wife-abandonment; the wife's affidavit to an information, admitted); *Tex.* 1920, Hollien *v.* State, — Tex. Cr. —, 224 S. W. 779 (desertion; wife admitted, under P. C. 1911, § 640 *a*); *Wis.* 1874, Bach *v.* Parmely, 35 Wis. 238 (wife admitted, for a claimant charging the husband with necessaries supplied to her, to prove the husband's acts of cruelty, "on the ground of necessity"); 1905, Morgenroth *v.* Spencer, 124 Wis. 564, 102 N. W. 1086 (Bach *v.* Parmely followed).

[14] *Eng.* 1804, De Manneville *v.* De Manneville, 10 Ves. Jr. 52, 56 (a mother's petition against the father for the child's custody; her affidavit admitted; L. C. Eldon: "This may be compared to the common case where affidavits of ill-treatment are read to prevent the husband's taking the interest of money in court the property of the wife; . . . it is almost of necessity in such a case [as this] that the wife's affidavit should be read, the circumstances generally taking place in no other presence than that of the husband"); *U. S.* 1836, People *v.* Chegaray, 18 Wend. N. Y. 637, 642 (custody of children; the wife's affidavit against the husband, doubtingly received); 1839, People *v.* Mercein, 8 Paige N. Y. 47, 53 (similar cause; the wife's testimony admitted to prove the husband's cruelty as justifying her living separately); 1913, Hunter *v.* State, 10 Okl. Cr. App. 119, 134 Pac. 1134 (failure to support a minor child; the wife admitted, under Rev. L. 1910, § 5882, making an exception for "a crime committed by one against the other"; eloquent opinion by Furman, J.); 1921, Terrell *v.* State, 88 Tex. Cr. 599, 228 S. W. 240 (wife-desertion; wife admitted against husband, under P. C. § 640 *c*).

The following ruling was over-strict: 1789, Sedgwick *v.* Watkins, 1 Ves. Jr. 49 (wife's writ 'ne exeat regno' against husband; L. C. Thurlow: "For security of the peace, indeed, she may make an affidavit against him; but cannot sustain an indictment; . . . I have always taken it to be a rule that a wife can never be evidence against her husband, except in the case I have alluded to").

For the numerous modern statutes expressly so providing, see *ante*, § 488.

(3) At common law, in the early practice, the notion of an injury to the wife was not regarded as including much more than those corporal brutalities which satisfied most gross and elementary conceptions of wrong. But as times have gone on, more refined distinctions have been countenanced; especially under the statutory exceptions for "crimes against the other," it has become possible for the Courts to take a broader view *for sexual offences by the spouse with a third person.* That *adultery* by one spouse is an offence against the other is plain enough in morals, and ought to be plain in law.[15] The argument may be made, to be sure, that adultery by the husband (with an unmarried woman, at least) was not a crime at common law, and ought not to be a crime; but that is a mere evasion; whenever it is made a criminal offence, then if any crime at all can be a crime, not only against the State, but also a "crime against the other," adultery is certainly one of those crimes. So, too, is *incest.*[16] So, equally, is *bigamy.*[17] Nevertheless, judges have been found who dispute this; it has been argued, in skilful word-fencing, that a bigamous marriage is a crime "against the marital relation," but not "against the wife." [18] The following passage may serve as a reply to that and all similar attempts to restrict the application of the statutory principle:

1887, ZANE, C. J., in *U. S.* v. *Bassett*, 5 Utah 131, 136, 13 Pac. 237: "Is then polygamy a crime against the lawful wife? It certainly is a breach of the implied if not of the express terms of the marriage contract; . . . and because it is a breach of that contract,

[15] *Accord:* 1870, State *v.* Bennett, 31 Ia. 24; 1874, State *v.* Hazen, 39 Ia. 648; 1885, Lord *v.* State, 17 Nebr. 526, 528, 23 N. W. 507.

Contra: 1860, State *v.* Armstrong, 4 Minn. 335, 343 (even under a statute making the complaint by the injured spouse the necessary basis of prosecution); 1868, State *v.* Berlin, 42 Mo. 572, 577, *semble;* 1882, Compton *v.* State, 13 Tex. App. 271 (cited in the next note); 1839, Mills *v.* U. S., 1 Pinney Wis. 73; 1898, Crawford *v.* State, 98 Wis. 623, 74 N. W. 537.

Not decided: 1905, State *v.* Nelson, 39 Wash. 221, 81 Pac. 721.

But in some States the statute (*ante*, § 488) expressly sanctions the privilege in proceedings "*founded on adultery*," and this provision controls: 1894, Hanselman *v.* Dovel, 102 Mich. 505, 60 N. W. 978 (husband not admitted for himself, in crim. con., even after divorce); 1896, People *v.* Isham, 109 Mich. 72, 67 N. W. 819 (adultery); 1896, People *v.* Imes, 110 Mich. 250, 68 N. W. 157 (same); 1890, De Meli *v.* De Meli, 120 N. Y. 485, 492, 24 N. E. 996 (adultery).

[16] 1893, State *v.* Chambers, 87 Ia. 1, 3, 53 N. W. 1090 (wife competent against a husband charged with incest); 1897, State *v.* Hurd, 101 Ia. 391, 70 N. W. 613; 1916, State *v.* Shultz, 177 Ia. 321, 158 N. W. 539 (incest; wife admitted for the prosecution); 1891, Owens *v.* State, 32 Nebr. 174, 49 N. W. 226 (incest); 1907, Harris *v.* State, 80 Nebr. 195, 114 N. W. 168 (rape under age, on the defendant's stepdaughter; the wife admitted).

[17] *Accord:* 1880, State *v.* Sloan, 55 Ia. 217, 220, 7 N. W. 516; 1882, State *v.* Hughes, 58 Ia. 165, 168, 11 N. W. 706; La. St. 1904, No. 41; 1906, Richardson *v.* State, 103 Md. 112, 63 Atl. 317 (but under a broad statute, Pub. Gen. L. 1904, Art. 35, § 4); 1901, Hills *v.* State, 61 Nebr. 589, 85 N. W. 836 (to hold otherwise "would be to impute to the Legislature a useless purpose, since the common law was then in force except where modified by statute"); 1915, State *v.* Locke, 77 Or. 492, 151 Pac. 717 (bigamy; the first wife may testify to the date and place of the marriage, under St. 1913, p. 351, amending Lord's Or. L. § 1535); 1887, U. S. *v.* Bassett, 5 Utah 131, 134, 13 Pac. 237 (polygamy; first wife admitted against the defendant; quoted *supra*).

Contra: 1890, Bassett *v.* U. S., 137 U. S. 496, 503, 11 Sup. 165; 1892, People *v.* Quanstrom, 93 Mich. 254, 53 N. W. 165 (Morse, C. J., and Grant, J., diss.); 1894, Boyd *v.* State, 33 Tex. Cr. 470, 472 (lawful wife not admitted to testify to the fact of her marriage); 1906, State *v.* Kniffen, 44 Wash. 485, 87 Pac. 837.

[18] Brewer, J., in Bassett *v.* U. S., *supra.*

most hurtful in its consequences, it is declared to be a crime. Whenever the act or the conduct which constitutes a public offense or crime consists in a direct violation of the rights of an individual, the crime is against that individual as well as against the public. The law recognizes the marital rights of a woman or man as well as their rights to life, liberty, and security from personal violence; and the breach thereof by a second marriage or by cohabitation with another woman as a wife is often more injurious to the feelings of the lawful wife (as well as in other respects) than would be a deprivation of personal security or of personal liberty, — more injurious than the shake of a fist coupled with a threat or an attempt to commit a bodily injury. . . . The ground upon which the exclusion of the wife or husband rests is that it would destroy confidence and produce discord. A man in the bed of a strange woman is in a very unfavorable situation to insist upon preserving inviolate the sacred concord of marriage and harmony and confidence on the part of his wife."

In a petition for *divorce*, the petitioner should be admitted, under the spirit of the present principle, to testify to such causes of divorce as consist plainly of personal wrongs — for example, maltreatment or desertion — and perhaps (since divorce presupposes in general some sort of injustice to the petitioner) to other causes; and this view has sometimes been taken in applying the statutory exception for "personal wrong or injury." [19] But, needless to say, the common law recognized no such exception; and since, in many of the jurisdictions retaining the privilege, there has been an express reservation of it for divorce causes,[20] there is in those jurisdictions no opening, on this pretext, for the admission of husband or wife by implication from their competence as parties to the suit.[21] In an action for *criminal conversation*, or for

[19] 1880, Stebbins *v.* Anthony, 5 Colo. 348, 361 (divorce for desertion; the petitioner is competent under such a statute); 1888, Spitz's Appeal, 56 Conn. 184, 14 Atl. 776 (quoted *infra*, n. 24); 1883, Burdette *v.* Burdette, 13 D. C. 469 (parties in divorce suits 'a vinculo' are incompetent; but by Equity Rule 98 the petitioner for separation may testify to cruel or inhuman treatment taking place when no other witness was present); 1900, Gardner *v.* Gardner, 104 Tenn. 410, 58 S. W. 342 (admissible in a petition for divorce on the ground of cruelty). Moreover, under the statute making *parties* in general *competent*, the same result is sometimes reached; the cases are noted *post*, § 2244.

[20] The statutes are collected *ante*, § 488.

[21] In the following cases, the parties were held *not admissible:* 1905, Bishop *v.* Bishop, 124 Ga. 293, 52 S. E. 743 (in divorce for adultery, under Code § 5272, Rev. C. 1910, § 5861, the husband and wife are disqualified, and in a proceeding for alimony pending suit for divorce for desertion, neither may testify to the other's adultery); 1913, Anderson *v.* Anderson, 140 Ga. 802, 79 S. E. 1124 (wife's suit for divorce for cruelty, with a cross-libel for adultery; the wife allowed to testify in support of her bill, but not in denial of the cross-bill; this case illustrates the absurd technicalities of the patchwork statutory treatment of this privilege); 1901, Fightmaster *v.* Fightmaster, — Ky. —, 60 S. W. 918 (divorce for cruelty; wife not admissible to prove acts of cruelty); 1901, Lambert *v.* Lambert, — Ky. —, 63 S. W. 614 (neither admissible); 1903, Boreing *v.* Boreing, 114 Ky. 522, 71 S. W. 431 (wife not admissible against husband in her suit for divorce); 1921, Gates *v.* Gates, 192 Ky. 253, 232 S. W. 378 (divorce asked by wife; the wife not competent to testify to defendant's infidelity, under Civ. C. § 606, amended 1912); 1880, Dillon *v.* Dillon, 32 La. An. 643, 645; 1880, Daspit *v.* Ehringer, 32 La. An. 1174, 1176; 1859, Dwelly *v.* Dwelly, 46 Me. 377; 1921, Stillman *v.* Stillman, Sup. Sp. T., 187 N. Y. Suppl. 383 (divorce; plaintiff husband's affidavits as to facts rendering non-confidential certain documents delivered to him by defend ant wife, held not admissible under C. C. P. § 831); 1914, Hooper *v.* Hooper, 165 N. C. 605, 81 S. E. 933 (husband's testimony to wife's infectious disease, excluded).

In the following cases, on one ground or another, the parties were held *admissible:* 1871, Castello *v.* Castello, 41 Ga. 613; 1916, Bœck *v.* Bœck, 29 Ida. 639, 161 Pac. 576 (divorce by wife for cruelty; the wife may call the husband and compel him to testify for her, under Rev. C. § 5958 and St. 1909, Mar. 13); 1904, Schaab *v.* Schaab, 66 N. J. Eq. 334, 57 Atl. 1090 (under St. 1900, c. 150, §§ 2, 5, a wife may

enticement, or for *alienation of affections*, or for *seduction*, so far as misconduct on the part of (for example) the plaintiff-husband to the wife becomes a part of the issue, in excuse or in mitigation of damages, it would seem that the wife should be admissible against the husband to prove this on the analogy of the doctrine already noted (*supra*, par. 2);[22] but ordinarily this has not been judicially recognized.[23] To ignore it is at least to cast discredit on the supposed reason of the privilege; for, in an action for alienation of affections, of what use is it to pretend any longer by a rule of evidence to preserve those affections?

(4) In a few instances, a *deprivation* or *injury of property*[24] has been brought within the common-law exception, and the same liberality should be shown for *defamation*[25] and *perjury*.[26]

(5) As a part of the common-law exception, but resting on the supposed

testify for her husband in an action for divorce for adultery, but is not compellable); 1920, Rosenwasser *v.* Rosenwasser, Sup. Ct. 179 N. Y. Suppl. 617 (husband and wife, in divorce, held competent for certain purposes, under C. C. P. § 831 as amended; prior cases collated); 1873, Barringer *v.* Barringer, 69 N. C. 179 (divorce for impotence); 1902, Broom *v.* Broom, 130 id. 562, 41 S. E. 673 (under a statute rendering a spouse not "competent or compellable to give evidence for or against the other," the wife, in the husband's suit for divorce for adultery, may testify in denial of the adultery); 1895, Seitz *v.* Seitz, 170 Pa. 71, 32 Atl. 578.

Compare the cases on divorce, cited *post*, § 2245, and *supra*, note 15, par. 4.

[22] 1839, Gilchrist *v.* Bale, 8 Watts 355, 357 (enticement of the plaintiff's wife; the wife's declarations of ill-treatment by the husband, admitted).

[23] *Eng.* 1745, Winsmore *v.* Greenbank, Willes 577, 578 (enticement of a wife; her declarations not admitted against the plaintiff; no reason given); *U. S.* 1895, Rice *v.* Rice, 104 Mich. 371, 379, 62 N. W. 833 (wife's action for alienation of the husband's affections; the latter not admitted against her); 1880, Huot *v.* Wise, 27 Minn. 68, 6 N. W. 68 (the wife, in an action by the husband for her enticement, not admitted under the statutory exception for "crimes against the other"); 1921, Smith *v.* Sheffield, — Utah —, 197 Pac. 605 (alienation of wife's affections; the wife held not admissible against the plaintiff, under Comp. L. 1917, § 7124; "the statute may be barbaric; possibly it should be liberalized, but that cannot be done by judicial construction"); compare the cases cited *ante*, § 2235. In the cases cited *ante*, § 1730, where the *wife's letters* are admitted under the Hearsay exception, this question does not seem to have presented itself.

[24] 1888, Spitz's Appeal, 56 Conn. 184, 14 Atl. 776 (rule not applicable "to actions at law in which the husband and wife have conflicting interests and are opposing parties, as petitions for divorce or suits by the wife seeking protection against the husband, and has no application to suits in equity relating to the wife's separate estate"; a wife here allowed to testify against creditors of an estate assigned by the husband, as to a claim for her separate property included therein); 1900, Hach *v.* Rollins, 158 Mo. 182, 59 S. W. 232 (widow's bill to set aside a deceased husband's conveyance in fraud of the wife's dower and homestead; the widow admitted to testify to the fraud, under the common law exception "'ex necessitate' as to conversations between them, in order to expose a fraud that was perpetrated by the husband on the wife").

Contra: 1912, Molyneux *v.* Willcockson, 157 Ia. 39, 137 N. W. 1016 (forgery by the husband of money obligations in the wife's name; the exception held not applicable); 1875, Overton *v.* State, 43 Tex. 616, 618 (wife excluded in a prosecution of the husband for stealing her mule).

Compare the statutory exception for *separate estate*, *post*, § 2240.

Undecided: 1921, Com. *v.* Wilson, 190 Ky. 813, 229 S. W. 60 (obtaining money under false pretences; whether defendant's wife at time of the offence, nowdivorced, wasadmissible against him, the property so obtained being hers; not decided).

[25] *Contra:* 1838, State *v.* Burlingham, 15 Me. 104, 107 (wife not admitted against a husband conspiring to charge her with adultery; the rule is "confined to cases seeking security of the peace and cases of personal violence"); 1895, Bohner *v.* Bohner, 46 Nebr. 204, 64 N. W. 700 (slander).

The following ruling seems correct: 1871, Taulman *v.* State, 37 Ind. 353 (wife not admitted on a charge against the husband of carrying concealed weapons).

[26] 1917, West *v.* State, 13 Okl. Cr. 312, 164 Pac. 327 (perjury by husband in divorce proceeding, held a "crime against the wife" under Rev. L. 1910, § 5882; liberal opinion by Matson, J.).

extreme necessity for the State, and not for the wife individually, the privilege has sometimes been said to cease in a trial for *treason*.[27] But this was not the early tradition.[28]

§ 2240. **Under Statutory Exceptions (Separate Estate, Agency, etc.).** In almost all the jurisdictions which retain the privilege in general, new statutory exceptions, unknown to the common law, have been added.[1] The most common one is that which admits either spouse against the other in proceedings involving a "*personal wrong or injury*," or a "*crime against the other*"; this is merely a generalized extension of the common-law exception, and its interpretation has already been considered in that connection (*ante*, § 2239).

Another exception, less common, admits either spouse in controversies concerning the wife's *separate estate;*[2] another, in cases where either has been *acting as agent* for the other;[3] and still another, in *proceedings supplementary to execution, i. e.* for reaching a debtor's fraudulent conveyances.[4]

These seem to be the statutory exceptions that have most often called for judicial interpretation.[5] In effect, such statutes are sometimes

[27] 1767, Buller, Trials at Nisi Prius 286.

[28] 1613, Anon., 1 Brownl. 47 ("the wife is not bound in case of high treason to discover her husband's treason"); 1680, Hale, Pleas of the Crown, I, 301.

§ **2240.** [1] The statutes are collected *ante*, § 488.

[2] The following rulings apply such a statute: *Mich.* 1884, Hunt *v.* Eaton, 55 Mich. 362, 365, 21 N. W. 429; 1886, Eaton *v.* Knowles, 61 Mich. 625, 633, 28 N. W. 740; 1891, Blanchard *v.* Moors, 85 Mich. 380, 385, 48 N. W. 542; 1894, Berles *v.* Adsit, 102 Mich. 495, 60 N. W. 967; 1898, Dowling *v.* Dowling, 116 Mich. 346, 74 N. W. 523 (wife admitted against husband, in an action by her to recover a loan to him); *Pa.* 1906, Heckman *v.* Heckman, 215 Pa. 203, 64 Atl. 425 (neither is competent under Pa. St. 1893, P. L. 345, in a suit in equity for reconveyance of the wife's separate estate); 1918, Morrish *v.* Morrish, 262 Pa. 192, 105 Atl. 83 (cancellation of wife's anti-nuptial deed to husband; the wife admitted for herself; under St. 1913, Mar. 27).

For cases of the same sort under the common-law principle, see *ante*, § 2239.

For rulings applying the same statutes where the *qualification* of one spouse *on behalf of the other* is in question, see *ante*, § 614.

[3] The following rulings apply such a statute; *Ky.* 1921, Com. *v.* Wilson, 190 Ky. 813, 229 S. W. 60 (obtaining money by false pretences; defendant's wife at time of offence, since divorced, held admissible against him, under C. C. P. § 606, the pretences having been made by him as agent for the wife); *Mo.* 1873, Paul *v.* Leavitt, 53 Mo. 595, 597; 1873, Chesley *v.* Chesley, 54 Mo. 347; 1877, Haerle *v.* Kreihn, 65 Mo. 202, 206; 1892, Leete *v.* State Bank, 115 Mo. 184, 204, 21 S. W. 788; 1904, First Nat'l Bank *v.* Wright, 104 Mo. App. 242, 78 S. W. 636; *Wis.* 1886, Blabon *v.* Gilchrist, 67 Wis. 38, 45, 29 N. W. 220.

Compare the rulings cited *ante*, § 616, applying the same statutes to the question of *admitting one spouse on behalf of the other*.

[4] The following rulings apply such a statute: *Minn.* 1890, Wolford *v.* Farnham, 44 Minn. 159, 164, 46 N. W. 295; 1899, National Germ. Am. Bank *v.* Lawrence, 77 Minn. 282, 79 N. W. 1016; *Pa.* 1915, In re Kessler, D. C. E. D. Pa., 225 Fed. 394 (the privilege of a wife not to testify against her husband in a bankruptcy proceeding in Pennsylvania is determinable by the State law, and not by the Federal bankruptcy statute, on the principle of § 6, *ante*).

[5] The following rulings apply an exception for spouses "*joined as parties and having a separate interest*": *La.* 1866, Cull *v.* Herwig, 18 La. An. 315, 319; 1872, Phillips *v.* Stewart, 24 La. An. 153; 1880, Hennen *v.* Hacker, 32 La. An. 668; 1886, Cooley *v.* Cooley, 38 La. An. 195, 197.

Sundry statutes have led to the following rulings; *Or.* 1914, State *v.* Von Klein, 71 Or. 159, 142 Pac. 549 (the exception for "cases of polygamy" applied; construing L. O. L. § 1535, as amended by Or. St. 1913, p. 351); *Pa.* 1907, Rust *v.* Oltmer, 74 N. J. L. 802, 67 Atl. 337 (P. L. 1900, p. 363, Evidence, § 5, held not to exclude the wife's testimony on a count for alienation of affections); 1916, Com. *v.* Garanchoskie, 251 Pa. 247, 96 Atl. 513 (murder of J. for improper intimacy with defendant's wife; wife admitted for the prosecution, under St. 1899, April 11, § 2, quoted *ante*, § 488); 1917, Lyen *v.* Lyen, 98 Wash. 498, 167 Pac. 1113 (alienation of husband's affections;

equivalent to those abolishing the privilege, in part or entirely (*post*, § 2245).

6. Exercise of the Privilege

§ 2241. **Whose is the Privilege.** If we consult the reason most commonly advanced in support of the privilege, namely, the prevention of marital dissension (*ante*, § 2228), it would seem to attribute the privilege to the marital *party only*, and not to the marital *witness*. That is, if the husband is the defendant, and the wife is called against him as a witness, exclusion is here directed to prevent ill-feeling against her on the husband's part, for her revelation of the truth; and thus, if that ill-feeling of his were obviated, it would seem that no concern of hers was involved. But taking the other suggested reason for the privilege, namely, immunity from the repugnant situation of being condemned by one's spouse or of becoming the instrument of a spouse's condemnation (*ante*, § 2228), the privilege seems to be *equally* that of *party* and of witness. In other words, while the defendant-husband is entitled to be protected against condemnation through the wife's testimony, the witness-wife is also entitled to be protected against becoming the instrument of that condemnation, — the sentiment in each case being equal in degree and yet different in quality.

The latter view seems generally to be accepted, by implication underlying the various judicial utterances; but precise rulings are naturally rare, and depend much on the wording of statutes. It is established in some Courts that at least the privilege belongs to the *party*-spouse against whom the other is offered as a witness.[1] Rarely is the privilege denied to belong to the *witness*-spouse;[2] and rarely also is it denied to belong to the *party*-spouse.[3] In any case, if the husband is not a party, and the wife is called to testify against his interest, a case in which the privilege is by some Courts held applicable (*ante*, § 2235), the privilege may be waived by husband and

the husband having ceased to be a party to the case, his deposition was held not admissible against the wife, under Rem. Code § 1214); *W. Va.* 1881, Zane *v.* Fink, 18 W. Va. 693, 744 (former statutory exception for suits between husband and wife, applied).

Upon these various statutes, compare also the rulings cited *ante*, § 617, interpreting the same statutes as applied to qualify one spouse to testify *on behalf* of the other.

§ 2241. [1] 1896, Ward *v.* Dickson, 96 Ia. 708, 65 N. W. 997; 1894, People *v.* Gordon, 100 Mich. 518, 520, 59 N. W. 322; 1895, Lihs *v.* Lihs, 44 Nebr. 143, 62 N. W. 457.

[2] 1882, Turner *v.* State, 60 Miss. 351 (assault and battery on the wife; the wife compellable to testify, though unwilling, the husband not having here a privilege; and even if the wife had, the husband could not raise the objection, on the principle of § 2196, *ante*).

[3] 1871, State *v.* McCord, 8 Kan. 232 (the wife being entitled as a party to testify); 1878, State *v.* Buffington, 20 Kan. 599, 616; 1892, State *v.* Geer, 48 Kan. 752, 754, 30 Pac. 236 (the wife may consent, though not compellable, to testify against husband); 1920, State *v.* Bischoff, 146 La. 748, 84 So. 41 (bigamy; the first wife admitted voluntarily to testify against the defendant, under St. 1916, No. 157); 1904, Com. *v.* Barker, 185 Mass. 324, 70 N. E. 203 (under Rev. L. 1902, c. 175, § 20, Gen. L. 1920, c. 233, § 20, the wife may voluntarily testify against the husband in a criminal case); 1920, Com. *v.* Baronian, 235 Mass. 364, 126 N. E. 833 (perjury; wife permitted to testify voluntarily to husband-defendant's statements made before marriage).

The following ruling is plainly correct in any case: 1883, Dumas *v.* State, 14 Tex. App. 464, 473 (if the wife is qualified on the husbands' behalf, she is compellable on his behalf, even against her will).

wife, without regard to the party-opponent; for, upon the general principle (*ante*, § 2196), the privilege is personal to them and does not concern the party.[4]

§ 2242. **Waiver of the Privilege.** (1) If Lord Coke's fantastic reason (*ante*, § 2228) had been the real one for the privilege, then indeed it would have been no privilege, in any true sense, and therefore there could have been no waiver; for privilege implies option (*ante*, §§ 2175, 2196, 2197). A privilege without a waiver becomes a vain use of words, and means no more nor less than an absolute rule of exclusion, of a very different type (*ante*, § 2175). But on no other reason than Lord Coke's could this result be reached; for, by either of the main and popular reasons, the object of the privilege is to protect from the consequences of ill-feeling or from a repugnant situation (*ante*, § 2238); and this implies necessarily that a spouse not apprehending such consequences, or not desiring to be protected, may waive the protection which is optionally granted.

Nevertheless, the application of the privilege has tended to be obscured by the use of the term "incompetency" for both the disqualification to testify on the spouse's behalf and the privilege not to testify against the spouse. The former is plainly an absolute rule of law, not left to the party's option (*ante*, § 604); the latter is a mere privilege. The common phrase, declaring them "incompetent to testify for or against the other," by associating the former with the latter, has sometimes led, by confusion, to the extension of the idea of absoluteness from the one to the other. In a few instances, it has been denied or doubted that the privilege can be waived.[1] But this doubt is entirely unfounded, and is repudiated not only by occasional decision,[2] but also by implication in most of the modern statutes which

[4] 1862, Wright, J., in Russ *v.* Steamboat War Eagle, 14 Ia. 363, 375 ("The prohibition is not founded on interest, but [on] the interruption which the allowance of such a practice might produce in the domestic harmony of the parties on grounds of policy appertaining to the domestic relation. Such considerations are addressed to the husband or wife, and not to their adversary. The privilege is a personal one; and therefore, if the husband is ready to waive the right, and the wife does not object, it is not for the other party to stand guardian over the domestic quiet and welfare"); 1911, State *v.* Stewart, 85 Kan. 404, 116 Pac. 489 (holding only that the party's counsel may properly request or suggest to the judge that the husband-witness be informed of the privilege; whether the party may take advantage of an erroneous denial of the privilege, not decided).

§ 2242. [1] 1736, Barker *v.* Dixie, Lee cas. t. Hardwicke 264 (case too confusedly reported to be of any value); 1883, Clark *v.* Krause, 13 D. C. 559, 573 (privilege cannot be waived; said *obiter*); 1903, Barber *v.* People, 203 Ill. 543, 68 N. E. 93 (calling the first wife, in a prosecution for bigamy; waiver not allowed); 1875, Tilton *v.* Beecher, N. Y., Official Report, III, 313, 355, 925 (crim. con.; Mrs. Tilton was not offered by the defendant, but the plaintiff expressed his consent and waiver of objection to the defendant calling her; the judge was not obliged to render a decision, but the defendant and the plaintiff respectively contended that a waiver was and was not sufficient to render the wife admissible; and the plaintiff argued that an inference might be drawn from the defendant's failure to call her); 1902, Brock *v.* State, 44 Tex. Cr. 335, 71 S. W. 20 (neither the testifying spouse, nor the one testified against, can waive); 1903, Davis *v.* State, 45 Tex. Cr. 292, 77 S. W. 451.

[2] *Eng.* 1829, Best, C. J., in Pedley *v.* Wellesley, 3 C. & P. 558; *U. S.* 1862, Russ *v.* Steamboat War Eagle, 14 Ia. 363, 375 (under a statute expressly sanctioning a waiver); 1865, Blake *v.* Graves, 18 Ia. 312, 318 (same; by a majority); 1890, Estey *v.* Fuller I. Co., 82 Ia. 678, 682, 46 N. W. 1098, *semble* (same). Add the cases cited in notes 4–8, *infra*.

declare the one inadmissible against the other "without the consent of the other." [3]

(2) *Who may waive* the privilege depends upon whose privilege it is, — a question already considered (*ante*, § 2241).

(3) *What constitutes a waiver* is usually not difficult to answer. Consent, express or implied, before trial may have the effect of a waiver.[4] A failure to object, upon the calling of the spouse to the stand, must be equivalent to consent.[5] In a few jurisdictions, it is expressly enacted that the taking of the stand by a party shall constitute a waiver as to his privilege for his wife's testimony.[6] The usual case presented is that of a party who calls his wife on his own behalf and then attempts to claim his privilege to prevent her cross-examination. Argument is scarcely needed to demonstrate the unfairness and the logical inconsistency of such a proceeding; it involves of course a waiver,[7] and yet this has in at least one Court been denied.[8]

§ 2243. **Inference from Exercise of the Privilege.** If the spouse against whom it is desired to call the other as a witness takes advantage of the privilege and thus causes the rejection of the witness, how far may this circumstance be taken as permitting the inference that the excluded testimony would be unfavorable to the party-spouse? The established principle (*ante*, § 286) permits such an inference ordinarily, from the suppression of avail-

[3] The statutes are collected *ante*, § 488.

[4] 1878, Hubbell *v.* Grant, 39 Mich. 641, 643 (consent not implied from failure to object to discovery under oath). But no doubt a *stipulation*, in the nature of a judicial admission (*post*, § 2590), or a contract (*ante*, § 7*a*) would suffice.

[5] 1914, Cohen *v.* U. S., 9th C. C. A., 214 Fed. 23 (wife held properly admissible where it did not appear that either she or her husband did not consent); 1906, People *v.* Chadwick, 4 Cal. App. 63, 87 Pac. 384, 389 (but a failure to object at a former trial is not a waiver for a subsequent trial); 1883, Benson *v.* Morgan, 50 Mich. 77, 79, 14 N. W. 705 (consent implied from attendance in court and failure to object); 1913, Hunter *v.* State, 10 Okl. Cr. App. 119, 134 Pac. 1134.

Compare the rules for *objections* (*ante*, §§ 18, 486).

[6] As in the Codes of California, Oregon, etc., quoted *ante*, § 488; construed in the following case erroneously: 1899, State *v.* McGrath, 35 Or. 109, 57 Pac. 321 (under C. C. P. § 713, a defendant by taking the stand in a criminal case does not consent to the examination of his wife by the prosecution; a singular reading out of an express provision).

The husband's *own testimony to his wife's statements*, in an issue where she is virtually an opposed party in interest, ought to be a waiver of the privilege, because in fairness she should have an opportunity to deny or explain. *Contra:* 1910, Fuller *v.* Robinson, 230 Mo. 22, 130 S. W. 343 (alienation of affections).

[7] 1899, National Germ. Am. Bank *v.* Lawrence, 77 Minn. 282, 80 N. W. 363 (a husband's permission of the wife's testimony "completely waives his statutory privilege" for purposes of her cross-examination); 1897, Danley *v.* Danley, 179 Pa. 170, 36 Atl. 225 (a plaintiff-wife admitted after examination at the opponent's demand, although her husband was a co-defendant); and some of the statutes quoted *ante*, § 488.

[8] 1869, Griffin *v.* State, 32 Tex. 164, 166; but this ruling did not long remain: 1870, Creamer *v.* State, 34 Tex. 173 (preceding case repudiated; but the prosecution may not examine to new matter); 1876, Hampton *v.* State, 45 Tex. 154, 158 (cross-examination to her statements on the preliminary examination, allowed); 1884, Washington *v.* State, 17 Tex. App. 197, 204 (like Creamer *v.* State); 1889, Johnson *v.* State, 28 Tex. App. 17, 25, 11 S. W. 667 (same); 1893, Bluman *v.* State, 33 Tex. Cr. 43, 64, 21 S. W. 1027, 26 S. W. 75 (same); 1895, Hoover *v.* State, 35 Tex. Cr. 342, 345, 33 S. W. 337 (same); 1907, Jones *v.* State, 51 Tex. Cr. 472, 101 S. W. 993 (Hoover *v.* State followed).

Distinguish the question (*ante*, § 1885) whether in general a witness may be cross-examined on the subject of the *whole case* or only on the subject of the direct examination.

able testimony, or the failure to utilize it. Must it yield in this instance, as being inconsistent with the full exercise of the privilege? This question has usually been answered in the affirmative: [1]

§ 2243. [1] ENGLAND: St. 1898, 61 and 62 Vict. c. 36, Criminal Evid. Act, § 1 (*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"; but this is merely an unnatural application of the principle of § 282, *ante*, and not a recognition of the doctrine that exercise of this privilege is no ground for inference, for by § 4 of the same Act, quoted in full *ante*, § 488, the privilege is abolished); 1910, Dickman's Case, 5 Cr. App. 135 (applying St. 1898, § 1).

CANADA: Dom. St. 1893, c. 31, § 4, Rev. St. 1906, c. 145, § 4 ("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," etc.; quoted in full *ante*, § 488; the same comment here applies as to the English statute above); 1898, R. *v.* Corby, 30 N. Sc. 330, 332; 1903, R. *v.* Hill, 36 N. Sc. 253 (following R. *v.* Corby, *supra*, even where the defendant's counsel had already introduced the subject by explaining the wife's absence); 1915, R. *v.* Romano, 21 D. L. R. 195, Que. (judge's comment on accused's wife's failure to testify, held inproper); 1916, R. *v.* Lindsay, 30 D. L. R. 417, Ont. (incest; comment by Crown counsel on failure of defendant's wife to testify, held error).

UNITED STATES: *Ariz.* 1914, Zumwalt *v.* State, 16 Ariz. 82, 141 Pac. 710 (statutory rape; under P. C. 1913, § 1228, the defendant's failure to call his wife cannot be commented on); *Ill.* 1906, Mash *v.* People, 220 Ill. 86, 77 N. E. 92 (prosecuting counsel's argument drawing an inference from the wife's claim, held to have been here excused by the defendant's counsel's prior similar impropriety); *Kan.* 1918, State *v.* Peterson, 102 Kan. 900, 171 Pac. 1153 (robbery); *Mich.* 1867, Knowles *v.* People, 15 Mich. 408, 413 (quoted *supra*); *Minn.* 1899, National Germ. Am. Bank *v.* Lawrence, 77 Minn. 282, 79 N. W. 1016; 1918, State *v.* Kampert, 139 Minn. 132, 165 N. W. 972 (carnal knowledge under age); *Miss.* 1885, Johnson *v.* State, 63 Miss. 313 (the wife being here competent, but the husband-defendant being privileged not to call her; quoted *supra*); 1912, Fannie *v.* State, 101 Miss. 378, 58 So. 2 (Johnson *v.* State followed); *Mo.* 1905, State *v.* Shouse, 188 Mo. 473, 87 S. W. 480; *N. C.* 1921, State *v.* Harris, 181 N. C. 600, 107 S. E. 466 (wife of accused; no inference allowed from failure to call her); *W. Va.* 1905, State *v.* Taylor, 57 W. Va. 228, 50 S. E. 247 (like Johnson *v.* State, Miss.); and several of the statutes quoted *ante*, § 488.

Contra: Mass. 1912, Com. *v.* Spencer, 212 Mass. 438, 99 N. E. 266 (defendant's failure to call his wife, held open to comment; like People *v.* Hovey); *N. Y.* 1883, People *v.* Hovey, 92 N. Y. 554, 559 (inference allowable from the failure of the defendant to call his wife, an eye-witness, who was not compellable to testify against him, but was competent for him); *Okl.* 1909, Rhea *v.* Territory, 3 Okl. Cr. 230, 105 Pac. 314 (where by law the defendant's wife may testify for him but he is privileged not to let the prosecution call her against him, the Court may tell the jury that the prosecution has no power to call her but that the defendant has, to prevent any inference from being drawn against the prosecution; and an inference may be drawn against the defendant); *Tex.* 1869, Griffin *v.* State, 32 Tex. 164, 166; 1906, McMichael *v.* State, 49 Tex. Cr. 422, 93 S. W. 723 (wife an eye-witness); 1917, Norwood *v.* State, 80 Tex. Cr. 552, 192 S. W. 248 (murder; a conversation between defendant and his wife took place on his return home; the defendant claimed privilege when the State asked the wife on cross-examination to state the conversation; held that a comment on defendant's failure to use or prevention of use of his wife's testimony was allowable; but, on rehearing, that the defendant's claim of privilege for communications was valid, on the principle of § 2332, *post;* Prendergast, J., diss.; the opinions collate fully the Texas cases); 1921, Smith *v.* State, 90 Tex. Cr. 24, 232 S. W. 497 (murder, the wife being an eye-witness; "the jury were legitimately told that he might have done so [*i. e.* called her] had he wished, but that the State could not").

Uncertain: 1893, Graves *v.* U. S., 150 U. S. 118, 120, 14 Sup. 40 (a woman was present with the murderer; the defendant's failure to have his wife in court, so that it could be seen whether she was the woman, and the party thus identified, not allowed as ground for inference, partly because he was not bound to anticipate the need, partly because she was incompetent to testify for him; Brewer, J., diss.); 1918, State *v.* Morgan, 142 La. 755, 77 So. 588 (murder; comment on defendant's wife's failure to testify for him; not decided); 1896, State *v.* Hatcher, 29 Or. 309, 44 Pac. 584 (left doubtful, though erroneously treated as involved in the privilege, on the same principle as in the privilege against self-crimination; but held that in any case the failure shows nothing unless it appears that the wife was within the jurisdiction, and that she was willing to waive her privilege); 1921, Corvin *v.* Com., — Va. —, 108 S. E. 652 (bigamy; failure of the alleged second wife to testify, held not a subject for instruction, under Code

1867, CAMPBELL, J., in *Knowles* v. *People*, 15 Mich. 408, 413: "If the omission to call the wife upon the stand is to be treated as warranting the conclusion that her testimony would be adverse, then the privilege is entirely destroyed and she will have to be called at all events. . . . The law, in permitting husbands and wives to testify on behalf of each other, cannot have contemplated that any moral coercion should enable others to force them into the witness-box."

1885, ARNOLD, J., in *Johnson* v. *State*, 63 Miss. 313, 317: "If the failure of the husband to call his wife as a witness in his behalf is to be construed as testimony or as a circumstance against him, his privilege and option in the matter would be annulled, and he would be compelled in all cases to introduce her or run the hazard of being convicted on a constrained, implied confession or admission, or to make explanations for introducing her which might involve the sacred privacy of domestic life."

Whether this conclusion is inevitable is at least open to argument. The argument against it is that there is no actual coercion and no actual denial of the privilege, but merely a dilemma and an option, which are created, not by any direct attempt to break into the privilege, but by the accidental coincidence, upon the same piece of testimony, of two independent principles of law, neither one of which should be made to yield rather than the other. This argument is nearly the same as that which applies to the privilege against self-crimination (*post*, § 2272), and need not be further noticed here.[2]

It must be noted that, when the privilege does not exist,[3] or where it has been waived,[4] the inference is permissible; and, furthermore, that, in any event, upon the same principle as under the privilege against self-crimination (*post*, § 2272), the party desiring to compel the spouse to testify may at least call for the testimony, and is not to be deprived of it until the party-spouse formally objects and claims the privilege.[5]

7. Statutory Changes

§ 2245. **Statutory Abolition, Express or Implied.** The progress of acceptance of Bentham's reasoning, in its effect on this privilege, has not been as

1919, § 6211, the status of the woman being one of the issues).

The following ruling seems correct: 1907, State *v.* Brown, 118 La. 373, 42 So. 969 (statement by the prosecuting attorney that the defendant's wife could testify neither for nor against the accused, held not improper).

[2] It may be added that the present question must be distinguished from that which arises when the witness-spouse is *disqualified* on the other's behalf, and not merely privileged, because then it is impossible to use the testimony under any conditions, and no inference could arise even if there were no privilege; this is an ordinary deduction from the general principle affecting such inferences, and the rulings have been already noted thereunder (*ante*, § 286).

[3] 1873, Alley's Trial, Mass., Pamph. Rep. 144 (that the defendant's wife was not called to explain his whereabouts, allowed to be considered); 1902, Richardson *v.* State, 44 Tex. Cr. 211, 70 S. W. 320. *Contra:* 1903, Moore *v.* State, 54 Tex. Cr. 234, 75 S. W. 497, *semble* (Henderson, J., diss.).

[4] 1870, Creamer *v.* State, 34 Tex. 173 (the husband's refusal to allow cross-examination of the wife; inference permissible).

[5] 1915, State *v.* Roby, 128 Minn. 187, 150 N. W. 793 (carnal knowledge of a female minor; the prosecution's request for the defendant's consent to his wife being called, held proper, even though the defendant had before trial served a notice objecting to her testimony being taken in any form); 1915, State *v.* Virgens, 128 Minn. 422, 151 N. W. 190 (murder; the defence having evidenced intimacy of the defendant's wife with a paramour and the possible guilt of the paramour as the murderer, the prosecution was allowed to ask the defendant whether he would consent to the wife's testifying, as a means of rebutting the prosecution's acquiescence in the defence's insinuation); 1895, Com. *v.* Weber, 167 Pa. 153, 31 Atl. 481. *Contra:* 1903, Moore *v.* State, 45 Tex. Cr. 234, 75 S. W. 497 (Henderson, J., diss.).

rapid as with most others of his proposed reforms. The disqualification of interested persons has been removed, as well as that of parties in civil cases and of defendants in criminal cases (*ante*, §§ 576, 577, 579). The privilege of parties in civil cases has been swept away (*ante*, § 2218). The disqualification of husband or wife on the other's behalf has disappeared in almost all jurisdictions (*ante*, § 602). But their privilege has been entirely removed in only a minority of jurisdictions.[1]

Many and large inroads, however, have been made upon it by statutory exceptions in almost every jurisdiction;[2] and in some States the statutory alteration of the privilege — for example, by denying it in civil cases — has risen beyond the degree of an exception to that of a partial abolition. The consequence of these numerous express changes, and of the enactment of the other statutes dealing with parties and interested persons, has been to require more or less judicial interpretation to determine the effect of the legislation upon the privilege. These rulings depend largely upon the phrasing of the individual statutes; but some of the questions presented have general features, which may here be noticed.

(*a*) The statutes declaring that no person should be "excluded" or "incompetent" by reason of being *a party to the cause* might well be argued to have the effect of abolishing the disqualification of a husband or wife, when a party, to testify for the other;[3] but they could not have the effect of abolishing the privilege — namely, of making the one compellable against the other — unless the notion of incompetency were given its larger and looser meaning (*ante*, § 2242) of disqualification and of privilege also. Such a meaning was given to it by some Courts, because it was commonly construed as abolishing for parties both disqualification and privilege; so that when the husband and the wife were parties, neither could prevent the other being called on the opposite side;[4] and this effect was sometimes

§ 2245. [1] The statutes are all placed, for convenience' sake, *ante*, § 488.

Stated summarily, the general result seems to be now as follows:

Civil Cases: The spouse, as *witness*, is compellable in England, in eight Canadian Provinces, and in eleven States; as against a *party-spouse only*, the privilege is abandoned in one State.

Criminal Cases: The spouse, as *witness*, is compellable in England (?) and in one State; as against a *party-spouse only*, the privilege is abandoned in seven States.

[2] Already examined *ante*, § 2240.

[3] This effect has been already examined (*ante*, § 613).

[4] 1877, Sutherland *v.* Hankins, 56 Ind. 343, 351 (contested will, the wife being an heir, but withdrawing as a plaintiff and joining as a defendant; husband compellable to testify for the heirs); 1871, Richards *v.* Burden, 31 Ia. 305, 310; 1904, Chaslavka *v.* Mechalek, 124 Ia. 69, 99 N. W. 154 (rule of Richards *v.* Burden applied to a wife's and a husband's admissions); 1861, Chamberlain *v.* People, 23 N. Y. 85, 88; 1869, Re O'Brien, 24 Wis. 547 (wife compellable to answer in proceedings to reach property of a judgment debtor, her husband); 1883, Carney *v.* Gleissner, 58 Wis. 674, 17 N. W. 398 (but not when the witness is interested, if not a party; here a wife was not admitted for the bailee of her separate property sued in replevin by her husband); 1886, Blabon *v.* Gilchrist, 67 Wis. 38, 45, 29 N. W. 220 (proceedings against a judgment debtor; his wife not examinable, because not a party; distinguishing Re O'Brien, *supra*, where a different procedure then prevailed).

Contra: 1904, Lenoir *v.* Lenoir, 24 D. C. App. 160, 165 (said *obiter* that Code 1901, § 1068, quoted *ante*, § 488, does not make the parties competent in a divorce case, thus preserving the rule of Burdette *v.* Burdette, 13 D. C. 469, *infra*, n. 7, and Bergheimer *v.* Bergheimer, 17 D. C. App. 381, in spite of the subsequent broad language of Code 1901; this result is

conceded for suits for divorce[5] and other suits where they were the sole parties and on opposite sides.[6] But no such consequence could plausibly be deduced from the statutes abolishing *interest* as a disqualification;[7] for there was here no privilege to be abolished (*ante*, § 2222). A statute, it may be noted, making husband or wife "competent" would of course (by the same construction above mentioned) make the person compellable also.[8] These problems of interpretation, however, arose chiefly under the earlier statutes. Successive revisions have left few of them to survive for judicial ruling.

(*b*) The codification of many jurisdictions has given the criminal and the civil procedure a separate treatment, and thus it is necessary sometimes to resort to construction to determine how far a given rule applies in common to *civil and criminal cases*. Moreover, in the earlier steps of legislation, the privilege was sometimes abolished for the former class of cases but expressly retained for the latter; and thus the question has often arisen how far the abolition of the privilege has been carried by the Legislature. This question depends, of course, entirely on the wording of the local statutes; and it has therefore received varying answers, — sometimes that the privilege is in criminal cases retained[9] or

unsound also as a matter of legal reasoning, for the Court mistakes the rule of Code 1901, § 964, quoted *ante*, § 2067, n. 10, to have some effect in disqualifying the parties, instead of merely requiring corroboration); 1905, Bishop *v.* Bishop, 124 Ga. 293, 52 S. E. 743 (divorce for adultery, and testimony to adultery in a proceeding for alimony pending suit for divorce for desertion).

[5] 1872, Moore *v.* Moore, 51 Mo. 118, 119; 1873, Berlin *v.* Berlin, 52 Mo. 151; 1861, Chamberlain *v.* People, 23 N. Y. 85, 88; 1865, Hays *v.* Hays, 19 Wis. 182. Compare the same result reached by another road in the rulings cited *ante*, § 2239.

[6] 1874, Darrier *v.* Darrier, 58 Mo. 222, 234 (controversy of land-title).

[7] 1883, Burdette *v.* Burdette, 13 D. C. 469; 1883, Clark *v.* Krause, 13 D. C. 559, 572; 1896, Ward *v.* Dickson, 96 Ia. 708, 65 N. W. 998, *semble;* 1860, Breed *v.* Gove, 41 N. H. 452, 454. *Contra:* 1873, Rowland *v.* Plummer, 50 Ala. 182, 193, *semble*.

But it was held in one jurisdiction that the real party, being a spouse, became compellable to testify, when the other was but a nominal party: 1867, Metler's Adm'r *v.* Metler, 18 N. J. Eq. 270, 277; 1868, Petrick *v.* Ashcroft, 19 N. J. Eq. 339, *semble*.

[8] 1909, Ex parte Beville, 58 Fla. 170, 50 So. 685 (habeas corpus for a wife committed for refusing to testify before the grand jury against her husband, on a matter not involving a crime against her person nor a marital communication; held compellable, under Rev. St. 1892, § 2863, and St. 1891, c. 4029, as heretofore interpreted; "the statute that removed the disqualification removed the privilege also"; careful opinion by Parkhill, J.; Whitfield, C. J., and Shackleford, J., diss.); 1872, Southwick *v.* Southwick, 49 N. Y. 510.

But not a statute abolishing "any disqualification known to the common law": 1909, U. S. *v.* Meyers, 14 N. Mex. 522, 99 Pac. 336 (one judge diss.).

[9] ENGLAND: 1911, Acaster's and Leach's Case, 7 Cr. App. 84 (under St. 1898, 61–2 Vict. c. 36, § 4, the wife of a defendant is compellable, without her consent, to testify; statutes carefully examined, in a convincing opinion by L. C. J. Alverstone); reversed on appeal in Leach *v.* Rex, [1912] A. C. 305, 7 Cr. App. 157 (construing St. 1898, 61–2 Vict. c. 36, § 4, "the wife or husband . . . may be called as a witness" etc.; wife held not compellable). On this topic, under modern English statutes, see the learned pamphlet of Herman Cohen, Esq., of the Inner Temple, "Spouse-Witnesses in Criminal Cases" (London, 1913); the preface says, "This little essay owes its origin to the argument of the Solicitor-General and Mr. (now Mr. Justice) Rowlatt in Leach's Case."

CANADA: 1913, R. *v.* Allen, N. Br. S. C., 14 D. L. R. 825 (wife not admissible against her husband, even though she consents, on a charge of obtaining money by false pretences).

UNITED STATES: 1915, Smith *v.* State, 13 Ala. App. 411, 69 So. 406 (bastardy; defendant's wife admissible, the case not being criminal); 1894, State *v.* Willis, 119 Mo. 485,

abolished,[10] or that in civil cases it is retained [11] or abolished,[12] and sometimes that it is in both civil and criminal cases alike retained [13] or alike abolished.[14] The time ought soon to come when these rulings are outlawed by reform (as some of them even now are). Doubtless, before the centenary of Bentham's death, no vestige of the privilege will remain.

488, 24 S. W. 1008; 1908, State *v.* Orth, 79 Oh. 130, 86 N. E. 476 (father's refusal to support children; mother's testimony held not admissible against him in a criminal case).

[10] *Canada:* 1903, Gosselin *v.* King, 33 Can. Sup. 255, 263 (under Dom. Evidence Act 1893, c. 31, § 4, the husband or wife of the accused is both admissible and compellable to testify for the prosecution against the accused; Mills, J., diss.); but now see Dom. Rev. St. 1906, c. 145, § 4, quoted *ante*, § 488.

United States: Ala. 1875, Jackson *v.* State, 53 Ala. 472; *Del.* 1918, State *v.* Jaroslowski, 30 Del. 108, 103 Atl. 657 (father's murder of his infant child by poison; the wife being called for the prosecution with her consent, held that under Rev. C. 1915, § 4216, the husband had no privilege; whether the wife would have been privileged, not decided); *Fla.* 1894, Everett *v.* State, 33 Fla. 661, 664, 15 So. 543 (St. 1891, c. 4029, Rev. G. S. 1919, § 2702, and Rev. St. 1892, § 2863, Rev. G. S. 1919, § 6018, taken together, make the wife admissible in criminal cases against the husband); 1898, Mercer *v.* State, 40 Fla. 216, 24 So. 154; *Md.* 1906, Richardson *v.* State, 103 Md. 112, 63 Atl. 317 (under Pub. Gen. L. 1904, art. 35, § 4, the husband or wife is admissible for the prosecution, though not compellable); *Mass.* 1892, Com. *v.* Dill, 156 Mass. 226, 228, 30 N. E. 1016; 1895, Com. *v.* Hayden, 163 Mass. 453, 456, 40 N. E. 846; *S. C.* 1897, State *v.* Reynolds, 48 S. C. 384, 26 S. E. 679 (since the omission in 1882 of a clause specifically limiting the section's application to civil cases, the section applies equally to criminal cases; thus disposing of State *v.* Belcher, 1880, 13 S. C. 459, and State *v.* Dodson, 1881, 16 S. C. 460, decided under the original statute); *Tenn.* 1916, McCormick *v.* State, 135 Tenn. 218, 186 S. W. 95 (St. 1915, c. 161, abolishing the privilege in criminal cases, applied); *Vt.* 1913, State *v.* Nieburg, 86 Vt. 392, 85 Atl. 769; 1915, State *v.* Shaw, 89 Vt. 121, 94 Atl. 434 (adultery; following State *v.* Nieburg).

[11] 1884, Stephenson *v.* Cook, 64 Ia. 265, 269, 20 N. W. 182; 1893, Niland *v.* Kalish, 37 Nebr. 47, 49, 55 N. W. 295; 1894, Skinner *v.* Skinner, 38 Nebr. 756, 760, 57 N. W. 534 (nor do the statutes removing married women's property disabilities affect the statute upon evidence); 1894, Greene *v.* Greene, 42 Nebr. 634, 638, 60 N. W. 937 (same); 1904, Reed *v.* Reed, 70 Nebr. 775, 98 N. W. 76 (property rights).

[12] 1911, Harris *v.* Brown, C. C. A., 187 Fed. 6 (Gen. St. 1909, Kansas, § 5915, C. C. P. § 321, held to abolish all marital incompetency except for marital communications); 1882, Williams *v.* Riley, 88 Ind. 290, 296; 1895, Jordan *v.* State, 142 Ind. 422, 425; 1874, Westerman *v.* Westerman, 25 Oh. St. 500, 507.

[13] 1879, Byrd *v.* State, 57 Miss. 243; 1880, Anon., 58 Miss. 15; 1881, Leach *v.* Shelby, 58 Miss. 681, 688; but under the Code of 1892, see Saffold *v.* Horne (1894), 72 Miss. 470, 482, 18 So. 433.

[14] 1879, Brown *v.* Norton, 67 Ind. 424; 1879, Hutchason *v.* State, 67 Ind. 449; 1881, Smith *v.* Smith, 77 Ind. 80, 82.

TOPIC A (*continued*): PRIVILEGED TOPICS

SUB-TOPIC III: PRIVILEGE FOR SELF-CRIMINATING FACTS

CHAPTER LXXVIII.

1. In general

§ 2250. **History of the Privilege.**[1] The history of the privilege against self-crimination has something more than the ordinary interest of a rule of

§ 2250. [1] The substance of the history here set forth was first printed in 5 Harvard Law Review 71. Since that time, a wider survey of the sources (including a page-to-

Evidence, — not only because the privilege has been given a constitutional sanction in nearly every one of our jurisdictions; nor merely because the tracing of its origin takes us so far afield, in our survey, as the administrative policy of William the Conqueror, and the criminal procedure of Louis XIV and the French Revolution; but particularly because the woof of its long story is woven across a tangled warp composed in part of the inventions of the early canonists, of the momentous contest between the Courts of the common law and of the church, and of the political and religious issues of that convulsive period in English history, the days of the dictatorial Stuarts. To disentangle these various elements, while keeping each in sight and unbroken, is a complicated task.

To begin with, two distinct and parallel lines of development must be kept in mind, — the one an outgrowth of the other, succeeding it, and yet beginning just before the other comes to an end. The first is the history of the opposition to the 'ex officio' *oath of the ecclesiastical courts;* the second is the history of the opposition to the *criminating question in the common-law courts*, *i. e.* of the present privilege in its modern shape. Let us remember that there is, in the first part of this history, no question whatever of the subject of the second part, and that the second part has not yet begun to exist. The first part begins in the 1200s, and lasts well into the 1600s; the second part begins in the early 1600s, and runs on for another century.

I. Under the Anglo-Saxon rule, the bishops had sat as judges and entertained suits in the popular courts. But William the Conqueror, before 1100, had put an end to this. His enactment required the bishops to decide the causes according to the ecclesiastical law; whence sprang up a separate system and a double judicature.[2] By a century later, the papal power and the regal power were in hot conflict over the delimitation of their jurisdictions; in the great Constitution of Clarendon, in 1164, Henry II temporarily gained the advantage.[3] By another century, Stephen and John had lost ground; and under Henry III the influence of the leaders of the church, foreign born and foreign educated, was in the ascendant.[4] When Henry married his French wife, in 1236, there came over four uncles with her; one of whom, by name Boniface, was placed in the see of Canterbury as arch-

page search of the Corpus Juris Canonici) and the collection of much additional material has made it possible to trace the story more correctly. The present account was printed in 15 Harv. Law Rev. 610 (1902); it has since been revised by taking note of the corroborative researches of Esmein, Hinschius, Pertile, Tanon, and Salvioli. The first of these has once for all settled the early history of the subject on the Continent. Their works cited herein are: *Esmein*, 1882, Histoire de la procédure criminelle en France, et spécialement de la procédure inquisitoire (translated as Vol. V of the Continental Legal History Series); 1896, Le serment des inculpés en droit canonique (reprinted by Leroux, Paris, from vol. 7, Bibliothèque de l'école des hautes études, sciences religieuses); *Hinschius*, 1869–1897, System des Katholischen Kirchenrechts mit besonderer Rücksicht auf Deutschland; *Pertile*, 1900, Storia del diritto italiano, 2d ed., vols. I–VI; *Tanon*, 1893, Histoire des tribunaux de l'inquisition en France; *Salvioli*, Jusjurandum de Calumnia, 1888; Manuale di storia di diritto italiano, 4th ed. 1903, 8th ed. 1921.

[2] Stubbs, Sel. Chart. 85, Const. Hist. II, 171; Pollock & Maitland, Hist. Eng. Law. I, 66, 67, 432.

[3] Poll. & Mait. I, 104 ff., 430 ff.

[4] Stubbs, Const. Hist. II, 57–65; Poll. & Mait. I, 100; Gneist, Const. Hist. I, 240.

bishop (or perhaps archdeacon). In the same year, 1236 (Matthew Paris said 1237), there came over also a Cardinal Otho. These two men were active in developing the local church law of England.[5] First to be noted is a constitution of Otho, promulgated at a Pan-Anglican council in London, 1236: "Jusjurandum calumniæ in causis ecclesiasticis et civilibus de veritate dicenda in spiritualibus, quo ut veritas facilius aperiatur et causæ celerius terminentur, statuimus præstari de cetero in regno Angliæ secundum canonicas et legitimas sanctiones, obtenta consuetudine in contrarium non obstante."[6] Next, in 1272, came a similar constitution from Boniface: "Statuimus quod laici, ubi de subditorum peccatis et excessibus corrigendis per prælatos et judices ecclesiasticos inquiritur, ad præstandum de veritate dicenda juramentum per excommunicationis sententias, si opus fuerit, compellantur."[7] Meanwhile, the general struggle between papal and royal claims of jurisdiction had gone on. Under Edward I, the statute of 'Circumspecte Agatis' (1285) favored the former's rights.[8] But by the early 1300s the statute 'De Articulis Cleri'[9] set fairly definite limits; it was enacted that the royal officers should not permit "quod aliqui laici in ballione sua in aliquibus locis conveniant ad aliquas recognitiones per sacramenta sua facienda, nisi in causis matrimonialibus et testamentariis." Such are the preliminary data at the opening of this first part of the history. What was their significance for the relation of the parties to the contest?

First of all, we may note that the opposition therein reflected had nothing to do with any objection to the general process of putting a man on his oath to declare his guilt or innocence; they concerned only the questions (*a*) *who* should have the right to do this, and (*b*) *how* it should be done. Moreover, the former of these things is alone at first concerned; later, the second comes to dominate in importance. Three stages are fairly well marked, namely, (1) to Elizabeth's time, (2) to Charles I's, (3) and afterwards.

1. *a. Who* should have the *rights of jurisdiction?* This was in the 1200s and 1300s the great question. The statute 'De Articulis Cleri' settled the line of ecclesiastical jurisdiction over laymen by confining it to causes matrimonial and testamentary; and this in substance prevailed till the end of church courts in England.[10] The forms of writs of prohibition were thereafter based on this statute.[11] A century later, in 1402, under Henry IV, the

[5] Poll. & Mait. I, 93, 94, 103; Gibson's Codex Jur. Eccl. Angl. 1011; Lindwood's Provinciale, preface to parts I and II; Jura Ecclesiastica, II, 90; Coke, 12 Rep. 26; 2 Inst. 599, 657.

[6] Lindwood, pt. II, p. 60; Gibson, 1011; 12 Rep. 28.

[7] Lindwood, pt. I, p. 109; 12 Rep. 26. In the notes to Lindwood, it is added that the laymen, "suffulti potestate temporalium dominorum, in hujusmodi inquisitionibus citati noluerunt jurare de veritate dicenda."

[8] Statutes of the Realm (Cay), I, 101.

[9] Statutes, I, 209; 2 Inst. 600. The date given by the editors, Cay and Tomlins, is 'tempore incerto' before the end of Edward II's reign (1326). Coke attributes it to the first few years of Edward I; but this, for several reasons, is improbable. In 9 Edward II (1316), certain Articuli Cleri had been presented by the clergy in a futile protest against the narrowness of their powers: Statutes, I, 171; Lindwood, pt. III, p. 37; 2 Inst. 601, 618.

[10] With sundry detailed variations, noted in Pollock & Maitland I, 105 ff.

[11] Reg. Brev. 36*b*; Fitzh. Nat. Brev. 41 A; Nichols' Britton, f. 35*b*.

papal or clerical power obtained some sort of enlargement of its "liberties and privileges"; [12] but under Henry VIII this foreign and papal domination was repudiated, and in 1533 [13] all canons "repugnant to the customs, laws, or statutes of this realm" were forbidden to be enforced. Under Mary, for a moment, in 1554,[14] the statute of Henry was repealed; but Elizabeth, in 1558,[15] took care promptly to restore it. Thenceforward the struggle of jurisdiction is against Elizabeth's own High Commission Court, and not against a foreign and papal power.

b. In the other important respect, namely, *how the church courts should proceed*, there is, as yet in the 1200s and 1300s, apparently no interference or hostile feeling at all, in relation to the methods that here concern us. It does not appear that the decrees of Otho and Boniface, above quoted, authorizing certain oaths to be employed, met with any more opposition than other acts done in assertion of the church's jurisdiction. The oath was plainly permitted, by the statute 'De Articulis Cleri,' in causes matrimonial and testamentary; there was no objection to it as such. How could there be, in a community where the compurgation system was still in full force in the popular and the royal courts, and men might be forced to clear themselves by their oaths with oath-helpers, — where they even struggled for the privilege of it, for centuries afterward, against the innovation of jury trial? [16] The writs of prohibition, set forth by Britton and Fitzherbert,[17] mentioned an oath, to be sure; but, in the first place, this might equally be the compurgation oath (not the 'jusjurandum calumniæ' or 'de veritate'); and, in the next place, and chiefly, it was mentioned simply as a descriptive feature of the forbidden jurisdiction, — as if one should forbid writs of 'habeas corpus' to be issued by a probate judge, not meaning in the least to strike at that sort of writ, but at the particular judge's power and jurisdiction. There is no valid reason to believe that the statute 'De Articulis Cleri' had among its motives any animus against the church's imposition of an oath as such.[18]

[12] St. 4 H. IV, c. 3.

[13] St. 25 H. VIII, c. 19; a statute "for the submission of the clergy to the king's majesty."

[14] St. 1 & 2 P. & M. c. 8.

[15] St. 1 Eliz. c. 1, §§ 6, 10.

[16] Thayer, Preliminary Treatise on Evidence, 25, 27.

[17] Cited *supra*.

[18] The only suggestion ever made to this effect has come from Coke, who claimed (12 Rep. 28) that in this respect Otho's constitution of 1236 was "against the law and custom of England," and that the statute 25 H. VIII, c. 14, cited *infra* (which he re-writes to suit his claim), merely restored the common law. His only authority is the concluding clause of Otho's above-quoted decree of 1236, "obtenta consuetudine in contrarium non obstante." This clause, however, plainly applies, not to English custom, but to the church's own law; for not only was the use of the inquisitional oath 'de veritate' a new thing at that time in the church's procedure (as explained later), but this particular 'jusjurandum calumniæ' was in the 1200s being much enlarged in its application. It had been in 1125-30 not yet usable, in the church's practice, for clerical persons and in spiritual causes: Corp. Jur. Canon., Decretal. II, 7, *de jur. calum.* cc. 1, 2; so, too, in 1145-53 "inusitatum est": ib. c. 4; by 1181 it was authorized for the clergy, "consuetudine non obstante": ib. c. 5; and finally, by 1294–1303, under Boniface VIII, it was prescribed in all spiritual causes: Sexti Decretal. II, 4, *de jur. calum.* cc. 1, 2; compare also Lindwood, II, 60; Hinschius, V, pt. 1, p. 356, note 7; Salvioli, Jusjurandum de Calumnia (printed in the Omaggio del Circolo Giuridico di Palermo alla Università di Bologna, 1888); Esmein, *ubi supra*, Le serment, p. 13, Hist. de la proc. crim., 68, 69. All this shows plainly

b (1) Nevertheless (though the king's lawyers cared nothing about it) this procedure of Otho's and Boniface's, the 'jusjurandum de veritate dicenda' (which we may call the inquisitional oath, as distinguished from the compurgation oath) [19] was then, *for the church*, an *innovation*. Hitherto, the trial by compurgation, or formal swearing of the party with oath-helpers, and the trial by ordeal, had been the common methods of ecclesiastical trial and decision. But in the early 1200s, under the organizing influence of Innocent III, one of the first great canonists in the papal chair (1198–1216), new ideas were rapidly germinating in church law.[20] The trial by ordeal was formally abolished by the church in 1215.[21] The trial by compurgation oaths "was already becoming little better than a farce." [22] There was a decided need of improvement in method. One of the marked expedients in this improvement was the inquisitional or interrogatory oath, introduced and developed in the early 1200s, chiefly by the decretals of Innocent III.[23] The time-worn com-

enough what Otho meant in prescribing it for spiritual causes in England, in 1236, by his "obtenta consuetudine in contrarium non obstante"; and Coke's argument falls to the ground.

There is, to be sure, an apparently opposing passage (not cited by Coke) in the Constitution of Clarendon, c. 6, of 1164 (Stubbs, Sel. Chart. 238): "Laici non debent accusari nisi per certos et legales accusatores et testes in præsentia episcopi, ita quod archdiaconus non perdat jus suum." But this could not refer to Otho's new oath of 1236, for the simple reason that the latter did not come in, nor anything of the kind, until the next century (as appears in the citations *infra*). Moreover, this particular Clarendon clause (whatever it meant) seems not to have been opposed to the church's claims, for in a Vatican MS. of that constitution, it is said, while two other clauses are marked "*toler.*," and the rest "*damn.*," this clause 6 is ignored entirely: Gieseler, Eccles. Hist., Hull's ed., 1857, III, 65; Smith's Hull's ed., 1857–58, II, 289; the contrary statement, in Poll. & Mait. I, 437, that "the pope seems to have condemned this constitution as a whole," is based upon authorities not here accessible for comparison. Probably the Clarendon clause was aimed at some sort of reform in the compurgation system, which was then degenerate (as noted later); moreover, who could be an "accusator" was then a much discussed question in church law: Decretal. II, 7, *de accus.* Or it may have concerned the then changing judicial relation between the archdeacon and the episcopal ordinary: Hinschius, V, pt. 1, p. 432, § 288; Schulte, Kathol. Kirchenrecht, § 59, III; Lea, Inquisition, I, 309. The remark has been made in Pollock & Maitland, I, 131, that the bearing of this clause is "very obscure."

[19] The word 'inquirere' is the typical word in the passages of the Decretals issued under the new procedure.

[20] Hinschius, V, pt. 1, § 284, pp. 337, 348, 350; Pertile, VI, pt. 2, p. 3; Schulte, Katholisches Kirchenrecht, 1873, 3d ed., § 100, III; Pollock & Maitland, I, 426; Lea, Inquisition, I, 309; Gieseler, Eccles. Hist., Hull's ed., III, 157. This new movement was part of a general one, affecting also the substantive law of the church; on the procedure side, the rise of the papal inquisition of heresy, in the late 1200s, was another related phase.

[21] Thayer, Prelim. Treatise, 37; Lea, Superstition and Force, 4th ed., 419.

[22] Pollock & Maitland, I, 425, 426, II, 653.

[23] The first appearance of it, as administered to a party accused, seems to occur in Innocent's decretals of 1205 and 1206 (Decretal. V, 1, *de accusationibus*, cc. 17, 18), where, as the "forma juramenti," the persons charged "meram et plenam dicant inquisitoribus veritatem"; so also in 1208: ib. II, 27, *de sententia*, c. 22 (an instructive case). As still a secondary resort, it appears, soon afterwards, under Honorius III, in 1216 (ib. II, 24, *de jurejurando*, c. 32); and by the time of Gregory IX, in 1239, Innocent IV, in 1245, and Boniface VIII, 1294–1303, it comes to be the usual requirement and the typical mode of procedure (Sexti Decretal. I, 1, *de judiciis*, c. 1; II, 4, *de jur. calum.* cc. 1, 2; II, 10, *de testibus*, c. 2). As late as the Lateran Council of 1215, the old compurgation oath had still prevailed as the regular mode of trial for heresy: Decretal. V, 7, *de hæreticis*, c. 13 (= c. 3 of Concil. Lat.); Hinschius, V, pt. 1, § 284, p. 346; but by the middle of that century the new oath became the customary instrument in the papal inquisition of heresy; which indeed owed its effectiveness largely to the new methods: Lea, Inquisition, I, 306, 313, 337, 411, 559; Hinschius, V, pt. 1, § 297, p. 484, VI, pt. 1, p. 373. The entire passing away of the old 'purgatio canonica,' by the late 1500s, is described in Hinschius, VI, pt. 1, p. 71.

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purgation oath had operated as a formal appeal to a divine and magical test or 'Gottesurtheil'; there was no interrogation by the tribunal; the process consisted merely in daring and succeeding to pronounce a formula of innocence, usually in company with oath-helpers.[24] But the new oath pledged the accused to answer truly,[25] and this was followed by a rational process of judicial probing by questions to the specific details of the affair, after the essentially modern manner. The former oath operated of itself as a decision, through the party's own act; the latter merely furnished material for the judge with which to reach a personal conviction and decision. This was an epochal difference of method. Indeed, the radical part played, for the progress of English procedure, by the new jury trial in the 1200s and 1300s, was paralleled, in a near degree, not only for ecclesiastical procedure but also for the secular criminal procedure of the Continent, by this inquisitional oath of the 1200s.[26] There were, to be sure, as time went on, several varieties of form to the oath.

âge, p. 276; 1880) had declared that the oath 'de veritate' was no part of the ordinary 'ex officio' procedure, and that the texts of the Decretals had been misconstrued. M. Esmein answered this, in 1896, in the pamphlet above cited, and showed conclusively that the oath was a natural historical development, explaining the various causes and aspects. M. Tanon (L'inquisition, p. 348) had meanwhile refused to accept the correctness of M. Fournier's assertion.

[24] Brunner, Deutsche Rechtsgeschichte, I, 398, 427, 433, 435. For the church's compurgation oath, as distinct both in name and in substance from the inquisition or interrogatory oath, see good examples in Decretal. V, 34, *de purg. canon.* cc. 5, 13, 16; Decret. Pars II, causa V, qu. V, cc. 12, 15, 17, 19 (A.D. 1130–1148).

[25] "You swear that you shall make true answers to all things that shall be asked of you"; thus it was handed down in the 1600s. In the 1200s, its nature is well illustrated in a case of 1239, under Gregory IX: Sexti Decretal. II, 10, *de testibus*, c. 2: "recepto juramento de veritate dicenda, iniungas dictis abbati et priori [the opposing parties], ut tam ponendo quam respondendo dicant veritatem quam super positionibus [*i.e.* specific allegations of fact] tibi sub bulla nostra transmissis ipsi sciunt et illos intelligunt in quorum animas juraverunt. Præterea, sigillatim super quolibet articulo in qualibet positione contento facias a partibus sufficienter adinvicem responderi."

[26] One of the great facts of the 1200s–1300s on the Continent was the breaking down of the old 'laissez faire' system of private prosecution by the injured party, and the prevalence and increase of unpunished crime. Something had to be done for remedying this. It was a time of various new methods (Schroeder, Deutsche Rechtsgeschichte, 775; Siegel, D. Rechtsg. 552–556), among which were the 'Rügeverfahren,' and the celebrated 'Vehmgerichte' in Germany (described in Sir Walter Scott's Anne of Geierstein). The ultimate result was the rise of a system of public or State prosecutors, now for the first time known on the Continent, and of grand juries, the English equivalent (Poll. & Mait. II, 639–657). These public prosecutors, acting 'ex officio,' laid hold of the weapon just invented by the canon lawyers, the compulsory oath to the accused 'de veritate dicenda,' and applied it in their secular criminal procedure. The public prosecutor, indeed, as an institution, "slipped in," as Esmein puts it (Hist. de la proc. crim., pp. 103, 133, translated as Vol. V of the Continental Legal History Series) "by the opening provided by the procedure 'per inquisitionem' in canon law." The influence, therefore, of the canon-law expedient upon continental legal history may be said to have been epochal. Its development in this respect in France and Italy may be further seen in Pertile, *ubi supra*, VI, 3–12, 24–28, 148; Glasson, Hist. du droit et des institutions de la France, VI, 623, 625, 630 (1895); Tanon, *ubi supra*, Introd. i.; Salvioli, Manuale di storia di diritto italiano, 1903, 4th ed., §§ 390–393; Esmein, History of Continental Criminal Procedure (transl. Simpson; Continental Legal History Series, vol. V, 1913), pp. 79 ff.; original Fr. ed., pp. 124, 142, 229. In Germany, the rules of the 'inquisitio' (as noticed later) may be seen directly adopted in the great criminal code of 1532 which so long dominated that country: Constitutio Criminalis Caroli, Art. 6 (when a person on suspicion is "durch die oberkeyt vonn amptshalben [*i.e.* 'ex officio'] angenommen wurde, der soll doch *mit peinlicher frage nit angegriffen werden*, es sey dann zuvor redlich und derhalb *genugsame anzeigung unnd vermutung* von wegen derselben missethat auff jnen glaubwirdig gemacht" (1895, Siegel, Deutsche Rechtsgeschichte, 566).

The chief forms were the simple 'juramentum de veritate dicenda,' used in Boniface's English constitution of 1272 (quoted *supra*), and the broader 'jusjurandum calumniæ de veritate dicenda,' used in Otho's English constitution of 1236 (quoted *supra*);[27] but their unity consisted in the subjection of the accused to a rational specific interrogation for the purpose of informing the judge.

b (2) Yet there *was* a distinction of real consequence (upon which everything came later to turn), regarding the different *preliminary conditions* upon which a party could be put to this or any other oath. There must be some sort of a presentment, to put any person to answer. But must that come from accusing witnesses or private prosecutors or the like (corresponding to our notion of a 'qui tam' or a grand jury)? Or might it be begun by an official complaint (somewhat like our information 'ex relatione' by the attorney-general)? Or might the judge 'ex officio mero' summon the accused and put him to answer, in hopes of extracting a confession which would suffice? And in the last method, must the charge at least be brought first to the judge's notice 'per famam,' or 'per clamosam insinuationem,' "common report" or "violent suspicion"? Such were the questions of procedure which later formed the essential subject of dispute.[28] The last question became in the subsequent history the most important one; and it was apparently to be answered, in the strictness of the law, in the affirmative. Nevertheless,

[27] The difference between these two forms needs a little explanation. The 'jusjurandum calumniæ' was primarily a general pledge that the cause was a just one; and originally it had been used independently in civil cases long before the old compurgation procedure had ceased to exist, — that is, as early as the 1100s. Decretal. II, 7, *de jur. cal.* c. 1. But, as time went on, it came to include a clause 'de veritate dicenda,' or at any rate to be associated with that oath as a preliminary to every cause; this appears from 1245 onwards: Sexti Decretal. II, 1, *de judiciis*, c. 1; II, 9, *de confessis*, c. 2; II, 4, *de jur. cal.* cc. 1, 2; Lindwood, II, 60; Salvioli, Jusjurandum Calumniæ, *passim;* Esmein, Le serment, 13. Thus it became associated with and equally significant of the new inquisitional oath-procedure by the time of Boniface's English constitution, *supra*. The typical feature of that procedure, however, whether as a separate oath or as a clause in a larger oath, was the requirement 'de veritate dicenda,' *i. e.* to answer specific interrogatories. For forms of this, see Lea, Inquisition, I, 399. For other forms of oath, see Burn, Eccles. Law, "Oaths," who is, however, not clear on the present subject. Gibson, Codex Jur. Eccl. Angl. 1011, has something, but not very helpful.

[28] This triple classification of the preliminary procedure — 'accusatio,' 'denunciatio,' 'inquisitio,' — which became the foundation of later discussions (Lea, Inquisition, I, 310, 401; Schulte, Kathol. Kirchenrecht, § 100), is sometimes said to have been founded on c. 8 of the canon of the Lateran Council of Innocent III, in 1215 (Hefele, Conciliengeschichte, 2d ed., V, 885); and so it was. But Innocent composed that canon by adopting part of the language of two of his earliest decretals, of 1199 and 1206 (Decretal. V, 3, *de simonia*, c. 31, *licet heli*, to the Prior of St. Victor; ib. V, 1, *de accus.* c. 17, *qualiter et quando*, to the Bishop of Versailles), and the 'tribus modis' of the former of these appear later as the classification in V, 1, *de accus.* c. 24, identical with the Lateran Council's canon. Esmein (Le serment, p. 4) finds the earliest instances of the 'inquisitio' procedure in 1198, Decretal. III, 12, *ut eccl. benef.* c. 1, X, and in 1199, ib. V, 32, *de purg. canon.*, c. 10, X. But Tanon (L'inquisition, p. 284) and Hinschius (V, pt. 1, § 284, p. 350) concur with the foregoing statement in regarding the first-named Decretals as the first references to the 'inquisitio' as a generic method.

The phrase 'ex officio,' destined to become so famous in England, in connection with the third mode, seems taken from the same c. 31, *de simonia*, of 1199: "nos frequentibus clamoris excitati, ex officio nostro voluimus inquirere de præmissis"; so again, also in 1199, ib. V, 32, *de purg. canon.* c. 10: "licet contra eum nullus accusator legitimus appareret, ex officio tuo tamen, fama publica deferente, voluisti plenius inquirere veritatem."

the matter was complicated by the varieties of detail in procedure, and there were differences of phrasing in the various decretals that served as authority. It is enough here to note that the third method of trial — the 'inquisitio,' or proceeding 'ex officio mero' — became a favorite one for heresy trials; and that its canonical lawfulness in some shape was supported by clear authority.[29] About the year 1600, there came to be in England much pamphleteering anent this; and a formal opinion of nine canonists declared the lawfulness of putting the accused to answer on these conditions: "Licet nemo tenetur seipsum prodere [*i. e.* accuse], tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare."[30] Thus, on the one hand, it was easily arguable that, in ecclesiastical law, the accused could not be put to answer 'ex officio mero' without some sort of witnesses or presentment or bad repute; and in this sense an oath 'ex officio' (as it came to be called) might be claimed (as it was claimed) to be a distinct thing from the same oath when exacted on proper conditions, and to be therefore canonically unlawful. But, on the other hand, it is plain to see, also, how, in the headlong pursuit of heretics and schismatics under Elizabeth and James, the 'ex officio' proceeding, lawful enough on Innocent III's conditions about 'clamosa insinuatio' and 'fama publica,' would degenerate into a merely unlawful process of poking about in the speculation of finding something chargeable.[31]

In short, the common abuse, in later days, of the 'ex officio' proceeding led to the matter being argued, in English courts and in popular discussion, as if this oath were either wholly lawful or wholly unlawful;[32] though, in truth, by the theory of the canon law, it *might* be either, according to the circumstances of presentment.

[29] As to the conditions precedent to an 'ex officio' inquisition lawfully putting a party to his oath, the foregoing extracts in note 28, *supra*, suggest something of the original orthodox practice; as also the following passages: ib. V, 1, *de accusationibus*, c. 21, A. D. 1212: "inquisitio fieri debeat solummodo super illis de quibus clamores aliqui processerunt"; ib. c. 24, A. D. 1215: "debet inquisitionem clamosa insinuatio prævenire"; see also ib. cc. 17, 19, 20, 23, 24; V, 34, *de purg. canon.* cc. 1, 5, 6, 10, 12, 15; Sexti Decretal. V, 1, *de accus.* c. 2; Lindwood, I, 109: "a principio ubi inquisitio sit generalis [*i. e.* a roving commission, without specific accusation], non debet exigi juramentum per quod aliquis peccatum alicujus occultum prodere cogatur; ex quo tamen crimina sine juramento corrigenda, poterit inquisitor super his exigere juramentum"; I, 17: "Inquisitio preparatoria fit sine exactione juramenti"; and the statements of Hinschius, V, pt. 1, § 284, p. 351, § 297, pp. 483, 486, and of Pertile, VI, pt. 2, pp. 6, 7, 144.

This much is worth noticing in detail, because it is this precise point of procedure in the canon law which led ultimately to so different a thing as our modern privilege against self-criminating testimony.

[30] Strype's Life of Whitgift, 339, App. 136 'et passim'; compare Conset's Practice of the Spiritual Courts (1749), p. 384, pt. VII, cc. 1, 6; p. 100, pt. III, c. 3, § 2. Compare this statement with Lindwood's, quoted *supra*, antedating it by several centuries. The uncertain phrasing of the later custom and law in the church is seen in Archbishop Whitgift's claim, in 1584 (Strype, 157, App. 63), when using the above formula, that if a man is "proditus per denunciationem alterius, sive per famam," he is bound "seipsum ostendere ad evitandum scandalum et seipsum purgandum."

[31] "The tendency of the jurists was to permit an 'ex officio' proceeding, in the form of an inquisition, without the original requirements" (Hinschius, vol. VI, pp. 69, 70, writing of the 1600s).

[32] In the Mirror of Justices (*circa* 1300), B. V, par. 114 (Seld. Soc. Pub. VII, 172), it is said: "It is an abuse that a man is accused of matters touching life or limb 'quasi ex officio,' without suit and without indictment."

c. But (to take up again the story of Otho's and Boniface's decrees) all these distinctions, it must be clearly understood, did not trouble the lay powers in their controversy of earlier days with the church on English soil. At the time of Edward's statute 'De Articulis Cleri', in the early 1300s, the royal power is not at all concerned, in this respect, with the method of ecclesiastical procedure, but only with the *limits of that jurisdiction*.

Otho's and Boniface's constitutions of the 1200s were issued under a new and improved procedure in the church; if the king's lawyers had thought about it at all, they would probably have welcomed the better methods, for they certainly were dissatisfied with the church's old-fashioned compurgation methods.[33] But the jurisdictional controversy was the vital one, as the 'Articuli Cleri' show in every paragraph. Wherever the king and his counsellors concede this jurisdiction, there they are found ready enough to concede to the fullest the usual ecclesiastical procedure. In this very statute, indeed, 'De Articulis Cleri', they concede the church's oath-procedure where jurisdiction is conceded, *i. e.* in matrimonial and testamentary causes. As time goes on and the church becomes occupied with heresy trials, the same complaisance is equally plain. Towards the end of Richard II's time, during the Lollard agitation, the church began, in 1382,[34] to receive temporal sanction for its claims in the field of heresy; finally, in 1401,[35] Henry IV's statute gave to the church the punishment of heretics; these were to be arrested and detained by the diocesan when "defamed or evidently suspected," until they "do canonically purge him or themselves," the diocesan to "determine that same business according to the canonical decrees." Here is no objection to the oath or to the 'ex officio' procedure, but a sanction of the church's usual rule. Under this statute Archbishop Arundel, with renewed vigor, conducted his campaigns against heretics;[36] and under it were all subsequent prosecutions conducted for more than a century.

After a long period, however, there finally appears the little rift within the lute. In 1533, the statute of Henry IV, of 1401, was repealed[37] by a statute which did not take away the church's jurisdiction over heresy, nor yet oppose its power to put the accused on inquisitional oath, but did insist on something more than 'ex officio' proceedings; it provided that "every person

[33] Poll. & Mait. I, 426, giving numerous examples. These learned and distinguished authors' incidental suggestion that "very possibly the lay courts would have prevented the prelates from introducing in criminal cases any newer or more rational form of trial" is opposed to what is above advanced; yet, for lack of their reference to a plain authority, is still open to respectful dissent.

[34] St. 5 Rich. II, 2d sess., c. 5. This statute, however, was spuriously placed upon the statute-book, and its immediate repudiation by the Commons was omitted therefrom; for the interesting history of it, see Coke's Rep. XII, 58; Stephen, Criminal Law, II, 444; Campbell, Lives of the Chancellors, I, 247; Anon., Law and Lawyers, II, 347.

[35] St. 2 H. IV, c. 15. In 1414, St. 2 H. V, c. 7, another statute provided for delivering indicted heretics to the ordinary, to be tried by the church's procedure.

[36] Stubbs, Const. Hist. II, 488; III, 32, 357–365; Lindwood, I, 298; Hinschius, V, pt. 1, § 281, p. 311; Holdsworth, History of English Law, vol. I, 3d ed. 1922, p. 585; Archbishop Arundel was several times Chancellor, and his influence was strongly felt in the administration of this period.

[37] St. 25 H. VIII, c. 14.

presented or *indicted* of any heresy, or *duly accused by two lawful witnesses*, may be . . . committed to the ordinary [of the church] to answer in open court." Here was the first portent of the new phase of the contest. Under the brief liberality of Edward VI, in 1547, this whole jurisdiction over heresy was taken away;[38] but under Mary, in 1554, the extreme statute of Henry IV was revived.[39] Then, Mary's statute was in turn repealed, in 1558, by Elizabeth,[40] who at the same time took into her own hands the church's powers, and, with the Court of High Commission, introduced new features into the controversy.

2. *a.* Under Elizabeth and James, and to the end of the story, there appears no further doubt (material to us now) as to the *jurisdiction of the ordinary church courts;* it was confined, in its control of laymen, to causes "matrimonial and testamentary"; and it was constantly prohibited from holding them to answer in other classes of cases. So also the Court of High Commission in Causes Ecclesiastical,[41] which Elizabeth, as head of the church, now constituted, in 1558, as an extraordinary instrument for carrying out her church policy, worked under similar limitations, though it constantly strove to exceed them, and though it perhaps had jurisdiction over heresy. So, too, that offshoot of the Privy Council, known as the Court of the Star Chamber (first sanctioned by statute in 1487, but not beginning until Elizabeth's time to exercise actively its great and for some time useful powers), had by its charter so broad a jurisdiction that little dispute could be made on that score.[42]

b. Thus, the emphasis of controversy now shifted. It had in the 1300s concerned jurisdiction; it now concerned *methods*. The objection portended in 1533, in the statute of 25 H. VIII, c. 14 (above quoted), was now to be the vital one. The Court of High Commission of course followed ecclesiastical rules; the Court of Star Chamber did likewise, in what concerned the procedure of trial.[43] No one is going yet to object to their general process

[38] St. 1 Edw. VI, c. 12, § 3.

[39] St. 1 & 2 P. & M. c. 6.

[40] St. 1 Eliz. c. 1, § 15. Whether thus the statute of Henry VIII was revived would be a question; Coke cites it as if in force: 12 Rep. 27; see the Case of the Bishops, 12 Rep. 7. It did not much matter, since Elizabeth's High Court claimed even ampler powers.

[41] St. 1 El. c. 1; Gneist, Const. Hist. II, 170, 240; Coke, 4 Inst. 324, 12 Rep. 19.

[42] St. 3 H. VII, c. 1; Gneist, II, 183, 245, 287; Coke, 4 Inst. 60; Stephen, Hist. Crim. Law, I, 173; Leadam's Select Cases in the Star Chamber, Seld. Soc. Pub. vol. XVI, Introduction. Mr. Leadam has shown that its powers were exercised before this statute, and were apparently not restricted to the statutory enumeration.

[43] The Star Chamber Court, though its membership fluctuated, usually included the chancellor and the two chief justices; so that there was no lack of legal learning in it.

It should be added that the peculiar stronghold of *Chancery* practice, its personal examination on oath to make discovery, is found established as early as the first part of the 1400s, and that the opposition which went on during that century and the 1500s to the increasing spread of the Chancellor's powers was probably due in part to this feature of its procedure, in which "the Chancery was naturally identified with the Church" and its methods with those of the Ecclesiastical and Star Chamber courts (1890, Kerly, "Historical Sketch of the Equitable Jurisdiction of the Court of Chancery," pp. 43–45).

The King's Council also followed ecclesiastical procedure in the main; the parties were required to submit to examination on oath; details are given in Messrs. Leadam and Baldwin's Select Cases before the King's Council, 1243–1482, Introd. p. xlii (Selden Soc. Pub. vol. 36, 1918).

The historical continuity between the canon-law oath 'de veritate dicenda' and the later methods of "discovery" in chancery may be

of putting the accused to answer upon oath; but there is to be much opposition to the preliminary methods, to the lack of a presentment, to charging a person 'ex officio mero'. There was here some room (as we have seen) for uncertainty as to the proper canonical methods; and these courts were to strain all the possibilities, and even to exceed them.

The Court of Star Chamber seems to have raised no special antagonism during the 1500s, nor until James' time, in the next century. Nor did the Court of High Commission, under the first five commissions. But in 1583, the sixth was issued, with Archbishop Whitgift at the head, — a man of stern Christian zeal, determined to crush heresy wherever its head was raised. He proceeded immediately to examine clergymen and other suspected persons, upon oath, after the extremest 'ex officio' style. From this time onwards there is much concerning this oath.[44] That it was canonically and statutably lawful was at least arguable.[45] The repealed statute of Henry VIII, c. 14, in 1533 (quoted above), which might otherwise have been urged against its methods, was now of doubtful validity.[46] Furthermore, the royal Courts of common law, early in the agitation, had plainly declared these things lawful on certain conditions. In 1589, the question had been first raised in the Common Pleas, in Collier *v.* Collier.[47] In 1591, in Dr. Hunt's case, [48] the King's Bench refused to sustain an indictment for administering the oath on a charge of incontinency, since "the oath cannot be ministered to the party but where the offence is presented first by two men, 'quod fuit concessum'; and it was said, it was so in this case." So also, in the same year, when the case of the preacher Cartwright and his followers, for refusing to take Whitgift's oath and make answer, was brought up for a final set-

traced in the indorsement on a bill in chancery in Henry VI's time: "juratus et examinatus ad veritatem dicenda de materia in hac billa contenta" (Leadam's Select Cases in the Star Chamber, *ubi supra*, p. xxxi).

[44] Hallam, Const. Hist. I, 200 ff.; Neal, History of the Puritans, 1st ed., I, 274, 277, 281–286; Strype's Life of Whitgift, App. 49; Holdsworth, History of English Law, vol. I, 3d ed., 1922, p. 609. Neal remarks that this was the first Commission to use the oath in 'ex officio' manner.

[45] In 1583, certain ministers, under examination by Whitgift, had applied to Lord Burleigh to protect them; he mildly expostulated with the Archbishop, protesting that "this is not a charitable way"; but the Archbishop firmly answered that "it is so cleare by law that it was never hitherto called in doubt"; and the matter ended (Neal, History of the Puritans, 1st ed., I, 281–286; Strype's Whitgift, 157, 160, App. 49, 63).

[46] Note 40, *supra*.

[47] 4 Leon. 194; Cro. El. 201; Moor 906; charge of incontinency; according to one report, no decision was reached; by two others, the prohibition was granted. Coke was counsel for the petitioner, and cited the writs on the jurisdictional statute 'de articulis cleri,' claiming that "nemo tenetur seipsum prodere in such cases," but only "in causes testamentary and matrimonial."

The king's judges were evidently new to the question, for in 1590, when the dissenting preacher Udall was being examined before (probably) the High Commission Court as to the authorship of the Martin Marprelate books, and refused to answer, saying, "to swear to accuse myself or others, I think you have no law for it," Anderson, J., of the King's Bench, bade Egerton, Solicitor-General (afterwards Lord Chancellor), tell Udall what the law was, and Egerton declared: "Your answers are like the seminary priests' answers, for they say there is no law to compel them to take an oath to accuse themselves"; and afterwards, when Udall again said he was not bound to answer, Anderson, J., replied, "That is true, if it concerned the loss of your life," but "you ought to answer in this case" (1 How. St. Tr. 1271, 1274). This remark of Anderson does not in terms fit any of the supposed rules; yet in the very next year, in Dr. Hunt's case, *infra*, he concurs in laying down the strict ecclesiastical rule; so that his views were as yet in formation.

[48] Cro. El. 262.

tlement, all the chief judges and law officers gave it as their opinion that the refusal was unlawful.[49] Up to this time, then, it would seem that the stricter ecclesiastical rule was conceded by the highest authorities to be unimpeachable by common-law Courts. When James I came to the throne, in 1603, the church's claim was, if anything, strengthened; for James, in his own conceit, was as good a canonist as theologian, and would be prone to favor so useful an engine against heretics as the proceeding 'ex officio.' In the first scenes of his career, he appears plainly vouching for it.[50] So, too, when Bancroft succeeds Whitgift as Archbishop, bringing a like zealotry to the office, the common-law judges seem to have been still complaisant.[51]

But in 1606 Sir Edward Coke comes to be Chief Justice of the Common Pleas, and a change begins gradually. Coke had been counsel for Collier in 1589,[52] and had perhaps thus acquired his convictions. It is well known that he set himself, as judge, against the ecclesiastical Courts' pretensions in general. At first, however, he avoided a direct issue on the 'ex officio' oath. His first case, in 1609, he decided on other points.[53] His next, in 1615, was allowed to drag on for a year or more, with repeated adjournments and other expedients intended to induce either the accused or the High Court of Commission to yield a point and avoid the direct issue.[54] The plain opinion of Coke, and, apparently, the final decision of the Court, was that the oath was improperly put by the ecclesiastical Court; yet the objectionable thing seemed to be, not that the accused should be compelled to answer, but that he should

[49] Strype's Whitgift, 338, 360, App. 138; Neal, Puritans, 2d ed., I, 337 ff.; the officers were the two Chief Justices, the Chief Baron of the Exchequer, Sergeant Puckring, and the Attorney-General and Solicitor-General.

[50] Jan., 1604, Conference on Church Reformation, Neal's Puritans, 2d ed., I, 402, 2 How. St. Tr. 70, 86 (a Lord: "The proceedings in that Court [of the High Commission] are like the Spanish Inquisition, wherein men are urged to subscribe more than law requireth, and by the oath 'ex officio' forced to accuse themselves"; Whitgift, Archbishop of Canterbury: "Your lordship is deceived in the manner of proceeding, for if the article touch the party for life, liberty, or scandal he may refuse to answer"; Egerton, Lord Chancellor: "There is necessity and use of the oath 'ex officio' in divers courts and causes"; His Majesty, James I, "here soundly described the oath 'ex officio,' for the ground thereof, the wisdom of the law therein, the manner of proceeding thereby, and profitable effect of the same"). But the prelates were weakening; Whitgift, twenty years before, in his passage at arms with Burleigh (cited *supra*, note 45), had never made the concession here recorded, or anything like it.

[51] 1605, Bancroft's Articuli Cleri, and the Judges' Answer, 2 How. St. Tr. 131, 155 (*Objection* [by the clergy, that the Judges issue a prohibition to the clergy on the ground] "that the party ought to have a copy of the articles being called in question 'ex officio,' before he should answer them"; *Answer* [by the Judges]: "Yet ought they to have the cause made knowne unto them, for which they are called 'ex officio,' before they are examined, to the end that it may appeare unto them, before their examination, whether the cause be of ecclesiasticall cognizance; otherwise they ought not to examine them upon oath").

[52] *Supra*, note 47.

[53] 1609, Edwards' Case, 13 Rep. 9 (Coke, C. J., and three others; prohibition granted against the High Court of Ecclesiastical Causes, in putting Edwards to his oath, on a charge of libel, as to his meaning in the words uttered; resolved on three grounds, first, the matter was temporal, not ecclesiastical; secondly, it was not for this special court; thirdly, "in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words, and not of the intention or thought of his heart; and if any man should be examined upon his oath what opinion he holdeth concerning any point of religion, he is not bound to answer the same"; nothing was mentioned by party or judges, as to a privilege against matter involving a penalty, nor is the 'ex officio' oath declared unlawful).

[54] Dighton *v.* Holt, 3 Bulstr. 48; briefly reported in Moor 840, 2 Cro. 388, 1 Rolle 337, Jura Eccles. 355, pl. 9.

be charged 'ex officio,' in a cause not testamentary or matrimonial but penal.[55] In the meantime (in 1610, 1611, and 1615), three other cases had come before the common-law Courts, presumably the King's Bench, and from their imperfect reports it may be inferred that a similar view was now prevailing there.[56] The change had thus substantially been effected.[57] Archbishop Abbott, a man of less rabid views, had in 1610 succeeded Bancroft;[58] Coke had carried his views to the King's Bench, as Chief Justice, in 1613; and the matter seems to have been so far settled (in respect to the ecclesiastical claims) that no more cases occurred,[59] until in 1640, the statute (quoted later) put an end, for the time, to further doubt.

But the Star Chamber claims remained still to be faced. What had been settled was (in effect) merely that the ecclesiastical Courts (including that of High Commission) could not, as a matter of jurisdiction and procedure, put laymen to answer, 'ex officio,' to penal charges. But this did not touch the Court of Star Chamber. Its conceded jurisdiction was ample enough to fine and imprison for almost any offence that it chose to pursue.[60] The very statute that sanctioned it, in 1487, expressly vested in it the authority to examine the accused on oath in criminal cases, without naming even such restrictions as the ecclesiastical law conceded;[61] and its right to examine in this fashion, wherever the case was within its jurisdiction, seems to have been conceded under Henry VIII and Elizabeth, all through the 1500s.[62] But as James' reign went on, and its practices became arrogant and obnoxious, so its use of the 'ex officio' oath came to share the burden of criticism and discontent which that procedure in the ecclesiastical Courts excited.[63] The

[55] In 12 Rep. 26, "Oath Ex Officio," is given by Coke an opinion, said by him to have been rendered by himself, as Chief Justice, as early as 1607, to the Commons, on their request; in this he plainly declares that in the ecclesiastical courts "no layman may be examined 'ex officio,' except in two causes," matrimonial and testamentary. But the above date is doubtful; the volume was not printed until after his death, and its authority is not of the best.

[56] 1610, Mansfield's Case, Rolle's Abr., "Prohibition," (T) 4 (a clergyman was allowed to be examined on oath for preaching heresy); 1611, Clifford *v.* Huntly, Rolle's Abr. (T) 6, Jura Eccles. 427, pl. 7 (a woman was not allowed to be examined as to a forfeiture); Huntley *v.* Cage, 2 Brownl. 14 (apparently the same case); 1615, Bradston's Case, Rolle's Abr., "Prohibition," (T) 1, Jura Eccles. 355, pl. 9 (a layman was not bound to answer as to an offence involving forfeiture). All these, of course, are cases of prohibitions issuing to the ecclesiastical Court.

[57] In Spendlow *v.* Smith, Hob. 84, Jura Eccles. 428, probably late in 1615, a plain ruling was made; in a suit in the church court for dilapidation, charging a lease for years and fraud, the defendant was put to his oath as to the fraud; this was held unlawful, "for though the original cause belong to their cognizance, yet the covin and fraud is criminal, and . . . punishable both in the Star Chamber and by the penal laws of fraudulent gifts, and not to be extorted out of himself by his oath."

[58] Neal, Puritans, I, 450.

[59] Except Jenner's Case, in 1621 (Jura Eccles. 427, pl. 6, Rolle's Abr., "Prohibition," (T) 5, briefly reported; in accord with Edwards' Case, *supra*); and Latters *v.* Sussex, undated, but before 1616 (Noy 151).

[60] *Supra*, note 42.

[61] St. 3 H. VII, c. 1.

[62] 1589, Rither's Case, Cro. El. 148, *semble;* 1591, Buckley *v.* Wood, Cro. El. 248.

[63] That the contest over compulsory disclosure was becoming a matter of popular professional interest is indicated by the great dramatist's allusion to it in Hamlet, first printed in quarto in 1603; in Act III, Sc. 3, the King soliloquizes:

"In the corrupted currents of this world
Offence's gilded hand may shove by justice;
And oft 't is seen the wicked prize itself
Buys out the law. But 't is not so above;
There is no shuffling; there the action lies
In his true nature and, we ourselves compelled,
Even to the teeth and forehead of our faults,
To give in evidence."

common-law Courts seem to have found no handle against its oath-procedure, even after Coke's accession to the bench.[64] But though there was no explicit judicial condemnation, there was, after a time, more than one formal questioning of it.[65] The analogy of the doctrine already settled by Coke in 1607–1616, for the ecclesiastical Courts, was naturally invoked. Towards the end of its career, it would seem that some impression was being made on the Court's own theory of orthodoxy.[66]

3. But its time in the kingdom was now drawing to an end; and the trial which seems to have precipitated the crisis came in 1637, — a case full of instruction for our present history. John Lilburn, an obstreperous and forward opponent of the Stuarts (popularly known as "Freeborn John"), constituted somewhere between a patriot and a demagogue, had the obstinacy to force the issue. A decade later, he came into a similar collision with the Parliament's government; but he makes his entrance as a victim of the King's Star Chamber:

[64] In the following three cases, Coke himself, at the very time when he was opposing from the bench (as already observed) the 'ex officio' oath of the High Commission Court, appears as a consenting party to the enforcement of the even looser practice of the Court of Star Chamber:

1610, Andrew *v.* Ledsam, 2 Brownl. 49 (A. exhibited his bill in the Star Chamber against L., a broker, for defrauding him by forging deeds to represent the investments made by him with A.'s money; "L. had forged and counterfeited them, as he hath confessed upon his examination, upon interrogatories administered by the plaintiff in this Court"; the only question was whether, among his punishments, he should lose one ear or both; "and these doubts were resolved by Coke, Chief Justice of the Common Bench, — where they were moved, — and Fleming, Chief Justice of the King's Bench, that L. should lose but one ear"); 1613, Countess of Shrewsbury's Case, 12 Co. 94, 2 How. St. Tr. 769 (before a council, including the Chancellor, the two Chief Justices, Coke being one, and the Chief Baron, probably the Star Chamber in substance; the Countess of Shrewsbury, being brought before the Council and "required to declare her knowledge" as to the escape of Lady Arabella Stuart, which the Countess was said to have abetted, declined to answer, first, because she had made a vow to God to keep the matter secret, and next, because she was privileged as a peer not to testify, except before her peers; both these claims were totally repudiated, and she was adjudged in high contempt; nothing was said, by either the party or the judges, of the procedure or the present privilege; yet it was certainly involved if it had existed); 1613, Lord Sanchar's Case, 9 Co. 114, 121 (Lord Sanchar, accused of murdering his fencing-teacher, was "particularly examined touching certain articles special and pertinent," and "being prest thereupon by the questions, he discovered a long and inveterate malice which he had had, with all the occasions and material circumstances of this murder").

[65] 1629, Stroud's Trial, Cobbett's Parl. Hist. II, 504, 526, 3 How. St. Tr. 235, 237 (certain members, including Hollis, Eliot, and others, having been arrested and examined by the king's order, and having refused "to answer out of parliament what was said and done in parliament" concerning treasonable utterances, the judges, being asked whether this refusal was not a high contempt, answered all "that it is an offence, punishable as aforesaid, so that this do not concern himself but another, nor draw him to danger of treason or contempt by his answer"; this was an equivocal utterance); 1644, Archbishop Laud's Trial, 4 How. St. Tr. 315, 385, 397 (being charged with unlawfully tendering the oath 'ex officio,' some years before, he answers that "that was the usual proceeding in that court [*i. e.* Council of the Star Chamber]"; it was "then the common, and for ought I yet know, then the legal course of that court").

[66] *Ante* 1635, Hudson, Treatise of the Court of Star Chamber, in Hargr. Collect. Jurid. I, 208 ("Neither must it question the party to accuse him of a crime. . . . But the great question hath been, whether a witness which in examination will not give any answer shall be compelled to make answer to the interrogatories. . . . Therefore, if a witness conceive that the answering of a question may prejudice himself, it seemeth that he need not to answer; for he is produced to testify betwixt others, and not to prejudice himself"); 208 ("neither must it question the party to accuse him of a crime, for it is an high contempt to make the justice of this court an instrument of malice"). But Lilburn's case, *post*, shows plainly that the practice was very different from Hudson's exposition.

1637–1645, *Lilburn's Trial*, 3 How. St. Tr. 1315; John Lilburn was committed to prison by the Council of the Star Chamber, including the Chief Justice of the King's Bench, on a charge of printing or importing certain heretical and seditious books; on examination, while under arrest, by the Attorney-General, having denied these charges, he was further asked as to other like charges, but refused, saying: "I am not willing to answer you to any more of these questions, because I see you go about by this examination to ensnare me; for, seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination; and therefore, if you will not ask me about the thing laid to my charge, I shall answer no more; . . . and of any other matter that you have to accuse me of, I know it is warrantable by the law of God, and I think by the law of the land, that I may stand upon my just defence and not answer to your interrogatories." Afterwards, "some of the clerks began to reason with me, and told me every one took that oath, and would I be wiser than all other men? I told them, it made no matter to me what other men do." Then, when examined before the Chamber itself, he again refused, saying, "I had fully answered all things that belonged to me to answer unto," but as to things "concerning other men, to insnare me, and get further matter against me," he was not bound "to answer such things as do not belong unto me; and withal I perceived the oath to be an oath of inquiry," *i. e.* 'ex officio,' "and of the same nature as the High Commission oath," which was against the law of the land, the Petition of Right, and the law of God as shown in Christ's and Paul's trials; yet, "if I had been proceeded against by a bill, I would have answered." Then the Council condemned him to be whipped and pilloried, for his "boldness in refusing to take a legal oath," without which many offences might go "undiscovered and unpunished"; and in April, 1638, 13 Car. I, the sentence was executed. On Nov. 3, 1640, he preferred a complaint to Parliament; and on May 4, 1641, the Commons (having not yet abolished the Star Chamber Court) voted that the sentence was "illegal and against the liberty of the subject," and ordered reparation. But, the petition going for a while no further, he applied once more, and on Feb. 13, 1645 (1646), the House of Lords heard his petition by counsel, Mr. Bradshaw urging for him the sentence's illegality, "the ground whereof being that Mr. Lilburn refused to take an oath to answer all such questions as should be demanded of him, it being contrary to the laws of God, nature, and the kingdom, for any man to be his own accuser"; and Mr. Cook arguing that, without an information, "to administer an oath was all one with the High Commission," whereon the Lords ordered that the said sentence "be totally vacated . . . as illegal, and most unjust, against the liberty of the subject and law of the land and Magna Charta"; and on Dec. 21, 1648, he was finally granted £3000 in reparation.

Lilburn's case, together with those of Prynne and Leighton (whose grievances were of another sort), were sufficiently notorious to focus the attention of London and the whole country. The Long Parliament (after eleven years of no Parliament) met on Nov. 3, 1640. Lilburn was on the spot that day with his petition for redress. In March, 1641, a bill was introduced to abolish the Court of Star Chamber, as well as (then or shortly after) a bill to abolish the Court of High Commission for Ecclesiastical Causes.[67] These were both passed July 2–5 of the same year;[68] and in the latter statute was inserted a clause which forever forbade, for any ecclesiastical Court, the administration 'ex officio' of any oath requiring answer as to matters penal.[69] This clause

[67] Cobbett, Parliamentary History, II, 722, 762, 853.

[68] St. 16 Car. I, cc. 10, 11.

[69] 1641, St. 16 Car. I, c. 11, § 4 (no person "exercising spiritual or ecclesiastical power, authority, or jurisdiction," shall " 'ex officio,' or at the instance or promotion of any other whatsoever, urge, enforce, tender, give, or

was in substance reënacted as soon as the Restoration of the Stuarts was effected.[70]

But was the oath hereby *totally* abolished in ecclesiastical Courts, — that is, was it the 'ex officio' proceeding only that was abolished, and could a man still be put to answer in a penal matter, in a cause lying within the Court's jurisdiction and begun by proper canonical presentment? This question fairly remained open under the first statute, though less plausibly under the second one. During the next twenty years after the enactment of the second statute, the matter came often before the Courts, in applications for prohibitions. The various rulings are hardly to be reconciled.[71] But, by the end of the 1600s, professional opinion apparently settled against the exaction of an answer under any form of procedure, in matters of criminality or forfeiture. Such, at any rate, beginning with the 1700s, was the application of the law ever after, without question.[72] The statutes had abolished, in those courts, all obligation to answer on oath to such matters, without regard to the form of presentment or accusation.

II. But what, in the mean time, of the *common law*, and of *jury trial?* Thus far the controversy here examined had been purely one of ecclesiastical jurisdiction and ecclesiastical methods of presentment. The common-law Courts had concerned themselves with it simply by virtue of their superior authority to keep the church Courts and other Courts to their proper boundaries. In their enforcement of these restrictions, one thing seems plain:

minister" to any person "any corporal oath, whereby he or they shall or may be charged or obliged to make any presentment of any crime or offence, or to confess or to accuse himself or herself of any crime or offence, delinquency, or misdemeanor, or any neglect, matter, or thing, whereby or by reason whereof he or she shall or may be liable or exposed to any censure, pain, penalty, or punishment whatsoever").

[70] 1661, St. 13 Car. II, c. 12, § 4 (no person "having or exercising spiritual or ecclesiastical jurisdiction" shall tender to any person "the oath usually called the oath 'ex officio' or any other oath," in etc., effect as in the prior statute).

[71] 1665, R. *v.* Lake, Hardr. 364, 385 (prohibition against exacting an oath on articles apparently involving a criminal charge; apparently granted, but upon another point); 1665, Scurr *v.* Burrell, 1 Sid. 232 (prohibition against a charge of exacting the oath in 'ex officio' proceedings for sitting in church with the hat on; adjourned, and apparently not decided); 1669, Goulson *v.* Wainwright, 1 Sid. 374 (prohibition granted against exacting an oath on 'ex officio' articles for "matters which are criminal"); 1669, Taylor *v.* Archbishop of York, 2 Keb. 352 (prohibition lies against exacting the oath in criminal charges); 1671, Grove *v.* Elliot, 2 Ventr. 41 (prohibition against exacting oath on charge of keeping conventicles, etc.; argued that "no man ought to be proceeded against without due presentment"; held, that it did not appear to be a proceeding "merely 'ex officio,' and due presentment must be presumed, and hence the prohibition was refused); 1680, Farmer *v.* Brown, 2 Lev. 247, T. Jones 122; s. c. Herne *v.* Brown, 1 Ventr. 339 (prohibition against requiring an answer to a charge of not paying a church tax; apparently treated as a civil case, and not within the statute's prohibition; after a division of the court and adjournment, the prohibition was refused unanimously).

[72] 1750, L. C. Hardwicke, in Brownsword *v.* Edwards, 2 Ves. Sr. 243, 245 (refusing to compel discovery of an incestuous marriage punishable in the ecclesiastical court: "I am afraid, if the Court should overrule such a plea, it would be setting up the oath 'ex officio,' which then the Parliament in the time of Charles I would in vain have taken away, if the party might come into this court for it"); 1752, Finch *v.* Finch, 2 Ves. Sr. 491, 493 ("as to the first objection to it, that it will subject him to ecclesiastical censures and that the court will not compel him to answer on oath, which is like an oath 'ex officio,' that is true"); 1822, Schultes *v.* Hodgson, 1 Add. 105 (prosecution for adultery, etc.; "this is a criminal suit"; and none of the articles were required to be answered).

There is no feature of objection to the compulsion, in itself, of answering on oath; the objection is as to *who* shall require it, and *how* it shall be required. On the very eve of the statute of 16 Car. I, and of the disappearance of the Star Chamber forever, John Lilburn, the stoutest of recusants, is willing to answer all matters properly charged against him, and objects only to "such things as do not belong unto me." He seems to have known no broader defensive principle to fall back upon, more substantial or inclusive than a conceded rule of ecclesiastical procedure. Was there in fact, at the time, any available principle known in the common-law Courts in jury trials?

1. Down to the early 1600s, at any rate, it was certainly lacking. If we look at what the common law had to build upon, before then, there is nothing of the sort. The generations which forced an accused to the ordeal and the compurgation oath had plainly no scruple against such compulsion.[73] Compurgation, under its later name of "wager of law," was enforced in the 1500s without objection. Jury trial came to be approved as a trial so much more effective that the defendant's oath in wager of law became, indeed, rather a privilege than a burden.[74] In jury trial, to be sure, the oath was not administered to the defendant, because it would, in those days, still be regarded as a decisive thing,[75] and as a method of summary self-exoneration which would be entirely too facile; it was the jurors' oaths that were to "try" him, not his own; and so, in jury trial proper, either in civil or in criminal cases, the oath of the party does not appear. But wherever, in other proceedings, it was thought appropriate to have the defendant's oath, there was no hesitation in requiring it. All through the 1500s the statute-book records the sanction of oaths to accused persons. The Star Chamber statute of 1487 (3 H. VII, c. 1) had expressly sanctioned the examination of the accused on oath at the trial, because "little or nothing may be found by inquiry" of the ordinary sort. The statute of H. VIII, in 1533, authorized the common-law officers to turn over indicted heretics for examination by the ordinaries upon oath.[76] Wherever a party is committed to jail by the judges for fraud or other misconduct done in the course of trial, by forging writs or the like, he appears to have been put to his examination on oath to disclose it.[77] Persons charged as bankrupts,[78] as Jesuits,[79] as abusers of

[73] Rather was it to be regarded as surprising that the inquisitional method, conquering the rest of Europe, failed in England alone; but "the escape was a narrow one" (Pollock & Maitland, Hist. Eng. Law, II, 655); instances of the direct questioning of the accused (*circa* 1268) may be seen in Maitland's Court Baron, Selden Soc. Publ. IV, 62, and in the records of the King's Council cited *supra*, n. 43.

[74] Thayer, Prelim. Treatise, 29.

[75] "All such persons to be tried by their oathes," is a phrase of 1543 in the Court of Requests: Selden Soc. Publ. XII, lxxxv. The reason for this attitude toward the oath is sufficiently explained in the history of the numerical system (*ante*, § 2032). Compare also the history of the disqualification of parties in civil cases (*ante*, § 575).

[76] *Supra*, note 37.

[77] 1565, Whiteacres *v.* Thurland, Dyer 242*a*; Dawbeny *v.* Davie, ib. 244*a*: Thurland's Case, ib. 244*b*.

[78] 1570, St. 13 Eliz. c. 7, § 5.

[79] 1593, St. 35 Eliz. c. 2, § 11 (any person suspected to be a Jesuit, etc., who "being examined by any person having lawful authority . . . shall refuse to answer directly and truly whether he be a Jesuit," shall be committed "until he shall make direct and true answer to the said questions").

warrants,[80] were to be examined on oath by common-law officers. Most notably, every accused felon was required to be examined by the justices of the peace, and his examination to be preserved for the judges at the trial;[81] and, so far as appears, not a murmur was ever heard against this process till the middle of the 1700s; [82] and no statutory measure was taken to caution the accused that his answer was not compellable, until well on in the 1800s.[83] The every-day procedure in the trials of the 1500s and the 1600s, and almost the first step in the trial, was to read to the jury this compulsory examination of the accused; in 1638, the year after Lilburn's imprisonment, in the very next recorded trial, the accused's previous examination before the Chief Justice was offered and read at the outset, without a shadow of objection.[84] Furthermore, as the trial goes on, the accused, in all this period of 1500–1620, is questioned freely and urged by the judges to answer; he is not allowed to swear, for the reasons already noted, but he is pressed and bullied to answer.[85]

A striking example is found in the jury trial of Udall, in 1590, for seditious libel; and the significant circumstance is that Udall, who before the ecclesiastical High Commission Court, a few months previous,[86] had plainly based his refusal on the illegality of making a man accuse himself by inquisition, has here, before a common-law jury with witnesses charging him, no such claim to make:

1590, *Udall's Trial*, 1 How. St. Tr. 1271, 1275, 1289: Udall pleaded not guilty; and after argument made and witnesses testifying, Judge CLARKE: "What say you? Did you make the book, Udall, yes or no? What say you to it, will you be sworn? Will you take your oath that you made it not?" declaring this to be a favor; Udall refused, and the judge finally asked: "Will you but say upon your honesty that you made it not?" Udall again refused; Judge CLARKE: "You of the jury consider this. This argueth that, if he were not guilty, he would clear himself"; then, to Udall: "Do not stand in it; but confess it."

The same features appear still in 1606, in the Jesuit Garnet's trial for the Gunpowder Plot; called before the Council inquisitorially, he denies his lia-

[80] 1601, St. 43 Eliz. c. 6, § 1 (persons charged with abuse of warrants are to be sent for by the judges "and be examined thereof upon their oaths," and if the offence be confessed by them or otherwise proved, they are to be committed to jail).

[81] 1553, St. 1 & 2 P. & Mar. c. 13, § 4; 1555, St. 2 & 3 P. & Mar. c. 10 (inasmuch as the preceding statute did not extend to cases where the prisoner was not bailed, "in which case the examination of such prisoner, and of such as bring him, is as necessary, or rather more, than where such prisoner shall be let to bail," so it is extended to the latter case also); the defendant was here not put on oath, though the witnesses were (*ante*, § 849), but the reason for this was merely as before, that the oath was thought to give to the accused's statements a solemnity and weight which would be too great an advantage. As late as 1709 (R. *v.* Derby, 19 How. St. Tr. 1011, 1013, note) a judge says of this proceeding, "To have him examined is a privilege."

[82] *Ante*, § 848.

[83] Ibid.

[84] 3 How. St. Tr. 1369, 1373.

[85] 1535, Sir Thomas More's Trial, 1 How. St. Tr. 386, 389; 1554, Throckmorton's Trial, 1 How. St. Tr. 862, 873; 1571, Duke of Norfolk's Trial, 1 How. St. Tr. 958, 972 ("then being ruled over by the Lord High Steward that he should answer directly to that question, he answered"); 1588, Knightley's Trial, 1 How. St. Tr. 1263, 1267. Mr. Justice Stephen's summary of the proceedings at this period is in agreement with what is above said: Hist. Crim. Law, I, 325; so also, for 1565, Smith, Com. of England, II, c. 26, quoted in Thayer, Prelim. Treatise, 157.

[86] *Supra*, note 47.

bility to answer;[87] but, tried on indictment before a common-law jury and the chief common-law judges, he is questioned and urged, he answers or refuses to answer, as it suits him, but says never a word of the illegality of such questions or an immunity from answer.[88] And such indeed, beyond a reasonable doubt, was the common law, as well as the common practice, of the time.[89]

It is true that precedents apparently to the contrary have been alleged to exist, — by Coke, for example, who invokes two common-law cases to support his ambiguous and shifting arguments. But neither these, nor any others hinted at, indicate in any way the existence of any common-law rule.[90] Even Coke himself, whose writings have since served as the chief source of information on this subject, does not actually go so far as to apply his arguments to any effect but the limitation of the ecclesiastical Courts' proceedings.[91] He

[87] 1606, Garnet's Trial, 2 How. St. Tr. 218, 244 (Garnet: "When one is asked a question before a magistrate, he is not bound to answer before some witnesses be produced against him, 'quia nemo tenetur prodere seipsum'"); note that this is a reference to the ecclesiastical rule of presentment, as already examined, not a refusal to answer at all events.

[88] Ibid. *passim*.

[89] If anything further were needed, the prevalence of torture as an aid to confession, upon the examination of political offenders, was absolutely inconsistent with the recognition of a privilege against self-crimination; and it is highly significant that the last recorded instances of torture (*ante*, § 818) and the first instances of the established privilege (*infra*, note 105) coincide within about a decade.

In Bench and Bar, vol. IX, N. S., 530 (1915), Mr. A. Leo Everett warns the reader against "an uncritical acceptance" of the above history. Such a warning, from one who had not gone through the original sources, would of course be merely crude impertinence. Whether Mr. Everett has perused the sources above cited does not appear. His only quarrel seems to be with that part of the history which deals with the period before the Tudor times, in that period he believes that the accused was privileged from answering. There is, indeed, scanty original authority for that period, but it seems to be all one way, and Mr. Everett brings forward no contrary evidence, except an undocumented assertion of Hallam's. The present writer respects Hallam's general authority, but in this field learned at the very outset of the search not to rely upon him.

[90] Hinde's Case, 1558, Dyer 175b; cited by Coke (12 Rep. 27; 3 Bulstr. 49) to show that a person need not answer in the church court questions that bring him in danger of a penal law. Hinde's case in fact was this: The king had appointed a commission to examine the title of Skrogs, a justice's clerk, to his office, with power to commit him if he refused to answer; he refused, demurring to the jurisdiction, and was committed; then he was released on 'habeas corpus' by the judges of the Common Pleas, because "he was a person of the court, and a necessarie member of it"; and the reporter adds: "*Simile*, M. 18, by Hind, who would not take an oath before the ecclesiastical judges for usury."

Leigh's Case, 1568, is cited by Coke (*ubi supra*) as that of an attorney committed by the High Court for refusing to swear as to attendance at mass, and delivered on 'habeas corpus' by the Common Pleas, because "they ought not in such case to examine upon his oath." There is nothing to show that this was not an application of the ordinary ecclesiastical rule, examined *supra*. In Anon., 2 Brownl. 271 (1609), occurs a case similar to Skrogs'.

In Attorney-General *v.* Mico, cited *post*, other alleged precedents, unreported and scantily mentioned, were bandied back and forth by counsel; but there is nothing to show that they really involved the present question.

[91] In 4 Inst. 60, 324, on the Star Chamber and High Commission Courts, he says nothing of the oath. In 2 Inst. 657, and 12 Rep. 26, he has much against the oath, but substantially upon the ground of jurisdiction alone. In Dighton *v.* Holt (cited *supra*, note 54), he advances frequently the argument 'nemo tenetur' (he had first used it in Collier *v.* Collier, cited *supra*, note 47); but this was an invocation of the canon-law rule taken from the canon lawyers. In Edwards' Case (cited *supra*, note 53), he is concerned chiefly with the jurisdiction, and does not even criticise the 'ex officio' oath as such, though in his opinion in 12 Rep. 26, said by him to have been solemnly given two years before, he attacks the oath with great plainness. No two of his various expositions coincide in argument; to reconcile all of his passages is impossible. Add to this his inconsistent attitude in the three cases cited *supra*, note 64. His proneness to maltreat precedents in supporting his views has already been noticed (*ante*, § 2036).

is willing to stop them from requiring answers "which may be an evidence against him at the common law upon the penal statute"; but he says nothing about a common-law illegality; indeed, this argument of his seems rather to assume the contrary. He freely quotes, in mutilated form, the canon-law phrase (whose origin has been examined above) "nemo tenetur seipsum prodere"; but there is nothing to show, down to the end of his life, that he believed in or knew of any privilege of refusal in the king's common-law proceedings.

The only source of doubt that can be found arises from certain scantily reported chancery rulings of the late 1500s. Some of these, at first sight, might be supposed to indicate the existence, as early as Elizabeth's reign, of a general privilege against self-crimination. Other explanations, however, lie open with fair plainness. In the first place, it is a long-established maxim of jurisdiction that equity will not lend its aid, even by relief, apart from discovery, to enforce a forfeiture; on this ground (and remembering that an "answer" in chancery is a pleading as well as testimony) are explainable the cases refusing to compel an answer as to a forfeiture.[92] In the next place, the Chancellor had almost no jurisdiction over criminal charges;[93] hence, in cases of this nature, cognizance might be declined, by refusing to compel an answer.[94] But, where this jurisdiction was not disputable, there seems to have been no objection to compelling the answer.[95] Finally, the chancery practice is to be interpreted by the rules of the ecclesiastical Courts, already examined. The Chancellor was forming his procedure (hardly organized until Bacon's time, in the early 1600s) almost precisely after that of the ecclesiastical Courts.[96] So far as he could take cognizance at all of a case involving a criminal fact, he would of course employ this ecclesiastical rule, as he did others, and not require the defendant to answer without due accusation by two witnesses or by presentment; that is to say, a plaintiff, upon his unsworn bill alone, could not put the defendant to answer to a criminal fact. The close affinity between the Chancellor's and the Church's

[92] Such are the following cases: 1587, 1598, Cromer *v.* Penston, Cary 13 (bill against the survivor of a joint tenancy, suggesting a secret severance during lifetime; "the Lord Keeper overruled, that the defendant should not answer," — whatever this may mean); 1595, Wolgrave *v.* Coe, Toth. 18 (bill against one covenanting to deliver deeds; "the opinion of the Court was, the defendant needed not to answer, because he should thereby disclose cause of forfeiture of the bond"); 1600, Toth. 7 ("Mildmay was not enforced by answer to the bill of Cary and Cottington, to discover a forfeiture to his own hurt"); see also Toth. 10.

[93] 1585, Wakeman *v.* Smith, Toth. 12 ("although criminal causes are not here to be tried directly for the punishing of them, yet incidently for so much as concerneth the equity of the cause, they are to be answered").

[94] This perhaps explains the following case, undated, but probably before 1600: Vice-Countess Montague's Case, Cary 12 (eloignment of a ward; upon a bill of discovery brought, "it seemed," as to the defendants, "they should not answer to charge themselves criminally, especially in this case, where so great a punishment as abjuration may follow").

[95] 1570, Anon., Dyer 288*a* (examination on oath in chancery to answer a charge of perjury; held, by C. P., to be allowable if the Chancery Court had jurisdiction over perjury); 1631, Winn *v.* Swayne, Toth. 12 ("a commission to answer bribery and corruption").

[96] "Equity followed the ecclesiastical courts almost literally in its mode of taking the testimony of witnesses and requiring each party to submit to an examination under oath by his adversary" (Langdell, Equity Pleading, § 47); and note 43, *supra*.

Courts makes it plain that we need not look to the former for light upon the common-law notions of the time — especially when that practice stands out plainly in the full and abundant reports throughout this whole period.

2. For nearly a generation onwards, in the 1600s, there is no acknowledgment of any privilege in common-law trials. Under Coke's leadership, from 1607 to 1616, the ecclesiastical Courts had been kept within bounds; but there were as yet no bounds in common-law proceedings. With 1620 begin indications that some impression was being transferred into that department.[97] Nevertheless, in the parliamentary remonstrances to Charles I, and the discussion over ship-money and forced loans and the Petition of Right, in the Parliament which ended in 1629, there is nothing about such a privilege.[98]

3. Finally, however, in 1637–41, comes Lilburn's notorious agitation;[99] and in 1641, with a rush, the Courts of Star Chamber and of High Commission are abolished, and the 'ex officio' oath to answer criminal charges is swept away with them.[100] With all this stir and emotion, a decided effect is produced, and is immediately communicated, naturally enough, to the common-law Courts. Up to the last moment, Lilburn had never claimed the right to refuse absolutely to answer a criminating question; he had merely claimed a proper proceeding of presentment or accusation.[101] But now this once vital distinction comes to be ignored. It begins to be claimed, flatly, that *no man is bound to incriminate himself*, on any charge (no matter how properly instituted), or *in any Court* (not merely in the ecclesiastical or Star Chamber

[97] 1620, Sir G. Mompesson's Trial, 2 How. St. Tr. 1119, 1123 (the Lords' Committee reported "that they had examined many witnesses, . . . that the Lords' Committee urged none to accuse himself"; but their proceedings were probably inquisitorial, and came rather under the ecclesiastical rule); 1631, Fitzpatrick's Trial, 3 How. St. Tr. 419, 420 (Fitzpatrick had testified, at Lord Audley's trial, to a rape committed by F. at A.'s instigation; at F.'s own trial, he then protested against the use of his former testimony, since "neither the laws of the kingdom required nor was he bound to be the destruction of himself"; and Chief Justice Hyde replied, "it was true, the law did not oblige any man to be his own accuser," yet here the testimony could be used).

It was in 1628 that the judges unanimously declared, in Felton's case, the murderer of the Duke of Buckingham, that "he ought not by the law to be tortured by the rack"; nevertheless, when Felton was examined before the Privy Council (3 How. St. Tr. 371), "the Council much pressed him to confess who set him on," and Bishop Laud told him "if he would not confess, he must go to the rack." Though the rack was declared unlawful, yet nothing is recorded as to the unlawfulness of urging a confession.

[98] The suggestion by Lilburn's counsel, in 1637 (3 How. St. Tr. 1356), that the 'ex officio' oath was "directly contrary to the Petition of Right in 3 Car.," referred apparently to par. iii and x of the Petition of Right of 1628 (3 How. St. Tr. 222; *infra*), which protested against being "called to make answer or take such oath." This, perhaps, meant a political promissory oath of conformity or obedience in connection with the refusal to pay ship-money, — an entirely different thing. On the other hand, however, it may have referred to a really inquisitorial oath. The circumstances were these: Darnel, E. Hampden, and others, in 1627, on being required to make a loan to the king, and being examined to disclose their estates, declined to pay or to disclose, and applied for release under a 'habeas corpus,' which was refused by the judges (3 How. St. Tr. 1); on which the Petition of Right was passed: 1628, 3 Car. I, c. 1, §§ 3, 10 (after reciting that persons refusing to make loans to the king "have had an oath administered unto them not warrantable by the laws or statutes of this realm," Parliament petitions "that none be called to make answer or take such oath," or be confined "for refusal thereof"; and the king accords the petition).

[99] *Supra*, note 67.

[100] *Supra*, note 69.

[101] *Supra*, in the text, par. I, (3).

tribunals).[102] Then this claim comes to be conceded by the judges, — first in criminal trials, and even on occasions of great partisan excitement;[103] and afterwards, in the Protector's time, in civil cases, though not without ambiguity and hesitation.[104] By the end of Charles II's reign, under the Restoration, there is no longer any doubt, in any court;[105] and by this period, the extension of the privilege to include an ordinary witness, and not merely the party charged, is for the first time made.[106] It is interesting to note, in

[102] 1641, Twelve Bishops' Trial, 4 How. St. Tr. 63, 75 (on being asked whether they had subscribed the treasonable petition, they refused to answer, because they were not "bound to accuse themselves").

[103] 1649, King Charles' Trial, 4 How. St. Tr. 993, 1101 (one Holden objected to answering, and the Court, "perceiving that the questions intended to be asked him tended to accuse himself, thought fit to waive his examination"); 1649, Lilburn's Trial, 4 How. St. Tr. 1269, 1280, 1292, 1342 (Lilburn, on a trial under the Commonwealth for treason, claimed that his former counsel, Bradshaw, now Lord President of the Council, had tried to make him criminate himself just as the Star Chamber Court had formerly done; he here refused on his trial to do so; Lord *Keble:* "You shall not be compelled"; *Lilburn:* "I am upon Christ's terms, when Pilate asked him whether he was the Son of God, and adjured him to tell him whether he was or no; he replied, '*Thou* sayest it.' So say I: *Thou*, Mr. Prideaux, sayest it, they are my books. But prove it"; Judge *Jermin:* "But Christ said afterwards, 'I *am* the Son of God.' Confess, Mr. Lilburn, and give glory to God"; see also p. 1445).

[104] 1655, The Protector *v.* Lord Lumley, Hardr. 22 (Exchequer; bill to discover defendant's estate, "for that he was outlawed whereby his goods and the profits of his lands were forfeited; the defendant's demurrer, 'quia nemo tenetur prodere seipsum'," is overruled, because "the outlawry is in the nature of a gift to the king or a judgment for him"; thus the general principle is apparently assumed valid; though, as already seen *supra*, note 92, the equitable rule against aiding a forfeiture may have been the reason); 1658, Attorney-General *v.* Mico, Hardr. 139, 145 (Exchequer; bill for relief and discovery, for evading customs laws and attempting to bribe; demurrer, that the bill contained charges involving penalties and forfeitures; the defendant evidently cites most of his authorities from Coke's works, which had now been published; there was no decision; nor yet in the case of Att'y-Gen'l *v.* ——, Hardr. 201, in 1662, probably the same case).

[105] 1660, Scroop's Trial, 5 How. St. Tr. 1034, 1039 (L. C. B. Bridgman: "You are not bound to answer me, but if you will not, we must prove it"); 1662, Crook's Trial, 6 How. St. Tr. 201, 205 (the defendant, refusing to take the oath of allegiance claimed that he ought not to accuse himself, for "nemo debet seipsum prodere"); 1670, Penn's and Mead's Trial, 6 How. St. Tr. 951, 957 (on a question being put to Mead, he refused to answer; "It is a maxim in your own law, 'Nemo tenetur accusare seipsum,' which, if it be not true Latin, I am sure it is true English, 'that no man is bound to accuse himself' "); 1673, Penrice *v.* Parker, Finch 75 (bill for counsel's fees; demurrer allowed, that an answer would "draw him under a penal law"); 1676, Jenkes' Trial, 6 How. St. Tr. 1189, 1194 (defendant: "I desire to be excused all farther answer to such questions, since the law doth provide that no man be put to answer to his own prejudice"; and no further questions were put); 1679, Reading's Trial, 7 How. St. Tr. 259, 296 (Oates for the prosecution, is not allowed to be asked questions to accuse himself); 1679, Whitebread's Trial, 7 How. St. Tr. 311, 361 (defendant's witness is not allowed to be asked whether he was a priest, because it would "make him accuse himself"); 1679, Langhorn's Trial, 7 How. St. Tr. 417, 435 (Oates is not allowed to be asked about "a criminal matter that may bring himself in danger"); 1680, Castlemaine's Trial, 7 How. St. Tr. 1097, 1096 (similar, for answers to "bring him in danger of his life"); 1680, Earl of Stafford's Trial, 7 How. St. Tr. 1293, 1314 (a question whereby a witness "shall accuse himself" is objected to); 1681, Plunket's Trial, 8 How. St. Tr. 447, 481 (a witness is not bound to answer questions that "may tend to accuse himself"); 1682, Bird *v.* Hardwicke, 1 Vern. 109 (bill of discovery, charging compounding a fraud; a plea is allowed, that the answer would "subject him to a forfeiture"); 1682, Anon., 1 Vern. 60 (defendant's argument that "A court of equity ought not to assist a man in recovering a penalty, nor compel a discovery of a forfeiture," is apparently conceded); 1684, Rosewell's Trial, 10 How. St. Tr. 147, 169 (witnesses are not bound "to charge themselves with any crime" or "subject themselves to any penalty"); 1685, Oates' Trial, 10 How. St. Tr. 1079, 1099, 1123 (witness is not compellable to make himself "obnoxious to some penalty"); 1691, African Co. *v.* Parish, 2 Vern. 244 (principle conceded); 1700, Firebrass' Case, 2 Salk. 550 (bill against a ranger for discovery of deer-killing; answer as to "what is to make him forfeit his place," is not compelled).

[106] Reading's Trial, *supra*, in 1679.

passing, that the privilege, thus established, comes into full recognition under the judges of the restored Stuarts, and not under the parliamentary reformers.[107]

Nevertheless, the novelty and recentness of it all in common-law proceedings is apparent, not only in the doubts which the Court of Exchequer, in 1658, so long entertained, and in the very gradual progress of the recognition in criminal trials after 1641, but also in the fact that it remained an unknown doctrine for this whole generation in the colony of Massachusetts, — a colony not only familiar enough with common legal proceedings, but knowing enough to send over for Sir Edward Coke's reports and other law books to inform its Court and keep abreast of the times. In this colony the privilege which began its career after the departure of its founders from England was unrecognized till at least as late as 1685; more, they formally sanctioned the ecclesiastical rule by which the inquisitional oath was allowed.[108]

[107] While this was passing in England, the precisely contemporary struggle, across the Channel, is in marked contrast, with its fatally opposite results; for the Council of Louis XIV, then upon the draft of the great criminal Ordonnance of 1670, was fixing, for a century to come, the French rule of compulsory self-crimination. Hitherto this had rested simply on traditional practice (*supra*, note 26); now it was confirmed by statute (Esmein, Hist. de la proc. crim. 229, transl. Simpson, as History of Continental Criminal Procedure; Continental Legal History Series, vol. V, 1913, pp. 224 ff). The arguments of the opposing councillors in the debate employ language identical with our own privilege: "Nul n'est tenu se condamner soi-même [par sa bouche."

In the Continental canon law the oath 'de veritate dicenda' was practically abolished not long after this (Salvioli, Jusjurandum calumniæ, p. 82; Hinschius, VI, pt. 1, pp. 70, 112, quoting a decree of 1725 of the Roman provincial council: "nec juramentum huiusmodi a reis eisdem, nisi ut testes quoad alios examinentur, in futurum . . . exigatur").

In the modern procedure of the Catholic Church the privilege against self-crimination, for civil parties and for the accused, is expressly recognized; for ordinary witnesses, a broader rule includes it: Codex Juris Canonici Pii X, 1917, Can. 1742, § 1 ("Judici legitime interroganti partes respondere tenentur et fateri veritatem, nisi agatur de delicto ab ipsis commisso)"; Can. 1744 ("Jusjurandum de veritate dicenda in causis criminalibus nequit judex accusato deferre; in contentiosis, quoties bonum publicum in causa est, debet illud a partibus exigere; in aliis, potest pro sua prudentia"); Can. 1755, § 2 ("Testes . . . veritatem fateri debent . . . Ab hac obligatione eximuntur: . . . 2. Qui ex testificatione sibi . . . infamiam, periculosas vexationes, aliave mala valde gravia obventura timent").

[108] 1642, Bradford's History of the Plymouth Plantation, 465 (answers by one of the ministers to a letter of inquiry from the Governor of Boston: "'Quest.: How farr a magistrate may extracte a confession from a delinquente to accuse himselfe of a capitall crime, seeing 'Nemo tenetur prodere seipsum?' 'Ans.: A majestrate cannot without sin neglecte diligente inquision into the cause brought before him. If it be manifeste that a capitall crime is committed, and that common report, or probabilitie, suspition or some complainte (or the like) be of this or that person, a magistrate ought to require and by all due means to procure from the person (so farr allready bewrayed) a naked confession of the fact . . . ; for though 'nemo tenetur prodere seipsum,' yet by that which may be known to the magistrat by the forenamed means, he is bound thus to doe; or else he may betray his countrie and people to the heavie displeasure of God'").

This deliverance is corroborated by the following series of enactments, which exhibit the spirit of the times: 1641, Massachusetts Body of Liberties, Whitmore's ed., § 45 ("No man shall be forced by torture to confess any crime against himselfe nor any other unlesse it be in some capitall case where he is first fullie convicted by cleare and suffitient evidence to be guilty. After which, if the cause be of that nature, that it is very apparent there be other conspiratours or confederates with him, then he may be tortured, yet not with such tortures as be barbarous and inhumane"); § 61 ("No magestrate, juror, officer, or other man, shall be bound to informe present or reveale any private crim or offence, wherein there is no perill or danger to this plantation or any

Moreover, the privilege as yet, until well on into the time of the English Revolution, remained not much more than a bare rule of law, which the judges would recognize on demand. The spirit of it was wanting in them. The old habit of questioning and urging the accused died hard, — did not disappear, indeed, until the 1700s had begun.[109]

4. The privilege, too, creeping in thus by indirection, appears by no means to have been regarded as the constitutional landmark that our own later legislation has made it. In all the parliamentary remonstrances and petitions and declarations that preceded the expulsion of the Stuarts, it does not anywhere appear.[110] Even by 1689, when the Courts had for a decade ceased to question it, and at the English Revolution the fundamental victories of the past two generations' struggle were ratified by William in the Bill of Rights,[111] this doctrine is totally lacking. Whatever it was worth to the American constitution-makers of 1789, it was not worth mentioning to the English constitution-menders of 1689. It is a little singular that the later body, who had themselves suffered nothing in this respect, and could herein aim merely to copy the lessons which their forefathers of a century ago had handed down from their own experience, should have incorporated a principle which those forefathers themselves, fresh from that experience, had never thought to register among the fundamentals of just procedure.[112]

member thereof, when any necessarie tye of conscience binds him to secresie grounded upon the word of God, unlesse it be in case of testimony lawfully required"); 1660, Revised Laws and Liberties, "Punishment," "Jurors" (repeats in substance the foregoing); "Innkeepers" (parties may be examined by the magistrate, for offences against the liquor law); 1672, General Laws and Liberties, same titles (repeats in substance the foregoing; no changes were made as late as 1685).

No attempt has been made to discover the progress of the principle in the other colonies; but their records would doubtless disclose interesting material. It appears, for example, that the Bill of Rights in the first Maryland Constitution, of 1776, gave to the principle so loose a recognition as the following: Art. 20: "No man ought to be compelled to give evidence against himself in a court of common law or in any other court, but in such cases as have been usually practised in this State or may hereafter be directed by the Legislature"; the proviso was not omitted until the Constitution of 1864.

A summary of the early constitutional legislation on the privilege is found in the opinion of Moody, J., in Twining *v.* New Jersey, 211 U. S. 78, 29 Sup. 14 (1908).

[109] The following are merely a few examples at random: 1656, Nayler's Trial, 5 How St. Tr. 801, 806; 1660, Scroop's Trial, 5 How. St. Tr. 1034, 1039; Carew's Trial, 5 How. St. Tr. 1048, 1054; 1663, Twyn's Trial, 6 How. St. Tr. 513, 532; 1679, Reading's Trial, 7 How. St. Tr. 259, 302; 1692, Harrison's Trial, 12 How. St. Tr. 895; 1702, Swendsen's Trial, 14 How. St. Tr. 559, 580, 581; 1702, Baynton's Trial, 14 How. St. Tr. 598, 621-625. Sir J. Stephen (Hist. Crim. Law, I, 440) says that the practice of questioning the prisoner "died out soon after the Revolution of 1688"; but this is perhaps giving too early a cessation. Lord Holt died in 1710, and "to the end of his life he persevered in what we call 'the French system' of interrogating the prisoner during his trial" (Campbell's Lives of the Chief Justices, II, 174).

So, too, in Choice Cases in Chancery, 1652-1672, containing a short treatise on chancery practice, there is no mention of the privilege, among the rules for witnesses or for parties' answers.

[110] *Supra*, note 98; Cobbett's Parl. Hist. II, *passim*. In 1641, Parliament itself was trying its hand at inquisitional examinations: Cobbett's Parl. Hist. II, 668, 672.

[111] 1689, 1 W. & M. 2d sess., c. 2.

[112] The real explanation of the Colonial conventions' insistence on it would seem to be found in the agitation then going on in France against the inquisitional feature of the Ordonnance of 1670 (*supra*, note 107). There appears no allusion, in Elliot's Debates on the Constitution, to the contemporary French movement; but the delegates who had been over there must have known of it. The proposals of reform laid before the French Constitutional Assembly from the Provinces, in 1789, show how strong was the popular agi-

But, after all, the still more interesting question is, How did the result come about in England itself? How did a movement, which was directed, originally and throughout, against a method of procedure in ecclesiastical Courts, produce in its ultimate effect a rule against a certain kind of testimony in common-law Courts? The process of thought, popular and professional, is to be accounted for. For our history of legal ideas we do not ordinarily expect to go to Bentham. But he was the first to search into this history, and to maintain that this common-law privilege did not antedate the Restoration; [113] and, in this instance, his explanation of the process of thought by which the transmutation took place seems fairly to represent the probabilities. That explanation (as indeed the foregoing details exhibit) lies in the principle of the association of ideas, — an association which began to operate immediately in the reactionary period of the Restoration and the Revolution, when the growth and ascendancy of Whig principles involved all the Stuart practices in one indiscriminate and radical condemnation. Read in the light of the foregoing details, the great reformer's words serve as a correct analysis of motives and a fitting summary to the history:

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. IV, c. III (Bowring's ed., vol. VII, pp. 456, 460): "Of the Court of Star Chamber and the High Commission Court taken together, . . . the characteristic feature was that by taking upon them to execute the will of the king alone, as made known by proclamations, or not as

tation. The Third Estate in every district, in their 'cahiers' sent up to Paris, had voted to abolish compulsory sworn interrogation of the accused, and the Clergy in ninety-one districts had done the same. The decree of 1789 (though keeping the interrogation) abolished the oath 'de veritate'; Art. 12: "For this interrogatory, and for all others, the oath shall not be required from the accused"; and the Instructions of 1791 added: "Mere good sense suffices to convince of the uselessness and immorality of such an oath" (Esmein, Hist. de la proc. crim. 405).

But the privilege, as we understand it, is perhaps not yet fully established in *France*. The code d'Instruction Criminelle of 1808 retained the interrogatory, without the oath, it would seem (1898, Dalloz, Les Codes Annotés, Code d'Instr. Crim. § 310, App. note 20, Art. 93, notes 69-74; and the quotation from Stephen, *post*, § 2251). The new draft Code of 1878-80 had this article covering the preliminary hearing only: Art. 85. "The committing magistrate shall establish the identity of the accused, acquaint him with the charge, and receive his statements, after informing him that he is at liberty not to answer the questions that are put to him." This provision was adopted by the law of Dec. 8, 1897, Art. 3 (Dalloz, *ubi supra*, App. to Livre I, p. 248[2]): "Upon the preliminary arraignment of the accused, the magistrate is to establish his identity, to notify him of the facts charged against him, and to receive his statements, after warning him that he is at liberty not to make any. This warning must be recorded in the magistrate's report."

The contemporary law and practice in France is fully set forth in Professor James W. Garner's "Criminal Procedure in France" (1916, Yale L. Journal, XXV, 4, 255).

In *Germany* such a provision for the committal proceedings has apparently been introduced: Lowe, Die Strafprozessordnung fur das deutsche Reich, 10th ed., § 136, p. 427. But both in France and Germany there would be no doubt as to drawing inferences from the accused's refusal to answer.

In the *Philippine Islands*, under the Spanish system of procedure, including the reforms of 1880, the privilege was not in force, though the use of torture had been abolished: 1904, U. S. *v.* Navarro, 3 P. I. 143, 148; three judges diss.; Mapa, J., writes a learned opinion for the dissent.

[113] Mr. Justice Stephen had outlined the true history of the privilege in 1857, in his essay in the Juridical Society's Papers, I, 456 (The Practice of Interrogating Persons accused of Crime), and again in his History of the Criminal Law (1883), I, 342; his summary of the history was that the rule "arose from a peculiar and accidental state of things which has long since passed away, and that our modern law is in fact derived from somewhat questionable sources, though it may no doubt be defended."

yet known so much as by proclamations, they went to supersede the use of parliaments, substituting an absolute monarchy to a limited one. In the case of the High Commission Court, the mischief was aggravated by the use made of this arbitrary power in forcing men's consciences on the subject of religion. In the common-law Courts, these enormities could not be committed, because (except in a few extraordinary cases), convictions having never, in the practice of these Courts, been made to take place without the intervention of a jury, and the bulk of the people being understood to be adverse to these innovations, the attempt to get the official judges to carry prosecutions of the description in question into effect present itself as hopeless. In a state of things like this, what could be more natural than that, by a people infants as yet in reason, giants in passion, every distinguishable feature of a system of procedure directed to such ends should be condemned in the lump, should be involved in one undistinguishing mass of odium and abhorrence; more especially any particular instrument or feature, from which the system was seen to operate with a particular degree of efficiency towards such abominable ends? . . . In those days, the supreme power of the State was 'de facto' in the hands of the king alone; . . . being employed and directed against property, liberty, conscience, every blessing on which human nature sets a value, — every chance of safety depended upon the enfeeblement of it; every instrument on which the strength of that government in those days depended, every instrument which in happier times would to the people be a bond of safety, was an instrument of mischief, an object of terror and odium. . . . No practice could come in worse company than the practice of putting adverse questions to a party, to a defendant (and in a criminal, a capital case), did in that instance."

§ 2251. **Policy of the Privilege.** Neither the history of the privilege, nor its firm constitutional anchorage, need deter us from discussing at this day its policy. As a bequest of the 1600s, it is but a relic of controversies and convulsions which have long ceased. Its origin was local; in the other legal systems of the world it has had no place. It must therefore justify itself in the juridical forum of nations. Nor does its constitutional sanction, embodied in a clause of half a dozen words, relieve us from the necessity of considering its policy; for the attitude here taken may lead either by favoring implications to a wide extension of its scope, or by disfavoring interpretation to its close restriction. A sound and intelligent opinion must be formed upon the merits of the policy.

1. To reach this opinion, let us listen first to what has been urged against that policy. Few names, among jurists, have ever appeared as challengers on this side of the lists, but they are names of extraordinary panoply in the law, — those of Jeremy Bentham, the philosopher and reformer, and of William Appleton, Chief Justice of the Supreme Court of Maine, his disciple.[1] Remembering that in less than three generations nearly every reform which Bentham advocated for the law of Evidence has come to pass, we might almost regard his condemnation of any rule as presumptively an index of its ultimate downfall. Considering, too, that his disciple, as Chief Justice, while preaching against the anomalies of the law, presided over its administration

§ 2251. [1] A criticism of the privilege will also be found in Mr. (later L. C. J.) Denman's comments in 40 Edinb. Rev. 190 (1824), reviewing Bentham's treatise, and, more recently, in Professor Henry T. Terry's article in the Yale Law Journal, XV, 127 (1906), "Constitutional Provisions against Forcing Self-Incrimination."

for nearly twenty years upon the bench and commanded his colleagues' constant support in the vindication of his principles, we must concede to his views that value which experience gives as a test of the validity of theory. The argument against the privilege, as advanced by these jurists, is represented in the following passages:[2]

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. IV, c. III (Bowring's ed., vol. VII, pp. 452 ff.): "(*a*) Pretences for exclusion [of the accused's testimony on compulsion]. . . . 2. *The old woman's reason.* The essence of this reason is contained in the word 'hard'; 'tis 'hard' upon a man to be obliged to criminate himself. Hard it is upon a man, it must be confessed, to be obliged to do anything that he does not like. That he should not much like to do what is meant by his criminating himself, is natural enough; for what it leads to is his being punished. What is no less hard upon him is that he should be punished: but did it ever yet occur to a man to propose a general abolition of all punishment, with this hardship for a reason for it? Whatever hardship there is in a man's being punished, that, and no more, is there in his thus being made to criminate himself. . . . Nor yet is all this plea of tenderness, — this double-distilled and treble-refined sentimentality, anything better than a pretence. From his own mouth you will not receive the evidence of the culprit against him; but in his own hand, or from the mouth of another, you receive it without scruple: so that at bottom, all this sentimentality resolves itself into neither more nor less than a predilection — a confirmed and most extensive predilection, for bad evidence. . . . 'You are sure of being convicted: by what sort of evidence would you choose rather to be convicted? By the evidence of other people without any of your own, or by evidence of other people's and your own together'? Were a question of this sort put to a malefactor, would it not be matter of perplexity to him to choose? Would not a pot of beer or a glass of gin, on whichever side placed, be sufficient to turn the scale?[3] But allowing, for the sake of argument, that there is a difference between the pain in the one case and the pain in the other — for my own part, I can see none — but if there be, can it be assumed as a competent and sufficiently broad and solid ground for the establishment of a rule of law? Is there anything here capable of being set against the mischiefs of impunity? the mischiefs of the offence (be it what it may) which the law in question — the law which the rule of exclusion in question seeks to debilitate — is employed to combat? . . . 3. *The fox-hunter's reason.* This consists in introducing upon the carpet of legal procedure the idea of 'fairness,' in the sense in which the word is used by sportsmen.[4] The fox is to have a fair chance for his life: he must have (so close is the analogy) what is called 'law,' — leave to run a certain length of way for the express purpose of giving him a chance for escape. While under pursuit, he must not be shot: it would be as 'unfair' as convicting him of burglary on a hen-roost in five minutes' time, in a court of conscience. In the sporting code, these laws are rational, being obviously conducive to the professed end. Amusement is that end; a certain quantity of delay is essential to it; dispatch, a degree of dispatch reducing the quantity of delay below the allowed minimum, would be fatal to it. . . . [In this view] to different persons, both a fox and a criminal have their use; the use of a fox is to be hunted; the use of a criminal is to be tried. . . . 4. *Confounding interrogation with torture;* with the application of physical suffering, till some act is done, — in the present instance, till testimony is given to a particular effect required. On this occasion it is necessary to observe, that the act of putting a question to a person whose station is that of defendant in a cause, is no more an act of torture than the putting the same question to him would

[2] Chief Justice Appleton's statement of the case, not differing greatly from Bentham's, is found in his treatise on Evidence (1860), c. vii, pp. 129–134, c. xv, p. 246.

[3] This is an allusion to some of the absurd rulings on confessions (*ante*, § 839).

[4] For comments on the sportsmanship theory in English law, see *ante*, § 1845.

be, if, instead of being a defendant, he were an extraneous witness.[5] Whatever he chooses to say, he is at full liberty to say; only under this condition, properly but not essentially subjoined, viz. (as in the case of an extraneous witness) that, if anything he says should be mendacious, he is liable to be punished for it, as an extraneous witness would be punished. . . . 5. Reference to *unpopular institutions*. 'Whatever Titius did was wrong; but this is among the things that Titius did; therefore this is wrong'; such is the logic from which this sophism is deduced. In the apartment in which the Court called the Court of Star Chamber sat, the roof had stars in it for ornaments; or else certain deeds to which Jews were parties, and by them called shetars or shtars, used to be kept there; or, possibly, there being no natural incompatibility, both these facts were true. 'Whether it was owing to the gilt stars, or to the Jew parchments, the judges of this Court conducted themselves very badly; therefore judges should not sit in a room that has had stars in the roof, or in a room in which Jew parchments have been kept'; had the conclusion been in this strain, the logic would not have been very convincing, but neither would the mischief have been very great. 'In the High Commission Court, the judges sat and tried causes in virtue of a commission, and they too conducted themselves very badly; therefore judges ought not to be appointed by a commission.' The logic, though not less rational than in the preceding case, begins to be rather mischievous. . . . The Inquisition (meaning the true inquisition, of the Spanish sort) that used to work with such success in the extirpation or conversion of heretics, was a court in which it was the way of the judge to inquire into the business that came before him; to put questions to such persons as, in his conception, were likely to be more or less acquainted with the matter; and this, whether extraneous witnesses or parties. 'Now this it is that was and is a most wicked and popish practice. Judges ought not to put questions; be the business what it may that comes before them, it ought to be the care of judges never so much as to attempt to see to the bottom of it.' Here, then, we see the true source of all the odium; viz. not merely of that which has attached itself to this abominable court, but of that which attached itself to those other abominable courts. It was not by sitting in a room with stars or parchments in it, it was not by acting under a commission too high in itself, or that lay on too high a shelf; it was not by either of these causes that the two English courts, held in such just abhorrence by all true Englishmen, were rendered so bad as they were, — but by their abominable practice of asking questions, by the abominable attempt to penetrate to the bottom of a cause. [Such are the absurd reasons upon which it is claimed that the accused in a criminal cause ought to be privileged from answering all questions as to his complicity.] . . . [(*b*) The witness' privilege]. It may happen that the cause by means of which the deponent exposes himself to the mischief attached to the self-prejudicing evidence is not the cause in hand, but another cause, viz. a cause already in prospect, or a cause liable to be produced by the disclosure made by the evidence. . . . Prosecution for robbery: John Stiles examined in relation to it, in the character of an extraneous witness. A question is put, the effect of which, were he to answer it, might be to subject him to conviction in respect of another robbery, attended with murder, in which he bore a share. On the ground of public utility and common sense, is there any reason why the collateral advantage thus proffered by fortune to justice should be foregone? Refusing to compass the execution of justice by this means, by what fairer or better means can you ever hope to compass it? The punishment he will incur, if any, will be a distinct punishment, for a distinct offence; an offence which, at the institution of the suit, was perhaps never thought of. Be it so; and should this happen, where will be the mischief? Wherein consists the grievance? That a crime, which, but for the accident, might perhaps have remained unpunished, comes, by means of this accident, to be punished. . . . But what

[5] This attitude of maudlin sentimentality, repeating the misnomer of "torture," has not disappeared even since Bentham's day; as witness the following language of Temple, J., in People v. Arrighini, 122 Cal. 121, 54 Pac. 591: "The inquisition of torture is restored, only without the rack and thumbscrew."

shall we say, if, by a summons to appear as a witness in a cause (penal or non-penal) between other persons, an individual is purposely entrapped; and, being (in obedience to that summons) actually in court, is interrogated concerning a distinct offence supposed to have been committed by himself, and, in consequence of his answers, stopped and consigned to durance. What? Why, that so a delinquent be but brought into the hands of justice, just as well may it be by this means as by any other. Truth is not violated; fiction is not employed: no false tale is told; no falsehood here defiles the lips of justice. Nor, though possible, is the case likely to be frequent. The question must be relevant, pertinent to the cause actually in hand, or an answer will not be (for it ought not to be) allowed to be given. . . . An effect (for example) which certainly might, by design and contrivance, be brought into existence by incidental self-convicting evidence, is that of instituting a sort of feigned suit, penal or non-penal, for the purpose of bringing to light, not the facts belonging properly and directly to the avowed cause of action, but others, of a complexion differing to any degree of remoteness. Suppose, for example, a project formed for bringing down disgrace and punishment on the head of an individual, by means of questions to be put to him, in the character either of a defendant or a witness, in a cause to be instituted on purpose; drawing thus out of his mouth the confession of some crime, or disgraceful act, for which he has not been prosecuted. May not this be done? Yes: but not with any advantage to the party whose invention is supposed to be thus employed, nor with any disadvantage to the party against whom it is supposed to be employed. Why? Because in this there is nothing more than what might be done in a direct and ordinary way, by a suit instituted on purpose. In every point of view, then, in which it can be considered, the practice in question appears to stand clear of objection. In the first place, because the result supposed to be produced, cannot, with any propriety or consistency, be reckoned in the number of undesirable results; in the next place, because, though it were, no ulterior facility is afforded, beyond what would exist without it."

2. In weighing the foregoing objections, it is indispensable to distinguish between (*a*) questioning an ordinary witness, (*b*) questioning by preliminary inquisition one who is as yet not charged, (*c*) questioning an accused who has been duly placed on trial by indictment:

(*a*) For the *ordinary witness*, Bentham's argument seems to fail. It is true, as he points out, that the mere self-betrayal by the witness is of itself no evil, and that the instances of pretended suits to provide the opportunity for such self-betrayal would probably not be numerous. But there are other considerations. The witness-stand is to-day sufficiently a place of annoyance and dread. The reluctance to enter it must not be increased. Every influence which tends to suppress the sources of truth must be removed. To remove all limits of inquiry into the secrets of the persons who have no stake in the cause but can furnish help in its investigation, would be to add to the motives which now sufficiently dispose them to evade their duty. Moreover, no serious loss to justice can be incurred by recognizing the privilege. If the witness' testimony is indispensable, and the incriminating fact is vital to the cause, a pardon, executive or statutory, can for the particular instance remove the privilege.[6]

(*b*) For the *preliminary inquisition of one not yet charged* with an offence, the claims of the privilege seem equally valid. This aspect of it seems to

[6] *Post*, §§ 2280, 2281.

have been ignored by Bentham. Yet it was historically this situation which gave rise to the privilege. The system of "inquisition," properly so called, signifies an examination on mere suspicion, without prior presentment, indictment, or other formal accusation (*ante*, § 2250); and the contest for one hundred years centred solely on the abuse of such a system.[7] In the hands of petty bureaucrats, whether under James the First, or under Philip the Second, or in the twentieth century under an American republic, such a system is always certain to be abused.[8] The whole principle of the grand jury presupposes a formal and deliberate accusation, based on probable cause, before any person is called to answer for a crime. No doubt a guilty person may justly be called upon at any time, for guilt deserves no immunity. But *it is the innocent that need protection.* Under any system which permits John Doe to be forced to answer on the mere suspicion of an officer of the law, or on public rumor, or on secret betrayal, two abuses have always prevailed and inevitably will prevail; first, the petty judicial officer becomes a local tyrant and misuses his discretion for political or mercenary or malicious ends; secondly, a blackmail is practised by those unscrupulous members of the community who through threats of inspiring a prosecution are able to prey upon the fears of the weak or the timid. The modern system of formal presentment needs no defence. In this aspect the privilege against self-crimination is, in history and in policy, its just complement, in so far as it exempts all persons from being compelled to disclose their supposed offences before formal process of charge is had.

(*c*) When we come to the case of an *accused duly charged* by indictment and *now placed on trial*, we reach a somewhat different set of considerations. Here the question is merely whether he shall be required to disclose all that he knows of the crime charged against him. None of the considerations applicable to the foregoing situations have here any bearing. What is there to exempt the accused from simple and straightforward answers of denial, confession, or explanation? There are, to be sure, what the great jurist so plainly and truly stigmatized as the "old woman's reason" and the "fox-hunter's reason." There are also the false shibboleths of "torture" and the like; but these can only succeed in affecting us through the old rhetorical device of calling a thing by epithets which do not belong to it. So far as Bentham's argument goes, *i. e.* for the individual case, it is irrefutable. Assuming *this* man to be guilty, there is no good reason to exempt him.

There is no escape from this fundamental truth, so long as we confine our-

[7] This is illustrated by the trial of Lilburn (already quoted *ante*, § 2250), in 1637, 3 How. St. Tr. 1315, 1318; Lilburn, to those questioning him, replied: "I am not willing to answer you to any more of these questions, because I see you go about by this examination to ensnare me; for, seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination; and therefore, if you will not ask me about the thing laid to my charge, I shall answer no more."

[8] That these abuses are the creature of no one country or time may be seen from the extent to which the moral instincts of certain American officers were sapped by the insidious example, set before them in the Philippine Islands, in 1898, of the so-called "water-cure" for extracting information.

selves to the assumption on which it rests. That assumption is that the person charged is guilty. But assume him innocent, and a different problem is presented — a problem to which Bentham's arguments did not do justice. The truth is that the privilege exists for the sake of the innocent [9] — or at least for reasons irrespective of the guilt of the accused. It is not so much that the mere process of questioning and cross-questioning the accused is likely to perturb his mental operations, and educe from him the words and conduct of a guilty man. Current experience, as shown by the demeanor of defendants who voluntarily take the stand and are acquitted, discredits this. Moreover, the conduct of the accused, even while under the mental strain induced by arrest and incarceration, is not rejected as a source of evidence.[10]

The real objection is that *any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby.* The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer, — that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.

The argument is indeed empiric; and, being empiric, it is open to the fallacy of mistaking a mere accidental association for a cause. In the Continental procedure, for example, the judge exercises also in part the functions of our prosecuting officer; and it is probable that the abuses of which such a system is capable, when the privilege is not recognized, would be much less under a system like our own, in which the judicial and the prosecuting functions are sharply separated. Nevertheless, it is difficult to know how much allowance is to be made on this account; and it is wiser to accept the warnings of experience, even at the risk of overstraining their import. It may be conceded that the Continental practice is efficacious in detecting guilt.[11] But it must also be conceded that it leads to or is found united with a spirit of petty judicial license and browbeating, dangerous to innocence, and certain to lead to great abuses in our own community, if it once obtained a sanction.[12]

[9] 1862, Byles, J., in Bartlett *v.* Lewis, 12 C. B. N. S. 249, 265: "The rule was intended for the protection of the innocent, and not for that of the guilty."

[10] *Ante*, §§ 273, 871.

[11] See the remarks of Mr. J. Denman, already referred to, in 40 Edinb. Rev. 190; Mr. John (later Chief Justice) Campbell, during his sojourn in France, formed somewhat similar opinions about the French practice (Life, I, 362).

[12] The insidious effects of the practice in this respect may be seen in the history of the Holy Inquisition. Although the rules of the ordinary penal law of the church, even in 'ex officio' inquisitions, declared a confession insufficient 'per se' for condemnation, and hedged it about with rules (Esmein, Hist. de la proc. crim., 268 *et passim*, translated as vol. V of the Continental Legal History Series), yet as soon as these rules were relaxed in the special procedure

For the sake, then, not of the guilty, but of the innocent accused, and of conservative and healthy principles of judicial conduct, the privilege should be preserved.

3. Of the few attempts to analyze frankly the grounds of the privilege, the following passages are entitled to unusual weight, each for its own reasons:

1848, *Commissioners on Criminal Law in the Channel Islands*, Second Report, 8 St. Tr. N. s. 1127, 1200, 1210–1212; these Commissioners were appointed to inquire into the state of the criminal law in the Channel Islands — Guernsey, Jersey, Alderney, and Sark—, which, though long ago coming under English domination, had retained in their law many institutions essentially French; the Commissioners, reporting upon Guernsey, recommended the abolition of the process of examining the accused, with the following explanations: "Upon the information obtained from the preliminary examination, an 'acte d'accusation' is framed by the Court, charging the accused with the facts deposed to by the witnesses. He is then called before the Court. The 'acte d'accusation' is read to him; and, if he denies the crime, he is questioned by the Court upon the evidence previously obtained. This is called the 'interrogatoire.' It is also taken at a secret sitting of the Court; the prisoner being alone, and not allowed the assistance of a legal adviser. The present practice, however, requires that he be told that he cannot be compelled to answer the questions of the Court, and that what he says will be used against him at the trial. This is a departure from the old law in Terrien and the 'approbation,' by which the accused, in the event of refusing to answer or not answering pertinently, would be subjected to the torture. . . . The preliminary examinations 'au secret,' and the consequent 'interrogatoire' of the accused, appear to us equally objectionable. But our opinion with regard to them is not that of the Bailiff [*i. e.* Chief Justice] and the majority of the lawyers of the Court. This part of the criminal process differs so essentially from all that we have been accustomed to, as English lawyers, that we were anxious to have the subject discussed before us, in order to ascertain the opinions of the members of the Court, and the advocates, on the subject. With one exception, that of Mr. Falla, a gentleman very extensively engaged in the defence of criminals, the members of the Court, including the Bailiff [*i. e.* Chief Justice] and the Bar, were, more or less strongly, in favour of continuing the practice. The value of the Bailiff's testimony in favour of the system is the greater from his having been an English lawyer, filling criminal and civil judicial functions in England, and from his avowing that his opinions had been changed by experience. We are bound also to add that it was an unanimous opinion that the

of the Holy Inquisition, the whole effort degenerated into the procurement of a confession. "A confession dispensed with all other investigation and all further proceedings, either by the party-accuser (when the cause was begun by complaint) or by the judge (when it was 'ex officio'). One can thus understand with what zeal it was sought for in inquisitional proceedings" (Tanon, Hist. des tribunaux de l'inquisition en France, 358).

Some of these abuses are to be seen in the French trials quoted in Stephen's History of the Criminal Law, vol. III. Appendix; Feuerbach, Narratives of Remarkable (German) Criminal Trials (tr. by Duff-Gordon, 1846); Mejan, Causes Célèbres (1808–1811); Loeffler, Die Opfer mangelhafter Justiz (Jena, 1873); Fuller, Noted French Trials (Boston, 1882); Trials of Troppman and Prince Bonaparte, 5 American Law Review 14 (1870); another example of a French trial, treated from the English point of view, will be found in Thackeray's Paris Sketch book, in the chapter on "The Case of Peytel"; and from the French point of view the method is favorably depicted in de Balzac's novels of Lucien de Rubempré, cc. 16–23, and An Historical Mystery, cc. 17, 18, and in Gaboriau's novel of Monsieur Lecocq, cc. 16–31.

Compare the discriminating comments in Dr. Francis Lieber's Civil Liberty and Self-Government, ch. 7, and App. III (The Inquisitorial Trial); Sir S. Romilly's Memoirs, 2d ed., 1840, I, 315; N. W. Senior's Biographical Sketches (1863, pp. 209, 227, 313; Essays on Lord Holt, on Feuerbach, and on Ramcke).

The best account of the French system, its history and present practice, is to be found in Professor James W. Garner's "Criminal Procedure in France" (Yale Law Journal, 1916, XXV, 255).

practice of the Court had much improved under his presidency, so that his opinion in favour of retaining the ancient system could not possibly arise from prejudice or illiberal dread of change. We feel diffident in dissenting from such authority; but the reasons alleged in support of the present system have failed to convince us. . . . It is certainly not, at first sight, contrary to justice, that a party accused of crime, who has heard the evidence against him and has had an opportunity of questioning the witnesses, should be interrogated to elicit his explanation of the facts, before he is committed for trial. If means could be devised to ensure its never being abused, the 'interrogatoire,' so conducted, would be perhaps a proper mode of arriving at truth. But it cannot be said to be necessary for that purpose. Its utility was maintained by the Court and members of the Bar chiefly on the ground that the truth told by a man in answer to questions of the Court, without his having heard the evidence which suggested them, gives great weight to that part of his statement which is otherwise incapable of proof. But this is precisely the objection to the 'interrogatoire' as conducted by the Royal Court. An innocent person, who is perfectly intelligent and honest, has nothing to fear from any criminal prosecution fairly conducted. But most of the persons accused of crime are ill informed; and such persons are led into contradiction and falsehood by the desire to evade circumstances which they feel to make against them. . . . The questions put are those which arise from evidence which has been so arranged (and quite properly) as to give the fullest effect to the 'prima facie' case of accusation. The answers given to such questions are given at a great disadvantage; and probably, this disadvantage is even exaggerated by the prisoner, who is pressed with the circumstances of suspicion marshalled in their most formidable order. Hence arises a temptation to evade and deceive, by which an ignorant person would be seduced, however innocent of the offence charged. Another very dangerous feature in this practice appears to be that its tendency is to engage the Court, which conducts the examination, in a contest with the prisoner. We were assured that this in fact did not occur; and we are quite ready to believe that the members of the Court have not consciously allowed themselves to be drawn into such a course. But the danger is that the objectionable feeling will arise where the Court is conscious of nothing but an exercise of ingenuity in the pursuit of truth; and that this danger is not imaginary must, we think, be obvious to any one who has read much of the interrogatories administered by Courts in foreign criminal tribunals. We cannot see why all the advantages which this practice is alleged to possess may not be attained by merely reading over the adverse evidence to the accused, and then bidding him tell his own story, if he thinks fit. It is impossible to deny the efficacy of the present practice as an instrument for the occasional detection of crime; but it is equally clear that the practice is liable to mislead, even when administered with the purest intentions. We have no doubt that the members of the Royal Court were perfectly sincere in assuring us that it is often of the greatest use to a prisoner, and that they never knew an innocent man condemned in consequence of it. But it appears to us dangerous to make legal guilt depend upon anything short of proof from intrinsic evidence or the voluntary confession of the accused."

1883, Sir *J. F. Stephen*, History of the Criminal Law, I, 342, 441, 535, 542, 565:[13] "In the old Ecclesiastical Courts and in the Star Chamber [the 'ex officio' oath] was understood to be and was used as an oath to speak the truth on the matters objected against the defendant — an oath, in short, to accuse oneself. It was vehemently contended by those who found themselves pressed by this oath that it was against the law of God, and the law of nature, and that the maxim 'nemo tenetur prodere seipsum' was agreeable to the law of God, and part of the law of nature. In this, I think, as in most other discussions of the kind, the real truth was that those who disliked the oath had usually done the things of which they were accused, and which they regarded as meritorious actions,

[13] Mr. Justice Stephen's views were originally expounded in 1857, in his essay in the Juridical Society's Papers, I, 456, 470 ff.

though their judges regarded them as crimes. People always protest with passionate eagerness against being deprived of technical defences against what they regard as bad law, and such complaints often give a spurious value to technicalities when the cruelty of the laws against which they have afforded protection has come to be commonly admitted. . . . [But by the institution of our privilege against self-crimination] the result of the whole is that as matters stand the prisoner is absolutely protected against all judicial questioning before or at the trial. . . . This is one of the most characteristic features of English criminal procedure, and it presents a marked contrast to that which is common to, I believe, all continental countries. It is, I think, highly advantageous to the guilty. It contributes greatly to the dignity and apparent humanity of a criminal trial. It effectually avoids the appearance of harshness, not to say cruelty, which often shocks an English spectator in a French court of justice; and I think that the fact that the prisoner cannot be questioned stimulates the search for independent evidence. During the discussions which took place on the Indian Code of Criminal Procedure in 1872,[14] some observations were made on the reasons which occasionally lead native police officers to apply torture to prisoners. An experienced civil officer observed, 'There is a great deal of laziness in it. *It is far pleasanter to s't comfortably in the shade rubbing red pepper into a poor deril's eyes than to go about in the sun hunting up evidence.*' This was a new view to me, but I have no doubt of its truth. The evidence in an English trial is, I think, usually much fuller and more satisfactory than the evidence in such French trials as I have been able to study. The Procureur de la République and Juge d'Instruction, their power of holding inquiries, drawing up 'procès-verbaux,' examining suspected persons secretly, and without informing them even of the accusation or evidence against them, taking depositions behind their backs, and keeping them in solitary confinement till (whatever soft words may be used about it) every effort has been made to extort a confession from them, are contrasted in the strongest way with everything with which we are familiar, and which I have described, in detail, in the preceding chapters. To keep a man in solitary confinement and question him till he is driven into a confession is not the less torture because the process is protracted instead of being acute. . . . The following account of the matter is given by M. Hélie. 'The magistrate who puts questions to the accused and asks explanations from him has the right to interrogate him for the purpose of extracting his excuse or his confession of guilt. He should, without harassing or confusing him, but at the same time while requiring a disclosure, encourage his freedom of utterance. He should, in short, with the most complete impartiality, seek solely to get at the truth. The interrogatory must be neither an argument nor a combat; that is by no means the issue. The main object is to ascertain the theory of the defence, and thus to determine the details of the issue and the points therein which are to be established.' He adds, that though the interrogatory is not essential, yet the President can interrogate the accused either before or after the witnesses are heard, the former being the common course. . . . Whatever may be the law on the subject, the fact unquestionably is that the interrogation of the accused by the President is not only the first, but is also the most prominent, conspicuous, and important part of the whole trial. Moreover, all the reports of French trials which I have seen, and I have read very many, suggest that the views taken by M. Hélie as to the proper object of the interrogatory, and the proper method of carrying it on, are not shared by the great majority of French Presidents of Cours d'Assises. The accused is cross-examined with the utmost severity, and with continual rebuke, sarcasms, and exhortations, which no counsel in an English court would be permitted by any judge (who knew and did his duty) to address to any witness. This appears to me to be the weakest and most objectionable part of the whole system of French criminal procedure (except parts of the law as to the functions of the jury). It cannot but make the judge a party — and what is more, a party adverse to the prisoner; and it appears to me, apart

[14] Drawn by Sir J. Stephen himself.

from this, to place him in a position essentially undignified and inconsistent with his other functions. . . . This comparison of French and English criminal procedure naturally suggests the question, Which of the two is the best? To a person accustomed to the English system and to English ways of thinking and feeling there can be no comparison at all between them. However well fitted it may be for France, the French system would be utterly intolerable in England. . . . The whole temper and spirit of the French and the English differs so widely, that it would be rash for an Englishman to speak of trials in France as they actually are. We can think of the system only as it would work if transplanted into England. It may well be that it not only looks, but is, a very different thing in France. . . . The best way of comparing the working of the two systems is by comparing trials which have taken place under them. For this purpose I have given at the end of this work detailed accounts of seven celebrated trials, four English and three French, which afford strong illustrations of the results of the two systems. It seems to me that a comparison between them shows the superiority of the English system even more remarkably than any general observations which may be made on the subject. In every one of the English cases the evidence is fuller, clearer, and infinitely more cogent than it is in any one of the French cases, — notwithstanding which, far less time was occupied by the English trials than by the French ones, and not a word was said or a step taken which any one can represent as cruel or undignified." [15]

1910, *Wisconsin Branch, American Institute of Criminal Law and Criminology; Report of the Committee on Trial Procedure.* "A majority of our committee believe that the provision in § 8, Art. I of our Constitution that 'No person shall be compelled in any criminal case to be a witness against himself' has outlived its usefulness, and should be abolished, and that thereby one hiding-place of crime would be destroyed. We have obtained the views of many active lawyers and judges on this question; and a large majority of those consulted have expressed the opinion that no innocent person would suffer and that more guilty ones would be detected and convicted if this provision could be repealed. . . . The Constitutional provision does not so much stand in the way of the detection and punishment of crime of the lower orders (for the lower criminals no doubt would cunningly add perjury to their other crimes), as it prevents the obtaining of evidence to convict those guilty of offences such as bribery, grafting, rebating, violation of laws against combinations and similar offences, that threaten even more than the grosser crimes the foundations of good government and good order; nor so much even as it interferes at times with the obtaining of evidence in civil cases necessary to the redress of civil wrongs which may also involve some of the participants in liability to criminal prosecution. To overcome such interferences, we are fast acquiring immunity statutes, such as § 4078 granting immunity to witnesses testifying in actions brought on bonds of public officers. . . . The term 'immunity bath' has become something of a reproach to our criminal procedure. We recommend that this Institute urge upon the Legislature an amendment of the Constitution striking out the provision that 'No person shall be compelled in any criminal case to be a witness against himself;' and at the same time urge the enactment of legislation such as is suggested by Exhibit F hereto annexed. We believe that a resolution to so amend the Constitution would fare better when submitted to a vote of the people if it also provided for legislation for protection of the accused, about as follows: 'Resolved that § 8, Art. I of the Constitution of Wisconsin be amended by striking out the words

[15] Our greatest American constructive jurist, Edward Livingston, in his Introductory Report to the Code of Criminal Procedure (Works, ed. 1872, I, 354 ff.), written about 1823, had already expounded the arguments on both sides, reaching much the same conclusions as Mr. J. Stephen. One of the arguments most influential with Mr. Livingston was this: "An unrestrained right of interrogating is very apt to produce insidious and catching questions; instead of a cool and impartial attempt to extract the truth, the examination becomes a contest, in which the pride and ingenuity of the magistrate are arrayed against the caution or evasions of the accused, and every construction will be given to his answers that may fix upon him the imputation of guilt."

"nor shall be compelled in any criminal case to be a witness against himself" and inserting in lieu thereof the words "Nor shall any person be compelled in any criminal case to be a witness against himself until he shall first have the benefit of legal counsel to be provided as the Legislature may enact."'"

4. In preserving the privilege, however, we must resolve not to give it more than its due significance. We are to respect it rationally for its merits, not worship it blindly as a fetish. We are not merely to emphasize its benefits, but also to concede its shortcomings and guard against its abuses. Indirectly and ultimately it works for good, — for the good of the innocent accused and of the community at large. But directly and concretely it works for ill, — for the protection of the guilty and the consequent derangement of civic order. The current judicial habit is to ignore its latter aspect, and to laud it undiscriminatingly with false cant. A stranger from another legal sphere might imagine, in the perusal of our precedents, that the guilty criminal was the fond object of the Court's doting tenderness, guiding him at every step in the path of unrectitude, and lifting up his feet lest he fall into the pits digged for him by justice and by his own offences. The judicial practice, now too common, of treating with warm and fostering respect every appeal to this privilege, and of amiably feigning each guilty invocator to be an unsullied victim hounded by the persecutions of a tyrant, is a mark of traditional sentimentality. It involves a confusion between the abstract privilege — which is indeed a bulwark of justice — and the individual entitled to it — who may be a monster of crime. There is no reason why judges should lend themselves to confirming the insidious impression that crime in itself is worthy of protection. The privilege cannot be enforced without protecting crime; but that is a necessary evil inseparable from it, and not a reason for its existence. We should regret the evil, not magnify it by approval. No honest and intelligent accused (in the language of the Commissioners above quoted) has anything to fear from a criminal prosecution fairly conducted. To every such person, the appeal to the privilege is a repugnant and humiliating expedient. The spirit of every manly nature, unfortunate enough to be unjustly accused, must always be that of the brave and bluff Mr. George, who, when falsely charged with murder, and urged by his friends to seek the services of a lawyer, staunchly refused: [16]

"Say I am innocent and I get a lawyer; what would he do, whether or not? Act as if I was guilty, — shut my mouth up, tell me not to commit myself, keep circumstances back, chop the evidence small, quibble; and get me off perhaps. But, Miss Summerson, do I care for getting off in that way? . . . I don't intend to say," looking round upon us, with his powerful arms akimbo and his dark eyebrows raised, "that I am more partial to being hanged than another man. What I say is, I must come off clear and full, — or not at all. Therefore, when I hear stated against me what is true, I *say* it's true; and when they tell me, 'Whatever you say will be used,' I tell them I don't mind that, — I *mean* it to be used. If they can't make me innocent out of the whole truth, they are not likely to do it out of anything less or anything else."

[16] Charles Dickens, Bleak House, c. 51.

There ought to be an end of judicial cant towards crime. We have already too much of what a wit has called "justice tampered with mercy." A due respect for the privilege is perfectly consistent with a strict contempt for the guilty offender, and does not require or condone his protection as an end good in itself or good under any circumstances. It is enough for justice and for the commonwealth that the privilege exists, immovably fixed in the Constitution. The good which it aims at consists in that general fact and system, and not in the individual application of it to a given claimant. *That* effects mostly harm,—a particular harm which we suffer for the larger good.

The correct moral attitude toward the privilege has been well illustrated in a courageous and clear-thinking opinion, rendered in a case where outrageous fraud had been used at an election:

1907, LASSING, J., in *Scholl* v. *Bell*, 125 Ky. 750, 102 S. W. 248: "The testimony shows many outrages and crimes done by the police, and yet, when these men were placed on the witness stand and interrogated as to what they knew, they invariably sheltered under the law forbidding self-incrimination; and, when the question as to whether the witness should or not be compelled to answer was certified to the chancellors, the witnesses were always protected by the ruling. Assuming the ruling to be correct, the conclusion which seems to have been drawn as to the innocence of the officers is not justified. The principle under discussion is a rule of evidence, to protect the witness from criminal prosecution or public exposure to shame because of his own testimony. It is a rule of necessity, beyond which it should not be extended. Its use should not be considered as affording the witness a certificate of good character. Here were police officers being interrogated as to existence of crimes they were paid to prevent, if possible; if not, to expose and punish afterwards; and yet they one and all refused to answer 'under advice of counsel.' Suppose a secret murder had been committed, and the police on that beat, when asked about it, should say, 'I decline to answer for fear of incriminating myself.' This, under the rule invoked, would protect the witness from answering; but how long would it justify his retention on the roll of the police? What would be thought of those who left the public safety in his hands longer than it would require to discharge him? Suppose a bank had been robbed, and the bookkeeper, the teller, and cashier, when interrogated, should say, 'I decline to answer under advice of counsel.' What would be thought of a board of directors who would afterwards leave the bank in the hands of such men? This is precisely the situation here. Peace officers, whose duty it was to prevent and expose crime, when called on to do so, sheltered under the rule against self-incrimination; and yet these men still wear the official uniform, still draw salaries from the public purse, and this is made possible only by the consent of those who are the apparent beneficiaries of their silence."

The privilege therefore should be kept within limits the strictest possible. So much of it lies in the interpretation that its scope will be greatly affected by the spirit in which that interpretation is approached. Much can be settled by a consideration of its historic scope, before the constitutions were made. But, after all this, the decision will constantly depend upon whether the privilege is approached with favor or with disfavor, with fatuous adulation or with judicious appreciation. In the past generation, and especially in a few American Courts, this practical difference of effect is plainly apparent; for, under the guise of reasoning and interpretation, the privilege has by them, in a spirit of implicit favor, been so extended in application beyond

its previous limits as almost to be incredible, certainly to defy common sense. Even Lord Hardwicke, who a century and a half ago called it "a rule of great justice and tenderness," [17] could he now revisit the glimpses of the moon and observe the rule in those courts, would marvel what manner of justice we had contrived. But a reaction must come. A true conservatism must recommence to operate. More than one great modern judge is found to pronounce against the favor that has in the past been granted to it.[18] A multiplicity of statutes [19] have shown how seriously it is felt to block the investigation and punishment of crime. Courts should unite to keep the privilege strictly within the limits dictated by historic fact, cool reasoning, and sound policy.[20]

§ 2252. **Constitutional and Statutory Phrasings; Kinds of Proceedings affected by the Constitutional Sanction (Grand Jury, Legislative Inquiry, etc.).** The Federal Constitution and the Constitutions of the various States (with two exceptions [1]) have at one time or another come to add their sanctions to the principle of the privilege, and have thus established it solidly beyond the reach of ordinary legislative alteration.[2] But this constitutional sanction, being merely a recognition and not a new creation, has not altered the tenor and scope of the privilege; it has merely given greater permanence to the traditional rule as handed down to us. The framers of the Constitutions did not intend to codify the various details of the rule, or to alter in any respect its known bearings, but merely to describe it sufficiently for identification as a principle. The extreme brevity of the clauses naming the privilege is plain proof of this intention; and the great variety of phrasing, together with the undoubted uniformity of purpose running through all these legislative efforts, is a corroboration. In most jurisdictions a statute has additionally confirmed the common-law privilege, expressly or by implication.[3]

[17] Harrison *v.* Southcote, 2 Ves. Sr. 389, 394.

[18] *Eng.* 1882, Jessel, M. R., in Ex parte Reynolds, 15 Cox Cr. 108, 115 ("Perhaps our law has gone even too far in that direction"); *U. S.* 1875, Appleton, C. J., in State *v.* Wentworth, 65 Me. 234, 241 ("It is the privilege of crime; the interests of justice would be little promoted by its enlargement").

[19] *Post*, § 2281.

[20] A reaction against the excesses of the privilege is now to be seen, notably in Wisconsin: Herbert R. Limburg, "The Privilege of the Accused to Refuse to Testify" (American Academy of Political and Social Science, Phila., 1914, vol. LII, No. 141, p. 124); Wisconsin Branch of the American Institute of Criminal Law and Criminology, Report of Committee approving a Bill for a Constitutional Amendment (2d Annual Meeting, 1910, Journal of Criminal Law, etc., I, 808; 3d Annual Meeting, 1911, Journal of Criminal Law, etc., II, 870; quoted *supra*). See also the constitutional modification in Ohio, made in 1912 (quoted *post*, § 2252).

§ 2252. [1] Iowa and New Jersey.

[2] The doctrine of State *v.* Height, 117 Ia. 650, 91 N. W. 935 (1902), that even where no such constitutional clause exists, the privilege is beyond the control of the Legislature, must be regarded as anomalous and unsound; and the attempt, in the same opinion, to read the privilege by implication into the clause of "due process of law" is futile and unhistorical; that clause is already a catch-all, overflowing with misplaced principles, and no 'ex post facto' interpretation can make room in it for the present privilege. But State *v.* Height is perhaps overruled by Davison *v.* Guthrie, cited *post*, § 2282. On the privilege as it obtains in Iowa, the following essay gives a comprehensive survey: Professor D. O. McGovney, "Self-Criminating and Self-Disgracing Testimony; Code Revision Bill," Iowa Law Bulletin, V, 175, March, 1920.

[3] In the following list of enactments, the first under each jurisdiction of the United States is the constitutional clause; specific statutory enactments are also here inserted,

though it is clear that their phrasing cannot limit the constitutional provisions; most of the statutes carrying out these provisions occur in connection with clauses qualifying the accused to testify, and will be found *ante*, § 488.

ENGLAND: 1806, St. 46 Geo. III, c. 37 (quoted *ante*, § 2223); 1851, St. 14 & 15 Vict. c. 99, § 3 (parties are made compellable in civil cases; but "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, competent or compellable to give evidence for or against himself or herself or shall render any person compellable to answer any question tending to criminate himself or herself"); St. 1869, 32 & 33 Vict. c. 68, § 3 (adultery; quoted *ante*, § 488); 1898, St. 61 & 62 Vict. c. 36, § 1 (quoted *ante*, §§ 194*a*, 488; the interpretation is fully considered *ante*, § 194*a*); St. 1904, 4 Edw. VII, c. 15, § 12 (cruelty to children; quoted *ante*, § 488); for the privilege under the English Bankruptcy statute, see *post*, § 2281.

CANADA: *Alta.* St. 1910, 2d sess., c. 3, Evidence Act, § 8 (like Eng. St. 1869, 32 & 33 Vict. c. 68, § 3, except that instead of applying to any witness, it applies to "the husband or wife, is competent only under this Act").

B. C. Rev. St. 1911, c. 67, § 27 (divorce; quoted *ante*, § 488);

N. Br. Consol. St. 1903, c. 127, § 9 (adultery; quoted *ante*, § 488); § 10 (in general; quoted *ante*, § 488);

Newf. Consol. St. 1916, c. 91, § 2 (quoted *ante*, § 488);

N. Sc. Rev. St. 1900, c. 163, § 37 (quoted *ante*, § 488);

Ont. Rev. St. 1914, c. 76, § 7 (quoted *post*, § 2281);

P. E. I. St. 1889, c. 9, § 6 (quoted *ante*, § 488);

Yukon: Consol. Ord. 1914, c. 30, § 37 (like N. Sc. Rev. St. 1900, c. 163, § 37).

But in the Dominion and several Provinces the privilege is abolished, in a few classes of cases, by other statutes (quoted *ante*, § 488); compare also the statutory removals by prohibition of using the evidence (*post*, § 2281).

UNITED STATES: *Fed.* 1789, Amendment V ("No person . . . shall be compelled in any criminal case to be a witness against himself"); Code 1919, § 3114 (privilege declared for naval courts); § 6276 (letters rogatory from a foreign country; quoted *post*, § 2258); St. 1916, Aug. 29, c. 418, § 3, amending Rev. St. § 1342 (Articles of War; Art. 24 provides that no witness before a court-martial, etc. "shall be compelled to incriminate himself, or to answer any questions which may tend to incriminate or degrade him"); St. 1920, June 4, c. II, 41 Stats. 787 (Articles of War; Art. 24 as amended reads: "any question not material to the issue when such answer might tend to degrade him");
Ala. Art. I, § 6 ("In all criminal prosecutions the accused has a right . . . that he shall not be compelled to give evidence against himself," and he has a right to testify "if he elects to do so");
Alaska: Comp. L. 1913, § 1507 (like Or. Laws 1920, § 870, substituting "criminal prosecution" for "punishment for a felony," and omitting "and the objection," etc.);
Ariz. Art. II, § 7 ("No person shall be compelled in any criminal case to give evidence against himself");
Ark. Art. II, § 8 ("No person shall . . . be compelled in any criminal case to be a witness against himself");
Cal. Art. I, § 13 ("No person shall . . . be compelled, in any criminal case, to be a witness against himself"); C. C. P. 1872, § 2065 (sanctioning the privilege not to give "an answer which will have a tendency to subject him to punishment for a felony"); P. C. §§ 688, 1323 (privilege recognized);
Colo. Art. II, § 18 ("No person shall be compelled to testify against himself in a criminal case");
Conn. Art. I, § 9 ("In all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself"); Gen. St. 1918, § 5522 ("No person shall be compelled to give evidence against himself except as otherwise provided by the general statutes, nor shall such evidence when given by him be used against him");
Del. Art. I, § 7 ("In all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself");
Fla. Decl. of R., § 12 ("No person shall be . . . compelled in any criminal case to be a witness against himself"); Rev. G. S. 1919, § 6080 ("No accused person shall be compelled to give testimony against himself");
Ga. Art. I, § 1, par. 6 ("No person shall be compelled to give testimony tending in any manner to criminate himself"); Rev. C. 1910, §§ 4544, 5877, 6363 (similar, for matters "tending to criminate himself or to expose him to a penalty or forfeiture"); § 4554 (similar, for matters that "tend to criminate himself" or "tend to work a forfeiture of his estate"); P. C. 1910, §§ 9, 1037, par. 3 (privilege stated);
Haw. Rev. L. 1915, § 2613 (quoted *ante*, § 488);
Ida. Art. I, § 13 ("No person shall be . . . compelled in any criminal case to be a witness against himself"; so also Comp. St. 1919, § 8623); § 8044 (like Cal. C. C. P. § 2065);
Ill. Art. II, § 10 ("No person shall be compelled in any criminal case to give evidence against himself");
Ind. Art. I, § 14 ("No person, in any criminal prosecution, shall be compelled to testify against himself");
Ia. See the citations *supra*, note 2;
Kan. Bill of R., § 7 ("No person shall be a witness against himself");
Ky. § 11 ("In all criminal prosecutions the accused . . . cannot be compelled to give evidence against himself");
La. Art. I, § 11 ("No person shall be compelled

to give evidence against himself in a criminal case or in any proceeding that may subject him to criminal prosecution, except where otherwise provided in this Constitution"); St. 1916, No. 157 (quoted *ante*, § 488); C. Pr. 1870, § 136 (witness is guilty of contempt in refusing to answer questions "except such as might lead him to accuse himself of some crime");

Me. Art. I, § 6 ("In all criminal prosecutions, the accused . . . shall not be compelled to furnish or give evidence against himself"); so also Rev. St. 1916, c. 87, § 113, c. 136, § 19;

Md. Decl. of R., Art. 22 ("No man ought to be compelled to give evidence against himself in a criminal case");

Mass. Decl. of R., Art. 12 ("No subject shall . . . be compelled to accuse, or furnish evidence against himself");

Mich. Art. II, § 16 ("No person shall be compelled, in any criminal case, to be a witness against himself"); Comp. L. 1915, § 12547 (the rule abolishing civil privilege shall not be taken to compel "an answer which will have a tendency to accuse himself of any crime or misdemeanor or to expose him to any penalty or forfeiture");

Minn. Art. I, § 7 ("No person . . . shall be compelled in any criminal case to be witness against himself");

Miss. Art. III, § 26 ("In all criminal prosecutions the accused . . . shall not be compelled to give evidence against himself"); Code 1906, § 1923, Hem. § 1583 (privilege applies for matters which will "expose him to criminal prosecution or penalty");

Mo. Art. II, § 23 ("No person shall be compelled to testify against himself in a criminal cause"); Rev. St. 1919, § 5413 (statutes making interested persons competent are not "to compel any person to subject himself by his testimony to any prosecution for a criminal offence");

Mont. Art. III, § 18 ("No person shall be compelled to testify against himself in a criminal proceeding"); Rev. C. 1921, § 10673 (like Cal. C. C. P. § 2065); P. C. § 11613 (no one is compellable "in a criminal action to be a witness against himself"; so also § 12177, "in a criminal action or proceeding"); § 1393 (privilege declared for witnesses before military court);

Nebr. Art. I, § 12 ("No person shall be compelled, in any criminal case, to give evidence against himself"); Rev. St. 1921, § 8844 (privilege declared for matters which "tend to render him criminally liable");

Nev. Art. I, § 8 ("No person shall . . . be compelled, in any criminal case, to be a witness against himself"); Rev. L. 1912, § 6857 (like Const. Art. I, § 8); § 5437 (like Cal. C. C. P. § 2065);

N. H. Part I. Art. 15 ("No subject shall . . . be compelled to accuse or furnish evidence against himself");

N. J. Comp. St. 1910, Evidence, § 8 ("a witness shall not be excused from answering any questions relevant and material to the issue, provided the answers will not expose him to a criminal prosecution or penalty or to a forfeiture of his estate"); § 2 (no party compellable to be sworn in action for penalty or forfeiture; quoted *ante*, § 488); 1903, State v. Zdanowicz, 69 N. J. L. 620, 55 Atl. 743 ("Although we have not deemed it necessary to insert in our Constitution this prohibitive provision, the common-law doctrine, unaltered by legislation or by lax practice, is by us deemed to have its full force"); 1905, State v. Miller, 71 N. J. L. 527, 60 Atl. 202 (State v. Zdanowicz approved); 1916, Conover v. West Jersey Mortgage Co., 87 N. J. Eq. 16, 99 Atl. 604 (receiver);

N. Mex. Art. II, § 15 ("No person shall be compelled to testify against himself in a criminal proceeding"); Annot. St. 1915, § 2170 (no person is compellable "to answer any question to criminate himself or to subject him to prosecution for any penalty or crime");

N. Y. Art. I, § 6 ("No person shall . . . be compelled in any criminal case to be a witness against himself"; so also C. Cr. P. 1881, § 10, and Rev. St., I, 94, § 13); C. P. A. 1920, § 355 (the clause negativing a privilege against answers involving civil liability "does not require a witness to give an answer which will tend to accuse himself of a crime or to expose him to a penalty or forfeiture");

N. C. Art. I, § 11 ("In all criminal prosecutions, every man has the right . . . not to be compelled to give evidence against himself"; so also Con. St. 1919, § 1799);

N. Dak. Art. I, § 13 ("No person shall . . . be compelled in any criminal case to be a witness against himself"); Comp. L. 1913, § 10395 (similar, "in a criminal action");

Ohio: Const. 1851, Art. I, § 10, as amended 1912 ("No person shall be compelled in any criminal case to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel");

Okl. Art. II, § 21 ("No person shall be compelled to give evidence which will tend to criminate himself except as in this Constitution specifically provided"); § 27 (immunity; quoted *post*, § 2281); Comp. St. 1921, § 2351 ("No person can be compelled in a criminal action to be a witness against himself");

Or. Art. I, § 12 ("No person shall . . . be compelled in any criminal prosecution to testify against himself"); Laws 1920, § 870 (a witness "need not give an answer which will have a direct tendency to subject him to punishment for felony, or to degrade his character, unless in the latter case it be as to the very fact in issue or to a fact from which the fact in issue would be presumed. This privilege is the privilege of the witness, and the objection cannot be made by a party or his attorney; but a witness must answer as to the fact of his previous conviction for felony");

1. This variety of phrasing, then, *neither enlarges nor narrows* the scope of the privilege as already accepted, understood, and judicially developed in the common law.[4] The detailed rules are to be determined by the logical requirements of the principle, regardless of the particular words of a particular constitution. This doctrine, which has universal judicial acceptance,[5] leads to several important consequences:

(*a*) A clause exempting a person from being "a witness against himself" protects as well a *witness* as a *party accused* in the cause; that is, it is immaterial whether the prosecution is then and there "against himself" or not.[6]

Pa. Art. I, § 9 ("In all criminal prosecutions, the accused . . . cannot be compelled to give evidence against himself"); Pub. L. 1887, p. 158, § 10 ("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");
P. I. U. S. St. 1902, July 1, Philippines Act, § 5 ("No person shall be compelled in any criminal case to be a witness against himself"); St. 1916, Aug. 29, c. 416, § 3, 39 Stats. 546, Code 1919, § 4112 (similar); P. I. Act 1130, § 1, amended by Act 1243, § 1 (privilege recognized, for civilian witnesses before a general court-martial or naval court); P. C. 1911, Gen. Order 58 of 1900, § 15 (privilege recognized for the accused); § 56 (a witness "need not give an answer which will have a tendency to subject him to punishment for felony"); 1904, U. S. *v.* Navarro, 3 P. I. 143 (U. S. 1902, July 1, § 5, enacting the privilege for the Philippine Islands, and Gen. Order 58 of 1900, replace any prior rule to the contrary);
P. R. U. S. St. 1917, Mar. 2, Organic Act, § 2, 39 Stats. 951, Code 1919, § 4043 (privilege recognized); P. R. Rev. St. & C. 1911, § 1532 (like Cal. C. C. P. § 2065); 1902, Re Decker, 1 P. R. Fed. 381 (the Fifth Amendment held effective in Porto Rico, "because it is a principle of natural justice woven into the web and woof of our form of government"; a sounder reason is that the rule is a part of the common law in Federal courts);
R. I. Art. I, § 13 ("No man in a court of common law shall be compelled to give evidence criminating himself");
S. C. Art. I, § 17 ("Nor shall any person . . . be compelled in any criminal case to be a witness against himself"); C. C. Pr. 1922, § 967 ("No person shall be required to answer any question tending to criminate himself");
S. Dak. Art. VI, § 9 ("No person shall be compelled in any criminal case to give evidence against himself"); Rev. C. 1919, § 4412 (not compellable in a "criminal action" to "be a witness against himself");
Tenn. Art. I, § 9 ("In all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself");
Tex. Art. I, § 10, Rev. C. Cr. P. 1911, § 4 ("In all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself");
Utah: Art. I, § 12 ("The accused shall not be compelled to give evidence against himself"; so also Comp. L. 1917, §§ 7141, 8555); (no answer is compellable which would tend to "subject him to punishment for felony");
Vt. Ch. I, Art. 3 ("In all prosecutions for criminal offences, . . . nor can he be compelled to give evidence against himself"); Gen. L. 1917, § 1900 ("The provisions of the preceding sections shall not affect the law relating to the attestation of the execution of last wills and testaments, or of any other instrument, or compel a person to subject himself by his testimony to a prosecution for a criminal offense"); § 3541 (family-desertion; privilege maintained);
Va. Art. I, § 8 ("nor shall any man be compelled in any criminal proceeding to give evidence against himself");
Wash. Art. I, § 9 ("No person shall be compelled in any criminal case to give evidence against himself");
W. Va. Art. III, § 5 ("Nor shall any person, in any criminal case, be compelled to be a witness against himself");
Wis. Art. I, § 8 ("No person . . . shall be compelled in any criminal case to be a witness against himself"); Stats. 1919, § 4077 (this privilege re-stated, in a statute repudiating privilege for answers involving civil liability);
Wyo. Art. I, § 11 ("No person shall be compelled to testify against himself in any criminal case"); Comp. St. 1920, § 7507 (defendant in criminal case).

[4] 1853, Scott, J., in State *v.* Quarles, 13 Ark. 307, 311 ("No one, be he witness or accused, can pretend to claim it beyond its scope at the common law"); 1892, Counselman *v.* Hitchcock, 142 U. S. 547, 584, 586, 12 Sup. 195 ("There is really, in spirit and in principle, no distinction arising out of such difference of language").

[5] For a slight qualification of this statement, see *post*, § 2281.

[6] 1892, Counselman *v.* Hitchcock, 142 U. S. 547, 562, 12 Sup. 195; 1871, Com. *v.* Emery, 107 Mass. 171, 181; 1861, People *v.* Kelly, 24 N. Y. 74, 81 (a constitution prohibiting compulsion "in any criminal case to be a witness against himself" prohibits also self-

So also a clause exempting "the accused" protects equally a mere witness.[7]

(*b*) A clause exempting from self-criminating testimony "in criminal cases" protects equally in *civil cases*, when the fact asked for is a criminal one.[8]

(*c*) The protection, under all clauses, extends to *all manner of proceedings* in which testimony is to be taken, whether litigious or not, and whether 'ex parte' or otherwise. It therefore applies in all kinds of *courts* [9] (including juvenile courts, when constituted as criminal courts[10]), in all *methods of interrogation* before a court,[11] in investigations by a *grand jury*,[12] and in investigations by a *legislature* or a body having legislative functions.[13]

crimination when called as a witness against another person); 1911, Com. *v.* Cameron, 229 Pa. 592, 79 Atl. 169, *semble;* 1873, Cullen *v.* Com., 24 Gratt. Va. 624, 628.

[7] 1853, State *v.* Quarles, 13 Ark. 307, 310.

[8] 1896, Ex parte Senior, 37 Fla. 1, 19 So. 652; 1860, Wilkins *v.* Malone, 14 Ind. 153; 1913, Karel *v.* Conlan, 155 Wis. 221, 144 N. W. 268 (civil action for damages based on criminal conspiracy to libel — whatever that may mean; privilege sustained; but it is incomprehensible how the Court was induced to spend eight pages discussing as arguable such an elementary question, never judicially doubted for a century; it will not do for Courts to re-open settled questions whenever ignorant or daring counsel stir up a dust by citing a score of irrelevant cases; note, too, that the opinion misunderstands the point ruled in People *v.* Kelly, N. Y., *supra*, in stating that it held the privilege not applicable to a witness who was not a defendant; the Kelly case involved the effect of an immunity statute, as may be seen from the quotation *post*, § 2282).

[9] 1832, Swift *v.* Swift, 4 Hagg. Eccl. 139, 154 (ecclesiastical courts).

The question whether a *notary* or *examiner*, authorized to take depositions, has the power at all to enforce answers by process of contempt, is a different one, and involves the constitutional distribution of judicial functions; some authorities have been elsewhere cited (*ante*, § 2195).

[10] 1920, Ex parte Tahbel, — Cal. App. —, 189 Pac. 804 (habeas corpus for a boy of 15 committed to the detention home by the judge of the juvenile court; a petition to adjudge the boy a court ward was pending, on the ground of the immorality of his parents and of his having committed perjury and forgery in a trial involving his parents; an order was made leaving him in his father's custody, and then he was called before a referee to testify; he refused, on the ground of self-crimination; he was then committed to the detention home "until he does answer said questions"; held that the order violated the privilege; the opinion however erroneously refers to the boy's privilege as his "prerogative"; there are no "prerogatives" in the Bill of Rights, for that was the result of a popular struggle against prerogatives; moreover the opinion needlessly invokes sentiment about "the protecting Aegis of the Constitution"; the strong probability was that the Juvenile Court was engaged in a justifiable effort to get this youth away from the control of a band of fakirs, and the sympathies of the entire judicial system and of the community should have been on their side; it was simply a case where a wise constitutional rule obstructed temporarily a beneficent aim).

But when the juvenile court is constituted (as in Illinois and elsewhere) with chancery powers, and not as a criminal court, there is no ground for holding that its procedure as to the juvenile himself may be obstructed by this privilege. In some States a statute (*ante*, § 194*a*) especially forbids the use of a finding against the juvenile afterwards as a conviction of crime.

[11] 1864, Pye *v.* Butterfield, 5 B. & S. 829, 837 (statutory interrogatories to a party).

For *contempt*, see *post*, § 2257.

[12] *Fed.* 1892, Counselman *v.* Hitchcock, 142 U. S. 547, 563, 12 Sup. 195; 1905, *Re* Hale, 139 Fed. 496, 500; 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370; *Ky.* 1911, Bentler *v.* Com., 143 Ky. 503, 136 S. W. 896; *Minn.* 1871, State *v.* Froiseth, 16 Minn. 296; *Mo.* 1909, State *v.* Naughton, 221 Mo. 398, 120 S. W. 53; *N. Y.* 1861, People *v.* Kelly, 24 N. Y. 74, 78; *Oh.* 1913, State *v.* Cox, 87 Oh. 313, 101 N. E. 135; *Okl.* 1913, Scribner *v.* State, 9 Okl. Cr. 465, 132 Pac. 933 (Okl. Const. Bill of Rights § 27 applies to testimony before a grand jury); *Pa.* 1911, Com. *v.* Bolger, 229 Pa. 597, 79 Atl. 113 (testimony before grand jury; the defendant's offer held not explicit enough in its statement of the alleged violation of the privilege); *Tex.* 1899, Wilson *v.* State, 41 Tex. Cr. 115, 51 S. W. 916.

Whether an *indictment* should be *quashed* for violating the rule before the grand jury, is a different question, on which opinions have varied; 1909, Pendleton *v.* U. S., 216 U. S. 305,

[13] 1871, Com. *v.* Emery, 107 Mass. 171, 182.

2. The *Federal Fifth Amendment* of course applies in Federal trials only.[14] Nor does the Federal Fourteenth Amendment make the provisions of the fifth Amendment in the present respect a *privilege and immunity of citizens of the United States* so as to be protected and reviewable by the Federal Supreme Court, as against a violation by a State.[15]

2. Kinds of Facts protected from Disclosure

§ 2254. **Civil Liability.** The facts protected from disclosure are distinctly facts involving a criminal liability or its equivalent. Hence, facts involving a civil liability are entirely without the scope of the privilege. No question would probably ever have arisen in this respect, but for a ruling (possibly misreported) of Lord Kenyon in 1795,[1] whence proceeded a ripple, and then a wave, of doubt. This doubt was, however, shortly put at rest in England by a legislative declaration, based on the answers of the judges interrogated for the purpose.[2] In the United States the doubt was before long considered and duly repudiated in all the earlier courts; but an echo of it lingered for a generation or more, and so a similar legislative enactment has been repeated in many jurisdictions.[3]

§ 2255. **Infamy or Disgrace.** The privilege against disclosing facts involving disgrace or infamy (*i. e.* irrespective of criminality) began to be recognized later than the privilege against self-crimination and independently of it. Its

30 Sup. 315 (where the prosecuting attorney in the Philippines summoned the accused to answer questions, but the answers were not "afterwards used in any way"); 1885, Mackin *v.* People, 115 Ill. 312, 3 N. E. 222; 1894, Boone *v.* People, 148 Ill. 440, 36 N. E. 99; 1890, People *v.* Lander, 82 Mich. 109, 46 N. W. 956; 1902, State *v.* Gardner, 88 Minn. 130, 92 N. W. 529; 1903, Lindsey *v.* State, 69 Oh. 215, 69 N. E. 126 (good opinion by Spear, J.); 1922, Burke *v.* State, — Oh. —, 135 N. E. 644; 1905, State *v.* Duncan, 78 Vt. 364, 63 Atl. 225; 1913, State *v.* Lloyd, 152 Wis. 24, 139 N. W. 514.

[14] 1905, Ex parte Munn, 140 Fed. 782 (the Federal Fifth Amendment cannot be invoked by one committed by a State court for refusal to answer); 1920, Com. *v.* Leventhal, 236 Mass. 516, 128 N. E. 864 (collecting authorities).

For the Territories, see note 3, *supra*, under *Philippines* and *Porto Rico*.

[15] This was for a while expressly left undecided: 1904, Adams *v.* New York, 192 U. S. 585, 24 Sup. 372; 1908, Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541, 28 Sup. 178. But it is now settled: 1908, Twining *v.* New Jersey, 211 U. S. 78, 29 Sup. 14 (indictment for exhibiting to a bank examiner a false paper, namely, a record of a directors' meeting showing the defendants T. and C. to be present, etc.; the judge charged the jury that C.'s failure to take the stand to deny the testimony that they were present, etc., might be considered for the purpose "of drawing an inference of guilt"; the Federal Court held, in an opinion by Moody, J., (1) that the law of New Jersey, as there judicially construed, "permitted such an inference to be drawn"; (2) that the U. S. Const. Amendment V was not operative for State law; (3) that under the U. S. Const. Amendment XIV, preserving the "privileges and immunities of citizens of the U. S." against impairment by State law, the privilege against self-crimination was not included; (4) that it was also not included in the same Amendment's guarantee of "due process of law"; the opinion contains a careful summary of the legislative history of the privilege in the Colonies; Harlan, J., diss.).

§ **2254.** [1] Bain *v.* Hargrave, Peake, Evidence, 184, note (quoted *ante*, § 2223).

[2] 1806, St. 46 Geo. III, c. 37 (quoted *ante*, § 2223). For the peculiar statutes in *Canada* (Dominion and Ontario), abolishing the privilege as to civil liability in certain cases, see *ante*, § 2223, n. 7.

[3] The history of the doubt, the judicial rulings, and the statutes, have already been fully examined *ante*, § 2223. The line of distinction, however, which it thus becomes necessary to draw between civil liability and criminal liability, can best be observed in connection with the subsequent sections (§§ 2256, 2257) dealing with forfeitures and penalties as the subject of the present privilege; for *bankruptcy* questions, see *post*, §§ 2260, 2282.

limitations were entirely distinct, in that it did not cover facts merely "tending" to disclose infamy, and did not apply to facts material to the issues (but only to "collateral" facts, *i. e.* practically, to facts solely affecting credibility). Its history and scope have been already examined (*ante*, §§ 984–987). In English practice the two privileges — concerning infamy and concerning criminality — were never confused; and while the former has gradually fallen into desuetude, the latter has never been allowed to abate its strength. In this country, constitutional sanction was given to the latter with practical unanimity; but there never was any suggestion, in express proposal or in apparent phrasing, thus to recognize the former;[1] and here, as in England, it has in most jurisdictions come to be ignored, and is replaced by judicial restriction of cross-examination to character.

No further notice of it would here be needed, but for an egregious misconception exhibited in the course of the controversy culminating in the case of Brown *v.* Walker, in the Federal Court (*post*, § 2281). That misconception employs the argument that a statutory amnesty for a crime cannot annul the privilege against self-crimination, because the disgrace at least remains. It thus rests upon the assumption that the present constitutional privilege has the function of protecting against the disclosure not only of criminality but also of disgrace:

1896, FIELD, J., dissenting, in *Brown* v. *Walker*, 161 U. S. 591, 16 Sup. 594: "It is contended, indeed, that it was not the object of the constitutional safeguard to protect the witness against infamy and disgrace. It is urged that its sole purpose was to protect him against incriminating testimony with reference to the offense under prosecution. But we do not agree that such limited protection was all that was secured. As stated by counsel of the appellant, 'it is entirely possible, and certainly not impossible, that the framers of the Constitution reasoned that, in bestowing upon witnesses in criminal cases the privilege of silence when in danger of self-incrimination, they would at the same time save him in all such cases from the shame and infamy of confessing disgraceful crimes, and thus preserve to him some measure of self-respect. . . . It is true, as counsel observes, that both the safeguard of the Constitution and the common-law rule spring alike from that sentiment of personal self-respect, liberty, independence, and dignity which has inhabited the breasts of English-speaking peoples for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences. In scarcely anything has that sentiment been more manifest than in the abhorrence felt at the legal compulsion upon witnesses to make concessions which must cover the witness with lasting shame, and leave him degraded both in his own eyes and those of others. What can be more abhorrent . . . than to compel a man who has fought his way from obscurity to dignity and honor to reveal crimes of which he had repented, and of which the world was ignorant?' The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to everyone, and needs no illustration. . . . The counsel for the appellant justly observes that 'the proud sense of personal independence which is the basis of the most valued qualities of a free citizen is sustained and cultivated by the consciousness that there are limits which even the State cannot pass in tearing open the secrets of his bosom.'"[2]

§ 2255. [1] Except, apparently, once, in an early opinion speaking 'obiter': 1802, Shippen, C. J., in Respublica *v.* Gibbs, 3 Yeates, Pa. 429, 437, 4 Dall. Pa. 253.

The same reasoning had already been advanced by Grosscup, J., in U. S. *v.* James, 60 Fed. 257, a case involving the same issue.

The notion exhibited in this passage ignores the independence in principle, in details, and in history, of the two privileges. Its 'reductio ad absurdum' is that if the privilege concerning criminality has such a scope when criminality has been expunged, leaving only turpitude, then it has also that scope when criminality never arose, if turpitude was apparent; unless we avow that there is no turpitude except as involved in criminality, and if so, how could the other privilege against the disclosure of turpitude ever have arisen? The opinion also makes the broad assumption that every criminality also involves turpitude, — the fallacy of which is seen plainly enough in the very case giving rise to the opinion; for who could, without absurdity, predicate that the disclosure of a pardoned rate-discrimination by a leading merchant or a powerful railroad official would, in the language of the opinion, "cover the witness with lasting shame and leave him degraded both in his own eyes and those of others"? It is, to be sure, of little avail to suggest reasons against a view which ignores all precedent and all history. It is simple enough to create a constitutional doctrine 'instanter', if we may snatch it, like a magician's white rabbit, full-grown, out of empty space, and place it living and panting before the astonied spectators. But such is not the accepted judicial habit.

Quite apart from the errors of logic and of history, a greater fault in the opinion above quoted is its singular appeal to false sentiment. Such abuse of words is merely pathos. To invoke the sentiments of lofty indignation and of courageous self-respect against the arbitrary methods of royal tyrants and religious bigots, holding an inquisition to enforce cruel decrees of the prerogative, and torturing their victims with rack and stake, is fitting and laudable, and moves men with a just sympathy. But to apply the same terms to the orderly everyday processes of the witness-stand, in a community governing itself in freedom by the will of the majority and having on its statute-book no law which was not put there by itself and cannot be repealed to-morrow, — a community, moreover, cursed above others by constant evasion of the law and by over-laxity of criminal procedure, — this is to maltreat language, to enervate virile ideas, to abuse true sentiment, to degrade the Constitution, and to make hopeless the correct adjustment of the best motives of human nature to the facts of life. Were it not so serious in its implications, it would be as ludicrous a spectacle as if one were to devote a colossal fortune to founding a hospital for the care of ablebodied vagrants, or to recite Milton's Ode to the Nativity at the birth of a favorite feline's litter.

The doctrine of the minority opinion in Brown *v.* Walker rests on a misconception so radical that only the exalted source of its promulgation makes it necessary to be thus noticed. Judges in other Courts have repeatedly repudiated that misconception when advanced at the Bar.[3] In the

[3] For other opinions pointing out the distinction, see the following: 1895, Buffington, J., in Brown *v.* Walker, 70 Fed. 46; 1857, Burnett, J., in Ex parte Rowe, 7 Cal. 184; 1884, Fauntleroy, J., in Kendrick *v.* Com., 78 Va. 490, 496 ("The Courts of Virginia will not recognize the Spartan morality which deprecates not the perpetration but only the exposure of crime").

following passages the discrimination between the two privileges is plainly expounded:

1830, MARCY, J., in *People* v. *Mather*, 4 Wend. 229, 252: "The distinction which I have endeavored to point out between the rule which protects the witness from being compelled to proclaim his own infamy, and that which secures him when on the stand from becoming the unwilling instrument of his own conviction, is not new or unsupported by authority. . . . The object of the two rules I have been considering is very different. The one saves the witness from being the herald of his own infamy; the other from himself furnishing the means of his punishment. The confounding of these rules would in my opinion produce a strange result."

1896, BROWN, J., in *Brown* v. *Walker*, 161 U. S. 591, 16 Sup. 644: "The fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the Courts to protect that which he has himself esteemed to be of such little value. The safety and welfare of an entire community should not be put into the scale against the reputation of a self-confessed criminal, who ought not, either in justice or in good morals, to refuse to disclose that which may be of great public utility, in order that his neighbors may think well of him. The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good. If it be once conceded that the fact that his testimony may tend to bring the witness into disrepute, though not to incriminate him, does not entitle him to the privilege of silence, it necessarily follows that, if it also tends to incriminate, but at the same time operates as a pardon for the offense, the fact that the disgrace remains no more entitles him to immunity in this case than in the other. . . . The danger of extending the principle announced in Counselman *v.* Hitchcock is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege."

§ 2256. **Criminal Liability**: (*a*) **Forfeiture.** Where a right of property is divested, or a liability to pay money to another person is created, by way of a retribution for misconduct done, or of a deterrent from misconduct apprehended, the effect is in spirit penal; and the disclosure of such facts should therefore be protected by the privilege. The distinction between a penalty and a sum fixed in preappointed liquidation of damages is familiar in equitable practice, and suggests here an analogy. So, too, in property rights, the distinction between an invalid divestiture of an estate as a penalty for marriage, and a grant conditioned upon non-marriage, may be of some service. But, in the end, the canon of difference remains elusive, and can hardly be phrased with nicety.

The judicial interpretation has always leaned to liberality, — partly, per-

haps, because of some early cases [1] concerning the ecclesiastical Courts, and occurring before the establishment of the common-law privilege, wherein was involved merely the struggle against the jurisdiction of those Courts; [2] partly, also, because of the time-honored maxim of equitable practice never to aid a forfeiture, in consequence of which the boundary between relief and discovery remained confused and the rule for the former (which was independent of criminality) tended to enlarge the limits of the privilege for the latter.[3] Where the loss of a right is inflicted by statute, there is a greater semblance of penal policy; the distinction was indeed once taken between "a determination by the party himself and a determination by act of Parliament." [4] Yet this feature of public or legislative policy is equally present in the incapacity of an alien, which nevertheless is not within the privilege; [5] so that this distinction also lacks uniform efficacy.

At the present day, the kinds of forfeiture which furnished the precedents are comparatively rare, and it is difficult to say what the line of judicial definition would be. Most of the precedents come down from the 1700s. They concern forfeitures of *ecclesiastical livings* dealt with in violation of the *statute against simony;* [6] of *property-titles* by virtue of *statutory incapacity as a papist,* [7] or as an *alien;* [8] of *public office,* by virtue of statutory incapacity

§ 2256. [1] 1611, Clifford *v.* Huntly, Rolle's Abr. "Prohibition," (T) 6, Jura Ecclesiastica, 427, pl. 7 (obligation assumed, 'pendente lite' on a marriage contract, not to marry or cohabit with another; examination in the ecclesiastical Court as to such marriage afterwards refused, "for that tends to the forfeiture of the obligation"); 1615, Bradston's Case, Rolle, *ubi supra*, (T) 1, Jura Ecclesiastica, 355, pl. 9 (a layman, who is to forfeit a penalty either by statute or otherwise, cannot be examined on oath in the ecclesiastical Court as to the offence causing the forfeiture).

[2] The history of this has already been examined (*ante*, § 2250).

[3] This is noticeable in most of the rulings of the 1700s, cited *infra*, which arose in equity on bills of discovery. Compare also the history in § 2250.

[4] Boteler *v.* Allington, *infra*, note 6.

[5] *Infra*, note 8.

[6] 1746, Boteler *v.* Allington, 3 Atk. 453, 457 (clerical living; the acceptance of a second living operating by law to vacate the first under certain conditions, the defendant was held privileged from discovery, the distinction being between "a determination by the party himself and a determination by act of Parliament"); 1755, Grey *v.* Hesketh, 1 Ambl. 268 (sale of an advowson during a vacancy, held not within the penalties of the statute of simony, though void at common law; and thus not privileged from discovery); 1831, Southall *v.* ———, 1 Younge 308, 316 (discovery as to a simoniacal contract; the fact that the defendant was only patron and trustee of the living to be forfeited, held not to effect his privilege).

[7] 1736, Smith *v.* Read, 1 Atk. 526 (discovery refused as to defendant's devisor being a papist and consequently disabled to take the estate; "there is no difference between a forfeiture of a thing vested and a disability to take inflicted as a penalty; . . . in the case of aliens, bastards, etc., there is a difference, where the disability arises from the rules of law and where it is imposed as a penalty"); 1751, Harrison *v.* Southcote, 2 Ves. Sr. 389, 1 Atk. 528, 539 (discovery not compelled whether defendant's vendor was a papist, a forfeiture of the estate under statute being involved).

[8] 1753, Duplessis *v.* Attorney-General, 1 Brown P. C. 415, 420 (an alien's incapacity to take land by purchase is not a "penalty or forfeiture," and therefore not privileged from discovery; "here is no loss, no forfeiture, no right to be divested; for the appellant took nothing originally, but for the benefit of the Crown");

Whether *deportation* proceedings are criminal has been the subject of diverse rulings: 1903, U. S. *v.* Hung Chang, 126 Fed. 400, 405 (deportation of a Chinese; the person arrested for deportation is not compellable to testify); 1904, Ark Foo *v.* U. S., 128 Fed. 697, 63 C. C. A. 249, *semble* (similar); 1904, U. S. *v.* Hung Chang, 134 Fed. 19, 25, 67 C. C. A. 93 (deportation of aliens is not a criminal proceeding; the respondent alien's refusal to testify may be the subject of inference against him); 1906,

or punishment;[9] of various other interests under *statutory prohibitions;*[10] and of estates prescribed in a will or deed to be *divested* by forfeiture as distinguished from conditional limitation.[11]

Where the forfeiture enures solely to the party seeking disclosure, it is obvious that he has it in his power (supposing it to be consistent with his in-

Low Foon Yin v. U. S., 145 Fed. 791, C. C. A. (proceedings for deportation of an alien are not criminal, so as to privilege the defendant); 1906, Low Chin Woon v. U. S., 147 Fed. 727, C. C. A. (Low Foon Yin v. U. S. followed); 1908, U. S. v. Tom Wah, D. C. N. D. N. Y., 160 Fed. 207 (Low Foon Yin v. U. S. followed; the opinion remarks: "This precise question has been passed upon . . . in Fong Yue Ting v. U. S.," cited *ante*, § 1355; but *quaere* this statement).

[9] *Eng.* 1744, Honeywood v. Selwin, 3 Atk. 276 (bond to pay money during enjoyment of office; defendant, being a member of Parliament, held privileged from discovery, because by statute the acceptance of other office vacated a seat in Parliament); *U. S.* 1802, Respublica v. Gibbs, 3 Yeates Pa. 429, 437 (questions involving incapacity as an elector or juror, in punishment for treason, held privileged); 1917, Hawley v. Wallace, 137 Wis. 183, 163 N. W. 127 (aldermanic election contest, to avoid an election for violation by the contestee of the corrupt practices statute; the contestee held privileged from testifying to a penal violation of the statute, but not from taking the stand and being cross-examined subject to that privilege; "an election contest is in its general characteristics a civil proceeding"; careful opinion by Dibell, C., with a full survey of authorities).

Compare the cases under *removal from office, post*, § 2257.

[10] *Eng.* 1735, Sharp v. Carter, 3 P. Wms. 375 (statutory forfeiture for contracting to sell controverted rights, held privileged); 1840, Sloman v. Kelly, 1 Y. & C. Exch. 169 (discovery in aid of defendant, pleading illegal gaming as a defence to an action on securities given; held, that the inability to recover upon such securities was not a forfeiture); 1843, Attorney-General v. Lucas, 2 Hare 566 (information for forfeiture of an interest in a wife's property under statute; discovery refused); *Can.* 1904, Attorney-General v. Toronto J. R. Club, 7 Ont. L. R. 248 (proceeding to revoke a club's charter and enjoin its continuance, for maintaining a betting-house; discovery refused, a forfeiture being involved); *U. S.* 1900, La Bourgogne, 104 Fed. 823 (loss of a ship-owner's limitation of civil liability under statutes is not a forfeiture); 1827, Northrop v. Hatch, 6 Conn. 361 (statutory forfeiture, prescribed for a fraudulent conveyance, of "one year's value of the land"; privilege applied); 1831, Skinner v. Judson, 8 Conn. 528, 535 (same); 1820, Livingston v. Tompkins, 4 Johns. Ch. N. Y. 415, 432, *semble* (statutory cessation of a grant of a navigation charter, on the happening of an external event, held a forfeiture); 1832, Livingston v. Harris, 3 Paige N. Y. 528, 533 (forfeiture under a usury statute; privilege applied); 1839, Perrine v. Striker, 7 Paige N. Y. 598, 601 (forfeiture of a debt, as penalty for usury, is covered by the privilege).

[11] *Eng.* 1742, Chauncey v. Tahourden, 2 Atk. 392 (legacy to A at the age of 21 or day of marriage; but if she marries without B's consent, then over to another; discovery privileged, as involving a forfeiture); 1745, Lucas v. Evans, 3 Atk. 260 (gift with limitation over on a second marriage; the fact of the second marriage held not privileged); 1753, Jordan v. Holkham, 1 Ambl. 209 (gift with limitation over on a second marriage, held a forfeiture); 1850, Hambrook v. Smith, 17 Sim. 209, 217 (estate to A during life or until bankruptcy or alienation, and then to another person; held, a conditional limitation, and the condition not privileged from discovery); 1856, Chester v. Wortley, 17 C. B. 410, 426 (ejectment, for breach of covenant in lease; not decided); 1862, Blyth v. L'Estrange, 3 F. & F. 154 (ejectment for forfeiture of a copyhold; interrogatories refused); 1864, Pye v. Butterfield, 5 B. & S. 829, 837 (fact of underletting, as a ground for forfeiture of a lease, privileged from discovery; the privilege covers "forfeiture of estate, except where the estate is held on a conditional limitation, in which case it would be extinguished on non-performance of the condition; this may be a fine-drawn distinction, but whatever we may think of the rule, it is too well established to admit of doubt"); 1897, Earl of Mexborough v. Whitwood U. D. Council, 2 Q. B. 111 (privilege applied, in an action for forfeiture of a lease by breach of covenant against underletting; Pye v. Butterfield followed); *Ire.* 1904, Miller v. Commissioners, L. R. 2 Ire. 421 (conditional limitation, and forfeiture, distinguished); *U. S.* 1828, Horsburg v. Baker, 1 Pet. 232, a bill for discovery, in aid of a forfeiture of property under a deed and a will, was sanctioned, without apparently considering this principle.

But note that in *Canada*, under the statutes quoted *post*, § 2281, abolishing the privilege in part, by the immunity method, the privilege is held to be no longer applicable to prevent discovery in civil cases involving penalties and forfeitures.

terest) to obtain the disclosure by a *waiver of the forfeiture;* and this expedient effectually nullifies the privilege.[12]

§ 2257. Same: (*b*) Penalty. The distinction between a penalty and a forfeiture is a shadowy one; though both are in essence contrasted with a civil liability. A penalty may be defined as a liability to pay money or to yield up a public privilege by way of punishment imposed by law.

(1) When the penalty lies in the *yielding up of a privilege,* a distinction therefore seems proper between inflicting a punishment and restraining the continued improper exercise of functions. The process of *impeachment* of an official seems to fall in the former class;[1] but most other processes of *removal* or restraint (including *disbarment*) would ordinarily come within the latter description.[2] When the penalty lies in the *payment of money,* it seems clear that a mere unregulated increase of compensation under the name of exemplary damages is still a civil liability in essence; and therefore the same consequence ought to follow when by statute a fixed sum, or a multiple based on actual loss, is prescribed.[3]

In any case, the *form of the proceeding* is not decisive, for in the name of the State a proceeding essentially civil is sometimes conducted;[4] and, conversely, a specific penalty for wrongdoing is sometimes made recoverable at

[12] 1719, East India Co. *v.* Atkins, 1 Stra. 168, 175 (but the waiver must show plainly that he has disentitled himself to enforce the penalty); 1793, Wools *v.* Walley, 1 Anstr. 100 (bill for tithes; plaintiff's waiver of treble-value penalty, held to require discovery); 1747, Uxbridge *v.* Staveland, 1 Ves. Sr. 56 (lease); 1867, U. S. of America *v.* McRae, L. R. 4 Eq. 327, 334, 340.

§ 2257. [1] 1895, Thruston *v.* Clark, 107 Cal. 285, 40 Pac. 436 (proceedings for removal from office under Penal Code § 772; privilege applied).

[2] 1922, Attorney-General *v.* Pelletier, 240 Mass. 264, 134 N. E. 406 (information to remove a district attorney for misconduct in office; privilege held not applicable); 1900, State *v.* Standard Oil Co., 61 Nebr. 28, 84 N. W. 413 (statutory proceeding to enjoin a foreign corporation from violating the anti-trust law and to revoke its license, held not a criminal proceeding); 1899, Re Randel, 158 N. Y. 216, 52 N. E. 1106 (disbarment proceedings; privilege not applied); 1917, Re Rouss, 221 N. Y. 81, 116 N. E. 782 (an attorney in proceedings for disbarment, held not immune from discipline by reason of having testified for the prosecution on an indictment affecting his client's case; the present question not decided).

[3] 1899, Southern R. Co. *v.* Bush, 122 Ala. 470, 26 So. 168 (in an action for death, the damages, though punitive and not compensatory, are not a penalty, and the privilege does not apply to the defendant); 1895, Levy *v.* Superior Court, 105 Cal. 600, 38 Pac. 965 (administrator's citation of one charged with concealing and embezzling the estate of the deceased; the statute provided for double damages; an order of compulsory examination was held proper, the statute being remedial, not penal; McFarland and DeHaven, JJ., diss.); 1892, Boyle *v.* Smithman, 146 Pa. 255, 274, 23 Atl. 397 (action to recover penalties for not posting a statement of business done, under a statute declaring that the defendant "shall forfeit and pay" one thousand dollars for each act; privilege applied).

Contra: 1682, Anon., 1 Vern. 60 (bill for tithes; discovery declined, as a treble penalty was collectible; principle apparently sanctioned); 1916, Speidel Co. *v.* Barstow Co., D. C. R. I., 232 Fed. 617 (where a statute imposes triple damages for infringement of a patent, interrogatories for discovery under Equity Rule 58 are privileged from answer); 1921, Wilson *v.* Union Tool Co., D. C. S. D. Cal., 275 Fed. 624 (treble damages for infringement of a patent); 1890, Logan *v.* R. Co., 132 Pa. 403, 406, 409, 19 Atl. 137 (discovery of papers, refused for the purpose of recovering a penalty of treble damages for discrimination in carriers' rates, but allowed for recovering an excess of freight-money unjustly paid).

[4] 1896, Miller *v.* State, 110 Ala. 69, 20 So. 392 (bastardy proceedings not being a criminal case, the defendant's failure to take the stand was therefore held the proper subject of comment); 1895, State *v.* Collins, 68 N. H. 299, 44 Atl. 495 (proceeding to enjoin a liquor nuisance; defendant's failure to testify is open to inference).

the suit of an informer or other person by way of encouraging detection and prosecution.[5]

(2) In a civil case, it often happens that a main part of the issue concerns *conduct which is also criminal*; but the privilege protects nevertheless. The mere fact that a civil liability also inheres in the same act does not override the criminal liability; for it would not be possible to disclose the former without also disclosing the latter. This application of the principle causes hardship to civil parties who are in no wise interested in the criminal aspect of their opponents' conduct and yet are by that circumstance balked of discovery of their civil wrongs; but the doctrine is unquestioned. It finds illustration in civil suits involving *libel*,[6] *adultery* and the like,[7] *fraud*,[8] *bank-*

[5] In these cases so much depends often upon the details of the statute that the decision, in the earlier English cases, is not worth noting in full:

England: 1749, East India Co. *v.* Campbell, 1 Ves. Sr. 246 (penalties recoverable by East India Co. against infringers of their monopoly; privilege applied); 1739, Suffolk *v.* Green, 1 Atk. 450 (usury); 1781, Bishop of London *v.* Fytche, 1 Brown Ch. C. 96 (simony); 1792, Mynd *v.* Francis, 1 Anstr. 5 (common informer's suit against one winning money at play; discovery refused on other grounds); 1797, Raynes *v.* Towgood, Peake, Evidence, 184, note (statutory penalty for stock-jobbing; privilege affirmed); 1800, East India Co. *v.* Neave, 5 Ves. Jr. 173, 184 (contract as captain); 1802, Mayor, etc. of London *v.* Levy, 8 Ves. Jr. 398, 404 (alien dues on merchandise); 1803, Bullock *v.* Richardson, 11 Ves. Jr. 373 (stock-jobbing statute); 1826, Billing *v.* Flight, 1 Madd. 230 (stock-jobbing statute); 1836, Glynn *v.* Houston, 1 Keen 329, 337 ("In what way [he would be so subject, whether by indictment, information, impeachment, or, if necessary, by a bill of pains and penalties, is immaterial; it is sufficient that he would be subject to penal consequences"); 1854, Attorney-General *v.* Radloff, 10 Exch. 84 (information for penalties for smuggling; the Court equally divided as to whether it was a criminal proceeding, under a statute making parties competent and compellable in other than criminal proceedings; this case led to the ensuing statute); 1865, St. 28 & 29 Vict. c. 104, § 34 (cases on the revenue side of the Exchequer are not to be deemed criminal cases).

Canada: 1867, Burton *v.* Young, 17 Low. Can. 379 ('qui tam' for penalties; cited *post*, § 2260).

United States: 1832, U. S. *v.* Twenty-Eight Packages, Gilpin 306, 312 (information for forfeiture of goods fraudulently invoiced; privilege applied); 1880, Johnson *v.* Donaldson, 18 Blatchf. 287, 3 Fed. 22 (penalties and forfeitures under the copyright law; privilege applied); 1893, Lees *v.* U. S., 150 U. S. 476, 480, 14 Sup. 163 (action for penalty under the alien-immigration statute; privilege applied to the defendant); 1901, Newgold *v.* A. E. N. & M. Co., 108 Fed. 341 ('qui tam' action under U. S. Rev. St. § 4901; discovery privileged); 1901, Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435 (privilege held applicable to a bill of discovery in aid of a civil suit to recover penalties for gambling, notwithstanding the statutory sanction of such a bill in Rev. St. § 137, c. 38).

[6] *Eng.* 1812, Maloney *v.* Bartlett, 3 Camp. 210 (libel in an affidavit; the copier of an affidavit being liable for a misdemeanor, questions on that fact were held privileged); *U. S.* 1842, March *v.* Davidson, 9 Paige N. Y. 580 (discovery from defendant in libel, not allowed on the facts); 1913, Karel *v.* Conlan, 155 Wis. 221, 144 N. W. 266 (libel; cited more fully *ante*, § 2252, n. 8).

Distinguish the case of a party who, by inviting an issue, in effect waives the privilege: 1827, Macaulay *v.* Shackell, 1 Bligh N. s. 96, 121, 133, *semble* (libel; plea of truth; the defendant is entitled to discovery as to the truth of charges involving indictable acts; on the analogy of insurance cases, where fraud is set up as a defence to an action on the policy).

[7] *Eng.* 1814, Dodd *v.* Norris, 3 Camp. 519 (daughter, in an action for seduction, held privileged from answering as to being "criminal with other men"); 1891, Redfern *v.* Redfern, Prob. 139, 145 (divorce for adultery; discovery as to adultery, held not compellable, in so far as adultery is a punishable offence); *U. S.* 1863, Marsh *v.* Marsh, 16 N. J. Eq. 391, 397 (divorce for adultery; discovery as to adultery, held privileged); 1922, Gould *v.* Gould, Sup. App. Div., 194 N. Y. Suppl. 742 (action by a wife against her husband for necessaries while living apart in France; plea, adultery in France; the plaintiff held not privileged from testifying as to the adultery on the ground of forfeiture of dower, because that "would be an incident of the decree dissolving the marital relation and not the essential purpose of the action").

[8] *Eng.* 1795, Selby *v.* Crew, 2 Anstr. 504 (discovery of creditors signing a bankrupt's certificate for a consideration, refused as

ruptcy,[9] and sundry misconduct.[10] The traditional allegation, in chancery bills, of a *conspiracy* by the defendants is not of itself an obstacle to discovery, because it is usually a mere formal phrase of the draftsman.[11] Moreover, it may also be possible to separate one's inquiries, so as to require discovery as to the portion concerning non-criminal acts.[12]

(3) A proceeding to compel obedience to a judicial order, by process of *contempt*, may for general purposes not be distinctively a civil or a criminal proceeding. But the policy of the privilege covers such a proceeding, because the legal consequences of a finding against the defendant are an imprisonment or a fine.[13] Whether the proceeding be correctly called criminal or

involving subornation of perjury); 1805, Ex parte Symes, 11 Ves. Jr. 521 (creditor's fraudulent receipt of bankrupt's money); 1807, Claridge *v.* Hoare, 14 Ves. Jr. 59 (compounding a felony); 1807, Dummer *v.* Chippenham, 14 Ves. Jr. 246 (conspiracy); 1858, Michael *v.* Gay, 1 F. & F. 409 (conspiracy to defraud creditors, held privileged); *U. S.* 1881, Horstman *v.* Kaufman, 97 Pa. 147 (discovery by a plaintiff in execution against a defendant for fraudulent concealment of property, refused, the conduct being a misdemeanor).

But, of course, not all civil fraud is also criminal: 1849, Foss *v.* Haynes, 31 Me. 81, 90 (fraudulent conveyance, here held not to involve criminality).

[9] In bankruptcy proceedings, as illustrated in note 8, the privilege would have common application. But in England, by a strict construction of the doctrine as to facts "tending to criminate," and by skilful drafting of interrogatories, it would seem that the privilege was very nearly evaded, even before its practical abolition in the modern Bankruptcy Act; and in the United States a statutory amnesty partly controls. The cases can best be examined under those heads (*post*, §§ 2260, 2283).

[10] *Eng.* 1793, Oliver *v.* Haywood, 1 Anstr. 82 (bill for tithes; discovery as to a combination against the parson, refused, as involving maintenance); 1793, Mayor of London *v.* Ainsley, 1 Anstr. 158 (bill for account of tolls; discovery as to maintenance, refused); 1797, Whittingham *v.* Burgoyne, 3 Anstr. 900 (discovery as to the sale of a commission contrary to army regulations; not decided, but a ruling refusing such discovery was cited); *U. S.* 1907, Cassatt *v.* Mitchell C. C. Co., 81 C. C. A. 80, 150 Fed. 32, 44 (whether in a civil action against a carrier for damages under U. S. St. 1887, c. 104, Feb. 4, § 8, the criminality of the same conduct under ib. § 10 allows the privilege to operate; not decided); 1906, Patterson *v.* Wyoming Valley District Council, Pa. Super. Ct. (appeal dismissed without an opinion, confirming the decision of Head, J., published in advance sheets of 78 N. E. Rep., Oct. 19; in an attachment for contempt in the violation of an injunction against a boycott by a labor union, the production of the defendant's books was held not within the privilege).

Conversely, if the privilege be held *not applicable* to *corporations* in criminal cases, it is also not applicable to them in civil cases; 1921, Nekoosa-Edwards Paper Co. *v.* News Pub. Co., 174 Wis. 107, 182 N. W. 919 (action for damages under the anti-trust act).

Distinguish cases in which *all relief* in equity is refused in aid of an *immoral purpose*, irrespective of the privilege as to discovery merely: 1797, Wallis *v.* Portland, 3 Ves. Jr. 494 (services as solicitors for a candidate for Parliament).

[11] *Eng.* 1752, Chetwynd *v.* Lindon, 2 Ves. Sr. 451 ("It is not every conspiracy will be a ground for a criminal prosecution; if that was the case, almost all the causes in this court would come within that description; the boundaries are often very nice"; conspiracy to set up a supposititious child, *semble*, not privileged); *U. S.* 1848, Adams *v.* Porter, 1 Cush. Mass. 170, 174 ("The allegation of an unlawful confederation or conspiracy, which is usually introduced in bills in equity, is rather to be considered, however, as constituting a merely formal part of the bill, and requiring no particular answer").

[12] Examples are the following cases: 1843, Lichfield *v.* Bond, 6 Beav. 88, 93; 1848, Fisher *v.* Price, 11 Beav. 194, 200.

Compare, however, the effect on this expedient of the rule as to facts "tending to criminate" (*post*, § 2260).

[13] *Fed.* 1901, Gompers *v.* Buck Stove & Range Co., 221 U. S. 468, 31 Sup. 492 (contempt in violating an anti-boycott injunction; the opinion treats the privilege as not applicable); 1909, Hammond Lumber Co. *v.* Sailors' Union, C. C. N. D. Cal., 167 Fed. 809, 823 (a proceeding to punish for contempt of an injunction is a criminal proceeding, for the purposes of a claim of this privilege; cases collected); 1912, Merchants' S. & G. Co. *v.* Board of Trade, 8th C. C. A., 201 Fed. 20, 28 ("It may be safely said that there is no case where . . . the Fifth amendment applies except where the contempt charged also constitutes a crime"; hence, the defendant may be examined, so long as he is not required

civil, or whether some other rule or privilege of criminal cases (such as jury trial) pertains to it, should not be the criterion for the present question, which rests entirely on its own policies and logic.

§ 2258. **Crime under Foreign Sovereignty.** In Samoa it was tabooed to name a deceased chieftain by the title he bore when living; in Japan it was seditious to express a scepticism as to the official genealogy of His Imperial Majesty; in Germany it was once 'lèse majesté' to publish (as many British and American journalists have done) that irreverent metrical jest upon the Emperor. Shall our Courts, then, include in the category of criminating facts these various offences against the polyglot public policies of the wide world? In the State of Kansas it was, at one time, for a few months, unlawful for certain insurance companies to transact business within that sovereignty, because they had for many years struggled to avoid the payment of a noted claim alleged to have been fraudulently concocted. Should the privilege therefore have been applied in other jurisdictions during that period to all inquiries based on the transactions of these companies in Kansas? It was at one time a criminal offence in many Southern States to read the Bible to negro slaves; it has long been a crime in Italy to export art treasures without official consent, — in Germany to emigrate during military age without governmental permission, — in the Ottoman Empire to make proselytes from Islamism to Christianity, — and in Massachusetts, until recent times, to sell cigars on Sunday. Are the Courts of our various Commonwealths to

"Let observation, with extensive view,
Survey mankind, from China to Peru,"

and catalogue within the rubrics of criminality every act which is anywhere, under any system of manners, morals, or policy, stigmatized by law? If so, they will indeed be undertaking a huge and curious task — stimulative, no doubt, to the science of comparative nomology, but calculated to baffle their greatest zeal and to invite frequent failure.

It will not do to argue that our Courts may confine their search to those fifty jurisdictions united externally as the United States of America. These States are all independent legislative sovereignties in criminal matters, and there is no reason for ignoring this independence. Nor is anything gained by stopping at the boundaries of Anglo-Saxon civilization, with its common trend of legal ideas; for there are within the British dominions some sixty

to criminate himself otherwise than as being in contempt); *Cal.* 1893, Ex parte Gould, 99 Cal. 360, 33 Pac. 1112 (contempt by doing certain acts prohibited by injunction; privilege held applicable); *Ia.* 1918, Doyle *v.* Wilcockson, 184 Ia. 757, 169 N. W. 241 (proceedings of contempt for violating injunction); *Kan.* 1892, Re Nickell, 47 Kan. 734, 28 Pac. 1076 (contempt by eloigning witnesses; privilege held applicable); *N. J.* 1902, Re Haines, 67 N. J. L. 442, 51 Atl. 929 (contempt in disobeying a subpœna; privilege held applicable); *Or.* 1907, State ex rel. Baker Lodge *v.* Sieber, 49 Or. 1, 88 Pac. 313 (contempt by interfering with flow of water in a ditch, contrary to an injunction; privilege applicable); *Wash.* 1905, State ex rel. Dye *v.* Reilly, 40 Wash. 217, 82 Pac. 287 (contempt in obstructing a highway, contrary to an injunction; privilege held not applicable).

See an article by Mr. Roy C. Merrick, "Privilege against Self-Crimination as to Charges of Contempt" (Illinois Law Rev., XIV, 181).

legislative bodies, more or less autonomous; so that the search for criminalities might involve several scores of codes. Besides, the differences, within our own nation, of legislative policy are as radical as any within this larger field; New South Wales and England probably do not differ so much as Maine and Texas, or Porto Rico and Illinois. If we say that there is nevertheless a practical difference of safety between the cases of him who has offended against the laws of one of our own States and of him who has broken those of a foreign State, and that this difference should lead us to take the former into consideration, one sufficient answer is that extradition treaties have practically abolished the hope of refuge from the law. "Denmark's a prison? Then is the world one!" To-day's journal chronicles the sailing from England, under arrest, of a man who is charged with a murder committed nine years ago in Chicago; and, in the next paragraph, the granting of an extradition-writ for a convict in Sing-Sing, charged with embezzlement in France, and just completing a long confinement for crime in this country.

But, more than this, the answer is that a radical fallacy of principle underlies the assumption that the Courts of one State may consider the effect of enforced disclosures as creating a danger of prosecution in another sovereignty. It is not in the power or duty of one State, or of its Courts, to be concerned in the criminal law of another State. For the former, there is but one law, and that is its own. The boundaries of our Constitution and our sovereignty are coextensive. A constitution is intended to protect the accused against the methods of its own jurisdiction and no other. The Court's view, as well as its functions, should be confined to its own organic sphere.

Practical considerations also deter. The Court of one State knows nothing of the policies and rules of other systems; and it risks error and adds great burdens in attempting to master them. Further, it cannot well know the real probabilities of danger of prosecution under another system; for it would need to know what means and motives for prosecution there existed, what likelihood there was of migration thither by the accused or of his capture when arrived or of his involuntary extradition, and what the probability was of the discovery and employment in that prosecution of the disclosure now desired. Even if it could ascertain these elements of probability, it could not define any workable rule for measuring them. The only conceivable rule would be that when an act was by any possibility capable of being treated as criminal by the law of any other sovereignty, the privilege should protect it. That such a rule should be seriously suggested seems incredible.

And yet this, or something logically its equivalent, has at least once been proposed, — though, fortunately, without success. In the Federal Supreme Court, in considering the question how far a Federal statute, giving amnesty for a specific offence, expunged the offence and thus nullified the privilege, a minority placed their argument in part on the ground that the same act might

still be an offence in another jurisdiction and would therefore still be entitled to protection in the Federal Court:

1896, SHIRAS, J., with GRAY and WHITE, JJ., dissenting, in *Brown* v. *Walker*, 161 U. S. 591, 16 Sup. 644: "Another danger to which the witness is subjected by the withdrawal of the constitutional safeguard is that of a prosecution in the State courts. The same act or transaction which may be a violation of the interstate commerce act may also be an offense against a State law. Thus, in the present case, the inquiry was as to supposed rebates on freight charges. Such payments would have been in disregard of the Federal statute; but a full disclosure of all the attendant facts (and, if he testify at all, he must answer fully) might disclose that the witness had been guilty of embezzling the moneys intrusted to him for that purpose, or it might have been disclosed that he had made false entries in the books of the State corporation in whose employ he was acting. These acts would be crimes against the State, for which he might be indicted and punished, and he may have furnished, by his testimony in the Federal court or before the commission, the very facts, or, at least, clues thereto, which led to his prosecution."

Against this argument no more need be attempted; but it may be suggested that its exaggerated structure of apprehension of foreign prosecution is built upon a foundation of "mights" and "mays" and other exiguous possibilities so elaborate as to seem unfit for practical consideration in the zealous administration of justice. The opposite view has been expounded in the following passages:

1850, Lord CRANWORTH, V. C., in *King of Sicilies* v. *Wilcox*, 7 State Tr. N. S. 1049, 1068: "Can the defendants then object to answer that which might subject themselves to penal consequences if they should go to Sicily? I think not. The rule relied on by the defendants is one which exists merely by virtue of our own municipal law, and must, I think, have reference exclusively to matters penal by that law, — to matters as to which, if disclosed, the judge would be able to say, as matter of law, whether it could or could not entail penal consequences. . . . No judge can know, as matter of law, what would or would not be penal in a foreign country; and he cannot therefore form any judgment as to the force or truth of the objection of a witness when he declines to answer on such a ground. . . . It is to be observed that in such a case, in order to make the disclosure dangerous to the party who objects, it is essential that he should first quit the protection of our laws and wilfully go within the jurisdiction of the laws he has violated. . . . I am of opinion for these reasons, in the absence of all authority on the point, that the rule of protection is confined to what may tend to subject a party to penalties by our law."

1896, BROWN, J., in *Brown* v. *Walker*, *supra* (after arguing that Congress has power to enact such a statutory amnesty to apply in State courts, and that the statute in question was intended as a general one): "But, even granting that there were still a bare possibility that, by his disclosure, he might be subjected to the criminal laws of some other sovereignty, that [danger], as Chief Justice Cockburn said in Queen *v.* Boyes,[1] in reply to the argument that the witness was not protected by his pardon against an impeachment by the House of Commons, is not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but 'a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.' Such dangers it was never the object of the provision to obviate."

In Brown *v.* Walker, *supra*, the question arose for an act once criminal by the Federal law, but afterwards given statutory amnesty. But the argument

§ 2258. [1] 1 B. & S. 311; *post*, § 2260.

of the minority, as quoted *supra*, would apply equally well to any act that had never had the remotest taint of criminality under the Federal law; *e. g.* any bill of discovery into account-books, even if no interstate-commerce law had ever existed, might reveal an embezzlement which would be an offence under some State law though not under any Federal statute; so that the minority's argument is logically independent of the special facts in Brown *v.* Walker.

In point of precedent, three different cases may be distinguished. (1) The act may be criminal in another court or system of law in the *same jurisdiction* of legislative sovereignty; here the privilege applies.[2] (2) The act may be admitted or proved to be actually criminal by the contemporary laws of another and independent *sovereignty;* here the privilege ought not to apply, for the reasons above stated; but the precedents are not harmonious.[3] (3) The act may not be *admitted or proved* to be criminal by any other State's law, or, if thus criminal, to have been done so as to make the claimant of the privilege actually amenable to that law; here the privilege ought certainly to be denied, and it would seem that any Court would concede this.[4]

[2] 1749, East India Co. *v.* Campbell, 1 Ves. Sr. 246 (discovery of facts rendering a defendant punishable in the British criminal jurisdiction in Calcutta, though not in England, held not compellable); 1750, Brownsword *v.* Edwards, 2 Ves. Sr. 243 (discovery of an incestuous marriage, refused, incest being punishable in the ecclesiastical Court; "the general rule is that no one is bound to answer so as to subject himself to punishment, whether [or not] that punishment arises by the ecclesiastical law of the land").

[3] *Privilege denied: Eng.* 1850, King of Sicilies *v.* Wilcox, 7 State Tr. N. S. 1049, 1068 (discovery asked from agents of a revolutionary government in Sicily; their exposure to penalties in Sicily, held no ground of privilege); *U. S.* 1922, Gould *v.* Gould, Sup. App. Div., 194 N. Y. Suppl. 742 (action by a wife against a husband for necessaries while living apart in France; plea, adultery in France; the plaintiff held not privileged from testifying as to adultery, because "the plaintiff would not be liable to a criminal prosecution therefor in this jurisdiction"; and she had already been convicted for it in France); 1854, State *v.* March, 1 Jones N. C. 526 (answer as to perjury in Georgia, compellable; "our Courts, in administering justice among their suitors, will not notice the criminal laws of another State or country" for this purpose); 1887, State *v.* Thomas, 98 N. C. 599, 603, 4 S. E. 513 (preceding case approved).

Privilege affirmed: Eng. 1867, U. S. of America *v.* McRae, L. R. 4 Eq. 327, 339, L. R. 3 Ch. App. 79, 87 (bill for account against defendant for money received as agent of the Confederate States; plea, that the defendant's property was liable to seizure, and proceedings were pending to seize it, for such agency, by act of the U. S. Congress, held valid, by Wood, V. C.; King of Sicilies *v.* Wilcox, *supra*, distinguished, because here the existence of the foreign law and the actual liability under it appeared admitted upon the record); *U. S.* 1828, U. S. *v.* Saline Bank, 1 Pet. 100 (bill for discovery, filed in the U. S. District Court for Western Virginia, against stockholders of a Virginia bank; plea allowed that an answer would subject them to penalties under a Virginia statute); 1913, Buckeye Powder Co. *v.* Hazard P. Co., Conn. D., 205 Fed. 827 (State law of criminal libel).

Undecided: 1881, Power *v.* Ellis, 6 Can. Sup. 1, 6.

[4] 1896, Brown *v.* Walker, 161 U. S. 591, 16 Sup. 644, as quoted *supra;* 1903, People *v.* Butler St. F. & I. Co., 201 Ill. 236, 66 N. E. 349 (cited *post*, § 2281, n. 11); 1904, State *v.* Jack, 69 Kan. 387, 76 Pac. 911 (Kansas anti-trust law; the witness claiming that his business involved also interstate commerce, it was held that "the possibility that his answers might disclose violations of the Federal anti-trust law" was not a "real and probable danger," following Brown *v.* Walker, U. S.).

The doctrine of Brown *v.* Walker, that there must be a "real and probable danger," has since been thus developed: 1905, Jack *v.* Kansas, 179 U. S. 372, 26 Sup. 73 (information under the Kansas anti-trust act, in the Kansas District Court; held that the possibility that answers might be given which might also incriminate him under the Federal anti-trust act was too remote, the Kansas Court having ruled that matters constituting a violation of the Federal act would be immaterial in the proceeding in question; two judges dissenting;

§ 2259. **Crime of a Third Person.** It is obvious that the criminal act of a *third person* cannot be the subject of privilege for the claimant.[1]

§ 2259*a*. **Crime of a Corporation.** It is plain, on the one hand, that a *corporation*, when discovery is sought from it as such, is not protected from disclosure, so far as it is not capable of committing a criminal act.[1]

(1) But if the corporation is chargeable with a criminal act, has it the privilege, like a natural person?

The following passage presumably expresses most coherently the instinctive attitude which underlies the usual negative answer given by the Courts:

1921, VINJE, J., in *Nekoosa-Edwards Paper Co. v. News Pub. Co.*, 174 Wis. 107, 182 N. W. 919: "Is a corporation within the intent and purpose of the fifth federal amendment? In McCulloch *v.* Maryland, 4 Wheat. 411, we find this significant language of Chief Justice Marshall: 'The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else.'

"What is that something else? Obviously it is the transaction of lawful business. And it is equally obvious that the corporation is thus created for the primary benefit of the State, and not for that of the corporation itself. The State creates this corporate entity because the business needs of the public, the State, are thereby promoted. The moment a corporation becomes an injury to the public it has no valid reason for existence, because the object for which it was created has not only been thwarted, but the creature has become an instrument of evil.

"It is otherwise with a natural person. He is created for his own existence, and not for a mere business purpose. He has certain inalienable rights such as 'life, liberty and the pursuit of happiness.' He may transgress the law, and yet his right of being remains inviolate, except in cases of capital punishment. He is a natural entity, enjoying the faculties, rights, and privileges with which he is endowed, and the basic law says he shall not be compelled to make declarations that will forfeit them because he is not a mere instrument for a specific business purpose. He has his hopes, his aspirations, his desires and his weaknesses — he lives; a corporation merely exists, and that in an artificial way, for a single purpose. . . . Having, then, these sensibilities and faculties which constitute the essence of a natural person, there is an underlying reason for not requiring self-incrimina-

in this case, however, it would seem that the Federal Court erred in assuming, as it did, that under the U. S. 14th Amendment the witness should be protected from the Kansas Court even if there was a "real danger" of Federal prosecution); 1905, Ballmann *v.* Fagin, 200 U. S. 186, 26 Sup. 212 (a witness in a Federal Court refused to produce a book, and made the claim that it would criminate him either under the Federal bucket-shop act, Rev. St. § 5209, or under the Ohio bucket-shop act, alleging that several charges under the latter act were pending; held privileged, on the authority of Jack *v.* Kansas, *supra;* two judges dissenting); 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370 (anti-trust law; that a Federal immunity-statute would not protect a witness from possible prosecution under a State law in a State court is immaterial; approving King of Sicilies *v.* Wilcox, *supra*, n. 3, and distinguishing U. S. *v.* Saline Bank, *supra*, n. 3).

However, on *letters rogatory* from a foreign country to a Federal court, the following extraordinary and impracticable statute gives a maximum scope to the privilege: U. S. Code, § 6276 (on letters rogatory from a foreign country for a witness residing in the U. S., privilege protects from self-incrimination "either under the laws of the State or Territory within which such examination is had, or any other, or any foreign State").

§ 2259. [1] 1850, King of Sicilies *v.* Wilcox, 7 State Tr. N. S. 1049, 1068 (Lord Cranworth, V. C.: "There is no privilege against disclosing matter within the knowledge of the party, merely because it might subject other persons to punishment"; here, persons in Sicily); 1906, Washington Nat'l Bank *v.* Daily, 166 Ind. 631, 77 N. E. 53, *semble* (cited *ante*, § 2200).

Distinguish the rule that the witness alone, *not the party* to the trial, can claim the privilege (*post*, § 2270).

§ 2259*a*. [1] 1850, King of Sicilies *v.* Wilcox, *ubi supra*, 1062 (defendant corporation not privileged as to a breach of the Foreign Enlistment Act, because a corporation was not indictable under it).

tion from him which does not exist in the case of a corporation. There is no 'personal' death or loss of liberty in the annulment of a corporate franchise or in a judgment for damages against it. When, therefore, it undertakes to do that which the law forbids, and which injures the public, it has no claim for mercy that needs be recognized.

"Hence, if a corporation has made a record by its books or papers that shows it has violated the purposes for which it was created, why should not the State, which gave it birth for legitimate business purposes only, have the right, either directly in the exercise of its inquisitorial powers, or indirectly through one damaged by such unlawful conduct of the corporation, to inspect the record thus made?"

But this argument fails to give attention to the legal fact that a corporation is (by hypothesis) as capable of a crime as a natural person. Furthermore, it does not refer for its criterion to the policies underlying the privilege (*ante*, § 2251). Looking especially at those policies, what answer is furnished?

Two main reasons here militate against recognizing the privilege. The first is that the sentiment of fundamental fairness, on which the privilege is in part based, applies only between man and man. It is a sentiment which recoils from forcing another human being to supply by his own act the incriminating evidence. It guards against the abuses of physical compulsion which are apt to grow out of the license to interrogate (*ante*, § 2251). This sentiment and these dangers are not applicable where the accused is not a human being, but only an artificial entity. Secondly, a corporation virtually can act by written record only (*post*, § 2451), and its criminal acts are therefore contained in writings only; so that the disclosure of crimination is not made by answers to interrogatories, but merely by the surrender of the writings. Moreover, these being virtually the sole evidential criminating material, the prosecuting officer must depend almost exclusively upon them. Thus, since a main object of the privilege (*ante*, § 2251) is to oblige the prosecution to search and gather, in full proof of the offence, all the available materials independent of the accused's own disclosures, that main object here finds no application; for there *is* but little material apart from these writings. Thus the privilege is not needed; if recognized, it would impose upon the prosecuting officer a task largely futile.

Whether on these reasons or on others (for little direct light on the principle has been judicially vouchsafed in the opinions), it has been accepted by almost all Courts that this *privilege cannot be invoked by a corporation.*[2]

(2) The foregoing considerations are directed to the question whether the

[2] UNITED STATES: *Fed.* 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370 (on subpœna to the secretary-treasurer of a New Jersey corporation to produce corporate documents before a grand-jury investigating offences against the Federal anti-trust law, it was held, Brewer, J., and Fuller, C. J., diss., that conceding the officer to be "entitled to assert the rights of the corporation, . . . there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State; . . . the corporation is a creature of the State, it receives certain special privileges and franchises, . . . [and may therefore not refuse to answer criminating questions] when charged with an abuse of such privileges"); 1907, Cassatt *v.* Mitchell C. & C. Co., 81 C. C. A. 80, 150 Fed. 32, 45 (whether a corporation is a "person" under either constitutional amendment; the "varying expressions of opinion" in Hale *v.* Henkel pointed out); 1907, International Coal M. Co. *v.* Pennsyl-

privilege as developed at *common law* included corporations. But even if it did, the interpretation of the *Constitution*, in its recognition of the common law, remains for settlement. In the Federal case of Hale *v.* Henkel, the Court's opinion has left this vital inquiry unanswered. The point is this: The privilege began, continued, and now exists at common law, independently of statute; the Fifth Amendment to the Constitution merely guarantees it against legislative alteration; did the Supreme Court, then, mean to say that a corporation was and is not within the privilege at common law? or did they mean to say merely that the Constitutional guarantee of it to all "persons" does not include corporations?[3] If they meant the former, then no immunity (*post*, § 2281) needs to be given to, nor can be claimed by, a corporation; and Courts are free to exact everything from a corporation. But if they meant the latter, then the privilege stands, for corporations, until abolished by the Legislature; hence, if the Legislature has not abolished it, the corporation may still claim it; hence also, if the Legislature in abolishing it has chosen (unnecessarily, to be sure) to grant immunity as an inseparable gift annexed therewith, the corporation will get the immunity when forced to relinquish the privilege. The importance of this distinction in the current attempts to investigate corporate conduct is obvious. But no certain light upon it is to be found in Hale *v.* Henkel. The opinion in Wilson *v.* U. S. adopts the former of these two views.

vania R. Co., 152 Fed. 557, C. C. (a corporation has not a privilege to refuse to disclose books in a proceeding to recover a penalty; following Hale *v.* Henkel); 1911, Wilson *v.* U. S., 221 U. S. 361, 31 Sup. 538 (the defendant was president of a corporation; an indictment was found against him and other officers; a subpœna d. t. was issued against the corporation and served on the defendant, and also the secretary and directors; the defendant was the custodian of the books, which contained his own and corporate business; he refused to produce; the directors voted that he surrender the books to them for production, and he again refused; held (1) that the corporation, in view of the reserved visitatorial powers of the State, had no privilege against self-crimination; (2) that the defendant had no privilege to withhold the corporate books, even though the entries were made by him; (3) that his personal letters therein were privileged); 1911, American Lithographic Co. *v.* Werckmeister, 221 U. S. 603, 31 Sup. 676; 1916, Orvig Dampskibselskap *v.* New York & B. Co., D. C. E. D. N. Y., 229 Fed. 293 (following Hale *v.* Henkel). The decision in Hale *v.* Henkel, *supra*, may perhaps be supported on the ground that where the criminality of an act consists, for a corporation, essentially in the violation of its franchise or privilege, the feature of criminality is a merely incidental one; or on the ground that the power to create involves the power to forfeit. But the opinion does not face the argument *contra* based on the criminal capacity of a corporation;

Ky. 1914, Com. *v.* Southern Express Co., 160 Ky. 1, 169 S. W. 517;

Miss. 1910, Cumberland T. & T. Co. *v.* State, 98 Miss. 159, 53 So. 489 (a corporation is not within the constitutional privilege; following Hale *v.* Henkel, but here Code § 5018 expressly gave immunity);

Mo. 1909, State *v.* Standard Oil Co., 218 Mo. 1, 116 S. W. 902, 1017 (a corporation "has no constitutional right to refuse to produce its books and papers");

Wis. 1921, Nekoosa-Edwards Paper Co. *v.* News Pub. Co., 174 Wis. 107, 182 N. W. 919 (a corporation is not a person protected by the 5th U. S. Amendment or statutes thereunder, nor by the Wisconsin Constitution or statutes; opinion by Vinje, J., quoted *supra*).

Contra: Pa. 1890, Logan *v.* R. Co., 132 Pa. 403, 408, 19 Atl. 137 (privilege held applicable to corporations).

Undecided: 1907, Re Consolidated Rendering Co., 80 Vt. 55, 66 Atl. 790 (foreign corporation subpœnaed d. t. before a grand jury; not decided).

[3] Distinguish the effect of the Fourth Amendment forbidding *search without a warrant;* here a corporation may still invoke that doctrine like a natural person: 1920, Silverthorne Lumber Co. *v.* U. S., 251 U. S. 385, 40 Sup. 182. Compare the cases on that subject *ante*, § 2184.

(3) The privilege has been *legislatively denied* for corporations in certain offences, since the decision in Hale *v.* Henkel, in 1906.[4] But, for the reasons just stated, the effect of such declarations (usually occurring in statutes offering immunity) may depend upon whether they are to be interpreted as a denial that such a privilege ever existed or as a deprival of the privilege by reason of immunity granted (*post*, § 2281).

(4) The corporation must of course *make its claim through its officer or counsel*, when called upon as an ordinary witness (*post*, § 2270). But when the corporation is a party, and its officer is summoned as a witness, the claim by the corporation or its counsel, on its own behalf, must be distinguished from the officer's personal claim.[5]

§ 2259*b*. **Crime of an Officer or Agent, disclosed by Corporate Books.** What is the effect of the foregoing two premises upon the questions that arise when discovery is sought from an *officer* or *employee* of a corporation, — in the usual case, by a demand for the *production of the corporate books?*

In the first place, the employee or officer cannot refuse to produce on the ground that the disclosure would criminate the corporation.[1] On the other

[4] The statutes are cited more fully *post*, § 2281; they deny a privilege for the following subjects:
Federal: for *anti-trust offences*, etc. U. S. St. 1906, June 30, c. 3920, Stat. L. vol. 34, p. 798, Code § 7034 (under the acts of Feb. 11, 1893, Feb. 14, 1903, Feb. 19, 1903, and Feb. 25, 1903, quoted *post*, § 2281; "immunity shall extend *only to a natural person* who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath"); St. 1903, Feb. 14, c. 552, Code 1919, § 7091, and the Federal Trade Commission Act, St. 1914, Sept. 26, c. 31, § 9 (Federal trade; "no natural person shall be prosecuted," except for perjury); Code § 8044 (similar, for U. S. shipping board); Code § 9708 (similar, for U. S. tariff commission); for offences under the National *Prohibition* Act, St. 1919, Oct. 28, tit. II, § 30;
Arizona: for *public service corporations* (Rev. St. 1913, Civ. C. § 2331);
California: for *illegal trusts*, St. 1907, p. 984, March 23, § 6 (privilege abolished, but "no individual" shall be prosecuted etc.); for *public utilities*, St. 1913, p. 115, April 23, § 55, par. *d*;
Hawaii: for *public utilities* (Rev. L. 1915, § 2228, cited *post*, § 2281);
Idaho: for *public utilities* (Comp. St. 1919, § 2483);
Maryland: for *public service* hearings (St. 1910, c. 180, § 422);
Michigan: for *specified cases* (Comp. L. 1915, § 12548);
Mississippi: for *certain cases* (St. 1912, c. 251);
Missouri: for *public service corporations* (Rev. St. 1919, § 10536);
New York: in *public service commission* hearings (Cons. L. 1909, Pub. Service Com. § 20);
Oregon: for *public utilities* inquiries (Laws 1920, §§ 5862, 6088);
Pennsylvania: for *public service commission* inquiries (St. 1913, July 26, Art. VI, § 1);
Utah: for *public utilities* (Comp. St. 1917, § 4822);
Vermont: for all *relevant records:* Gen. L. 1917, § 4951 (corporation doing business in the State must produce on notice all documents or entries relevant to the pending case "and which have at any time been made or kept within this State" and are anywhere in the corporate custody or control); id. § 4952 (same, for documents or entries concerning "any transaction within this State, or with any party residing or having a place of business within this State");
Wisconsin: for *railroad corporations*, in certain cases (St. 1905, c. 447, § 1, Stats. 1919, § 4078*a*);
Wyoming: for *liquor offences* (St. 1921, c. 117, § 28).

[5] As in Hale *v.* Henkel, McAlister *v.* Henkel, *post*, § 2259*b*. Compare *ante*, § 2200 (subpœna d. t.).

Courts ought to recognize a form of subpœna which will obtain the corporate books *without summoning the corporation-custodian;* as more fully noticed *ante*, § 2200.

§ 2259*b*. [1] ENGLAND: 1812, Gibbons *v.* Proprietors of Waterloo Bridge, 5 Price 491 ("a clerk to the defendants [a corporation] cannot demur on the ground that his principals are liable to penalties; and his answer could not be read against them").

UNITED STATES: *Fed.* 1890, Re Peasley, 44 Fed. 271, 275, C. C. (the treasurer of a cor-

hand, where the corporate misconduct involves also the claimant's misconduct, or where the document is in reality the personal act of the claimant, though nominally that of the corporation, its disclosures are virtually his own, and to that extent his privilege protects him from producing them.[2]

Further, when the process is directed to the legal custodian of the corporate books, and the claimant of the privilege is some other officer or agent, the latter cannot invoke the privilege to withhold their disclosure by the legal custodian, nor even to resist surrendering them to the legal custodian with a view to their disclosure under process; because the privilege covers only disclosure by the person claiming the privilege, and not disclosure by any other person.[3]

poration, held not privileged to withhold the corporate books on the ground that their contents might criminate the corporation); 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370 (the constitutional privilege "is limited to a person who shall be compelled in any criminal case to be a witness against *himself;* and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation"; here the witness was subpœnaed personally before a grand jury investigating by presentment against the corporation); 1906, McAlister *v.* Henkel, 201 U. S. 90, 26 Sup. 385 (similar to Hale *v.* Henkel; here the witness was subpœnaed before the grand jury on a charge and complaint against the corporation); 1911, Wilson *v.* U. S., 221 U. S. 361, 31 Sup. 538 (cited more fully *ante*, § 2259*a*); 1918, Linn *v.* U. S., 2d C. C. A., 251 Fed. 476 (corporation papers obtained by subpœna upon the defendant as president, held admissible); *Ia.* 1886, U. S. Express Co. *v.* Henderson, 69 Ia. 40, 28 N. W. 426 (similar to Gibbons *v.* Waterloo Bridge, *supra*); *Mich.* 1904, Re Moser, 138 Mich. 302, 101 N. W. 588 (the president of a corporation held bound to produce the corporate books for a period antedating his interest in the corporation; since he had "no right to attempt to avert real danger from others, no matter how closely he may be associated with them"; moreover, "when as agent for another he chooses to make entries on the books of that other," the books may be produced from the other's possession); *Mo.* 1909, State *v.* Standard Oil Co., 218 Mo. 1, 116 S. W. 902, 1017; *Okl.* 1913, Burnett *v.* State, 8 Okl. Cr. 639, 129 Pac. 1110 (president and cashier of an insolvent bank corporation, held bound to hand over the bank's book to the State bank commissioner; following Wilson *v.* U. S., *infra;* but here the plea alleged that the books "might" incriminate the defendants).

Distinguish, however, a refusal on the ground that the documents are not within his control (*ante*, §§ 2200, 2211, 2219). The general applicability of the privilege to *documents*, as well as to testimony on the stand, is noticed elsewhere (*post*, § 2264).

The above common-law result seems to be needlessly affected by such statutes as the following: *N. D.* Comp. L. 1913, § 8002 (in certain actions against a corporation or officers, privilege ceases "although such answer may expose the corporation . . . to a forfeiture of its corporate rights"; but the witness so answering shall not be prosecuted for any matter testified to; this is a needless 'quid pro quo' offered under § 2281, *post*).

[2] ENGLAND: 1744, R. *v.* Cornelius, 2 Stra. 1210 (information against justices for granting licenses for money; inspection of the corporate books not allowed); 1749, R. *v.* Purnell, 1 W. Bl. 37, 45, 2 T. R. 202, note (information against the vice-chancellor of Oxford University, for not punishing certain offences; inspection of the corporation-books refused, because they "relate to the defendant's behaviour as a member of a particular corporation"; though it had been argued that "when a man is a magistrate, and as such has books in his custody, his having the office shall not secrete those books which another vice-chancellor must have produced"); 1849, R. *v.* Granatelli, 7 State Tr. N. S. 979, 986 (secretary of the P. & O. S. N. Co.; refusal to produce documents, on account of their tendency to criminate others "for whom I am interested" and himself, sanctioned).

UNITED STATES: *Fed.* 1906, McAlister *v.* Henkel, 201 U. S. 90, 26 Sup. 385 (a corporate officer may plead the privilege to resist production of books where the books contain criminating transactions of his own and are "to all intents and purposes his own books"); 1911, Wilson *v.* U. S., 221 U. S. 361, 31 Sup. 538 (cited *ante*, § 2259*a*); *Ky.* 1914, Com. *v.* Phœnix Hotel Co., 157 Ky. 180, 162 S. W. 823 (prosecution for illegal sale of game; the defendant's hotel manager's claim of privilege, on the ground that facts showing the defendant's guilt would show his own also, was sustained).

[3] *Ill.* 1909, Manning *v.* Mercantile Securities Co., 242 Ill. 584, 90 N. E. 238 (the defendants were officers of a corporation, in a winding-up proceeding by stockholders charging criminal

The same principle is involved where a *bankrupt's* books are surrendered by the *trustee;* but there the solution usually involves the further question of fact whether the testimonial process ran against the bankrupt or some different person (*post*, § 2264).

§ 2259c. **Crime disclosed in (1) Public Books, or (2) Books required by Law to be Kept.** 1. Public *official* books, being the property of the State, are always accessible to its representatives and usually to the public. No guilty officer, merely by his own entries in them, can any more insist on privacy than if he were to have gone to the judicial records and there inscribed a forgery. His assumption of the office involves an implied undertaking to yield the documents of the office to all inspection duly authorized. The judicial demand for its disclosure is therefore made against him as an official, and not as an accused person; and his status as the latter cannot annul or override his status as the former. This distinction seems generally accepted.[1]

But there is an even more cogent reason for reaching this conclusion: The State requires the books to be kept, but it does not require the officer to commit the crime. If in the course of committing the crime he makes entries, the criminality of the entries exists by his own choice and election, not by compulsion of law. The State announced its requirement to keep the books

fraud in the business; a receiver being appointed, the chancery court ordered the defendants to hand over the corporation books to the receiver, but the defendants failed to do so, and on citation for contempt, answered alleging that the books contained matter incriminating them; held, that the privilege did not here protect them); 1917, People *v.* Munday, 280 Ill. 32, 117 N. E. 286 (conspiracy to defraud a bank; production of the books of banks in which defendant was an officer, held not privileged); 1918, People *v.* Hartenbower, 283 Ill. 591, 598, 119 N. E. 605 (fraudulent banking books, etc., in the hands of the trustee in bankruptcy, held not privileged, following People *v.* Munday, 280 Ill. 32); *Nev.* 1907, Ex parte Hedden, 29 Nev. 352, 90 Pac. 737 (corporation books in the custody of A. J. L., auditor, were summoned by subpœna on A. J. L. to be produced before the grand jury, whereon A. J. L. was ordered by the president to hand over the books to J. F. H., general superintendent; held that J. F. H., not being legal custodian, was not privileged to withhold the books on the ground that the matters contained therein would criminate himself. McAlister *v.* Henkel distinguished; but what does the opinion mean by saying, in this day and generation, that the privilege "was reaffirmed in Magna Charta"?); *Pa.* 1898, McElree *v.* Darlington, 187 Pa. 593, 41 Atl. 456 (embezzlement by the president of a corporation; examination of the corporation-books, not protected by the defendant's privilege).

§ 2259c. [1] ENGLAND: 1836, Bradshaw *v.* Murphy, 7 C. & P. 612 (libel; a witness having custody of the parish vestry-book was compelled to produce it, as it was required by statute to be kept).

UNITED STATES: *Fed.* Rev. St. 1878, § 859, Code § 1359 ("an official paper or record produced" by a witness before Congress "is not within said privilege"; quoted more fully *post*, § 2281); *Ala.* 1920, Vaughn *v.* State, 17 Ala. App. 383, 84 So. 379 (transcript of testimony, made by official stenographer, and paid for and retained by defendant, held not privileged); *Ill.* Rev. St. 1874, c. 63, § 6 (no "official paper or record" produced by a witness at a legislative hearing is to be within the privilege against self-crimination); *N. Y.* 1899, People *v.* Coombs, 158 N. Y. 532, 53 N. E. 527 (false vouchers of a coroner for inquest fees, obtained by subpœna from his clerk, held not within the privilege; this case may also be supported under § 2259b).

The following early cases are to be distinguished:

1701, R. *v.* Worsenham, 1 Ld. Raym. 705 (information against custom-house officers for forging a custom-house bond; custom-house books not compelled to be produced; this case and R. *v.* Cornelius, *ante*, § 2259b, with the ensuing one, seem to have turned on the anomalous nature of some of the offices and corporations in that century, which were regarded as private estates and bodies, although to-day they would be treated as public); 1704, R. *v.* Mead, 2 Ld. Raym. 927 (information against defendant, who with eight others was incorporated as highway surveyors; surveyors' books not required to be produced, the books not being of a public nature).

long before there was any crime; so that the entry was made by reason of a command or compulsion which was directed to the class of entries in general, and not to this specific act. The duty or compulsion to disclose the books existed generically, and prior to the specific act; hence the compulsion is not directed to the criminal act, but is independent of it, and cannot be attributed to it.

2. The same reasoning applies to *records required by law to be kept* by a citizen not being a public official, *e. g.* a druggist's report of liquor sales, or a pawnbroker's record of pledges. The only difference here is that the duty arises not from the person's general official status, but from the specific statute limited to a particular class of acts. The duty, or compulsion, is directed as before, to the generic class of acts, not to the criminal act, and is anterior to and independent of the crime; the crime being due to the party's own election, made subsequent to the origin of the duty. The object of such statutory measures is primarily to assist in the public administration, and the citizen merely becomes an assistant 'ad hoc' in that administration, — precisely as a clergyman or a physician is given an official duty to record marriages or deaths and his record thus becomes official for that subject (*ante*, § 1644). The generalization, therefore, may be made, that *there is no compulsory self-crimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in future be criminal at the choice of the party reporting.*

Such records therefore are not protected by the present privilege against self-crimination.[2]

[2] *Accord: Ill.* 1903, People *v.* Butler S. F. & I. Co., Ill., cited *post*, § 2281, n. 11 (trusts); *Ia.* 1888, State *v.* Smith, 74 Ia. 580, 584, 38 N. W. 492 (registered pharmacist's reports, filed as required by law, admitted); 1888, State *v.* Cummins, 76 Ia. 133, 136, 40 N. W. 124 (same); *Ky.* 1899, Louisville & N. R. Co. *v.* Com., 106 Ky. 633, 51 S. W. 167 (criminal prosecution for an unlawful railroad charge; a tariff-sheet publicly posted, held not a private document, and therefore subject to compulsory production); *Mich.* 1900, People *v.* Henwood, 123 Mich. 317, 82 N. W. 70 (St. 1899, No. 183, § 25, requiring druggists to file with the prosecuting attorney a sworn report of liquors sold, held not to violate the privilege, in so far as a failure to file a report was charged as the offence of the druggist); 1904, People *v.* Robinson, 135 Mich. 511, 98 N. W. 12 (druggist; a report voluntarily filed was held admissible); *Mo.* 1894, St. Joseph *v.* Levin, 128 Mo. 588, 31 S. W. 101 (pawnbroker; like People *v.* Henwood, Mich.); *N. D.* 1901, State *v.* Donovan, 10 N. D. 203, 86 N. W. 709 (druggist's record of sales, kept under statute, receivable to charge him with illegal liquor selling, being a public book).

Contra: Ind. 1909, State *v.* Pence, 173 Ind. 99, 89 N. E. 488 (under a statute requiring a druggist to keep applications for liquor sold, the defendant was held entitled to refuse to produce the incriminating applications on order of a court for a grand jury, and an indictment founded thereon was abated); *N. Y.* 1910, People ex rel. Ferguson *v.* Reardon, 197 N. Y. 236, 90 N. E. 829 (a tax-statute applicable to brokers provided that transfers of stock should be taxed, that each broker should keep an account-book entering such transfers made by him, that the failure to pay the tax should be an offence, and that the failure to make entries of transfers should be an offence; the Comptroller's agent demanded inspection of the relator's books, but he refused; held, that he was privileged. The opinion proceeds on erroneous reasoning, for it treats the proceeding as an attempt to "force the relator to produce before the Comptroller his books," which it was not. The mere inspection by the agent could not be in any sense a compulsion of the relator to testify. The only compulsory self-crimination could have been the relator's making an entry exhibiting that he had transferred stock without paying tax; but as the offence could consist only in subsequent non-payment, it is difficult to see how the entry could have been a crime. The non-entry would have been an offence; but the agent's inspection and

Distinguish, however, the protection of certain *confidential reports* (*e. g.* industrial accidents) required to be filed by citizens with officials (*post*, § 2377).

§ 2259*d*. **Crime disclosed in Oral Report required by Law to be Made.** The foregoing logic leads to the same result where the report required by law to be made is *oral* only; *e. g.* those laws which require a person whose *vehicle*, machinery, or other property has *caused an injury, to make an oral disclosure* to an official, at the *time*, of his name and address or of other circumstances of the injury.[1]

The *logic* is the same; for here also the purpose is administrative, the duty applies to a generic class of acts, irrespective of the criminality of any particular one (and it is certain that only an occasional one will involve criminality); and the duty exists anterior to the whole series of acts, so that the possible criminality is due to the party's own election, and the duty is independent of it. That the report may in a given case be later used in a criminal proceeding, and that such a possible use was foreseen by the legislator, does not alter the fact that the duty existed prior to and independent of the criminality. — Furthermore, so far as such a measure is limited to disclosure of *identity* only (not acts), *i. e.* name of person and number of vehicle, it is on general principles not a disclosure of a criminal fact; for the identity of the party is conceded not to fall within the protection either of the privilege against self-crimination (*post*, § 2265) or of the privilege for communications to an attorney (*post*, § 2306).

Moreover, the *policy* of the privilege (*ante*, § 2251) is not infringed, *i. e.* the danger of encouraging the police and prosecuting officers to rely upon the accused's self-disclosure, instead of searching completely to amass all the evidence of an offence; for a disclosure under such statutes is made freshly on the spot, if at all, and no motive is afforded for slackness in the search for

discovery of a non-entry would not have been a self-criminating production by the broker).

The following statute expressly abdicates the right to compel disclosure, and offers immunity therefor (*post*, § 2281); *Utah:* Comp. L. 1917, § 2034 (dentist's failure to file statement of names of assistants and their licenses, to be a misdemeanor; but such "statement shall not be used as evidence against him" for offences here defined).

§ 2259*d*. [1] *Accord: Mo.* 1912, Ex parte Kneedler, 243 Mo. 632, 147 S. W. 983 (St. 1911, p. 328, § 12, provided that any operator of a motor vehicle "not knowing that injury has been caused to a person or property due to the culpability of the said operator or to accident, leaves the place of said injury or accident without stopping and giving his name, residence," etc., to the injured person, or a police officer, etc., shall be guilty of a felony; held not unconstitutional; (1) the mere fact of identity is "no evidence of guilt"; "in the large majority of cases, such accidents are free from culpability"; (2) even if the statute violates the privilege, the question should be raised on the trial for the offence, and not by habeas corpus, as here); *N. H.* 1916, State *v.* Sterrin, 78 N. H. 220, 98 Atl. 482 (St. 1911, c. 137, § 20, requiring the operator of a motor vehicle, after an injury, to give his name and address, etc., held not an infringement of the privilege; following People *v.* Rosenheimer, N. Y., and Ex parte Kneedler, Mo.); *N. Y.* 1913, People *v.* Rosenheimer, 128 N. Y. Suppl. 1093, 130 N. Y. Suppl. 544, 209 N. Y. 115, 102 N. E. 530 (a statute providing that a person operating a motor vehicle, who, knowing that injury has been caused by the operator's culpability, leaves the place without stating his name, address, etc., shall be guilty of a felony, does not in requiring such disclosure violate the privilege, and an indictment for such a felony is valid; reversing two intermediate rulings; approving Ex parte Kneedler, Mo.; one judge diss. in the Court of Appeals; the opinions do not adequately dispose of the question).

Distinguish the privilege for *confidential reports* required to be made to an official, *post*, § 2377 (industrial accidents, taxes, etc.).

evidence and for relying upon a later disclosure by the accused at the pleasure of the prosecuting officers. Moreover, the failure to make such a disclosure may block all subsequent efforts to discover the offender, and thus the privilege, if it annuls such statutes, may do the most harm to justice of which it is ever capable.

§ 2260. **Facts "tending to Criminate."** Most criminal acts are made up of two or more subordinate facts, each an essential part of the completed crime. For example, embezzlement assumes (1) a position of trust or employment, (2) the receipt of valuables by the incumbent, (3) their improper disposal. So also arson at common law involves (1) the existence of a structure, (2) its use as a dwelling, (3) the setting fire by the accused, (4) a destruction of some part of the structure. Again, forgery by utterance involves (1) possession by the accused (2) of a certain kind of document (3) false in its nature, and (4) its transfer to another person. In all these instances, no one of the component facts constitutes of itself the crime, and yet every one of them must be established in order to establish the crime. It is therefore obvious that unless the privilege is to remain an empty formula easily evaded, its protection must extend to each one of these facts taken separately, as well as to the general whole. It would be immaterial whether the evasion consisted in obtaining from the witness himself all these component facts by separate inquiries, or in obtaining one such fact by inquiry of himself and the remainder by other proof; the difference would be merely in the quantity of evasion; for it would be the witness' own disclosure which still would be essential to complete the proof, and his own disclosure would thus essentially involve a criminating fact.

Such, and no more, is the orthodox and traditional doctrine that the privilege covers facts which even "tend to criminate":

1750, L. C. HARDWICKE, in *Weaver* v. *Meath*, 2 Ves. Sr. 108: "Suppose a bill for discovery of waste, charging the defendant to be tenant for life and that he committed waste, and praying that he may set forth and discover whether he is not tenant for life; he may plead [his privilege] to the discovery whether he hath committed waste or not, but not whether he is tenant for life or not. . . . He may plead to discovery of the act causing the forfeiture; but this is not a plea to that, but to discovery of the estate. There never was such a thing heard of. Consider how far it would go." [1]

1807, L. C. ELDON, in *Claridge* v. *Hoare*, 14 Ves. Jr. 59: "A defendant has the right to insist that he is not to be compelled to answer, not only the broad and leading fact, but any fact the answer to which may furnish a step in the prosecution, if any person should choose to indict him"; here, discovery was refused as to a transfer of stock which with other facts was alleged to be the compounding of a felony.

1809, L. C. ELDON, in *Paxton* v. *Douglas*, 16 Ves. Jr. 239, 242, 19 id. 225: "If a series of questions are put, all meant to establish the same criminality, you cannot pick out a particular question and say, if that alone had been put, it might have been answered. . . .

§ 2260. [1] This utterance is not the earliest appearance of the doctrine; it had been recognized by the same judge shortly before: 1749, East India Co. *v.* Campbell, 1 Ves. Sr. 216 ("If a defendant is not obliged to answer the facts, he need not answer the circumstances, although they have not such an immediate tendency to criminate"). Moreover, in L. C. Macclesfield's Trial, in 1725 (cited *post*, § 2261), it already appears in full-fledged form.

He is at liberty to protect himself against answering, not only the direct question whether he did what was illegal, but also every question fairly appearing to be put with a view of drawing from him an answer containing nothing to affect him except as it is one link in a chain of proof that is to affect him"; here the inquiry concerned consideration of a bond.

1827, V. C. LEACH, in *Green* v. *Weaver*, 1 Sim. 404, 430: "[L. C. Eldon in Paxton *v.* Douglas] went there to the extent of stating, not only that a man should not make a discovery that would subject himself directly to penalty or criminal prosecution, but that every question leading incidentally to that conclusion would be likewise equally objectionable. Now when one comes to look at that as a proposition unexplained, one cannot help seeing that the true principle of a bill in equity is that every statement of fact in every bill ought to be 'incidentally leading' to the same conclusion, ultimately, as the prayer of the bill does lead to; for the fact is either conducive to the general result or it is unimportant and irrelevant. But I take Lord Eldon to have meant (and which perhaps is not very fully explained in the report, and which satisfied my mind a good deal) not that every fact which may lead to the effect of subjecting a defendant to a penalty is objectionable; but where the sole gist and object of the suit is to convict a man in a penalty, where there would be no other purpose but to have relief in a court of equity on the footing of penalty, that, as a Court of equity does not relieve on penalty, it will not give any incidental discovery."

1807, *Aaron Burr's Trial*, Robertson's Rep. I. 208, 244; treason; a cipher letter was placed before the witness, who had been secretary to the defendant, and he was asked by Mr. *McRae*, for the prosecution: "Do you understand the contents of that paper?" Mr. *Williams*, for the defendant: "He objects to answer. He says that, though that question may be an innocent one, yet the counsel for the prosecution might go on gradually, from one question to another, until he at last obtained matter enough to criminate him. If a man know of treasonable matter, and do not disclose it, he is guilty of misprision of treason. . . . The knowledge of the treason, again, comprehends two ideas, — that he must have [1] seen and understood [2] the treasonable matter. To one of these points Mr. W. is called upon to depose; if this be established, who knows but the other elements of the crime may be gradually unfolded so as to implicate him?" MARSHALL, C. J., sanctioning the witness' refusal: "According to their [the prosecution's] statement, a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it would be insufficient. While that remains concealed within his bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the Court can never know. It would seem, then, that the Court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

These expositions of the principle have ever since been followed without controversy.[2]

[2] 1836, Glynn *v.* Houston, 1 Keen 329, 339 (Lord Langdale, M. R., approved the distinction taken in Green *v.* Weaver); 1853, Chadwick *v.* Chadwick, 22 L. J. Ch. N. S. 329 (Green *v.* Weaver approved).

The doctrine may therefore be defined by enumerating three classes of cases. It plainly does *not* apply to a fact which merely under *some conceivable circumstances may form part of a crime* (for any fact at all may conceivably do that, — for example, using a copy of the Holy Scriptures in preaching the Gospel, provided a law against heresy were in force). But it applies (1) to a fact which is *relevant to an inquiry whose sole or essential* object is to *charge a crime* upon the claimant; or, (2) to a fact which forms an *essential part of a crime* now desired to be *charged* against the claimant *as a subordinate purpose* in the inquiry; or, (3) though no crime is desired to be charged against the claimant for any purpose whatever, to a fact which *would form an essential part of a crime under certain circumstances*, which circumstances for practical purposes must now be deemed to be true of the claimant.

(1) The first class includes the case of an *accused* in a *criminal case*, where the privilege exempts him from all answers whatsoever,[3] and that of a *bill* in equity to *enforce a penalty*, where the privilege exempts from all discovery, even on incidental points.[4]

(2) The second class includes the ordinary case of a *witness*, not a party, against whom it is desired to prove a crime by way of impeachment (*ante*, § 984).

(3) The third class includes those cases in which the proof of a crime is *no part of the cause* nor of the purpose of the interrogator, and in which therefore commonly arises a difficult question (*post*, § 2271) as to the proper person to determine whether the fact is part of any crime at all. The necessity for this last question is due to the present principle, for since any fact may theoretically be conceived as *potentially* forming part of a crime under some conditions, and since the privilege can properly be enforced only on the theory that the fact is part of a crime under the *actual* conditions of the inquiry, it becomes inevitable to make some compromise between these two extreme requirements.

Apart from the last problem, which involves another aspect of the principle, the application of the present rule obviously turns much upon the various definitions of the criminal law and upon the special facts of each case and each witness. It may be noted particularly that in *bankruptcy* proceedings the English Courts had apparently driven a coach-and-four

[3] As universal practice concedes. For the question whether at least the *question may be put* to him, and a formal claim of privilege exacted, see *post*, § 2268.

[4] 1820, Thorpe *v.* Macaulay, 5 Madd. 218, 229 (libel; discovery refused on all points, where "the sole object of the bill is to prove . . . the truth of the criminal charge; every question asked must necessarily be with a view to that end and tend to that point"); 1827, Green *v.* Weaver, 1 Sim. 404 (quoted *supra*); 1867, Burton *v.* Young, 17 Low. Can. 379 ('qui tam' for penalties; held, that defendant, being sworn, was not bound to answer any questions as a witness, "the tendency of every material question necessarily being to subject him to penalties," and thus it became merely a question of how to claim the privilege most conveniently and expeditiously; Taschereau, J., diss.).

through the privilege,[5] long before the modern statute of 1883 [6] had expressly nullified it.

For other *varieties of crimes* and proceedings, no especial difficulties arise, and no generalizations seem profitable.[7]

[5] The bearing of the principle noted *ante*, § 2257, may have had something to do with these rulings: 1820, Ex parte Cossens, Buck Bkcy. Cas. 531, 540 (L. C. Eldon: "A bankrupt cannot refuse to discover his estate and effects, . . . [though] that information may tend to show that he has property which he has not got according to law," this being "a qualification" of the general rule; but a question whether a certain bond was received for an illegal consideration was held properly refused, because the latter part of it was not necessary); 1833, Re Heath, 2 D. & Ch. 214, 221 (questions as to the bankrupt's disposition of goods, objected to as criminating him in respect to fraudulent disposition, held not privileged; following Ex parte Cossens); 1833, Re Smith, 2 D. & Ch. 230, 235 (similar; the words of the statute being taken as an express authorization); 1856, R. *v.* Sloggett, 7 Cox Cr. 139, before five judges (privilege recognized for certain matters); 1856, R. *v.* Scott, 1 D. & B. 47, before five judges (privilege held to have been abrogated by statute for the bankrupt; Coleridge, J., diss.); 1877, Ex parte Schofield, L. R. 6 Ch. D. 230 (similar; but the exemption still applies to witnesses in bankruptcy proceedings); 1892, R. *v.* Erdheim, 2 Q. B. 260, 267 (R. *v.* Scott followed); 1902, Re X. Y., 1 K. B. 98 (the debtor may be examined at large, in bankruptcy proceedings, by the petitioning creditor, because "since 1869 . . . it is difficult to say that bankruptcy proceedings are in any sense criminal"). The statutory amnesty (*post*, § 2281) may affect some of these rulings. For a few intervening cases approving R. *v.* Scott, in regard to *confessions*, see *ante*, § 850.

For the *Federal bankruptcy* statute, see *post*, §§ 2281, 2282.

[6] *Post*, §§ 2281, 2282. The earlier ruling seems not to have gone so far: 1793, Chambers *v.* Thompson, 4 Brown Ch. C. 434 (bankruptcy; privilege allowed as to acts of bankruptcy and intent to defraud, but not as to the fact of trading).

[7] The other rulings are as follows:

ENGLAND: 1750, Weaver *v.* Meath, 2 Ves. Sr. 108 (discovery of the fact of tenancy for life, required, though other facts would show a forfeiture of it); 1751, Finch *v.* Finch, 2 Ves. Sr. 491 (discovery of fact of marriage and lawful issue, compelled; "it does not tend to discovery whether he cohabited with any woman, if he should answer whether he has or has not a son lawfully begotten"); 1811, Cates *v.* Hardacre, 3 Taunt. 424 (usury; a question whether the witness had before this had the bill in his possession, held privileged, as a "link in a chain"); 1802, Cartwright *v.* Green, 8 Ves. Jr. 405 (taking money of another); 1828, Maccallum *v.* Turton, 2 Y. & J. 183, 192 (sale of shares of a dissolved company, held privileged under the circumstances); 1833, R. *v.* Pegler, 5 C. & P. 521 (question whether witness had not "said that he committed" an offence, held privileged); 1842, Lee *v.* Read, 5 Beav. 381, 385; 1850, King *v.* King, 2 Rob. Eccl. 153, 156 (divorce for adultery); 1851, Short *v.* Mercier, McN. & G. 205, 216 (stockjobbing; useful opinion by L. C. Truro); 1864, Bunn *v.* Bunn, 4 De G. J. & S. 316 (fraudulent conveyance under the statutes of Elizabeth; held that the penalty and forfeiture clauses of the statutes did not exempt from discovery as to the mere possession of such a deed).

CANADA: 1885, Brown *v.* Hooper, 3 Man. 86 (examination as to a fraudulent conveyance, prohibited); 1916, Attorney-General *v.* Kelly, 28 D. L. R. 409, Man. (a claim by affidavit that production of documents "might" tend, not "would" tend to eliminate, held sufficient, the precise word being immaterial); 1901, Hopkins *v.* Smith, 1 Ont. L. R. 659 (discovery of maintenance; where the whole topic is criminal, the party may refuse to answer at all).

UNITED STATES: *Fed.* 1807, U. S. *v.* Burr, U. S. (quoted *supra*); 1876, Matter of Graham, 8 Ben. 419 (gambling); *Conn.* 1831, Skinner *v.* Judson, 8 Conn. 528, 535 (fraudulent conveyance); *Ga.* 1853, Higdon *v.* Heard, 14 Ga. 255, 258 (gaming); 1901, Wheatley *v.* State, 114 Ga. 175, 39 S. E. 877 (whether the witness had seen defendant gaming, held not privileged; four judges disapproved of Higdon *v.* Heard, but the concurrence of five was necessary for overruling it); *Ill.* 1880, Taylor *v.* McIrvin, 94 Ill. 489, 493 (bankruptcy); *Me.* 1845, State *v.* Blake, 25 Me. 350, 353 (whether he had admitted that his former testimony was false, *semble*, privileged; but not whether he had said that he would testify as C. told him to); *Mass.* 1837, Com. *v.* Kimball, 24 Pick. 366, 369 (retailing liquor unlawfully; questions to witnesses as to purchases made of defendant, held not privileged; "the cases depend much upon their own circumstances"); *Minn.* 1868, Simmons *v.* Holster, 13 Minn. 249, 254 (libel); *Mo.* 1881, State *v.* Talbot, 73 Mo. 347, 359 (bigamy); 1905, Ex parte Conrades, 112 Mo. App. 21, 85 S. W. 150 (ordinance to investigate mercantile books in order to discover possible assets evading taxation; privilege held not applicable to the defendant's books at large without a specific claim as to incriminating facts); *N. H.* 1855, Coburn *v.* Odell, 30 N. H.

§ 2261. **Facts Furnishing a Clue to the Discovery of Criminal Facts.** It is obvious, from the illustrations given in the orthodox definitions of the foregoing principle, that the notion of a fact "tending to criminate" is that of a fact forming, in the phrase of Chief Justice Marshall, "a necessary and essential part of a crime." The assumption is that the means of establishing the other parts are already available for the prosecution, and that the claimant's disclosure of the missing link will complete the chain and thus in effect criminate him. This doctrine about "tending to criminate" is thus merely a logical deduction from the fundamental principle.

But the phrase has also been wrenched and extended, in a certain class of rulings, to mean much more, namely, to cover facts which, though colorless in themselves, *by possibility may furnish a clue* in searching for other and criminal facts. The privilege thus protects facts which may by disclosure lead ultimately to the extra-judicial detection of the criminal fact and its subsequent infra-judicial proof by other testimony.

How widely this differs from Chief Justice Marshall's notion may be seen in two marked features. (1) By this interpretation the fact ceases to be a "necessary and essential part of a crime," and becomes merely a colorless fact having no criminal flavor under any circumstances, — as if the witness be asked to disclose his residence, and then in his residence be found a man who discloses the whereabouts of stolen goods. (2) By this interpretation the relation between the main crime and the fact "tending to criminate" is not a logical and inherent one, *i. e.* that of a legal whole to its parts, but a casual and external one, *i. e.* a relation consisting in the probability that the one fact will so stimulate the ingenuity and fit the resources of certain prosecuting officials that they will be enabled thereby to discover the other fact, which else, with the same ingenuity and resources, would have remained undiscovered by them.

The thought of making an important rule of law turn upon so contingent, ephemeral, and unmeasurable a test as this was never entertained,

540, 555; 1906, Noyes *v.* Thorpe, 73 N. H. 481, 62 Atl. 787 (bill of discovery against the publisher of a libel, which was also a criminal one; the defendant held privileged not to produce the original manuscript nor to disclose the name of the author); *N. Y.* 1830, People *v.* Mather, 4 Wend. 229, 252; 1832, Bellinger *v.* People, 8 Wend. 595 (witness not compelled to state what she swore to on a prior examination, because it might tend to convict her of perjury); 1840, Burns *v.* Kempshall, 24 Wend. 360, 4 Hill 468 (usury); 1842, Cloyes *v.* Thayer, 3 Hill 564, 566 (usury); 1845, People *v.* Bodine, 1 Denio 281, 314 (like Bellinger *v.* People, *supra*); 1846, Bank *v.* Henry, 2 Denio 155, 157 (usury); 1847, Henry *v.* Salina Bank, 1 N. Y. 83, 86 (usury); 1894, People *v.* Forbes, 143 N. Y. 219, 224, 38 N. E. 303 (murder by poisonous gas); *N. C.* 1895, Smith *v.* Smith, 116 N. C. 386, 21 S. E. 196 (whether the witness had had connection with the defendant in a divorce proceeding, a single act of the sort not being criminal, held privileged); *S. C.* 1819, State *v.* Edwards, 2 N. & McC. 13 (challenge to a duel); 1842, Poole *v.* Perritt, 1 Spears 128 (gaming); *Tenn.* 1860, Lea *v.* Henderson, 1 Coldw. 146, 149 (seduction); *Tex.* 1851, Floyd *v.* State, 7 Tex. 215 (rule in U. S. *v.* Burr followed); 1906, Ex parte Merrell, 50 Tex. Cr. 193, 95 S. W. 1047 (liquor sales); *Va.* 1873, Cullen *v.* Com., 24 Gratt. 624, 635 (duelling; questions to a surgeon in attendance, held by possibility to involve a criminating tendency); *Wis.* 1906, Rudolph *v.* State, 128 Wis. 222, 107 N. W. 466 (bribery; cited more fully *post*, § 2282); *Wyo.* 1899, Miskimmins *v.* Shaver, 8 Wyo. 392, 58 Pac. 411 (compounding a felony; rule of U. S. *v.* Burr adopted; Knight, J., diss.).

and could not have been, by so wholesome a thinker as Chief Justice Marshall. It was reserved for latter-day Courts, who treated the privilege with morbid delicacy, and were disposed to expand it into misty attenuation, to resort to this meaning. In Counselman *v.* Hitchcock, and its accordant rulings, wherein the question arose whether a statute prohibiting the subsequent use of compulsory self-incriminating testimony was effectual to nullify the privilege, the main argument against such a statute's efficacy was held to be this same interpretation, *i. e.* that the privilege protected even against facts which might furnish indirectly a clue to crime, and that the statute had not annulled, and could not, this use of such facts. These statutes, and the rulings upon them, are examined in their place.[1]

It is necessary here to note that this theory of the scope of the privilege is heterodox and unsound. It had in fact long before been disposed of, without regard to its bearing upon such statutes. The issue was squarely presented in rulings upon a claim of privilege resisting such an interrogatory as this: "Who, other than yourself, is known to you to have participated in a crime?" or "to have been present at its commission?" The following opinion faces the issue firmly:

1829, MCGIRK, C. J., in *Ward* v. *State*, 2 Mo. 120, 122: "Was the witness right in refusing to answer the question on the ground that the answer would implicate himself? The record shows that the game of faro is played with cards, by one person as banker against any number of persons, each person playing for himself, without any aid from the others, against the banker; and that there is no common interest among those persons playing against the banker. Thus it appears that each player against the bank is separate and independent of all others. The inquiry made by the grand jury is 'Tell who bet at the game of faro, not naming yourself.' The answer of the witness is (supposing him to be A) that 'if I tell that B, C, and D played, it will be either full or partial evidence that I played.' This is the whole argument of the case, — an argument which I think is totally untenable in law and reason. . . . The question is, 'Who did you see betting at faro except yourself? It is believed that a direct answer in the negative to this would be, 'I saw no one bet at faro.' This answer, I think, all will allow, does not accuse him. But suppose his answer must be, that he saw B bet at faro, can it not be true that though B bet, yet he, the witness, did not? Does the mere fact that one man saw another commit crime, prove in law or reason that he who saw the crime committed was a participator? . . . But in this case it is said, if the witness is bound to tell who bet at the game, without naming himself, then those persons who are named will be examined as to the fact, whether he bet; and if the witness is not compelled to name who did bet, then they will remain unknown to the grand jury, and cannot be examined whether the witness bet. I understand this doctrine to be grounded more on the fear of retaliation than on any sound principle of law. Will the law permit a man to keep offences and offenders a secret, lest the offenders should in their turn give evidence against him? I have looked into the cases cited at the bar, and I am unable to perceive any principle, in any of them, which ought to vary the foregoing opinion." [2]

§ 2261. [1] *Post*, § 2282.

[2] The learned judge might have added that the whole argument opposed by him rested on the assumption that these other persons not only were then unknown but unsuspected, and that they would have remained unsuspected, except for the witness' disclosure, — an assumption which is, to say the least, an exaggerated one.

The rule as thus expounded is in accord with the earliest precedent recognizing the doctrine of facts "tending to criminate," [3] and seems to have been generally accepted.[4] Whatever may have been the extent of the subsequent misconception in the cases complicated by the statutes already referred to (*post*, § 2283), the tenor of the principle in its original bearings seems plain.

3. Form of Disclosure protected

§ 2263. **General Principle.** In the interpretation of the principle, nothing turns upon the variations of wording in the constitutional clauses; this much is conceded (*ante*, § 2252). It is therefore immaterial that the witness is protected by one Constitution from "testifying," or by another from "furnishing evidence," or by another from "giving evidence," or by still another from "being a witness." These various phrasings have a common conception, in respect to the *form* of the protected disclosure. What is that conception?

Looking back at the history of the privilege (*ante*, § 2250) and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to *extract from the person's own lips* an admission of his guilt, which will thus take the place of other evidence. Such was the process of the ecclesiastical Court, as opposed through two centuries, — the inquisitorial method of putting the accused upon his oath, in order to supply the lack of the required two witnesses. Such was the complaint of Lilburn and his fellow-objectors, that he ought to be convicted by other evidence and not by his own forced confession upon oath.

[3] 1725, Lord Chancellor Macclesfield's Trial, 16 How. St. Tr. 767, 920, 1146, 1150 (the former incumbent of a public office was asked what was the greatest price for which it was illegally sold; this was held a privileged question, as involving by implication his own complicity in such a transaction; the question "whether he knows of any money paid to the Great Seal by any master in chancery" was also held privileged, because the next question might be whether he was himself a master; but the question whether he knew of money being so paid by any other master than himself was held not privileged).

[4] *Eng.* 1832, R. *v.* Slaney, 5 C. & P. 213, 214 (libel; a witness was not compelled to answer whether he had written the libel, but was compelled to answer whether he knew who did, and then was allowed to refuse to name the person, "because it may be himself");

U. S. 1917, Mason *v.* U. S., 244 U. S. 362, 37 Sup. 621 (gambling; similar to Richman *v.* State, Ia., but decided on another ground; cited more fully, *post*, § 2271); 1850, Richman *v.* State, 2 Greene Ia. 532 (answer to the question "Do you know of any person, other than yourself, being engaged in gaming, etc.?" held compellable); 1861, Prints *v.* Cheeney, 11 Ia. 469 (answer to the question "what he knew in regard to any person's tearing down and carrying away the property," held not compellable); 1863, State *v.* Duffy, 15 Ia. 425 (answer to the question "if he knew whether N. D. altered a bull," held compellable; the preceding case distinguished); 1829, Ward *v.* State, 2 Mo. 120, 122 (gaming; quoted *supra*); 1891, Ex parte Buskett, 106 Mo. 602, 609, 17 S. W. 753 (like the preceding case); 1906, Ex parte Gfeller, 178 Mo. 248, 77 S. W. 552, *semble;* 1880, La Fontaine *v.* Southern Underwriters' Ass'n, 83 N. C. 132, 141 (supplementary proceedings against an insolvent; Ward *v.* State, Mo., approved); 1904, Re Briggs, 135 N. C. 118, 47 S. E. 403 (question No. 3 here put was similar to that considered in Ward *v.* State, Mo., *supra;* the opinion of Clark, C. J., for the Court, overruling the claim of privilege, does not allude to this question; but Walker, J., specially concurring, says: "We all agree, as I understand, that the first three questions did not tend to criminate the witness," citing Ward *v.* State).

Contra: 1891, Minters *v.* People, 139 Ill. 363, 365 (gaming; the answer to a question whether he had seen others playing, held not compellable; but on the erroneous assumption that the witness himself was by his own testimony a participant; none of the cases on this point are cited).

Such, too, is the inference from the policy of the privilege as a defensible institution (*ante*, § 2251); that is to say, it exists mainly in order to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's confessions.

Such, finally, is the practical requirement that follows from the necessity of recognizing other unquestioned methods of procuring evidence; for if the privilege extended beyond these limits, and protected an accused otherwise than in his strictly testimonial status, — if, in other words, it created inviolability not only for his physical control of his own vocal utterances, but also for his physical control in whatever form exercised, then it would be possible for a guilty person to shut himself up in his house, with all the tools and indicia of his crime, and defy the authority of the law to employ in evidence anything that might be obtained by forcibly overthrowing his possession and compelling the surrender of the evidential articles, — a clear 'reductio ad absurdum.'

In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial compulsion*.[1] The one idea is as essential as the other.

The general principle, therefore, in regard to the form of the protected disclosure, may be said to be this: The privilege protects a person from any disclosure *sought by legal process against him as a witness*.

§ 2264. **Production or Inspection of Documents and Chattels.** 1. It follows that the production of *documents or chattels* by a person (whether ordinary witness or party-witness) in response to a subpœna, or to a motion to order production, or to other form of *process treating him as a witness* (*i.e.* as a person appearing before the tribunal to furnish testimony on his moral responsibility for truth-telling), may be refused under the protection of the privilege; and this is universally conceded.[1] For though the disclosure thus

§ 2263. [1] 1894, Earl, J., in People *v.* Gardner, 144 N. Y. 119, 38 N. E. 1003 ("The main purpose of the provision was to prohibit the compulsory oral examination of prisoners before trial, or upon trial, for the purpose of extorting unwilling confessions or declarations implicating them in crime"). . . . But in a criminal or penal cause, the defendant is never forced to produce any evidence, though he should hold it in his hands in court").

U. S. 1885, Boyd *v.* U. S., 116 U. S. 616, 6 Sup. 524 (cited *infra*); 1896, U. S. *v.* Lead Co., 75 Fed. 94; 1902, Re Kanter, 117 Fed. 356 (privilege applied to documentary proof in bankruptcy proceedings); 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370 (cited more fully *infra*); 1896, Lamson *v.* Boyden, 160 Ill. 613, 43 N. E. 781 (privilege applied to documents called for by demand in court); 1918, Temple *v.* State, 15 Okl. Cr. 146, 175 Pac. 555 (forgery; on order of the trial Court, at the request of the prosecution, defendant was compelled to produce the deed alleged to be forged; held, a violation of the privilege); 1890, Logan *v.* R. Co., 132 Pa. 403, 406, 409, 19 Atl. 137 (discovery of papers refused); 1892, Boyle *v.* Smithman, 146 Pa. 255, 257, 274, 23 Atl. 397 (defendant not compellable by

§ 2264. [1] To the following cases add those concerning corporations, etc., cited *ante*, § 2259: *Eng.* 1749, R. *v.* Purnell, 1 W. Bl. 37, 45 (Lee, C. J.: "We know no instance wherein this Court has granted a rule to inspect books in a criminal prosecution nakedly considered"); 1769, Roe *v.* Harvey, 4 Burr. 2484, 2489 (the plaintiff in ejectment would not produce a deed affecting his title, the deed being "in Court, or at least in the plaintiff's power"; Lord Mansfield "observed that in civil causes the Court will force parties to produce evidence which may prove against themselves, or leave the refusal to do it (after proper notice) as a strong presumption to the jury.

sought be not oral in form, and though the documents or chattels be already in existence and not desired to be first written and created by a testimonial act or utterance of the person in response to the process, still no line can be drawn short of any process which treats him as a witness; because in virtue of it he would be at any time liable to make oath to the identity or authenticity or origin of the articles produced.

2. It follows, on the other hand, that documents or chattels obtained from the person's control *without the use of process against him as a witness* are not in the scope of the privilege, and may be used evidentially; for obviously the proof of their identity, or authenticity, or other circumstances affecting them, may and must be made by the testimony of other persons, without any employment of the accused's oath or testimonial responsibility:

1717, *Francia's Trial*, 15 How. St. Tr. 897, 966. PRATT, J.: "I never knew in my life but what was done in this case was ordinarily done in the like case, and ought to be done; and you ought not to go on with invectives to the jury, complaining that his papers are seized and then that those papers are turned against him. When a correspondence is carried on by letters, ought they not to be seized? And if they appear to be treasonable, ought they not to be kept and made use of against him?" *Counsel for defendant:* "I have not said anything to impeach the legality of what was done. All I said, and do say, is that the evidence is from the papers found in his own custody."

1858, BELL, J., in *State* v. *Flynn*, 36 N. H. 64: "Its ground [of the objection] is, rather, that information obtained by means of a search-warrant, in a case not authorized by the Constitution, is not competent to be given in evidence, because it has been obtained by compulsion from the defendant himself, in violation of that clause of the Constitution which provides that no person shall be compelled to furnish evidence against himself. . . . It seems to us an unfounded idea that the discoveries made by the officers and their assistants, in the execution of process, whether legal or illegal, or where they intrude upon a man's privacy without any legal warrant, are of the nature of admissions made under duress, or that it is evidence furnished by the party himself upon compulsion. The information thus acquired is not the admission of the party, nor evidence given by him, in any sense. The party has in his power certain mute witnesses, as they may be called, which he endeavors to keep out of sight, so that they may not disclose the facts which he is desirous to conceal. By force or fraud, access is gained to them, and they are examined, to see what evidence they bear. That evidence is theirs, not their owner's. . . . It does not seem to us possible to establish a sound distinction between that case, and the case of the counterfeit bills, the forger's implements, the false keys, or the like, which have been obtained by similar means. The evidence is in no sense his."

(*a*) This distinction has received repeated illustration and almost universal acceptance, in a variety of applications to documents and chattels obtained by *search or seizure independent of testimonial process*, *e. g.* by physical search

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subpœna or Court order to produce his books of account); 1898, Ex parte Wilson, 39 Tex. Cr. 630, 47 S. W. 996 (privilege applied to the production of documents); 1801, State v. Squires, Tyler Vt. 147 (compulsory process ordering the delivery of a client's notes in his attorney's hands, the notes being alleged to be forged, held improper).

But it seems clear that the witness must at least answer the preliminary question whether he *has possession* of the book asked for; this follows from the principle of § 2268, *post*, and from the analogy of the civil party's privilege against discovery (*ante*, §§ 1859, 2200, 2219). *Contra*, *semble*, per Holmes, J., in Ballmann v. Fagin, 200 U. S. 186, 26 Sup. 212 (1905).

of the person or premises without calling upon the party for any act or utterance of his own.[2]

[2] These cases, for the reasons noted *supra*, should be compared with the cases cited *ante*, § 2183 (documents obtained by illegal search) and § 2259b (documents of a corporation); *Ala.* 1887, Chastang *v.* State, 83 Ala. 29, 3 So. 304 (defendant was arrested under a warrant, but resisted; on disarming and searching him, a pistol was found; admitted, distinguishing U. S. *v.* Boyd, *infra*, since "the evidence is obtained without requiring the defendant to do any affirmative act"); 1893, Shields *v.* State, 104 Ala. 35, 39, 16 So. 85 (similar); *Ark.* 1896, Starchman *v.* State, 62 Ark. 538, 36 S. W. 940 (tools found by officers searching defendant's house, admitted); *Cal.* 1909, People *v.* LeDoux, 155 Cal. 535, 102 Pac. 517 (papers taken on an unauthorized search, admitted; Adams *v.* New York, U. S., followed; Boyd *v.* U. S. distinguished); *Conn.* 1896, State *v.* Griswold, 67 Conn. 290, 34 Atl. 1047 (papers seized in the defendant's house during his absence, held not privileged); *Ga.* 1882, Franklin *v.* State, 69 Ga. 36 (shoes and socks, taken by officers from the defendant's feet without objection by him, held admissible); 1885, Drake *v.* State, 74 Ga. 413 (clothing taken off the defendant, held properly admitted; the privilege applies "when a person is sworn as a witness"); 1888, Wolfolk *v.* State, 81 Ga. 551, 562, 8 S. E. 724 (clothing removed from defendant by the coroner's order at an inquest, admitted; "the officer has a right to do so," and the discoveries are admissible); 1894, Rusher *v.* State, 94 Ga. 363, 367, 21 S. E. 593 (money discovered by compelling the accused, without unlawful violence, to point it out, held admissible); 1895, Hinkle *v.* State, 94 Ga. 595, 21 S. E. 595 (evidence obtained from an accused by compulsion out of court is not within the privilege, except where, in violation of the confession-rule, "a substantive preëxisting physical fact bearing directly on the fruits of the crime has been discovered by means of exciting hope or fear"; here the discovery of stolen money); 1896, Myers *v.* State, 97 Ga. 76, 25 S. E. 252 (the taking of a pair of shoes from the defendant by an officer and comparing them with certain tracks, held not a violation of the privilege); 1898, Williams *v.* State, 100 Ga. 511, 28 S. E. 624 (lottery-tickets and money obtained by a search of the defendant's house and person, by officers not having a warrant, held admissible; Boyd *v.* U. S., *infra*, expressly distinguished, and Gindrat *v.* People, Ill., followed); 1899, Evans *v.* State, 106 Ga. 519, 32 S. E. 659 (a police-officer called to quell a disturbance found the defendant, and compelled him to give up his pistol; excluded, on a prosecution for carrying a concealed weapon; the singular distinction is taken that such evidence is inadmissible if the person was not at the time in legal custody, but otherwise if he was); 1899, Dozier *v.* State, 107 Ga. 708, 33 S. E. 418 (carrying concealed weapon; that the sheriff searched the accused without meeting resistance, and found the pistol, admitted; Evans *v.* State distinguished, since there the defendant was compelled to hand over the pistol); the foregoing Georgia cases are perhaps not law, since the rulings cited *infra*, n. 11; *Ill.* 1891, Gindrat *v.* People, 138 Ill. 103, 105, 27 N. E. 1085 (larceny; articles obtained by illegal search of defendant's rooms without a warrant, admitted; quoted *infra*); 1892, Siebert *v.* People, 143 Ill. 571, 583, 32 N. E. 431 (similar; here, letters); 1894, Trask *v.* People, 151 Ill. 523, 38 N. E. 248 (similar; here, papers); 1904, Swedish-American Tel. Co. *v.* Fidelity & C. Co., 208 Ill. 562, 70 N. E. 768 (here the privilege was held not violated by an order which merely authorized inspection of the books by the applicant-party while in the defendant's possession); *Kan.* 1905, State *v.* Schmidt, 71 Kan. 862, 80 Pac. 948 (bottles of liquor, seized from the defendant's possession by an officer without a warrant, admitted); *La.* 1904, State *v.* Aspara, 113 La. 940, 37 So. 883 (clothing taken from defendant in jail, exhibited); *Md.* 1906, Lawrence *v.* State, 103 Md. 17, 63 Atl. 96 (documents taken by the police from the defendant's satchel or from his person under arrest, admitted; Boyd *v.* U. S. not followed as to its *obiter* statements, but Adams *v.* New York, U. S., *infra*, followed; Blum *v.* State, Md., *infra*, n. 11, distinguished, as involving "virtually compulsory process for the production of evidence in the immediate proceeding in which it was offered"); *Minn.* 1903, State *v.* Stoffels, 89 Minn. 205, 94 N. W. 675 (introduction of liquors illegally kept, possession being obtained by a search-warrant, held not a violation of the privilege); 1911, State *v.* Rogne, 115 Minn. 204, 132 N. W. 5 (scrap iron taken by the sheriff from the defendant's premises; privilege not applicable); *Mo.* 1895, State *v.* Pomeroy, 130 Mo. 489, 497, 32 S. W. 1002 (lottery tickets seized by officers, without a search-warrant, from defendant's desk and on his person, held not privileged); 1908, State *v.* Jeffries, 210 Mo. 302, 109 S. W. 614 (defendant's shoes; "it is immaterial how they were obtained"); *Mont.* 1906, State *v.* Fuller, 34 Mont. 12, 85 Pac. 369 (the majority opinion in Boyd *v.* U. S., disapproved); *Nebr.* 1902, Russell *v.* State, 66 Nebr. 497, 92 N. W. 751 (shoes of the defendant, found in the county jail and taken therefrom, admitted); *N. H.* 1858, State *v.* Flynn, 36 N. H. 64 (liquor found on defendant's premises by officers searching under a warrant, admitted; quoted *supra*):

(*b*) The distinction would apparently never have suffered any judicial doubt,[3] but for a modern opinion, in which (in spite of a protest by a minority of the Court) the seeds of a dangerous heresy were sown. In Boyd *v.* United States,[4] an order for production by the defendant himself of self-criminating documents was properly held to be within the privilege, on the principle of par. (1), *supra;* but the opinion of the majority, speaking 'obiter', declared the privilege applicable also to documents obtained by officers' search or seizure *legal or illegal*, irrespective of testimonial process.

Incidentally, it may be noted that the Constitution (in the Fourth Amendment) does not by any means prohibit searches and seizures as such; but only "unreasonable" ones. Historically (as is well known) it was the illegal practices of "general warrants" (defeated by Wilkes' great struggle of 1763–65 and by Lord Camden's vindication [5]) and of "writs of assistance" (elo-

N. Y. 1903, People *v.* Adams, 176 N. Y. 351, 68 N. E. 636 (policy gambling; papers seized in the defendant's office under a search-warrant, and used partly as standards of handwriting and partly as papers forming part of the crime, admitted; Boyd *v.* U. S., *infra*, distinguished); People *v.* Adams, *supra*, affirmed on writ of error in Adams *v.* New York, 192 U. S. 585, 24 Sup. 372 (1904) (stated *infra*, n. 12); *N. C.* 1899, State *v.* Mallett, 125 N. C. 718, 34 S. E. 651 (books already seized on attachment, admitted); *Okl.* 1919, Knight *v.* State, 16 Okl. Cr. 298, 182 Pac. 736 (search-warrant); *S. C.* 1893, State *v.* Atkinson, 40 S. C. 363, 372, 18 S. E. 1021 (papers taken from defendant's house, in defendant's absence and without communication to him, held not privileged); *S. D.* 1908, State *v.* Vey, 21 S. D. 612, 114 N. W. 719 (unsealed letter handed by accused to sheriff in jail, and kept by sheriff; admitted); *Vt.* 1905, State *v.* Krinski, 78 Vt. 162, 62 Atl. 37 (illegal keeping of liquors; articles seized under an illegal warrant, admitted; distinguishing State *v.* Slamon, Vt., *infra*, n. 12, and approving Adams *v.* N. Y., U. S., *infra*, n. 12); 1905, State *v.* Barr, 78 Vt. 97, 62 Atl. 43 (like State *v.* Krinski, *supra*); 1906, State *v.* Suitor, 78 Vt. 391, 63 Atl. 182 (similar); *Wash.* 1893, State *v.* Nordstrom, 7 Wash. 506, 509, 35 Pac. 382 (boots, socks, cap, memorandum-book, obtained by search of the person, held not privileged); 1905, State *v.* Royce, 38 Wash. 111, 80 Pac. 268 (burglary; a pawn ticket taken from the defendant's person on search by the arresting officers, admitted; Gindrat *v.* People, Ill., followed); *W. Va.* 1889, State *v.* Baker, 33 W. Va. 319, 331, 10 S. E. 639 (pantaloons taken off by accused, while in jail, at the sheriff's request and handed to him, held not privileged); 1902, State *v.* Edwards, 51 W. Va. 220, 41 S. E. 429 (larceny by trick, in using worthless State bank-notes; the notes, seized on the defendant's person by the officer arresting, held admissible; quoted *supra*).

Distinguish the following: 1888, R. *v.* Luce, 6 Haw. 684 (under a statute authorising a search-warrant to discover "articles necessary to be produced as evidence or otherwise," held that the statute did not apply to books of account of the accused; the constitutional question not decided).

Distinguish also the rule that a subpœna for documents must be *reasonably specific* in its terms, in order to be entitled to obedience (cases cited *ante*, § 2200).

[3] Except that the fallacy was anticipated, by some years, in an utterance of Mr. Justice Cooley in his Constitutional Limitations, c. X.

[4] 1885, Boyd *v.* U. S., 116 U. S. 616, 618, 6 Sup. 437, 524 (information for evasion of customs dues by fraudulent invoicing; on the order of the trial Court, the invoice was compelled to be produced by the defendant for inspection in court, under St. June 22, 1874, § 5 (quoted *ante*, § 2219), requiring production on motion, and taking the facts to be confessed as alleged, in case of failure to produce; the order was held unconstitutional, under the Fifth and also the Fourth Amendments; the present case was held to be in effect a criminal proceeding, and the above statute apparently held void so far as its provisions are literally applicable to "all suits and proceedings other than criminal"; Waite, C. J., and Miller, J., diss., solely to the extent of holding that the Court's order was not for a search nor a seizure and therefore not within the prohibition of the Fourth Amendment). It is obvious that the decision of this case, apart from the opinion, was correct, under par. (1), *supra*.

[5] 1763, Wilkes' Case, 19 How. St. Tr. 982, 1381; 1765, Leach *v.* Money, 19 How. St. Tr. 1001, 1027, 3 Burr. 1692, 1742; 1765, Entick *v.* Carrington, 19 How. St. Tr. 1029, 1063, 2 Wils. 275; Cooley, Constitutional Limitations, 6th ed., 364; May, Constitutional Law, c. 11; Campbell, Lives of the Chancellors, VI, 367.

quently opposed in 1761 by Otis [6]), against which the various Bills of Rights and the Federal Fourth Amendment were intended to provide protection.[7] The majority's opinion in Boyd *v.* United States therefore mistreats the Fourth Amendment, in applying its prohibition to a returnable writ of seizure describing specific documents in the possession of a specific person.

But, apart from this error, the radical fallacy of the opinion lies in its attempt to wrest the Fourth Amendment to the aid of the Fifth. The "intimate relation between them," which the opinion predicates, must be wholly denied. (1) In the first place, the two doctrines had had a totally different political and legal history.[8] Furthermore, if the privilege against self-crimination had been regarded as violated by seizures of papers, it is singular that this principle did not suffice, without anything more, to defeat the practice of general warrants in Wilkes' controversy. And again, if it had any such bearing, it would have protected equally against all warrants, whether general or specific, lawful or unlawful. Nor can we suppose that the framers of the Constitutions and Bills of Rights, with Wilkes' pamphlets and Otis' speeches fresh in their memories, could have believed that they were merely duplicating one principle in the two clauses of the same document. In short, the principles of the Fourth and the Fifth Amendments are complementary to each other; what the one covers, the other leaves untouched. (2) In the second place, the only bearing which the Fourth Amendment can be conceived to have is that, in case of a seizure under a warrant violating that rule, the seized articles come before the court as illegally obtained. But this circumstance of itself cannot stand in the way of their use as evidence. If there was ever any rule well settled (until the opinion in Boyd *v.* United States), it was this, that an illegality in the mode of obtaining evidence cannot exclude it, but must be redressed or punished or resisted by appropriate proceedings otherwise taken.[9]

There is, therefore, no respect whatever in which the principle of the Fourth Amendment can be properly invoked in applying the principle of the Fifth Amendment. For these reasons, judicial opinion elsewhere, since Boyd *v.* United States was decided, generally refused to accept its pronouncement: [10]

1891, BAKER, J., in *Gindrat* v. *People*, 138 Ill. 103, 109, 111, 27 N. E. 1085: "That which was condemned in Boyd *v.* U. S. [cited *supra*] was the enforced production by the parties to the criminal case of evidence against themselves, through and by means of an order made by the Court and a process under the seal of the Court, issued by virtue thereof.

[6] 1761, Paxton's Case, Quincy's Rep. 51; Cooley, Constitutional Limitations, 6th ed., 367. An interesting account of the scene on the occasion of James Otis' argument against "writs of assistance" (general warrants) in Massachusetts is given in John Adams' Letter to William Tudor, March 29, 1817.

[7] This sufficiently appears from a comparison *e. g.* of the Bill of Rights of Virginia, art. 10, in 1776, and of the Declaration of Rights of Massachusetts, art. 14, in 1780, with the Fourth Amendment to the Federal Constitution, a decade later.

[8] That of the Fifth has been examined in detail (*ante*, § 2250). That of the Fourth began a hundred years later, as a direct sequence of Wilkes' and Otis' agitations.

[9] This principle has been already examined (*ante*, §§ 2183, 2184).

[10] The cases in accord have been placed *supra*, note 2.

. . . The unconstitutional and erroneous order, process, and procedure of the trial Court compelled the claimants to produce evidence against themselves, and such order, process, and procedure were also held to be tantamount to an unreasonable search and seizure; while here, and in the other cases cited, the question of illegality was raised collaterally, and the Courts exercised no compulsion whatever to procure evidence from the defendants, and neither made orders nor issued process authorizing or purporting to authorize a search of premises or a seizure of property or papers; but simply admitted evidence which was offered, without stopping to inquire whether possession of it had been obtained lawfully or unlawfully."

1902, POFFENBARGER, J., in *State* v. *Edwards*, 51 W. Va. 220, 41 S. E. 429 (admitting worthless bank-notes used in cheating, and seized on the defendant's person): "There is such a thing as unreasonable search, which the law will not permit. But where a man stands charged with crime, and an instrument or device is found upon his person or in his possession which was a part of the means by which he accomplished the crime, those instruments, devices, or tokens are legitimate evidence for the State, and may be taken from him and used for that purpose. If it were otherwise, the pistol with which a murderer shoots down his victim, or the dagger with which he stabs him, inseparably connected with the 'corpus delicti,' and, therefore, competent and legitimate evidence, could not be taken from the pocket of the murderer and used as evidence against him, for the reason that they belong to him and are found upon his person. It is well settled that a person in custody on a criminal charge may be subjected to a personal search, and examination against his will, in order to discover upon him evidence of his criminality. . . . What are these old papers except the instruments, as effectually used in closing the eyes of Dennison to the larceny of his money which the defendant was perpetrating under the deception practiced by their use, as a burglar uses his jimmy to break open a safe?"

Nevertheless, the 'obiter' expressions of opinion by the majority in Boyd *v.* United States led a few other Courts, after the publication of that case, to adopt its erroneous view and to exclude documents obtained even by seizure.[11]

However, the heresy of Boyd *v.* United States, in later Federal opinions, before long, was for practical purposes repudiated (in respect to the 'obiter' statements in the majority opinion, above noted), by rulings which held de-

[11] *Ga.* 1907, Hammock *v.* State, 1 Ga. App. 126, 58 S. E. 66 (carrying concealed weapons; practically repudiating, for this State, the foregoing cases in note 2; cited more fully *ante*, § 2183); 1907, Hughes *v.* State, 2 Ga. App. 29, 58 S. E. 390 (similar); 1907, Sherman *v.* State, 2 Ga. App. 686, 58 S. E. 1122 (similar); 1907, Smith *v.* State, 3 Ga. App. 326, 59 S. E. 934 (selling liquor illegally; the Hammock Case distinguished; see the citation *ante*, § 2183); 1913, Underwood *v.* State, 13 Ga. App. 206, 78 S. E. 1103 (cited more fully *ante*, § 2183); the cases in this State are going to an extreme; *Ia.* 1902, State *v.* Height, 117 Ia. 650, 91 N. W. 935 (Boyd *v.* U. S. approved, *obiter*; cited *post*, § 2265); 1903, State *v.* Sheridan, 121 Ia. 164, 96 N. W. 730 (goods unlawfully taken, on a search-warrant, from the defendant's premises, for the sole purpose of obtaining evidence against the defendant, excluded; following State *v.* Height); *Md.* 1902, Blum *v.* State, 94 Md. 375, 51 Atl. 26 (false pretences; account-books obtained by a receiver from a constable who had taken possession of defendant's premises under an attachment, held inadmissible; following Boyd *v.* U. S.); *N. Y.* 1894, People *v.* Spiegel, 143 N. Y. 107, 38 N. E. 284, *semble* (Boyd *v.* U. S. approved); *Okl.* 1911, Gillespie *v.* State, 5 Okl. Cr. 546, 115 Pac. 620 (cited more fully *post*, § 2273); *Vt.* 1901, State *v.* Slamon, 73 Vt. 212, 50 Atl. 1097 (following Boyd *v.* U. S. on both grounds; a letter improperly taken from defendant under a search-warrant for stolen goods, held inadmissible to impeach the writer, a witness for the defendant; unsound, because the privilege certainly does not apply to documents written by other persons).

Distinguish here also the question of the scope of the Fourth Amendment as applied to *statutes compelling discovery* by process: 1921, State Tax Commission *v.* Tennessee C. I. & R. Co., 206 Ala. 355, 89 So. 179. Compare the cases cited *ante*, § 2200 (subpœna d. t.) and § 2219 (party's privilege).

cisively (1) that the Fourth Amendment does not prevent the use of documents and chattels obtained by lawful search-warrant, and (2) that furthermore the use of documents produced under compulsion of subpœna, for which the privilege under the Fifth Amendment has been taken away by an immunity-statute, cannot be objected to on the ground of the Fourth Amendment.[12] So that the orthodox doctrine now prevails virtually everywhere. In the following lucid opinion the return of the Federal Court to orthodoxy is amply declared:

1920, BAKER, J., in *Haywood* v. *U. S.*, 7th C. C. A., 268 Fed. 795, 802: "From the thirteenth to the middle of the seventeenth century the Ecclesiastical Courts of England and during the later part of the period the Courts of Star Chamber and of High Commission compelled defendants to testify respecting criminal charges against them. During

[12] The recantation begins with Adams *v.* New York: 1893, Tucker *v.* U. S., 151 U. S. 164, 168, 14 Sup. 299 (defendant's affidavit, voluntarily filed, for the summoning of witnesses in his behalf, admitted to contradict him, and held not to be a violation of the privilege nor of U. S. Rev. St. 1878, § 860, quoted *post*, § 2281); 1897, Hoover *v.* M'Chesney, 81 Fed. 472 (a seizure by the post-officials of mail of a person supposed to be infringing the law, and its return to the sender or the dead-letter office, held a violation of the privilege); 1904, Adams *v.* New York, 192 U. S. 585, 24 Sup. 372 (facts stated *supra*, n. 2, in People *v.* Adams, N. Y., brought here on writ of error; the Federal Court referred to the opinion of the majority in Boyd *v.* U. S. with apparent approval of its statement as to the history of the two Amendments; but held that here there was no violation of either Amendment, — not of the Fifth, because "he was not compelled to testify concerning the papers or make any admission about them," nor of the Fourth, because the search was not wrongful; and that in any event the effect of the Fourth does not "extend to excluding testimony which has been obtained by such means, if it is otherwise competent"; thus practically drawing the fangs of the erroneous 'obiter dictum' in the majority opinion of Boyd *v.* U. S.); 1904, Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 24 Sup. 563 (order to an officer of a defendant corporation to testify and produce certain contracts of the corporation before the Commission; the privilege of the Fifth Amendment being obviated by the immunity of St. 1893, under § 2281, *post*, the Court held that the Fourth Amendment did not stand in the way; "testimony given under such circumstances presents scarcely a suggestion of an unreasonable search or seizure"; this squarely contradicts in effect the 'obiter dictum' of the majority opinion in Boyd *v.* U. S.); 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370 (similar, for corporation documents produced upon subpœna before a grand jury, by an officer entitled to the immunity-clause of St. 1903, Feb. 25, quoted *post*, § 2281; of the Boyd case, it is said that "subsequent cases treat the Fourth and Fifth Amendments as quite distinct, having different histories, and performing different functions"; this seems to signify plainly that the 'obiter' statements of the majority opinion in the Boyd case are no longer approved by the Federal Supreme Court; Harlan and McKenna, JJ., concurring, emphasize the fact that a corporation may not be within the Fourth Amendment at all); 1908, U. S. *v.* Wilson, C. C. S. D. N. Y., 163 Fed. 338 (cited more fully *ante*, § 2184); 1910, Holt *v.* U. S., 218 U. S. 245, 31 Sup. 2 (Adams *v.* N. Y. approved); 1914, Weeks *v.* U. S., 232 U. S. 383, 34 Sup. 341 (cited more fully *ante*, § 2184; it does not restrict the effect of the prior rulings, so far as the present principle is concerned); 1914, U. S. *v.* Hart, D. C. N. D. N. Y., 214 Fed. 655, 216 Fed. 374 (Weeks *v.* U. S. held not to forbid the use of papers voluntarily handed by a witness to the district attorney for use before the grand jury on a promise to return them); 1918, Perlman *v.* U. S., 247 U. S. 7, 38 Sup. 417 (petition to restrain the U. S. district attorney from taking possession of exhibits impounded by the Court in a civil suit by the petitioner wherein the exhibits had been offered by him; after the order to impound, a further order was made to produce the exhibits before the grand jury with a view to the prosecution of the petitioner for an offence; held, that since the petitioner had made "a voluntary exposition of the articles, for use as evidence," there was no compulsion, and therefore no violation of privilege in the prosecution's use of them); 1919, Laughter *v.* U. S., 6th C. C. A., 259 Fed. 94 (cited more fully *ante*, § 2184); 1919, Schenck *v.* U. S., Baer *v.* U. S., 249 U. S. 47, 39 Sup. 247 (Holt *v.* U. S. and Weeks *v.* U. S. held not to exclude the use of documents obtained on a valid search warrant); 1920, MacKnight *v.* U. S., 1st C. C. A., 263 Fed. 832, 838 (documents seized under a search warrant legal under § 2, St. June 15, 1917, c. 30, admitted); 1920, Haywood *v.* U. S., 7th C. C. A., 268 Fed. 795 (quoted *supra*).

the last century of our colonial period the principle that no person shall be compelled in a criminal case to be a witness against himself had become a fixed part of our inheritance. And it was that fixed and definite meaning that in clearest terms was incorporated in our federal Bill of Rights. 'Witness' is the key word. Constitutional safeguards should be applied as broadly as the wording, in the historical light of the evil that was aimed at, will permit; and so a defendant is protected not merely from being placed on the witness stand and compelled to testify to his version of the matters set forth in the indictment; he is protected from authenticating by his oath any documents that are sought to be used against him; he is protected from producing his documents in response to a subpœna 'duces tecum,' for his production of them in court would be his voucher of their genuineness; he is protected from an act of Congress declaring that the government's statement of the contents of his documents, if he fail to produce them on notice, shall be taken as confessed. But unless the origin and purpose of the command be disregarded and the key word be turned into an unintended, if not impossible, meaning, no compulsion is forbidden by the Fifth Amendment except *testimonial* compulsion. At the trial of this case no defendant was compelled in any way to become a witness against himself or against any of his alleged co-conspirators. Letters, pamphlets and other documents, identified by other witnesses, were competent evidence; and the trial judge, correctly finding them competent, was not required to stop, and would not have been justified in stopping, the trial to pursue a collateral inquiry into how they came to the hands of government attorneys. Consequently there was no violation of defendants' rights under the Fifth Amendment."

3. But the ill-advised opinion in Boyd *v.* United States left one unfortunate remnant of influence on Federal practice, which has led to similar aberrations in other Courts, viz. the doctrine that a search and seizure *unlawful* under the Fourth Amendment renders inadmissible any documents or chattels thus illegally obtained. The state of the law on this subject has been fully examined elsewhere, under the principle that illegality in the mode of obtaining evidence does not exclude it (*ante*, § 2184).

4. Three apparent exceptions to the first branch of the rule (*supra*, par. 1) may now be noted:

(*a*) Where a document, even though possessed or made or inscribed by the claimant of the privilege, is an *official document*, it is not protected by the privilege; for it is made or kept by him as an official holding a public trust and is therefore liable to inspection at any time, either by the proper authorities or (as in most cases) also by the public at large or by citizens interested (*ante*, § 2259*c*).

(*b*) Where a document within the privilege is withheld, under claim of privilege, no inference of its contents can be made (*post*, § 2272). But just as an inference may be drawn, in spite of that principle, from the accused's failure to summon witnesses who might naturally have been able to clear him if he were innocent, so a similar *inference may be drawn from his failure to produce documents* which might have exonerated him if innocent. This distinction is considered *post*, § 2273, in dealing with the general principle applicable to inferences from a claim of privilege.

(*c*) A *copy* of the privileged document may of course be used if available, on the principle of § 1200, *ante*.

5. A corollary of the first branch of the rule (*supra*, par. 1) is that the

State is entitled to use its physical force to take evidential documents or chattels from the possession of one chargeable with crime; because it is prevented by the privilege from using a subpœna duces tecum against him personally, and therefore would otherwise be helpless to obtain and preserve necessary evidence. Hence, no action lies against an *officer for trespass in taking such documents or chattels*.[13] This general power of the State affords the officer a larger protection than the ordinary search-warrant, which is hedged about by statutory limitations.[14]

§ 2264*a*. **Same: Custodian of Documents Called For; Bankrupt's Documents.** In applying the foregoing principle, a question may arise as to the incidence of the process used, *i. e.* whether the testimonial process is being used in fact *against the person claiming the privilege* or against a third person. If the latter, then the claim is of course ineffective, because a claim of privilege by one person has no effect to protect documents possessed by a third person (*ante*, § 2259). Instances of this question have already been noted in considering the claim of privilege by an officer of a corporation for the corporate books (*ante*, § 2259*b*), and they occur also under the general principle of § 2264, *ante*.

A special difficulty (usually of fact only) occurs where the *books of a bankrupt* are sought.[1] Here it is obvious that the privilege protects them if the

[13] *Accord:* 1887, Dillon *v.* O'Brien, 20 L. R. Ir. 300, 16 Cox Cr. 245 (trespass, etc.; the defendant, a peace officer, arresting the plaintiff on a warrant for conspiracy, took possession of books, papers, etc. "which were material and necessary evidence in the prosecution for such offence," and detained them pending the prosecution; held that the plea was good, and applied to misdemeanors as well as felonies, and rested on "the interest which the State has in a person guilty, or reasonably believed to be guilty, of a crime being brought to justice"; Pallas, C. B.: "If there be a right to production or preservation of this evidence, I cannot see how it can be enforced otherwise than by capture; if material evidences of crime are in possession of a third party, production can be enforced by the Crown by subpœna duces tecum, but no such writ can be effective in the case of the person charged"; prior cases reviewed); 1903, Carmichael *v.* McCowen, 8 Newf. (Morris & Browning) 597 (action for trespass to personalty and realty: plea that defendant was chief of police, that plaintiff had committed fraudulent arson on her premises, and that defendant entered and took possession for the purpose of using various portions as evidence and did so use them, and that the plaintiff was convicted; the plea was held good; Harwood, C. J.: "The law regards the public interest in securing the conviction of public offenders as of such paramount importance that all considerations of regard for the rights of private property must yield").

Contra, but unsound: 1895, Newberry *v.* Carpenter, 107 Mich. 567, 65 N. W. 530 (impounding an exploded boiler pending trial of the liability for the explosion is actionable).

[14] Compare the cases cited *ante*, §§ 2183, 2184 (illegal search).

§ **2264***a*. [1] The following cases include those representing all the different situations noted above in the text; additional cases involving bankrupt's books in other aspects are placed *ante*, § 2259*b*; *Federal:* 1910, In re Tracy & Co., D. C. S. D. N. Y., 177 Fed. 532 (refusing to restrain a trustee in bankruptcy from delivering to the district attorney for use in prosecution the bankrupt's books taken possession of by the receiver, delivered by him to public accountants, and taken by the district attorney from them under subpœna with the trustee's connivance; there need not have been any hesitation about this case); 1911, Matter of George Harris, 221 U. S. 274, 31 Sup. 557 (bankrupt required to deposit his books with the receiver; cited more fully *post*, § 2282); 1912, Johnson *v.* U. S., 228 U. S. 457, 33 Sup. 572 (where a bankrupt's books have been transferred to the trustee under § 70 of the Bankruptcy Act, without any reservation of rights in the court's order, then the trustee's use of the books, either before the grand jury or before the trial jury, on a charge of fraudulent concealment of assets, is not a violation of the privilege; opinion per Holmes, J.: "A party is privileged from producing the evidence, but not from its production"; "A man cannot protect his property from being used to pay his debts by attaching to it a disclosure of crime");

testimonial process is invoked directly against the bankrupt himself when in legal possession of the documents, but not if it is invoked against the receiver or other custodian; nor if the compulsory surrender sought from the bankrupt is not by testimonial process. But between these typical situations several borderline cases occur which may be difficult to interpret.

§ 2265. **Bodily Exhibition (Clothes, Features, Finger Prints, Medical Examination, etc.).** If an accused person were to refuse to be removed from the jail to the court-room for trial, claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given to such a claim. And yet no less a claim is the logical consequence of the argument that has been frequently offered and occasionally sanctioned in applying the privilege to proof of the bodily features of the accused.

The limit of the privilege is a plain one. From the general principle (*ante*, § 2263) it results that an inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege, because it does not call upon the accused as a witness, *i. e.* upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action — as when he is required to take off his shoes or roll up his sleeve — is immaterial, — unless all bodily action were synonymous with testimonial utterance; for, as already observed (*ante*, § 2263), not compulsion alone is the component idea of the privilege, but testimonial compulsion. What is obtained from the accused

1913, U. S. *v.* Harris, D. C. S. D. N. Y., 164 Fed. 292 (motion for receiver asking for order that bankrupt deliver books of account to the receiver; order framed directing delivery, but protecting them against any use other than for civil litigation over the estate; the Court very properly hesitates over the order; but why was it assumed that without such an order the receiver could not get lawful possession of the books? Are not the books a part of the business property, and is not the receiver entitled to enter in possession and turn out the bankrupt? A man who buys a horse and stable from another is entitled to go to the stable and take the horse without waiting for a court order); *Columbia (Dist.)*: 1912, U. S. *v.* Halstead, 38 D. C. App. 68 (taking of a bankrupt's books, by a receiver under court order; privilege not violated); *Illinois:* 1909, Manning *v.* Mercantile Securities Co., 242 Ill. 584, 90 N. E. 238 (officers of a corporation having custody of corporation documents, ordered to hand them over to a receiver appointed in winding-up proceedings, held in contempt for refusal and not to be protected by the privilege, because "the possession of the receiver is the possession of the Court"; but the opinion unsoundly announces that "the appellants could be fully protected by the Court from the use of such evidence against them while the books are in the hands of the receiver"; for the writ of sequestration is like a search-warrant and involves no testimonial process against the officers); 1919, People *v.* Paisley, 288 Ill. 310, 123 N. E. 573 (bankrupt's books, secured by the State's attorney from the bankruptcy receiver, "who had gotten them from defendant's receiver," admitted); 1919, People *v.* Bransfield, 289 Ill. 72, 124 N. E. 365 (embezzlement by bank officials; two of the officials were also in partnership in a real estate and loan business, and bankruptcy proceedings were pending; the partnership books, obtained from the Federal Court, were received in evidence; held, not a violation of the privilege, the title to the books being in the bankruptcy trustee, and the production being therefore made by him and not by the partners); *Minnesota:* 1905, State *v.* Strait, 94 Minn. 384, 102 N. W. 913 (defendants were bankers in partnership, and on voluntary assignment in bankruptcy a trustee took possession of the banking books; held, that the defendants were not entitled to claim the privilege to prevent the use of the books before the grand jury on subpœna to the trustee; Boyd *v.* U. S. distinguished); *Pennsylvania:* 1910, Com. *v.* Ensign, 228 Pa. 400, 77 Atl. 657 (insolvent banker's receipt of deposits; his books delivered by him to the U. S. bankruptcy trustee in involuntary bankruptcy, and obtained from the trustee, admitted).

by such action is not testimony about his body, but his body itself.[1] Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one. Moreover, the main object of the privilege (*ante*, § 2251) is to force prosecuting officers to go out and search and obtain all the extrinsic available evidence of an offence, without relying upon the accused's admissions. Now in the case of the person's body, its marks and traits, itself is the main evidence; there is ordinarily no other or better evidence available for the prosecutor. Hence, the main reason for the privilege loses its force.

Both principle and practical good sense forbid any larger interpretation of the privilege in this application; and healthy judicial opinion has frequently pointed this out:

1876, RODMAN, J., in *State* v. *Graham*, 74 N. C. 648 (admitting evidence of a compulsory placing of the accused's foot in a track): "If an officer who arrests one charged with an offence had no right to make the prisoner show the contents of his pocket, how could the broken knife or the fragment of paper corresponding to the wadding [alluding to cases cited] have been found? If when a prisoner is arrested for passing counterfeit money, the contents of his pocket are sacred from search, how can it ever appear whether or not he has on his person a large number of similar bills, which if proved is certainly evidence of the 'scienter'? If an officer sees a pistol projecting from the pocket of a prisoner arrested for a fresh murder, may he not take out the pistol against the prisoner's consent to see whether it appears to have been recently discharged? Suppose it be a question as to the identity of the prisoner, whether a person whom a witness says he saw commit a murder, and the prisoner appears in Court with a veil or mask over his face; may not the Court order its removal in order that the witness may say whether or not he was the person whom he saw commit the crime? Would the robber whose face was marked with the wards of a key have been allowed to conceal his identity by wearing a mask during the trial? We conceive that these questions admit of but one answer, and that is one consistent with the general practice."

1892, COX, J., in *U. S.* v. *Cross*, 20 D. C. 365, 382 (admitting a measurement of the defendant made in the Marshal's office): "It could not be contended that the knowledge of the size or height of a man acquired in any other way, for instance by a tailor, could not be used when at the time it was not taken for the purpose of being used as testimony, and it seems to us that a record taken as this was, for a lawful purpose and under the rules of the office, might be made use of afterwards. It does not seem to us that it is compelling the defendant to give evidence against himself, although some cases that have been cited to us go very far in that direction. There was one case holding that it was error for the prosecuting officer to compel the prisoner in court to put his foot into a vessel filled with mud in order to measure it and identify it. That is well enough. It was held in another case that where the officer compelled the defendant to put his foot in certain tracks that were discovered, in order to identify him, that was wrong, as it was compelling him to give evidence against himself, and evidence of that kind, so secured, could not be used. We think that is going very far; it is rather too fine. What would be the consequence if such evidence should be entirely excluded? You could not compel a person after his arrest to empty his pockets and disclose a weapon, when the most vital evidence on the part of the Government, in a homicide case, is the possession of the deadly weapon.

§ 2265. [1] The theory of such evidence ("real" evidence) has elsewhere been examined (*ante*, § 1150).

Could you not compel him to open his pocket-book and exhibit papers that might be conclusive in the case of a forgery, or anything of that sort? We think that officers having a prisoner in custody have a right to acquire information about him, even by force, and that, for example, when his photograph is taken or his measurement taken, it is simply the act of the officers and is not compelling him to give evidence against himself."

1. A great variety of concrete illustrations have been ruled upon.[2] To generalize their result is difficult; the various situations shade off into each

[2] Where in the following cases the examination was voluntarily submitted to, the ruling is not decisive, for the privilege may there be deemed to have been waived; compare the cases about garments and weapons, cited *ante*, § 2264:

ENGLAND: 1696, Vaughan's Trial, 13 How. St. Tr. 517 (Witness, identifying a defendant: "If it be the same gentleman, his hair is reddish." L. C. J. Holt: "Pull off his peruke," which was done; Powis, B.: "Let somebody look on it more particularly"; then an officer took a candle and looked on his head, but it was shaved so close the color could not be discerned); 1775, Maharajah Nundocomar's Trial, 20 How. St. Tr. 923 (physicians were ordered to examine the defendant to see whether he was in truth unable by illness, as alleged, to attend the trial); 953, 965 (the same measure, to see whether a witness was in truth too ill to come and give testimony); 1877, Agnew *v.* Jobson, 13 Cox Cr. 625 (a magistrate has no right to order the medical examination of defendant, here of a woman charged with concealment of birth).

CANADA: St. 1898, c. 54, R. S. 1906, c. 149, § 2 (any person in lawful custody under charge or conviction of an indictable offence may be subjected to the identifying measurements known as the Bertillon Signaletic System; or any measurements, etc., having like purpose); Orders in Council, July 21, 1908, Mar. 20, 1911, Canada Gazette, vol. 1, p. 3484 (photographing and finger-printing sanctioned as methods usable under R. S. c. 149); St. 1918, 8 & 9 Geo. V, c. 12, § 2 (any person in custody for an indictable offence may be subjected to any measurements or other processes, including finger-prints, for purposes of identification).

UNITED STATES: *Federal:* 1910, Holt *v.* U. S., 218 U. S. 245, 31 Sup. 2 (the accused's putting on of a blouse, to see whether it was his; held, not privileged);
Alabama: 1881, Spicer *v.* State, 69 Ala. 159, 163 (child-murder; facts disclosed by a corporal examination of defendant, submitted to by her on inducements, admitted); 1888, Cooper *v.* State, 86 Ala. 610, 6 So. 110 (held improper to force the accused to make foot-tracks for comparison); 1892, Williams *v.* State, 98 Ala. 52, 13 So. 333 (requiring the defendant to "stand facing the jury, that they might determine her age from her appearance," held improper); 1902, Davis *v.* State, 131 Ala. 10, 31 So. 569 (defendant's refusal to let his shoes be taken for comparison with tracks, excluded); 1906, Moss *v.* State, 146 Ala. 686, 40 So. 340 (shoes taken off voluntarily by the accused in prison, at an officer's request, and handed to him; admitted);
Arizona: 1921, Moon *v.* State, 22 Ariz. 418, 198 Pac. 288 (finger-prints of accused, taken by defendant's voluntary action, admitted);
California: 1888, People *v.* Goldenson, 76 Cal. 328, 347, 19 Pac. 161 (a trial Court's order to the defendant to stand up for identification, held proper); 1899, People *v.* Oliveria, 127 Cal. 376, 59 Pac. 772 (compelling defendant to stand up for comparison of size, allowable); 1915, People *v.* Bundy, 168 Cal. 777, 145 Pac. 537 (examination of the accused in jail by two physicians, the accused voluntarily answering and submitting, held not a violation of the privilege);
Columbia (Dist.): 1892, U. S. *v.* Cross, 20 D. C. 365 (quoted *supra*); 1904, Shaffer *v.* U. S., 24 D. C. App. 417, 425 (accused allowed to be identified by a photograph of him taken while under arrest);
Georgia: 1880, Day *v.* State, 63 Ga. 669 (testimony that a witness forcibly placed defendant's foot in certain tracks, held inadmissible); 1881, Blackwell *v.* State, 67 Ga. 76, 78 (order of the Court to a defendant, to stand up so that a witness could identify him as lacking the right foot, held improper); 1882, Gordon *v.* State, 68 Ga. 814 (after the defendant had voluntarily exhibited a scar, an order to allow a medical witness to examine it was held proper);
Hawaii: 1912, Terr. *v.* Chung Ning, 21 Haw. 214, 219 (examination of defendant's person by ordering him to remove his trousers, "which he did without objection," held not a violation of the privilege);
Indiana: 1890, O'Brien *v.* State, 125 Ind. 38, 42, 25 N. E. 137 (testimony based on an examination of the defendant, in jail, against his will, by officers, to discover scars of identification, held proper);
Iowa: 1897, State *v.* Reasby, 100 Ia. 231, 69 N. W. 451 (compelling the defendant to stand up in court for identification, allowed); 1902, State *v.* Height, 117 Ia. 650, 91 N. W. 935 (rape; testimony of physicians to defendant's diseased condition, based on an examination of his parts while in jail, after he had refused and been directed to submit, held inadmissible); 1905, State *v.* Arthur, 129 Ia. 235, 105 N. W.

other with only faint borderlines. Moreover, each State Court may have its own special attitude toward the whole principle, — an attitude which carries

422 (burglary; shoe measurements admitted, made with shoes given up by the defendant to the sheriff at his direction; State *v.* Height distinguished, because the defendant's voluntary surrender of the shoes was a waiver); Comp. Code § 9476 (measurements and photographs, "by the Bertillon or other system," of a person in custody on a charge, may be taken);

Louisiana: 1873, State *v.* Prudhomme, 25 La. An. 522, 523 (compelling an accused "to place his feet where they could be seen by the witness and the jury" for identification, allowable); 1906, State *v.* Graham, 116 La. 779, 44 So. 90 (sheriff's measurements of shoe-tracks, by putting the accused's feet in them, without resistance by him, admitted); 1910, State *v.* McKowen, 126 La. 1075, 53 So. 353 (defendant's refusal to write the word "incorrigible," as a test of his spelling, allowed to be considered; but here he had presumably waived his privilege by taking the stand);

Maryland: 1909, Downs *v.* Swann, 111 Md. 53, 73 Atl. 653 (photographing and measuring of arrested persons not yet convicted, for purposes of identification, is not a violation of the privilege; collecting the authorities);

Michigan: 1883, People *v.* Mead, 50 Mich. 228, 231, 15 N. W. 95 (defendant privileged not to try on or measure a shoe in court for identification); 1888, People *v.* Glover, 71 Mich. 303, 307, 38 N. W. 874 (testimony gained by a medical examination in jail, voluntarily submitted to, received); 1916, People *v.* Breen, 192 Mich. 39, 158 N. W. 142 (taking defendant's shoes and fitting them to footprints; privilege not violated); 1920, People *v.* Sturman, 209 Mich. 284, 176 N. W. 397, *semble* (compelling a defendant to write a signature alleged to be his alias, not allowable; but here the defendant voluntarily wrote at the prosecution's request); 1921, Rock *v.* Carney, 216 Mich. 280, 185 N. W. 798 (action for damages for compulsory detention in a hospital while suffering from gonorrhea; under St. 1919, No. 272, the plaintiff had been examined by the health officer, one of the defendants, in order to determine whether she was diseased, and the order of detention had followed; the Court divided four and three, as to the validity of the power to examine, but on what lines of definition does not clearly appear);

Minnesota: 1921, State *v.* Wormack, 150 Minn. 249, 184 N.W. 970 (murder; accused voluntarily standing up, on request of the State, for identification, not improper);

Mississippi: 1908, Magee *v.* State, 93 Miss. 865, 46 So. 529 (compelling the accused to put his foot in a track, to identify him, held not a violation of privilege; careful opinion by Whitfield, C. J.);

Missouri: 1900, State *v.* Jones, 153 Mo. 457, 55 S. W. 80 (examination held not compulsory on the facts); 1900, State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743 (testimony of physicians to the condition of a wound on defendant's head, shaved by compulsion, admissible); 1906, State *v.* Ruck, 194 Mo. 416, 92 S. W. 706 (accused compellable to stand up for identification by a witness); 1909, State *v.* Newcomb, 220 Mo. 54, 119 S. W. 405 (rape under age; physician's examination of defendant's private parts, while under arrest, by order of the justice, held a violation of the privilege); 1913, State *v.* Horton, 247 Mo. 657, 153 S. W. 1051 (physician's examination for venereal disease by order of police captain, held a violation of the privilege, on the erroneous ground that failure to object is not a waiver); 1906, State *v.* Church, 199 Mo. 605, 98 S. W. 16 (examination of defendant in jail by physicians without objection by defendant, held not to violate the privilege); 1915, State *v.* Matsinger, — Mo. —, 180 S. W. 856 (rape; examination by physicians of defendant while in jail, excluded, his consent not appearing affirmatively);

Montana: 1906, State *v.* Fuller, 34 Mont. 12, 85 Pac. 369 (shoes of defendant, compared by the sheriff with footprints; privilege not violated; here the defendant voluntarily gave them to the officer, but the opinion expressly declares this immaterial);

Nebraska: 1905, Krens *v.* State, 75 Nebr. 294, 106 N. W. 27 (testimony to comparisons of shoe-tracks, made with shoes taken from the accused, allowed);

Nevada: 1879, State *v.* Ah Chuey, 14 Nev. 79 (the defendant was compelled "to exhibit his arm so as to show certain tattoo marks"; held, not a violation of privilege; "no evidence of physical facts can be held" to be within the privilege; best opinion, by Hawley, J.; Leonard, J., diss.); 1910, State *v.* Petty, 32 Nev. 384, 108 Pac. 934 (the defendant, pleading sadistic insanity, and having called an expert who had examined him, the Court's order appointing three other physicians to examine him in the county jail for the same purpose was held proper);

New Jersey: 1905, State *v.* Miller, 71 N. J. L. 527, 60 Atl. 202 (doctor's testimony to wounds on the accused's hands, observed after the accused's clothes were taken off in jail, admitted; here it did not appear that the exhibition was not voluntary, but the Court laid down the same rule for a forcible stripping; defendant was also called upon by officers to place his hand upon a bloody mark, for comparison; allowed, the accused having voluntarily complied); 1914, State *v.* Cerciello, 86 N. J. L. 309, 90 Atl. 1112 (finger-prints of accused, admissible, "so far as he shall not have involuntarily contributed to its production");

New Mexico: 1917, State *v.* Barela, 23 N. M.

it logically to most of the concrete solutions; hence, to attempt to generalize, by a topical cross-section (as it were), *e. g.* as to finger-prints, removal of shoes,

395, 168 Pac. 545 (arson; the sheriff "compelled the defendants to remove their shoes" and then compared them with tracks found; held admissible, citing with approval the text above);

New York: 1854, Henrietta Robinson's Trial, N. Y., 11 Amer. St. Tr. 528, 543, 545, 547, 549 (murder of another woman; the accused at the trial sat heavily veiled; on a question to a witness to the killing, "Do you see her now?" meaning the person who killed, the accused refused to remove her veil; her counsel informed the judge that her action was contrary to their advice; finally, the issue of insanity being evidenced, Harris, J., announced: "The prisoner must unveil her face, so that it can be seen; . . . if the prisoner now refuses to remove the veil, it will be my duty, however painful it may be, to order the sheriff to do it by force"; the accused then complied); 1873, People *v.* McCoy, 45 How. Pr. 216 (murder of defendant's bastard infant, testimony of physicians, as to her recent delivery, based on an examination of her in jail, under the coroner's order and against her objection, held inadmissible); 1890, People *v.* Kemmler, 119 N. Y. 580, 24 N. E. 9 (testimony of physicians, sent for the purpose, and based on an observation of the accused's mental condition while in jail, held admissible); 1894, People *v.* Gardner, 144 N. Y. 119, 38 N. E. 1003 (defendant held compellable to stand up in court for identification; good opinion by Earl, J.); 1901, People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286 (specimens written by a defendant, when under suspicion of a crime, but voluntarily, at the request of the prosecuting attorney, held admissible against him); 1902, People *v.* Truck, 170 N. Y. 203, 63 N. E. 281 (examination by experts, in jail, to ascertain sanity and testify thereto, held not a breach of the privilege); 1903, People *v.* Van Wormer, 175 N. Y. 188, 67 N. E. 299 (taking the defendants' shoes from them and placing the shoes in foot-marks, held not a violation of the privilege); 1907, People *v.* Furlong, 187 N. Y. 198, 79 N. E. 978 (People *v.* Truck followed); 1908, People *v.* Strollo, 191 N. Y. 42, 83 N. E. 573 (search and examination by the police, held not a violation of privilege on the facts);

North Carolina: 1858, State *v.* Jacobs, 5 Jones 259 (accused held not compellable to exhibit himself to the jury as being of colored race within a prohibited degree); 1872, State *v.* Jonnson, 67 N. C. 55, 58 (State *v.* Jacobs approved; here it was held proper to allow witnesses "to point at him as being the identical person of whom they were speaking"); 1874, State *v.* Garrett, 71 N. C. 85, 87 (the defendant had been ordered by the coroner to unwrap her hand, and show it to a medical witness, who testified that there was no burn on it; held allowable, on the theory (*ante*, § 2183) that testimony based on an act in itself inadmissible was still admissible; State *v.* Jacobs distinguished); 1876, State *v.* Graham, 74 N. C. 647 (evidence obtained by compelling an accused, out of court, to put his foot in a track for identification; held admissible; quoted *supra*); 1912, State *v.* Thompson, 161 N. C. 238, 76 S. E. 249 (the constable told the accused to shoulder the gun, aim it, etc., and he did so; held admissible, following State *v.* Graham); 1918, State *v.* Neville, 175 N. C. 731, 95 S. E. 55 (rape; taking the accused to the scene of the offence and placing him in the alleged position of the guilty person for identification by the victim, held not improper);

Ohio: 1915, Angeloff *v.* State, 91 Oh. 361, 110 N. E. 936 (the woman's intercourse with others about the time, admissible to explain the existence of venereal disease, but not her attempts to have such intercourse);

Pennsylvania: 1886, Johnson *v.* Com., 115 Pa. 369, 373, 395, 9 Atl. 78 (defendant called upon by prosecution to repeat certain words to enable his voice to be identified; privilege doubted, but held waived by assent);

Philippine Isl. 1912, U. S. *v.* Tan Teng, 23 P. I. 145 (rape; the victim having gonorrhea, the defendant was physically examined, without objection, at the time of arrest, and a substance emitting from his body was given to the Bureau of Science for analysis; the results of analysis were allowed to be evidenced; following Holt *v.* U. S., U. S., *supra;* citing with approval the text above); 1917, U. S. *v.* Ong Siu Hong, 36 P. I. 735 (opium offence; the accused was "forced to discharge the morphine from his mouth"; the privilege held not violated); 1920, Villaflor *v.* Summers, 41 P. I. 62, Sept. 30, 1920 (adultery; the trial Court ordered the defendant woman to submit to medical examination, to determine whether pregnancy existed; privilege held not to prevent this; liberal opinion by Malcolm, J.);

South Carolina: 1893, State *v.* Atkinson, 40 S. C. 363, 367, 372, 18 S. E. 1021 (compelling the accused to put his foot in tracks; undecided); 1906, State *v.* Sanders, 75 S. C. 409, 56 S. E. 35 (placing defendant's foot in a track, with his consent, held not a violation of the privilege); 1913, State *v.* McIntosh, 94 S. C. 439, 78 S. E. 327 (like State *v.* Atkinson; admitted);

Tennessee: 1875, Stokes *v.* State, 5 Baxt. 619 (ordering the accused to put his foot in a pan of mud, for identification, before the jury, held improper); 1885, Lipes *v.* State, 15 Lea 125, 128 (examination of the defendant's feet under order of the Court to see if they fitted tracks,

etc., would be misleading, in that it would give an appearance of a general rule that does not exist. There are fifty jurisdictions; and the sound method of treating the precedents here is to seek for some consistent test valid for the body of a particular court's rulings, and not to attempt a factitious reconciliation of rulings by many independent courts.

2. On the principal varieties of situation presented, the following reasonings may be offered:

Measuring or *photographing* the party is not within the privilege.[3] Nor is the *removal* or *replacement* of his *garments* or *shoes*. Nor is the requirement that the party move his body to enable the foregoing things to be done. Requiring him to make *specimens of handwriting* is no more than requiring him to move his body. Requiring him to *speak words* for identification of his voice is no more than requiring the revelation of a physical mark. Requiring him to talk for inference as to *sanity or insanity* is on principle no more than the foregoing, but approaches the borderline. But requiring him to speak for *revealing any external circumstance* — *e. g.* the location of stolen goods — crosses the borderline; his words become a testimonial utterance, to be used as an assertion of fact, and hence are within the privilege.

A *medical examination* is not a violation of the privilege, whether its object be to ascertain *insanity* or to ascertain *disease in general*. But under the modern sanitary statutes (*ante*, § 2220) directing medical examination to ascertain the existence of contagious disease, and authorizing segregation of the person till cured, the purpose is not penal but administrative; and if there is no crime, the present privilege would not be applicable (*ante*, §§ 2254, 2255).

3. It is not always noted that the compulsion, to come within the present

semble, held compellable; to rebut testimony as to peculiarities of the defendant's feet, the State was allowed to have a physician examine them under orders of the Court);
Texas: 1879, Walker *v.* State, 7 Tex. App. 245, 264 (testimony admitted as to tracks made by the defendant, apparently without compulsion, in the magistrate's office before trial); 1902, Benson *v.* State, — Tex. Cr. —, 69 S. W. 165 (compelling the defendant to stand up in court for identification, and, *semble*, to put on his hat, held proper); 1906, Turman *v.* State, 50 Tex. Cr. 7, 95 S. W. 533 (rape; held improper "for the State to require appellant to place the cap on his head for the purpose of identification by the prosecutrix," although he had voluntarily taken the stand; Benson *v.* State ignored; this Court seems disposed to make it hard for an accused not to be acquitted); 1907, Powell *v.* State, 50 Tex. Cr. 592, 99 S. W. 1005 (photographs of defendant's hand, taken with his consent and after warning, admitted); 1920, Moore *v.* State, 87 Tex. Cr. 569, 226 S. W. 415 (robbery; footprints made by defendant while under arrest, admissible, the accused having acted voluntarily);
Vermont: 1902, State *v.* Eastwood, 73 Vt. 205, 50 Atl. 1077 (testimony of the superintendent of an insane asylum to the defendant's mental condition, based on the defendant's conduct while there committed after arrest, held admissible);
Virginia: 1886, Sprouse *v.* Com., 81 Va. 374, 378 (defendant's act of writing his name at the judge's request, without threat or compulsion, held not to violate the privilege);
Washington: 1893, State *v.* Nordstrom, 7 Wash. 506, 510, 35 Pac. 382 (measurement of defendant's feet, allowed, to contradict his testimony that he could not wear certain boots; *semble*, that exhibition of parts of the body usually covered is not compellable);
Wisconsin: 1903, Thornton *v.* State, 117 Wis. 338, 93 N. W. 1107 (requiring the defendant to give up his shoe and then comparing it with tracks, held not a violation of privilege).

[3] See the following: R. M. Kidd, "The right to take Finger-Prints, Measurements, and Photographs" (California L. Rev., Nov. 1919, VIII, 25).

principle, must be by *process of law, or its equivalent*, for the purpose of obtaining testimony — a distinction to be further examined (*post*, § 2266).

The tendency to-day, almost everywhere, is against the loose extension of the privilege — by way of just reaction against an inclination at one time exhibited to the contrary. That the doubt is entirely one of the present generation shows how alien it is to the orthodox spirit of the privilege. It will one day be incredible that judges could have descended as far as they sometimes have here gone on the road to logical absurdity.

§ 2266. **Confessions and the Self-Crimination Privilege, distinguished.** The rule excluding untrustworthy Confessions and the rule giving a Privilege against compulsory testimonial Self-Crimination are sometimes not kept plainly apart, — and naturally enough, for not only have they the common feature of an acknowledgment of guilty facts, but also, by the test frequently employed (*ante*, § 826) the test of voluntariness for confessions becomes almost identical with the idea of compulsion as forbidden by the privilege. Judicial expressions which blend the two into one principle might therefore sometimes be expected.[1]

But this confusion is radically erroneous, both in history, principle, and practice:

That the *history* of the two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents, appears sufficiently from a survey of the two histories as already set forth (*ante*, §§ 818, 2250). If the privilege, fully established by 1680, had sufficed for both classes of cases, there would have been no need in 1780 for creating the distinct rule about confessions.

So far as concerns *principle*, the two doctrines have not the same boundaries; *i. e.* the privilege covers only statements made in court under process as a witness; the confession-rule covers statements made out of court, but may also, overlapping, cover statements made in court.

Finally, in regard to *practical effects*, the conceded differences become material: (*a*) The confession-rule is broader, because it may exclude statements which are obtained without compulsion; (*b*) Where the privilege is waived or not claimed, the confession-rule may still operate to exclude; (*c*) Where the privilege is nullified by statute (as it may be in England, and has been by the English Bankruptcy Act), the confession-rule may still operate; (*d*) Where the testimony, though given under oath, does not violate the confession-rule, it may still involve a violation of the privilege; (*e*) The privilege applies to witnesses as such, in civil and in criminal cases, but the confession-

§ 2266. [1] For example, the following, used of a confession: "I have always felt that we ought to watch jealously any encroachment on the principle that no man is bound to criminate himself, and that we ought to see that no one is induced either by a threat or a promise to say anything of a criminatory character against himself" (1867, Kelly, C. B., in R. *v.* Jarvis, 10 Cox Cr. 576); "[The constitutional privilege against self-crimination] was but a crystallization of the doctrine as to confessions" (1897, White, J., in Bram *v.* U. S., 168 U. S. 532, 18 Sup. 182).

rule is concerned only with party-defendants in criminal cases; (*f*) A party-defendant is protected by the confession-rule against the use of his own statements only; but the privilege is applicable also to witnesses during his trial, and it is by some maintained that he may object to the use against him of testimony extracted by a violation of the witness' privilege.[2] No doubt other situations may be conceived in which the two principles operate with entire independence.

Nothing but subversion of principle and confusion of practical rules can result from an attempt to predicate an analogy and relationship. The sole relationship is found in the general spirit of protection and caution which our legal system shows towards an accused. But this spirit is equally responsible for the rule about reasonable doubt, the rule about 'corpus delicti', the rule about lists of witnesses, and several others peculiar to criminal cases; and there is no more reason for linking the privilege with the one than with the others, — there is, indeed, less reason, since the privilege is intended as well for witnesses as for parties defendant.[3]

4. Mode and Effect of Claiming the Privilege

§ 2268. **Privilege must be Claimed; Criminative Questions not forbidden; Notice to Produce Documents.** The privilege is merely an option of refusal, not a prohibition of inquiry.

(1) Hence it follows that when an *ordinary witness* is on the stand, and a criminating fact, relevant to the issue, is desired to be proved through him, the question may be asked, and it is for him then to say whether he will exercise the option given him by the law. It cannot be known beforehand whether he will refuse. Besides, to prevent the question would be to convert the option into a prohibition.

This principle would seem incapable of dispute.[1] But it sometimes is involved in confusion, because the fact inquired about in the question may of course be irrelevant or otherwise forbidden by some rule of law, and thus a ruling upon the admissibility of the fact may sometimes tend to be confused with a ruling upon the compulsoriness of the answer. For example, in the impeachment of a witness by cross-examination to character, he may be asked whether he stole from his last employer, and this fact might for that purpose be held inadmissible (*ante*, §§ 982–987), though, even if it were admissible to be asked, it might still be privileged from answer. The confounding of

[2] These contrasts between the two may be seen illustrated in the precedents concerning the application of the confession-rule to testimony on oath (*ante*, §§ 848–850).

[3] For opinions making clear the distinction between the privilege-rule and the confession-rule, see those of Campbell, C. J., in R. *v.* Scott, 1 Dears. & B. 47 (1856), Selden, J., in Hendrickson *v.* People, 10 N. Y. 33 (1854), and in People *v.* McMahon, 15 N. Y. 386 (1857).

§ 2268. [1] Yet a great judge has here used language likely to mislead: 1872, Cooley, J., in Gale *v.* People, 26 Mich. 157, 160 (commenting on the trial Court's allowance of a question, while telling the witness that he had the option to decline to answer: "When the judge sustained the questions, he decided in effect that they were proper to be put and answered"; no authorities cited).

these two things has occurred most often in dealing with the waiver of the privilege (*post*, § 2277). Here it is enough to note that the privilege always presupposes that the fact inquired about is a proper one, and that its propriety has been assumed or otherwise determined:

1878, JAMES, L. J., in *Allhusen* v. *Labouchere*, L. R. 3 Q. B. D. 654, 660: "Nobody was ever allowed to object to a relevant question because that question tended to criminate himself. He might object to answer it, but it was never a ground of demurrer to an interrogatory or a ground for striking it out, that the answer might involve him in a crime."

1865, PORTER, J., in *Great Western Turnpike Co.* v. *Loomis*, 32 N. Y. 127, 138: "Strictly speaking, there is no case in which a witness is at liberty to object to a *question*. That is the office of the party or of the Court. The right of the witness is to decline an *answer*, if the Court sustains his claim of privilege. When the question is relevant, it cannot be excluded on the objection of the party, and the witness is free to assert or to waive his privilege. But when the question is irrelevant, the objection properly proceeds from the party, and the witness has no concern in the matter unless it be overruled by the judge."

Accordingly, it is universally conceded that the question may be put to the witness *on the stand*.[2] The same rule applies to *interrogatories* in a bill of discovery, both in ordinary chancery practice and under modern statutory interrogatories to the adverse party;[3] whether the refusal, in case of written

[2] *Can.* 1881, Power *v.* Ellis, 20 N. Br. 40, 6 Can. Sup. 1, 7, 8 (Taschereau, J., diss.); *U. S. Fed.* 1905, Re Knickerbocker Steamboat Co., 139 Fed. 713, C. C. (the party claiming privilege "must say so in unmistakable language and give the reasons for shielding himself"); *Del.* 1845, Short *v.* State, 4 Harringt. 568; *La.* 1835, Macarty *v.* Bond, 9 La. 351, 356; *N. J.* 1830, Fries *v.* Brugler, 12 N. J. L. 79; *N. Y.* 1826, Southard *v.* Rexford, 6 Cow. 254, 259; 1838, People *v.* Abbot, 19 Wend. 192, 195; *S. Car.* 1896, State *v.* Butler, 47 S. C. 25, 26, 24 S. E. 991; *Vt.* 1905, Rowell, C. J., in State *v.* Duncan, 78 Vt. 364, 63 Atl. 225 ("The privilege is an option of refusal, not a prohibition of inquiry").

Contra: 1911, State *v.* Thorne, 39 Utah 208, 117 Pac. 58 (no relevant authority cited; does the privilege justify us in tenderly swathing accused persons in cotton wool?).

[3] *Eng.* 1809, Paxton *v.* Douglas, 16 Ves. Jr. 239 (L. C. Eldon: "The objection is, not to the question, but to answering it"); 1821, Ex parte Burlton, 1 Gl. & Jam. 30, Leach, V. C.; 1855, Osborn *v.* London Dock Co., 10 Exch. 698; 1856, Chester *v.* Wortley, 17 C. B. 410; 1862, Bartlett *v.* Lewis, 12 C. B. N. S. 249, 259 (Erle, C. J., and Willes, J., took the ground that the situation was analogous to that of putting a question on the stand, but, further, that they did not object to the possibility that the party's refusal might lead to the jury's drawing inferences, *post*, § 2272; Keating, J., took the more correct ground that "we are not to assume that he cannot answer them without admitting his guilt or that he will claim protection from answering them"; the prior contrary cases *infra* were repudiated); 1868, McFadzen *v.* Liverpool, L. R. 3 Exch. 279; 1878, Fisher *v.* Owen, L. R. 8 Ch. D. 645, 656 ("Where an interrogatory, although tending to criminate, is put for the purpose of establishing a definite fact upon which the party interrogating relies, then that party is entitled to have the oath of the person interrogated, either in answering the interrogatory or in asserting his privilege not to answer"); 1878, Allhusen *v.* Labouchere, L. R. 3 Q. B. D. 654, 660, 666; 1879, Webb *v.* East, L. R. 5 Exch. D. 23; 1897, Spokes *v.* Hotel Co., 2 Q. B. 124, 131 (the objection must be taken "in answer, and not as an objection to the putting of the question"; here, a summons to make an affidavit as to what relevant documents he had); *U. S.* 1920, Cutter *v.* Cooper, 234 Mass. 307, 125 N. E. 634 ("a question is not incompetent merely because its answer may tend to incriminate").

The following earlier English rulings are therefore outlawed: 1822, Schultes *v.* Hodgson, 1 Add. 105, 110 (following literally the Stat. 13 Car. II, *ante*, § 2250, the oath is not even to be "tendered," in the ecclesiastical court); 1861, Tupling *v.* Ward, 6 H. & N. 749 ("Without laying down any general rule, we think that in cases of this kind [libel], it would be unfair to submit questions which a party is clearly not bound to answer"; compare par. (3), *infra*).

The following contrary rulings may be distinguished: 1897, Earl of Mexborough *v.* Whitwood U. D. Council, 2 Q. B. 111 (forfeiture of lease; leave to administer interrogatories, denied; foregoing cases not cited;

interrogatories of discovery, should be by plea or by demurrer or by answer has been a much mooted question, depending on the orthodox technicalities of pleading in chancery.[4] And, 'a priori', the witness cannot at the very outer threshold set up the privilege of not answering possible questions as a valid reason for refusing to *obey the process* of court summoning him to appear.[5]

(2) For the *party-defendant in a criminal case*, the privilege permits him to refuse *answering any question whatever in the cause*, on the general principle that it "tends to criminate" (*ante*, § 2260). This being so, the prosecution could nevertheless on principle have a right at least to call him to be sworn, because, as with an ordinary witness, it could not be known beforehand whether he would exercise his privilege.

But no Court seems ever to have sanctioned this application of the principle.[6] This result may be rested on several considerations: (*a*) Historically,

apparently not treated as involving this doctrine); 1856, Thornton *v.* Adkins, 19 Ga. 464 (by express statute); 1882, Simpson *v.* Smith, 27 Kan. 565, 578 (by two judges to one; answers in a deposition, claiming privilege, may be suppressed).

For a consideration of the effect of this doctrine on the *immunity-statutes*, see *post*, § 2282.

[4] The following cases deal with this question: *Eng.* 1742, Baker *v.* Pritchard, 2 Atk. 387, 389; 1789, Williams *v.* Farrington, 3 Brown Ch. C. 38; 1818, Curzon *v.* De la Zouch, 1 Swanst. 185, 192; 1818, Attorney-General *v.* Brown, 1 Swanst. 265, 294, 305; 1828, Fleming *v.* St. John, 2 Sim. 181.

U. S. 1839, Atterberry *v.* Knox, 3 Dana Ky. 282; 1828, Salmon *v.* Clagett, 3 Bland Ch. Md. 125, 144; 1828, Wolf *v.* Wolf, 2 H. & G. Md. 385, 389; 1859, Bay State Iron Co. *v.* Goodall, 39 N. H. 223, 235; 1869, Currier *v.* R. Co., 48 N. H. 321, 327, 330; 1819, M'Intyre *v.* Mancius, 16 Johns. N. Y. 592; 1832, Livingston *v.* Harris, 3 Paige N. Y. 528, 530; 1843, Brownell *v.* Curtis, 10 Paige N. Y. 210.

Compare the practice for privileged communications between *attorney and client*, *post*, § 2321.

Where a *document* is the subject of the claim of privilege, the claim must specifically designate the document: 1916, Attorney-General *v.* Kelly, 28 D. L. R. 409, Man. (claim by affidavit specifying documents, held specific enough on the facts).

[5] *Fed.* 1908, U. S. *v.* Price, U. S. *v.* Haas, C. C. S. D. N. Y., 163 Fed. 904 (the now defendants had been subpœnaed to appear before the grand jury; they appeared and were informed of the subject of inquiry and of their privilege, and were sworn; they protested against being sworn, claimed privilege as to the few preliminary questions asked, and were then dismissed; held (1) that they were not in the position of defendants but of ordinary witnesses, and (2) that as witnesses their privilege was not violated; careful opinion by Hough, J.); *Kan.* 1920, State ex rel. Court of Industrial Relations *v.* Howat, 107 Kan. 423, 191 Pac. 585 (contempt in not appearing as witness before a court whose constitutional power was questioned; privilege against self-crimination cannot be brought into question "until they had appeared and some question had been asked"); *Ky.* 1914, Com. *v.* Southern Express Co., 160 Ky. 1, 169 S. W. 517 (here a corporation was held to be in contempt for removing its books from the jurisdiction to evade inquiry by the grand jury; the party must appear and tender his books, in order to assert privilege); *Oh.* 1913, State *v.* Cox, 87 Ohio 313, 101 N. E. 135 (inquiries by a grand jury; the witness must take the oath before the privilege can be claimed); *Vt.* 1907, Re Consolidated Rendering Co., 80 Vt. 55, 66 Atl. 790 (the witness must appear and make claim; he cannot refuse to obey a subpœna *d. t.* and also claim privilege).

[6] *Accord:* 1900, Re Green, 86 Mo. App. 216 (cited *infra*); 1915, People *v.* Ferola, 215 N. Y. 285, 109 N. E. 500, per Miller, J.; 1901, Town Council *v.* Owens, 61 S. C. 22, 39 S. E. 184 (testimony of a defendant, not asking to be sworn, but not objecting, held improperly taken); 1904, Ex parte Sauls, 46 Tex. Cr. 209, 78 S. W. 1073 (habeas corpus; the relators were arrested under a search-warrant for liquor illegally kept, and on arraignment before the justice they objected to being sworn at all; held that "they could refuse to be sworn as well as to testify"; "there might be a different question raised if the parties were testifying in a case other than their own"). *Contra:* 1907, U. S. *v.* Rota, 9 P. I. 426 (accused, being called upon to testify in his own behalf, answered without objection; held not improper).

Otherwise for *former testimony* obtained under an immunity statute and now offered: 1920, Bain *v.* U. S., 6th C. C. A., 262 Fed. 664 (under the U. S. Bankruptcy Act, providing

the privilege existed long before the abolition of the accused's disqualification; hence, until those statutory changes (in 1860–1900), the accused could not testify even if he were willing; thus, to call him would be useless, and the negative practice became fixed. (*b*) Under the modern statutory competency of the accused, if he should choose to testify when the time comes for putting in his case, the prosecution may on his cross-examination put the questions which it could have put on calling him earlier, and thus the prosecution's opportunity to find whether he will exercise his privilege is practically obtained. (*c*) Even though the prosecution might technically be entitled to that opportunity at the earlier stage, still the exercise of this technical right need hardly be conceded, since that procedure could only have, as its chief effect, the emphasizing of his refusal, should he refuse, and thus the indirect suggestion of that inference against him from which he is protected by another aspect of the principle (*post*, § 2272). (*d*) By the express tenor, in most jurisdictions, of the statute qualifying the accused, he is declared to be a competent witness "at his own request, but not otherwise" (*ante*, §§ 488, 579). Whether this form of words was chosen with a view to its present bearing can only be surmised; but its evident effect is to forbid the calling of the accused by the prosecution.

Where, however, the accused, though not taking the stand, possesses *documents* which the prosecution desires to use, the prosecution may of course give *notice to produce*, without violating the privilege. This is because the accused's privilege as to his personal testimony is separate from his privilege as to his documents; and it cannot be known, until the notice, whether he is to claim the latter privilege. Moreover, the prosecution must give notice to produce, in order to authorize its later resort to a copy (*ante*, §§ 1205, 1207), and its use of a copy is concededly not a violation of the privilege.—The propriety of giving such notice was never doubted, until the extraordinary ruling in McKnight *v.* United States, in 1902, which seems since to have exercised a baleful spell over a few other Courts.[7] Besides ignoring the

that "no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding," the bankrupt's deposition may be used to contradict his present testimony, unless objection is duly made on the ground of privilege).

[7] *Federal:* 1902, McKnight *v.* U. S., 54 C. C. A. 358, 115 Fed. 972 (after evidence that an incriminating document is in the accused's possession, no notice of production can be given by the prosecution, because the claiming of the privilege would permit inferences to be drawn against him; the ruling is made on the assumption that a copy could be used under such circumstances without notice to produce, — an incorrect assumption, as shown *ante*, §§ 1202, 1205, 1207; the opinion in R. *v.* Smith, 3 Burr. 1475, cited *ante*, § 291, shows the natural and orthodox treatment of the situation); 1915, Hanish *v.* U. S., 7th C. C. A. 227 Fed. 584 (mailing obscene books; to prove the letter of request by the purchaser, a copy was offered, and a notice to produce it was read; held improper, purporting to follow McKnight *v.* U. S., *ante*, § 1205, and *supra*, but not prejudicial, the letter not being 'per se' incriminating; it is singular how the McKnight Case has come to retain any standing, in view of its multifold fallacies and its contraventions of orthodox practice: in the present opinion an additional fallacy appears, in alluding to the notice as "not the *sole evidence* that the copies . . . were true copies"; for it is elementary common law that a notice to produce an original is no evidence at all of the correctness of the copy, which must be independently proved; it seems hopeless to clear away the mesh of elementary error which the McKnight Case involves); 1920, Bain *v.* U. S., 6th C. C. A. 262 Fed. 664

fundamental principle (*supra*, par. 1) that the privilege must be claimed, the opinion also involves the fallacy that the mere necessity of making a claim of privilege for documents is improper because of the possible resulting inference (*post*, § 2273) — a fallacy which reasons in a circle, because the privilege cannot be enforced until it is claimed and the Court cannot both enforce it and forbid the necessary condition precedent to enforcing it. The ruling involves the further fallacy that the accused's failure, on notice, to produce the document was equivalent to a claim of privilege; but it was not, because it might have been done in precisely the same way for a non-criminating document and would merely have served as a basis for the use of a copy by the prosecution. These fallacies so subtly combine in this opinion that the result is a plausible one; but the ruling remains purely fallacious and wholly unsound.

(3) For a *party-defendant* in a *civil cause having a criminal fact as its main issue*, the question arises whether his situation is to be assimilated to the former or the latter case above mentioned. None of the reasons applicable

(following McKnight *v.* U. S.); *New York;* 1916, People *v.* Gibson, 218 N. Y. 70, 112 N. E. 730 (indictment for withholding a will; a document by the administrator authorizing bearer to demand property in defendant's hands had been served on defendant; to prove the document, the prosecution had notified defendant to produce it, and at the trial after proving the notice to produce asked defendant's counsel whether he had the document; counsel objected to the question being asked; the objection was held valid; Willard Bartlett, C. J., after expressing disagreement with the above comment on McKnight *v.* U. S.: "The practice of calling upon defendants in criminal cases to produce incriminating papers alleged to be in their possession so frequently adopted by zealous prosecutors . . . is objectionable . . . We approve the rule laid down in McKnight *v.* U. S. because it seems to us the only effective method of preventing a practice which virtually deprives the defendant" of his privilege; here the judge's instruction to the jury to disregard the question was held to cure the error; the fallacy of the main ruling lies in ignoring the distinction between permitting a question and compelling an answer); 1917, People *v.* Minkowitz, 220 N. Y. 399, 115 N. E. 987 (defendant had produced papers at the trial of S., and they were returned to his attorney; a subpœna had been served upon the attorney to produce them at this trial; the prosecuting attorney at the trial asked the attorney for them, and he refused to produce on the ground of the privilege; held erroneous to call for production at the trial either from the defendant or from his attorney; following People *v.* Gibson; unsound); *Oklahoma:* 1911, Gillespie *v.* State, 5 Okl. Cr. 546, 115 Pac. 620 (letters, written by the defendant and in his possession, called for by the prosecutor as a part of his case on trial, and the call objected to; held improper); *Pennsylvania:* 1922, Com. *v.* Valeroso, 273 Pa. —, 116 Atl. 828 (murder; to prove a letter written to defendant by deceased's attorney, threatening eviction, the prosecution called on the defendant in court to produce the letter, and on non-production proved the contents by other evidence; held improper, on the theory that "on the call for the letter, he was bound to speak or remain silent, and silence was the equivalent of speech"; unsound obviously, for the notice to produce does not call for any answer; the opponent's mere failure to produce furnishes the first party with the desired excuse for secondary evidence); *Vermont:* 1917, State *v.* Bolton, 92 Vt. 157, 102 Atl. 489 (document in defendant's possession; on his objection to evidence of it without the original, the prosecution called for it, but then withdrew the request; point not decided); *Washington:* 1915, State *v.* Jackson, 83 Wash. 514, 145 Pac. 470 (like McKnight *v.* U. S.; the learned Court declines to accept the above criticism of that case; on this point, further argument would seem to be useless; it is enough to note that these rulings are consistent with the judicial attitude towards the accused person as a delicate sacred image of Dresden china, whose slightest marring would bring down a divine thunderbolt on courts of justice); 1915, State *v.* Morden, 87 Wash. 465, 151 Pac. 832 (statutory rape; letter sent by the female to the defendant; inquiry by counsel whether defendant had the letter, held not a violation of the rule).

See a learned note in Harvard Law Review, XXIX, 211 (1915), on McKnight *v.* U. S. and Hanish *v.* U. S.

to the latter case (except perhaps the third) have force here; and it would therefore seem that the technical right of the plaintiff, to call the opponent as a witness and question him until it appears that the privilege will be exercised, should be conceded to operate.[8] The same rule should apply to an *ordinary witness* called in a case plainly involving his crimination.[9]

(4) For a *co-defendant* in a *criminal case*, the privilege of course applies; *i. e.*, one defendant cannot call a co-defendant unless the latter waives his privilege.[10]

§ 2269. **Judge's Warning to the Witness.** It is plausible to argue that the witness should be warned and notified, when a criminating fact is inquired about, that he has by law an option to refuse an answer; and this view was often insisted upon, a century ago, by the leaders at the Bar:

1783, Mr. *Bearcroft*, arguing in *Bembridge's Trial*, 22 How. St. Tr. 143 (for the defence): "It is true he was examined in a mode of inquiry in which it was not improper perhaps, to examine him; but it cannot be doubted that the persons who did examine him saw that the questions that they put upon that occasion tended to criminate the person under that examination. What does your lordship do in that situation? What does every judge do, even down to the lowest justice of the peace, even to committee-men upon elections, whenever a question of that sort is asked of a witness? 'Stop; understand that you are at your own discretion whether you will answer that question or not; you need not accuse yourself.' The law of England is that no man is bound to accuse himself; and the man who administers that law best always takes care to give that caution."

1794, Mr. *Erskine*, in *Watt's Trial*, 23 How. St. Tr. 1265 (for the defence): "I conceive it to be of all things the idlest and most superfluous to recognize as a principle of law that a witness is not to answer a question that might criminate himself, without at the same time warning him what might or not be a question where the answer might criminate himself."

[8] *Eng.* 1855, Boyle *v.* Wiseman, 10 Exch. 647, 653 (libel; the defendant objected to being sworn, on the present ground; held, that he must be sworn, and could object upon being asked questions); *Can.* 1867, Burton *v.* Young, 17 Low. Can. 379, *semble* (cited *ante*, § 2260); *U. S.* 1921, Ridge *v.* State, 206 Ala. 349, 89 So. 742 (abatement of nuisance of house of prostitution, under St. 1919, Feb. 12, p. 52; the requirement of a sworn answer, held not to violate the privilege, since the "respondent can successfully invoke the protection of his constitutional privilege by making a proper showing to the Court," if his answer should involve a crime); 1916, People *v.* Seymour, 272 Ill. 295, 111 N. E. 1008 (contempt; "no question of that kind arises on the record, since he claimed no exemption from answering").

Contra: 1919, Warmbein *v.* Ulrich, Man., 3 W. W. R. 959 (crim. con.; motion to compel attendance of defendant to be examined for discovery, denied, under Eng. St. 32 & 33 Vict. c. 68, § 3, quoted *ante*, § 2252); 1900, Re Green, 86 Mo. App. 216 (citation under statute against a former administrator, with interrogatories charging concealment, embezzlement, etc.; the defendant's situation being "analogous to that of a defendant in a criminal suit," "he cannot be called by the opposite party as a witness").

[9] *Can.* 1915, Re Isler, 25 D. L. R. 845, Ont. (application from a French court to take the deposition of I. for criminal proceedings pending against I. in France; per Middleton, J., the order issued, leaving it to I. to claim or waive privilege; "the only limitation upon the right to examine is found in R. S. Can. 1906, c. 145, § 45, which gives the witness the same right to refuse to answer questions tending to criminate, or other questions, which a party would have in a cause pending").

U. S. 1902, U. S. *v.* Kimball, 117 Fed. 156, 163 (grand jury); 1886, Ex parte Stice, 70 Cal. 51, 53, 11 Pac. 459 (like Eckstein's Pet., Pa.); 1903, Ex parte Gfeller, 178 Mo. 248, 77 S. W. 552 (interrogatories to a witness in a proceeding against E. for discovery of property embezzled from an estate; interrogatories allowed; distinguishing Re Green, n. 8, *supra*); 1892, Eckstein's Petition, 148 Pa. 509, 516, 24 Atl. 63 (a witness is not exempted from being sworn because incriminating questions are likely to be asked); 1920, Re Adams, 42 S. D. 592, 176 N. W. 508 (subpœna by a chairman of county council of defence; party not entitled to refuse to appear merely because he would be asked criminating questions).

[10] 1919, State *v.* Medley, 178 N. C. 710, 100 S. E. 591.

But there are opposing considerations. In the first place, such a warning would be an anomaly; it is not given for any other privilege; witnesses are in other respects supposed to know their rights; and why not here? In the next place, it is not called for by principle, since, until the witness refuses, it can hardly be said that he is compelled to answer; nor is it material that he believes himself compelled, for the Court's action, and not the witness' state of mind, must be the test of compulsion. Again, the question can at any rate only be one of judicial propriety of conduct, for no one supposes that an answer given under such an erroneous belief should be struck out for lack of the warning. Finally, in practical convenience, there is no demand for such a rule; witnesses are usually well enough advised beforehand by counsel as to their rights when such issues impend, and judges are too much concerned with other responsibilities to be burdened with the prevision of individual witnesses' knowledge; the risk of their being in ignorance should fall rather upon the party summoning than the party opposing.

Nevertheless, it is plain that the old practice was to give such a warning, when it appeared to be needed.[1] But, as general knowledge spread among the masses, and the preparation for testimony became more thorough, this practice seems to have disappeared in England, so far at least as any general rule was concerned.[2]

In the United States both the rule and the trial custom vary in the different jurisdictions.[3] No doubt a capable and painstaking judge will give the warning, where need appears; but there is no reason for letting a wholesome custom degenerate into a technical rule.

§ 2269. [1] 1725, L. C. Macclesfield's Trial, 16 How. St. Tr. 850 (Mr. Solicitor-General: "It is our duty that he should not be surprized into a question that may subject him to a punishment. . . . We ought to let him know that an answer to the question may subject him to a prosecution"); 1783, Mr. Bearcroft, quoted *supra;* 1809, L. C. Eldon, in Lloyd *v.* Passingham, 16 Ves. Jr. 59, 64 ("The practice formerly was that the judge told the witness he was not bound to answer the question").

[2] 1809, L. C. Eldon, in Paxton *v.* Douglas, 16 Ves. Jr. 239, 242 ("Now, it appears to be understood that he may waive the objection and proceed if he thinks proper; and in general it is left to his own discretion"); 1854, Parke, B., in Att'y-Gen'l *v.* Radloff, 10 Exch. 84, 88 ("I think that a witness ought to make the objection himself").

[3] *Ga.* 1896, Dunn *v.* State, 99 Ga. 211, 25 S. E. 448, *semble* (caution is not required); *Haw.* 1896, Republic *v.* Parsons, 10 Haw. 601, 605 (the Court is not bound to instruct); *Ill.* 1900, Bolen *v.* People, 184 Ill. 338, 56 N. E. 408 ("when such inquiry [as to the extent of his right to refuse] is made by the witness, it is the duty of the Court to inform him"); *Mass.* 1876, Mayo *v.* Mayo, 119 Mass. 290, 292 ("It is within the discretion of the Court, and the usual practice, to advise a witness that he is not bound to criminate himself, where it appears necessary to protect the rights of the witness"); *Miss.* 1904, Ivy *v.* State, 84 Miss. 264, 36 So. 265 ("the better practice" requires a warning); *N. H.* 1854, Janvrin *v.* Scammon, 29 N. H. 280, 290 ("The Court will frequently interfere and inform the witness of his privilege"); *N. Y.* 1833, Taylor *v.* Wood, 2 Edw. Ch. 94 (the Court should advise the witness); *Pa.* 1842, Ralph *v.* Brown, 3 W. & S. 395, 400 ("the judge ought to advise the witness of his privilege"); *S. D.* 1906, State *v.* Mungeon, 20 S. D. 612, 108 N. W. 552 (incest; the prosecutrix being unwilling to testify, the Court's refusal to advise her of the privilege, on demand of defendant's counsel, was held not improper); *Vt.* 1840, Smith *v.* Crane, 12 Vt. 491, 493 ("Ordinarily" he should be told of his privilege, when it is likely to apply); *Wis.* 1899, Emery *v.* State, 101 Wis. 627, 78 N. W. 145; 1913, State *v.* Lloyd, 152 Wis. 24, 139 N. W. 514 (examination before the State fire-marshal; warning held not necessary).

That the *party* cannot object for lack of an instruction is noticed *post*, § 2270, note 3.

§ 2270. **Who may Claim the Privilege; Party, Witness, Counsel; Effect of Erroneous Overruling of Claim.** The privilege is that of the person under examination as witness, and, like all other privileges, is intended for his protection only (*ante*, § 2196); consequently, it does not concern a right of the *party calling him;*

1870, COCKBURN, C. J., in *R.* v. *Kinglake*, 22 L. T. R. N. S. 335: "By refusing to be examined, the witness may have exposed himself to imprisonment for contempt or to a fine. But that merely concerns the witness himself. If he chooses to give his evidence voluntarily, it would be perfectly good evidence, and would not be illegal evidence in any sense whatever, and there could be no cause of complaint. If so, what difference does it make that he has given his evidence in consequence of some coercion which has been put upon him?" BLACKBURN, J.: "Granting that a wrong was done to the witness, it is a ground of complaint for him and no one else."

1842, NELSON, C. J., in *Cloyes* v. *Thayer*, 3 Hill 564, 566: "The privilege belongs exclusively to the witness, who may take advantage of it or not, at his pleasure. . . . If ordered to testify in a case where he is privileged, it is a matter exclusively between the Court and the witness. The latter may stand out and be committed for contempt, or he may submit; but the party has no right to interfere or complain of the error. It would be otherwise if the Court allowed the privilege in a case where the witness had not brought himself within the rule, as the [cross-examining] party would then be improperly deprived of his testimony."

(1) It follows, where the *party* and the *witness* are *separate persons*, that the witness must be left to make the claim for himself, and the calling party may not make it for him;[1] furthermore, that the party's counsel may not, as such, give public warning of the privilege to the witness or require the judge to do so;[2] and, finally, that the calling party has no ground for com-

§ 2270. [1] *England:* 1870, R. *v.* Kinglake, 22 L. T. R. N. S. 335 (quoted *supra*).

United States: Fed. 1906, McAlister *v.* Henkel, 201 U. S. 90, 26 Sup. 385 (a corporation cannot claim for its officer as witness); *Alaska:* Comp. L. 1913, § 1507 (quoted *ante*, § 2252); *Colo.* 1891, Lothrop *v.* Roberts, 16 Colo. 250, 254, 27 Pac. 698; 1903, Barr *v.* People, 30 Colo. 522, 71 Pac. 392; *D. C.* 1918, Graul *v.* U. S., 47 D. C. App. 543; *Ill.* 1900, Bolen *v.* People, 184 Ill. 338, 56 N. E. 408; 1902, New York Life Ins. Co. *v.* People, 195 Ill. 430, 63 N. E. 264; *Ind.* 1884, South Bend *v.* Hardy, 98 Ind. 577, 583; *Ia.* 1892, Clifton *v.* Granger, 86 Ia. 573, 575, 53 N. W. 316; 1905, State *v.* Cobley, 128 Ia. 114, 103 N. W. 99; *Mich.* 1869, Foster *v.* People, 18 Mich. 266, 271; *Miss.* 1876, White *v.* State, 52 Miss. 216, 225; *N. J.* 1830, Fries *v.* Brugler, 12 N. J. L. 79; *N. Y.* 1826, Southard *v.* Rexford, 6 Cow. 254, 259 ("It is a personal privilege only"); 1842, Cloyes *v.* Thayer, 3 Hill 564, 566; 1843, Ward *v.* People, 6 Hill 144, 146; 1845, People *v.* Bodine, 1 Denio 281, 314; *Or.* Laws 1920, § 870 (quoted *ante*, § 2252); *Tex.* 1895, Ingersol *v.* McWillie, 87 Tex. 647, 30 S. W. 869; *Wis.* 1869, State *v.* Olin, 23 Wis. 309, 319.

But where the witness is represented by counsel, an objection on his behalf may be taken *by counsel:* 1827, Seymour's Trial, N. Y., 3 Amer. St. Tr. 385, 401 (abduction of Morgan, the renegade Mason).

Compare the cases cited *ante*, § 2196.

A *corporation* may of course claim by its officers: 1897, D'Ivry *v.* World Newspaper Co., 17 Ont. Br. 387; 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370, *semble*.

Compare the rule for *documents* of a corporation (*ante*, § 2259).

[2] ENGLAND: 1826, Thomas *v.* Newton, M. & M. 48, note (L. C. J. Tenterden would not allow counsel to object or argue as to the privilege); 1831, R. *v.* Adey, 1 Mo. & Rob. 94 (L. C. J. Tenterden: "The privilege is that of the witness, not of the party; and I think therefore that counsel have no right to interfere for the purpose of excluding an examination to which, as against their client, there is no objection").

UNITED STATES: *Colo.* 1903, Barr *v.* People, 30 Colo. 522, 71 Pac. 392 (the party cannot require that the judge instruct the witness); *Mass.* 1837, Com. *v.* Shaw, 4 Cush. 594 (sustaining the trial judge's refusal, on demand by the party as matter of right, to inform the witness of his privilege); 1859, Com. *v.* Howe,

plaint if the privilege is erroneously held inapplicable and the answer compelled.[3] It would seem, however, that the opposing party would have ground for complaint, if the opposite error were committed and the answer erroneously suppressed; because in the former case the error would have the effect merely of admitting facts concededly relevant, while in the latter case it would have the effect of excluding relevant evidence.[4]

(2) Where the *party* and the *witness* are *identical*, it would seem that the same results must follow; *i. e.* neither can the counsel make claim on the party-witness' behalf;[5] nor can an error in denying the privilege be complained of by the party for the purpose of overthrowing the proceedings in the cause; for, in his capacity as a witness, he must employ the course appropriate to a witness; but most Courts would probably decline to accept this conclusion in the latter respect.[6]

13 Gray 26, 31 (similar); *N. Y.* 1833, Taylor *v.* Wood, 2 Edw. Ch. 94 ("The counsel of the parties have no right to interrupt the examination by advising a witness that he is not bound to answer the question"; yet, if the witness desires to decline, he may apply to the party's counsel for advice); *N. Dak.* 1896, State *v.* Kent, 5 N. D. 516, 67 N. W. 1052; 1899, State *v.* Ekanger, 8 N. D. 559, 80 N. W. 482; *S. Car.* 1896, State *v.* Butler, 47 S. C. 25, 24 S. E. 991; *S. Dak.* 1906, State *v.* Mungeon, 20 S. D. 612, 108 N. W. 552 (cited *ante*, § 2269, n. 3).

Contra: 1892, Clifton *v.* Granger, 86 Ia. 573, 575, 53 N. W. 316 (the claim may be made through counsel for the party); 1906, State *v.* Barker, 43 Wash. 69, 86 Pac. 387 (said 'obiter,' without citing authority, that an attorney, who was signalling a witness to claim privilege, might "interpose suitable and timely objections" to the questions).

But note that where the *counsel is objecting to improper cross-examination to character* and is not claiming privilege — the distinction already adverted to (*ante*, § 2268), — he is of course entitled to speak; this distinction is brought out in the opinion in South Bend *v.* Hardy, 98 Ind. 577, 584 (1884).

[3] ENGLAND: 1870, R. *v.* Kinglake, 11 Cox Cr. 500, 22 L. T. R. N. S. 335 (a witness having been compelled to answer against his protest, held, that the party against whom his evidence was given had no ground of exception).

UNITED STATES: *Fed.* 1894, Morgan *v.* Halberstadt, 9 C. C. A. 147, 60 Fed. 592, 596, 20 U. S. App. 417, 424 ("if the witness waives his privilege, or the Court disregards it and requires him to answer, the party has no right to interfere or complain of the error"); 1907, Taylor *v.* U. S., 152 Fed. 1, 7, C. C. A. (Morgan *v.* Halberstadt followed); *Ala.* 1907, Beauvoir Club *v.* State, 148 Ala. 643, 42 So. 1040 ("the party cannot review the action of the Court here"); *Ill.* 1896, Samuel *v.* People, 164 Ill. 379, 45 N. E. 728 (following R. *v.* Kinglake); *Ia.* 1890, State *v.* Van Winkle, 80 Ia. 15, 45 N. W. 388; 1905, State *v.* Cobley, 128 Ia. 114, 103 N. W. 99; *N. Y.* 1842, Cloyes *v.* Thayer, 3 Hill 564, 566 (quoted *supra*); *N. Car.* 1903, State *v.* Morgan, 133 N. C. 743, 45 S. E. 1033; *Pa.* 1853, Phelin *v.* Kenderdine, 20 Pa. 354, 363, *semble*; *P. R.* 1919, People *v.* Banks, 27 P. R. 296 (adultery; approving Samuel *v.* People, Ill., *supra*); *S. Car.* 1896, State *v.* Butler, 47 S. C. 25, 26, 24 S. E. 991 (refusal to instruct as to privilege, not available as error for the party).

Contra: Mass. 1837, Com. *v.* Kimball, 24 Pick. 366, 368 (on the ground that "it could not be held that the verdict was supported by legal evidence"); 1849, Com. *v.* Shaw, 4 Cush. 594 (apparently approving Com. *v.* Kimball, as involving "the only mode practicable for revising such decision"); *Wis.* 1869, State *v.* Olin, 23 Wis. 309, 318 ("It seems" that "a party" may appeal).

Compare the cases cited *ante*, § 2196.

[4] *Eng.* R. *v.* Kinglake, Cloyes *v.* Thayer, quoted *supra*; *U. S.* 1913, State *v.* Cox, 87 Oh. 313, 101 N. E. 135; and the like general principle for all privileges (*ante*, § 2196).

[5] 1875, State *v.* Wentworth, 65 Me. 234, 241; 1896, State *v.* Kent, 5 N. D. 516, 67 N. W. 1052 (because otherwise it cannot be supported by the witness' oath; but counsel may raise the point, and ask that the witness be apprized of his rights and given an opportunity to make the claim).

Contra: 1878, People *v.* Brown, 72 N. Y. 571, 573; 1905, State *v.* Shockley, 29 Utah 25, 80 Pac. 865 (the reasoning in this opinion is fallacious; Bartch, C. J., diss.).

[6] *Eng.* 1856, R. *v.* Scott, 1 D. & B. 47 (quoted *ante*, § 850, note 8); *U. S.* 1878, People *v.* Brown, 72 N. Y. 571, 573 ("An error committed by the Court against him may inure to his benefit as a party"). This reason would be suitable for a game of whist.

How an erroneous ruling of this sort ought to be treated is shown in Pendleton *v.* U. S.,

§ 2271. **Who may Determine the Claim; Judge and Witness.** Plainly, by all principle, the judge at a trial is to pass upon the application of rules of evidence and to determine incidental questions of fact upon which their application depends.[1] On the other hand, and plainly also, if the data which show that the answer to a certain question does in fact criminate or tend to criminate are to be disclosed to the judge by the witness claiming the privilege, then the very disclosure has been made which the privilege aims to protect. It is true that the disclosure could be made without the hearing of the jury (as questions involving the admissibility of evidence are usually presented by counsel); but none the less has the disclosure been compelled, and by judicial compulsion; so that this expedient, which is adequate to solve other questions of privilege,[2] seems here inappropriate, and has never found favor. This dilemma was in England the source of long judicial hesitation and difference of opinion:[3]

1909, 216 U. S. 305, 30 Sup. 315 (the Philippine trial judge, in his finding, having noted that "the accused did not use his right to testify in his own favor," and the Philippine Supreme Court in denying a new trial having explicitly declared that "this Court in deciding the cause did not take said fact into consideration, but rendered the decision in accordance with the proofs," the Federal Supreme Court held that the original error, if any, "was not repeated in the Supreme Court and is not a ground of legal complaint").

What constitutes *compulsion*, in such a case, ought not to be a difficult question; compare with the following the cases under confessions before a magistrate (*ante*, §§ 849, 850, 852); 1902, U. S. *v.* Kimball, C. C., 117 Fed. 156 (certain witnesses, afterwards indicted, held not to have been compelled at a grand jury investigation; compulsion held to signify first a claim of privilege, an "expression of unwillingness in some form," and next an over-riding of the claim; the opinion unnecessarily dignifies by lengthy consideration the quibbles of the defendant).

Of course the improper compulsion of an accused by a *justice of the peace* to answer an incriminating question does not entitle the accused to plead immunity when tried before a jury, even though such answer cannot be used against him: 1912, Scribner *v.* State, 9 Okl. 465, 132 Pac. 933; 1913, Faucett *v.* State, — Okl. —, 134 Pac. 839.

Whether an answer erroneously compelled, but falsely given, is *perjury*, is a different question: 1903, State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116 (citing the precedents fully); 1903, State *v.* Lehman, 175 Mo. 619, 75 S. W. 139; 1905, State *v.* Faulkner, 185 Mo. 673, 84 S. W. 967; 1918, State *v.* Caperton, 276 Mo. 314, 207 S.W. 795. Of course, a false statement made in answer to questions which the witness *could by privilege have refused to answer* but did not refuse to answer, leaves him liable to perjury: 1908, People *v.* Cahill, 193 N. Y. 232, 86 N. E. 38. But, of course, also, an answer confessing under compulsion that an *answer on a former examination* was false cannot be used on a trial for perjury in the former answer: 1912, State *v.* Thornton, 245 Mo. 436, 150 S.W. 1048.

For the course of proceeding in a *prosecution for the offence* of wilful refusal to testify, see U. S. *v.* Praeger, — C. C. A. —, 149 Fed. 474, 484 (1907; court-martial).

How far a judicial order overruling a claim is *interlocutory* only and therefore not *subject to appeal*, is considered in Alexander *v.* U. S., 201 U. S. 117, 26 Sup. 356 (1906); Doyle *v.* London Guarantee & A. Co., 204 U. S. 509, 27 Sup. 313 (1907).

§ **2271.** [1] *Post*, § 2550.

[2] *Post*, § 2322, *ante*, §§ 2193, 2212.

[3] The British rulings, before and after the above cases, are as follows: *England:* 1847, R. *v.* Garbett, 2 C. & K. 474, 494, 1 Den. Cr. C. 276 (whether the mere declaration of the witness sufficed; not decided; quoted *supra*); 1851, Short *v.* Mercier, McN. & G. 205, 218 (L. C. Truro: "It will satisfy the rule if the witness state circumstances, consistent on the face of them with the existence of the peril alleged and which also render it extremely probable; . . . if the fact forms one of a series, and a party declines to answer who alone knows all the circumstances and how the fact is connected with others which may form a chain of evidence by which guilt may be established, I apprehend that in such a case the Court would be disposed to assist the party"); 1852, Fisher *v.* Ronalds, 12 C. B. 762 (bill of exchange; plea, illegal gaming as a consideration; question as to a roulette-table being in the room, held privileged, the witness claiming that it would tend to incriminate him; whether "the statement of the witness is conclusive," not decided, but Maule,

1847, *R.* v. *Garbett*, 2 C. & K. 474, 492, 2 Cox Cr. 448, 1 Den. Cr. C. 276. Mr. *Martin:* "It is for the discretion of the judge, where he is satisfied of 'bona fides' in the witness, and sees real danger to him, to allow him to decline to answer; otherwise a witness might say so in every case and as to everything." MAULE, J.: "The judge may think that a man knows his own affairs better than anybody else knows them." . . . ROLFE, B.: "If the witness says on his oath that he believes the answer will criminate him, can you compel him to give the answer after that?" WILLES, C. J.: "I have known judges over and over again tell the witness he must answer." PARKE, B.: "It must appear to the judge that the answer really had some tendency to criminate the witness." Afterwards, "a majority of their Lordships held the conviction wrong; being of opinion that if a witness claims the protection of the Court on the ground that his answer would tend to criminate himself, and there appears reasonable ground to believe that it would do so, he is not compellable to answer."

1861, WILLES, J., in *Ex parte Fernandez*, 10 C. B. N. S. 3, 39: "Some judges, out of tenderness for the witness, have held it a sufficient excuse if he swears that in his opinion — where such opinion may be well founded — his answering will expose him to such proceeding; some have thought that too lax and yielding a practice; but there has never been any doubt that it is for the Court to decide whether the circumstances judicially before it are such as to excuse the witnesses from answering."

The danger and impracticability of yielding to the extreme in the protection of the witness have been repeatedly pointed out, in passages which demonstrate the necessity of considering that aspect of the problem:

1882, JESSEL, M. R., in *Ex parte Reynolds*, 15 Cox Cr. 108, 114: "[It] is obvious that if you allowed the witness merely on his own statement . . . to refuse to answer the question, it would enable a friendly witness, who wished to assist one of the parties, to

J., thought that it was); 1855, Parke, B., in Osborn *v.* London Dock Co., 10 Exch. 698 ("The weight of authority seems to be in favor of the rule which requires the witness to satisfy the Court"); 1855, Pollock, C. B., in Adams *v.* Lloyd, 3 H. & N. 351, 357, 361 (the view of Maule, J., in Fisher *v.* Ronalds, approved; conceding an exception where "the judge is perfectly certain that the witness is trifling with the authority of the Court . . . having in reality no ground whatever for claiming his privilege"); 1857, Sidebottom *v.* Atkins, 3 Jur. 631 (V. C. Stuart disagreed with Mr. J. Maule's extreme opinion, and thought that the Court was to judge on the circumstances of the case); 1859, Re Mexican & S. A. Co., 27 Beav. 474 (Romilly, M. R.: "In a great number of instances the witness himself must be the only person to determine that point, but certainly, where all the facts relating to it are brought before the attention of the Court, then I am of opinion that it is for the Court to determine it"); 1861, Ex parte Fernandez, 10 C. B. N. S. 3, 39 (quoted *supra*); 1861, R. *v.* Boyes, 1 B. & S. 311, 330 ("If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question. . . . Subject to this reservation a judge is in our opinion bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril"; quoted *supra*); 1868, The Mary or Alexandra, L. R. 2 Ad. & Ec. 319, 324 (defendant's oath held sufficient on the facts); 1877, Ex parte Schofield, L. R. 6 Ch. D. 230, per James and Baggallay, LL. JJ. ("the judge will satisfy himself that the objection is a genuine one"); 1882, Ex parte Reynolds, 15 Cox Cr. 108, L. R. 20 Ch. D. 294 (bankruptcy; an auctioneer, as witness, was asked whether he had executed a certain deed, but refused to answer; the judge compelled him, not seeing "any chance of an answer to that question forming a link in a chain" of crimination, and believing that the witness was "setting up excuses which have no kind of foundation"; the witness was held bound to answer, unless the judge believes that "he is declining to answer 'bona fide' for his own protection and there is any appreciable danger to him"; approving R. *v.* Boyes and Ex parte Schofield; Bacon, V. C.: "Am I not bound to exercise such portion of common sense as I possess, and to say whether an answer to that question can possibly criminate anybody?");

Ireland: 1899, Kelly *v.* Colhoun, L. R. 2 Ire. 199 (libel);

Canada: 1888, Ex parte Maguire, 14 Que. 359, 362 (following R. *v.* Boyes; careful opinion).

escape examination altogether, and to refuse to give his evidence, — an evil so great that, when weighed even against the chance of occasionally assisting to convict a guilty man, it would certainly far overbear, as a question of public policy, the danger (if it is to be treated as a danger) of assisting to convict a guilty man occasionally out of his own mouth."

1891, STERRETT, J., in *Com.* v. *Bell*, 145 Pa. 374, 387, 22 Atl. 641, 644: "Was his determination, in opposition to the judgment of the Court, to be accepted as a finality, and was the Court powerless to enforce its order in the premises? We think not. If it was, courts of justice would be at the mercy of contumacious witnesses. . . . It is the plain duty of the trial judge to decide that question. Men who are as conscious of extreme susceptibility of crimination as the relator appears to have been would be badly qualified to decide such questions, especially in their own cases."

But a solution of the dilemma has now been generally accepted; the judicial differences to-day, if any, are in the phrasing rather than the substance, and concern in effect (as pointed out by Mr. Justice Mitchell) merely the burden of proof in the judge's mind. It is interesting to note that, during the two generations of repeated judicial attempts in England, there was already recorded, even before that controversy began, an opinion of Chief Justice Marshall which solved the problem in the manner now recognized as sound:

1861, COCKBURN, C. J., in *R.* v. *Boyes*, 1 B. & S. 311, 321: "To entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer; . . . [although] if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question. . . . Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things; not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding 'inter alios,' protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice."

1807, MARSHALL, C. J., in *Burr's Trial*, Robertson's Rep. I, 243: "It is alleged that he [the witness] is and from the nature of things must be the sole judge of the effect of his answer; that he is consequently at liberty to refuse to answer any question, if he will say upon his oath that his answer to that question might criminate himself. . . . [But] there is no distinction which takes from the Court the right to consider and decide whether any direct answer to the particular question propounded could be reasonably supposed to affect the witness. There may be questions no direct answer to which could in any degree affect him; and there is no case which goes so far as to say that he is not bound to answer such questions. . . . When two principles come in conflict with each other, the Court must give them both a reasonable construction so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable

extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which, it is conceived, Courts have generally observed; it is this: When a question is propounded, it belongs to the Court to consider and decide whether *any* direct answer to it *can* implicate the witness; if this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it *may* criminate himself, then he must be the sole judge what his answer would be; the Court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be, and a disclosure of that fact to the judges would strip him of the privilege which the law allows and which he claims."

1890, MITCHELL, J., in *State* v. *Thaden*, 43 Minn. 253, 255, 45 N. W. 447: "The problem is how to administer the rule so as to afford full protection to the witness, and at the same time prevent simulated excuses. All the authorities agree to the general proposition that the statement of the witness that the answer will tend to criminate himself is not necessarily conclusive, but that this is a question which the Court will determine from all the circumstances of the particular case, and the nature of the evidence which the witness is called upon to give. But the question on which the cases seem to differ is as to what we may call the burden of proof; some holding that the statement of the witness must be accepted as true, unless it affirmatively appears from the circumstances of the particular case that he is mistaken, or acts in bad faith, while other cases hold that, to entitle a witness to the privilege of silence, the Court must be able to see from the circumstances of the case and the nature of the evidence called for, that there is reasonable ground to apprehend danger to the witness, if he is compelled to answer. . . . The difference is theoretical, rather than practical; for it would be difficult to conceive of an instance where the circumstances of the case, and the nature of the evidence called for, would be entirely neutral in their probative force upon the question whether or not there was reasonable ground to apprehend that the answer might tend to criminate the witness. After consideration of the question and an examination of the authorities, our conclusion is that the best practical rule is that laid down in some of the English cases, and adopted and followed by Chief Justice Cockburn, in Reg. *v.* Boyes. . . . To this we would add that, when such reasonable apprehension of danger appears, then, inasmuch as the witness alone knows the nature of the answer he would give, he alone must decide whether it would criminate him. This, we think, is substantially what Chief Justice Marshall meant by his statement of the rule in the Burr trial."

This summing-up of Mr. Justice Mitchell leaves nothing to be added, and ought to remain the last word in the development of the rule. In the courts of the United States, a few of the earlier rulings inclined towards Mr. Justice Maule's extreme view in Fisher *v.* Ronalds; but the later decisions have generally adopted the common principle of R. *v.* Boyes and U. S. *v.* Burr, and the phraseology of either the one or the other.[4]

[4] *Federal:* 1807, U. S. *v.* Burr (quoted *supra*); 1883, U. S. *v.* McCarthy, 18 Fed. 87 (R. *v.* Boyes approved); 1896, Ex parte Irvine, 74 Fed. 954 (the Court's discretion controls, depending upon whether there is reasonable ground to infer crimination); 1904, Re Hess, 134 Fed. 109, D. C. (a bankrupt pleading the privilege for his books "should be required to bring the books and papers . . . before either the Court or the referee," the Court to "pass upon the probability of danger"); 1906, U. S. *v.* Collins, 145 Fed. 709, D. C. (witness' claim held not sufficient on the facts); 1906, U. S. *v.* Collins, 146 Fed. 553, D. C. (rule applied to a party summoned to produce documents before a grand jury); 1917, Mason *v.* U. S., 244 U. S. 362, 37 Sup. 621 (gambling; the witness was sitting at a table with the persons charged with gambling; "if at this time you saw any one playing a game of cards at the table at which you were sitting," held not improperly compelled to be answered);
Alabama: 1876, Calhoun *v.* Thompson, 56 Ala.

166, 170 ("If it is not apparent [to the Court] that such would be the tendency of the answer, the witness is not privileged"); 1896, Alston *v.* State, 109 Ala. 51, 20 So. 81 (the witness need not expressly explain, if the answer would clearly criminate);
California: 1900, Overend *v.* Superior Court, 131 Cal. 280, 63 Pac. 372 (the Court must decide); 1901, Bradley *v.* Clark, 133 Cal. 196, 65 Pac. 395 (similar); 1900, Re Rogers, 129 Cal. 468, 62 Pac. 47 ("It is for the Court to pass upon the sufficiency of the objection");
Florida: 1896, Ex parte Senior, 37 Fla. 1, 19 So. 652 (the Court is to decide on all the circumstances, but the witness cannot be required to explain); 1899, Wallace *v.* State, 41 Fla. 547, 26 So. 713 (the witness need not explain how it would criminate);
Georgia: 1913, Empire Life Ins. Co. *v.* Einstein, 12 Ga. App. 380, 77 S. E. 209 (rule in Burr's Case followed);
Hawaii: Rev. Laws 1915, § 2616 (the privilege shall not be allowed to any witness for any question "relevant and material to the matter in issue," unless the Court "shall be of the opinion that the answer will tend to subject such witness to punishment for treason, felony, or misdemeanor");
Illinois: 1909, Manning *v.* Mercantile Securities Co., 242 Ill. 584, 90 N. E. 238 (R. *v.* Boyes followed; officers of a corporation were held not to state a ground of privilege in refusing to hand the corporation books to a receiver, because some of the contents could not be incriminating and no specific facts showing the criminating portions were named);
Indiana: 1905, Wilson *v.* Ohio F. Ins. Co., 164 Ind. 462, 73 N. E. 893 (rule in U. S. *v.* Burr applied to a claim by the principal of a bond in an action against the surety);
Iowa: 1850, Richman *v.* State, 2 Greene 532, 533 (the ruling in U. S. *v.* Burr followed); 1861, Printz *v.* Cheeney, 11 Ia. 469, 471 (same); 1863, State *v.* Duffy, 15 Ia. 425, 427 (same); 1888, Mahanke *v.* Cleland, 76 Ia. 401, 404, 41 N. W. 53 (the Court should compel, "unless reasonable grounds for believing" a tendency to criminate);
Maryland: 1885, Chesapeake Club *v.* State, 63 Md. 446, 455 (R. *v.* Boyes approved);
Michigan: 1904, Re Moser, 138 Mich. 302, 101 N. W. 588 (rule of U. S. *v.* Burr approved; Moore, C. J., diss.); 1906, Re Mark, 146 Mich. 714, 110 N. W. 61 (rule in U. S. *v.* Burr applied);
Minnesota: 1890, State *v.* Thaden, 43 Minn. 253, 45 N. W. 447 (rule of Cockburn, C. J., in R. *v.* Boyes, approved; quoted *supra*);
Missouri: 1829, Ward *v.* State, 2 Mo. 120, 123 (following U. S. *v.* Burr); 1909, Ex parte Gauss, 223 Mo. 277, 122 S. W. 741 (rule in Burr's Trial, applied);
New Hampshire: 1854, Janvrin *v.* Scammon, 29 N. H. 280, 290 ("He will be protected unless the Court can see from the circumstances of the case that he is in error, or that it is a mere pretext on the part of the witness to avoid answering, and that his answer cannot, from the nature of things, criminate him"); 1862, Carter *v.* Beals, 44 N. H. 408, 412 (preceding case approved); 1865, Eaton *v.* Farmer, 46 N. H. 200, 202 (same);
New York: 1830, People *v.* Mather, 4 Wend. 229, 253 (good opinion by Marcy, J., adopting substantially the rule in U. S. *v.* Burr); 1894, People *v.* Forbes, 143 N. Y. 219, 231, 38 N. E. 303 ("The weight of authority seems to be in favor of the rule that the witness may be compelled to answer when he contumaciously refuses, or when it is perfectly clear and plain that he is mistaken"); 1900, People *v.* Priori, 164 N. Y. 459, 58 N. E. 668 (it rests largely in the trial Court's discretion; to justify compulsion, it must at least clearly be shown that an answer would not incriminate);
North Carolina: 1880, La Fontaine *v.* Southern Underwriters' Ass'n, 83 N. C. 132, 141 (approving Osborn *v.* Dock Co., Eng.);
Ohio: 1909, McGorray *v.* Sutter, 80 Oh. 400, 89 N. E. 10 (rule in Burr's Trial approved; here on habeas corpus; explaining the earlier case of Warren *v.* Lucas, 10 Oh. 336);
Pennsylvania: 1891, Com. *v.* Bell, 145 Pa. 374, 387, 22 Atl. 641, 644 (quoted *supra*);
Porto Rico: 1902, Re Decker, 1 P. R. Fed. 381 (answer compelled);
Rhode Island: 1901, Rosendale *v.* McNulty, 23 R. I. 465, 50 Atl. 850 (privilege held not applicable, where "the questions do not show that such a result [as crimination] is possible");
South Carolina: 1819, State *v.* Edwards, 2 Nott & McC. 13 ("Something must necessarily be left to the witness"); 1842, Poole *v.* Perritt, 1 Spears 128 (witness allowed to refuse, "upon his own assurance"; "the law does act wisely in leaving it to the witness himself"; Earle and Wardlaw, JJ., diss.); 1896, State *v.* Butler, 47 S. C. 25, 26, 24 S. E. 991 (preceding case approved);
Texas: 1907, Ex parte Andrews, 51 Tex. Cr. 79, 100 S. W. 376; 1922, Ex parte Copeland, — Tex. Cr. —, 240 S. W. 314 (rule of U. S. *v.* Burr applied);
Vermont: 1840, Smith *v.* Crane, 12 Vt. 491, 494 (witness' oath is to be taken, unless the Court is "fully satisfied such is not the fact, *i. e.* that the witness is either mistaken or acts in bad faith"); 1907, Re Consolidated Rendering Co., 80 Vt. 55, 66 Atl. 790 (rule of State *v.* Thaden, Minn., approved);
Virginia: 1881, Temple *v.* Com., 75 Va. 892, 898 (rule in U. S. *v.* Burr, approved by one judge; the other two reserving their opinion); 1884, Kendrick *v.* Com., 78 Va. 490, 495 (rule in U. S. *v.* Burr approved);
Washington: 1897, Perkins *v.* Bank, 17 Wash. 100, 49 Pac. 241 (the witness need not expressly say that the answer would criminate, if it is plain from the question; this is going too far, for he must of course state what privilege he claims);
Wisconsin: 1859, Kirschner *v.* State, 9 Wis. 140, 143 ("The Court is to determine, under

§ 2272. **Effect of Making Claim, as to Inferences permissible against the Claimant**; (*a*) **General Principle.** The question whether an *inference may be drawn from a person's exercise of his privilege* is one which may well puzzle by its anomalies.

1. Both principle and expediency are involved. The layman's natural first suggestion would probably be that the claim was a clear confession of the criminating fact. The lawyer's natural first answer would certainly be that then the privilege would thereby be annulled. Both of these have a truth, but only a partial truth. The nature of the issue should not be lost sight of. It is not a question of mere reasoning, — of the recognition that an inference is open. "Logic is logic," ever since the days of the one-hoss shay; and it is on that score impossible to deny that the very claim of the privilege involves a confession of the fact. "Were you assisting the defendant at the time of the affray?"; this may be answered "yes" or "no"; if "no," the fact is not criminating and the privilege is not applicable; if "yes," the fact is criminating and the privilege applies. The inference, as a mere matter of logic, is not only possible but inherent, and cannot be denied.

Yet, though not denied, can it not be ignored? This is the true question, — whether, in view of our trial methods, it is possible and proper to insist on the practical ignoring of this inference. If our trial tribunals were not divided in function, and if issues of fact and law came equally to the judge's mind for decision, the question would be a mere quibble, because the judge could hardly perform the impossible feat of ignoring the operations of his own mind. But since the jury, and the counsel's efforts with the jury, are more or less within the control of the judge irrespective of his own mental operations, it remains after all a practical question whether principle and expediency require us to prevent, so far as feasible, any further use of the inference than such as is inevitable from the mere disclosure of the claim. Perhaps the jury can effectively be instructed on the subject; at any rate, the comment by counsel can be prohibited. Thus the question ceases to be merely one of mental gymnastics, and is after all worth attempting to solve.

For a century this question remained in controversy in England and Canada. Until very modern times, it could not arise for an accused's testimony, because the accused could not testify even if he would. But the case of an ordinary witness presented very much the same issue; and each generation exhibited from time to time the same difference of opinion. Finally, in 1898 the statute making accused persons competent settled the law.[1]

all the circumstances of the case, whether such is the tendency of the question");
Wyoming: 1899, Miskimmins *v.* Shaver, 8 Wyo. 392, 58 Pac. 411 (rule in U. S. *v.* Burr approved).

In *chancery practice* a special question may arise, dependent upon the technicalities of that system of pleading, as to the proper mode of furnishing the judge with the data for decision: 1818, Sharp *v.* Sharp, 3 John. Ch. N. Y. 407, and the cases cited *ante*, § 2268, n. 4.

§ 2272. [1] The English and Canadian rulings are as follows:

ENGLAND: 1803, Millman *v.* Tucker, Peake Add. Cas. 222 (L. C. J. Ellenborough told the jury "that if the witness chose to avail himself of that protection which the law gave him, he was not thereby at all discredited"); 1809, L. C. Eldon, in Lloyd *v.* Passingham, 16 Ves. Jr. 59, 64 (quoted *supra*); 1817, R. *v.* Watson, 2 Stark. 153 (Bayley, J.: "He may demur to

In the United States almost universal legislation has decreed, in varying phraseology, that the inference shall not be availed of.[2] Only by a few

the question, for he is not bound to criminate himself; and if he refuse, this is not without its effect on the jury. . . . It would perhaps be going too far to say that you may discredit him if he refuse to answer; it is for the jury to draw what inferences they may"; Holroyd, J.: "If you propose a question to a witness and he declines to answer it, his not answering can have no effect with the jury"); 1826, Rose *v.* Blakemore, Ry. & Mo. 383, Abbott, C. J. ("There was an end of the protection of a witness if a demurrer to the question were to be taken as an admission of the fact inquired into"); 1855, Boyle *v.* Wiseman, 10 Exch. 647, 651 (Parke, B.: "The protection given by the statute would be of no avail, if the refusal to answer was construed into evidence of guilt; it is impossible, however, to prevent the jury drawing their own conclusions"; Alderson, B.: "It seems to me that a party not denying a fact which it is in his power to deny gives a color to the other evidence against him"); 1862, Bartlett *v.* Lewis, 12 C. B. N. s. 249, 263.

Then in 1898 came the statute (quoted *ante*, § 488) qualifying the accused as a witness, which provided that the accused's failure to give evidence "shall not be made the subject of any comment by the prosecution." This, however, left open the question of the *judge's* right to comment, in the exercise of his common-law power to comment generally on the evidence. It was immediately decided, and has since been adhered to, that the judge may so comment: 1899, R. *v.* Rhodes, 1 Q. B. 77, 83 (the Court's right to comment to the jury on the evidence is not taken away by the statute qualifying the accused; and comment on a failure to testify is allowable); 1894, Kops *v.* Reg., App. Cas. 650 (under N. S. Wales St. 1892, 55 Vict. No. 5, § 6, the judge may comment on the accused's failure to explain by his own testimony the evidence against him; and the provision against being "compellable" to testify does not forbid the drawing of inferences); 1908, Mudge's Case, 1 Cr. App. 62 (inference made from accused's failure to take the stand, under St. 1898); 1909, Kirkham's Case, 2 Cr. App. 253 ("People who set up an alibi, and do not go into the box, are not entitled to come here and rely upon that defence"); 1909, Hampton's Case, 2 Cr. App. 274; 1909, Theodorus' Case, 3 Cr. App. 269; 1915, George J. Smith's Trial, Notable British Trials, 1922, p. 308 (wife-murder; the accused's failure to testify, commented on by the judge).

For the further interpretation of St. 1898, see *ante*, § 194*a*.

CANADA: By Dom. St. 1893, c. 31, § 4, R. S. 1906, c. 145, Evidence Act, § 4 (quoted *ante*, § 488), the accused's failure to testify "shall not be made the subject of comment *by the judge or by counsel*," etc. This differed from the English statute by including the judge in the prohibition of comment, and this provision has since been frequently applied; the several Provincial statutes are quoted *ante*, § 488; *Dom.* 1916, R. *v.* Kelly, 34 D. L. R. 311, 323 (where the accused elects to make a statement not under oath, the judge may state to the jury that this is not the equivalent of sworn testimony, without violating Can. Evid. Act, § 4); 1919, Veuillette *v.* The King, 48 D. L. R. 158 (murder; judge's comments on the accused's failure in his testimony to deny the act, held not improper on the principle of § 2273, *post*);
Alberta: 1921, R. *v.* Gallagher, 63 D. L. R. 629, Alta. (judge's comment, held improper);
British Columbia: 1920, R. *v.* Mah Hong Hing, 53 D. L. R. 356, B. C. (judge's comment on accused's failure to disclose his defence at the preliminary hearing, held improper, under Can. Evid. Act, § 4);
New Brunswick: 1904, R. *v.* Maguire, 35 N. Br. 609 (the judge's comment on the accused's failure to show an alibi, held on the facts a comment violating Dom. St. 1893, c. 31, § 4);
Northwest Terr. 1905, R. *v.* King, 6 N. W. Terr. 139, 150 (murder; applying Dom. Evid. Act 1893, c. 31, § 4);
Quebec: 1915, R. *v.* Romano, 21 D. L. R. 195 (comment by the judge, held improper, under Can. Evid. Act, § 4; the judge's withdrawal of the comment, held here not to cure the error).

[2] In the following list are found all jurisdictions except Georgia, New Jersey, Ohio, and South Carolina; but the Court of the first-named State (in which an accused is as yet qualified only to make a "statement") has taken the same view (1874, Bird *v.* State, 50 Ga. 585, 589), and the Court of the second-named State has taken the opposite view (in the citations *infra*, note 3); in Maine, the statute supplanted the decisions collected *infra*, note 3; the statutes are quoted *ante*, § 488; their application usually takes the form of prohibiting comment by counsel: *Fed.* St. 1878, c. 37, March 16, Code § 1357; 1892, Wilson *v.* U. S., 149 U. S. 60, 13 Sup. 765; *Ala.* Code 1907, § 7894; 1888, Cooper *v.* State, 86 Ala. 610, 6 So. 110 (refusal to exhibit one's body); *Alaska:* Comp. L. 1913, § 2258; *Ariz.* Rev. St. 1913, P. C. § 1229; *Ark.* Dig. 1919, § 3123; *Cal.* P. C. 1872, § 1323; 1869, People *v.* Tyler, 36 Cal. 522, 527; 1871, People *v.* McGungill, 41 Cal. 429; 1873, People *v.* Russell, 46 Cal. 121, 123; 1878, People *v.* Brown, 53 Cal. 66; 1896, People *v.* Sanders, 114 Cal. 216, 46 Pac. 153; 1898, People *v.* Cuff, 122 Cal. 589, 55 Pac. 407 (holding C. C. P. § 2061, subd. 6, 7, not applicable);

Courts and Constitutions is the inference permitted to be drawn, against one who claims the privilege of silence.[3]

Colo. Comp. St. 1921, § 7101; 1885, Petite *v.* People, 8 Colo. 518; *Conn.* Gen. St. 1918, § 6634; *Del.* Rev. St. 1915, § 2215; *Fla.* Rev. G. S. 1919, § 6080; *Haw.* Rev. L. 1915, § 2613; *Ida.* Comp. St. 1919, § 9131; *Ill.* Rev. St. 1874, c. 38, §§ 35, 426; 1880, Angelo *v.* People, 96 Ill. 209, 213; 1888, Quinn *v.* People, 123 Ill. 333, 15 N. E. 46; *Ind.* Burns' Ann. St. 1914, § 2111; 1877, Long *v.* State, 56 Ind. 182, 186; *Ia.* Annot. Code 1897, § 5484, Comp. Code § 9464; 1893, State *v.* Baldoser, 88 Ia. 55, 56, 55 N. W. 97; *Kans.* Gen. St. 1915, §§ 8130, 8131; *Ky.* Stats. 1915, § 1645; *La.* St. 1916, No. 157; 1898, State *v.* Marceaux, 50 La. An. 1137, 24 So. 611; 1916, State *v.* Sinigal, 138 La. 469, 70 So. 478; *Me.* Rev. St. 1916, c. 136, § 20; 1886, State *v.* Banks, 78 Me. 490, 7 Atl. 269; 1892, State *v.* Landry, 85 Me. 95, 26 Atl. 998; *Md.* Ann. Code 1914, Art. 35, § 4; *Mass.* Gen. L. 1920, c. 233, § 20; 1877, Com. *v.* Scott, 123 Mass. 239 (comment not allowed, even where defendant's counsel had improperly alleged special reasons for the defendant's failure to take the stand; unsound, for the defendant's counsel's act was virtually a waiver of the right to prohibit comment, and the prosecution's comment was merely an answer to the defendant's counsel's); 1886, Com. *v.* Hanley, 140 Mass. 457, 5 N. E. 468; 1909, Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755 (comment allowable, except when prohibited by statute; see citation *infra*, note 3); *Mich.* Comp. L. 1915, § 12552; 1903, People *v.* Hammond, 93 Mich. 1084, 93 N. W. 1084; *Minn.* Gen. St. 1913, § 8376; 1894, State *v.* Pearce, 56 Minn. 226, 57 N. W. 652, 1065; 1896, State *v.* Holmes, 65 Minn. 230, 68 N. W. 11; 1903, State *v.* Stoffels, 89 Minn. 205, 94 N. W. 675; *Miss.* Code 1906, § 1918, Hem. § 1578; 1893, Yarbrough *v.* State, 70 Miss. 593, 12 So. 551; 1895, Reddick *v.* State, 72 Miss. 1008, 16 So. 490; *Mo.* Rev. St. 1919. § 4037; 1918, State *v.* Drummins, 274 Mo. 632, 204 S. W. 271 (seduction); *Mont.* Rev. C. 1921, § 12177; *Nebr.* Rev. St. 1921, § 10139; *Nev.* Rev. L. 1912, §§ 7161, 7456; *N. H.* Pub. St. 1891, c. 224, § 25; *N. Mex.* Annot. St. 1915, § 2166; *N. Y.* C. Cr. P. 1881, § 393; 1896, People *v.* Hoch, 150 N. Y. 291, 44 N. E. 977; 1898, People *v.* Fitzgerald, 156 N. Y. 253, 50 N. E. 846; *N. C.* Con. St. 1919, § 1799; *N. Dak.* Comp. L. 1913, § 10837; *Okl.* Comp. St. 1921, § 2698; *Or.* Laws 1920, § 1534; *Pa.* St. 1887, May 23, Dig. 1920, § 21864, Witnesses (Pub. L. 1887, p. 158, § 10); *P. I.* P. C. 1911, Gen. Order 58 of 1900, § 15; *R. I.* Gen. L. 1909, c. 292, § 44; 1893, State *v.* Hull, 18 R. I. 207, 211, 26 Atl. 191; *S. D.* Rev. C. 1919, § 4879; 1898, State *v.* Garrington, 11 S. D. 178, 76 N. W. 326; *Tenn.* Shannon's Code 1916, § 5601; *Tex.* Rev. C. Cr. P. 1911, § 790; 1891, Jordan *v.* State, 29 Tex. App. 595, 16 S. W. 543; *Utah:* Comp. L. 1917, § 9279; *Vt.* Gen. L. 1917, § 2554; 1868, State *v.* Cameron, 40 Vt. 555, 565; *Va.* Code 1919, § 4778; *Wash.* R. & B. Code 1909, § 2148; *W. Va.* Code 1914, c. 152, § 19; 1890, State *v.* Ice, 34 W. Va. 244, 249, 12 S. E. 695 (comment held not improper on the facts); *Wis.* Stats. 1919, § 4071; *Wyo.* Comp. St. 1920, § 7507.

[3] This view has been sanctioned by four Courts and one Constitution, though the statutes cited *supra*, note 2, have since controlled the subject in Maine and North Carolina: *Federal:* 1908, Twining *v.* New Jersey, 211 U. S. 78, 29 Sup. 14 (State *v.* Twining, N. J., *supra*, held not to raise a question under U. S. Const. Amendment XIV, and to be rightly decided so far as New Jersey law was controlling); *Maine:* 1867, State *v.* Bartlett, 55 Me. 200, 216 (quoted *supra*); 1870, State *v.* Lawrence, 57 Me. 574, 581; 1871, State *v.* Cleaves, 59 Me. 298 (quoted *supra*); *Massachusetts:* 1909, Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755 (inference and comment allowable, except as expressly prohibited by statute; going upon the cases in Maine, New Jersey, and England, and upon the inapplicable Massachusetts cases cited *post*, § 2273, notes 6, 8; an extraordinary ruling); *New Jersey:* 1898, Parker *v.* State, 61 N. J. L. 308, 39 Atl. 651 (careful opinion by Magie, C. J.); 1900, State *v.* Wines, 65 N. J. L. 31, 46 Atl. 702; 1906, State *v.* Banusik, — N. J. L. —, 64 Atl. 994 (comment by the judge); 1906, State *v.* Twining, 73 N. J. L. 683, 64 Atl. 1073, 1135 (comment by the judge); 1908, State *v.* Callahan, 76 N. J. L. 426, 69 Atl. 957; 1908, State *v.* Skillman, 76 N. J. L. 474, 70 Atl. 83; 1909, State *v.* Callahan, 77 N. J. L. 685, 73 Atl. 235 (Court of Errors and Appeals prior opinion explained); 1915, State *v.* Connors, 87 N. J. L. 419, 94 Atl. 812 (comment by the judge; State *v.* Callahan followed); 1921, State *v.* Bien, 95 N. J. L. 474, 113 Atl. 248; *North Carolina:* 1853, State *v.* Garrett, Busb. 357 (dealing only with the privilege against disgracing facts, but assuming that the witness is not bound to answer).

Compare also the opinion of Buck, J., in State *v.* Pearce (1894), 56 Minn. 226, 236, 57 N. W. 652, 1065.

This view has also been sanctioned by *express constitutional proviso* in *Ohio:* 1913, Const. Amendment to Sect. 10, Art. I ("No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the Court and jury and may be made the subject of comment by counsel"); 1914, State *v.* Morrow, 90 Oh. 202, 107 N. E. 515 (Const. Am. 1913 to Sect. 10, Art. I, construed as not being applicable to a "case pending" on Jan. 1, 1913); 1919,

2. But the inquiry remains necessary whether this majority-solution was right or wrong, — for, if wrong, it may be set right again. To those who have solved the problem in accord with the legislators, the matter has apparently been so simple that no elaborate reasoning was necessary in support. The following passages represent the grounds vouchsafed:

1809, L. C. Eldon, in *Lloyd* v. *Passingham*, 16 Ves. Jr. 59, 64: "I protest strongly against the doctrine that Robert Passingham, having demurred to so much of the bill as seeks a discovery of facts which have a tendency to affect him criminally, is on that account to be considered as admitting the allegations of the bill; having observed a notion prevailing, lately, that a witness who refuses to answer a question upon that ground is therefore not to be believed. Nothing can be more fallacious, as a standard of credit, than such a conclusion, or more dangerous to justice by depriving the subject of that protection to which he is entitled by law."

1869, Sawyer, C. J., in *People* v. *Tyler*, 36 Cal. 522, 530: "If the inference in question could be legally drawn, the very act of exercising his option as to going upon the stand as a witness, which he is necessarily compelled by the adoption of the statute to exercise one way or the other, would be, at least to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself."

The various aspects of the argument against suppressing the inference are to be found in the following passages, — the notable efforts being those of the Supreme Court of Maine:

1827, *Editors' Note*, in Ryan & Moody's Reports, 384: "Where the objection is that the answering the question may subject him to forfeiture, penalty, or punishment, it seems open to contend that there is no reason why comments should not be made on the fact of the witness' refusal to answer, with a view to satisfy the jury of the truth of the fact suggested in the question. It would seem that the witness is sufficiently secured from penalties, punishment, or forfeiture if he is not compelled to say anything which would be evidence against him in proceedings instituted with those objects; and as neither the inferences of counsel nor the opinion of the jury could have that effect, it appears as unreasonable to prevent counsel from drawing the one as it is impossible to prevent the jury from forming the other. The conclusion indeed is so obvious that the only way of preventing the jury from forming it is by declaring . . . not merely that the question need not be answered, but that it ought not to be asked. . . . With respect to questions tending merely to degrade, there may be more reason to adopt the principle laid down by Abbott, L. C. J., . . . as the ill opinion of the jury and of the persons present in Court forms part of that disgrace and infamy from which the Court is to protect the witness."

1862, Willes, J., in *Bartlett* v. *Lewis*, 12 C. B. N. s. 249, 263: "It appears to me that, even admitting that the interrogatories are put for the purpose of extracting answers which may criminate the party, or of prejudicing him in the estimation of the jury if he declines to answer them, they ought to be allowed to be put. I must own I have no sympathy with a witness who is compelled, in order to protect himself from answering a question, to admit that his answer would tend to criminate him." Erle, C. J.: "I know of no principle of law which should protect a man who has been guilty of an indictable offence from being placed in this predicament. . . . A man is not to be punished

Leonard v. State, 100 Oh. 456, 127 N. E. 464 (offence against the cold storage law; the defendant's failure to deny testimony as to receipts and deliveries, held open to comment and inference under Const. 1913); 1922, Mr. John G. Price, Attorney-General of Ohio, in Journal of Crim. L. and Criminology, XIII, 292 ("Experience in Ohio, since the adoption of the amendment, has fully justified its adoption").

upon his own forced admission of guilt. . . . [But] I must confess I do not see why a guilty man should not be prejudiced in the eyes of a jury."

1867, TAPLEY, J., in *State* v. *Bartlett*, 55 Me. 200, 217: "If a person remains silent when he may speak, he does so from choice, and the choice he makes upon such occasions has always been regarded competent evidence. It is the act of the party. From time immemorial the reply or the silence of the accused person, when charged [outside of the court], has been regarded as legitimate evidence on his trial for the consideration of the jury. Any act of his, when charged, tending to sustain the charge, may be proved. Fleeing from arrest, giving contradictory, untrue, or improbable accounts of the matters in issue, and refusals to account for the possession of stolen property, are evidences of guilt admitted upon the trial of the persons accused. These are proofs derived from the prisoner's acts, sayings, and silence. He never has been, and is not now, compelled to furnish the Court the evidence of the existence of these facts. If it be said, these are the voluntary acts of the prisoner, the manifest answer is, they are not more so than the refusal or neglect to testify. When found in the possession of stolen property and inquired of concerning it, he *must* speak or be silent. When found with the implements used in a recent burglary and interrogated in reference to them, he *must* answer or be silent. When found with the bloody instruments of a foul murder, and he is called upon to explain his possession, he *must* answer or be silent. There is no escape from this. He is in the strait betwixt the two. He must choose the one or the other. He must speak or be silent. Yet, in all these cases, it has been the uniform practice of the Court to admit in evidence the conduct of prisoners upon such occasions, and it never has been held an infringement of the rule referred to. . . . The Act in question [qualifying the accused] imposes no obligation upon the prisoner to testify; it only affords him an opportunity so to do, if he choose. It changes his condition only in adding one more opportunity to speak or be silent, and the same rule applies to the result which has been applied to such cases for a long time. . . . The danger apprehended has two antidotes; one lies in the intelligence of the jury, where the security of a proper consideration of every other fact lies, and the other remedy lies with the prisoner himself. If in silence there lies insecurity, the law in its beneficence allows him to break silence and avoid the danger arising from it. If he has so conducted himself that he thus encounters greater difficulties, the fault is his own and not that of the law."

1871, APPLETON, C. J., in *State* v. *Cleaves*, 59 Me. 298, 300: "The statute authorizing the defendant in criminal proceedings, at his own request, to testify, was passed for the benefit of the innocent and for the protection of innocence. The defendant, in criminal cases, is either innocent or guilty. If innocent, he has every inducement to state the facts, which would exonerate him. The truth would be his protection. There can be no reason why he should withhold it, and every reason for its utterance. Being guilty, if a witness, a statement of the truth would lead to his conviction, and justice would ensue. Being guilty, and denying his guilt as a witness, an additional crime would be committed, and the peril of a conviction for a new offence incurred. But the defendant, having the opportunity to contradict or explain the inculpative facts proved against him, may decline to avail himself of the opportunity thus afforded him by the law. His declining to avail himself of the privilege of testifying is an existent and obvious fact. It is a fact patent in the case. The jury cannot avoid perceiving it. Why should they not regard it as a fact of more or less weight in determining the guilt or innocence of the accused? . . . The silence of the accused, the omission to explain or contradict, when the evidence tends to establish guilt, is a fact — the probative effect of which may vary according to the varying conditions of the different trials in which it may occur — which the jury must perceive, and which perceiving they can no more disregard than one can the light of the sun, when shining with full blaze on the open eye. It has been urged that this view of law places the prisoner in an embarrassed condition. Not so. The embarrassment of the prisoner, if embarrassed, is the result of his own previous misconduct, not of the law. If innocent, he will regard the privilege of testifying as a boon justly conceded. If guilty,

it is optional with the accused to testify or not, and he cannot complain of the election he may make. If he does not avail himself of the privilege of contradiction or explanation it is his fault, if by his own misconduct or crime he has placed himself in such a situation that he prefers any inferences which may be drawn from his refusal to testify, to those which must be drawn from his testimony, if truly delivered."

1917, *Massachusetts Constitutional Convention* (Proceedings, I, 375): "Mr. Robert Walcott of Cambridge presented a resolution (No. 70) providing for an amendment inserting at (A) the words: 'but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel.' The committee on Bill of Rights reported that the resolution ought NOT to be adopted (Mr. Walcott, dissenting).

"Mr. *Walcott* of Cambridge: . . . The anomaly was created that the defendant could testify in his own behalf but he could not be made to testify in behalf of the State against himself, which was neither common sense nor ancient English practice. . . . What then is the objection to the change proposed? The objections that I have heard are two: First, that it is unnecessary, because a jury of intelligence will now take into consideration the fact that the defendant does not take the stand as leading to the inference that if he were guiltless he would have no objection to doing so. But the answer to that objection, it seems to me, is this: The jury at present do in an underhand way what they ought to be encouraged to do and allowed to do as a matter of right and common sense, and the result of their carrying on the practice contrary to law is that it makes the charge of the judge ridiculous when he has to charge the jury, if so requested by counsel, that 'the failure of a defendant to take the stand shall cause no inference unfavorable to the defendant in the minds of the jury.' The other objection is, . . . that if this rule were adopted more defendants might be convicted. But the rule of law would be unchanged, that a man has to be shown to be guilty beyond a reasonable doubt in order to be convicted, and it does not seem to me that that objection should hold." The resolution was considered by the Committee of the Whole Wednesday, July 25, 1917, and was rejected by the Convention the following day.

1921, Mr. *Jesse L. Deck* (Chairman of the Committee on Criminal Law and Criminology of the Illinois State Bar Association), "Proposed Reforms in Illinois Criminal Law and Procedure" (Journal of Criminal Law and Criminology, XII, 385): "The statute should be repealed which prevents reference by the state's attorney in argument to the defendant's failure to testify in his own behalf in criminal cases. The purpose of a trial of a criminal case is to determine the guilt or innocence of the defendant of the crime charged. If a defendant is not guilty of the charge, it would seem that he should be determined to take the stand and explain why he should not be convicted. If he is guilty and fails to testify, it would seem that there is no sound reason why his failure to deny the charge should not be the subject of comment by the prosecutor. At the present time, if before trial he stands mute when accused of the commission of the crime, that fact may be shown against him in evidence and argued to the jury as a tacit admission of his guilt; at least the jury may consider his failure to deny such accusation in determining his guilt or innocence. Upon principle it would seem that the people should have the same right to argue his failure to reply when accused upon the trial. In civil suits the fact that the defendant has made no denial of the plaintiff's claim is one of the most formidable weapons used against him in argument. It is difficult to understand why any distinction should be made between civil and criminal cases in this respect."

The reasoning is not to be summarily disposed of. Perhaps it is impregnable. Certainly the possibilities of *pro* and *con* are prolific and interesting. But the substance of it all, and the answers to it, seem to be as follows:

Argument *first:* An inference from the refusal is inevitable; therefore

why try futilely to avoid it? Answer: The bare inference is indeed inevitable; but it is at least a practical question whether counsel's comment shall be permitted. Argument *second:* There is no actual compulsion, as prohibited by the rule; for the accused has an option, and the exercise of this option, by choosing silence, is therefore a voluntary act of his own. Answer: By hypothesis, his answer will be criminating (and it is the ignoring of this hypothesis which seems to form the fallacy of the learned Chief Justice Appleton); thus, the supposed option lies between answering in confession of the criminating fact or keeping silence and letting the same fact be inferred; which is no option at all. Argument *third:* The inference is drawn by virtue of the non-production of the testimony of a competent witness (*ante*, § 285), and not by virtue of the claim of privilege, and hence the two may be kept distinct, — precisely as the characters of the party as witness and as accused are allowed to be kept distinct (*ante*, § 61). Answer: It is true that the inference is drawable by virtue of that principle, but it is also a necessary implication in the claim of privilege; so that the analogy is not exact. Where a constitutional rule is involved, and not merely an ordinary rule of evidence, it would seem better to allow the former and not the latter aspect to control the situation. Nevertheless, if a logical mode of escape from the privilege is desired — that is, if we are determined to limit its harmful operation by any interpretation which an honest logic will permit — this argument seems a tenable one. Argument *fourth:* There is no actual extraction of any reply, and hence the privilege not to reply is literally maintained. Answer: It is true that no reply is required, and that this is the strongest argument for maintaining that the privilege is not violated. But if we consider the ultimate ground of policy upon which the privilege rests (*ante*, § 2251), we observe that a general practice of permitting the use of such inferences would (as against accused persons, at least) tend to bring about the very evils which the privilege is intended to prevent, namely, the reliance by the prosecution, for the means of proof, upon the confessions in court of the accused himself or upon the inferences of guilt which could be drawn from his silence, and the consequent slack and imperfect investigation of other sources of proof. If there is such a policy involved in the privilege, it applies equally to the prohibition of inferences, differing only in the degree of danger involved.

3. Such, then, being the conclusions of principle and expediency which forbid the drawing of inferences from a claim of privilege, it remains to notice the forms in which the rule is applicable:

(1) It clearly forbids *comment by counsel* upon the *accused's failure to testify*,[4]

[4] Most of the statutes cited *ante* enact this expressly; and the decisions invariably accept it; most of those cited *supra*, note 2, make this application.

Of course, where the *defendant's counsel* has himself *first discussed* the defendant's failure to testify, the prosecution may discuss it: 1920, Collins *v.* State, 143 Ark. 604, 221 S. W. 455; 1920, People *v.* Schultz, 210 Mich. 297, 178 N. W. 89 (prosecutor's reference is excused where accused's counsel has in argument explained to the jury why defendant was not called).

as well as comment by the *judge*.[5] But there is no call for the stringent rule that a *new trial* shall be granted 'ipso facto' where comment has been improperly made;[6] the trial judge must be trusted, not only to control counsel, but also to remedy the effect of his impropriety. Nor is it proper to go so far as to *instruct the jury* (even when no comment has been made) to disregard the inference; it is well enough to contrive artificial fictions for use by lawyers, but to attempt to enlist the layman in the process of nullifying his own reasoning powers is merely futile, and tends towards confusion and a disrespect for the law's reasonableness. However, by express statute in Indiana and Washington such an instruction is required. By express statute in Oklahoma and West Virginia (and perhaps by implication in other statutes) no "mention" of the accused's silence is to be made, and this may be construed to forbid even the judge's reference to it by instructions; thus, the words of the local statute may affect the result.[7] In two States the final

[5] Except in England, under the statute of 1898, cited *supra*, n. 1.

But in *Canada*, the statute being different, comment by the judge is equally improper; cases cited *supra*, n. 1.

United States: Occasionally a judge's charge presents the question: 1916, York *v.* U. S., 9th C. C. A., 241 Fed. 656 (here the defendant waived the error); 1918, Shea *v.* U. S., 6th C. C. A., 251 Fed. 440 (the judge's reference to "uncontradicted testimony," held not improper on the facts); 1916, Rader *v.* State, 12 Okl. Cr. 354, 157 Pac. 270; 1915, Com. *v.* Chickerella, 251 Pa. 160, 96 Atl. 129 (murder; a charge that "the defense has not made any denial of the testimony as offered by the Commonwealth," held not improper).

[6] This unnecessary measure is expressly provided by the statutes of Iowa and Oklahoma, cited *supra;* for the judicial views upon the question whether an instruction may cure the fault, see the following cases and compare the general doctrine of new trials (*ante*, § 21):

CANADA: 1898, R. *v.* Corby, 30 N. Sc. 330 (marital privilege).

UNITED STATES: *Fed.* 1902, Knight *v.* U. S., 54 C. C. A. 358, 115 Fed. 972, 982; 1892, Wilson *v.* U. S., 149 U. S. 68, 13 Sup. 765; 1909, Pendleton *v.* U. S., 216 U. S. 305, 30 Sup. 315 (cited more fully *ante*, § 2270; showing the only proper mode of treating an erroneous ruling on this point); *Colo.* Petite *v.* People, 8 Colo. 518, 520, 9 Pac. 622; *Ga.* 1904, O'Dell *v.* State, 120 Ga. 152, 47 S. E. 577; 1904, Minor *v.* State, 120 Ga. 490, 48 S. E. 198; *Ill.* 1880, Angelo *v.* People, 96 Ill. 209, 213; 1910, People *v.* McMahon, 244 Ill. 45, 91 N. E. 104: *Ind.* Coleman *v.* State, 111 Ind. 563, 567, 13 N. E. 100; 1900, Blume *v.* State, 154 Ind. 343, 56 N. E. 771; *Ia.* 1886, State *v.* Ryan, 70 Ia. 154, 156, 30 N. W. 397; *Kan.* 1904, State *v.* Rambo, 69 Kan. 777, 77 Pac. 563; *La.* 1904, State *v.* Robinson, 112 La. 939, 36 So. 811; *Mass.* 1911, Com. *v.* Richmond, 207 Mass. 240, 93 N. E. 816 (sensible opinion by Rugg, J., the best on the subject); *Mich.* 1907, People *v.* Cahill, 147 Mich. 201, 110 N. W. 520; *Mo.* 1907, State *v.* Kelleher, 201 Mo. 614, 100 S. W. 470; *Nev.* 1905, State *v.* Williams, 28 Nev. 395, 82 Pac. 353; *Okl.* 1909, Sturgis *v.* State, 2 Okl. Cr. App. 362, 102 Pac. 57; 1917, Moody *v.* State, 13 Okl. Cr. 327, 164 Pac. 676; 1919, Brown *v.* State, 16 Okl. Cr. 155, 181 Pac. 318 (prosecuting attorney here held to have commented; an unjustified ruling, on the facts); 1920, Russell *v.* State, — Okl. Cr. —, 186 Pac. 492 (collecting the cases since Sturgis *v.* State); *Pa.* 1912, Com. *v.* Green, 233 Pa. 291, 82 Atl. 250; *S. Dak.* 1907, State *v.* Bennett, 21 S. D. 396, 113 N. W. 78; *W. Va.* 1892, State *v.* Chisnell, 36 W. Va. 667, 15 S. E. 412; *Wis.* 1903, Dunn *v.* State, 118 Wis. 82, 94 N. W. 646.

[7] The following cases deal with the subject: *Alabama:* 1904, Thomas *v.* State, 139 Ala. 80, 36 So. 734; *Florida:* 1916, Roberts *v.* State, 72 Fla. 132, 72 So. 649 (not decided); *Idaho:* 1904, State *v.* Levy, 9 Ida. 483, 75 Pac. 227 (sensible opinion by Sullivan, C. J.); 1911, State *v.* Gruber, 19 Ida. 692, 115 Pac. 1; *Illinois:* 1890, Farrell *v.* People, 133 Ill. 244, 24 N. E. 423; 1905, Miller *v.* People, 216 Ill. 309, 74 N. E. 743 (Court comment forbidden); 1914, People *v.* Spira, 264 Ill. 243, 106 N. E. 241 (proper instruction where one defendant testifies and another does not); 1917, People *v.* Michael, 280 Ill. 11, 117 N. E. 193; *Iowa:* 1885, State *v.* Stevens, 67 Ia. 557, 559, 25 N. W. 777; 1898, State *v.* Carnagy, 106 Ia. 483, 76 N. W. 805; 1905, State *v.* Scery, 129 Ia. 259, 105 N. W. 511; 1921, State *v.* Bower, 191 Ia. 713, 183 N. W. 322 (under Code 1897, § 5484, prohibiting comment by the State's attorney, it is not illegal for the judge to instruct the jury as to not drawing an inference); *Louisiana:* 1898, State *v.* Johnson, 50 La. An. 138, 23 So. 199; *Maine:* 1892, State *v.* Landry, 85 Me. 95, 26 Atl. 998; *Massachusetts:* 1909, Com. *v.* People's Express Co., 201 Mass. 564,

absurdity has been committed of forbidding the jury even to discuss the subject among themselves.[8]

(2) The rule applies equally to the *ordinary witness; i. e.* the inference that the criminating fact exists is not to be made because of his claim of privilege.[9]

(3) The rule also forbids drawing an inference, during the trial, from the accused's prior failure to testify at a *preliminary* or other prior *examination;* [10] unless where he has now waived the privilege by voluntarily taking the stand.[11]

88 N. E. 420 (in some cases, it may be proper *not to stop* the counsel's argument, but merely to give an instruction later); *Michigan:* 1906, People *v.* Provost, 144 Mich. 17, 107 N. W. 716 (careful opinion, by McAlvay, J., reviewing the various rules); 1906, People *v.* Murphy, 145 Mich. 524, 108 N. W. 1009; *Minnesota:* 1894, State *v.* Pearce, 56 Minn. 226, 234, 57 N. W. 652, 1062; *Missouri:* 1893, State *v.* Robinson, 117 Mo. 649, 663, 23 S. W. 1066; 1905, State *v.* DeWitt, 186 Mo. 61, 84 S. W. 956 (revising State *v.* Robinson); *Nebraska:* 1895, Metz *v.* State, 46 Nebr. 547, 65 N. W. 190; 1903, Lamb *v.* State, 69 Nebr. 212, 95 N. W. 1050; 1919, Neal *v.* State, 104 Nebr. 56, 175 N. W. 669; *Nevada:* a statute makes an especially futile attempt to muzzle the judge on the subject (*supra*, n. 2); *New Mexico:* 1916, State *v.* Graves, 21 N. M. 556, 157 Pac. 160 ("the argument of the appellant is extraordinary and novel; it is that the jury was actually prejudiced because the Court gave the customary instruction!"); *New York:* 1871, Ruloff *v.* People, 45 N. Y. 213; *Oklahoma:* 1920, Russell *v.* State, — Okl. Cr. —, 186 Pac. 492 (whether the recital of the statutory rule by the judge is error requiring a new trial; McLaughlin *v.* State, 14 Okl. Cr. 192, 169 Pac. 657, modified); *South Dakota:* 1911, State *v.* Carlisle, 28 S. D. 169, 132 N. W. 686; *Texas:* 1890, Fulcher *v.* State, 28 Tex. App. 465, 473, 13 S. W. 750; 1898, Wilson *v.* State, 39 Tex. Cr. 365, 46 S. W. 251; *Washington:* 1904, State *v.* Deatherage, 35 Wash. 326, 77 Pac. 504; *Wyoming:* 1921, Anderson *v.* State, 27 Wyo. 345, 196 Pac. 1047 (an instruction pointing out the difference between the defendant's election to testify and his election to make a statement, held improper).

[8] *Kan.* C. C. P. § 215 (Gen. St. 1915, § 8130); 1904, State *v.* Rambo, 69 Kan. 777, 77 Pac. 563 (here the Court with fervid scholastic zeal applied this intellectual thumbscrew, and set aside the verdict because the jurors in their deliberations were unable to fetter their native reasoning powers to suit the statute); 1906, State *v.* Brooks, 74 Kan. 175, 85 Pac. 1013 (discusses the meaning of the term "considered" in the statute, and finds no violation of it in this case); *Tex.* 1898, Wilson *v.* State, 39 Tex. Cr. 365, 46 S. W. 251.

The actual effect, in experience, on the minds of jurymen, of forbidding the inference, may be gathered from Mr. (Assistant District Attorney) Arthur Train's useful book, "The Prisoner at the Bar" (1906), pp. 160–164.

[9] 1890, Beach *v.* U. S., 46 Fed. 754 (as also the inference that the witness is by collusion shielding the accused); 1886, Harrison *v.* Powers, 76 Ga. 218, 238, 245; 1917, State *v.* Weber, 272 Mo. 475, 199 S. W. 147 (rape under age); 1905, Powers *v.* State, 75 Nebr. 226, 106 N. W. 332 (adultery with the wife of C.; the wife's claim of privilege, when called by the prosecution to prove the adultery, held to permit no inference as to the defendant's guilt; no authority cited); 1853, Phelin *v.* Kenderdine, 20 Pa. 354, 363; 1892, Boyle *v.* Smithman, 146 Pa. 255, 258, 274, 23 Atl. 397; 1917, State *v.* Nelson, 91 Vt. 168, 99 Atl. 881 (four accomplices called by the State and refusing to answer by claim of privilege).

Compare the opposite view expressed by some of the English judges, quoted *supra*.

[10] 1922, People *v.* Mayen, — Cal. —, 205 Pac. 435 (larceny; comment on defendant's failure to testify in a former related trial, held improper on the facts); 1916, Loewenberg *v.* Merchants' & M. Bank, 144 Ga. 556, 87 S. E. 778 (in a fi. fa. proceeding to levy upon M., a judgment debtor, L. intervened as claimant; L. had been a witness before the grand jury in proceedings to indict M. for larceny; L. claimed privilege; held that the fact of L.'s exercise of privilege could not be used against him in the fi. fa. proceeding against M.); 1880, State *v.* Bailey, 54 Ia. 414, 415, 6 N. W. 589 (former claim of privilege as a witness); Mass. Gen. L. 1920, c. 278, § 23; 1900, Bunckley *v.* State, 77 Miss. 540, 27 So. 638; 1904, Boyd *v.* State, 84 Miss. 414, 36 So. 525 (by a majority); 1920, Vouligaris *v.* Gianaris, 79 N. H. 408, 109 Atl. 838 (but, such a comment by counsel being error of law, the opponent's failure to ask correction by the judge's instruction is a waiver); 1911, Parrott *v.* State, 125 Tenn. 1, 139 S. W. 1056; 1913, Smithson *v.* State, 127 Tenn. 357, 155 S. W. 133.

[11] These cases are collected *post*, § 2273.

Moreover, his *testimony at a prior trial* may also be now offered against him, as an admission, even though he does not on this trial take the stand, — on the principle of § 1051, *ante:* 1905, Miller *v.* People, 216 Ill. 309, 74 N. E. 743 (three judges dissenting, but without ground, and citing no authority).

(4) The rule equally forbids inferences from the *non-production of privileged documents;* [12] but it does not forbid the *proof of copies* by other means, when the production of the original is refused.[13]

§ 2273. **Same: (*b*) Inference from not producing Evidence, distinguished.** The principle has been already examined (*ante*, §§ 285–291) that a party's failure to produce evidence which, if favorable, would naturally have been produced, is open to the inference that the facts were unfavorable to his cause. One application of this principle (*ante*, § 289) is that the *party's failure to testify in his own behalf* is equally open to that inference.

This specific application of it is obviously (as just noted in § 2272) in conflict with the privilege against self-crimination. But the other applications of it remain in full force. It is therefore necessary to draw the line between the two, and to determine the boundary of the prohibited inference. No Court has doubted that such a boundary must be recognized, but there is not always unanimity in locating it:

1850, SHAW, C. J., in *Commonwealth* v. *Webster*, 5 Cush. 295, 316: "When pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused not accessible to the prosecution."

Certain situations must here be discriminated.

(1) The *failure to produce evidence*, in general, *other than his own testimony*, is open to inference against a party accused, with the same limitations (*ante*, §§ 285–291) applicable to civil parties.[1] The application of the distinction

[12] This is unquestioned; cases involving certain discriminations are collected *post*, § 2273.

[13] *Ante*, § 1210.

Nor, of course, does it forbid the prosecution's giving of *notice to produce* under §§ 1202, 1209, *ante*, required as preliminary to proof by copy. This is so elementary that Lord Eldon would have lamented the decay of sound principle under the blight of democracy could he have read the contrary opinion in McKnight v. U. S. (1902), 115 Fed. 972 (discussed *ante*, § 2268).

§ 2273. [1] CANADA: 1904, R. *v.* Aho, 11 Br. C. 114 (a statement in the charge that the onus is on the accused to account for his presence at the place, etc., the accused not taking the stand, is proper); 1906, R. *v.* Burdell, 11 Ont. L. R. 440 (failure to account for possession of stolen goods); 1909, R. *v.* Guerin, 18 Ont. L. R. 425 (Riddell, J., who had commented on some uncontradicted testimony to a conversation with the accused: "I have heard the same kind of statement by trial judges over and over again before 1892, and it never was thought an impropriety or an unfair thing to do at that time when the mouth of the accused was closed").

UNITED STATES: *Federal:* 1921, Lefkowitz *v.* U. S., 2d C. C. A., 273 Fed. 664 ("There isn't a word of denial. . . that S. and L. were partners," held not improper comment); *Arizona:* 1914, Cutler *v.* State, 15 Ariz. 343, 138 Pac. 1048 (rape under age); 1919, U. S. *v.* Wallace, U. S. Court for China, 1 Extraterr. Cas. 900 (conspiracy to deal in opium); *Arkansas:* 1921, Markham *v.* State, 149 Ark. 507, 233 S. W. 676 (liquor offence; "We find the five leaving the mill and going in the direction of the still; none of them denied that they went to the still but P. F.," held not improper comment); *California:* 1890, People *v.* Cline, 83 Cal. 374, 378, 23 Pac. 391 (larceny of horse; defendant's failure to call the alleged vendor, held to be open to inference); *Connecticut:* 1900, State *v.* Griswold, 73 Conn. 95, 46 Atl. 829; 1899, Price *v.* U. S., 14 D. C. App. 391, 400 (failure to attempt to prove an alibi); 1921, State *v.* Monahan, 96 Conn. 289, 114 Atl. 102 (burglary; counsel's comment on defendant's failure to produce evidence, held not error);

will depend upon the language used (by counsel or judge) in a particular case in pointing out the inference:

1921, MORROW, P. J., in *Boone* v. *State*, 90 Tex. Cr. 374, 235 S. W. 580 (robbery; the defence was an alibi, but the defendant himself did not testify):

"A bill is presented complaining of the remark of counsel, who stated that

"'If he were accused of an offense of robbery, and had been tried once and was on trial

Georgia: 1909, Mills *v.* State, 133 Ga. 155, 65 S. E. 368 (but there is no presumption of law); *Illinois:* 1907, Lipsey *v.* People, 227 Ill. 364, 81 N. E. 348; 1910, People *v.* McMahon, 244 Ill. 45, 91 N. E. 104 (the defendant not having taken the stand, the prosecutor's form of argument as to uncontradicted evidence, "Is there a man or a woman on earth that ever came in here and contradicted her in the least? No, sir," was held "near the danger line"; this ruling goes too far in hampering legitimate argument); 1912, People *v.* Donaldson, 255 Ill. 19, 99 N. E. 62 (absence of contradiction may be noticed in argument); 1921, People *v.* Paisley, 299 Ill. 576, 132 N. E. 872 (insolvency of a private banker; prosecution's comment on lack of testimony denying certain assertions of K., a witness for the prosecution, held allowable, even though none but the accused could have supplied the denial); *Indiana:* 1893, Frazier *v.* State, 135 Ind. 38, 39, 34 N. E. 817 (failure to produce any evidence); 1904, Griffiths *v.* State, 163 Ind. 555, 72 N. E. 563 (larceny); *Iowa:* 1858, State *v.* Hinkle, 6 Ia. 385 (failure to explain where arsenic was bought); 1903, State *v.* Hasty, 121 Ia. 507, 96 N. W. 1115 (the absence of contradiction for certain facts may be noticed, even though the accused is the only one who could contradict them); 1911, State *v.* Kimes, 152 Ia. 240, 132 N. W. 180; *Kansas:* 1909, State *v.* Labore, 80 Kan. 664, 103 Pac. 106 (absence of contradictory evidence in general); *Louisiana:* 1918, State *v.* Connor, 142 La. 631, 77 So. 482 (larceny; "Is there one single denial from the defendant that he stole those goods?" held not a violation of the rule); *Massachusetts:* 1850, Com. *v.* Webster, 5 Cush. 295, 316 (quoted *supra*); 1872, Com. *v.* Horner, 110 Mass. 411; 1887, Com. *v.* Brownell, 145 Mass. 319, 14 N. E. 108; 1908, Com. *v.* Johnson, 199 Mass. 55, 85 N. E. 188 (failure to call witnesses to occupation, etc.); 1909, Com. *v.* People's Express Co., 201 Mass. 564, 88 N. E. 420 (defendant corporation's failure to call its own employees is open to inference); *Michigan:* 1893, People *v.* Mills, 94 Mich. 630, 638, 54 N. W. 488; 1922, People *v.* Lowrey, — Mich. —, 186 N. W. 396 (larceny; "the facts that the complaining witness has related in this case stand absolutely uncontradicted and undisputed," held not improper); *Missouri:* 1919, State *v.* Steele, 280 Mo. 63, 217 S. W. 80 (abortion); 1921, State *v.* De Priest, 288 Mo. 459, 232 S. W. 83 ("You must say that B. was there; . . . there has not been a witness here who says he was not there," held not improper comment); *New York:* 1916, People *v.* Watson, 216 N. Y. 565, 111 N. E. 243 (wife-murder, the son being the only witness of the alleged killing; but repeated allusions to the lack of contradiction of the son's testimony, held improper); *North Carolina:* 1900, State *v.* Costner, 127 N. C. 566, 37 S. E. 326 (failure to call witnesses to explain accused's whereabouts); *Oklahoma:* 1906, Perkins *v.* Terr., 17 Okl. 82, 87 Pac. 297 (larceny, but here the opinion so perversely construes the principle as practically to shut the mouth of the prosecution in discussing the accused's failure to produce evidence in general); 1916, Rader *v.* State, 12 Okl. Cr. 354, 157 Pac. 270 (liquor; "none of the witnesses testifying here said or proved that it was for his own use," held improper; unsound; carried this far, the rule becomes merely a gag for legitimate argument); *Philippine Isl.* 1904, U. S. *v.* Navarro, 3 P. I. 143 (the original Spanish Penal Code § 483, on the offense of imprisonment of another person, providing that the failure of the accused to give information of the person's whereabouts or to prove that he was set at liberty shall increase the penalty, is a violation of the privilege, and is void; three judges diss.); 1905, U. S. *v.* Luzon, 4 P. I. 343 (similar); 1910, U. S. *v.* Tria, 17 P. I. 303 (illegal voting); 1918, U. S. *v.* Sarikala, 37 P. I. 486 (murder; citing the above text with approval); *South Dakota:* 1914, State *v.* Knapp, 33 S. D. 177, 144 N. W. 921; *Texas:* 1892, Jackson *v.* State, 31 Tex. Cr. 342, 344, 20 S. W. 921 (failure to account for possession of stolen goods); 1921, Boone *v.* State, 190 Tex. Cr. 374, 235 S. W. 580 (robbery; quoted *supra*); *Vermont:* 1917, State *v.* Bolton, 92 Vt. 157, 102 Atl. 489 (judge's reference to "unexplained evidence," held not improper on the facts); *Washington:* 1905, State *v.* Smokalem, 37 Wash. 91, 79 Pac. 603; *Wisconsin:* 1907, Lam Yee *v.* State, 132 Wis. 527, 112 N. W. 425 (rape; defendant's failure to call witnesses to deny his gonorrhea); 1922, Haffner *v.* State, — Wis. —, 187 N. W. 173 (keeping a house of ill-fame; comments on non-production of evidence, held improper on the facts).

So also where *other persons were present* and one was possibly the doer, *their denials* of their guilt allow an inference that the defendant was the only possible doer, and this is distinct from the inference from his failure to deny: 1911, Com. *v.* Richmond, 207 Mass. 240, 98 N. E. 816.

again for the offense, that he would feel that he should give the jury the benefit of all his movements on the day of the robbery and that "they" (meaning the defendant and his counsel) hadn't done it.' This is claimed to have violated the statute prohibiting reference in argument to the failure of the accused on trial to testify.

"The statute (Art. 790, Code of Criminal Procedure) does not prohibit the comment in argument upon the failure of the accused or his counsel to produce evidence. It does prohibit counsel in argument to allude to or comment upon his failure to testify. The plain import of the statute is that counsel for the State, in argument, must refrain from making use of the silence of the accused during his trial against him by direct or indirect means. An indirect comment upon the failure of the accused to testify is quite as hurtful as a direct one, and this court has often held that the consequences of the violation of the statute were not to be avoided by the adroitness of counsel in selecting indirect rather than direct means of disregarding it.

"The statute is not shown to have been infringed, however, by disclosing that counsel, in argument, used language which might be construed as an implied or indirect allusion to the failure of the accused to testify. To come within the prohibition the implication must be a necessary one; that is, one that cannot reasonably be applied to the failure of the accused to produce other testimony than his own. Where there is other evidence, or the absence of other evidence, to which remarks may reasonably have been applied by the jury, the statute is not transgressed. The case of *Vickers* v. *State,* 69 Tex. Cr. 628, was one of incest with Ollie Walston, and the following language was used: 'They tell you the prosecuting witness has not been corroborated — they will tell you no one saw the act of intercourse except the two (prosecutrix and defendant). 'T is true that no one was present at the act of intercourse but these two; 'tis true that Ollie Walston testifies that no one was present when the defendant told her to take the turpentine except herself and the defendant; but, gentlemen, she has testified to both of these transactions, and they have not dared to put a witness on the stand to contradict her testimony in any particular.' It is obvious from the quotation that contradiction demanded could come from no source save the accused. The court held, and wisely held, that the statute was impinged. The case of *Jackson* v. *State,* 31 Tex. Cr. 342, was one for theft of money. In argument counsel said: 'I say they have not proved that the money was Drew's money. Why have they not had Drew's family here, and the other witnesses, to prove that the money was Drew's money? Don't you know that counsel appreciates the importance of the evidence, and if the money was Drew's money they ought to have had their witnesses here to prove it? And nobody has testified to this jury that the money belonged to defendant, and he has never claimed it since the sheriff took it from him.' The argument was held legitimate. Many like illustrations are available. . . .

"In the case before us, . . . the State's evidence goes to show that he was absent from the city of Amarillo during a large part of the day upon which the robbery took place; that he was seen on the road traveled by the offenders in various places in an Overland automobile. It may be conceded that on some of these occasions there were no others with him, but it is his theory that it was not he that the State's witnesses saw, and that he was elsewhere. To meet the requirements of the law which the appellant invokes, it would be necessary that the state of the evidence be such as to exclude the knowledge of his presence elsewhere by others."

Here, however, the effect of the burden of proof has sometimes tended to confuse. It is true that the burden is on the prosecution (*post,* §§ 2485, 2511), and that the accused is not required by any rule of law to produce evidence; but nevertheless he runs the risk of an inference from non-production. This seeming paradox, which has been already sufficiently noticed

in treating of the general principle (*ante*, § 290), has misled a few Courts to deny that any inference may be drawn.[2]

(2) The inference is equally applicable to the *non-production of documents*. But since the privilege applies to all documents which as a witness the party is called upon to produce (*ante*, § 2264), does the prohibition of an inference extend to all documents which he *might* as a witness otherwise have been compelled to produce, *i. e.* to all documents within his possession or control? Presumably not. It is clear that a document here plays a double part; it is, with regard to the inference, like a witness, *i. e.* it is something distinct from his own testimony and personality, and is merely an object which he has the power to produce; yet, with regard to the privilege, it is on a level with his own testimony. In this dilemma, where it becomes a question in what capacity the document should be regarded and which aspect should override the other, it seems desirable to choose that solution which is not open to abuse. Now it is obvious that if the inference were to be prohibited for all documents in the party's control, he could, by purposely securing the control of all sorts of documents, effectually prevent not only their perusal but even any inference as to their contents. This would be an abuse of the privilege, and is certainly not to be endured by the law. It seems proper therefore to restrict the prohibition of the inference to such documents only as are of his own personal authorship (for thus they become in truth his own testimony and admissions), and to permit the inference for all others which happen to be within his control and are not produced. Such would seem to have been the practice hitherto.[3]

(3) Where the witness not produced is *privileged* and therefore might refuse to testify if called, there arises an interesting and complicated problem, already elsewhere considered (*ante*, § 286, in general, and § 2243, marital privilege).

[2] *Cal.* 1898, People *v.* Streuber, 121 Cal. 431, 53 Pac. 918 ("No presumption against him is raised by the law if he does not make the attempt to explain [evidence against him]"); *La.* 1873, State *v.* Carr, 25 La. An. 407, 408 (inference not allowable from a failure to offer any evidence for the defence); *Minn.* 1919, State *v.* Richman, 143 Minn. 314, 173 N. W. 718 (failure to explain possession of stolen money; the opinion ignores the consideration that the whole common-law doctrine about unexplained stolen possession, *post*, § 2513, could never have grown up if this had been the law); *R. I.* 1893, State *v.* Hull, 18 R. I. 207, 211, 26 Atl. 191 (keeping a house of ill-fame; comment forbidden, on the theory that by virtue of the burden of proof, "the State was bound to prove her guilty without any assistance, either active or passive, on her part").

Undecided: 1920, People *v.* Haas, 293 Ill. 274, 127 N. E. 740 (*semble*, but not considering the general question); 1866, Doan *v.* State, 26 Ind. 495, 498 (instruction held not properly worded).

Compare the rule as to presumptions in general (*post*, § 2511).

[3] See the following cases, also cited *ante*, § 291, and compare the cases cited *ante*, § 2268 (notice to produce):

ENGLAND: 1764, R. *v.* Smith, 3 Burr. 1475.

UNITED STATES: *Federal:* 1846, Clifton *v.* U. S., 4 How. 242, 247; 1884, U. S. *v.* Flemming, 18 Fed. 907, 916; 1906, Grunberg *v.* U. S., 145 Fed. 81, 89, C. C. A. (failure to produce invoices, etc.); *Illinois:* 1902, Central Stock & G. Exchange *v.* Board of Trade, 196 Ill. 396, 63 N. E. 740 (plaintiff, in a bill to secure quotation-service, refused to produce its sales-sheets, claiming the privilege; held, that the inference could be drawn as against a party to a civil cause, even though production was not compellable because of the privilege); *Missouri:* 1886, State *v.* Chamberlain, 89 Mo. 129, 134, 1 S. W. 145.

For the question whether the prosecution is at least entitled to give the usual *notice to produce* a document possessed by defendant, see *ante*, § 2268.

It here involves also the question whether the accused's failure to call a *co-defendant*, who would be privileged but competent, and whose non-production would otherwise be open to inference, can thus be noticed. It would seem that it ought to be, — at least, unless it appears that the co-defendant claims his privilege.[4]

(4) Where the accused *takes the stand voluntarily*, he waives his privilege, to a certain extent at least (*post*, § 2276). The prohibition against inferences from his failure to testify comes to an end, with the ending of the privilege. Hence, his *failure in his testimony to deny or explain* the evidence against him which he might naturally have explained is therefore open to inference;[5] and

[4] CANADA: 1906, R. *v.* Blais, 11 Ont. L. R. 345 (the judge's comment on the accused's failure to call F., jointly indicted but separately tried, and competent for either party, held not a violation of Can. St. 1893, c. 31, § 4, quoted *ante*, § 488).

UNITED STATES: *Alabama:* 1899, Brock *v.* State, 123 Ala. 24, 26 So. 329 (adultery with C.; defendant's failure to call C., who would be privileged, and was equally available for the prosecution, not a matter for inference; Tyson, J., diss.; useful opinions); Coppin *v.* State, 123 Ala. 58, 26 So. 333 (same); *Kentucky:* 1912, McElwain *v.* Com., 146 Ky. 104, 142 S. W. 234 (inference allowed); *Michigan:* 1920, People *v.* Schultz, 210 Mich. 297, 178 N. W. 89 (prosecutor may comment on failure to call co-defendants); *Missouri:* 1888, State *v.* Mathews, 98 Mo. 125, 130, 10 S. W. 144, 11 S. W. 1135 (inference allowed, the co-defendant not being on trial at the same time, and being therefore qualified and not privileged; Sherwood, J., diss., on the ground that a co-defendant not on trial is privileged); 1901, State *v.* Weaver, 165 Mo. 1, 65 S. W. 308 (no inference allowed for a failure to call a competent co-indictee not on trial; State *v.* Mathews, *supra*, repudiated, with the unprecedented remark that "the ruling in that case simply dodged the issue, and that is what every lawyer will say who reads the opinion in the case"); *Oklahoma:* 1919, Cole *v.* State, 16 Okl. Crim. 420, 183 Pac. 734 (convicted co-defendant; inference allowed from failure to call him); *Oregon:* 1906, State *v.* Drake, — Or. —, 87 Pac. 137 (conspiracy to kidnap; failure to call an incompetent co-defendant not on trial; the Court need not instruct the jury not to draw inference).

[5] *Federal:* 1902, U. S. *v.* Lee Huen, 118 Fed. 442, 456; 1904, Balliet *v.* U. S., 129 Fed. 689, 695, 64 C. C. A. 201 (the principle is conceded, but here the trial judge's language in the instruction was held too broad); 1917, Caminetti *v.* U. S., 242 U. S. 470, 37 Sup. 192 (the accused's "failure to explain incriminating circumstances and events already in evidence, in which he has participated and concerning which he is informed," is open to inference; repudiating the language in Balliet *v.* U. S., C. C. A., 129 Fed. 689); 1918, LeMore *v.* U. S., 5th C. C. A., 253 Fed. 887, 897; *Alabama:* 1888, Clarke *v.* State, 87 Ala. 71, 74, 6 So. 368; 1888, Cotton *v.* State, ib. 103, 6 So. 396; *Colorado:* 1873, Solander *v.* People, 2 Colo. 48, 69; 1920, Blanda *v.* People, 67 Colo. 541, 189 Pac. 249; *Kansas:* 1893, State *v.* Glave, 51 Kan. 330, 335, 33 Pac. 8; *Missouri:* 1913, State *v.* Larkin, 250 Mo. 218, 157 S. W. 600 ("We conclude that the case of State *v.* Graves [cited *infra*] . . . ought to be overruled and no longer followed in this behalf"; careful and sensible opinion by Faris, J.; this opinion was rendered in Div. No. 2); 1917, State *v.* Murray, — Mo. —, 193 S. W. 830 (murder; since State *v.* Larkin, "the rule announced in the earlier cases is no longer the law; . . . no doubt need exist in this jurisdiction as to the present status of the law on this subject"); 1918, State *v.* Prunty, 276 Mo. 359, 208 S. W. 91 (State *v.* Larkin and later cases "overrule earlier cases upon this proposition"); *Nebraska:* 1905, Powers *v.* State, 75 Nebr. 226, 106 N. W. 332; 1907, Russell *v.* State, 77 Nebr. 519, 110 N. W. 380 (but the inference does not necessarily apply to every fact not explicitly denied by a party taking the stand); *New York:* 1874, Stover *v.* People, 56 N. Y. 315, 320 (larceny; defendant's failure, when on the stand, to account for the money, admissible for comment; Church, C. J., and Andrews, J., diss., on unspecified points in the case); *Utah:* 1911, State *v.* Mattivi, 39 Utah 324, 117 Pac. 31.

Contra: Missouri: 1888, State *v.* Graves, 95 Mo. 510, 514, 8 S. W. 739 (Rev. St. § 1918, quoted *post*, § 2276, interpreted to mean that "when he elects to go on the stand, he may testify only to such matters as he may choose," and that therefore no inference may be drawn from his failure to mention certain matters; Brace and Sherwood, JJ., diss.); 1888, State *v.* Jackson, 95 Mo. 623, 655, 8 S. W. 749 (Sherwood, J., points out the fallacy of the preceding ruling, but a majority of the Court express dissent on this point); 1893, State *v.* Elmer, 115 Mo. 401, 122 S. W. 369 (State *v.* Graves approved); 1893, State *v.* Fairlamb, 121 Mo. 137, 150, 25 S. W. 895 (failure to testify to a "particular fact," held not open to inference);

this must be so, however narrowly (*post*, § 2276) the extent of the waiver be interpreted. Furthermore, where the party refuses answer and claims privilege as to the matter which is in truth included in the waiver, but the answer is not insisted upon, the inference is of course available,[6] and this is conceded even under the anomalous doctrine of Mr. Justice Cooley (*post*, § 2276) as to waiver.[7] Finally, this waiver has been held to go so far as to permit inferences to be drawn from *prior omissions or failures or refusals to testify* at a time when the privilege existed and the inference would have been prohibited.[8]

5. Cessation of the Privilege

§ 2275. **Waiver**: (*a*) **by Contract.** It has never been doubted that the privilege is in itself *waivable:* [1]

1719, L. C. PARKER, in *East India Co.* v. *Atkins*, 1 Stra. 168, 176 (holding valid a covenant to give discovery): "It is a negative privilege that is allowed by the law, that a man may, if he please, refuse to discover a matter that will subject him to penalties. It is only a privilege, not a natural right, for then he would shake that natural right whenever he saw fit to make such discovery. If a man will waive such a privilege, surely he may; it is not a thing prohibited by the law. The reason why he is not obliged to discover is a want of right in the other party to oblige him to it; but if he *will* make a discovery, he may, nor is any rule of justice or natural right broke by it. Is it unjust that the whole

1899, State *v.* Hudspeth, 150 Mo. 12, 51 S. W. 483 (instruction that statements of the accused testified to by the prosecution and not denied by the accused are to be taken as facts, held erroneous); 1906, State *v.* Miles, 199 Mo. 530, 98 S. W. 25 (rule of State *v.* Graves followed, but here held not applicable); 1909, State *v.* James, 216 Mo. 394, 115 S. W. 994 (following State *v.* Graves; cited more fully *post*, § 2276, n. 5).

It should be understood in other States that the foregoing Missouri rule was unsound, both in principle and in policy, and is now abandoned, by State *v.* Larkin, *supra*.

[6] 1903, Tines *v.* Com., — Ky. —, 77 S. W. 363; 1870, Andrews *v.* Frye, 104 Mass. 234, 236; 1873, State *v.* Ober, 52 N. H. 459, 465; 1912, State *v.* Dodson, 23 N. D. 305, 136 N. W. 789.

[7] Cooley, C. J., in Constitutional Limitations, p. 317, quoted *post*, § 2276. Compare the following cases of earlier date: 1852, Carne *v.* Litchfield, 2 Mich. 340, 344; 1867, Knowles *v.* People, 15 Mich. 408, 413.

[8] CANADA: 1910, R. *v.* Ellis, 2 K. B. 747 (false pretences by an art-dealer to a customer; in a civil suit for fraud in the same transaction, the now defendant had absented himself abroad at the trial and failed to testify; held admissible);
UNITED STATES: 1896, Taylor *v.* Com., — Ky. —, 34 S. W. 227 (failure to testify at a preliminary examination); 1895, Com. *v.* Smith, 163 Mass. 411, 40 N. E. 189 (refusal to testify before the grand jury); 1909, Phillips *v.* Chase, 201 Mass. 444, 87 N. E. 755 (Com. *v.* Smith approved, but on the extraordinary theory noted *ante*, § 2272); 1908, Wilson *v.* State, 54 Tex. Cr. 505, 113 S. W. 529.

Contra: Can. 1920, R. *v.* Mah Hong Hing, 53 D. L. R. 356, B. C. (judge's comment on the accused's failure at the preliminary hearing to disclose an alibi defence, held improper; but the point about waiver is not noticed); *U. S.* 1905, Newman *v.* Com., — Ky. —, 88 S. W. 1089 (failure to testify on application for bail; no authority cited; could not the Court at least notice its own opposed ruling in Taylor *v.* Com., *supra*?); Mass. St. 1912, c. 325, Gen. L. 1920, c. 278, § 23 (thus annulling Com. *v.* Smith, *supra*); 1907, Masterson *v.* St. Louis Transit Co., 204 Mo. 507, 103 S. W. 48 (one judge diss.); 1909, Garrett *v.* St. Louis Transit Co., 219 Mo. 65, 118 S. W. 68 (the same judge again dissenting); 1901, Wooley *v.* State, — Tex. Cr. —, 64 S. W. 1054; 1902, Rogers *v.* State, 44 Tex. Cr. 350, 71 S. W. 18.

Compare the cases as to *impeaching a witness* by his former silence (*ante*, § 1042).

Otherwise, of course, where the defendant has *not now taken the stand:* cases cited *ante*, § 2272, note 8.

§ 2275. [1] The only hesitation indicated by any Court on this point has been in Georgia: 1884, Gravett *v.* State, 74 Ga. 191, 200 (questioning the *obiter* remark that there can be no waiver, in Higdon *v.* Heard, 14 Ga. 258, where alone that view seems to have been uttered). But compare the doctrine of Mr. J. Cooley, *post*, § 2276.

case should be laid before the Court? If the party has not done anything contrary to his duty, an answer can do him no harm. And why should not this Court carry it so far, when there can be no prejudice unless the party is a knave? And if he be one, shall a Court of equity protect him?"

But may such a waiver be made irrevocably *by contract* before trial? Unless the contract is one which by its circumstances has come within the doctrine of duress or oppression, and is thus voidable on general principles of contract, there is no reason in its present aspect why it should not be binding. This has been the doctrine since the origin of the privilege.[2] It would follow that a contract found *by implication* from the relations of the parties is equally effective:[3]

1827, V. C. LEACH, in *Green* v. *Weaver*, 1 Sim. 404, 425, 433: "I think that two propositions may be assumed; first, that the policy of the law not only requires that a broker or agent should act with fidelity to his employer, and should be ready, at all times, to render a full and clear account of his transactions; but, secondly, from the nature of this case, the defendant must possess, and perhaps exclusively possess, the means of stating that account, which the policy of the law entitles the plaintiff to demand. I think these propositions may be assumed in this case as clear. . . . Then the next question is, inasmuch as the objection to make the discovery arose, in the cases I have referred to, from the stipulations of instruments under seal, can the solemnity of the seal make that obligation to discover more obligatory in a court of equity, than the moral obligation resulting from principal and agent, when one reposes and another accepts the confidence so reposed? . . I should say that a Court of equity knows no difference between a mere moral obligation, and one resulting from stipulation by deed. If we contrast the circumstances of this case with those of the decisions I have referred to, I think we shall find that this case creates a higher moral obligation to give the discovery than any of those cases. In each of those cases the parties dealt at arm's length. The employer contemplated a breach of the contract by the agent, and stipulated for his own damages in case a breach of contract should take place. In the present case the employer surrendered himself, unconditionally,

[2] The general principle of the validity of a contract to *waive rules of Evidence* has been considered *ante*, § 7*a*: *England:* 1719, East India Co. *v.* Atkins, 1 Stra. 168, 176 (bill against plaintiff's employees to discover misconduct involving a forfeiture of the plaintiff's right to a franchise of trade; defendant's covenant to answer any bill of discovery, held valid; quoted *supra*); 1728, South Sea Co. *v.* Bumpstead, Mosely 74 (covenant by a supercargo to make discovery to a bill by employer, here enforced, although involving disclosure of matter of forfeiture); 1827, Green *v.* Weaver, 1 Sim. 404, 430 (bill against a broker, who had given a bond to the corporation subject to penalties, V. C. Leach: "A man may contract so as to incur an obligation to discover the facts, although that discovery may incidentally subject him to pecuniary penalties").

United States: 1920, Hickman *v.* London Ass. Co., 184 Cal. 524, 195 Pac. 45 (clause providing that one insured against fire should submit to examination on oath, as a condition precedent to action brought; after a refusal based on this privilege, an action by the insured was dismissed, the clause being held valid); 1904, Swedish-American Tel. Co. *v.* Fidelity & C. Co., 208 Ill. 562, 70 N. E. 768 (a contract between a liability insurance company and the insured, giving to the former the right of inspection of the latter's books, is a waiver of the constitutional guarantee against unreasonable searches and seizures).

[3] 1827, Green *v.* Weaver, 1 Sim. 404, 431 (bill against a broker to discover the transactions which he had had on the plaintiff's account; held, that the relation was confidential and implied an agreement to give discovery without reserve; quoted *supra*).

The principle ought to be equally applicable to a *stipulation* made before the trial though not as a part of a covenant of employment: *Contra:* 1842, Lee *v.* Read, 5 Beav. 381, 385, *semble* (defendant's agreement, before trial, to give full discovery is not binding).

It ought equally to apply to an *accused's agreement* made before trial: *Contra:* 1889, U. S. *v.* Smith, 4 Day Conn. 121, 124 (accomplice agreeing to turn State's evidence, but afterwards refusing).

to the agent whom he employed, in the confidence that the agent sustained the character that he publicly assumed. The employer had no reason to suspect, nor had any means of detecting the misrepresentation of the fact, whether they were, or not, duly constituted legal brokers. Much less could he apprehend that they were daily and hourly living in the violation of the law of the country in so acting; and that they kept this violation lurking in the background, to be brought forward, by way of defence, against the just demands of those whose confidence they invited. If a Court of equity gives effect to a defence so constituted, I do not know that there can be any reason why an executor or administrator, who has made oath duly to administer the assets, and executed a bond for that purpose, may not allege those matters in answer to a bill of discovery charging him with fraudulently tendering an account of the assets."

§ 2276. **Waiver: (*b*) by Volunteering Testimony on the Stand; (1) Ordinary Witness; (2) Accused.** (1) The case of the *ordinary witness* can hardly present any doubt. He may waive his privilege; this is conceded. He waives it by exercising his option of answering; this is conceded. Thus the only inquiry can be whether, by *answering as to fact X, he waived it for fact Y*. If the two are related facts, parts of a whole fact forming a single relevant topic, then his waiver as to a part is a waiver as to the remaining parts; because the privilege exists for the sake of the criminating fact as a whole. The reasoning is aptly expounded in the following passage:

1869, CAMPBELL, J., in *Foster* v. *People*, 18 Mich. 266, 274: "Where he has not actually admitted criminating facts, the witness may unquestionably stop short at any point and determine that he will go no further in that direction. . . . But the rule which allows a witness to refuse answering questions not directly pointing to guilt, rests solely on the doctrine that, as in most cases the crimination would be made out by a series of circumstances, any one of them may have such a tendency to aid in reaching the result, that an answer concerning it may supply means of conviction, by aiding the other proofs which it indicates, or supplements, on behalf of the prosecution. The right to decline answering as to these minor facts is merely accessory to the right to decline answering to the entire criminating charge, and can be of no manner of use when that is once admitted, and must be regarded as waived when the objection to answering to the complete offense is waived. The law does not endeavor to preserve any vain privileges, and such a privilege as would allow a witness to answer a principal criminating question, and refuse to answer as to its incidents, would be worse than vain; for, while it could not help the witness, it must inevitably injure the party, who is thus deprived of the power of cross-examination to test the credibility of a person who may, by avoiding it, indulge his vindictiveness or corrupt passions with impunity. . . . And the further consideration is also recognized, that a witness has no right, under pretense of a claim of privilege, to prejudice a party by a one-sided or garbled narrative."

This view, however, did not receive final sanction in England; after much contrariety of opinion, the doctrine seems there to obtain, since R. *v.* Garbett, in 1847, that the privilege may be claimed at any moment, — a practical nullification of the present application of the principle of waiver.[1] But in the

§ 2276. [1] ENGLAND: 1820, Ex parte Cossens, Buck Bkcy. Cas. 531, 540 (bankrupt's examination; L. C. Eldon: "If a man has gone on answering questions that had a tendency to criminate himself, he may stay, in answering those questions, wherever he pleases; you cannot carry him further than he chooses voluntarily to go himself"); 1824, Dixon *v.* Vale, 1 C. & P. 278 (Best, C. J., said that if a witness, after caution, chooses to

United States the rule set forth in the above passage is generally accepted, with varying phraseology; one or two Courts alone following the English doctrine of R. *v.* Garbett. The application of the rule thus comes to depend chiefly on the relations of the particular facts inquired about and the extent to which the particular witness has gone in his prior answers.[2]

answer, "he is bound to answer all questions relative to that transaction"); 1827, Dandridge *v.* Corden, 3 C. & P. 11 (bill of exchange; after answering that there was an acceptance for value, the witness refused to state the consideration; L. C. J. Tenterden refused to compel him); 1827, East *v.* Chapman, M. & M. 46 (after answering "one or two questions on the subject" of a libel, the witness claimed his privilege; Abbott, C. J.: "Having partially answered you are now bound to give the whole truth"); 1834, Ewing *v.* Osbaldiston, 6 Sim. 608 (account of partnership, the answer defending, on the ground of the partnership's illegality; discovery compelled, because in the answer the liability to penalties was apparent, "and consequently he could not be damnified by a production of the documents"); 1847, R. *v.* Garbett, 2 C. & K. 474, 495, 1 Den. Cr. C. 276 (answering in part is no waiver, for a witness; he may "claim the privilege at any stage of the inquiry"); 1851, King of the Two Sicilies *v.* Wilcox, 1 Sim. N. S. 301, 320 (R. *v.* Garbett followed; Ewing *v.* Osbaldiston said to be inconsistent with it); 1860, Fisher *v.* Fisher, 30 L. J. P. M. A. 24 (divorce on the ground of cruelty; the petitioner by testifying does not waive the privilege of refusing to answer questions as to her adultery).

A special statutory rule exists for the *party* on an issue of *adultery:* 1869, St. 32 & 33 Vict. c. 68, § 3 (in any proceeding instituted in consequence of adultery, no witness "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"); 1891, Redfern *v.* Redfern, Prob. 139, 149 (husband or wife not compellable to answer as to adultery); 1907, S. *v.* S., Prob. 224 (divorce by a wife for impotency; cross-bill by the husband for adultery; cross-examination of the wife as to adultery with the co-respondent, held not allowable, under St. 20–21 Vict. c. 85, § 43, and 32–33 Vict. c. 68); 1912, Lewis *v.* Lewis, Prob. 19 (similar); 1915, Brown *v.* Brown, Prob. 83 (divorce for cruelty and adultery; under St. 32 & 33 Vict. c. 68, § 3, Evidence Further Amendment, a party, here the husband, who has taken the stand in denial of the acts of adultery charged, is privileged from answering as to other acts of adultery not charged); 1921, Franklin *v.* Franklin, Prob. 407 (affidavit of merits by the defendant wife in divorce charging adultery need not contain express denial of adultery, but may merely assert that she has a defence on the merits; prior cases reviewed).

CANADA: The statutes are quoted *ante*, § 488.

[2] *Alabama:* 1879, Lockett *v.* State, 63 Ala. 5, 11 (compellable to answer only "questions concerning the matter he has testified about," and not "those concerning other matters, though they come within the scope of the cause"; here, an accomplice turning State's evidence); 1885, Smith *v.* State, 79 Ala. 21, 23 (approving the preceding case); 1888, Clarke *v.* State, 87 Ala. 71, 74, 6 So. 368 (similar); 1888, Cotton *v.* State, 87 Ala. 103, 6 So. 372 (similar); 1889, Rains *v.* State, 88 Ala. 91, 98, 7 So. 315 (similar); 1892, Williams *v.* State, 98 Ala. 52, 54, 13 So. 333 (similar); *California:* 1880, People *v.* Freshour, 55 Cal. 375 (a disclosure of part of a transaction waives the privilege as to the whole); *Columbia (Dist.):* 1918, Graul *v.* U. S., 47 D. C. App. 543, 549 (the waiver extends to cross-examination so far as it relates to the subject of the examination in chief); *Florida:* 1896, Ex parte Senior, 37 Fla. 1, 19 So. 652 ("if with full knowledge of his rights he consents to testify about the very matter that may criminate him, he must submit to a full, legitimate cross-examination" upon it; here the witness, after caution, testified for a contestant of an election that he had voted for him and refused on cross-examination to answer as to his residence, registration, etc.; held, a waiver, since to speak as to voting was to testify about the main element, the crime of illegal voting); *Idaho:* 1906, State *v.* Bond, 12 Ida. 424, 86 Pac. 43 (murder of B.; the wife of B., defendant's paramour, was also indicted but separately tried; the wife held privileged, when called by the State, not to answer as to her complicity); *Illinois:* 1898, Eggers *v.* Fox, 177 Ill. 185, 52 N. E. 269 (no test laid down); *Iowa:* 1876, State *v.* Fay, 43 Ia. 651 (after testifying to an admission by the defendant, the witness was compelled to answer as to the other persons present at the conversation); 1886, Slocum *v.* Knosby, 70 Ia. 75, 30 N. W. 18 (action on notes; plea, payment; a clerk's testimony to non-payment, held not to waive privilege as to collateral questions about embezzling from his employer; Bock, J., diss.); *Kentucky:* 1824, Ginn *v.* Com., 5 Litt. 300 (complainant in bastardy, held bound to answer as to intimacy with other men); *Maine:* 1831, Tillson *v.* Bowley, 8 Greenl. 163 (like the next case); 1841, Low *v.* Mitchell, 18 Me. 372 (privilege waived as to "that matter so far as material

(2) The case of an *accused* in a criminal trial, who *voluntarily* takes the stand, is different. Here his privilege has protected him from being asked even a single question, for the reason that no relevant fact could be inquired about that would not tend to criminate him (*ante*, §§ 2260, 2268). On this very hypothesis, then, his voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all. His situation is distinct from that of the ordinary witness, with reference to the point of time when a waiver can be predicated, because the ordinary witness is compelled to take the stand in the first instance, and his opportunity for choice does not come till later, when some part of the criminating fact is asked for; while the accused has the choice at the outset. From the point of view of the actual prescience of witness and accused, the

to the issue," but not as to "other unlawful acts, wholly unconnected with the act of which he has spoken, even though they may be material to the issue"; here a complainant in bastardy, held privileged as to intercourse with other men about the time of begetting; a ruling clearly erroneous on the facts); 1875, State *v.* Wentworth, 65 Me. 234, 246 (preceding rulings disapproved; the privilege is waived for the "subject-matters of the inquiry of the direct examination"); *Maryland:* 1885, Chesapeake Club *v.* State, 63 Md. 446, 455, 462 (illegal liquor-selling; questions as to seeing liquor on the premises, after other questions of the same sort answered, held privileged, on the authority of R. *v.* Garbett, that the witness "may claim his protection at any stage of the inquiry"; no American cases cited); *Massachusetts:* 1853, Foster *v.* Pierce, 11 Cush. 437 (bastardy; after answering a question to the complainant's intercourse, the witness refused to answer the cross-examiner's question as to the person with whom it was had; held compellable, on "the broad principle that the witness must claim his privilege in the outset, when the testimony he is about to give will, if he answers fully all that pertains to it, expose him to a criminal charge"); 1858, Com. *v.* Pierce, 10 Gray, 472, 477 (forgery; an accomplice compelled on cross-examination to testify to part of the transaction, since "he must answer all questions legally put to him concerning that matter"); 1876, Mayo *v.* Mayo, 119 Mass. 290 (answers given by a witness not fully understanding his rights, but intending to claim the privilege, were struck out, and a claim of privilege as to further answers was allowed); 1879, Com. *v.* Pratt, 126 Mass. 462 (illegal liquor-selling; witness compelled to answer as to other illegal sales); 1887, Com. *v.* Trider, 143 Mass. 180, 9 N. E. 510 (adultery; witness held not to have waived on the facts); 1899, Evans *v.* O'Connor, 174 Mass. 287, 54 N. E. 557 (loss of wife's affections by adultery in 1893, 1894, and 1895; plaintiff's wife allowed to testify to 1893 without waiving privilege as to 1894 and 1895, as involving "distinct transactions"); *Michigan:* 1869, Foster *v.* People, 18 Mich. 266, 273 ("where he has not actually admitted criminating facts, the witness may unquestionably stop short at any point"; but otherwise, he must "disclose fully what he has attempted to relate"; accomplices, however, cannot "stop short of a full disclosure"; quoted *supra*); *Minnesota:* 1882, State *v.* Nichols, 29 Minn. 357, 358, 13 N. W. 153 (bastardy; a witness testifying to knowledge of the complainant's intercourse with other parties than defendant, compelled to name the person); *Missouri:* 1865, State *v.* Marshall, 36 Mo. 400, 401 (murder; a witness for the prosecution held privileged as to matters irrelevant on the facts); *Nebraska:* 1888, Lombard *v.* Mayberry, 24 Nebr. 674, 690, 40 N. W. 271 (action on bond as security for notes; witness to genuineness of notes held not to have waived his privilege as to their alteration); 1919, Neal *v.* State, 104 Nebr. 56, 175 N. W. 671 (stealing an automobile; cross-examination of an accomplice, testifying for the prosecution, to other similar thefts, not allowed; unsound); *New Hampshire:* 1829, State *v.* K., 4 N. H. 562 (witness compellable, if he testifies to the general fact of defendant's innocence, to "state all the circumstances relating to that fact"); 1837, Amherst *v.* Hollis, 9 N. H. 107, 110 (support of a pauper; witness testifying to his poverty may claim the privilege as how he had disposed of certain property); 1851, State *v.* Foster, 23 N. H. 348, 354 (illegal liquor selling; witness held compellable on the facts); 1855, Coburn *v.* Odell, 30 N. H. 540, 555 (note for illegal consideration; party plaintiff called by defendant, held not to have waived on the facts); *New York:* 1894, People *v.* Forbes, 143 N. Y. 219, 230, 38 N. E. 303 (murder by poisonous gas; grand jury's inquiry; voluntary answering of general questions as to the witness' guilt, held not to preclude a claim of privilege as to questions about the purchase of the instruments used for the offence); 1914, People *v.* Pindar, 210 N. Y. 191, 104 N. E. 133 (larceny; rule applied to defendant's cross-examination of witness for prosecution).

result is the same. Each knows well enough that the inquiries will be upon topics relevant to the charge in issue; but that is immaterial. The question is, What does he know as to the connection between the first question and a possible subsequent incriminating question? Now the accused knows that there must always be such a connection; but in the witness' case there may or may not be such a connection, and if there is not, then his answer cannot be a waiver. The result is, then, that the accused, as to all facts whatever (except those which merely impeach his credit and therefore are not related to the charge in issue), has signified his waiver by the initial act of taking the stand. Moreover, the spirit and the purpose of the privilege (*ante*, § 2251) cannot be violated by any questioning after the accused has once voluntarily taken the stand; and the nice distinctions attempted by Courts are needless.

The judicial and legislative solutions of this problem have been numerous. Leaving aside for the moment (*post*, § 2277) certain rules that are to be distinguished, there are half a dozen forms of solution: [3]

[3] In the following list, the statutes referred to are quoted in full *ante*, § 488; their tenor is here briefly indicated by letters referring to the six forms of rule above noted in the text; many rulings do not indicate whether they intend to apply the present principle or that of the ensuing section (§ 2277); the rulings cited *ante*, § 1890 (cross-examination to one's own case) should also be compared:

ENGLAND: St. 1898, 61 & 62 Vict. c. 36, § 1 (accused may testify on his own behalf; quoted in full *ante*, §§ 488, 194*a*; sub-section (*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"); 1900, Charnock *v.* Merchant, 1 Q. B. 474 (statute applied); 1909, Chitson's Case, 2 Cr. App. 325, 2 K. B. 945 (rape under age; cross-examination of the accused as to his statement to the woman of his intercourse with another woman, allowed); 1910, Rowland's Case, 3 Cr. App. 277, 1 K. B. 458 (under St. 1898, § 1 (*e*), an accused who declines to give evidence for himself but afterwards gives evidence for a co-defendant may be cross-examined to his own case); the English statute, however, has a number of other clauses which may affect proof of former crimes; in these aspects it is examined *ante*, § 194*a*.

CANADA: *Alta.* 1913, R. *v.* Hurd, Alta. S. C., 10 D. L. R. 475 (cross-examination to prior conviction; not decided); *Br. C.* 1904, R. *v.* Grinder, 11 Br.C. 370 (larceny; after cross-examination of the accused, the trial judge asked him to write a specimen of his handwriting, to compare with a memorandum in evidence; held inadmissible); *Ont.* 1901, R. *v.* D'Aoust, 3 Ont. L. R. 653 (an accused taking the stand may be asked as to prior convictions; "he is in the same situation as any other witness").

UNITED STATES: *Federal:* 1887, U. S. *v.* Mullaney, 32 Fed. 370 (defendant charged with forging the registration of electors, compelled to write the names on cross-examination); 1887, Spies *v.* Illinois, 123 U. S. 131, 180, 8 Sup. 21, 22 ("He became bound to submit to a proper cross-examination"); 1900, Fitzpatrick *v.* U. S., 178 U. S. 304, 20 Sup. 944 (Oregon rule applied; the prosecution may cross-examine "with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime"); 1904, Balliet *v.* U. S., 129 Fed. 689, 695, 64 C. C. A. 201 (Fitzpatrick *v.* U. S. followed); 1906, Sawyer *v.* U. S., 202 U. S. 150, 26 Sup. 573 (murder on a vessel; cross-examination allowable "with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime"); 1912, Powers *v.* U. S., 223 U. S. 303, 32 Sup. 284 (in particular, may be cross-examined as to former sworn statements); 1914, Myrick *v.* U. S., 1st C. C. A., 219 Fed. 1 (two indictments for false statements to postal officials; the defendant having taken the stand and testified to certain facts in the first indictment, held not to waive the privilege as to further facts not covered by the direct examination, the scope of the waiver being thus determined by applying the rule of § 1885, *ante;* unsound; Putnam, J., diss.); 1915, Diggs *v.* U. S., Caminetti *v.* U. S., 9th C. C. A., 220 Fed. 545 (enticement for immoral purposes; the defendant took the stand and testified to part of the transaction charged, and then stopped; held that an inference could be drawn, for "the waiver is complete"; declining to follow Balliet *v.* U. S.; Ross, J., diss.); affirmed in Caminetti *v.* U. S., 242 U. S. 470, 37 Sup. 192; 1912, Powers *v.* U. S., 223 U. S. 303, 32 Sup. 281

(a) The first is that the voluntary taking of the stand is a waiver as to *all facts whatever, including even those which merely affect credibility:*

1872, CHURCH, C. J., in *Connors* v. *People*, 50 N. Y. 240 (permitting answers as to former arrests, as affecting credibility): "The prohibition in the Constitution is against *compelling* an accused person to become a witness against himself. If he consents to

(revenue offense; defendant voluntarily taking the stand allowed to be cross-examined as to a former statement, etc.); 1918, Le More *v.* U. S., 5th C. C. A., 253 Fed. 887, 897 (fraudulent use of mails; by defendant's taking the stand, "the waiver of his constitutional privilege was complete"; scope of cross-examination held to be in the trial Court's discretion);

Alabama: 1885, Harris *v.* State, 78 Ala. 482 (defendant becomes subject to cross-examination by co-defendants on their own behalf); 1903, Smith *v.* State, 137 Ala. 22, 34 So. 396 (he becomes "subject to cross-examination and impeachment as are other witnesses"); 1906, Miller *v.* State, 146 Ala. 686, 40 So. 342 (Smith *v.* State followed); 1906, Davis *v.* State, 145 Ala. 69, 40 So. 663 (liquor-selling); 1921, Latikos *v.* State, 17 Ala. App. 655, 88 So. 47 (knowing receipt of stolen goods; cross-examination of defendant to former conviction of similar offense, held allowable, not the particulars of such offense); 1921, Walker *v.* State, 205 Ala. 197, 87 So. 833 (murder; questions to defendant as to "difficulties with other parties and at other times, in no manner connected with the offense," held improper);

Alaska: Comp. L. 1913, § 2258 (rule *d*);

Arizona: Rev. St. 1913, P. C. § 1229 (rule *d*); 1900, Lewis *v.* Terr., 7 Ariz. 52, 60 Pac. 694 (privilege not waived as to questions about former offences and convictions, under Rev. St. § 2040);

California: P. C. 1872, § 1323 (rule *d*); 1870, People *v.* Dennis, 39 Cal. 625, 634 (answer to a cross-examination as to the details of a matter testified to in chief, held compellable); 1885, People *v.* O'Brien, 66 Cal. 602, 6 Pac. 695 (defendant's cross-examination held to be limited to the subject of the direct examination, under the statute; McKee, J., diss., points out that the rule as to privilege and the rule as to order of evidence are distinct); 1888, People *v.* Meyer, 75 Cal. 383, 385, 17 Pac. 431 (privilege waived as to cross-examination to character; Paterson and McFarland, JJ., diss.); 1888, People *v.* Rozelle, 78 Cal. 84, 92, 20 Pac. 36 (P. C. § 1323, applied; defendant may be cross-examined by the same rule as other witnesses, except that the Court has no discretion); 1892, People *v.* O'Brien, 96 Cal. 171, 180, 31 Pac. 45 (same); 1893, People *v.* Gallagher, 100 Cal. 466, 475, 476, 35 Pac. 80 (same; privilege is waived upon all such matters); 1897, People *v.* Arnold, 116 Cal. 682, 687, 48 Pac. 803 (privilege is waived as to cross-examination to character); 1898, People *v.* Dole, — Cal. —, 51 Pac. 945 (Gallagher Case approved; here, a question as to a former admission, allowed); 1898, People *v.* Arrighini, 122 Cal. 121, 54 Pac. 591 (cross-examination allowed only on the matter of the direct examination); 1903, People *v.* Walker, 140 Cal. 153, 73 Pac. 831 (cross-examination to prior self-contradiction allowed); 1909, People *v.* Smith, 9 Cal. App. 644, 99 Pac. 1111 (murder; questions about another revolver excluded; the extent to which the cross-examination of the accused is muzzled in this State is a travesty of principle); compare here the cases cited *ante*, § 1890, and *post*, § 2277;

Colorado: 1896, Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013 (forgery; defendant taking the stand was required to write a specimen);

Connecticut: 1859, Norfolk *v.* Gaylord, 28 Conn. 309 (bastardy; defendant not privileged as to other acts of intercourse); 1868, State *v.* Gaylord, 35 Conn. 203, 207, *semble* (murder; cross-examination to credit, allowed);

Florida: Rev. G. S. 1919, § 6080 (rule *c*); 1899, Wallace *v.* State, 41 Fla. 547, 26 So. 713 ("becomes liable to cross-examination as other witnesses"); 1906, Pittman *v.* State, 51 Fla. 521, 41 So. 385 (the rules for cross-examination to motives, etc., apply to an accused as to other witnesses);

Georgia: P. C. 1910, § 1036 (rule *f*); 1897, Hackney *v.* State, 101 Ga. 512, 28 S. E. 1007 (the cross-examination of a defendant making a statement can be only after it is finished and his consent is expressed; a cross-examining question by the Court, improper); 1902, Walker *v.* State, 116 Ga. 537, 42 S. E. 787;

Hawaii: Rev. L. 1915, § 2610 (rule *c*);

Idaho: 1897, State *v.* Larkins, 5 Ida. 200, 47 Pac. 945 ("any facts material to the issues in the action," except so far as limited by the rule for order of evidence, *ante*, § 1890, n. 2);

Illinois: 1883, Chambers *v.* People, 105 Ill. 409, 413 (defendant "is to be examined precisely as other witnesses"); 1887, Spies *v.* People, 122 Ill. 1, 235, 12 N. E. 865, 17 N. E. 898 (defendant "cannot excuse himself" on this ground);

Indiana: 1885, Thomas *v.* State, 103 Ind. 419, 438, 2 N. E. 808 (not decided; but Com. *v.* Nichols, Mass., is quoted with approval); 1885, Boyle *v.* State, 105 Ind. 469, 475, 5 N. E. 203 (same);

Iowa: Code 1897, § 5485, Comp. Code § 9465 (rules *c* and *d*); 1890, State *v.* Peffers, 80 Ia. 580, 583, 46 N. W. 662 (defendant not privileged from answering as to prior testimony);

Kansas: 1921, State *v.* Roselli, 33 Kan. 109,

become a witness in the case, voluntarily and without any compulsion, it would seem to follow that he occupies for the time being the position of a witness with all its rights and privileges and subject to all its duties and obligations. If he gives evidence which bears against himself, it results from his voluntary act of becoming a witness, and not from compulsion. His own act is the primary cause, and if that was voluntary, he has no reason to complain."

198 Pac. 195 (murder; cross-examination of defendant to numerous criminal facts, held allowable on the facts);
Kentucky: (other citations are placed *post*, § 2277); 1908, Welch *v.* Com., — Ky. —, 108 S. W. 863 (cross-examination to motive; privilege allowed; unsound); 1914, Com. *v.* Phœnix Hotel Co., 157 Ky. 180, 162 S. W. 823 (voluntary testimony at a former trial of a separate but similar charge, held not a waiver);
Louisiana: 1912, State *v.* Oden, 130 La. 598, 58 So. 351 (liquor-selling; cross-examination to other sales since the one charged, allowed, *semble*);
Maine: Rev. St. 1916, c. 136, § 19 (quoted *ante*, § 488; forbids cross-examination to other crimes); 1875, State *v.* Wentworth, 65 Me. 234, 240, 243 (defendant waives the privilege "as to all matters pertinent to the issue"; here, as to other illegal sales of liquor than the one charged; quoted *supra*);
Maryland: 1875, Roddy *v.* Finnegan, 43 Md. 490, 502 (privilege waived "as to any matter about which he has given testimony in chief"); 1899, Guy *v.* State, 90 Md. 29, 44 Atl. 997 (may be cross-examined "concerning any matter pertinent to the issue on trial, regardless of the extent of the direct examination"; here, as to possession of a Federal liquor license, in a prosecution for unlawful sale);
Massachusetts: 1866, Com. *v.* Lanman, 13 All. 563, 569 (liquor-selling; defendant compelled to answer a question relating to the charge; he waives objection to "any question pertinent to the issue"); 1867, Com. *v.* Mullen, 97 Mass. 545 (he must testify to "any facts relevant and material to the issue"); 1867, Com. *v.* Bonner, 97 Mass. 587 (defendant not privileged from cross-examination to character; he assumes "the liabilities incident to that position"); 1871, Com. *v.* Morgan, 107 Mass. 199, 200, 205 (similar to Com. *v.* Mullen); 1873, Com. *v.* Nichols, 114 Mass. 285 (defendant "cannot refuse to testify to any facts which would be competent evidence in the case, if proved by other witnesses"); 1876, Com. *v.* Tolliver, 119 Mass. 312, 315 (defendant allowed to be cross-examined to inconsistent statements); 1889, Com. *v.* Sullivan, 150 Mass. 315, 23 N. E. 47 (defendant allowed to be cross-examined as to prior conviction); 1895, Com. *v.* Smith, 163 Mass. 411, 430, 40 N. E. 189 (preceding cases approved);
Michigan: 1872, Gale *v.* People, 26 Mich. 157, 159 (defendant held not to waive the privilege as to matters affecting his character and credibility); 1888, People *v.* Howard, 73 Mich. 10, 13, 40 N. W. 789 (defendant may be cross-examined to character like any other witness); 1888, Ritchie *v.* Stenius, 73 Mich. 563, 569, 41 N. W. 687 (same for a civil case); 1889, People *v.* Pinkerton, 79 Mich. 110, 114, 117, 44 N. W. 180 (defendant not compellable to "answer questions irrelevant to the issue, having a tendency to bring in other charges"; no authority cited, Sherwood, C. J., diss.); 1890, People *v.* Hicks, 79 Mich. 457, 463, 44 N. W. 931 (defendant cross-examined as to details of the issue; no authority cited); 1890, People *v.* Bussey, 82 Mich. 49, 57, 63, 46 N. W. 97 (defendant held subject to "any cross-examination which went directly to the merits of the case"); 1892, People *v.* Foote, 93 Mich. 38, 40, 52 N. W. 1036 (like People *v.* Howard); 1897, Georgia *v.* Bond, 114 Mich. 196, 72 N. W. 232 (like Ritchie *v.* Stenius); 1900, People *v.* Ecarius, 124 Mich. 616, 83 N. W. 628 (murder; defendant required to place a weapon in his pocket to illustrate the alleged circumstances); 1903, People *v.* Dupounce, 133 Mich. 1, 94 N. W. 388 (the waiver extends to "any question, material to the case, which would in the case of any other witness be legitimate cross-examination," even though it involves some other crime; here applied to questions concerning the rape-intercourse which led to the charge of bastardy; the view of Cooley, J., quoted *supra*, expressly repudiated); 1904, People *v.* Gray, 135 Mich. 542, 98 N. W. 261 (cross-examination to the defendant's false swearing as surety on a bond, allowed to affect credibility); 1912, People *v.* Fritch, 170 Mich. 258, 136 N. W. 493;
Minnesota: 1891, State *v.* Klitzke, 46 Minn. 343, 49 N. W. 97 (bastardy; defendant denying the intercourse charged, compelled to testify as to other intercourse); 1908, State *v.* Kight, 106 Minn. 371, 119 N. W. 56 ("the general rule applicable to all witnesses" applies);
Missouri: Rev. St. 1919, §§ 4036, 5439 (rule d, quoted *ante*, § 488); 1888, State *v.* Graves, 95 Mo. 510, 514, 8 S. W. 739 (Rev. St. § 1918 interpreted to mean that "when he elects to go on the stand he may testify only to such matters as he may choose"; Brace and Sherwood, JJ., diss.); 1888, State *v.* Jackson, 95 Mo. 623, 655, 8 S. W. 749 (contrary statement, Sherwood, J., writing the opinion, but a majority of the Court dissenting); 1893, State *v.* Elmer, 115 Mo. 401, 22 S. W. 369 (rule of State *v.* Graves, approved); 1901, State *v.* Fisher, 162 Mo. 169, 62 S. W. 690 (statute

This goes beyond the limit above suggested. It may be supported on the ground that as the privilege protects the accused against any form of com-

applied); 1905, State v. Miller, 190 Mo. 463, 89 S. W. 377; 1909, State v. James, 216 Mo. 394, 115 S. W. 994 (following State v. Graves, and clinching the absurd rule which allows a defendant to take the stand and say "I did not do it" and then stop, free from cross-examination or comment); 1909, State v. Myers, 221 Mo. 598, 121 S. W. 131 (liberal rule followed); 1910, State v. Keener, 225 Mo. 488, 125 S. W. 747 (liberal rule followed); 1910, State v. Mitchell, 229 Mo. 683, 129 S. W. 917 (State v. Miller followed); 1915, State v. Roe, — Mo. —, 180 S. W. 881 (murder); 1916, State v. Swearingen, 269 Mo. 177, 190 S. W. 268 (murder); 1916, State v. Kinney, — Mo. —, 190 S. W. 306 (burglary); 1916, State v. Dixon, — Mo. —, 190 S. W. 290 (murder); 1917, State v. Burgess, — Mo. —, 193 S. W. 821 (embezzlement); 1917, State v. Weber, 272 Mo. 475, 199 S. W. 147 (rape under age); 1918, State v. Stewart, 274 Mo. 649, 204 S. W. 10 (murder); 1919, State v. Cole, — Mo. —, 213 S. W. 110 (rule in State v. Pfeifer approved); 1921, State v. Edelen, 288 Mo. 160, 231 S. W. 585 (rape; cross-examination of defendant, held on the facts to exceed the rule); 1921, State v. Smith, — Mo. —, 228 S. W. 1057 (homicide; cross-examination held to be within limits); compare here the cases cited *ante*, § 1890, and *post*, § 2277;

Montana: 1904, State v. Rogers, 31 Mont. 1, 77 Pac. 293;

Nebraska: 1910, Johns v. State, 88 Nebr. 145, 129 N. W. 992 (defendant taking the stand may be questioned in detail as to prior conviction for felony; even if he at first denies by equivocation); 1921, Denker v. State, 106 Nebr. 779, 184 N. W. 945 (similar, under Rev. St. 1913, § 7906); 1919, Mauzy v. State, 103 Nebr. 775, 174 N. W. 325 (cross-examination to the use of an alias, allowed);

Nevada: Rev. L. 1912, § 7456 (a defendant taking the stand "may be cross-examined . . . the same as any other witness"); 1905, State v. Lawrence, 28 Nev. 440, 82 Pac. 614 (cross-examination to convictions of felonies to affect credibility, allowed); 1913, State v. Urie, 35 Nev. 268, 129 Pac. 305;

New Hampshire: 1873, State v. Ober, 52 N. H. 459 (illegal liquor-selling; a defendant denying certain sales, held to have waived the privilege as to other sales; he is examinable "as to any and every matter pertinent to the issue"; "he places himself in the attitude of any ordinary witness, irrespective of any interest in the cause"; Mr. J. Cooley's utterance in his 2d ed. adversely criticised);

New Jersey: 1903, State v. Zdanowicz, 69 N. J. L. 619, 55 Atl. 743 (rule of prior cases that the cross-examination must not go beyond the topics of the direct examination, applied; whether such a limitation is sound, not decided; compare the cases cited *ante*, § 1890);

New Mexico: 1921, State v. Bailey, — N. Mex. —, 198 Pac. 529 (murder; cross-examination to other assaults, admitted, in trial Court's discretion);

New York: 1870, Brandon v. People, 42 N. Y. (Hand) 270 (question not determined, because the privilege was not claimed); 1872, Connors v. People, 50 N. Y. 240 (assault; questions as to former arrests, to affect credibility, allowed; quoted *supra*); 1878, People v. Casey, 72 N. Y. 393, 398 (assault; questions as to former assaults, to affect credibility, allowed); 1878, People v. Brown, 72 N. Y. 571, 573 (ignoring People v. Casey, and apparently approving Connors v. People so far as concerned the self-crimination privilege; but here making the curious distinction that the privilege against self-disgrace, *ante*, § 2216, was not waived; confused opinion); 1892, People v. Tice, 131 N. Y. 651, 655, 30 N. E. 494 (approving Connors v. People; defendant not privileged as to questions affecting his credibility); 1893, People v. Webster, 139 N. Y. 73, 84, 34 N. E. 730 (preceding case followed); 1911, People v. Brown, 203 N. Y. 44, 96 N. E. 367 (voluntary testimony, held to permit cross-examination as to prior testimony inadmissible under the confession-rule; erroneous on principle; see *ante*, § 821, n. 4); 1916, People v. Trybus, 219 N. Y. 18, 25, 113 N. E. 538 (murder; rule applied);

North Carolina: Con. St. 1919, § 1799 (rule c); 1883, State v. Lawhorn, 88 N. C. 634, 637 (defendant allowed to be cross-examined to prior convictions); 1887, State v. Thomas, 98 N. C. 599, 604, 4 S. E. 518 (compellable to answer as to prior charges); 1890, State v. Allen, 107 N. C. 805, 11 S. E. 1016 (preceding case approved); 1910, State v. Simonds, 154 N. C. 197, 69 S. E. 790 (manslaughter; cross-examination to illicit intercourse with the woman on whom deceased was calling, allowed);

North Dakota: 1896, State v. Kent, 5 N. D. 516, 67 N. W. 1052 (the privilege is "that of every witness who goes into the witness-box, and nothing more"; waiving as to collateral crimes relevant to the crime in question, but not as to collateral crimes merely affecting credibility); 1909, State v. Nyhus, 19 N. D. 326, 124 N. W. 71 (rape; questions to the accused as to former misconduct with a woman, excluded);

Ohio: 1881, Hanoff v. State, 37 Oh. St. 178, 181, 188 (defendant held apparently to waive his privilege to some extent; Okey, J., diss.); 1887, Este v. Wilshire, 44 Oh. 636 (broker's fraud; motion tried on affidavits; defendant held to have waived his privilege by filing an affidavit);

Oklahoma: 1919, Creek v. State, 16 Okl. Cr. 492, 184 Pac. 917 (questions as to escape from jail after arrest, allowed);

pulsory disclosure as a witness (*ante*, § 2263), so its waiver abandons any right to refuse as a witness.

(*b*) The second view is the one above suggested as correct, and appears in varying phraseology. Commonly, it is said that the waiver extends to all

Oregon: Laws 1920, § 1534 (rule *d*); 1897, State *v.* Moore, 32 Or. 65, 48 Pac. 468; 1908, State *v.* Deal, 52 Or. 568, 98 Pac. 165 (cross-examination to the circumstances of an alleged exculpation, allowed); 1914, State *v.* Jensen, 70 Or. 156, 140 Pac. 740 (assault with intent to rape; cross-examination of defendant to misconduct with a woman in another State, excluded); 1914, State *v.* Torbet, 72 Or. 402, 143 Pac. 1107 (murder; cross-examination to a confession, allowed); 1921, State *v.* Rathie, 101 Or. 339, 368, 199 Pac. 169 (accused's former statements to grand jury); and cases cited in § 2277, *post*, apply the statute;

Pennsylvania: this State has now permitted the following vicious piece of legislation to slip in and thus tenderly to make it easier for astute defenders of villains to juggle their clients out of legal danger: St. 1911, Mar. 15, p. 20, Dig. 1920, § 8174, Crim. Procedure (an accused taking the stand "shall not be asked and if asked shall not be required to answer any question tending to show that he has committed or been charged with or been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation"; unless he has offered evidence of his good character or has testified against a co-defendant);

Philippine Islands: P. C. 1911, Gen. Order 58 of 1900, § 15 (quoted *ante*, § 488); 1916, U. S. *v.* Binayoh, 35 P. I. 23 (murder);

Porto Rico: 1908, People *v.* Morales, 14 P. R. 227, 240 (murder); 1912, People *v.* Roman, 18 P. R. 217, 228 (murder);

Rhode Island: 1903, State *v.* Babcock, 25 R. I. 224, 55 Atl. 685 (cross-examination to prior conviction allowed);

South Carolina: 1903, State *v.* Williamson, 65 S. C. 242, 43 S. E. 671 (question not decided);

South Dakota: 1909, State *v.* La Mont, 23 S. D. 174, 120 N. W. 1104 (rape under age; cross-examination of defendant to other acts of intercourse with women of his family, excluded; the opinion does not distinguish the different questions involved);

Tennessee: 1895, Clapp *v.* State, 94 Tenn. 186, 30 S. W. 214 (privilege not waived as to other crimes);

Texas: 1891, Quintana *v.* State, 29 Tex. App. 401, 406, 16 S. W. 258 ("he is subject to all the tests and rules applicable to other witnesses, even to the answering of questions that would tend to criminate him"); 1896, Rodriguez *v.* State, — Tex. Cr. —, 36 S. W. 435 (in impeachment, no confessions, otherwise inadmissible, may be proved, by cross-examination or otherwise); 1918, Houseton *v.* State, 83 Tex. Cr. 453, 204 S. W. 1007 (defendant's wife); compare here the cases cited *post*, § 2277;

Utah: Comp. L. 1917, § 9279 (rule *c*); 1905, State *v.* Shockley, 29 Utah 25, 80 Pac. 865 (murder in robbery; cross-examination as to other crimes, held improper; the ruling really proceeds on the principle of § 1810, *ante*, for the claim of privilege was conceded on all the questions but one; Bartch, J., dissenting, points out that Utah Rev. St. § 5015 is practically ignored by the majority; the decision makes confusion in the law, and helped to set free a confessed villain); 1910, State *v.* Vance, 38 Utah 1, 110 Pac. 434 (the above criticism on the Shockley case, and that of § 21, n. 12, *ante*, reviewed and answered; see the further comments, *ante*, § 21, n. 12); 1911, State *v.* Thorne, 39 Utah 208, 117 Pac. 58 (rule *c*);

Virginia: Code 1919, § 4778 (the accused may be "examined in his own behalf, and if so sworn and examined . . . he shall be deemed to have waived his privilege of not giving evidence against himself, and shall be subject to cross-examination as any other witness"; the second clause was first inserted in the Revision of 1919); 1891, Watson *v.* Com., 87 Va. 608, 613, 13 S. E. 22 (cross-examination to the issue, held proper on the facts); 1922, Thaniel *v.* Com., — Va. —, 111 S. E. 259 (accused's testimony before the coroner as a witness; cross-examination to this testimony at the trial, allowed, under Code 1919, § 4778, the second clause of which was added to the prior text; the Code now "seems to go the full length of requiring the accused person to absolutely and in all respects waive his privilege");

Washington: R. & B. Code 1909, § 2148 (rule *c*); 1893, State *v.* Duncan, 7 Wash. 336, 339, 35 Pac. 117 (defendant is treated "the same as any other witness"; Stiles, J., diss.); 1897, State *v.* O'Hara, 17 Wash. 523, 50 Pac. 477, 933 (cross-examination as to the execution of a paper already introduced in chief by the prosecution, excluded); 1903, State *v.* Melvern, 32 Wash. 7, 72 Pac. 489 (cross-examination to prior conduct, held not within the privilege, on the facts); 1922, State *v.* Crowder, — Wash. —, 205 Pac. 850 (statutory rape; cross-examination of defendant to other acts of intercourse with complainant, held improper, because the prosecution had already evidenced them; this is a thoroughly erroneous misunderstanding of the rule; the opinion is unaware that two distinct principles are involved, and cites without discrimination authorities for both).

matters *relevant to the issue*, meaning thereby to exclude "collateral" matters, *i. e.* facts merely affecting credibility:

1875, APPLETON, C. J., in *State* v. *Wentworth*, 65 Me. 234, 243: "He was not obliged to testify. He does testify. . . . He exonerates himself. He denies the commission of the offense charged. He is subject to cross-examination, as the necessary result of his assuming the position of a witness. . . . If he discloses part, he must disclose the whole in relation to the subject-matter about which he had answered in part. Answering truly in part with answers exonerative, he cannot stop midway, but must proceed, though his further answers may be self-criminative. Answering falsely as to the subject-matter, he is not to be exempt from cross-examination because his answers to such cross-examination would tend to show the falsity of those given on direct examination. If it were so, a preference would be accorded to falsehood rather than to truth."

(*c*) A third rule, usually originated by statute, makes the accused liable to cross-examination "*like any other witness.*" This would upon its face go no further than the second rule just examined, *i. e.* it would not predicate a waiver for facts merely affecting credibility. But it is not always construed so narrowly; and the statute may be supposed merely to be dealing with the topics available for cross-examination (*post*, § 2277), without expressing anything as to the doctrine of waiver.

(*d*) A fourth rule, usually under statute, is that the accused may be cross-examined only as to the subjects *already dealt with in his direct examination.* This form was doubtless intended merely to apply to the accused the usual rule of a majority of the States as to the order of topics on cross-examination (*ante*, §§ 1885–1890, *post*, § 2778); but its literal effect is to limit the doctrine of waiver to the subject of the direct examination. This, though an unnecessary result on principle, ought not to make any practical difference; for the subject of the direct examination, properly construed, is the whole fact of guilt or innocence, and hence the topic of cross-examination might always range over any relevant facts except those merely affecting credibility; and thus the rule becomes in effect identical with that of (*b*) *supra.* The judicial interpretation of this statutory rule is not always harmonious.

(*e*) Still another view, substantially more restricted, and expressly embodied in a few statutes, is that the waiver extends to no other criminal acts than the one *precisely charged.* The policy of this rule is set forth in the following passage:

1898, MOORE, J., in *State* v. *Bartmess*, 33 Or. 110, 54 Pac. 167: "The reason for this distinction is found in the fact that if the defendant could be treated as a general witness, and cross-examined as such, evidence of inculpatory acts tending to the commission of the crime with which he was charged, and also of the commission of other crimes, might be brought before the jury, thereby causing them to lose sight of the real issue to be tried, and tending to the return of a verdict of guilty based upon evidence of particular acts wholly disconnected with the case on trial."

This limitation is sufficiently answered by the reasoning of Mr. Justice Campbell (above quoted). An accused who voluntarily takes the stand may fairly be asked to tell all he knows that is relevant. Since the prosecution

can in any event, by other witnesses, prove the "inculpatory acts" above referred to (*ante*, § 305), it is difficult to see why the same acts cannot be proved by his own testimony, without unfair prejudice.

(*f*) Finally, there is an extreme view that the privilege *may be claimed at any moment, i. e.* virtually no waiver is conceded:

1871, COOLEY, J., Constitutional Limitations, 2d edition, p. 317: "If the accused does not choose to avail himself of it [his option to testify], unfavorable inferences are not to be drawn to his prejudice from that circumstance; and if he does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as under the circumstances they think it entitled to; otherwise the statute [giving him the option] must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege [to testify] becomes a snare and a delusion."

This passage was explained by the learned author in his third edition as follows:

1873, COOLEY, J., Constitutional Limitations, 3d edition, 317: "This paragraph appears to have led to some misapprehension of our views, and consequently we must regard it as unfortunately worded. Nevertheless, after full consideration, it has been concluded to leave it as it stands. What we intend to affirm by it is, that the privilege to testify in his own behalf is one the accused may waive [*sic?* claim] without justly subjecting himself to unfavorable comments; and that if he avails himself of it, and stops short of a full disclosure, no compulsory process can be made use of to compel him to testify further. It was not designed to be understood that, in the latter case, his failure to answer any proper question would not be the subject of comment and criticism by counsel; but, on the contrary, it was supposed that this was implied in the remark, that 'it must be left to the jury to give a statement which he declines to make a full one such weight as, under the circumstances, they think it entitled to.' All circumstances which it is proper for the jury to consider, it is proper for counsel to comment upon. . . . We not only approve of this ruling, but we should be at a loss for reasons which could furnish plausible support for any other."

On the inconsistency in permitting an inference for a particular refusal but prohibiting it for a general refusal, it is needless to comment. It is further inconsistent (*ante*, § 2272) to hold that no compulsion may be used and yet that an inference may be drawn. On the precise point in controversy, whether the privilege against compulsion may be claimed at any point, no detailed reasoning is vouchsafed by the learned author. His view has apparently not been accepted outside of a single jurisdiction.

The state of the law in the various jurisdictions is not easy to determine, partly because of the ambiguity of the various statutes and partly because of the differing interpretations of the same statutory words by different Courts. On the whole, the second form of rule above described seems to find the greatest support.

(3) The waiver involved in the accused's taking the stand permits the usual stages of inquiry to be pursued (*ante*, § 1866). He may therefore be

recalled for further cross-examination under the same conditions as the ordinary witness.[4]

(4) The waiver involved in the accused's taking the stand is *limited to the particular proceeding* in which he thus volunteers testimony. His voluntary testimony before a *coroner's inquest*, or a *grand jury*, or other preliminary and separate proceeding, *e. g.* in *bankruptcy*, is therefore not a waiver for the main trial;[5] nor is his testimony at a first trial a waiver for a *later trial*.[6] But it is sometimes held that a present waiver is *retroactive*, so that his vol-

[4] CANADA: 1859, Peters *v.* Irish, 4 All. N. Br. 326 (answer on cross-examination, held a waiver for the purpose of re-examination).

UNITED STATES: *Ala.* 1893, Thomas *v.* State, 100 Ala. 53, 14 So. 621 (recall allowed); 1894, Thompson *v.* State, 100 Ala. 70, 14 So. 878 (defendant may be recalled to identify him with a convicted person, the record being offered to discredit him); 1899, Dudley *v.* State, 121 Ala. 4, 25 So. 742 (defendant may be recalled to ask as to prior inconsistent statements); *Kan.* 1872, State *v.* Horne, 9 Kan. 123 (where the defendant had taken the stand, and was cross-examined and re-examined, a recall for the purpose of calling attention to a prior self-contradiction was held allowable); 1896, State *v.* Lewis, 56 Kan. 374, 43 Pac. 265 (defendant cannot be recalled in rebuttal; this is unsound); *Ky.* 1901, Abbott *v.* Com., — Ky. —, 62 S. W. 715 (recall for a prior self-contradiction, allowed); *La.* 1892, State *v.* Walsh, 44 La. An. 1122, 1133, 11 So. 811 (recall for a prior self-contradiction, allowed); 1899, State *v.* Favre, 51 La. An. 434, 25 So. 93 (similar); 1904, State *v.* Brown, 111 La. 696, 35 So. 818 (similar); *Mo.* 1894, State *v.* Kennade, 121 Mo. 405, 415, 26 S. W. 347 (recall for cross-examination, allowed); *Tex.* 1899, Clay *v.* State, 40 Tex. Cr. 593, 51 S. W. 370 (recall allowable as for ordinary witnesses); 1907, Hays *v.* State, 51 Tex. Cr. 111, 100 S. W. 926 (defendant may be recalled for questions preliminary to impeachment by self-contradiction); *Wis.* 1880, State *v.* Glass, 50 Wis. 218, 223, 6 N. W. 500 (recall allowable in the trial Court's discretion).

The practical fairness and utility of construing the waiver liberally against the accused is noted, from the standpoint of experience, in Mr. (Assistant District Attorney) Arthur Train's important book, "The Prisoner at the Bar" (1906), pp. 163, 164.

[5] *Fed.* 1920, Arndstein *v.* McCarthy, 254 U. S. 71, 41 Sup. 26 (on involuntary bankruptcy the debtor claimed privilege on special examination; subsequently he filed sworn schedules showing assets and liabilities; on examination "concerning these," he claimed privilege; held that the filing of the sworn schedules was not "a waiver of the right to stop short" whenever the answer might criminate him; unsound; the examination was virtually a cross-examination on the schedule's statements, and the debtor is virtually an accused; the result of such a ruling is to guarantee an opportunity to lie without cross-examination on the subject of the lie; which is just what the doctrine of waiver is aimed to prevent); *Cal.* 1900, Overend *v.* Superior Court, 131 Cal. 280, 63 Pac. 372 (testimony at a preliminary examination, held not a waiver for the trial); *Ill.* 1896, Samuel *v.* People, 164 Ill. 379, 45 N. E. 728 (the making of an affidavit, indorsed on the information, declaring the truth of the charge, and thus setting the prosecution in motion, is not a waiver); *Mich.* 1906, Re Mark, 146 Mich. 714, 110 N. W. 61 (testimony at an 'ex parte' complaint as witness, held not a waiver on subsequent trial of the accused before the committing magistrate); *N. Y.* 1915, People *v.* Cassidy, 213 N. Y. 288, 107 N. E. 713 (corrupt nomination to office; testimony with waiver at an information in Q. Co., then compulsory testimony at a trial in K. Co., the former held not a waiver of the privilege at the latter, though the same offense was involved); *Va.* 1873, Cullen *v.* Com., 24 Gratt. 624, 637 (voluntary disclosure as witness at an inquest without warning as to his privilege, held not to be a waiver sufficient on the trial for the homicide); 1881, Temple *v.* Com., 75 Va. 892, 896 (same ruling for one who had testified before the grand jury; but a majority of the Court declined to express an opinion); *contra:* 1922, Thaniel *v.* Com., — Va. —, 111 S. E. 259 (testimony before the coroner; cited more fully *supra*, n. 3; the Virginia rulings above cited are presumably now supplanted); *Wyo.* 1899, Miskimmins *v.* Shaver, 8 Wyo. 392, 58 Pac. 411 (compounding a felony; the witness' affidavit as informant in the requisition proceedings for the felon, held not a waiver of the privilege for the preliminary examination).

But of course his voluntary testimony on the former occasion may *itself be used* (subject to the rule for confessions, *ante*, § 852) on the subsequent occasion: cases cited *infra*, n. 8.

Compare the rule for using an inference from *former failure to testify* (*ante*, § 2270).

[6] 1896, Georgia R. & B. Co. *v.* Lybrend, 99 Ga. 421, 27 S. E. 794; 1899, Emery *v.* State, 101 Wis. 627, 78 N. W. 145. *Contra:* 1908, State *v.* Simmons, 78 Kan. 872, 98 Pac. 277; this is the sounder view.

untary testimony at the present trial permits inferences to be drawn from his refusal and claim of privilege at a former proceeding.[7]

(5) Where the witness waives by answering, his answers may be *afterwards used against him;*[8] because the privilege, in disappearing, disappears completely. Combining this with the principle of retroactivity (*supra*), it follows that in *bankruptcy proceedings* under U. S. Rev. St. 1878, § 860 (quoted *post*, § 2281; now repealed) and U. S. St. 1898, c. 541, § 7 (bankruptcy; quoted *post*, § 2281) providing that no testimony given in certain cases shall be used against the witness thereafter, the defendant would, by taking the stand, waive the privilege so as to permit the use against him (either by an independent offer of evidence or by his own cross-examination) of *former answers made by him* in a situation covered by either of those statutes.[9]

(6) The principle of waiver has been invoked by some Courts to admit facts obtained by the accused's *voluntary surrender of chattels* or *submission to bodily inspection* out of court (*ante*, §§ 2264, 2265).

(7) When the privilege is justly claimed, by either witness or accused, at such a stage or on such topics as to prevent substantially all cross-examination, the *direct testimony* may be *struck out;* for no testimony under any conditions can be received without liability to a substantially full cross-examination.[10]

§ 2277. **Waiver: Cross-Examination to Accused's Character in Impeachment, distinguished.** When an accused takes the stand, several other questions arise, as to the applicability of principles affecting witnesses in general, and they tend sometimes to be confused with the one just examined.

(1) *May the accused as a witness be impeached at all?* As an accused, his bad moral character is, by universal concession, not to be evidenced by the prosecution unless he first has attempted to show his good character (*ante*, § 55). But as a witness, his character may be impeached. In which status is he to be regarded? Is his status as an accused to displace his status as a witness? This question, already elsewhere examined on principle (*ante*, § 890),

[7] *Ante*, § 2273, note 8.

Of course, a waiver, by volunteering testimony, leaves him responsible for *perjury* in such testimony: 1899, State *v.* Turley, 153 Ind. 345, 55 N. E. 30 (examination before grand jury). Compare the cases cited *post*, § 2281, *ad finem*, and *ante*, § 2270.

[8] 1907, Weaver *v.* State, 83 Ark. 119, 102 S. W. 713 (affidavit for continuance); 1907, People *v.* Willard, 150 Cal. 543, 89 Pac. 124 (petition for 'habeas corpus,' and testimony of the defendant on the hearing, admitted); 1914, Bennett *v.* State, 68 Fla. 494, 67 So. 125 (testimony at the preliminary hearing); 1911, State *v.* Kimes, 152 Ia. 240, 132 N. W. 180; 1907, State *v.* Taylor, 202 Mo. 1, 100 S. W. 41; 1902, State *v.* Burrell, 27 Mont. 282, 70 Pac. 982; 1921, Roberts *v.* State, 759 Tex. Cr. 454, 231 S. W. 759 (voluntary testimony at a former trial of "another case," admitted against the accused on a trial for assault with intent to kill); and cases cited *ante*, §§ 850, 852 (confessions), and instances cited *ante*, § 278, n. 3.

[9] *Contra*, but unsound: 1908, Jacobs *v.* U. S., 1st C. C. A., 161 Fed. 694, 698 (cross-examination of a bankrupt, on a trial for fraudulent concealment, to his former answers on examination before the referee; held not allowable under St. 1898, c. 541, § 7); 1908, Alkon *v.* U. S., 1st C. C. A., 163 Fed. 810 (conspiracy by a bankrupt; cross-examination to his testimony before the referee, held not allowable, under Rev. St. § 860).

Compare Arndstein *v.* McCarthy, U. S., cited *supra*, n. 5.

[10] *Ante*, § 1391.

is universally answered in the negative. The accused, as a witness, is *open to impeachment like any other witness*.[1]

§ 2277. [1] The authorities are placed here, for convenience of comparison with those in § 2276. Where not otherwise noted, the impeachment was allowed. It is sometimes impossible to ascertain which principle the Court has in mind. Indeed, it is not inconceivable that the Court is sometimes not aware of the distinction. It is to be noted that, so far as impeachment through cross-examination is concerned, the present principle is in some States covered by the statutes noted *ante*, § 2276, making the accused examinable "like any other witness":
Federal: 1918, Williams *v.* U. S., 5th C. C. A., 254 Fed. 52 (defendant taking the stand; former convictions for felony shown); 1918, Gordon *v.* U. S., 5th C. C. A., 254 Fed. 53 (similar; "he may be interrogated as to all matters affecting his credibility");
Alabama: 1896, Buchanan *v.* State, 109 Ala. 7, 19 So. 410; 1899, Fields *v.* State, 121 Ala. 16, 25 So. 727 (general bad character);
Arkansas: 1905, Smith *v.* State, 74 Ark. 397, 85 S. W. 1123 ("subject to impeachment like any other witness"); 1905, Carothers *v.* State, 75 Ark. 574, 88 S. W. 585 (cross-examination to subornation of a witness); 1921, Powell *v.* State, 149 Ark. 311, 232 S. W. 429 (rape under age; cross-examination of accused to cohabitation with his wife before marriage, allowed);
California: 1868, Clark *v.* Reese, 35 Cal. 89, 96 (personal liberties with a woman); 1870, People *v.* Reinhart, 39 Cal. 449 (former conviction of sundry offences); 1877, People *v.* Chin Mook Sow, 51 Cal. 597, 601; 1881, People *v.* Johnson, 57 Cal. 571; 1881, People *v.* Beck, 58 Cal. 212 (character for veracity); 1888, People *v.* Meyer, 75 Cal. 383, 385, 17 Pac. 431 (prior conviction); 1896, People *v.* Hickman, 113 Cal. 86, 45 Pac. 175; 1896, People *v.* Mayes, 113 Cal. 618, 45 Pac. 861; 1897, People *v.* Arnold, 116 Cal. 682, 48 Pac. 803 (questions as to former conviction are allowable, and P. C. § 1093, dealt with *ante*, § 196, regulating the use of such evidence as affecting sentence, does not prevent its independent use in this connection); 1897, People *v.* Sears, 119 Cal. 267, 51 Pac. 325 (prior conviction); 1898, People *v.* Reed, — Cal. —, 52 Pac. 835 (character for truth); 1908, People *v.* Oliver, 7 Cal. App. 601, 95 Pac. 172 (the accused on cross-examination may be asked as to prior convictions for felony, in spite of P. C. § 1025, prohibiting allusion to a former conviction when used to affect the sentence under § 196 *ante;* re-affirming People *v.* Arnold, *supra*, and holding that the re-enactment of P. C. § 1093 in 1905 as P. C. § 1025 did not change the rule); 1911, People *v.* Walker, 15 Cal. App. 400, 114 Pac. 1009 (prior conviction of felony may be asked);
Colorado: 1882, McKeone *v.* People, 6 Colo. 346, 347 (prior self-contradiction); 1900, Herren *v.* People, 28 Colo. 33, 62 Pac. 833 (general character for credibility);
Connecticut: 1896, State *v.* Griswold, 67 Conn. 290, 34 Atl. 1047 (questions showing a prior self-contradiction);
Florida: (here the accused was not a competent witness until 1895; the following rulings hold him now open to impeachment); 1896, Lester *v.* State, 37 Fla. 382, 20 So. 232 (holding the amended act of 1895, now Rev. G. S. 1919, § 6080, constitutional as regards its title); 1899, Copeland *v.* State, 41 Fla. 320, 26 So. 319 (since St. 1895, c. 4400, there can be no sworn statement without cross-examination); 1899, Wallace *v.* State, 41 Fla. 547, 26 So. 713; 1900, Squires *v.* State, 42 Fla. 251, 27 So. 864; 1916, Herndon *v.* State, 72 Fla. 108, 72 So. 833 (larceny of cattle; cross-examination to a former conviction for larceny of a mule, admissible);
Georgia: (here the accused is still not competent and may merely make a "statement"; for the ways of impeaching this "statement," see the citations in Hackney *v.* State, cited *ante*, § 2276, and the cases cited *ante*, § 579);
Hawaii: 1919, Terr. *v.* Goo Wan Hoy, 24 Haw. 721, 729 (perjury);
Illinois: 1883, Chambers *v.* People, 105 Ill. 409, 413 (in general); 1899, Halloway *v.* People, 181 Ill. 544, 54 N. E. 1030 (cross-examination to conduct);
Indiana: 1874, Fletcher *v.* State, 49 Ind. 124, 130 (general character); 1875, Mershon *v.* State, 51 Ind. 14, 21; 1879, State *v.* Bloom, 68 Ind. 54, *semble;* State *v.* Beal, 68 Ind. 346; 1884, South Bend *v.* Hardy, 98 Ind. 579; 1885, Boyle *v.* State, 105 Ind. 469, 475, 5 N. E. 203 (cross-examination); 1889, Keyes *v.* State, 122 Ind. 527, 531, 23 N. E. 1097 (same); 1897, Vancleave *v.* State, 150 Ind. 273, 275, 49 N. E. 1060 (same);
Indian Terr. 1906, McCoy *v.* U. S., 6 Ind. Terr. 415, 98 S. W. 144 (a defendant "is subjected to the same rules governing as to [*sic?*] other witnesses");
Iowa: 1880, State *v.* Red, 53 Ia. 69, 70, 4 N. W. 831 (in general); 1884, State *v.* Kirkpatrick, 63 Ia. 554, 559, 19 N. W. 660; 1886, State *v.* Teeter, 69 Ia. 717, 719, 27 N. W. 485; 1890, State *v.* O'Brien, 81 Ia. 93, 46 N. W. 861; 1911, State *v.* Bradenburger, 151 Ia. 197, 130 N. W. 1065 (cross-examination to past marital misconduct, allowed);
Kansas: 1886, State *v.* Pfefferle, 36 Kan. 90, 92, 12 Pac. 406 (he may be "contradicted, discredited, and impeached"); 1891, State *v.* Probasco, 46 Kan. 310, 311, 26 Pac. 749 (cross-examination to character);
Kentucky: (in this State the precedents as to cross-examination to misconduct are much entangled, as noted, *ante*, § 987, but the pres-

In applying this principle, it will be seen that Courts might employ a form of words similar to those employed in predicating a waiver of his privilege

ent principle is unquestioned); 1887, McDonald *v.* Com., 86 Ky. 13, 4 S. W. 687; 1888, Lockard *v.* Com., 87 Ky. 201, 204, 8 S. W. 266; 1889, Pace *v.* Com., 89 Ky. 204, 209, 12 S. W. 271; 1892, Burdette *v.* Com., 93 Ky. 77, 18 S. W. 1011; 1895, Saylor *v.* Com., 97 Ky. 184, 30 S. W. 390; 1895, Montgomery *v.* Com., — Ky. —, 30 S. W. 602; 1895, Barton *v.* Com., — Ky. —, 32 S. W. 172; 1897, Trusty *v.* Com., — Ky. —, 41 S. W. 766; 1898, Justice *v.* Com., — Ky. —, 46 S. W. 499; 1899, Baker *v.* Com., 106 Ky. 212, 50 S. W. 54; 1906, Henderson *v.* Com., 122 Ky. 296, 91 S. W. 1141 (cross-examination to conviction for felony, allowed); 1910, Smith *v.* Com., 140 Ky. 599, 131 S. W. 499;

Louisiana: 1893, State *v.* Taylor, 45 La. An. 605, 607, 12 So. 927; State *v.* Murphy, 45 La. An. 959, 13 So. 229; 1896, State *v.* Southern, 48 La. An. 628, 19 So. 668 (cross-examination to character);

Maine: 1876, State *v.* Watson, 65 Me. 79 (prior conviction); 1875, State *v.* Carson, 66 Me. 116, 117 (cross-examination to character); 1881, State *v.* Witham, 72 Me. 531, 534 (except as protected by privilege); 1892, State *v.* Farmer, 84 Me. 436, 24 Atl. 985 (record of conviction);

Maryland: 1906, Lawrence *v.* State, 103 Md. 17, 63 Atl. 96 (rule of Guy *v.* State, *ante*, § 2276, applied);

Massachusetts: 1859, Holbrook *v.* Dow, 12 Gray 357, 359 (the accused testifies "subject to all the responsibilities which the law attaches"; here, cross-examination); 1867, Com. *v.* Brennan, 97 Mass. 587; 1868, Com. *v.* Gorham, 99 Mass. 421; 1870, Root *v.* Hamilton, 105 Mass. 23;

Michigan: 1895, People *v.* Sutherland, 104 Mich. 468, 62 N. W. 566 (cross-examination to misconduct); 1897, People *v.* Parmelee, 112 Mich. 291, 70 N. W. 577; 1897, Georgia *v.* Bond, 114 Mich. 196, 72 N. W. 232 (cross-examination to character); 1906, People *v.* DeCamp, 146 Mich. 533, 109 N. W. 1047 (record of conviction);

Minnesota: 1888, State *v.* Curtis, 39 Minn. 357, 359, 40 N. W 263 (cross-examination to misconduct); 1890, State *v.* Sauer, 42 Minn. 259, 44 N. W. 115;

Mississippi: 1905, Williams *v.* State, 87 Miss. 373, 39 So. 1006 (cross-examination to prior conviction);

Missouri: (in this State it may be noted that, by another principle, *ante*, § 1270, proof of conviction of crime by cross-examination was forbidden until the statute of 1895); 1878, State *v.* Clinton, 67 Mo. 380, 390 (construing St. 1877, p. 356, making defendants in criminal cases competent; "he may be impeached as any other witness"; here, by general character); State *v.* Cox, 67 Mo. 392 (general character); 1878, State *v.* Testerman, 68 Mo. 408, 414 (prior self-contradiction); State *v.* Rugan, 68 Mo. 215 (misconduct and false statements); 1880, State *v.* Cooper, 71 Mo. 436, 442; 1883, State *v.* Owen, 78 Mo. 367, 377; 1886, State *v.* Palmer, 88 Mo. 568, 571; 1886, State *v.* Bulla, 89 Mo. 595, 598, 1 S. W. 764; 1886, State *v.* Rider, 90 Mo. 54, 63, 1 S. W. 825; 95 Mo. 474, 486, 8 S. W. 723; 1887, State *v.* Beaucleigh, 92 Mo. 490, 495, 4 S. W. 666; 1887, State *v.* Brooks, 92 Mo. 542, 581, 5 S. W. 257, 330; 1888, State *v.* West, 95 Mo. 139, 143, 8 S. W. 354; 1889, State *v.* Taylor, 98 Mo. 240, 244, 11 S. W. 570 ("in the same manner as any other witness"); 1894, State *v.* Smith, 125 Mo. 2, 6, 28 S. W. 181; St. 1895, p. 284, Rev. St. 1899, § 4680, R. S. 1909, § 5242, R. S. 1919, § 5439 (quoted *ante*, §§ 488, 987; allows a witness' conviction of crime to be proved by cross-examination); 1897, State *v.* Dyer, 139 Mo. 199, 40 S. W. 768; 1903, State *v.* Blitz, 171 Mo. 530, 71 S. W. 1027 (defendant may be cross-examined to prior convictions); 1903, State *v.* Thornhill, 174 Mo. 364, 74 S. W. 832 (similar; compare the rule of §§ 987, 1270, *ante*); 1905, State *v.* Spivey, 191 Mo. 87, 90 S. W. 81 (similar; but the question should ask directly for the conviction, and not merely as to being in the penitentiary, etc.); 1905, State *v.* Woodward, 191 Mo. 617, 90 S. W. 90 (compare the rule of § 1270, *ante;* general moral character may be used); 1906, State *v.* Beckner, 194 Mo. 281, 91 S. W. 892 (general moral character may be used); 1907, State *v.* Barnett, 203 Mo. 640, 102 S. W. 506 (State *v.* Beckner followed); 1917, State *v.* Willard, — Mo. —, 192 S. W. 437 (murder; the statute's rule allowing proof of conviction "is, to an extent, the price which the witness pays for being allowed to testify at all after conviction for a heinous offence"; this is rather inappropriate language in a Supreme judicial court; the trial is not a game between participants with handicaps; the State is interested in obtaining reliable testimony and makes rules for that purpose); 1917, State *v.* Ivy, — Mo. —, 192 S. W. 733 (rape under age; "The decisions of this Court have many times construed R. S. 1909, § 5242, and have evolved *pretty definitely, among others*, these propositions"; i. is needless to chronicle the propositions here, since the opinion concedes that they figure only "among others" not specified); 1921, State *v.* Howe, 287 Mo. 1, 228 S. W. 477 (under Mo. R. S. 1909, § 5242, a defendant taking the stand may nevertheless be cross-examined to former convictions, to affect his credibility, pursuant to *ibid.* § 6383); 1921, State *v.* Stokes, 288 Mo. 539, 232 S. W. 107 (seduction; cross-examination of accused to former convictions, held

(*ante*, § 2276). The difference in bearing is nevertheless obvious. The question whether the accused may be impeached as a witness involves all forms

proper under St. 1895, Rev. St. 1919, § 5439); the foregoing rulings should be compared with those cited *ante*, § 987 (impeachment of witness' character); and § 2276 (waiver of privilege);
Montana: 1900, State *v.* Schnepel, 23 Mont. 523, 59 Pac. 927;
Nebraska: 1905, Nickolizack *v.* State, 75 Nebr. 27, 105 N. W. 895 (rape under age; cross-examination to improper conduct with another child excluded; the opinion shows no clear perception of the questions involved);
Nevada: 1874, State *v.* Cohn, 9 Nev. 179, 189 (he is to be "treated as an ordinary witness"); 1876, State *v.* Huff, 11 Nev. 17, 27 (he is subject to "the same cross-examination that would be proper in the case of any other witness"); 1905, State *v.* Lawrence, 28 Nev. 440, 82 Pac. 614 (cross-examination to convictions of felony, allowed; "the defendant was in a double capacity, that of defendant and that of witness"; State *v.* Cohn not cited);
New Mexico: 1894, Terr. *v.* De Gutman, 8 N. M. 92, 42 Pac. 68;
New York: (the principle is in this State unquestioned; most of the cases declaring it have been collected *ante*, §§ 2276 and 987); 1897, People *v.* Conroy, 153 N. Y. 174, 47 N. E. 258 ("specific immoral acts" may be inquired of on cross-examination);
North Carolina: 1881, State *v.* Efler, 85 N. C. 585, 587; 1883, State *v.* Lawhorn, 88 N. C. 634, 637; 1897, State *v.* Traylor, 121 N. C. 674, 28 S. E. 493; 1918, State *v.* Atwood, 176 N. C. 704, 97 S. E. 12 (murder; the accused having testified and offered his good witness-character, held that in rebuttal the prosecution could dispute his character generally, including party-character; "when the defendant goes upon the stand, . . . logically and necessarily he puts his character in all capacities . . . in issue");
North Dakota: 1890, Terr. *v.* O'Hare, 1 N. D. 30, 44, 44 N. W. 1003 (cross-examination to character); 1899, State *v.* Rozum, 8 N. D. 548, 80 N. W. 480 (cross-examination to collateral offences);
Ohio: 1881, Hanoff *v.* State, 37 Oh. St. 178 (cross-examination to conduct);
Oklahoma: 1898, Asher *v.* Terr., 7 Okl. 188, 54 Pac. 445 (similar); 1899, Hyde *v.* Terr., 8 Okl. 69, 56 Pac. 851 (cross-examination to character); 1907, Harrold *v.* Terr., 18 Okl. 395, 89 Pac. 202 (he is "subject to be cross-examined the same as any other witness"); 1911, Cowan *v.* State, 5 Okl. Cr. 313, 114 Pac. 627 (cross-examination to prior conviction for felony or offence of moral turpitude, allowable);
Oregon: 1883, State *v.* Abrams, 11 Or. 169, 173, 8 Pac. 327 (prior self-contradiction); 1886, State *v.* Saunders, 14 Or. 300, 309, 313, 12 Pac. 441 (excluding cross-examination to past misconduct not involved in the issue, probably on the principle of § 2276, *ante*); 1898, State *v.* Bartmess, 33 Or. 110, 54 Pac. 167 (cross-examination as to prior inconsistent statements, and outside testimony thereto, allowable, following State *v.* Abrams); 1903, State *v.* Miller, 43 Or. 325, 74 Pac. 658 (the cross-examination is restricted to "matters concerning which he has testified in the first instance"); 1910, State *v.* Lem Woon, 57 Or. 482, 107 Pac. 974 (State *v.* Bartmess followed); 1921, State *v.* Won Wen Tueng, 99 Or. 95, 195 Pac. 349 (murder; rule applied on the facts); 1921, State *v.* Rathie, 101 Or. 339, 368, 199 Pac. 169 (cross-examination to former conviction of crime, allowed);
Rhode Island: 1885, State *v.* McGuire, 15 R. I. 23, 22 Atl. 1118 (the accused is "liable to impeachment like any other witness");
South Carolina: 1886, State *v.* Robertson, 26 S. C. 117, 120, 1 S. E. 443 (character for truth); 1890, State *v.* Wyse, 33 S. C. 582, 591, 12 S. E. 556 (contradiction); 1890, State *v.* Merriman, 34 S. C. 16, 39, 12 S. E. 619 (cross-examination to character); 1892, State *v.* Turner, 36 S. C. 534, 543, 15 S. E. 602 (similar); 1900, State *v.* Mitchell, 56 S. C. 524, 35 S. E. 210 (liquor offence; questions as to former indictments and fines for liquor offences, allowed); 1914, State *v.* Knox, 98 S. C. 114, 82 S. E. 278 (battery; cross-examination to other quarrels not connected with the charge, excluded);
Tennessee: 1887, Peck *v.* State, 86 Tenn. 259, 263, 6 S. W. 389; 1892, Hill *v.* State, 91 Tenn. 521, 524, 19 S. W. 674 (the accused is "subject to impeachment as any other witness would have been");
Texas: 1892, Bell *v.* State, 31 Tex. Cr. 276, 20 S. W. 549 (in general); 1896, Morales *v.* State, 36 Tex. Cr. 234, 245, 36 S. W. 435, 846 (but the statutory restrictions as to using his confessions, *ante*, § 851, still apply to questions about them on cross-examination; and thus a cross-examination to the accused's admission or self-contradictions is practically prevented); 1898, Holley *v.* State, 39 Tex. Cr. 301, 46 S. W. 39; 1900, Walton *v.* State, 41 Tex. Cr. 454, 55 S. W. 566 (like Morales *v.* State); 1900, Dickey *v.* State, — Tex. Cr. —, 56 S. W. 627 (cross-examination to character); 1901, Wooley *v.* State, — Tex. Cr. —, 64 S. W. 1054 (allowing cross-examination to self-contradictions);
Utah: 1894, People *v.* Larsen, 10 Utah 143, 37 Pac. 258 (cross-examination to character); 1917, State *v.* Williams, 49 Utah 320, 163 Pac. 1104 (assault);
Wisconsin: 1881, Yanke *v.* State, 51 Wis. 464, 467, 8 N. W. 276 (the accused subjects himself "to the same rules of cross-examination applicable to other witnesses").

of proof and all kinds of facts, *i. e.* proof by other witnesses, proof of general character, conviction of crime, and the like; while the question of privilege involves merely an inquiry of the accused himself as to a criminal act. Upon such an inquiry there are involved both questions at once, and a settlement of the question of privilege will usually involve incidentally the settlement of the other question. But upon all other inquiries the question of privilege is not involved, and the question of impeachment in general is alone involved and settled.[2]

(2) By what *kind of character* may the accused be impeached? As a witness, only by his *character for veracity*, in most jurisdictions, but in others by his *general bad character;* as an accused, not at all, until he has himself attempted to prove good character for the trait relevant in the charge, and then the prosecution may deny this in rebuttal. As a witness, then, he is subject to proof which would not be receivable against him as an accused except on certain conditions. The rule for witnesses' character has been considered *ante*, § 923; its application to the accused as a witness is dealt with *ante*, §§ 61, 890, 924. Many of the rulings cited in §§ 2276 and 2277 are inextricably concerned also with these questions.

(3) As an accused, the party may offer his *good character in support*, but this character must be for the trait relevant to the charge (*ante*, §§ 56, 59). As a witness, however, the party may not offer his good character *until impeachment* (*ante*, § 1104), and then (in most jurisdictions) only his character for veracity. Thus, a further practical distinction may arise, in consequence of his double status (*ante*, § 61).

(4) As a witness, the accused is subject to cross-examination to *specific acts of misconduct impeaching his character for veracity*. The distinction between the propriety of such inquiries and the privilege not to answer them has been already considered (*ante*, §§ 2268, 2276).[3] It may also here be noted that in some jurisdictions[4] a question has occasionally been raised whether, for an accused, there should be stricter limits to this cross-examination than for an ordinary witness. This question has already been considered in connection with the general principle as to cross-examination to misconduct (*ante*, §§ 981–987); but some of the rulings already cited in this section (§ 2277) and in § 2276 do not always keep in mind the distinction between those three principles, namely, impeaching an accused witness in general (*supra*, par. 1), impeaching him by cross-examination to misconduct (*ante*, § 987), and privileging him not to answer (*ante*, § 2276).

(5) As a witness, the accused may be impeached by proof of *conviction of another crime* (*ante*, § 985). But whether this proof may be made on his own cross-examination, without producing a copy of the record of conviction, involves another principle (*ante*, § 1270).

[2] In People *v.* Tice, N. Y., cited *ante*, § 2276, the distinction is brought out.

[3] See also the opinions in South Bend *v.* Hardy, Ind., cited *ante*, § 2270, and in the Brown and Brandon cases, N. Y., cited *ante*, § 2276.

[4] Notably in Kentucky and New York.

§ 2278. **Same: Other Principles affecting the Accused's Cross-Examination and Impeachment, distinguished (Cross-Examining to One's Own Case, etc.).** (1) By a rule intended originally to prescribe merely the order of presenting evidence, it is in a majority of jurisdictions not permitted to put in one's own case on the cross-examination of the opponent's witnesses (*ante*, §§ 1885–1891), or, in the usual phrase, the *cross-examination must be confined*, in its material, to the *subject of the direct examination*. This rule, in its effect upon the examination of the accused, is palpably unfair to the prosecution; for, since the prosecution would presumably have neither the right nor the desire to recall the accused as its own witness, that which was intended merely as a prohibition against obtaining certain facts on his cross-examination becomes in effect a prohibition against obtaining them from him at all. The poor policy and faulty reasoning of such a result has already been examined (*ante*, § 1887).

It is here, however, worth while to note that this rule, as enshrined in many States by statute, is by some Courts interpreted as if it were a rule affecting the *waiver of the privilege* against self-crimination.[1] The two have of course no connection; although, if the former rule forbids questions which go beyond the subject of the direct examination, the waiver is also incidentally thus limited, for the simple reason that there are no questions for the accused to answer, and the result is the same. But the practical error of treating the two questions as one (an error not uncommon under such statutes) is seen in the case of questions directed merely to facts impeaching character. Here it is plain that the effect of the first rule is not to exclude such inquiries (*ante*, § 1891); for there would otherwise never be any opportunity to ask them. But this leaves the question of privilege and its waiver still undetermined, and resort must be had for that purpose to the appropriate principle (*ante*, § 2276). In a few jurisdictions, however, this distinction seems irrevocably buried in the decisions interpreting the statute.[2]

(2) The accused as a witness may be discredited by the biassed position which he occupies as an *interested party*, *i. e.* the jury may consider that circumstance in weighing his credit (*ante*, § 968). This is in no way connected with the doctrine of waiver; yet the possibilities of misunderstanding these various principles seem unlimited, and this sort of confusion has sometimes occurred in rulings dealing with the accused as an impeachable witness (*ante*, § 2277, par. 1).

§ 2279. **Expurgation of Criminality**: (*a*) **by Conviction**; (*b*) **by Acquittal**; (*c*) **by Lapse of Time.** The law is concerned with its own penalties only. Legal criminality consists in liability to the law's punishment. When that liability is removed, criminality ceases; and with the criminality the privilege.

[r] § 2278. [1] This has been noticed in dealing with the waiver, in § 2276. The distinction is pointed out by McKee, J., diss., in People *v.* O'Brien, Cal., cited *ante*, § 2276.

[2] The rulings in §§ 1890 and 2276 should be compared. In some decisions it is difficult to tell which rule is being applied, and therefore to classify them.

Of the various modes in which that liability may cease, the following enumeration seems to be complete: *Conviction* and the suffering of the punishment; *Acquittal*, or other former jeopardy; *Abolition of the general crime*, subsequent to its commission (provided the rule of criminal law thereby exonerates prior offenders); *Lapse of time* barring prosecution of the particular offence; *Executive pardon* for the particular offender; *Statutory amnesty*, before or after the act, for the particular criminal act or for the offender. Of these various modes, however, not all seem to have called for judicial interpretation as to their effect.

(*a*) A *conviction* for the crime discharges all liability to the State and removes the possibility of further penalty; hence an act for which the person has been convicted no longer tends to criminate, in the sense of the privilege. This is universally conceded; and the only question can be whether there is a privilege against disclosing the disgrace or infamy of the conviction (*ante*, §§ 984, 2255).

(*b*) An *acquittal* conclusively negatives criminality; no privilege can therefore be based upon the charge of crime.[1]

(*c*) A crime erased by *lapse of time* exists no longer. There is therefore no criminal fact to be privileged from disclosure. A legal limitation of the time of prosecution is in effect an expurgation of the crime; and after the lapse of the time fixed by law the privilege ceases.[2] Moreover, since the prohibition of inferences from a claim of privilege rests merely on the ground that the privilege would otherwise be evaded (*ante*, § 2272), it follows that a person's claim of privilege on a prior occasion may be used [3] to impeach him as an *admission* or self-contradiction, in a trial occurring after the statutory period has elapsed.[4] The only question can be whether the claimant or the

§ 2279. [1] 1898, Holt *v.* State, Tex., cited *post*, § 2280.

It would seem that the *nolle pros.* of a co-defendant, entered in order to secure his testimony for the State, is equivalent to an acquittal: 1886, Ex parte Stice, 70 Cal. 51, 55, 11 Pac. 459 (applying P. C. §§ 1099–1101).

Contra: 1912, Scribner *v.* State, 9 Okl. 465, 132 Pac. 933; 1913, Faucett *v.* State, — Okl. —, 134 Pac. 839.

The *erroneous compulsion* of an incriminating answer, by a *justice of the peace* or a *coroner*, does not have the effect of an acquittal, so as to be pleaded in immunity on the trial before a jury; Scribner *v.* State, Faucett *v.* State, Okl., *supra*.

[2] England: 1789, Williams *v.* Farrington, 3 Brown Ch. C. 38, 40 (privilege ceases, so far as the time for recovering penalties has elapsed); 1828, Roberts *v.* Allatt, M. & M. 192 (privilege denied, where the statutory period had expired without proceedings begun); 1828, Trinity House *v.* Burge, 3 Sim. 411 (and this is equally so, where the period ends after plea filed but before the hearing); 1832, Davis *v.* Reid, 5 Sim. 443, 446.

United States: *Ala.* 1876, Calhoun *v.* Thompson, 56 Ala. 166, 170 (aiding a criminal to escape); *Conn.* 1809, U. S. *v.* Smith, 4 Day 121, 123 (under a statute limiting prosecutions to a period of two years, except the person flee from justice, the witness "is 'prima facie' protected from prosecution by the statute"; the witness' plea that he fled does not preserve his privilege, but the prosecution will thereafter be barred); 1831, Skinner *v.* Judson, 8 Conn. 528, 535 (penalty for fraudulent conveyance, barred by statute; explaining Northrup *v.* Hatch, 6 Conn. 361); 1859, Norfolk *v.* Gaylord, 28 Conn. 309, 314 (bastardy; same ruling); *Ga.* 1849, Marshall *v.* Riley, 7 Ga. 367, 372 (penalty for unlicensed practice of medicine; principle recognized); *Ill.* 1851, Weldon *v.* Burch, 12 Ill. 374 (riot and burglary; principle applied); *Ia.* 1888, Mahanke *v.* Cleland, 76 Ia. 401, 404, 41 N.W. 53 (general principle affirmed); *N. Y.* 1845, Close *v.* Olney, 1 Denio 319, 323 (usury; principle applied).

[3] On the general principles of §§ 289, 1042, 1060, *ante*.

[4] 1894, Childs *v.* Merrill, 66 Vt. 302, 306, 29 Atl. 532 (refusal to answer in a prior criminal proceeding, admitted in a civil suit after the

opponent of the privilege has the burden of proof with respect to the usual condition upon which the running of the statutory period depends, namely, that no prosecution has been begun within the time; and this burden is held to be upon the opponent.[5]

§ 2280. **Expurgation of Criminality; (*d*) by Executive Pardon.** It seems always to have been conceded that an *Executive pardon* for a past offence, by prohibiting and preventing all punishment for the offence, nullifies the privilege. Criminality, in the sense of the law, is liability to legal punishment; and if the punishment is abrogated, the criminality ceases. In the reason of the thing, from every point of view, there can be no doubt of the correctness of this conclusion. Nevertheless, in applying the principle, certain discriminations become necessary.

(1) The pardon of the Executive, under the Constitution of the Nation, may be no protection against duplicate *penal proceedings by some other branch of the government;* does the privilege then continue?[1] This ought to depend upon whether the liability has been practically, even though not technically, taken away:

1861, COCKBURN, C. J., in *R.* v. *Boyes*, 1 B. & S. 311, 325 (the witness was pardoned for bribery in election; by statute the witness was still liable to impeachment by the House of Commons): "It was contended that a bare possibility of legal peril was sufficient to entitle a witness to protect. . . . [But] we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of the law in the ordinary course of things, — not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding 'inter alios,' protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the courts of justice. Now in the present case no one seriously supposes that the witness runs the slightest risk of an impeachment by the House of Commons. . . . It was therefore the duty of the presiding judge to compel him to answer."

(2) The pardon may not protect against *prosecution by another sovereignty* for the same offence. Here, however, the act is in truth a different offence

limitation-period for the crime had elapsed).

The same principle applies to a *prior acquittal:* 1898, Holt *v.* State, 39 Tex. Cr. 282, 45 S. W. 1016, 46 S.W. 829 (a witness previously acquitted of the present charge, compelled to answer that he had claimed his privilege on that trial).

[5] 1893, Southern R. N. Co. *v.* Russell, 91 Ga. 808, 18 S. E. 40; 1896, Lamson *v.* Boyden, 160 Ill. 613, 43 N. E. 781; 1846, Bank *v.* Henry, 2 Denio N. Y. 155, 160; 1847, Bank *v.* Henry, 1 N. Y. 83, 87, *semble.*

§ 2280. [1] The same question may arise with reference to the effect of a pardon upon private suits for penalties: *Eng.* 1870, R. *v.* Kinglake, 22 L. T. R. N. S. 335 (bribery being by statute subject to prosecution and also to an action for penalties, Cockburn, C. J., and Blackburn, J., doubted whether any privilege remained after the granting of a pardon and entering of a 'nolle pros.' by the Government); *U. S.* 1846, Bank *v.* Salina, 2 Denio N. Y. 155, 159 (usury penalties; cited *post*, § 2282).

under a different system of laws, — a foreign crime; and this question has been elsewhere examined (*ante*, § 2258).

(3) Is a *prosecuting officer's promise of immunity* equivalent to a pardon? Technically, and sometimes practically, it is not; morally, it is. If, therefore, the promise is so recorded as to give genuine immunity, the privilege has ceased.[2]

(4) Has a *judge* power to order a release from prosecution amounting to immunity? Assuredly, for the effect of a 'nolle prosequi' is on principle due to the judge's sanction.

(5) A pardon abrogates all legal consequences of the crime, but it cannot abrogate the social consequences, the *disgrace*. There may therefore remain, uninfringed, the independent privilege against disclosure of facts of disgrace or infamy.[3] But this privilege is not protected by the Constitution, never applied to any but "collateral" inquiries, and is to-day in many jurisdictions fallen into desuetude (*ante*, §§ 984, 987, 2255).

(6) Must a pardon be *accepted*, to be effective? No, on any sound theory of State power and function.[4]

§ 2281. **Expurgation of Criminality**: (*e*) **by Legislative Amnesty, Indemnity, or Immunity**; (1) **Statutes granting Immunity from Prosecution for the Offence.** If a statute passed on July 1 were to abolish the crime of liquor-

[2] 1914, Ex parte Muncy, 72 Tex. Cr. 541, 163 S. W. 29 (the relator, a boy of 12, was summoned before the grand jury inquiring into the death of the relator's father, who had been murdered, either by the boy or by his mother; the boy claimed privilege; the prosecuting attorney promised immunity, which promise the trial judge by order affirmed; the boy accepted and testified, incriminating his mother; later, on habeas corpus by the mother, the boy again refused, on the ground that he had revoked his acceptance of immunity; held (1) that the judge and prosecuting attorney had authority to guarantee immunity; (2) that the relator's later retraction was immaterial, because his original consent was immaterial; Davidson, J., diss.; elaborate opinions, with full examination of Texas precedents; the majority opinion of Harper, J., seems conclusive); 1922, Ex parte Copeland, — Tex. Cr. —, 240 S. W. 314 (Ku Klux inquiry; the district attorney tendered an order approved by the judge extending immunity, after the witness had claimed privilege; the witness refused to accept and continued to decline to answer; held that the offer of immunity was effective, and that the privilege ceased; valuable opinion by Lattimore, J.). *Contra:* 1896, Ex parte Irvine, 74 Fed. 945, 964 (because the promise merely gives an "equitable right" to future immunity, and is both conditional and uncertain); 1881, Temple *v.* Com., 75 Va. 892, 897 (a promise by the State's attorney not to prosecute is not sufficient). For the learning on this subject, see the Whiskey Cases, 99 U. S. 594 (1878).

For a *nolle pros.*, as equivalent to an *acquittal*, see *ante*, § 2279.

But the party's *failure to fulfil* the condition on which the promise is made prevents the accrual of immunity: 1910, U. S. *v.* Grant, 18 P. I. 122, 168.

[3] 1861, R. *v.* Boyes, 1 B. & S. 311, 321.

Distinguish, moreover, the question whether a *pardoned crime*, being no longer a crime, is even relevant to discredit a witness: 1679, Reading's Trial, 7 How. St. Tr. 259, 296 (Oates, for the prosecution, was not allowed to be asked about a crime for which he had been pardoned, because the object was merely to discredit him as a witness, and a pardoned crime was not relevant for that purpose); and cases cited *ante*, § 985.

[4] *Contra:* 1915, Burdick *v.* U. S., 236 U. S. 79, 35 Sup. 267 (the appellant, a newspaper editor, was examined before a grand jury inquiring into alleged customs frauds; he claimed the privilege, was remanded, and was later re-called and tendered a Federal pardon for any offence committed in obtaining the information about which he had been asked; he refused the pardon, declined to answer, and sued out a writ of error for his commitment; held, following U. S. *v.* Wilson, 7 Pet. 150, that a pardon to be effective must be accepted, and that the offer of an unaccepted pardon did not overcome the privilege; enough here to note that all this learning about pardons is now quaint and anachronistic, judged by the standard of modern criminal philosophy).

selling or bribery or gambling, and declare that on and after the ensuing January 1 no person doing any of these things should be liable to punishment by the law, it is plain that a person doing any of them on January 1 could plead no privilege, although the doer of them on December 31 would retain his privilege. And yet the act itself, and the morality of it, would be identical on December 31 and January 1. Penality is the creation of the law, not an inherent attribute in the act itself. It may therefore be taken away by the law. The treasons and the criminal libels which filled English prisons two centuries ago are now non-existent, though the same acts are done as of yore. The privilege protects only against legal consequences of conduct; hence, the legal consequences lacking, the privilege does not exist for such conduct. Furthermore, legislation may remove criminality for a class of persons or an individual, as well as for a generic act. Finally, the removal of criminality may be conditioned on the happening of an event; and this event may equally be the doing of an act by the individual himself who is to obtain a benefit thereby.

1. A legislative provision, therefore, providing *amnesty for an individual offender who shall disclose the facts of the offence* upon inquiry is effective to remove the criminality of the offence, and the privilege thereby ceases as to him:

1853, SCOTT, J., in *State* v. *Quarles*, 13 Ark. 307, 310: "When this rule of the common law should have been so changed by legislative enactment, as to make unnecessary any appeal whatever on the part of the witness to his constitutional guarantee — as by regulations securing to him otherwise and effectually all that was guaranteed by the Bill of Rights — he could have no greater reason to complain than he would have had, had the law remained unchanged and under its operation he had never had any occasion to take shelter under the guarantee. And in such case, there would be no more ground upon which to suppose a want of competent power in the Legislature to make such regulations than there would be in case that body were to repeal the statute of gaming, and by this means deprive the gambler of his constitutional privilege to be accused and tried for a criminal offence, which has no longer existence. In either case, all that could be said would be, as to the gambler, that the Courts could not indulge him in the luxury of a constitutional accusation and trial, wherein he could display his skill in breaking through the meshes of the law, for the reason that he had committed no offence then known to the law. And as to the witness, that he could not be indulged with the arm of the law to prevent his being ravished of matters tending to a crimination of himself, for the reason that nothing that could be wormed out of him could possibly have that effect. In a word, in neither case, there being no invasion of right or privilege, could there be any place for vindication; and there being no encroachment upon any right retained by the citizen, and no pretence of any transgression of any of the higher powers delegated to the Legislature, such acts would be clearly without the pale of prohibition and within the scope of authority."

1878, SMITH, J., in *State* v. *Nowell*, 58 N. H. 314: "The legal protection of the witness against prosecution for crime disclosed by him is in law equivalent to his legal innocence of the crime disclosed. . . . The witness, regarded in law as innocent, if prosecuted for a crime which he has been compelled by statute to disclose, will stand as well as other innocent persons; and it was not the design of the common-law maxim, affirmed by the Bill of Rights, that he should stand any better. . . . He could plead and show that he had

disclosed the same offence upon a lawful accusation against his principal, and thus make a perfect answer in bar or abatement of the prosecution against himself."

1894, HARRISON, J., in *Ex parte Cohen*, 104 Cal. 524, 530, 38 Pac. 364: "Any evidence that he may give under such a statutory direction will not be 'against himself,' for the reason that by the very act of giving evidence he becomes exempted from any prosecution or punishment for the offense respecting which his evidence is given. In such a case he is not compelled to give evidence which may be used against himself in any criminal case, for the reason that the Legislature has declared that there can be no criminal case against him which the evidence which he gives may tend to establish."

Such statutes, therefore, have for two centuries been the expedients resorted to for the investigation of many offences, chiefly those whose proof and punishment were otherwise practically impossible because of the criminal implication in the offence itself of all who could bear useful testimony.

Though doubtless the expedient was earlier employed,[1] the first notable instance (in 1725) was that of Lord Chancellor Macclesfield, whose traffic in the sale of offices and appointments was beyond the endurance even of a generation in which the spoils system and political venality were accepted as matters of course.[2] The next instance of note was the parliamentary investigation, in 1742, into the practices of Lord Orford (Robert Walpole), whose long prime-ministry was maintained by his cynical and notorious methods of political corruption.[3] The expediency and practical utility of this mode of obtaining evidence, may, as a measure of legislation, be open to argument.[4] But the tradition of it as a lawful method of annulling the privilege against self-crimination is unquestioned in English history.

The technical term originally in vogue in England for this removal of penal consequences was "indemnity." But the term "immunity," since about 1905, has become the customary term in the United States. The term is unfortunate, in the following respects: (a) "Immunity" signifies the beneficial *result to the offender;* "amnesty" signifies the sacrificial *act on the part*

§ 2281. [1] 1723, Bishop Atterbury's Trial, 16 How. St. Tr. 604 (here the witness was not summoned, because he was jointly concerned in the very treasons charged against the defendant and thus would have criminated himself, while the Bill acquitting him of any future prosecution for those treasons had passed the House but not received the royal assent; many lords dissented).

[2] 1725, Lord Chancellor Macclesfield's Trial, 16 How. St. Tr. 921, 1147 (illegal traffic in public offices; an act was passed to indemnify present Masters in Chancery for such malfeasance, and persons in that class were compelled to testify to such transactions, but former Masters and other officers were allowed to refuse to answer).

[3] The proceedings and debates will be found in Cobbett's Parliamentary History, vol. XII, pp. 625–734. (The form of the bill here provided that the witnesses, if they truly discovered, "are hereby freed, indemnified, and discharged of . . . all forfeitures, penalties, punishments, . . . which he, she, or they may incur or become subject to for or by reason or means of any matter or thing which he, she, or they, shall upon his or her or their being examined, as aforesaid, truly and faithfully discover . . . concerning the said enquiry").

[4] The arguments *pro* and *con* will be found in Cobbett, *ubi supra*, and in Hansard, Parl. Deb., 1st ser., VI, 401 (Lord Melville's case), and in the debates in Congress on the act of Jan. 24, 1857, now Rev. St. 1878, § 102 (Congr. Globe, Jan. 23, p. 434, Smith's Digest of Precedents of Privileges of Congress, 1894, pp. 151–190).

In 1806, in the debate on a similar bill to indemnify the witnesses against Lord Melville (Mr. Dundas), Lord Eldon, speaking against it (Hans. Parl. Deb., 1st ser., VI, 170) referred to Lord Hardwicke's opposition, sixty years before, to the other bill, and remarked that "that great man concluded his speech by observing 'that he would much rather be the object of such a bill than the author of it.' "

of the State. These two meanings will here be strictly adhered to. (b) "Immunity" signifies the *non-liability for the offence* itself, "privilege" signifies the *non-compellability to speak* about the offence. By an immunity the offender's guilt ceases; under a privilege, it continues. This distinction is commonplace; but the failure to observe it, and the improper use of "immunity" and "privilege" as interchangeable terms, have rendered some judicial opinions needlessly obscure.

2. Singular as it may seem, there have been found occasionally those who disputed the legal effectiveness of such statutes under the Constitution. The general reasoning in support of the statutes has been set forth above; and it will suffice here to notice briefly the various opposing arguments:

(1) It has been urged that the *disgrace* or *infamy* of the offence remains indelibly, even after its criminality has been abolished, and that the privilege was meant to protect against this also. Enough has already been said in disposal of this argument (*ante*, § 2255).

(2) It has been urged that the act may also be a *crime under another sovereignty*, and that the amnesty of one Legislature cannot protect the offender against the use of his disclosures in a prosecution in the other sovereignty. This argument has also been dealt with in another place (*ante*, § 2258).[5]

(3) It has been suggested that the amnesty does not supervene except from and *after the disclosure*, and that therefore the fact disclosed is at that moment (though for the single instant only) still a crime, and therefore the privilege is at that moment still valid.[6] This bit of metaphysical quibbling will not command the support of healthy minds, especially where a great question of practical justice is at stake.

(4) Still another argument, and the only one bearing the semblance of a substance, urges that there is for the offender a practical *burden in proving the amnesty* which detracts from its absolute efficacy:

1896, SHIRAS, J., with GRAY and WHITE, JJ., dissenting, in *Brown* v. *Walker*, *infra:* "All that can be said is that the witness is not protected by the provision in question from being prosecuted, but that he has been furnished with a good plea to the indictment, which will secure his acquittal. But is that true? Not unless the plea is sustained by competent evidence. His condition, then, is that he has been prosecuted, been compelled presumably, to furnish bail, and put to the trouble and expense of employing counsel and furnishing the evidence to make good his plea. . . . Nor is it a matter of perfect assurance that a person who has compulsorily testified, before the commission, grand jury, or court, will be able, if subsequently indicted for some matter or thing concerning which he testified, to procure the evidence that will be necessary to maintain his plea. No provision is made in the law itself for the preservation of the evidence. Witnesses may die or become insane, and papers and records may be destroyed by accident or design."

[5] It has also been argued, but unsoundly, that the Legislature cannot in this manner infringe upon the Executive prerogative of pardon (Report of Senate Judiciary Committee 1876, by Senator Edmunds, answered by Senator Thurman in the minority report, 44th Cong. 1 sess. Sen. Rep. No. 253, reprinted in Smith's Digest of Precedents of Privileges of Congress, 1894, pp. 558–567).

[6] 1874, Turney, J., dissenting, in Hirsch v. State, Tenn., cited *infra;* the same judge makes much the same argument in State v. Warner, Tenn., cited *infra*.

A sufficient answer to this is that the argument would apply equally to a pardon (which for practical efficacy depends upon the preservation of records), to a judgment of acquittal (whose theoretical conclusiveness may be practically defeated by the loss of its record), and to all judicial and legislative acts, which, while in theory creating objective facts, may in practice never produce results because of the mutability of human affairs and of that substratum of contingencies which constantly defeats the most cherished dogmas of the law. A jury's verdict in theory establishes facts, and the law could never admit any other supposition; but the truth often remains untouched by a verdict. A judgment establishes a right; but the insolvency of the debtor or the exhaustion of the creditor's resources for litigation may leave the right as barren as the claim of Charles Stuart's descendant to the crown of England. The law has long ago decided to ignore this frequent contrast between its decrees and the realities. When justice has been done, on legal principles, it is out of the question for the law to stultify its general rules because the accidents of an individual's situation leave him a barren remedy. One could as well argue, because a judge might by error or malice compel a criminating disclosure, and because the witness thus wronged might not have the money to pursue his appeal or might lose by death or conflagration the proofs of the wrong, that therefore no witness should ever be compelled to answer against a claim of privilege whether that claim be right or wrong. Such a refined possibility of a contingency cannot deter a sane and practical justice from exercising its functions:

1896, Brown, J., in *Brown* v. *Walker*, 161 U. S. 591, 16 Sup. 644: "If the object of the provision be to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure, then, if no such prosecution be possible, — in other words, if his testimony operate as a complete pardon for the offense to which it relates, — a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question. . . . It can only be said, in general, that the clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose, — not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder, or obstruct the administration of criminal justice. . . . The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself; but, unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him. He may even be convicted of a crime, and suffer imprisonment or other punishment before his innocence is discovered; but that gives him no claim to indemnity against the State, or even against the prosecutor, if the action of the latter was taken in good faith, and in a reasonable belief that he was justified in so doing." [7]

[7] Compare the similar remarks in R. *v.* Boyes, quoted *ante*, § 2280, and in the opinion of Brown, J., in Hale *v.* Henkel, 201 U. S. 43, cited *post*, § 2282.

The view then, that such statutes, by expurgating the crime, remove the privilege, has prevailed wherever the question has been decided,[8] except in a single jurisdiction.[9]

In modern times the expedient has been resorted to, not for individual cases of misdoing (as originally), but rather for classes of crimes. Thus placed upon a sounder basis of policy, it has been vastly extended in its use.[10]

[8] *Fed.* 1895, Brown *v.* Walker, 70 Fed. 46, Buffington, J. (St. 1893, Feb. 11, held effective); on appeal, affirmed in 161 U. S. 591, 16 Sup. 644; 1904, Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 24 Sup. 563 (order of the Circuit Court requiring production of certain contracts, etc., at the petition of the Commission in a complaint by the district attorney alleging violations of St. 1887, Feb. 4, as amended by St. 1893, Feb. 11, as to discriminations, etc., and asking for the enforcement of the statute by injunction to desist from the violations; the witness, an official of a defendant corporation, was ordered to produce, since the immunity of the statute would annul the privilege; Brown *v.* Walker followed); 1905, Jack *v.* Kansas, 199 U. S. 372, 26 Sup. 73 (following Brown *v.* Walker; accepting a decision of the Kansas Court which held sufficient the immunity of Kan. St. 1897, c. 265, § 10); 1905, Re Hale, 139 Fed. 496, 501, C. C. (under U. S. St. 1903, Feb. 19, the immunity produced by testimony "in any proceeding," etc., applies to testimony before a grand jury); 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370 (Brown *v.* Walker, *supra*, approved and followed without dissent; here applying the rule to testimony and documents obtained under the immunity-clause of U. S. St. 1903, Feb. 25, *infra*, n. 10); *Cal.* 1894, Ex parte Cohen, 104 Cal. 524, 528, 38 Pac. 364 (holding the election statute of 1893 effective); *Ill.* 1903, People *v.* Butler St. F. & I. Co., 201 Ill. 236, 66 N. E. 349 (St. 1893, June 20, §§ 7 a, 7 b, amending the anti-trust law, held not unconstitutional; the argument as to extra-territorial use of the disclosures, expressly repudiated; Brown *v.* Walker followed); *Ind.* 1877, Frazee *v.* State, 58 Ind. 8, 13 (gaming statute, held sufficient to annul the privilege); 1879, State *v.* Enochs, 69 Ind. 314, 316 (Frazee *v.* State approved; here a statute relating to trespasses on land was held defective); *Kan.* 1904, State *v.* Jack, 69 Kan. 387, 76 Pac. 911 (St. 1897, quoted *infra*, n. 10, exempting from prosecution for offences against the anti-trust law, effectually annuls the privilege); *Ky.* 1903, Weber *v.* Com., — Ky. —, 72 S. W. 30, *semble* (under St. 1897, May 20, § 10, Ky. Stats. § 1241 A, applying to lynching offences, the privilege is effectually annulled and an accomplice may be required to testify); *N. H.* 1878, State *v.* Nowell, 58 N. H. 314; *N. C.* 1904, Re Briggs, 135 N. C. 118, 47 S. E. 403 (Brown *v.* Walker followed, sanctioning the effectiveness of Cr. Code § 1215; Douglas, J., specially concurring with hesitation, and Walker, J., also specially concurring); *Tex.* 1851, Floyd *v.* State, 7 Tex. 215, 218 (gaming statute); *Va.* 1884, Kendrick *v.* Com., 78 Va. 490, 495, 497 (gaming statute barring prosecution, held to annul the privilege; Lacy, J., diss.); *Wis.* 1905, Murphy *v.* State, 124 Wis. 635, 102 N. W. 1087 (Brown *v.* Walker followed, applying Stats. 1898, § 4078, amended by St. 1901, c. 85, cited *infra*, n. 10).

To these should be added, by necessary implication, all the cases in the next section holding the other class of statutes effective.

[9] 1874, Hirsch *v.* State, 8 Baxt. Tenn. 89, 91 (statute giving immunity to witnesses before the grand jury, held constitutional; the effect being, "as to him, an abrogation of the offense"; Nicholson, C. J., and Turney, J., diss., on the ground that the abrogation followed the giving of testimony, and hence the privilege not to give it remained until it was given); 1884, State *v.* Warner, 13 Lea Tenn. 52, 58 (opinion by Turney, J.; preceding case repudiated, on the grounds given in the dissenting opinion there). The following similar ruling is now disposed of by Brown *v.* Walker: 1894, U. S. *v.* James, 60 Fed. 257 (St. 1893, Feb. 11, held not effective, on the chief ground that the disgrace-privilege remained undisposed of; the attempted appeal to history, citing no authorities, is totally unfounded; see *ante*, § 2255).

In the following cases the decision was avoided: 1896, Lamson *v.* Boyden, 160 Ill. 613, 43 N. E. 781 (a statute making the pardon conditional not merely on the discovery, but on repayment by the defendant; div. 1, § 137, of Crim. Code, held not effective without such repayment); 1901, Robson *v.* Doyle, 191 Ill. 566, 61 N. E. 435 (effect of Rev. St. c. 38, § 137, as abolishing the privilege, left undetermined).

[10] The following list of statutes covers both those which grant express and entire amnesty and those which merely prohibit the use of the compelled testimony; the constitutionality of the latter class is dealt with in the ensuing § 2283. After each statute are placed the decisions construing it on points not involving the general principle.

ENGLAND: 1842, St. 5 & 6 Vict. c. 39, § 6 (factors' liability; the agent committing the offence specified is not to be "convicted by any evidence whatsoever in respect of any act done by him, if he shall, at any time previously

to his being indicted for such offence, have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been 'bona fide' instituted by any party aggrieved," or on examination before a bankrupt commissioner); 1852, St. 15 & 16 Vict. c. 57, § 8 (in election inquiries as to corrupt practices, "no statement made by any person in answer to any question put by such commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding civil or criminal"); 1861, St. 24 & 25 Vict. c. 96, § 85 (like St. 5 & 6 Vict.; but substituting "charged" for "indicted," as to the time of disclosure, and adding "compulsory" under the last clause); 1863, St. 26 & 27 Vict. c. 29, § 7 (in election inquiries, no person shall be excused from answering on the ground of self-crimination; "provided always that where any witness shall answer every question relating to the matters aforesaid," when required, "and the answer to which may criminate or tend to criminate him," he shall be entitled to a certificate to that effect; and then, if any information, etc. be pending for any offence punishable under the election-acts, "committed by him previously to the time of his giving his evidence and at or in relation to the election concerning or in relation to which the witness may have been so examined, the Court shall, on production and proof of such certificate, stay the proceedings," and providing further as in St. 15 & 16 Vict.); 1883, St. 46 & 47 Vict. c. 52, § 17 (it shall be the bankrupt's duty "to answer all such questions as the Court may put or allow to be put to him"); 1890, St. 53 & 54 Vict. c. 71, § 27 (statement made by any person on compulsory examination in bankruptcy proceedings "shall not be admissible as evidence against that person" on charges of specified misdemeanors); St. 1905, 5 Edw. VII, c. 7, § 2 (investigation into corrupt transactions by war-contractors in South Africa; immunity clause similar to that of St. 1863 for a person making "a full and true disclosure," etc.); St. 1914, 4 & 5 Geo. V, c. 59, Bankruptcy, § 166 (like St. 1890, *supra*); 1824, Orme *v.* Crockford, 13 Price 376, 388 (statute on gaming); 1860, R. *v.* Charlesworth, 2 F. & F. 326, 332 (St. 15 & 16 Vict. c. 57); 1789, Bancroft *v.* Wentworth, 3 Brown Ch. C. 11 (stock-jobbing statute); 1870, R. *v.* Hulme, L. R. 5 Q. B. 377 (St. 26 & 27 Vict. c. 29); 1902, R. *v.* Pike, 1 K. B. 553 (statute applied; the bankrupt's "statement of affairs," not being made on an examination, held not within the immunity); and compare the bankruptcy rulings cited *ante*, § 2260.

CANADA: here compare also the statutes abolishing the privilege entirely (*ante*, § 2252); *Dominion:* R. S. 1906, c. 152, § 106 (in proceedings concerning elections relating to intoxicating liquors, the privilege is abolished, but no answer shall be used against the witness in any proceeding, except perjury, if the judge gives a certificate that the witness claimed this privilege and "made full and true answers to the satisfaction" of the judge); c. 8, §§ 25–27 (election offences; provision similar to Eng. St. 26 & 27 Vict.); c. 7, § 46 (similar to c. 152, § 106, *supra*); c. 146, § 642 (in gaming offences, the privilege is abolished; but one who "makes true disclosure to the best of his knowledge of all things as to which he is examined" shall receive a certificate, and be "freed from all criminal prosecutions and penal actions and from all penalties, forfeitures, and punishments to which he has become liable for anything done before that time in respect of the matters regarding which he has been examined"; the certificate to operate in stay of subsequent proceedings when produced and proved); c. 37, § 66 (Canada board of railway commissioners; privilege ceases for documentary evidence, but no document produced shall be used, etc.); St. 1893, c. 31, § 5, now c. 145, Evid. Act, § 5 ("No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person. 2. If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence"); St. 1920, 10 & 11 Geo. V, c. 46, § 93 (Dominion election offences and actions; privilege ceases, but no answer given after claim of privilege shall be used, etc., if the judge gives a certificate as in R. S. 1906, c. 8, *supra*);

Alberta: St. 1910, 2d Sess., c. 3, Evidence Act, § 7 (like Dom. Evid. Act, § 5, *supra*, except that the last clause gives immunity "in any civil proceeding or in any proceeding under any act or ordinance in force in Alberta");

British Columbia: Rev. St. 1911, c. 72, § 336 (electoral petitions; substantially like Ont. R. St. 1914, c. 10, § 49); §§ 297, 298 (corrupt electoral practices; like Eng. St. 1861); c. 78, § 5 (like Dom. Evidence Act, § 5); c. 127, § 182 (fraud in registration of land-title; no person shall be privileged by this act from discovery in any civil proceeding, "but no such affidavit shall be admissible against any such person in evidence in any

penal proceeding"); c. 81, § 75 (Factories Act offences; cited *ante*, § 488); St. 1912, 2 Geo. V, c. 17, § 6 (Forest Board; witness not to be privileged, but no answer made shall be admissible in evidence in any proceeding, except for perjury);

Manitoba: Rev. St. 1913, c. 117, § 194 (privilege abolished for others than the defendant, in offences under the liquor act; but the evidence shall not be used against him in any prosecution); c. 65, § 5 (privilege ceases for answers tending to criminate or to establish "liability to a civil proceeding at the instance of the Crown or of any other person"; but "no evidence so given shall be used" against him in any later proceeding); St. 1916, c. 125, § 83 (temperance act; privilege ceases as to every person, other than the defendant or his wife, examined as a witness, on facts "tending to subject him to any penalty imposed by this Act"; but his testimony shall not be used, etc.);

New Brunswick: Consol. St. 1903, c. 127, § 8 (privilege abolished in civil proceedings and trials for violation of a statute of this province or for a penalty imposed by its law; but "no evidence so given shall be used or receivable in evidence" in any proceeding, except perjury); St. 1905, c. 7, § 41 (offences under the Factory Act; defendant's privilege abolished; quoted *ante*, § 488); St. 1911, 1 Geo. V, c. 11, §§ 15, 16 (elections; certificate of full disclosure to protect a witness; like Ont. Rev. St. c. 10, § 49); St. 1916, c. 20, Prohibition Act, § 133 (like Man. St. 1916, c. 125, § 83); § 171 (intoxicated person may be compelled to disclose source of liquor; privilege ceases but "the answers so given shall not be used," etc.);

Newfoundland: Consol. St. 1916, c. 3, § 111 (election inquiries; like Ont. Rev. St. c. 10, § 49); § 125 (parties, etc., to be compellable, in civil actions for election penalties or damages, but such evidence is not to be thereafter used against them in any criminal proceeding under this chapter); § 156 (privilege abolished, in election inquiries, for matters tending to criminate under this chapter); c. 2, § 11 (legislative inquiries; privilege is the same as in a court of justice);

Nova Scotia: Rev. St. 1900, c. 5, § 113 (in election offences, privilege abolished; but no answer given after such claim "shall be used in any proceeding" against him); c. 6, § 36 (similar, for controverted elections); c. 100, § 163 (similar, for offences concerning the sale of intoxicating liquors; except for the person charged); St. 1902, c. 31, adding § 79 (a) to Rev. St. c. 72 (similar, for municipal elections); St. 1913, c. 37 (inserting a new § 45a in Rev. St. 1900, c. 163, Evidence Act; the new section is identical with Dom. St. 1893, c. 31, § 5, as amended by St. 1898, c. 53); St. 1918, c. 8, Temperance Act, § 45 (liquor offences; privilege ceases for offences under this Act; but on claim made and answer compelled, "the answer so given shall not be used," etc.);

Northwest Terr. 1906, R. v. Van Metre, 7 N. W. Terr. 297 (Dom. Evid. Act, § 5, applied to admit answers made without claim of privilege on an examination in aid of execution);

Ontario: Rev. St. 1914, c. 10, § 49 (election contests; privilege ceases, but "a witness who answers truly all questions which he is required by the election Court to answer" shall be given a certificate to that effect, and "any such answer . . . shall not be admissible in evidence"; on any prosecution for an electoral offence committed before the date of the certificate, the proceedings shall be stayed on production of the certificate); c. 76, § 7 ("(1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of this Legislature; (2) If, with respect to any question, a witness objects to answer upon any of the grounds mentioned in subsection 1, and if, but for this section or any Act of the Parliament of Canada, he would therefore have been excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him in any civil proceeding or in any proceeding under any Act of this Legislature"); St. 1916, c. 50, Temperance Act, § 50 (where the magistrate sees fit, he may "by certificate in such behalf exempt such witness from prosecution," with certain exceptions); 1904, Attorney-General v. Toronto J. R. Club, 7 Ont. L. R. 248 (using premises as a betting-house; on motion for production of documents by the defendant's president, held that the privilege applied, under Ont. Rev. St. 1897, c. 73, § 5, quoted *ante*, § 2252, and that Can. Dom. St. 1893, c. 31, § 5, as amended in 1898 and 1901, quoted *supra* in this note, was not applicable in Ontario); 1906, Chambers v. Jaffray, 12 Ont. L. R. 377 (claim of privilege by a defendant in libel resisting discovery; St. 1904, c. 10, § 21, now R. S. c. 76, § 7, held to apply to parties in such situation, and not only to ordinary witnesses, so as to take away the privilege); 1917, Re Ginsberg, 38 D. L. R. 261 (fraud of creditors under Ont. R. S. 1914, c. 134; under Can. Evid. Act, 1906, § 5, subsec. 1, and Ont. Evid. Act, 1914, § 7, the privilege has been abrogated); 1921, R. v. Barnes, 61 D. L. R. 345 (an automobile driven by B. killed R. on Sept. 19; at a coroner's inquest held Oct. 2, B. was summoned as a witness to the inquest; meanwhile, in an adjacent county, on Sept. 27, he had been committed by a magistrate for trial on a charge of manslaughter; at the inquest, he claimed privilege, on the ground that Can. Evid. Act,

§ 5 did not apply to him at the inquest, by reason of his being already an accused in the other county; this claim was rejected by the Supreme Court, the several judges differing in part in their distinctions);

Prince Edward Island: St. 1910, c. 3, § 46 (election trials; witness compeliable, but no answer made after claim of privilege "shall be used in any criminal proceeding against any such person," except for perjury, if the trial judge gives a certificate that claim was made and full and true answer given); St. 1918, c. 1, § 140 (liquor offences; privilege ceases for an intoxicated person, as in Man. St. 1916, c. 20, § 171); § 115 (like N. Sc. St. 1918, c. 8, § 45);

Saskatchewan: Rev. St. 1920, c. 44, § 31 (similar to Ont. Rev. St. c. 76, § 7); c. 194, § 4 (liquor offences; privilege ceases for "an interdicted person," but a witness who "makes true disclosure to the best of his knowledge" shall receive a certificate and "be freed from all prosecutions . . . for anything done before that time under the provisions of § 95 in respect of the matters regarding which he has been examined"); St. 1920, c. 28, § 1 (amending Evid. Act, R. S. c. 44, § 29, as to compelling the party's or spouse's testimony; quoted *ante*, § 488); 1913, Bartleman *v.* Moretti, Sask. S. C., 9 D. L. R. 805 (the Canada Evidence Act, § 5, identical with Sask. Evid. Act, Rev. St. c. 60, § 27, "entirely displaces and removes the reason for not ordinarily allowing discovery in actions for the recovery of penalties"; here, a forfeiture of money paid under a land contract);

Yukon: Consol. Ord. 1914, c. 56, § 12, St. 1920, c. 9, § 20 (liquor offences; like Man. Rev. St. 1913, c. 117, § 194); ib. § 117 (liquor offences; provision similar to Dom. Rev. St. c. 146, § 642).

UNITED STATES: *Federal:* Rev. St. 1878, § 859, Code § 1359 ("No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court," except for perjury; "but an official paper or record produced by him is not within the said privilege"); St. 1887, Feb. 1, c. 104, § 9, 24 Stat. 379 (in any action against a common carrier for damage under this statute, the privilege is not to excuse from testimony; "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"); § 12 (similar, for investigations by the Interstate Commerce Commission); St. 1891, Feb. 10, c. 128, amending St. 1887, Feb. 4, c. 104, § 12 (upon investigations by the Interstate Commerce Commission, where the aid of the circuit court is required to obtain testimony, "the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"); St. 1893, Feb. 11, c. 83, 27 Stat. 443, now Code § 7034 (passed in consequence of the decision in Counselman *v.* Hitchcock, *post*, § 2282; "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the commission, whether such subpœna be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled 'an act to regulate commerce,' approved Feb. 4, 1887, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding: Provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying"); St. 1898, July 1, c. 541, § 7, 30 Stat. 548, Code § 8790 (a bankrupt shall "submit to an examination" concerning all matters affecting the settlement; "but no testimony given by him shall be offered against him in any criminal proceeding"); St. 1903, Feb. 14, c. 552, Code § 7091 (Federal Trade Commission, succeeding to the powers of the corporations commissioner; privilege ceases, but "no natural person shall be prosecuted," etc.); St. 1914, Sept. 26, Federal Trade Commission, § 9, Code § 7091 (no person shall be excused, etc.; "but no natural person shall be prosecuted" for any matter "concerning which he may testify . . . before the commission in obedience to a subpœna issued by it," except for perjury); St. 1916, Sept. 7, c. 451, § 29, Code § 8044 (vessels in domestic commerce; before the Shipping Board, "no person shall be excused on the ground that it may tend to incriminate him" etc. "but no natural person shall be prosecuted" etc. "for or on account of any transaction, matter or thing as to which, in obedience to a subpœna and under oath, he may so testify," etc., except for perjury); St. 1917, Feb. 14, c. 53, § 16, Code § 3873 (liquor in Alaska; "no person shall be excused" etc., but "the testimony given by such person shall in no case be used against him"; but no legislative draftsman should be excused for employing this ineffective formula); St. 1919, Oct. 28, tit. II, § 30, National Prohibition Act (privilege not to apply "in any suit or proceeding based upon or growing out of any alleged violation of this Act"; but "no natural person shall

be prosecuted" for any matter "as to which in obedience to a subpœna and under oath he may so testify," etc.); St. 1920, Feb. 28, § 415 (Interstate Commerce Act amended; reproducing the former language); St. 1920, Feb. 28, § 310 (Transportation Act; before the Railroad Labor Board no person shall be excused on the ground of this privilege; but "no natural person shall be prosecuted . . . [for any matter] as to which in obedience to subpœna and under oath he may so testify" etc.; except for perjury therein); Code § 9708 (tariff commission; privilege ceases; but "no natural person shall be prosecuted" etc. for testimony given "in obedience to a subpœna and under oath"); Code § 10702 (white slave traffic; privilege ceases for statement required to be filed with commissioner general of immigration; but "no person shall be prosecuted," etc.);

Alabama: Const. 1901, Art. VIII, § 189 (contested elections; privilege ceases for other persons than an accused in a criminal prosecution: but "such person shall not be prosecuted for any offense arising out of the transactions concerning which he testified," except perjury); Code 1907, § 6994 (privilege ceases for a witness before the grand jury for offences within twelve months; "but no witness must be prosecuted for any offense as to which he testified before the grand jury"); § 5674 (State railroad commission; privilege ceases, but "no person shall be prosecuted," etc.); § 2226 (State tax commission; privilege ceases, "but no person shall be prosecuted," etc., for testimony before the commission "in obedience to its subpœna"); § 3738 (creditors' bills for discovery; no answer made "can be read in evidence against the defendant on an indictment for any fraud charged in the bill"); § 7693 (railroad passes; witness before grand jury compellable, but "no witness shall be prosecuted," etc.); St. 1909, No. 191, Spec. Sess. p. 63, Aug. 25, § 12 (liquor prohibition; witnesses compellable before the grand jury, "but a witness must not be prosecuted for any offense as to which he testifies before the grand jury"); § 15 (no agent or principal, etc., shall be excused by reason of the privilege from testifying against principal or agent, etc., but no such testimony "shall in any manner in any prosecution be used as evidence directly or indirectly against him," nor shall he be "thereafter prosecuted for any offense so disclosed by him"); § 21, par. 13 (similar, for a person testifying in any proceeding for seizure of liquors, "excepting one who answers claiming some right, title, or interest in the liquors so seized"); § 29½ (similar blanket clause for any person "who testifies with respect to any unlawful act under this statute," etc.); St. 1911, No. 259, p. 249, Apr. 6, § 32 (dispensary liquor law; like § 12 of St. 1909); St. 1911, No. 479, p. 421, Apr. 4, § 29 (primary elections; answer compellable as to an illegal vote, and "if he make full true answers which may tend to criminate him, he shall not be prosecuted for voting at such election"); St. 1915, No. 2, p. 8, § 12 (intemperance; privilege ceases for witnesses before grand jury, but "a witness must not be prosecuted for any offense as to which he testifies"); § 15 (privilege ceases for clerk, etc., testifying against a principal, "but no testimony so given shall be used, etc., nor shall the party testifying be thereafter prosecuted," etc.); St. 1915, No. 78, p. 218, § 41 (primary elections; a witness voting illegally, "if he make full true answers which may tend to criminate him," shall not be prosecuted for illegal voting); St. 1915, No. 464, p. 386, § 102 (tax inquiries; privilege ceases, but "no person shall be prosecuted," etc.);

Alaska: Comp. L. 1913, § 2106 (white slave traffic; privilege ceases, but "no person shall be prosecuted," etc.); St. 1917, Apr. 26, c. 6, § 5 (legislative investigations; "any person who is called as a witness . . . and refuses to answer any question . . . on the ground that the answer . . . may tend to criminate himself, may be granted immunity from punishment for the offence" under inquiry, and "such witness may then be compelled to answer," etc.); St. 1919, c. 56, § 1 (gambling offences; privilege ceases, but "no indictment or prosecution shall afterwards be brought," etc.); St. 1919, c. 46, § 27 (insurance rebates; privilege ceases, but "no person shall be prosecuted," etc.);

Arizona: Const. 1910, Art. II, § 19 (bribery and illegal rebating; privilege ceases, but "no person shall be prosecuted," etc.); Rev. St. 1913, P. C. § 204 (duelling offences; privilege ceases, but "no evidence given upon any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding"); § 339 (gaming offences; privilege ceases, "but no prosecution can afterwards be had against him for any offense concerning which he testified"); § 14 (wherever in this Code it is provided that "evidence obtained upon the examination of a person as a witness cannot be received against him in any criminal proceeding." this does not forbid use in a prosecution for perjury); § 88 (obtaining money on promise to influence legislation; privilege ceases, but "such testimony shall not afterwards be used," etc.); § 589 (trusts and monopolies; privilege ceases, but the witness "shall not be liable to criminal prosecution," etc., nor shall the evidence be used against him, etc.); Civ. C. § 39 (legislative hearings; privilege ceases, but no person examined can be "held to answer criminally," nor can any statement made be competent evidence, etc.); § 2331 (State corporation commission; privilege ceases, but "no person shall be prosecuted," etc., for any testimony under oath);

Arkansas: Const. 1874, Art. III, § 9 ("In trials of contested elections and in proceedings for the investigation of elections, no person

shall be permitted to withhold his testimony on the ground that it may criminate himself or subject him to public infamy; but such testimony shall not be used against him in any judicial proceeding, except for perjury in giving such testimony"); Dig. 1919, § 1005 (actions for personal injury against railroads; privilege ceases for defendant's agents, etc., but "such evidence or testimony shall not be used," etc.); §§ 1687, 1688 (State corporation commission; privilege ceases, but "such witness shall not be prosecuted," etc.); § 2655 (dealing in futures; privilege ceases, but "any discovery made . . . shall not be used," etc., "and he shall be altogether released from punishment," etc.); § 6178 (liquor offences; privilege ceases, but "no disclosure or discovery made by such person is to be used," etc.);

California: P. C. 1872, § 89 (obtaining money to influence a legislative vote; the privilege ceases for a witness "testifying as such," "but such testimony shall not afterwards be used against him in any judicial proceeding," except for perjury); § 232 (unlawful duel or challenge; the privilege ceases; "but no evidence given on any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding"); § 334 (gaming; the privilege ceases for a witness "testifying as such"; "but no prosecution can afterwards be had against him for any offense concerning which he testified"); Pol. C. § 304 ("No person sworn and examined before either house of the Legislature or any committee thereof can be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify; nor is any statement made or paper produced by any such witness competent evidence in any criminal proceeding against such witness"; except on a charge of perjury); P. C. 1872, § 1324, as amended by St. 1907, Mar. 19, p. 671, § 10 (applicable to an offender "against any law of this State"; "If such person demands that he be excused from testifying . . . on the ground that his testimony . . . may incriminate himself, he shall not be excused, but in that case the testimony so given . . . shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying, except for perjury in giving such testimony, and he shall not thereafter be liable to prosecution by indictment, information, or presentment, nor to prosecution or punishment for the offence with reference to which his testimony was given . . . No person shall be exempt from indictment, presentment by information, prosecution or punishment for the offence with reference to which he may have testified as aforesaid, . . . when such person so testifying . . . fails to ask to be excused from testifying . . . on the ground that his testimony . . . may incriminate himself, but [*sic?* and] in all such cases the testimony so given may be used in any prosecution or proceeding, civil or criminal, against the person so testifying. Any person shall be deemed to have asked to be excused from testifying . . . under this section, unless, before any testimony is given . . . by such witness, the judge, foreman or other person presiding at such trial, hearing, proceeding or investigation shall distinctly read this section . . . to such witness, and the form of the objection by the witness shall be immaterial if he in substance makes objection that his testimony . . . may incriminate himself, and he shall not be obliged to object to each question, but one objection shall be sufficient to protect such witness from prosecution for any offence concerning which he may testify . . . upon such trial, hearing, proceeding or investigation"); §14 (code provisions abolishing privilege but forbidding use of testimony "do not forbid such evidence being proved . . . upon a charge of perjury" therein); § 64 (crimes against elective franchise; privilege ceases, but "no prosecution can afterwards be had against such witness for any such offense concerning which he testified for the prosecution"); St. 1907, p. 984, Mar. 23, § 6 (illegal trusts; privilege ceases, but "no individual shall be prosecuted" etc.); St. 1911, c. 14, p. 18, Dec. 23, § 55 (public utilities commission; witnesses to be compellable, but no person shall be prosecuted etc. for "any act, transaction, matter, or thing concerning which he shall under oath have testified or produced documentary evidence," except for perjury, and except that this shall be construed "as in any manner giving to any public utility immunity of any kind"); St. 1913, Apr. 23, p. 115, § 55, par. *d* (State public utilities commission; privilege ceases, but "no person shall be prosecuted" etc., except for perjury; "nothing herein contained shall be construed as in any manner giving to any public utility immunity of any kind"); St. 1913, June 13, p. 1035, No. 606, § 5 (State civil service commission; privilege ceases, but no person shall be prosecuted for any matter on which he has testified, etc.; nothing is to give "to any person immunity of any kind otherwise than is herein expressly provided"); St. 1915, June 7, p. 1272, § 2 (misrepresentation of terms of insurance policy; privilege ceases, but no person shall be prosecuted "for any act concerning which he shall be compelled to testify," except perjury therein); 1901, Bradley v. Clark, 133 Cal. 196, 65 Pac. 395 (St. 1893, § 32, construed);

Colorado: Const. 1876, Art. VII, § 9 (like Ark. Const. Art. III, § 9, for contested elections and electoral offences); Comp. L. 1921, § 7801 (testimony in election contests as to a witness not being a qualified voter; "no part of his testimony shall be used against him in any criminal prosecution," except for perjury); § 6829 (publishing as a coward or challenging to a duel; the publisher or printer is compellable, but "the testimony given by

any such witness shall in no case be used in any prosecution against such witness"); Comp. L. 1921, § 7843 (in election offences, the privilege ceases, but "the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying," except for perjury; and "a person so testifying shall not thereafter be liable to indictment, prosecution, or punishment, for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly, in bar of such indictment or prosecution"); § 7834 (corrupt practices act; same provision); § 2988 (State railroad commission; privilege ceases, "but such evidence or testimony shall not be used," etc.); § 4043 (trust offences; privilege ceases, but "no individual shall be prosecuted," etc.); § 6846 (pimping; privilege ceases, but "the testimony so given shall not thereafter be used," etc., and "the person so testifying shall not thereafter be liable to indictment," etc., and may plead or prove the fact in bar); § 7350 (State tax commission; privilege ceases, "but no person having so testified shall be prosecuted," etc.); C. C. P. 1921, § 67 ("no pleading can be used in a criminal prosecution as evidence of a fact admitted or alleged in such pleading");
Connecticut: Gen. St. 1918, § 6315 (on a prosecution for improper conduct with a jury, full disclosure is compellable, "which shall not be used against him"); § 6635 (no one to be excused, in cases of election-bribery, on the ground of disgrace or self-crimination, but he shall not "be prosecuted for anything connected with the transaction about which he shall so testify," nor shall "the evidence he may so give be used against him in any proceeding whatever"); § 4805 (defendant's evidence in an action for gaming-losses is not to be "offered against him in any criminal prosecution"); § 6475 (a person summoned for the prosecution on a charge of illegal gaming is not to be excused on the ground of disgrace and self-crimination, but he shall not be prosecuted "for anything connected with the transaction about which he shall so testify"); § 3001 (witness for a prosecution for an unlawful exhibition is not to be prosecuted "for anything about which he shall have so testified"); § 2813 (selling liquor to disqualified person; privilege ceases for buyer and for seller, but no testimony so given shall be used, etc.; nor shall the witness be prosecuted, etc.); § 4121 (discrimination in life insurance; privilege ceases, but no person shall be prosecuted "for any act concerning which he shall be compelled" to testify, except for perjury); § 4122 (premium rebates, etc.; similar to the foregoing); § 3618 (public service commission's inquiry; privilege ceases; but "if any witness objects" on this ground, and the commission "direct such witness to testify . . . and he complies, or he be compelled to do so by order of court," then he shall not be prosecuted, etc.); § 5032 (fiduciary examined in probate court; privilege ceases for fraud, but the answer shall not be used, etc.); § 5522 (general provision; quoted *ante*, § 2252); § 5767 (privilege protects in a party's answers on discovery); § 5984 (insolvent debtor; privilege ceases for fraud, etc., but his answers shall not be used, etc.); § 6446 (bribery of business agent, and commercial graft; privilege ceases, but no person shall be liable for any offense concerning which he may testify etc. "before said court or in obedience to its subpœna");
Delaware: Const. 1897, Art. V, § 7 (electoral offenses; privilege ceases, but "such testimony shall not afterwards be used" etc., except for perjury);
Florida: Rev. G. S. 1919, § 4656 (State railroad commissioners' investigations; privilege ceases, but "such testimony shall not be used against him," etc.); § 4990 (combination to control meat prices, etc.; privilege ceases, but "no such person shall be prosecuted," etc.); § 5353 (bribery of officials; privilege abolished for the briber; "but if he does testify, nothing said by him in his testimony shall be admissible in evidence in any civil or criminal action against him"); § 6017 (bribery, burglary, larceny, gaming, and liquor offences; privilege abolished, but "no person shall be prosecuted or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding"); § 5478 (liquor offences; privilege ceases, but "any person who shall so testify . . . shall not be prosecuted," etc., and the evidence shall not be used, etc.); § 5683 (dealing in margins; privilege ceases, but "any discovery . . . shall not be used" etc. and "he shall be altogether pardoned," etc.); § 5729 (trusts and combinations; "any person so summoned and examined shall not be liable to prosecution," etc.); § 5738 (insurance discrimination; privilege ceases, but "no person shall be prosecuted," etc.); § 5741 (illegal issuance of insurance stock; privilege ceases, but "no person [who] shall be compelled so to testify [shall be prosecuted]," etc.; the vital words are omitted);
Georgia: Rev. C. 1910, § 2636 (in complaints of illegal rates by common carriers, certain persons are compellable by the railroad commission to testify; the commission shall first make an order that he is required, and "that he is exempt thereafter from indictment or prosecution for any transaction about which he is so compelled to testify; when such order is made, the witness shall be compelled to give evidence touching such complaints, and he shall be forever free from indictment or prosecution in any court of this State touching the matters about which he is compelled

to testify"); § 2637 (a witness thus exonerated by the Commission shall be compellable to testify in any suit or prosecution in the State Courts for those transactions); § 4260 (illegal contracts for sale on future delivery; privilege ceases, but "any discovery . . . shall not be used" etc., and "he shall be altogether pardoned of the offence"); P. C. 1910, § 665 (in election offences, any offender not on trial shall be competent and compellable; "and nothing then said by such witness shall at any time be received or given in evidence against him in any prosecution" except for perjury therein); § 120 (interfering with apprentices; privilege ceases, but "no statements made by him on such trial shall be given in evidence" etc.); § 404 (gaming; "any other person who may have played and bet at the same time" is compellable; but "nothing then said by such witness" shall be received against him, etc.); § 676 (vote-buying at primaries; any person not the accused is compellable, as in P. C. § 404); 1895, Henderson *v.* State, 95 Ga. 326, 22 S. E. 537 (the exemption of Code 1882, § 4545, Code 1895, § 404, does not apply to the new sections 4549 *b* and *c* against lotteries);

Hawaii: Rev. L. 1915, § 3010 (bastardy; the mother to be compellable, "but no prosecution shall afterwards be had against her" for any matter testified to); § 1203 (bank examiner's inquiry; privilege ceases, but "no prosecution can afterwards be had," etc.); § 2228 (public utilities commission; privilege ceases, but "no person shall be prosecuted," etc., for anything "concerning which he shall under oath" give evidence); § 3886 (offense of footbinding; privilege ceases, but the witness "shall not be prosecuted," etc.); § 4182 (gambling offences; privilege ceases, but "no prosecution can afterwards be had," etc.); § 4184 (action to recover money lost at betting, etc.; privilege ceases for persons other than the parties, but "the testimony of any such person shall not be used," etc.);

Idaho: Comp. St. 1919, § 103 ("no statement made" in testimony before the Legislature or a committee thereof "is competent evidence in any criminal proceeding against such witness," but this is not to exempt from prosecution for perjury); § 8244 (the privilege ceases on prosecution for duelling offences; "but no evidence given . . . shall be received against him in any criminal prosecution or proceeding"); § 8081 (wherever evidence under these sections is forbidden to be used, the prohibition does not extend to a charge of perjury in such testimony); § 8313 (in gambling offences, the privilege ceases; "but no prosecution can afterwards be had against him for any offence concerning which he testified"); § 8145 (bribery; no person testifying for the State is to be excused, but "no person shall be prosecuted or punished on account of any transaction, manner [*sic?* matter], or thing concerning which he may be so required to testify or produce evidence," except for perjury therein); § 2639 (liquor prosecutions; witness compellable, "but no person shall be prosecuted or punished on account of any transaction or matter or thing concerning which he shall be compelled to testify," nor shall his testimony be used, etc.); § 2483 (State public utilities commission; privilege ceases, but no person so testifying shall be exempt from prosecution; and this shall not be construed "as in any manner giving to any public utility immunity of any kind"); § 2547 (anti-trust law; privilege ceases, but no person shall be prosecuted for any matter concerning which he may testify, except for perjury in testifying); § 5036 (insurance offences; privilege ceases, but no person shall be prosecuted, etc., and no testimony so given shall be received against him);

Illinois: Rev. St. 1874, c. 38, § 35 (when in a grand jury investigation or on the trial of bribery offences it appears to the Court that a person not charged is "a material and necessary witness," and that "his testimony would tend to criminate himself," the Court may order "that such witness be released from all liability to be prosecuted or punished on account of any matter to which he shall be required to testify," and privilege shall then cease, and if he testifies such order shall be a bar to any prosecution, etc., "for such matter"); § 137 (in proceedings for illegal gaming, "all persons shall be obliged and compelled to answer upon oath" a bill of discovery for the sums won; "upon the discovery and repayment of the money or other thing so to be discovered and repaid, the person who shall discover and repay the same, as aforesaid, shall be acquitted, indemnified, and discharged from any other or further punishment, forfeiture, or penalty," etc.); c. 63, § 6 ("the testimony of a witness examined and testifying" before either house of the General Assembly, or a committee or joint committee thereof, "shall not be used as evidence in any criminal proceedings against such witness in any court of justice," but no official paper produced shall be regarded as within the privilege "so [as] to protect such witness from any criminal proceeding as aforesaid," and no exemption is secured from punishment for perjury); St. 1891, June 11, p. 206, as amended by St. 1897, July 1, p. 298, §§ 7 *a*, 7 *b* (the Secretary of State shall by letter of inquiry to the officer of each corporation doing business in this State "require an answer under oath" as to membership in any combination, etc., made criminal by §§ 3 and 4; on refusal or failure to make such oath, a penalty of $50 for each day is incurred; provided "that no corporation, firm, association, or individual, shall be subject to any criminal prosecution by reason of anything truthfully disclosed by the affidavit required by this act or truthfully disclosed in any testimony elicited in the execution thereof"); St. 1915, June 22, p. 371, § 4 (abatement

of prostitution nuisance; privilege ceases, but the answer "shall not be used against him," etc., "nor shall he be prosecuted," etc.);
Indiana: Burns' Ann. St. 1914, §§ 2112, 7551, 7552 (the privilege ceases for a witness in gaming prosecutions; but "such evidence shall not be used against him in any prosecution for such or any other offense, and he shall not be liable to trial by indictment or information, or to punishment, for such offense"); § 2113 (same, for a witness "required to testify touching the commission of any misdemeanor"; but the testimony may be used for perjury therein); § 2126 (in a prosecution for having corrupt interest in public contract, the contractor is compellable to testify against the officer, and officer against contractor; but "such evidence shall not be used against the party testifying, in any prosecution against himself, and the person thus testifying shall be exempt from prosecution or punishment for such offense"); § 2129 ("The evidence of any person in any civil action disclosing fraud against creditors shall not be evidence against any such person or any criminal prosecution for committing such fraud"); § 1077 (admissions in answers in divorce are not to be "used as evidence" in any other case); § 5542 (privilege abolished for witnesses before the railroad commission; "the claim that any such testimony may tend to criminate the person giving it shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding . . . nor shall any such witness so compelled to testify against himself be thereafter prosecuted," etc.); § 8656 (privilege abolished for witnesses before investigations by common councils, for offences under this act or ordinances thereunder; "but such testimony shall not be used against such witness in any criminal prosecution"); § 2556 (bribery at elections; a guilty person is compellable, "but such evidence shall not be used against him in any prosecution for such or any other offence growing out of the matters about which he testifies, and he shall not be liable to trial by indictment or information or punished for such offence"); § 3876 (anti-trust law, civil remedies; witness who is officer, etc., of corporation, to be compellable, but his "testimony shall not be used against such witness or party in any criminal prosecution"); § 7103 (primary elections; accomplice "informing and testifying shall not be thereafter prosecuted for his guilt in connection with the transaction"); § 7441*h* (State fire-marshal's powers; witness compellable, but "such evidence or testimony shall not be used," etc., nor shall such witness "be thereafter prosecuted for any crime concerning which he has been compelled to testify"); § 2646 (insurance company's contribution of money for political purposes; privilege ceases, but "no person shall be prosecuted," etc., and the testimony shall not be used, etc.); § 7111*n* (corrupt practices at elections; privilege ceases, but "his answer, or the thing produced by him" shall not be used, etc.); St. 1915, April 26, p. 523, § 9 (keeping house of ill-fame; prosecuting attorney and court "may grant immunity to any citizen called to testify in behalf of the prosecution"); St. 1917, April 2, p. 15, § 34 (liquor offences; witness called for the State "who shall give freely and truthfully" any testimony tending to incriminate "shall be immune from prosecution" as to any offense involved);
Iowa: Code 1897, § 4612, Comp. Code § 7319 (the privilege ceases for prosecutions for gaming, trusts, and liquor offences; "but any matter so elicited shall not be used against him, and said witness shall not be prosecuted for any crime connected with or growing out of the act on which the prosecution is based in the cause in which his evidence is used for the State under the provisions of this section"); § 3587, Comp. Code § 7230 (a verification of a pleading that might result in a criminating answer is not required); § 2131, Comp. Code § 5186 (in a statutory action against a common carrier, the privilege ceases for the agent, etc., of a corporation defendant, "but no person shall be prosecuted or subjected to any penalty or forfeiture for and on account of any transaction, matter, or thing concerning which he may testify or produce evidence," except for perjury therein); § 2399, Comp. Code § 934 (illegal liquor sales; the privilege ceases for seller and buyer as to documents and testimony, "but such oral evidence shall not be used against such person or witness on the trial of any criminal proceeding against him"); § 4075, Comp. Code § 7759 (in proceedings auxiliary to execution, the debtor must answer on oath, without privilege for answers that "will tend to convict him of a fraud, but his answers shall not be used as evidence against him in a prosecution for such fraud"); St. 1907, c. 73, § 3, Comp. Code § 5375 (political contributions by corporations; privilege denied, "and no person having so testified shall be liable," etc.); St. 1907, c. 112, § 3, Comp. Code § 5222 (railroad passes, privilege denied, "but no person having so testified shall be liable," etc.); c. 183, § 2, Comp. Code § 8956 (corrupt offers to agents, etc.; privilege denied, but "no person shall be liable to any criminal prosecution," etc.); St. 1913, c. 15, p. 20, April 17, Comp. Code § 683 (bids for public supplies; witnesses compellable, but not to be prosecuted); Comp. C. § 541 (corrupt practices at elections; privilege ceases, but "any matter so elicited shall not be used against him, and said witness shall not be prosecuted for any crime connected with or growing out of the act on which the prosecution is based in the cause in which his evidence is used for the State"; an original and ingenious phrasing, but equally futile with the others to define unmistakably the limits of immunity); § 591 (contested county elections; privilege ceases, but

"no part of his testimony on that trial shall be used," etc.); §§ 1853, 1903 (State board of control; privilege ceases, but "no person shall be prosecuted," etc.); § 6238 (combinations, pools, and trusts; privilege ceases, but "such witness shall not be prosecuted," etc.); 1892, Parks *v.* Johnson, 86 Ia. 475, 53 N. W. 285 (exemption from the use of answers on a charge of debtor's "fraud," held not applicable to contempt proceedings);

Kansas: Gen. St. 1915, § 8133 (bribery or corruption at elections; no person testifying "shall be deemed to criminate himself, nor shall he be held to answer, . . . for any complicity on his part in the bribery or corruption concerning which he may testify"; except for a candidate for election or appointment); § 5511 (the privilege ceases on charges of liquor-law offences; but "the testimony given by such person shall in no case be used against him"); § 8138 (a witness against another in a gaming offence is compellable; "but he shall not be liable to punishment in any such case"); § 8395 (railroad rate inquiries by the railroad commissioners; the claim of privilege shall not be allowed, but the testimony "shall not be used against such person" in criminal trials, "nor shall he be liable to criminal prosecution for or on account of any transaction, matter, or thing concerning which he may so testify"); § 6421 (anti-trust laws, civil remedies; defendant compellable to answer, but answers shall not be used in a criminal prosecution, nor shall he be "liable to criminal prosecution for any offense about which his answers or books or papers produced would be evidential"); § 5504 (intoxicating liquors; witness compellable, but "no person shall be prosecuted" for any matter thus compelled to be testified to, and no such testimony shall be used against him); § 7614 (removal of public officers; like Gen. St. § 5504); § 8344 (public utilities commission; witnesses compellable, but "no person having so testified shall be prosecuted . . . on account of any transaction, matter, or thing concerning which he may have testified or produced any documentary evidence," except for perjury); § 3652 (gaming offences; privilege ceases, but no person shall be prosecuted, etc., except for perjury); § 3686 (obscene publications; testimony compellable on certain topics, but no testimony obtained shall be used etc., and this shall not require "any person prosecuted criminally under this law to testify against himself under such prosecution"); § 4276 (illegal voter is compellable to answer; "but no part of his testimony" shall be used etc.); § 5373 (fire insurance rate discrimination; privilege ceases, but no person shall be prosecuted, etc., except for perjury); § 6025 (legislative investigation; privilege ceases, but no such testimony shall be used etc., except for perjury); St. 1919, Feb. 24, c. 316, § 4 (trusts and monopolies; privilege ceases, but "no person shall be prosecuted," etc., "nor shall such testimony be used," etc.);

Kentucky: Stats. 1915, § 213 (champertous contracts concerning land; the privilege of parties ceases, but they shall not be subject to prosecution, and "such evidence or discovery" shall not "be used in any such prosecution"); § 1973 (in gaming prosecutions, the privilege ceases; but "no such testimony shall be used against him in any prosecution except for false swearing or perjury, and he shall be discharged from all liability for any gaming so necessarily disclosed in his testimony"); § 2579 (same, for the buyer of a lottery ticket, in a prosecution against the seller); §§ 1593, 1594 (the privilege ceases for a witness summoned by the grand jury as to his knowledge of election-offences in the county within eighteen months; but his testimony is not to "be used against him in any prosecution except for perjury," and "if used on behalf of the Commonwealth, he shall stand discharged from all penalty for any violation of this chapter, so necessarily disclosed in his testimony, as tending to convict the accused"); § 1241*a* (lynching offences, etc.; privilege abolished, "but no such testimony given by the witness shall be used against him in any prosecution except for perjury, and he shall be discharged from all liability for any violation of this act so necessarily disclosed in his testimony"); § 762c, par. 11 (State insurance board; privilege ceases, but "no person shall be prosecuted," etc.); St. 1916, Feb. 10, p. 1, Stats. § 201*c*-6 (free passes by common carriers forbidden; privilege ceases, but "no person having so testified shall be liable to any prosecution," etc.); St. 1916, Mar. 15, p. 74, Stats. § 3921*a*-12 (anti-trust law; privilege ceases, but "no person shall be subject to prosecution," etc.); 1911, Bentler *v.* Com., 143 Ky. 503, 136 S. W. 896 (Stats. 1899, § 1973, applied, and held constitutional); 1922, Gordon *v.* Tracy, 194 Ky. 166, 238 S. W. 395 (St. 1920, c. 8, giving immunity for testimony concerning gambling offences, applied);

Louisiana: Const. 1921, Art. XIX, § 13 ("Any person may be compelled to testify in any lawful proceeding against any one who may be charged with having committed the offence of bribery, and shall not be permitted to withhold his testimony upon the ground that it may criminate him or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving such testimony"); § 15 (illegal free pass to public officer; no person giving one shall be privileged, "but he shall not be liable to civil or criminal prosecution therefor, if he shall testify to the giving of the same"); Art. VIII, § 19 ("In the trial of contested elections and in proceedings for the investigation of election, and in all criminal trials under the election laws, no person shall be permitted to withhold," etc., substantially as in Art. XIX; adding,

in trials for bribery at elections, "either the bribe-giver or the bribe-taker may give evidence, or make affidavit against the other, with immunity from prosecution in favor of the first informer," except for perjury); C. Pr. 1870, § 475 (production of documents may be ordered, except that no production shall be compelled "that would subject him to a criminal prosecution under the penal laws of the State"); St. 1912, No. 213, § 30 (corrupt electoral practices; privilege ceases, but "the testimony so given shall not be used," etc., and "a person so testifying shall not be liable to indictment," etc.); St. 1915, No. 12, § 3 (trusts and monopolies; privilege ceases, but "no such witness shall be liable to prosecution," etc.);

Maine: Rev. St. 1916, c. 33, § 90 (violation of game laws; privilege ceases, but evidence so given shall not be used, etc.); c. 55, § 60 (State public utilities commission; privilege ceases, but "no person having so testified shall be prosecuted," etc.);

Maryland: Ann. Code 1914, Art. 27, § 228 (in gaming or betting charges, the privilege ceases; but after giving testimony for the State, the witness "shall not be prosecuted for any offence to which his testimony relates"); Art. 23, § 422 (State public service commission; privilege ceases, but "no person shall be prosecuted" for anything testified to "under oath, by order of the commission or a commissioner"; but this shall not give "unto any corporation immunity of any kind from the law"); § 462 (in court proceedings concerning public utilities, privilege ceases, but "no person having so testified shall be prosecuted," etc.); Art. 33, § 176 (corrupt electoral practices; in contest proceedings, privilege ceases, but the answer shall not be used against him); § 177 (same; in criminal trial, privilege ceases except for the accused, but the answer shall not be used against him); St. 1914, c. 800, Ann. Code 1914, Art. 101, § 7 (State industrial accident commission; privilege ceases, but "no person shall be prosecuted," etc., for any matter on which he "shall under oath have by order of the commission," etc., testified);

Massachusetts: Gen. L. 1920, c. 191, § 14, c. 266, § 39 (a person suspected of concealing, etc., a will is compellable to respond under oath, but his examination is not to be used against him in a prosecution for stealing or destroying the will); c. 55, § 45 (in election inquests no person is to be excused on the present ground; but no person so testifying shall "be prosecuted or be subjected to a penalty or forfeiture for or on account of any action, matter, or thing concerning which he may so testify except for perjury committed in such testimony"); c. 3, § 28 (testimony before the Legislature or a committee thereof; privilege ceases, but the witness shall not be prosecuted, etc., except for perjury); c. 55, § 25 (candidate's election expenses; no person "called upon to testify" shall be liable to criminal prosecution, etc.); c. 93, § 7 (restraint of trade; privilege ceases, but "no person shall be prosecuted," etc.); c. 271, § 39 (bribery of employee; privilege ceases, but "no person shall be liable to any suit or prosecution, civil or criminal," for testimony thus given "before said court or in obedience to its subpœna");

Michigan: Comp. L. 1915, § 12078 (offences by attorneys; "no evidence derived from the examination of any such attorney . . . shall be admitted in proof on any criminal prosecution against him for violating any of the provisions of this chapter"); § 9304 (political contributions by insurance companies; witnesses compellable, but "no person shall be prosecuted or subjected to any penalty or forfeiture" for any matter so testified to, and no testimony so given shall be used against him, etc.); § 8135 (railroad commission; like Comp. L. § 12548); § 12548 (anti-trust law; witness to be compellable, but "no person shall be prosecuted," etc., for any matter to which he may testify at such trial, and "no testimony so given by him" shall be used against him etc.; "provided that immunity shall extend only to a natural person who in obedience to a subpœna gives testimony under oath or produces evidence documentary or otherwise under oath"; also excepting perjury); § 3836 (corrupt electoral practices; privilege ceases, "but no prosecution can afterwards be had," etc.); § 7049 (intoxicated person; privilege ceases for interrogation as to source of liquor, etc.; but the person so testifying shall not be prosecuted for the intoxication); § 13645 (fraudulent debtors; privilege ceases, but "no such answer shall be used in evidence in any other suit or prosecution"); St. 1919, No. 53, Apr. 1, § 7 (intoxicating liquors; privilege ceases, "but the testimony so given shall not be used," etc.);

Minnesota: Gen. St. 1913, § 8537 (in bribery offences, the privilege ceases, "but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying to the giving of a bribe, which has been accepted, shall not thereafter be liable to indictment, prosecution, or punishment for that bribery," and may plead his testimony in bar); § 4769 (in game-law offences, "any participant in any violation thereof may testify . . . without criminating himself by so doing, nor shall the evidence so given by him be used against him in any criminal proceeding against him for such violation"); § 3199 (illegal sale of liquor; on examination of witnesses before a justice, "no testimony given upon such a hearing shall be in any manner used to the prejudice of the witness giving the same"); § 3616 (insurance rebates; privilege ceases, but "no person shall be prosecuted for any act concerning which he shall be compelled to so testify," etc.); § 4020 (State board of control of charitable and penal institutions; privilege ceases, but "no person shall be prose-

cuted," etc.); § 4197 (in any proceedings involving common carriers or public warehousemen, "the Court in its discretion may require a witness to answer any question, although his answer may tend to convict him of a crime, but no person so compelled to answer shall thereafter be liable to any prosecution for such crime"); § 5898 (usury; every person offending is compellable to answer on oath in any action for discovery of sums, etc., received); § 7956 (supplementary proceedings against a debtor; privilege ceases for fraud, but "his answer shall not be used against him in any criminal proceeding"); § 8502 (in every case where it is provided that "a witness shall not be excused from giving testimony tending to criminate himself," no person shall be excused on that ground, "but he shall not be prosecuted . . . for any matter . . . concerning which he shall testify," except for perjury therein); § 8644 (dwelling offenses; no offender shall be excused from testifying on the ground of self-crimination); § 8734 (gambling offences; "no person shall be excused from testifying . . . by reason of his having bet or played," etc.); § 8812 (offenses against public peace, including prize-fights, duels, etc.; "no person shall be excused from giving evidence," etc., on the ground of self-crimination); § 8863 (fraud in trademarks, etc.; no testimony given or civil action shall be used in a criminal prosecution, and privilege ceases in civil action);

Mississippi: Code 1906, § 1503, Hem. § 1261 (for duelling offences, the privilege ceases; but "the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying," except for perjury; "and the fact that he testified thereof shall be a bar to any prosecution against him for such transaction"); Code §§ 1504, 1505, Hem. §§ 1262, 1263 (a witness giving evidence of a gaming offence shall be exempt from criminal prosecution, etc.); Code § 1506, Hem. § 1264 (crimes against the legislative power; the privilege ceases, but "such testimony shall not afterwards be used against him in any criminal prosecution" except for perjury); Code § 3017, Hem. § 5405 (a person sworn without his contrivance before a legislative House "shall not be held to answer criminally, or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify; nor shall any statement made, or book, document, or paper produced by any such witness be competent evidence in any criminal proceeding against such witness," except for perjury; "nor shall such witness refuse to testify," etc., because of this privilege); Code § 1507, Hem. § 1265 (purchaser of a lottery ticket; privilege ceases, but he is exempted from prosecution); Code § 1792, Hem. § 2106 (liquor offences; privilege ceases, "but no person shall be prosecuted," etc.); Code §§ 5013, 5014, Hem. §§ 3295, 3296 (trusts and combines; privilege ceases, but "the testimony so given shall not be used," etc., and "a person so testifying shall not thereafter be liable to indictment," etc.); St. 1908, c. 118, Hem. § 1917 (gambling in grain, etc.; privilege ceases, but any discovery shall not be used, etc., "and he shall be altogether pardoned," etc.); St. 1912, c. 251, p. 318, Mar. 13 (repealing Code 1906, § 5018, which exempted corporations from prosecution on production of documents, etc.); 1910, Cumberland T. & T. Co. v. State, 98 Miss. 159, 53 So. 489 (Code § 5018, giving immunity to corporations producing documents upon trial for violation of the anti-trust laws, applied);

Missouri: Rev. St. 1919, § 5416 (when a person testifies in any suit, "the testimony of such person shall not be used as evidence to prove any fact in any suit or prosecution" against him for a penalty in regard to a fraudulent conveyance); § 5747 (in civil actions to recover money lost at gaming, the defendant's answer on oath "shall not be admitted as evidence against such person in any proceeding by indictment"); § 3580 (on a trial for illegal dealing in options, every officer, agent, and employee of the defendant is compellable to "answer all questions propounded to him relevant to the issue in such trial"); § 13270 (trademark actions and offences; "no testimony or evidence given" in any civil action "can or shall be used in any criminal prosecution against such party or witness under any of the provisions of this chapter," and no person shall refuse to testify in a civil case because of those provisions); § 10536 (public service commission; witnesses are compellable, but "no person shall be prosecuted" etc. for any matter "concerning which he shall under oath have testified or produced documentary evidence," except for perjury; and this is not to give "unto any corporation immunity of any kind"); § 5040 (corrupt electoral practices; privilege ceases, but no answer "shall be used or be evidence" in criminal cases); § 7900 (city public utilities commission; privilege ceases, but testimony shall not be used, etc., nor shall any criminal proceeding be brought, etc.); §§ 9668, 9693 (pools and trusts; privilege ceases, but no person shall be subjected to prosecution, etc.); § 9683 (unlawful discrimination, pools, etc.; privilege ceases, but no person shall be subjected to prosecution, etc.; and upon filing of required affidavit, no person shall be prosecuted for any matter truthfully disclosed);

Montana: Rev. C. 1921, § 83 ("No person sworn and examined before either house of the Legislative Assembly, or any committee thereof, can be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify; nor is any statement made or paper produced by any such witness competent evidence in any criminal proceeding against such witness"; and the privilege ceases for such

witness); § 3902 (public service commission; witnesses compellable, but "no person having so testified shall be prosecuted," etc., for any matter "concerning which he may have testified or produced any documentary evidence," except for perjury); § 3800 (State board of railroad commissioners; privilege ceases, but "no person shall be prosecuted," etc., and "no testimony or evidence so given or produced shall be received," etc.); § 10720 (the prohibition in the following sections does not apply to a perjury-charge); § 10987 (the privilege ceases on trials for duelling offences; "but no evidence given upon any examination of a person so testifying shall be received against him in any criminal proceeding or prosecution"); § 10846 (the privilege ceases for the offence of promising legislative bribery, "but such testimony shall not afterward be used against him in any judicial proceeding"); § 10863 (on a charge of bribery or corruption, the offender's privilege ceases, "but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying to the giving of a bribe which has been accepted shall not thereafter be liable to indictment, prosecution, or punishment for that bribery," and may plead it in bar); § 10817 (election contest; privilege ceases, but "no admission, evidence, or paper made or advanced or produced by such person shall be offered or used against him in any civil or criminal prosecution, or any evidence that is the direct result of such evidence or information that he may have so given"; a clumsy and also a futile provision, not creditable to the legal draftsmen of 1912, the year of enactment); § 11178 (gambling offences; privilege ceases, but "no person shall be prosecuted," etc., and "no testimony or evidence so given or produced shall be received," etc.); § 11076 (liquor offences; privilege ceases, but "no natural person shall be prosecuted," etc.); § 11112 (liquor offences; privilege ceases, but "no person shall be prosecuted," etc., "nor shall such testimony be used," etc.; query, are these two provisions cumulative, or inconsistent, or differentiable?); § 11405 (extortion; like id. § 11112, *supra*); § 12178 (co-defendant testifying for or against the other; "the testimony of such witness must not be used," etc.); St. 1921, Sp. Sess., c. 9, § 29 (intoxicating liquors; privilege ceases for testimony given "in obedience to a subpœna"; but "no natural person shall be prosecuted," etc.);

Nebraska: Rev. St. 1921, § 5475 (the privilege ceases for testimony before the board of railroad commissioners, "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"); § 9051 (an insolvent debtor on examination is not privileged as to an answer showing fraud; "but his answer shall not be used as evidence against him in a prosecution for such fraud"); § 3469 (prosecution under the statute against illegal trusts; the privilege ceases, "but no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence," except for perjury); § 5475 (State railway commission; witness compellable, "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"); § 7896 (insurance offences; witnesses compellable, "but no person shall be prosecuted for any act concerning which he shall be compelled so to testify," except for perjury; this is the neatest of all the various phrasings used); § 6848 (State commissioners of State institutions; witnesses compellable, but "evidence given by any witness," etc., "shall not be used" against him, but he shall not be exempt from perjury, etc.); § 3279 (liquor offences; privilege ceases, but "the testimony so given, unless voluntary, shall in no case be used," etc.); § 3428 (insurance combination; privilege ceases, but the statements made shall not be used, etc., and the officer or agent shall not be prosecuted, etc.); § 3430 (lumber and coal combinations; privilege ceases, but "such evidence or testimony shall not be used," etc.); § 4424 (city officers' corruption; privilege ceases, but "no person shall be prosecuted," etc.); § 2080 (illegal voting; privilege ceases, but "no part of his testimony on that trial shall be used," etc.); § 3080 (labor employer's liability; before the compensation commissioner, privilege ceases, "but no person shall be prosecuted," etc.); § 9707 (bribery in paving contracts; privilege ceases, but "such evidence or testimony shall not be used," etc.); § 9877 (grain monopolies; privilege ceases, but "such evidence or testimony shall not be used," etc.);

Nevada: Rev. L. 1912, § 3581 (in proceedings based on railroad discrimination, the privilege ceases, but "such evidence or testimony shall not be used as against such person on the trial of any indictment against him"); § 6328 (on a trial for bribery or corruption the privilege ceases, "but such testimony shall not afterwards be used against him in any judicial proceeding," except for perjury); § 6522 (no person is to be excused on this ground from testifying to gaming offences; but "no prosecution can afterwards be had," etc.); § 6424 (in trials for duelling offences, any spectator, etc., may be compelled to testify, "but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying"); § 7451 (the privilege ceases for accomplices; quoted *ante*, § 488); § 4565 (State railroad commission; witnesses compellable, but "no person having so testified shall be prosecuted," etc., except for perjury); § 4536 (State public service commission; like § 4565); § 6449 (abortion or selling drugs therefor; privilege ceases, but "such testimony shall not be used," etc.); St. 1919, p. 1, § 29 (liquor offences; "any per-

son called on behalf of the State . . . who shall give freely and truthfully any testimony tending in any way to incriminate himself shall be immune from prosecution under this act"); St. 1919, Mar. 28, p. 198, § 30 (State public service commission; privilege ceases, but "no person having so testified shall be prosecuted," etc.);

New Hampshire: Pub. St. 1891, c. 112, § 26 (no employee or agent is to be excused on the present ground in prosecutions for illegal dealing with liquor; but no such testimony is to be used against him and no prosecution is to be instituted for any offence so disclosed by him); c. 190, § 1 (one suspected of eloigning a deceased person's property may be examined under oath, but "no evidence elicited on such examination" may be used against him except on a charge of perjury in testifying); c. 201, § 27 (same, for one suspected of eloigning or possessing an insolvent debtor's property); c. 245, § 43 (no deposition taken in trustee process is to be evidence in a criminal prosecution, except for perjury therein); c. 260, § 10 (the participant in a riot who testifies fully for the prosecution shall not be liable for such participation); St. 1921, c. 147 (liquor offences; privilege ceases for clerk, etc., of person accused; but no testimony so given shall be used, etc.);

New Jersey: Comp. L. 1910, Evidence, § 67 (legislative investigations; the privilege ceases, but no answer "shall be used or admitted in evidence in any proceeding against him," except in perjury in the answer); Crim. Procedure, § 154 (procuring miscarriage; the privilege ceases, but the testimony "shall not be used in any prosecution civil or criminal" against him); Crimes, §§ 158, 159 (certain corporate frauds; no person disclosing his act under compulsion "shall be liable to be convicted of any" of the offences specified "by any evidence whatever in respect of" the act disclosed); Usury, § 3 (every offender under this act "may be compelled to answer as a witness in any suit that he may bring," as to an agreement in violation of the law); Crimes, § 27*f* (bribery, etc., at elections; privilege abolished, but, "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise," and the testimony is not to be used against him in a criminal proceeding); Crimes, § 27*k* (bribery at elections; privilege abolished; but "no person called to testify in any proceedings under this act shall be liable to a criminal prosecution either under this act or otherwise, for any matters or causes in respect to which he shall be examined or to which his testimony shall relate, except to a prosecution for bribery committed in such testimony"); Crimes, § 27*n* (political contributions by insurance companies; privilege ceases, but "no person shall be prosecuted," etc., and "no testimony so given" shall be used, etc.); Elections, § 171 (in electoral contests, Court may require disclosure of vote from one voting illegally, but "no part of his testimony shall be used," etc.); Elections, § 213 (indictment for electoral offences; like Evidence, § 67); Gaming, § 7 (winner of moneys at gaming, compellable to answer on discovery when sued); St. 1911, Apr. 20, c. 188, § 32 (corrupt practices at elections; privilege ceases, but "the testimony so given shall not be used," etc., and "a person so testifying shall thereafter not be liable to indictment," etc., and may plead in bar the giving of such testimony);

New Mexico: Const. 1911, Art. IV, § 41 (legislative corruption; privilege abolished, "but such testimony shall not be used against him in any judicial proceeding" except for perjury); St. 1901, c. 85 (in trials for offences of prostitution, the privilege ceases for such offences, "but the testimony which may be given by such person shall in no case be used against him"); Annot. St. 1915, § 2463 (game and fish laws; "any participant in a violation thereof, when so requested by the district attorney," etc., may testify, "and his evidence so given shall not be used against him in any prosecution for such violation"); § 1786 (in offences against public morals, no person shall be "excused from testifying concerning any offenses committed by another," but the testimony "shall in no case be used against him"); §§ 2514, 2515 (gambling; in action to recover money won, defendant may be called upon to answer interrogatories, and a refusal will be taken as a confession; but "such answer shall not be admitted against such person as evidence in any criminal proceeding"); § 2838 (corrupt practices at elections; privilege ceases, "but no person shall be prosecuted . . . for . . . any transaction . . . concerning which he may so testify," and no testimony so given shall be used against him); § 5378 (in inquiries by the State corporation commission, privilege ceases, but "such testimony or evidence shall not be used in any criminal proceeding," etc.); St. 1919, Mar. 10, c. 32, Ann. St. 1915, § 4124 ("no pleading can be used in a criminal prosecution against the party as proof of the fact admitted or alleged in such pleading");

New York: Constitution 1895, Art. XIII, § 3 (bribery; the privilege ceases for the offeror of bribe, but "he shall not be liable to civil or criminal prosecution therefor"); § 5 (free pass by a corporation to a public officer; similar provision); *Consolidated Laws* 1909: Canal § 20 (public-works frauds; privilege ceases; but "his testimony shall not be used," etc.); Debtor and Creditor § 22 (in a creditor's action relating to a debtor's assignment, the privilege ceases, but the "answer shall not be used against him in any criminal action or proceeding"); § 175 (insolvent debtor, when examined, "and answering to the satisfaction of the Court, shall not be liable to any penalty,"

etc., but his answers may be used as if obtained in a civil case); Election § 558 (corrupt practices; privilege ceases, but "no person shall be prosecuted," etc., and "no testimony so given or produced shall be received," etc.); Forest Fish & Game § 223 (violation of game-law; privilege ceases, but "no evidence derived" shall be used, etc., and no witness called for the People shall be liable, etc.); Gen. Corporation § 44 (political contributions; privilege ceases, but "no person shall be prosecuted," etc., and "no testimony so given" shall be received); Liquor Tax § 33 (privilege ceases, in liquor seizures, except for claimant of interest, but "no person shall be prosecuted," etc., and "no testimony so given" shall be received, etc.); Penal § 770 (election offences; the privilege ceases, but the testimony shall not be used in any proceeding and he "shall not thereafter be liable" criminally for that offence testified to); § 381 (bribery charge; the privilege ceases, but the testimony shall not be used against him in any proceeding, and he "shall not thereafter be liable" criminally "for that bribery"); § 2443 (champerty; the privilege ceases, but "no evidence derived from the examination of such person shall be received against him" criminally); § 737 (duelling; the privilege ceases, but "evidence given . . . cannot be received against him" criminally); §§ 713, 1472, 1716, 1787, 1906, 2038, 2097 (no person is to be excused from giving evidence upon offences specified in Arts. 14, 69, 140, 165, 168, 172, 182, 189; "but such evidence shall not be received against him upon any criminal proceeding"); § 996 (gaining offences; privilege ceases, but "no person shall be prosecuted," etc., and "no testimony so given or produced shall be received against him," etc.); § 1631 (sections of this chapter forbidding evidence to be used do not apply to prosecution for perjury in such examination); Public Service Com. § 20 (public service commission inquiries; privilege ceases, but "no person shall be prosecuted," etc.); Second Class Cities § 243 (city council inquiries; privilege ceases, but "such testimony shall not be used," etc.); *Civil Practice Act* 1920, § 791 (examination of a judgment debtor; the privilege ceases, but the answer "cannot be used as evidence" against him criminally); § 1219 (unlawful exercise of corporate rights; privilege ceases, but "such answer cannot be used," etc.); *Justice Court Act* 1920, § 486 (corrupt practice by a justice, etc.; the privilege ceases; but the testimony "is not evidence" against him criminally);
Session Laws since 1909: Consol. L. 1909, Gen. Business § 345, as amended St. 1910, c. 394, p. 724 (monopolies; witnesses to be compellable, but "no person shall be prosecuted or subjected to any penalty or forfeiture" for any matter testified to; and no such testimony shall be used, etc.); Consol. L. 1909, Penal § 584, as amended by St. 1910, c. 395, inserting a new § 584 (conspiracies; like Gen. Bus. § 345); Consol. L. 1909, Labor § 154, as amended by St. 1909, c. 514, § 3 (bureau of industries and immigration; inserting a new § 154; "no person shall be prosecuted," etc., except for perjury); St. 1911, c. 647, § 25 (conservation department; witnesses compellable, but "no person shall be prosecuted," etc., except for perjury; but this is not to give "unto any corporation immunity of any kind"); St. 1912, c. 444, § 4 (amending St. 1911, c. 647, by inserting § 35; conservation department; like St. 1911, c. 647, § 25); St. 1913, c. 236, p. 425 (amending Consol. L. 1909, Penal, by adding a new § 395; bucket-shop offences; witnesses compellable, but "no person shall be prosecuted," etc., and such testimony shall not be used against him, etc.); St. 1914, c. 360, § 3 (amending § 22 of Cons. L. 1909, Debtor and Creditor, *supra*, by changing the number to § 16; debtor's assignment for creditors; no witness or party to be excused, etc., but "such answer shall not be used against him in any criminal action or proceeding"); St. 1914, c. 518, § 31 (personal loan brokers; a violator of the Act is compellable; but "the testimony so given shall not be used," etc., "nor shall a person so testifying be thereafter liable to indictment," etc.); Penal § 166, as amended by St. 1920, c. 27 (anarchy; privilege ceases, but "no person shall be prosecuted," etc., and "no testimony so given or produced shall be received," etc.); C. Cr. P. § 392*a*, as added by St. 1920, c. 920 (a civil pleading is not to be used in a criminal prosecution as an admission);

1917, Re Rouss, 221 N. Y. 81, 116 N. E. 782 (proceeding for disbarment not being a punishment for crime, an attorney who had testified for the prosecution in a matter affecting his client was held not to have obtained immunity from disbarment under Cons. L. 1909, Penal § 584);

North Carolina: Con. St. 1919, § 1800 (in gaming or liquor prosecutions, the privilege ceases as to unlawful gaming; but "no discovery made by the witness upon such examination shall be used against him" in any penal prosecution, "and he shall be altogether pardoned of the offence so done or participated in by him"); § 1797 (on a charge of "fraud upon the State," a refusal to answer is a contempt; but "it shall not be competent to introduce any admissions thus made on the trial of any persons making the same"); § 2143 (in certain gaming offences, the privilege ceases; but the testimony "shall not be used against him in any criminal prosecution" therefor); § 4571 (in lynching investigations the privilege ceases, "but no discovery made by such witness or upon any such examination shall be used against him in any court or in any penal criminal prosecution, and he shall when so examined as a witness for the State be altogether pardoned of any and all participation in any crime" of this sort "concerning which he is required to testify"); § 5804 (privilege abolished for offences concerning unlawful sale

of liquor, keeping of games of chance, giving of entertainments, etc., near the State University; but the testimony "shall not be used against him in any criminal prosecution on account of such participation"); § 6096 (privilege ceases for a voter not qualified, on inquiry as to his vote; but "any witness making such discovery shall not be subject to criminal or penal prosecution for having voted at such election"); § 533 ("No pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it"); § 716 (examination of judgment debtor; privilege ceases, but "his answer shall not be used as evidence," etc.); § 2149 (dealing in futures, etc.; like ib. § 1800, *supra*); § 2569 (monopolies and trusts; privilege ceases, but "no person examined . . . shall be subject to indictment," etc., and "full immunity from prosecution . . . is hereby extended"); § 3406 (liquor offences; like ib. § 1800, *supra*); § 6681 (narcotic drug offences; like ib. § 1800, *supra*); § 4187 (electoral offences; privilege ceases, but "such person shall be immune from prosecution, and shall be pardoned for any violation of law about which such person is so required to testify"); § 4199 (using insurance funds for political purposes; privilege ceases, but "no person shall be prosecuted," etc., and "no testimony so given" shall be used, etc.); § 4220 (hazing students; privilege ceases, but the person so testifying shall not be amenable to prosecution); § 4476 (bribing employees; privilege ceases, but "no person shall be liable to any suit or prosecution," etc.); 1903, State *v.* Morgan, 133 N. C. 743, 45 S. E. 1033 (Cr. Code, § 1215, applied); 1904, Re Briggs, 135 N. C. 118, 47 S. E. 403 (Cr. Code, § 1215, applied);

North Dakota: Comp. L. 1915, § 4733 (the privilege ceases for an officer, etc., of a common carrier defendant in an action for damages; "but such evidence or testimony shall not be used against such person in any way on the trial of any criminal proceeding"); § 4739 (similar, for testimony compelled by aid of Court); § 10279 (fish and game law; "the participant in the violation thereof may testify as a witness against any other person violating the same, without incriminating himself in so doing. The evidence so given shall not be used" etc. This is a good example of how not to phrase such an Act); § 245 (witnesses before State board of control; privilege ceases, but no person testifying shall be prosecuted for "any matter or thing concerning which he may testify or produce evidence"); § 4797 (violation of maximum railroad rates; privilege ceases, but "no person so testifying shall be liable to prosecution or punishment for any offense concerning which he has been required to testify or to produce books or documents"); § 4858 (offense of contributing money by an insurance company to a political party, etc.; privilege ceases, but no person testifying shall be prosecuted, etc., and no testimony given shall be used against him, etc.); § 8002 (in certain actions against corporation officers, privilege ceases; but no person so testifying shall be prosecuted, etc., except for perjury); § 9296 (corrupt political practices; privilege ceases, but no person so testifying shall be prosecuted, and no testimony so given shall be used, etc.); § 9679 (gaming offences; privilege ceases, but witness' testimony is not to be used against him); § 10128 (liquor offences; similar); § 9418 (like Okl. Comp. St. § 1696); § 9826 (like Okl. § 2028); § 9554 (like Okl. § 1783); § 10355 (like Okl. § 2311); § 9698 (keeping a gambling house; privilege ceases, but the witness "shall be forever exempt from prosecution for any offense under the provisions of this chapter of which such evidence shall directly or indirectly tend to convict him"); St. 1917, Mar. 8, c. 117, § 5 (sale of narcotic drugs; privilege ceases, "but the testimony given by such person shall in no case be used against him"); St. 1919, Mar. 5, c. 133 (gambling; privilege ceases, but a person compelled to testify "shall not be prosecuted in such case"); St. 1919, Feb. 25, c. 151, § 5 (State industrial commission; privilege ceases, but "no person shall be prosecuted," etc.);

Ohio: Gen. Code Ann. 1921, § 13660 (the privilege ceases in certain prosecutions for illegal liquor-selling, gaming, etc.; but the witness shall "be discharged from liability for prosecution or punishment for such offense"); § 11359 (a verified pleading is not admissible in a criminal prosecution or in an action for a penalty or forfeiture); §§ 12952, 12953, 13315, 13223, 13223–2, 13340 (the privilege ceases on trials for election offences; but the testimony "shall not be used in any prosecution or proceeding civil or criminal against the person so testifying. A person so testifying shall not be liable thereafter to indictment, prosecution, or punishment, for the offence with reference to which his testimony may be given, and may plead or prove the giving of testimony accordingly in bar of such an indictment or prosecution"); § 11774 (the privilege ceases for a debtor examined as to fraud; but "his answer shall not be used as evidence against him" in a prosecution for such fraud); § 6401 (anti-trust law; the privilege is abolished, "but no individual shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise"); § 12824–1 (bribery; an offender is to be compellable against another offender, "but no individual shall be prosecuted," etc. for any matter on which he may testify, etc.); § 12412–1 (abortion, under Gen. Code, § 12412; the woman not to be prosecuted for complicity, if she testifies); § 60 (legislative committee inquiries; privilege ceases, but "no person shall be prosecuted," etc.); §§ 553, 614–39 (State utilities commission; privilege ceases, but "no person having so testified shall be

prosecuted," etc.); § 3515–1, Art. VI, § 15 (city council investigations; privilege ceases, "but such testimony shall not be used," etc.); § 5970 (money lost in gaming; in proceeding to recover it, the person liable who makes discovery "shall be acquitted and discharged from further punishment," etc.);

Oklahoma: Const. 1907, Art. II, § 27 ("Any person having knowledge or possession of facts that tend to establish the guilt of any other person or corporation charged with an offense against the laws of the State, shall not be excused from giving testimony or producing evidence, when legally called upon so to do, on the ground that it may tend to incriminate him under the laws of the State; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence"); Comp. St. 1921, § 1783 (the privilege ceases on a trial for duelling offences; "but no evidence given upon any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding," except for perjury); § 735 (on the examination of an insolvent debtor, the privilege ceases as to answers tending "to convict him of a fraud; but his answer shall not be used as evidence against him in a prosecution for such fraud"); § 1696 (in a civil action, no privilege is to be allowed on this ground for "facts showing that an evidence of debt or thing in action has been bought, sold, or received contrary to law"; "but no evidence derived from the examination of such person shall be received against him upon any criminal prosecution"); § 2028 (on an investigation or prosecution for specified crimes against the public peace, the privilege ceases; "but such answer or evidence shall not be received against him upon any criminal proceeding or prosecution," except for perjury); § 1610 (in bribery offences, "the party to such crime who shall first furnish information in relation thereto, as against the other parties, and in any prosecution therefor shall testify to the same truthfully and fully, shall not thereafter be criminally liable therefor"); § 2311 (the prohibition in these sections against using evidence given does not apply to a charge of perjury in the examination); § 6216 (electoral bribery; privilege ceases, but "any person to whom a bribe or benefit has been given, who voluntarily discloses the evidence" etc. and procures the conviction of the briber, "shall not be prosecuted for procuring a bribe"); § 7331 (State industrial commission; privilege ceases, but "no person shall be prosecuted," etc.); § 11052 (rate-combinations by bridge-contractors; privilege ceases, "nor shall any person so testifying be prosecuted," etc.);

Oregon: Laws 1920, § 4163 (corrupt electoral practices; witnesses compellable, but no such evidence "shall be offered or used against him," etc., "or any evidence that is the direct result of such evidence or information," except for perjury therein); §§ 5862, 6088 (public utilities commission; witnesses compellable, but "no person having so testified shall be prosecuted" etc., except for perjury, and this only when "in obedience to a subpœna" he "gives testimony under oath"); § 2109 (prosecution for gambling; privilege ceases, but "no indictment or prosecution shall afterwards be brought," etc.); § 2224–60 (liquor offences; privilege ceases, but "such testimony shall not be used against him," etc., and no person thus compelled to testify shall be prosecuted, etc.); § 2384 (immunity clauses do not prevent prosecution for perjury in the testimony given for immunity); St. 1911, Feb. 26, c. 354 (marine insurance; privilege ceases, but "no person shall be prosecuted," etc., and "no testimony . . . shall be used against him," etc.);

Pennsylvania: Const. 1874, Art. III, § 32 ("Any person may be compelled to testify, in any lawful investigation or judicial proceeding, against any person who may be charged with having committed the offence of bribery or corrupt solicitation, or practices of solicitation, and shall not be permitted to withhold his testimony upon the ground that it may criminate himself or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceeding except for perjury in giving such testimony"); Art. VIII, § 10 ("In trials of contested elections and in proceedings for the investigation of elections, no person shall be permitted," etc., as in Art. III, § 32); St. 1842, July 12, § 22, Dig. § 17154, Practice (arrest of fraudulent debtor; privilege ceases, "no such answer shall be used in evidence in any other suit or prosecution"); St. 1860, Mar. 31, § 49, Dig. 1920, § 7721, Crimes (the privilege ceases for a witness to bribery in a criminal proceeding or a legislative investigation, but "the evidence so given or the facts divulged by him shall not be used against him in any prosecution under this Act"); St. 1860, Mar. 31, § 58, Dig. 1920, § 7900 (gambling; similar to St. 1860, § 49); St. 1874, May 19, § 19, Dig. § 10091, Elections (the privilege ceases in investigations of elections; but "such testimony shall not afterwards be used against him in any judicial proceeding," except perjury in the testimony); St. 1874, May 19, § 34, Dig. § 10068 (illegal voter compellable to disclose vote; but "he shall not be afterwards presented for having illegally voted," etc.); St. 1883, May 17, Dig. § 10300, Evidence (witnesses before the Philadelphia city councils; the privilege ceases, but "such testimony shall not be used against him in any criminal prosecution"); St. 1897, July 9, § 2, Dig. § 21865 (execution on judgment confessed; privilege ceases, but "no such answer shall be used," etc.); St. 1901, June 4, § 15, Dig. 1920, § 737 (the privilege ceases for examinations in insolvency proceedings by a receiver; "but the information thus obtained shall not be used against him in any other proceeding"); St.

1913, May 9, No. 136, Dig. § 21797 (examination of judgment debtor: the debtor to be compellable, "but he shall not be prosecuted," etc., except for perjury); St. 1913, July 26, Art. VI, § 1, Dig. § 18162, Public Service Companies (public service commission; privilege ceases, but "no individual shall be prosecuted," etc.; but not to give "any corporation immunity of any kind"); St. 1915, June 7, § 13, Dig. 1920, § 1473, Banks (banking offences; privilege ceases, but "no person shall be prosecuted," etc.); St. 1919, July 1, § 4, Fires (State police inquiry into fires; privilege ceases, but "no person shall be prosecuted," etc., and "no testimony so given or produced shall be received," etc.); 1891, Com. *v.* Bell, 145 Pa. 374, 389, 22 Atl. 641, 644 (Art. III, § 32, of the Constitution, construed as to the crimes covered);

Philippine Isl. Act 183, § 39 (Manila charter; on inquiries by the prosecuting attorney, privilege ceases, but "no testimony elicited . . . under oath . . . shall be used," etc.); Act 1757, § 10 (gambling; privilege ceases, but "such testimony cannot be received," etc.);

Porto Rico: St. 1921, July 16, No. 66, § 176 (insurance offences; privilege ceases, but "the testimony or evidence so furnished shall not be used," etc.);

Rhode Island: Gen. L. 1909, c. 307, § 10 (a person having in control property of a deceased person or ward is not to be excused on the present ground from answering on oath, but the answer is not to be "used as evidence against him" in a criminal prosecution, except a prosecution for perjury); c. 349, § 12 (a person playing at a game may be compelled to answer for the prosecution in a gambling prosecution); c. 349, § 26 ("no person shall be excused," etc., but "no person shall be prosecuted," etc.; this section has no express words of limitation, but it evidently is limited to the offences defined in ib. c. 349); St. 1911, c. 714, p. 132 (life insurance rebates; witnesses compellable, "but no person shall be prosecuted," etc., and "no testimony so given or produced shall be received against him," etc.);

South Carolina: C. C. P. 1922, § 589 (examination of an execution-debtor; the privilege ceases, but "his answer shall not be used against him in any criminal proceeding or prosecution"); § 395 (no pleading may be used "in a criminal prosecution" as an admission); § 476 (abatement of nuisance of prostitution; "the solicitor, attorney-general, or other attorney representing the prosecution . . . with the approval of the Court, may grant immunity to any witness called to testify in behalf of the prosecution"); Civ. C. 1922, § 5233 (action against a railroad; privilege ceases, but "such evidence of [or?] testimony shall not be used," etc.); §§ 5384, 5390 (gambling contracts, etc.; person sued is "compellable to answer upon oath"); Crim. L. 1922, § 3783 (privilege ceases in investigations for violation of anti-trust laws; but "no person shall be prosecuted in any criminal action or proceedings, or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he may testify or produce evidence, documentary or otherwise, before said justice," etc.); § 3763 (trusts, pools, and monopolies; in a civil action for damages, privilege ceases, but "such testimony shall not be used in any other action or prosecution" against him, and he "shall forever be exempt from any prosecution," etc.); C. Cr. P. 1922, § 967 (the accused may testify; nor shall testimony given voluntarily on his own behalf be "used against him in any other criminal case" except perjury); § 968 (for certain offences, privilege ceases, but "no testimony so given of a character tending to criminate or disgrace such witness shall ever be used," etc.); § 969 (duelling; "any person concerned" is compellable to give evidence against the person indicted "without criminating himself or subjecting or making himself liable to any prosecution," etc.; this is obscure and crude, dating from 1882, and should not have been perpetuated in a 1922 revision); § 970 (duelling; a co-indictee may be discharged and called for the State, and in any future indictment "the fact of his or their being used as a witness or witnesses in the former prosecution for the same offense shall and may be pleaded in bar," etc.); § 971 (privilege ceases for certain offenses, but "any discovery made by a witness upon such examination shall not be used against him in any penal or criminal prosecution and he shall not be prosecuted therefor"; here are five distinct forms of legislative terms for this measure, and most of them inferior; this State, as well as others, needs to revise and standardize the legislative phraseology);

South Dakota: Const. 1889, Art. III, § 28 (the privilege ceases in proceedings against a person charged with bribery or corrupt solicitation; "but said testimony shall not afterwards be used against him in any judicial proceeding except for bribery [*sic?* perjury] in giving such testimony"); Rev. Code 1919, § 3623 (like N. D. Comp. L. § 10355); § 3792 (like N. D. Comp. L. § 9418); § 3958 (like N. D. Comp. L. § 9826); § 4076 (like N. D. Comp. L. § 9554); § 2699 (examination of a judgment debtor; privilege ceases, as to answers tending to "convict him of the commission of a fraud," and as to execution of "any conveyance, assignment, or transfer of his property for any purpose," but his "answer shall not be used against him," etc.); § 3654 (bribery of elector; privilege ceases for such offense, for testimony "against any other person so offending," but testimony shall not be used, etc., and witness shall not be liable to punishment); § 4361 (trusts and monopolies; privilege ceases, but "neither such testimony nor such evidence shall be used" etc., "nor shall he be punished," for the offence testified to); § 7384 (electoral campaign offences; privilege

ceases, but "if compelled to testify, his testimony shall not be used," etc., "nor shall he be thereafter punished," etc.); § 10524 (violation of game laws; privilege ceases, but "if compelled to testify, his testimony shall not be used," etc., "nor shall he be thereafter punished," etc.); St. 1919, Mar. 11, c. 296, § 8 (free passes by common carriers; privilege ceases, but "no such person shall thereafter be prosecuted," etc., and "the testimony so given shall not be used," etc.);

Tennessee: Shannon's Code 1916, §§ 7046–7048 (a witness testifying to a grand jury upon any of thirty specified classes of offences shall not "be indicted for any offense in relation to which he has testified"); § 1135 *a* 22 (removal of officer; privilege ceases, but "no person shall be prosecuted," etc., when "compelled to testify"); § 3059 *a* 33 (no officer, etc., of a railroad company who testifies before the railroad commission "shall be liable to indictment," etc.); St. 1897, Code 1916, § 6868 *a* 11 (election offences; an offender may be compelled to testify at any trial, etc., but the testimony shall not be used, etc., and "a person so testifying shall not thereafter be liable . . . for the offence with reference to which his testimony was given, and may plead or prove" the giving of it in bar); § 6868 *a* 20 (political bribery; privilege ceases, but the testimony shall not be used, etc., and the person shall not be liable to indictment, etc.); 1859, State *v.* Hatfield, 3 Head 231 (the statute giving immunity to witnesses before grand jury, construed not to include a grand juror); 1904, Lindsay *v.* Allen, 113 Tenn. 517, 82 S. W. 648 (St. 1897, c. 14, § 6, in its compulsory clause, does not apply to a commissioner's examination in a contested election proceeding);

Texas: Rev. P. C. 1911, § 574 (gaming offences; "any person so summoned and examined [for the State] shall not be liable to prosecution for any violation of said articles about which he may testify"); § 506 *c*, St. 1911, p. 29 (pandering; "any testimony or statement given by such female . . . shall not be used," etc.); § 547 (bucket-shops; privilege ceases, but "no person called . . . to testify shall be prosecuted," etc.); § 582 (betting on horse-race; accomplice or participant testifying "shall be exempt from prosecution," etc.); § 588¼ *ss*, St. 1919, 2d Sp. Sess. c. 78 (liquor offences; privilege ceases, but "no person required to so testify shall be punished for acts disclosed by such testimony"); § 593 *c*, St. 1911, c. 15 (liquor offences; privilege ceases, but "the testimony given by a witness shall not be used," etc., "nor shall any criminal action or proceeding be brought," etc.); § 663, St. 1913, c. 106 (insurance offences; privilege ceases, but "no person shall be prosecuted," etc.); § 758 *e*, St. 1911, c. 55 (unlawful practice of medicine; privilege ceases, but the testimony shall not be used, etc., nor shall any criminal action be brought, etc.); § 1184 (anonymous threatening letters; accomplice compellable, but "such person shall not be prosecuted," etc.); § 1199, St. 1907 (blacklisting of employees; witness summoned "shall not be liable to prosecution for any violation of the provisions of this title about which he may testify fully and without reserve"); Rev. Civ. St. 1911, § 4901 (insurance offences; privilege ceases, but "no person shall be prosecuted," etc.); § 5517 (legislative investigation of public officers; witnesses compellable, but the testimony "shall not be used against him," etc., "nor shall any criminal action or proceeding be brought against such witness on account of such testimony" except for perjury); §§ 7810, 7817, P. C. 1911, § 1468 (anti-trust law; witness for the State "shall not be subject to indictment" etc. for matters testified to); § 6668 (State railroad commission; privilege ceases, but "such evidence or testimony shall not be used," etc.); St. 1903, Mar. 31, c. 94, § 15, p. 119 (anti-trust law; a witness is compellable to testify and "shall not be liable for prosecution"); 1907, Ex parte Andrews, 51 Tex. Cr. 79, 100 S. W. 376 (foregoing statute of 1903 held applicable by its terms to an examination before a justice only, not before a grand jury);

Utah: Comp. L. 1917, § 7900 (in general); § 8060 (duelling offences; like Cal. P. C. § 232); § 8166 (gaming offences; like Cal. P. C. § 334, substituting "is compelled to testify" for "testified"); § 7950 (bribery, etc.; like Cal. P. C. § 89); § 2354 (election offences; the privilege ceases for offenders, "but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying," except for perjury; "a person so testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly in bar of such indictment or prosecution"); § 2373 (corrupt practices at elections; privilege ceases, but "no prosecution can afterwards be had," except for perjury); § 3372 (liquor offences; privilege ceases, but no person shall be prosecuted, etc., nor shall his testimony be used, etc.); § 4822 (State public utilities commission; privilege ceases, but no person shall be prosecuted, etc., except for perjury); § 6963 (supplementary proceedings against debtor; privilege ceases, but no answer can be used as evidence, etc.); 1916, Beauregaard *v.* Gunnison City, 48 Utah 515, 160 Pac. 815 (Comp. L. 1907, § 912, giving immunity for election offences, held applicable to a contest upon a referendum);

Vermont: Gen. L. 1917, § 1510 (a defendant's answer in Chancery is not to be used against him in a prosecution for crime or penalty); § 1901 ("When a person testifies in a suit or proceeding at law or in equity, his testimony shall not be used as evidence to prove any fact in a suit or prosecution against him for a penalty or for violation of a law in relation to

fraudulent conveyance of property"); § 2001 (a trustee's disclosure on oath is not to be evidence against him in a prosecution for a crime or penalty); §§ 3614, 3615 (in bastardy complaints, the woman is compellable to testify, after thirty days from time of delivery, but her testimony is not to be used against her in a criminal prosecution except for perjury in the testimony); § 7059 (no person testifying, in prosecutions for unlawful oaths, as the taker or the administrator of the oath, against the other, is to be prosecuted for a prior offence of the same kind);

Virginia: Code 1919, § 4425 (the privilege ceases as to a person concerned in duel; but after testifying "he shall never thereafter be liable to any punishment" for any offence "in or about said duel"); § 4780 (unlawful gaming; the privilege ceases, but the witness shall not "be ever proceeded against" for any such offence committed as charged in this prosecution); § 4498 (bribery offences; "nor shall any witness called by the Court or Commonwealth's attorney and giving evidence for the prosecution, either before the grand jury or the court in such prosecution, be ever proceeded against for any offence of giving, or offering to give, or accepting a bribe committed by him at the time and place indicated in such prosecution; but such witness shall be compelled to testify"); § 258 (election offences; "no witness giving evidence . . . shall ever be proceeded against for any offense made penal" by this chapter); § 4675 (illegal transactions in ardent spirits; privilege ceases, but no such testimony can be used, etc., nor shall the witness be prosecuted, etc.); St. 1918, Mar. 19, c. 388, § 73 (intoxicating liquors; privilege ceases, but the testimony shall not be used, etc., "nor shall he be prosecuted," etc.); 1912, Flanary *v.* Com., 113 Va. 775, 75 S. E. 289 (in a prosecution under Code § 3853, concerning elections, a witness who had testified before a grand jury under Code § 145*a*, containing an immunity provision as to election offences, was held to have obtained immunity and therefore to be compellable; precise point of dispute not clear);
Washington: R. & B. Code 1909, § 282 ("No [verified] pleading shall be used in a criminal prosecution against the party as evidence of a fact alleged in such pleading"); §§ 2149, 2150, 2330 (bribery and corruption offences; any offender "shall be a competent witness against any other person so offending," and is compellable; "but the testimony so given shall not be used," etc.; and the person "shall not thereafter be liable to indictment," etc.; but this Act does not apply to proceeding before a committing magistrate or justice of the peace); § 2568 (anarchistic propaganda; no person to be excused on investigation of such offences on the ground of self-crimination); § 2291 (criminal Code; wherever in this Code "it is provided that a witness shall not be excused from giving testimony tending to criminate himself, no person shall be excused" on that ground, but "he shall not be prosecuted or subjected," etc., for any matter so testified to, except for perjury); § 2480 (gambling, etc.; no person to be excused "from giving testimony concerning any offense committed by another . . . by reason of his having bet or played at the prohibited device"); § 2423 (similar provision for duelling offences); St. 1911, c. 117, p. 589, § 76, R. & B. Code §§ 8640, 8676-26 (public service commission; witnesses compellable, "but such evidence or testimony shall not be used," etc., except for perjury); St. 1913, c. 120, p. 356, § 13, R. & B. Code § 5395-13 (game law offences; "a participant in the violation thereof may testify as a witness against any other person violating the same, without incriminating himself in so doing," but the evidence shall not be used, etc.); § 632 (proceedings supplemental to execution; privilege ceases, but "an answer cannot be used," etc.); § 2451 (abortion, etc.; "no person shall be excused" on the ground of self-crimination); St. 1915, c. 2, § 13 (intoxicating liquor; privilege ceases, but "no person shall be prosecuted," etc.; "nor shall such testimony be used," etc.);
West Virginia: Const. 1872, Art. VI, § 45 (bribery and embracery in the Legislature; Legislature shall provide for abolishing the privilege; but any person so compelled "shall be exempted from trial and punishment," etc.); Code 1914, c. 3, § 90 (in cases of violation of the election law, the privilege ceases, but "if such witness testify fully, he shall be exonerated from such offence in which he is implicated, and shall not be prosecuted therefor"); c. 148, § 11 (in prosecutions for lynching or mobbing, the privilege ceases for a witness for the State, but a witness answering "fully and truly" all questions "touching his connection with or knowledge of such combination" or of the offence charged, shall not be "prosecuted or punished for the same offence in the indictment"); c. 152, § 18 (gaming, bribery, etc., etc.; privilege ceases, but no person against whom such witness testifies shall be competent against him on a like charge); c. 147, § 5*a* (bribery and embracery in the Legislature; privilege ceases, but "any person so compelled to testify shall be exempt" etc.); St. 1890, c. 16, Code 1914, § 168 (in cases of violation of the caucus law, the privilege ceases, but "his testimony shall not be given in evidence against him in any prosecution for such offence"); St. 1909, c. 60, Code 1914, § 3490 (in offences against the game laws, the privilege ceases, but "his testimony shall not be given in evidence against him in any prosecution against him for such offence"); St. 1913, c. 9, Code 1914, §§ 648, 653 (public service commission; public service corporation agents, etc., and others, compellable to testify, "but any such witness shall not be prosecuted," etc.); St. 1913, c. 13, § 33, as added by St. 1915, c. 7 (intoxicating liquors; any person called for the State "who shall give freely and truthfully any testimony

Indeed, in the United States, or parts of them, it is difficult to conceive how the law could ever have been forced to punish certain insidious offences without thus clearing the way for justice. In England and Canada no written constitution grants protection; only a just conservatism requires that the nullification of the privilege be attained by the method of amnesty. But the American constitutional enshrinement of this particular privilege leaves no other method available; and the frequent and increasing resort to it seems to show how necessary it is found to be. Bribery and other forms of political corruption have called chiefly for its aid; and, next, gambling, liquor-selling, sundry frauds, and monopolistic extortions; moreover, investigations upon all subjects by legislative committees are commonly thus facilitated. These statutes, then, represent a demand for more effective investigation by any lawful expedient.

tending in any way to incriminate himself shall be immune from prosecution under this Act");

Wisconsin: Stats. 1919, § 12.26 (corrupt electoral practices; privilege ceases, but "no person shall be prosecuted," etc.); § 13.29 (no person required to testify before the Legislature or a committee "shall be held to answer criminally in any court or be subject to any penalty or forfeiture for any fact or act touching which he shall be so required to testify and as to which he shall have been examined and have testified," and no such testimony shall be used against him); § 4078 (in actions by the State or a municipality involving the official conduct of an officer, etc., the privilege ceases; but no person shall be prosecuted, etc.); § 4581 *h* (certain offences against chastity; the privilege ceases, "but no testimony so given by any person shall be used against him in any civil or criminal action to which he is a party," except for perjury); § 4534 (gaming offences; the privilege ceases, but "any such answer or evidence thus required of any person shall not be used against him for any purpose in any case, either civil or criminal, in which he is a party"); § 3033 (examination of a judgment debtor; no privilege obtains as to answers involving fraud, "but his answer shall not be used against him in any criminal action or proceeding"); § 4552 *a* (on a charge of soliciting or giving free passes for political services, the privilege ceases, but "no person having so testified shall be liable to any prosecution or punishment for any offence concerning which he was required to give his testimony or produce any documentary evidence"); § 4078 *d* (in prosecutions under Stats. 1988, §§ 4352, 4583, the privilege is abolished, "when so ordered to testify by a court of record or any judge thereof; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which such person may so testify or produce evidence," except for perjury therein); § 4078*a* (no railroad corporation shall be excused from producing documents, etc., in any civil action for penalties, etc., on the ground that the document, etc. "may subject it to a penalty or forfeiture," or be excused "from making a true answer under oath by and through its properly authorized officer or agent" on such a ground); § 4078 *b* (no officer or employee of any railroad corporation shall be excused from testifying or producing documents, etc., on the above ground; but no such person shall be prosecuted, etc.); § 1436 *e* (medical professional misconduct; witness compellable, but "no person shall be prosecuted" for any matter thus testified to, except for perjury); § 4475-2 (bribery as to State funds deposit; witness compellable, but "no testimony so given shall be in any manner used," etc., except for perjury); § 1729 *t* (State board of conciliation; privilege ceases, but "no person . . . shall be prosecuted," etc.); § 4575 *n* (graft by chauffeurs; privilege ceases, but no person shall be liable, etc.); § 4581 *h*-1 (pandering; § 4581 *h* made applicable); St. 1921, c. 571, making Stats. § 1495.22 (department of markets; except as to certain kinds of bearings, privilege ceases, but "no natural person shall be prosecuted," etc., and "no testimony so given" shall be received against him);

Wyoming: Comp. St. 1920, § 6073 (examination of a debtor; the privilege ceases as to answers involving fraud; "but his answer shall not be used as evidence against him in a prosecution for such fraud"); § 2749 (corrupt electoral practices; privilege ceases, but "any matter so elicited shall not be used against him, and said witness shall not be prosecuted," etc.); § 3430 (liquor offences; privilege ceases, but "no person required so to testify shall be punished for his own acts disclosed by such testimony"); § 5501 (public utilities commission; privilege ceases, but "no person having so testified shall be prosecuted," etc.); St. 1921, c. 117, § 28 (liquor law violations; privilege ceases, but "no natural person shall be prosecuted," etc.); St. 1921, c. 142, § 19 (insurance; privilege ceases, "and no testimony so given or produced shall be received," etc.).

§ 2282. **Same: Application of the Principle.** The great increase in the number and scope of statutes thus granting immunity has led to a number of detailed questions in the application of the principle. The salient elements in the principle are: The State, (1) having in view certain crimes which are the subject of a privilege, but are covered by the official authority to eliminate their penality, (2) calls for a testimonial disclosure of the crime, (3) invoking compulsion of law as the means of obtaining it, and (4) thus granting immunity as a consequence of the disclosure. Hence the questions arising may be thus grouped:

1. The *kind of crime* whose disclosure is to obtain the immunity;
2. The *sufficiency of the disclosure* itself;
3. The *compulsoriness* of the disclosure; and, finally,
4. The manner of *effectuating the immunity* obtained.

1. *Kind of Crime.* (*a*) As a necessary deduction from the principle of § 2259*a*, *ante*, an immunity granted to a person who testifies or produces documents is sufficient to destroy the privilege for him, even though the facts obtained from him serve to incriminate a *third person*, — in particular, a *corporation* whose agent or officer the witness is.[1]

(*b*) A further question arises as to *other crimes by the witness himself; i. e.* does the immunity extend to offences (disclosed by him) other than the one charged in the indictment or sought for in the proceeding? Here something depends on the nature of the tribunal and the words of the statute. 1. On a trial by jury upon indictment, the offence charged, or one incidental to it, would mark the limit of immunity; for the general object of the immunity would thus be sufficiently attained, and the immunity is not meant to be wasteful. But on a roving inquiry by a grand jury, no formal document defines its scope, either to warn the witness or to form a record of the results; hence there should be no limit, if the other conditions later mentioned are fulfilled. 2. Yet the statute may use broad terms; if it does, those terms should be taken as marking the limits; for the Legislature has power to make the pardon-immunity larger than was necessary and the only question can be whether its statute has so expressed an intention.[2] — The foregoing question, it is to be noted, may arise in one of two ways: Either the accused *has made*

§ 2282. [1] 1906, Hale *v.* Henkel, 201 U. S. 43, 26 Sup. 370.

Conversely, compulsory immunity to the officer or agent does not benefit the corporations: Ind. St. 1907, c. 243, p. 490, Mar. 11, § 11 (anti-trust law, civil remedies; witness compellable, who is agent, etc., of corporation, to be immune from prosecution, but "such exemption shall be personal to such witness and shall not exempt or render immune the corporation," etc.).

[2] 1912, Heike *v.* U. S., C. C. A., 192 Fed. 83 (whether testimony to offences under the anti-trust law gave immunity under a charge of fraud on the revenue laws); 1908, People *v.* Argo, 237 Ill. 173, 86 N. E. 679 (under a statute authorizing a court to make an order of immunity for a witness called upon in a bribery inquiry, the statutory immunity covers only the offences of bribery specified in the statute, and therefore questions concerning illegal gambling, in protection of which the bribery was said to have been committed, are still privileged; unsound, because the statute's immunity-phrase covered "any matter to which he shall be required to testify," and this must signify any matter relevant to the bribery inquiry); 1914, Mankato *v.* Olger, — Minn. — 148 N. W. 471 (illegal sale of liquor; disclosure before the grand jury held here not to have related to the crime now charged).

disclosure of a separate offence, and is later charged with it, and then pleads an immunity gained by his disclosure; or, the accused *refuses disclosure* of the other offence, alleging it to be a separate one, therefore not covered by the immunity, and therefore still privileged, and the prosecution alleges the contrary and asks that an answer be compelled. The decision, it would seem, should be the same, in whichever of these ways the question arises.

(*c*) Immunity under these statutes cannot extend to a prosecution for *perjury* committed in the very disclosure itself;[3] nor does the usual express statutory proviso in that tenor make them any the more effective. If argument were needed, it would be sufficient merely to appeal to the terms of the privilege, which forbids that one be compelled to give evidence against himself; for (a) the perjured utterance is not "evidence" or "testimony" to a crime but *is* the very act of crime itself; (b) the compulsion is not to testify falsely, but to testify truly; and (c) the privilege, by hypothesis, would have been violated only if the witness had truly confessed his crime, but if he denies it and falsely exonerates himself, he has confessed no fact "against himself"; hence his privilege has not been infringed by the actual answer, even though it might have been by some other answer; *e.g.*, if a witness is asked, "Did you kill Doe?" and answers "No," it is not, as it turns out, "against himself," and what it might have been is immaterial.

2. *Sufficiency of Disclosure.* The question will also arise whether the witness has, in the *subject of his testimony, made a disclosure such as entitles him to the immunity*. This may depend somewhat upon the phrasing of the particular statute. But, so far as the general principle is not affected by particular statutory wordings, it should be necessary and sufficient (a) that the witness *states something*, not merely *denies* knowledge of any facts; (b) that his state-

[3] *Fed.* 1906, Edelstein *v.* U. S., C. C. A., 149 Fed. 636, 642 (good opinion by Adams, J.; Phillips, J., diss.); 1908, Wechsler *v.* U. S., 2d C. C. A., 158 Fed. 579 (under U. S. St. 1898, c. 541, § 7, following Edelstein *v.* U. S.); 1910, U. S. *v.* Brod, C. C. N. D. Ga., 176 Fed. 165 (under U. S. St. 1898, c. 541, § 7, Bankruptcy; following Edelstein *v.* U. S. and Wechsler *v.* U. S.); 1912, Glickstein *v.* U. S., 222 U. S. 139, 32 Sup. 71 (the immunity granted in § 7, subd. 9, of the Bankruptcy Act does not bar a prosecution for perjury committed in the testimony exacted under that section); 1913, Cameron *v.* U. S., 231 U. S. 710, 34 Sup. 244 (applying the Bankruptcy Act, St. July 1, 1898, § 7, and U. S. Rev. St. 1878, § 860; but the further ruling that under the latter statute "testimony given [by the same person] in the one bankruptcy proceeding [before the examiner], not tending to establish perjury in that proceeding, should not have been received to establish the crime charged in the other proceeding [before the referee]," is an unworthy quibble, and must excite astonishment); *Ohio:* 1913, State *v.* Cox, 87 Oh. St. 313, 101 N. E. 135; *Or.* 1919, State *v.* Frasier, 94 Or. 90, 184 Pac. 848 (St. 1898, July 1, c. 3, § 7, Bankruptcy Act, does not exclude or give immunity for perjured statements made before the referee in bankruptcy).

Contra: 1897, U. S. *v.* Bell, C. C., 81 Fed. 830, *semble* (in a labored opinion of perverse ingenuity; the soundness of which may be judged by its holding that a negro "lawyer and notary public" was not sufficiently informed of his privilege, and by its predication of a "long-established right to stand silent and refuse to answer when his answers might . . . submit him to the pains and penalties of yielding to the temptation to sustain his wrongdoing by false swearing." This "right" not to be tempted to commit perjury would be popular enough among witnesses, if it should be any more widely promulgated); 1906, U. S. *v.* Simon, 146 Fed. 89, 92 D. C. (for a bankrupt; cited *post*, § 2283); 1913, U. S. *v.* Rhodes, D. C. S. D. Ala., 212 Fed. 518 (the opinion cites only, In re Harris, 164 Fed. 292, which is however irrelevant). Compare State *v.* Turley, Ind., cited *ante*, § 2276, par. 4, and the cases upon perjury, cited *ante*, § 2270.

ment is of facts *asked for* by the opponent, not of facts *volunteered* or irrelevantly interjected; and (c) that the facts concern a matter about which the answer *might* by reasonable possibility *have criminated him;* for, while on the one hand it is immaterial whether the answer actually given is an incriminating one, yet, on the other hand, there is no privilege which he can exchange for the immunity unless (*ante*, § 2260) the matter is one on which his answer might conceivably criminate him.[4]

3. *Compulsoriness of Disclosure.* The privilege protects against being "compelled" to disclose. The idea of compulsion of course involves a relation between the State representative and the witness, *i. e.* an exercise of power by the former, and a submission by the latter. In developing this idea, a number of questions arise:

(A) *Ordinary Jury Trial.* Where the disclosure takes place in the course of testimony at an ordinary trial, whether before a judge, master-in-chancery, or other judicial officer, it can hardly be doubted that the principle is satisfied when three elements appear, viz. (1) an invocation or threat to exercise the general State power of testimonial inquiry; (2) a resistance by the witness signifying his intention to rely upon his privilege; (3) an exercise by the State of its specific power to eliminate the privilege. Concretely, then:

(1) The very session of the tribunal, convoked for purposes of trial, implies the first element. Therefore, no *service of subpœna* is necessary, in order

[4] The cases do not cover all the points above noted: *Eng.* 1859, R. *v.* Skeen, 8 Cox Cr. 143 (cited *infra*); *U. S. Fed.* 1906, Edelstein *v.* U. S., 79 C. C. A. 328, 149 Fed. 636, 642 (under U. S. Bankruptcy Act 1898, § 7, subdiv. 9, the grant of immunity for any criminal proceeding is restricted to "such as might arise out of the conduct of his business . . . about which alone the statute authorized the examination in question to be made"); *Cal.* 1896, People *v.* Sternberg, 111 Cal. 3, 43 Pac. 198 (cited *supra*, n. 13); *Okl.* 1918, Temple *v.* State, 15 Okl. Cr. 146, 175 Pac. 555 (forgery by T. and X.; on the trial T. was illegally ordered and compelled to produce the deed alleged to be forged; held that under Const. Art. II, § 27, no immunity was obtained by T. because he did not produce the deed thereunder); *Wis.* 1906, Rudolph *v.* State, 128 Wis. 222, 107 N. W. 466 (indictment for soliciting a bribe as alderman; plea, that under St. 1901, c. 85, quoted *ante*, § 2281, he was immune from prosecution by reason of having testified on the subject before the grand jury; his testimony there merely stated that he was alderman, and knew of no bribery; held, that the testimony to his being alderman was not upon an incriminating fact, on the principle of § 2260, *ante*, so as to secure immunity); 1906, State *v.* Murphy, 128 Wis. 201, 107 N. W. 470 (similar; the defendant's testimony that he "did not know of any alderman demanding or receiving money," etc., was held not to secure immunity; as to point (*a*), *supra*, in the text, it is held that whether the witness gives testimony adverse to himself or not, and whether he testifies truthfully or not, are immaterial, but the question is under the statute "whether the defendant did, in any reasonable sense, testify concerning the transaction, matter, or thing for or concerning which he is prosecuted," and therefore "we should but travesty the statute should we hold that a declaration that he could give no evidence of any transactions within a general class constituted testimony concerning one"; lucid opinion by Dodge, J., concurred in on this point by the others; as to point (*c*) *supra*, in the text, Dodge, J., declares that the immunity granted may be broader than the privilege yielded, in respect to the scope of facts, if the Legislature clearly so intends; but from this view, *i. e.* that the immunity from the crime could be supposed to be given in exchange for "disclosures which but for moral turpitude he could be compelled to make any way, disclosures of mere circumstances so remote as not to fall within the scope of self-criminatory evidence," Marshall J., dissents "as emphatically as practicable," because the immunity and privilege are equivalents, "the one being exchanged by force of the law for the other," and the statutory phrase "transaction, matter, or thing" signifies "an event of a criminal character"; with him agree Kerwin and Winslow, JJ., thus forming a majority on this point *c*).

to bring into play the inquisitorial function. Since as a witness may voluntarily take the stand in court without a subpœna, and still be subject to a witness' duties of disclosure and entitled to a witness' privileges, so here the State power is impliedly invoked by the very situation, without subpœna.[5] Nor is an *oath*, it would seem, any more necessary; whether perjury could be committed without an oath is immaterial, for the law of crimes and of evidence are not inherently coextensive; the imposition of an oath is a safeguard of trustworthiness only, and if the officer waives it, both his testimonial powers and the witness' testimonial duties remain unaffected in essence.[6]

(2) There must be a *claim of privilege*.[7] The reason is that the anticipatory

[5] Authority cited for the general principle as to subpœna, *ante*, § 2199, n. 5; and the following: 1906, U. S. *v.* Armour Co., 142 Fed. 808, N. D. Ill., Humphrey, J. (a plea of immunity from prosecution, by the defendants, officers of meat-packing companies, was sustained, on the ground that the defendants had as witnesses obtained immunity, under U. S. St. 1903, Feb. 14 and 25, cited *supra*, n. 10, § 2281, by producing documents and giving information to the Federal Commissioner of Corporations; "the subpœna is a useless and superfluous thing after the parties are together"); 1920, Atkinson *v.* State, — Ind. —, 128 N. E. 433 (illegal gaming; immunity claimed under Burns' Ind. Stats. 1914, § 2113; defendant had been "invited" to appear and testify before the grand jury, no subpœna issued, and defendant testified; held that immunity was secured; following Armour *v.* U. S.).

By a Federal statute, passed since the above ruling in U. S. *v.* Armour, it has been attempted to confine the grant of immunity to persons who testify or produce "*in obedience to a subpoena . . . under oath*" (U. S. St. 1906, June 30, c. 3920, Code § 7034 quoted *ante*, § 2259). But it still remains for the Court to determine whether such a statute infringes on the constitutional lines of the privilege.

[6] U. S. *v.* Armour, *supra*, and authorities cited *ante*, § 1819. *Contra:* 1884, State *v.* Warner, 13 Lea. 52, 57.

In the foregoing statute, cited n. 5, it has been attempted to confine the grant of immunity to testimony given "under oath"; so also in the Federal Prohibition Act, U. S. St. 1919, Oct. 28, tit. II, § 30 (quoted *ante*, § 2281), and in Md. Ann. Code 1914, Art. 23, § 422 (quoted *ante*, § 2281).

[7] The general principle is amply shown in the authorities cited *ante*, § 2268. The following apply it to the present situation: Fed. 1902, U. S. *v.* Kimball, 117 Fed. 156, 163, C. C. ("The constitutional privilege cannot be violated before it can be invoked for his protection. . . . Compulsion can only exist where there is something to be overcome, as for instance refusal, objection, or an unwillingness of which the jury is apprised. Hence that refusal, objection, or unwillingness must affirmatively appear before compulsion is possible. . . . He must express his unwillingness in some form, and bring himself within the rule that he who would have the benefit of an exemption or privilege must claim it"); 1904, Burrell *v.* Montana, 194 U. S. 572, 24 Sup. 787, *semble* (a witness answering voluntarily and without claim of privilege on a bankruptcy citation cannot obtain the benefit of the Bankruptcy Act's prohibition of the subsequent use of the testimony against him); *Okl.* 1913, Scribner *v.* State, 9 Okl. Cr. 465, 132 Pac. 933 (interpreting Okl. Const. Bill of Rights, § 27; "the immunity clause is just as broad and no broader than the right of privilege of silence which it invades"); 1921, McConnell *v.* State, — Okl. Cr. —, 197 Pac. 521 (defendant pleaded guilty to murder, was then called to testify against a co-indictee, and later was sentenced to death; held, that no immunity was obtained by the defendant's act of testifying, there being no claim of privilege and no agreement by the prosecuting attorney; but the sentence was commuted to imprisonment for life); *Pa.* 1911, Com. *v.* Richardson, 229 Pa. 609, 79 Atl. 222 (testimony given as a witness for the prosecution, in a trial of M., without subpœna and without claim of privilege, held not to entitle immunity from use under Pa. Const. Art. 3, § 32); *Wis.* 1906, State *v.* Murphy, 128 Wis. 201, 107 N. W. 470 (the defendant had testified under subpœna, before the grand jury; his testimony consisted wholly of denials of any knowledge on the matters involved, and it did not appear that he claimed any privilege or offered any objection; Marshall, J., held that "for the statute to operate, there must be evidence under a real compulsion, not mere right of compulsion," so that an express claim of privilege would be unnecessary only where the situation was such that on refusal to answer "he would be liable to punishment as standing in defiance of the Court": Kerwin, J., concurred; Winslow, J., concurred; "I do not think that compelling a person to appear by subpœna can properly be considered as compelling him to testify; . . . A person might be compelled by sub-

patory legislative pardon or immunity is not authorized absolutely, but only conditionally upon and in exchange for the relinquishment of the privilege. The Legislature did not intend to give something for nothing, *i. e.* to give immunity merely in exchange for a testimonial disclosure which it could in any event have got by ordinary rules or by the witness' failure to insist on his privilege. The immunity was intended to be given solely as the means of overcoming the obstacle of the privilege; and therefore (irrespective of the precise formality of the judge's procedure) could not come into effect until that obstacle was explicitly presented and thus needed to be overcome.[8] It is not to be argued, in opposition, that the criminality of the act disappears by operation of law as soon as the witness speaks, and that therefore no claim of privilege is necessary. This argument, in the first place, equally ignores the above-mentioned essential feature of the legislative intention (namely, to give the immunity solely as a means of removing the obstacle of the claim). But furthermore, it involves somewhat of a logical absurdity; for by this theory, before the witness has testified, his act is still criminal, and therefore

pœna to attend, but might testify voluntarily when so in attendance and thus waive his privilege; in like manner I think he may waive his immunity; I do not mean by this that it is necessary for the witness to refuse to answer, but simply that he should make known the fact that he does not testify voluntarily but only in obedience to the command of the law and the Court," which he did not here do; Dodge, J., dissenting, on this point).

Contra: Cal. 1917, People *v.* Fryer, 175 Cal. 785, 167 Pac. 382 (murder; defendant held entitled to immunity, under P. C. § 1324, by reason of having testified as a witness under subpœna and oath at a preliminary examination of G.; the judge's failure to read the Code to the witness held to satisfy the requirements for immunity under P. C. § 1324, even though the witness did not ask to be excused; unsound; Angellotti, C. J., and Lawlor and Lorigan, J. J., diss.); *Ia.* 1918, Doyle *v.* Wilcockson, 184 Ia. 757, 169 N. W. 241 (applying Code § 4612); *N. Y.* 1887, People *v.* Sharp, 107 N. Y. 427, 445 ("He could not be required, in order to gain the indemnity which the same law afforded, to go through the formality of an objection or protest which, however made, would be useless").

Under U. S. R. S. § 860 (which did not give immunity, but only forbade the use of the evidence), the statute's language made a claim unnecessary: 1909, Hammond Lumber Co. *v.* Sailors' Union, C. C. N. D. Cal., 167 Fed. 809, 823 (deposition given in a civil proceeding upon a subpœna *duces tecum* to produce records as secretary; the witness producing and being examined was held entitled to the benefit of U. S. R. S. § 860 though no claim of privilege was made at the time; it is enough if "the exemption is claimed, as here, at the time the evidence thus obtained is first sought to be used," *i. e.* proceedings for criminal contempt in violating the injunction in the civil proceeding). But this statute is now repealed (*ante*, § 488).

The proper *statutory form*, for making clear the necessity of an express claim of privilege in order to obtain the immunity, is found in the Canadian statutes of the Dominion and Ontario (quoted *ante*, § 2281). The California statute of 1905, P. C. § 1324 (quoted *ante*, § 2281), antedating by a year the ruling in U. S. *v.* Armour, is a well-worded statement, offering a fair and correct solution of the problem; it does not vary from what might well be the judicial construction of the privilege, except its liberality in presuming a claim of privilege in the absence of a reading aloud of the statute to the witness; the statute, however, has omitted to provide (as it ought to) that the oath may be impliedly waived, and that a voluntary attendance of the witness at a hearing shall be equivalent to a summons by subpœna, for the purpose of entitling to immunity. The Connecticut statute for public service corporations, Rev. St. 1918, § 3618 (quoted *ante*, § 2281) is an example of a correct form.

[8] This appears, *e. g.*, in the U. S. St. 1887 (Interstate Commerce Commission), §§ 9, 12, and its successors (*ante*, § 2281, n. 5), where it is said that "the *claim* . . . shall not excuse," and "no person shall be *excused* . . . *on the ground* that, etc.," "but no person shall be prosecuted for" anything so testified about.

This general principle that there must inherently be an *exchange* of privilege for immunity is well stated in the following opinions: 1884, Turney, J., in State *v.* Warner, 13 Lea 52, 62–66; 1906, Marshall, J., in State *v.* Murphy, 128 Wis. 201, 107 N. W. 470 (quoted *supra*).

within the privilege, and yet he can be compelled to speak and thus do something to remove its criminality; in other words, being as yet non-compellable, he is compelled to become compellable! No such logical feat is required in applying the other view above set forth.

It follows that testimony given actually by deliberate choice, under only the *appearance of compulsion*, either by imposing upon the judge's inadvertence, or by collusion with opposing counsel, can of course not earn immunity.[9] It is to defeat such collusive attempts to obtain immunity that the witness' plain expression of the claim of privilege should, on practical grounds, be insisted upon.

(3) There must be a *ruling of the judge*, overriding the claim and requiring an answer.[10] It is plain that the judge, upon such a claim of privilege being made, could if he chose respect it, and thus refrain from exercising the immunity-power. Therefore, the immunity operates as soon as —and not until — he overrides the claim, by some form of ruling. Moreover, the immunity can only be obtained in some proceeding where *the State is represented* by counsel; otherwise there is no grant of it; moreover, (unless the statute speaks expressly to the contrary) it cannot be supposed that every offender is to have the power in his own discretion to obtain immunity automatically on demand. The grant must be left to the discretion of the State's representative. Whether the proceeding be in form criminal or civil, is immaterial; the action of the State's representative is the important thing.[11]

(B) *Administrative officer.* Where the testimonial disclosure is made before an administrative officer, having the auxiliary power to subpœna witnesses and to obtain judicial aid to enforce his testimonial powers, the question is more complicated in certain details, though not different in principle:

(1) Neither *subpœna* nor *oath* is necessary, for the same reasons as before

[9] *Eng.* Re Strahan, 7 Cox Cr. 85 (voluntary application of bankrupt to be examined; per Alderson, B., the statutory permission to plead such examination in bar of an indictment did not cover "a mere process, got up for the purpose, voluntarily absolving themselves from the consequences of their acts"); 1859, R. v. Skeen, 8 Cox Cr. 143 (under the same bankruptcy statute, an examination given in bankruptcy, after committal for trial on indictment, and covering only the facts at that time already otherwise testified to and known, held not a "disclosure" sufficient to exonerate under the statute, by nine judges to five); 1914, R. v. Noel, 3 K. B. 848 (immunity held not to be obtained by disclosures made under cross-examination after voluntarily taking the stand as defendant in a civil action, under the Larceny Act, 1861, c. 96, § 85, giving immunity "if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process"; the mere production of a document by order of the judge, held not a compulsory production, under the same statute); *U. S.* 1902, U. S. v. Kimball, 117 Fed. 156, 163 (nature of compulsion, considered).

Compare the following ruling: 1896, People v. Sternberg, 111 Cal. 3, 43 Pac. 198 (whether the person had in fact so testified to the offence now charged); and the cases cited *ante*, § 2270, as to what constitutes compulsion.

[10] Authorities *ante*, § 2270, n. 6, § 2271, for the general principle; and the following: 1907, Ex parte Andrews, 51 Tex. Cr. 79, 100 S. W. 376 (a witness refused to answer, claiming the privilege; on habeas corpus, an immunity statute being cited, it was held that "inasmuch as he was offered no immunity," the privilege remained).

[11] 1921, Nekoosa-Edwards Paper Co. v. News Pub. Co., 174 Wis. 107, 182 N. W. 919 (action for price of goods sold; counter-claim under Stats. § 1747 *e* for damages caused by maintaining a monopoly; the defendant-company held not entitled to immunity; opinion obscure).

(*supra*, par. (A) 1). Yet, owing to the less formal and dramatic features of a hearing before an administrative officer, the situation presents greater difficulty of interpreting the circumstances and of determining whether the State power was being invoked.

(2) But a *claim of privilege against self-incrimination*, explicitly made, is essential.[12] This is not only equally true as for the case of testimony in a judicial trial (*supra*, (A) 2), but the explicitness is here even more essential, and particularly where the administrative officer makes a general demand for documents or testimony upon a broad class of topics. The reason is clear. The officer has testimonial powers to extract a general mass of facts, of which some, many, or most will certainly be innocent and unprivileged, some may be privileged communications (*e. g.*, between attorney and client) whose privilege remains unaffected by the statute defining his powers, and some may be privileged as self-criminating but liable to become demandable by overriding this privilege with a grant of immunity. Among this mass of facts, then, the officer will seek those which are relevant to his administrative inquiry; he cannot know which of them fall within one or another privilege, in particular, which of them tend to criminate at all, or to criminate a particular person; if such facts are there, he may not desire or be authorized to exercise the option of granting immunity so as to obtain them; his primary function and power is to obtain the relevant facts at large, and his power to obtain a special and limited class of facts by grant of immunity is only a secondary one, and one which he will not exercise till a cause arises, if even then. For these reasons of practical sense, then, as well as for the inherent requirements of principle already noticed for judicial officers, it is particularly true for an inquiry by an administrative officer that the witness must explicitly claim his privilege, and specifically *the* privilege against self-incrimination, and must then be overridden in that claim, before immunity can take effect. The contrary view can only be reached by forgetting the contrast between the broad class of innocent facts which are the normal object of the officer's inquiry, and the special and limited class of criminal facts which may form scattered parts of the mass. The analogy is seen in judicial trials, where it is settled that though an accused in a criminal trial need make no claim, yet a party in a civil trial or a witness in any trial *must* make his claim (*ante*, § 2268), because out of the whole mass of innocent facts subject to inquiry it cannot be known beforehand by the tribunal what particular facts asked for will tend to criminate nor whether he will voluntarily choose to disclose them. So, here, it is especially necessary that the claim of the particular privilege against self-incrimination should be explicitly put forward by the witness to segregate and mark the specific facts which he knows or believes to have that quality; then, and then only, is the officer placed in a position

[12] U. S. *v.* Skinner, D. C. S. D. N. Y., 218 Fed. 870 (there must be a claim of privilege, express or implied; here ruling upon testimony given before the Interstate Commerce Commission, under St. 1893, Feb. 11; good opinion by Grubb, J.).

Contra: 1906, U. S. *v.* Armour, 142 Fed. 808, per Humphrey, J. (cited *supra*, n. 5).

when he can consciously exercise the option which the immunity-statute gives him. This option he can certainly not be deemed to exercise unwittingly and in gross by the mere circumstance of pursuing his normal course of duty and power for relevant facts at large. It is indeed astonishing to suppose that a witness by surreptitiously including criminal with non-criminal facts could obtain from such an officer a wholesale immunity, without having done anything to notify either whether particular facts are criminating or whether he waives his privlege voluntarily and without immunity.

The contrary ruling made in 1906, in a prosecution growing out of an investigation by the Federal Commissioner of Corporations into the practices of the meat-packing trade, led to the following historic utterance by President Roosevelt:

1906, President *Roosevelt*, Message to Congress, April 18: "It is very desirable to enact a law declaring the true construction of the existing legislation so far as it affects immunity. I can hardly believe that the ruling of Judge Humphrey will be followed by other judges. . . . It is, of course, necessary, under the Constitution and the laws, that persons who give testimony or produce evidence, as witnesses, should receive immunity from prosecution. It has hitherto been supposed that the immunity conferred by existing laws was only upon persons who, being subpœnaed, had given testimony or produced evidence, as witnesses, relating to any offence with which they were, or might be, charged. But Judge Humphrey's decision is, in effect, that, if either the Commissioner of Corporations does his duty, or the Interstate Commerce Commission does its, by making the investigations which they by law are required to make, though they issue no subpœna and receive no testimony or evidence, within the proper meaning of those words, the very fact of the investigation may, of itself, operate to prevent the prosecution of any offender for any offence which may have been developed in even the most indirect manner during the course of the investigation, or even for any offence which may have been detected by investigations conducted by the Department of Justice entirely independently of the labors of the Interstate Commerce Commission or of the Commissioner of Corporations — the only condition of immunity being that the offender should have given, or directed to be given, information which related to the subject out of which the offence has grown.

"In offences of this kind it is at the best hard enough to execute justice upon offenders. Our system of criminal jurisprudence has descended to us from a period when the danger was lest the accused should not have his rights adequately preserved, and it is admirably framed to meet this danger. But at present the danger is just the reverse; that is, the danger nowadays is, not that the innocent man will be convicted of crime, but that the guilty man will go scot-free. This is especially the case where the crime is one of greed and cunning, perpetrated by a man of wealth in the course of those business operations where the code of conduct is at variance, not merely with the code of humanity and morality, but with the code as established in the law of the land. It is much easier, but much less effective, to proceed against a corporation, than to proceed against the individuals in that corporation who are themselves responsible for the wrong-doing. Very naturally, outside persons who have no knowledge of the facts, and no responsibility for the success of the proceedings, are apt to clamor for action against the individuals. The Department of Justice has, most wisely, invariably refused thus to proceed against individuals, unless it was convinced both that they were in fact guilty and that there was at least a reasonable chance of establishing this fact of their guilt. These beef-packing cases offered one of the very few instances where there was not only the moral certainty that the accused men were guilty, but what seemed — and now seems — sufficient legal evidence of the fact.

"But in obedience to the explicit orders of the Congress the Commissioner of Corpora-

tions had investigated the beef-packing business. The counsel for the beef-packers explicitly admitted that there was no claim that any promise of immunity had been given by Mr. Garfield, as shown by the following colloquy during the argument of the Attorney-General: *Mr. Moody:* . . . 'I dismiss almost with a word the claim that Mr. Garfield promised immunity. Whether there is any evidence of such a promise or not, I do not know and I do not care.' *Mr. Miller* (the counsel for the beef-packers): 'There is no claim of it.' *Mr. Moody:* 'Then I was mistaken, and I will not even say that word.' But Judge Humphrey holds that if the Commissioner of Corporations (and therefore if the Interstate Commerce Commission) in the course of any investigations prescribed by Congress, asks any questions of a person, not called as a witness, or asks any questions of an officer of a corporation, not called as a witness, with regard to the action of the corporation on a subject out of which prosecutions may subsequently arise, then the fact of such questions having been asked operates as a bar to the prosecution of that person or of that officer of the corporation for his own misdeeds.

"Such interpretation of the law comes measurably near making the law a farce; and I therefore recommend that the Congress pass a declaratory act stating its real intention."

The *formalities* of claim, before an administrative officer, are the only really doubtful and difficult aspects of the problem. — In the first place, it is doubtful whether a statutory requirement of *writing* for the validity of the witness' claim would be constitutional. A writing is not necessary for such a claim in court; nor would the claim necessarily there become part of the record. But the statute, as a matter of policy, ought at least to require the officer to file his questions in writing, and to note a claim of privilege in writing; so that the Government, on its part, could at least insure itself and the witness against the enormous expense of time and money that might be involved in a trial of the plea of immunity. — In the next place, if writing is not requirable nor in fact employed, the claim and its overriding must at least be *explicit;* by which is meant, not a form of words, nor any formality of conduct, but an expressed and understood claim of the right not to disclose on the specific ground of facts tending to criminate; and an explicit overriding of the claim and a grant of immunity.[13] Furthermore, in the case of an inquiry into acts of a *corporation*, where the Government demands production of corporate books from the agents of the corporation, the agent producing the books must claim the personal privilege for himself, if that is what he desires; first, because it cannot be known, until he says so, that the corporate books contain facts tending to criminate *him;* and, secondly, because, even though they do, it cannot be known which of the privileges — his own, or that of the corporation, or both — the officer will choose to override; for a question may still

[13] Whether the claim was explicitly made in fact in U. S. *v.* Armour, *supra*, is perhaps open to question, as to some of the witnesses, upon some of the testimony. But it is fairly clear that the witnesses' counsel were amply aware of the applicability of the privilege, and could have been explicit enough had they chosen. The natural query is, why did they not all explicitly and in writing claim both privilege and immunity?

The following statute seeks to supply a simple method of plainly *declining the immunity:* N. Y. St. 1912, c. 312, p. 568 (amending Consol. L. c. 40, St. 1909, c. 88, by adding § 2446; if by any law an immunity of the present sort is provided, a person may file with the county clerk "a statement expressly waiving such immunity" for a special transaction, and thereupon his testimony "may be received or produced before any judge," etc., and if received, "such person shall not be entitled to any immunity," etc.).

remain (*ante*, § 2259) as to the privilege of the corporation.[14] — Finally, the claim may well be *in gross*, *i. e.* for a particular mass of documents the claim may be made as to all criminating facts therein, and need not be more specifically made nor more frequently renewed than will suffice to avoid misunderstanding. The essential thing is that no formality is required, on the one hand, and, on the other, that the witness, since he is the one to be explicit, must be explicit enough to serve his purpose. — These are not all the applicable considerations, either of general principle or of detail; the entire question will doubtless not be thoroughly worked out in our judicial decisions for many years to come. But the foregoing aspects are those which will first claim the judicial labors for their early settlement by courts of last resort.

(3) There must be some expression of the officer, in the nature of a ruling, overriding the claim and insisting upon an answer; and this for the same reason as in a judicial trial (*supra*, par. (A) 3).

It remains to notice a misunderstanding which should not obscure the effect of the rule in question. It was said, for example, at the time of U. S. *v.* Armour, above cited, that "the Department of Commerce and Labor, created with power to investigate the trusts and combinations in restraint of trade, it is declared, is absolutely useless if the results of its investigations cannot furnish any basis on which to bring offenders to punishment." Now the profession ought to understand that no administrative Department has a function to procure self-incriminating evidence "on which to bring offenders to punishment." That is precisely what the Constitution protects us against. It is just because no officer has inquisitorial powers to force self-crimination that the immunity-statutes were passed; so that only by abnegating the judicial inquisitorial attitude could the Department obtain the information necessary for its administrative purposes. The real inconvenience of the above-cited ruling in U. S. *v.* Armour was that it hampered the Department of Justice, by making the Department of Commerce the unwitting instrument of stopping the prosecutions of the former. Even this is not an insuperable obstacle. If U. S. *v.* Armour should ever become the final law, it would mean simply this, that an administrative officer, in obtaining testimony for the purposes of his department, has the burden of making and proving an explicit and specific disavowal of any intention to grant immunity from prosecution, otherwise the immunity obtains. This leaves the situation temporarily annoying for the Government; but it leaves them with ample power of self-protection for the future.

4. *Mode of Effectuating the Immunity.* The proper mode (apart from express provision) for taking advantage of the immunity gained by thus testifying is a *motion to quash the indictment* founded upon the charge testified to.[15]

[14] This distinction seems not to have been noticed in U. S. *v.* Armour, *supra*.

[15] 1903, Sandwich *v.* State, 137 Ala. 85, 34 So. 620. Compare the citations in § 2270, *ante*.

Suppose a witness *already under indictment* and now summoned before the grand jury to testify as a witness on the same subject; has his privilege yet disappeared? Yes, for although he has not yet had an opportunity to claim immunity from trial, yet the indictment is

But a *plea in bar* has also been employed.[16] The English and Canadian method of furnishing the party with a certificate (*ante*, § 2281) is the most sensible and efficient provision.

§ 2283. **Same: (2) Statutes forbidding the Use of Testimony.** (1) Where the statute does not pronounce an entire immunity, by forbidding punishment or prosecution for the offence disclosed, but merely prohibits in any criminal prosecution the *use of the testimonial admissions* made by the witness, a slightly different question is presented, not so plain of solution.

The only argument that has ever been advanced against holding such statutes equally effective is an argument based on the theory of facts "tending to criminate." By the conceded principle (*ante*, § 2260), the privilege protects against the disclosure of facts "tending" to criminate; and it is argued that a compulsory admission, though itself prohibited to be used, may nevertheless furnish a clue to other evidence, the use of which is not reached by the statute's prohibition; and that thus the disclosure may "tend" to criminate in spite of the statute:[1]

1892, BLATCHFORD, J., in *Counselman* v. *Hitchcock*, 142 U. S. 547, 564, 586, 12 Sup. 195: "This [statute] of course protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted. . . . [Section 860 U. S. Revised Statutes] affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party. . . . We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States."

a substantial part of the 'quid pro quo,' and his act of testifying will relate back to the indictment, and will entitle him to quash it: 1910, In re Kittle, C. C. S. D. N. Y., 180 Fed. 946. Conversely, the witness testifying obtains immunity, even though he is *already arrested* or indicted: 1921, Dodson *v.* State, 89 Tex. Cr. 541, 232 S. W. 836 (under P. C. § 574).

[16] 1910, Heike *v.* U. S., 217 U. S. 423, 30 Sup. 539 (the defendant pleaded specially in bar that he had obtained statutory immunity by testifying before the grand jury; this plea failed, the trial Court directing a verdict on it; the defendant then, by leave pleading over, pleaded not guilty; before trial of this plea, the trial Court entered judgment subject to the leave to plead; on the question whether this judgment was reviewable in the Supreme Court as a final judgment, the argument was made that the statutory immunity was meant to prevent prosecution, and hence a judgment on a plea in bar if favorable must be final; this argument was held insufficient to affect the usual rule as to Federal judgments on writ of error).

May acts for which immunity *has been obtained* be still merely as *evidence relevant* to a charge of some later act? Yes: 1911, U. S. *v.* Swift, D. C. N. D. Ill., 186 Fed. 1002 (an immunity obtained by giving information in 1904 does not extend to include acts done in pursuance of the same continuing conspiracy to 1910 or a period prior but not barred by statute of limitations; and the transactions covered by the original immunity may still be given in evidence when relevant to show the nature of the conspiracy at a later time).

§ 2283. [1] This argument was first advanced in 1853, in the Second Report of the Commissioners of Common Law Practice, p. 21.

The answer to this argument has been already supplied in dealing with the "tendency" aspect of the privilege (*ante*, § 2261). That doctrine signifies merely that when facts A, B, C, and D are the constituents of a crime, but no one of them is of itself criminal, the disclosure of fact A alone cannot be compelled, because, if the facts B, C, and D were otherwise proved, then fact A could be proved, and the "chain" completed, by the witness' compulsory admission, and thus the admission would after all have criminated him. But the doctrine does *not* mean that the disclosure of fact X can be refused because from fact X a clue might by possibility be obtained, which otherwise could not have been obtained, to some criminal fact A B C D. If, then, we repudiate the notion that the "tendency" doctrine involves facts which might furnish clues, and suppose that the disclosure of fact A has been compelled, we have, under the statutes in question, a prohibition to use this compulsory admission of fact A in any prosecution charging the crime A B C D; the prohibition being obeyed, it is obvious that the proof of the entire criminal fact A B C D must be still as impossible as ever without the aid of the admission, and that, so long as the admission remains out of the evidence in that prosecution, no criminating consequences (so far as the privilege protected against them) will have come to the witness.[2] This is the sufficient answer; and it is plain that it turns upon the precise meaning of the privilege with reference to clues disclosed (*ante*, § 2261). But it may be added that if reliance is to be placed upon the liberality of the Constitutions in forbidding the "use" of evidence "furnished" against himself by the witness, and if this be thought to prohibit even the "use" of it to obtain clues to other evidence, then that prohibition may none the less be made effective, under the statutes in question, by the exclusion, in the subsequent prosecution, of any evidence which has in fact been obtained by this forbidden "use" of the clues in the original disclosure. Such a prohibition can also be carried out. If this forced interpretation of the word "use" is to be put upon the constitutional enactment, it must surely also be applied to the statutory enactments, which equally forbid any "use" of the admissions obtained.[3] It is illogical to expand the prohibition of the Constitution without equally expanding the remedy of the statute.

The constitutional efficacy of this type of statute for their purpose was well expounded in the following early opinions, written at a period nearer to

[2] Such is the construction of these statutes in England: 1861, R. *v.* Leatham, 3 E. & E. 658 (defendant, testifying on the former occasion under statutory immunity, had mentioned a letter written by him to W.; afterwards W. produced the letter; held, that "a document already existing before, and referred to by the witness in the course of, the examination" is not to be excluded, if proved by other evidence; the fact that his testimony had given the clue does not exclude the evidence).

[3] That the principle, not the words, control, see *ante*, § 2252. The opinion in Counselman *v.* Hitchcock itself declares this. But Com. *v.* Emery, Mass. (cited *infra*), on which it partly relied, had turned upon the local wording.

The above view has now been taken in Com. *v.* Cameron, 229 Pa. 592, 79 Atl. 169 (1911; under Pa. Const. Art. 3, § 32, providing that in bribery self-crimination may be compelled, but that such testimony "shall not afterwards be used against him," the witness so testifying does not obtain immunity from prosecution).

the era of constitution-making, when the cobwebs of artificial fantasy had not begun to obscure its plain meanings:

1853, Scott, J., in *State* v. *Quarles*, 13 Ark. 307, 311: "The privilege in question, in its greatest scope, as allowed by the common law — and no one, be he witness or accused, can pretend to claim it beyond its scope at the common law — never did contemplate that the witness might not be proved guilty of the very crime about which he may be called to testify; but only that the witness should not be compelled to produce the evidence to prove himself guilty of that crime. His privilege, therefore, was not an exemption from the consequences of a crime that he might have committed; but only an exemption from the necessity of himself producing the evidence to establish his own crime. . . . So long as it might be lawful to produce in evidence against an accused party whatever he might before have voluntarily said as a witness on a prosecution against another, there were no means by which the privilege could be made available short of a claim by the witness to be silent; and as that was the rule of the common law, this was the common-law mode of making the privilege available. And that silence was but a mode of making the privilege available, and was not of the essence of the privilege itself, is conclusively proven by all that current of enlightened authority, to which we yield our fullest assent, which holds that the privilege has ceased when the crime has been pardoned, when the witness has been tried and acquitted, or is adjudged guilty, or when the prosecution, to which he was exposed, has been barred by lapse of time. . . . But the Legislature has so changed the common-law rule, by the enactment in question, in the substitution of a rule that the testimony, required to be given by the act, shall never be used against the witness for the purpose of procuring his conviction for the crime or misdemeanor to which it relates, that it is no longer necessary for him to claim his privilege as to such testimony, in order to prevent its being afterwards used against him. And the only question that can possibly arise under the present state of the law, as applicable to the case now before us, is as to whether our statutory regulations afford sufficient protection to the witness, responsive to this new rule and to his constitutional guarantee against compulsory self-accusation. . . . In any case where more than ordinary precautions may be thought expedient or necessary, the powers of the Circuit Court are ample for the complete preservation of every item of evidence that might be produced. There can then be no ground for apprehension for the safety of the witness from this source. Nor can there be any greater cause for apprehension from any supposed possibility or probability that the true privilege of the witness may be invaded under the operation of the new rule, by the practical effect of his evidence, either direct or indirect, in opening up to the State avenues of light leading to evidences of other crimes or misdemeanors, upon which prosecutions might be afterwards founded against the witnesses, that might otherwise remain closed and unsuggested. Because, when the course of examination would lead to any inquiry as to any matter materially connected with any crime or misdemeanor other than that which was the subject of direct inquiry before the court, — as, when such matter might be indispensable for the elucidation of some material matter already produced in evidence by the witness and directly involved in the issue — the witness could claim his privilege as to such matter as fully as if he had been inquired of in chief touching such other crime or misdemeanor. . . . And when the effect of the witness' testimony would not substantially amount to the furnishing of an item in a consecutive series of proofs tending to his conviction for another crime or misdemeanor, it would be so remote, contingent, and intangible, as scarcely to be of capacity to be considered of as legitimately resulting from his testimony in legal contemplation, in any sense to invade his true privilege. At any rate, we can safely say, it would not 'prima facie' be so. And the argument to maintain the contrary can only be supported by assuming that the privilege is absolute and unqualified, which is not only legally untrue as to it, but untrue as to every other right and privilege of the citizen, because they are all but component elements, not of natural liberty, but of civil

liberty. And the error of the hypothesis will abundantly appear in the absurdities evolved in carrying out, to its inevitable result, any given right or privilege of the citizen when so based. If, for instance, it were broadly admitted that the privilege in question was so based, and hence would be invaded whenever the incidental effect of the testimony of the witness might in any degree be suggestive of sources of light that, when pursued, might lead to evidences upon which prosecutions might afterwards be founded against the witness for other crimes or misdemeanors; and also (as contended for on the other side) that the witness is to be the sole judge of the occasion for the exercise of his privilege, it would be difficult to drive the machinery of government forward in its ordinary course. A Court, for instance, might then lawfully refuse to try a cause, lest its investigation, by the instrumentality of the jury and witnesses, might be suggestive of inquiries that might ultimately lead to evidence upon which a criminal prosecution might be afterwards founded against the presiding judge. And for a like reason, the Executive might feel lawfully authorized to withhold his ordinary communications from the Legislature; and even that body might lawfully decline to perform its ordinary duties upon the same grounds — especially if the true privilege not only authorizes the citizen to withhold criminating matter, but also any matter that might have a tendency to degrade — because, the very remedies for the future would often be suggestive of the errors of the past, and these might not all be of an excusable cast. But to all objections of this class, it is a conclusive answer to say that, if, beyond reasonable foresight, any such cases should arise under the operation of our statute rule, as would seem to be clearly within its equity, although not embraced within its strict letter, all such special and unlooked-for cases would be as fully within its provisions, as if embraced by its terms, and witnesses in such extreme cases would doubtless obtain full protection from the Courts."

1861, DENIO, J., in *People* v. *Kelly*, 24 N. Y. 74, 83: "But it is proposed by the appellant's counsel to push the construction of the Constitution a step further. A person is not only not compellable to be a witness against himself in his own cause, or to testify to the truth in a prosecution against another person where the evidence given, if used as his admission, might tend to convict himself if he should be afterwards prosecuted, but he is still privileged from answering, though he is secured against his answers being repeated to his prejudice on another trial against himself. It is no doubt true that a precise account of the circumstances of a given crime would afford a prosecutor some facilities for fastening the guilt upon the actual offender, though he were not permitted to prove such account upon the trial. The possession of the circumstances might point out to him sources of evidence which he would otherwise be ignorant of, and in this way the witness might be prejudiced. But neither the law nor the Constitution is so sedulous to screen the guilty as the argument supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition and not any want of humanity in the law. If a witness objects to a question on the ground that an answer would criminate himself, he must allege, in substance, that his answer, if repeated as his admission on his own trial, would tend to prove him guilty of a criminal offence. If the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged. It is not within any reasonable construction of the language of the constitutional provision. The term 'criminal case,' used in the clause, must be allowed some meaning, and none can be conceived other than a prosecution for a criminal offence. But it must be a prosecution against *him;* for what is forbidden is that he should be compelled to be a witness against himself. Now if he be prosecuted criminally touching the matter about which he has testified upon the trial of another person, the statute makes it impossible that his testimony given on that occasion should be used by the prosecution on the trial. It cannot, therefore, be said that in such criminal case he has been made a witness

against himself, by force of any compulsion used towards him to procure, in the other case, testimony which cannot possibly be used in the criminal case against himself."

This was the view once generally accepted throughout this country, including the lower Federal courts.[4]

But in 1892 came the ruling in Counselman *v.* Hitchcock, in the Federal Supreme Court.[5] Up to that time, three rulings only, so far as appears, had

[4] *Federal:* 1871, U. S. *v.* Brown, 1 Sawyer 531, 536, Fed. Cas. No. 14, 671 (statute held to annul the privilege; Deady, J.: "If this is not the object and effect of the act, I confess I do not know what is"); 1883, U. S. *v.* McCarthy, 18 Fed. 87, 89 (Brown, J.: "The statute, in preventing all possible use of testimony thus given, does away with the reason for the rule, and . . . will be a complete protection"); 1890, Re Counselman, 44 Fed. 268 (similar ruling, in a good opinion by Gresham, J.); *Arkansas:* 1853, State *v.* Quarles, 13 Ark. 307, 310 (quoted *supra:* statute as to accomplice's testimony, held constitutional); 1855, Pleasant *v.* State, 15 Ark. 624, 650 (preceding case approved); 1899, State *v.* Bach Liquor Co., 67 Ark. 163, 55 S. W. 854 (State *v.* Quarles approved; but on a trial for selling liquor, a witness asked as to a purchase is still privileged under the statute, because he is not "concerned" in the offence charged); *California:* 1857, Ex parte Rowe, 7 Cal. 184 ("The statute gives the witness that protection which was contemplated by the Constitution"); *Georgia:* 1853, Higdon *v.* Heard, 14 Ga. 255, 259 (gaming statute; "they get that protection [of the Constitution] thus: answers filed, in cases originating under the act of 1764, cannot be read in evidence against them in any criminal case whatever"); 1879, Kneeland *v.* State, 62 Ga. 395, 398 ("It is difficult to see how that which can never be used against him can tend in the slightest degree to criminate the witness"; sanctioning Code § 4545); *Indiana:* 1860, Wilkins *v.* Malone, 14 Ind. 153, 155 (usury statute, held sufficient to annul the privilege; following State *v.* Quarles, Ark., and Higdon *v.* Heard, Ga.); 1879, State *v.* Enochs, 69 Ind. 314, 316 (Wilkins *v.* Malone approved); 1888, Bedgood *v.* State, 115 Ind. 275, 17 N. E. 621 (rape; R. S. 1881, § 1800, held to annul the privilege); *Iowa:* 1919, Davison *v.* Guthrie, 186 Ia. 211, 172 N. W. 292 (Code § 4075, compelling answers of a judgment debtor, "but his answers shall not be used," etc., held valid; there being no Fifth Amendment clause in the Iowa constitution; see *ante*, § 2252; State *v.* Height, cited *ante*, § 2252, is not referred to); *Missouri:* 1891, Ex parte Buskett, 106 Mo. 602, 608, 17 S. W. 753 (gaming statute; "there can be no doubt that the language of the statute granting the protection . . . is as broad as the constitutional privilege"; following People *v.* Kelly, N. Y., and People *v.* Quarles, Ark.); *New York:* 1839, Perrine *v.* Striker, 7 Paige 598, 600 (Walworth, C., apparently ruled as in the next case); 1841, Bank of Salina *v.* Henry, 1 Hill N. Y. 555, Henry *v.* Bank of Salina, 5 Hill 523, 547 (statute making a usurer compellable as a witness when plaintiff; Walworth, C., held that the act "removes the constitutional difficulty in compelling them to answer, by declaring that the testimony given . . . shall not be used," etc.; this was supported by a vote of 13 to 8, the dissenters proceeding apparently on other grounds); 1846, Bank *v.* Salina, 2 Denio 155, 159 (statute protecting against the use of testimony of a usurer on indictment, held not sufficient since a forfeiture also, recoverable by action, was not covered by the statute; on the principle of § 2280, *ante*); 1861, People *v.* Kelly, 24 N. Y. 74, 82 (quoted *supra;* applied to the bribery Act of 1853); 1869, Lothrop *v.* Clapp, 40 N. Y. (Hand) 328, 332 (statutory supplementary proceedings against an insolvent debtor; statute assumed to be constitutional); 1887, People *v.* Sharp, 107 N. Y. 427, 441, 14 N. E. 319 (preceding case followed; here the statute, P. C. § 79, contained also an exemption from liability to prosecution, but this was apparently not considered material); *North Carolina:* 1880, La Fontaine *v.* Southern Underwriters' Ass'n, 83 N. C. 132, 141 (examination of an insolvent debtor; "the answers of the witness cannot be used against him in any criminal proceeding whatever, and his constitutional right . . . is maintained intact and full"; following Lothrop *v.* Clapp, N. Y.); 1904, Re Briggs, 135 N. C. 118, 47 S. E. 403 (La Fontaine *v.* Underwriters cited with approval); *Pennsylvania:* 1901, Re Kelly, 200 Pa. 430, 50 Atl. 248 (Const. Art. 8, § 10, held to be not repugnant to § 9, and therefore to be sufficient to destroy the privilege in election cases; "his answer could not be used against him in any legal proceeding; therefore he would be subject to no penalty or fine"); *Vermont:* 1840, Smith *v.* Crane, 12 Vt. 491, 493 (Redfield, J., 'obiter': "A rule that the testimony should be given in all cases but should never after be used for the purpose of procuring a conviction of crime, would . . . afford full protection to the witness").

[5] 1892, Counselman *v.* Hitchcock, 142 U. S. 547, 12 Sup. 195 (quoted *supra;* dealing with Rev. St. § 860, and St. 1887, Feb. 1); applied in the lower Federal Courts in the following cases: 1896, Ex parte Irvine, 74 Fed. 954, 963

held such statutes ineffective; of these three, one had afterwards been doubted in its own Court, a second was expressly based on the words of the local Constitution, and the third, in an 'obiter' approval of the second, ignored an expressly contrary prior decision in its own jurisdiction.[6] The remaining decisions discrediting these statutes have all been subsequent to Counselman *v.* Hitchcock.[7] It is unfortunate that the Court in which the latter pronouncement was made should have allied itself with such feeble forces.

The Federal *Bankruptcy Act* of 1898 (quoted *ante*, § 2281) at first received varying treatment in the different Federal Courts. Enacted as it was after the ruling in Counselman *v.* Hitchcock, and in the terms of the imperfect type of immunity above considered, it is difficult to imagine that its § 7 was

(Counselman *v.* Hitchcock recognized); 1897, U. S. *v.* Bell, 81 Fed. 830 (same); 1902, Foot *v.* Buchanan, 113 Fed. 156 (R. S. § 860, held still ineffective, since Counselman *v.* Hitchcock, except so far as remedied by express statute).

[6] *Massachusetts:* 1871, Com. *v.* Emery, 107 Mass. 171, 182 (under a constitution forbidding that one "be compelled to accuse, or furnish evidence against himself," the privilege is extended by the second phrase so as to protect from disclosure of "the circumstances of his offence the sources from which or the means by which evidence of its commission or of his connection with it may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him," and hence, since "the terms of the provision in the Constitution of Massachusetts require a much broader interpretation" than that of New York the privilege remains, "so long as he remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined or to which his testimony shall relate"); *New Hampshire:* 1869, Currier *v.* R. Co., 48 N. H. 327, 332 (compulsory statute, held insufficient for not providing "that such disclosures should not be used against them on trial for such offences, and thus obviating the objection that they were required to furnish evidence against themselves"; the ruling in People *v.* Kelly, N. Y., approved; the N. H. Constitution being phrased as in Massachusetts, more explicitly than that of New York, and this phrasing being noted in the opinion); 1878, State *v.* Nowell, 58 N. H. 314 (under a statute providing immunity from persecution and also forbidding the testimony to be used, it was said that "if our statute went no further [than the latter provision] in this respect, that case [of Emery, in Mass.] would be directly in point," and that the statute would then be "ineffectual," citing only Emery's Case, and ignoring Currier *v.* R. Co.); *Virginia:* 1873, Cullen *v.* Com., 24 Gratt. 624, 633 ("Nothing short of complete amnesty to the witness, an absolute wiping out of the offence as to him, so that he can no longer be prosecuted for it, will furnish that indemnity"; here applied to the duelling statute of 1870); 1881, Temple *v.* Com., 75 Va. 892, 896, 902, 903 (preceding case doubted to some extent by a majority of the Court).

There was also, to be sure, the Tennessee case, cited *ante*, § 2281, which implied the same result, but was itself in repudiation of its own prior doctrine.

[7] *California:* 1894, Ex parte Clarke, 103 Cal. 352, 37 Pac. 230 (statutory examination of an insolvent debtor, held improper; no protective clause of any sort was in the statute; but the Court approved Counselman *v.* Hitchcock, *obiter;* the question apparently was not argued); 1894, Ex parte Cohen, 104 Cal. 524, 530, 38 Pac. 364 (approving the preceding case, *obiter;* ignoring Ex parte Rowe, cited *supra*, note 4); *Missouri:* 1902, Ex parte Carter, 166 Mo. 604, 66 S. W. 540 (Mo. Rev. St. 1899, § 2206, held not to annul the privilege effectually; following Com. *v.* Emery, Mass., and Counselman *v.* Hitchcock, U. S.); *New York:* 1894, People *v.* Forbes, 143 N. Y. 219, 229, 38 N. E. 303 ("It seems that in such cases nothing short of absolute immunity from prosecution" can suffice; citing Counselman *v.* Hitchcock alone, although on the next preceding page People *v.* Kelly, *supra*, is cited for another point; the statement was wholly uncalled for in the case, and reprehensibly tended to unsettle the law in this jurisdiction); 1903, People *v.* O'Brien, 176 N. Y. 253, 68 N. E. 353 (P. C. § 342, relating to gambling offences, and prohibiting the subsequent receipt of testimony compulsorily obtained, does not suffice to abolish the privilege, because it does not give complete immunity; People *v.* Kelly, *supra*, repudiated; Counselman *v.* Hitchcock, U.S., followed); *North Dakota:* 1908, In re Beer, 17 N. D. 184, 115 N. W. 672 (Counselman *v.* Hitchcock followed, in a prosecution for violating the liquor law; holding Rev. Codes 1905, § 9383, ineffective); *Wyoming:* 1899, Miskimmins *v.* Shaver, 8 Wyo. 392, 58 Pac. 411 (Counselman *v.* Hitchcock, U. S. approved obiter).

Contra: Pennsylvania: 1911, Com. *v.* Cameron, 229 Pa. 592, 79 Atl. 169 (cited more fully *supra*, n. 3).

framed by any friend of the Act. Its ineffectiveness to remove the privilege has been settled.[8] But no steps have been taken to substitute an effective phrasing.

(2) In *Canada*, where no constitutional sanction prevents, this type of statute is given effect according to its terms, without regard to its possible inefficacy in removing all risk of subsequent prosecution through clues obtained.[9]

(3) Regardless, however, of the efficacy of such statutes to annul the privilege, and assuming that answers were duly made by the witness without disputing his compellability thereunder, the statutes have of course, according to their terms, the effect of *preventing the later use* of such answers. This result has seldom, indeed, been invoked, but cannot be doubted.[10]

[8] *Fed.* 1899, Re Scott, 95 Fed. 815 (§ 7, Bankruptcy Act 1898, Code § 8790, does not deprive the bankrupt of his privilege not to incriminate himself in bankruptcy proceedings); Re Rosser, 96 Fed. 305 (same); 1900, Mackel *v.* Rochester, 42 C. C. A. 427, 102 Fed. 314 (bankrupt compellable to answer, under the immunity granted by § 7 of the Bankruptcy Act and U. S. Rev. St. § 860); 1900, Re Franklin Syndicate, 114 Fed. 205 (§ 7, subd. 9, of the Bankruptcy Act, is a complete protection, taking away the privilege; but the disclosure of documents which might be used against him will not be compelled); 1901, Re Smith, 112 Fed. 509 (Bankruptcy Act affords immunity to the bankrupt only); 1902, Re Shera, 114 Fed. 207 ("an immunity similar to that which the Bankruptcy Act purports to afford is not sufficient"; citing Counselman *v.* Hitchcock); 1902, Re Nachibman, 114 Fed. 995 (bankrupt held privileged from disclosing the criminal conduct of his business); 1903, Re Leslie, 119 Fed. 406 (the refusal of a bankrupt's discharge is not a penalty, but a civil proceeding; and the bankrupt's prior testimony can be used therein, under Bankruptcy Act, § 7); 1904, U. S. *v.* Goldstein, 132 Fed. 789, D. C. (privilege held not annulled, under § 7 of the Act; the voluntary filing of a petition is not a waiver); 1904, Re Hess, 134 Fed. 109, D. C. (the Bankruptcy Act, § 7 does not abolish the privilege; but the decision proceeds in part upon the erroneous ground — *ante*, § 2258 — that the statute gives no protection against use of the evidence in State courts); 1904, Burrell *v.* Montana, 194 U. S. 572, 24 Sup. 787 (State *v.* Burrell, Mont., *infra* affirmed); 1906, U. S. *v.* Simon, 146 Fed. 89, 92 D. C. (applying Burrell *v.* Montana, *supra;* and also holding that a bankrupt cannot be charged with perjury committed in bankruptcy proceedings because the statute, forbidding the use of his testimony "in any criminal proceeding," omits the usual exception for perjury committed therein; collecting the prior rulings on this point); 1906, Edelstein *v.* U. S., 79 C. C. A. 328, 149 Fed. 636, 642 (privilege held not annulled); 1911, Matter of George Harris, 221 U S. 274, 31 Sup. 557 (a court order on a bankrupt to deposit his books with the receiver for use only in the bankrupt settlement but not for criminal proceedings, does not infringe the privilege, in spite of the possibility that the knowledge so obtained may be used to find other evidence against him in criminal proceedings); 1920, Arndstein *v.* McCarthy, 254 U. S. 71, 41 Sup. 26 (Bankruptcy Act, § 17, held ineffective to remove the privilege); *Minn.* 1910, State *v.* Drew, 110 Minn. 247, 124 N. W. 1091 (under the State banking-frauds act, the prosecution offered the accused's schedules of assets filed in involuntary bankruptcy proceedings under the Federal act; held that the immunity granted was not broad enough to remove the privilege); *Mont.* 1902, State *v.* Burrell, 27 Mont. 282, 70 Pac. 982 (privilege held not annulled).

For other aspects of the Bankruptcy Act, concerning production of documents, see *ante*, § 2259 *b*, § 2264 *a*.

[9] 1917, Re Ginsberg, 38 D. L. R. 261, Ont. (fraud of creditors; the defendant having claimed the privilege, and the Court having held that both Can. Evid. Act § 5 and Ont. Evid. Act § 7 in terms abrogated the privilege, held per Meredith, C. J. O., that the argument to the contrary that the Act's provision against using the answers afterwards in evidence "does not afford sufficient immunity in a case like this," was "beside the question," for the terms of the Act are absolute, and "whether sufficient protection has been afforded by the sections to the witness who is compelled to answer, is not for the Court, but for the Parliament and the Legislature, to determine").

[10] 1908, Jacobs *v.* U. S., 1st C. C. A., 161 Fed. 694 (under U. S. St. 1898, c. 541, § 7). 1908, Alkon *v.* U. S., 1st C. C. A., 163 Fed. 810 (under U. S. Rev. St. 1878, § 860, now repealed); these cases are cited more fully *ante*, § 2276, n. 9, on the point of waiver.

§ 2284. **Future Extension of this Measure.** The resort to immunity statutes seems to have proved itself a valuable and satisfactory aid to the investigation and prosecution of crime. Their only shortcoming is their large number; each statute affecting only a particular crime or small group of crimes, and the varied phraseology being a source of needless confusion. The scope of topics to which this method of annulling the privilege is now applied is in some States so extensive that the whole subject should receive codification, in such States, by summarizing in a single statute or code section all the provisions of that sort, with a reference to the several statutes in which they originated. This method has already been proposed in Iowa.[1]

But a more extensive and effective improvement would be to authorize the grant of immunity in all crimes without exception, by a single statutory section. This has already been done in Canada.[2] Such a measure should leave to the judge's discretion, in each instance, to determine whether the immunity should be granted. With such flexibility the expedient of immunity grants would reach its maximum utility:

1921, Mr. *Jesse L. Deck* (Chairman of the Committee on Criminal Law and Criminology of the Illinois State Bar Association), "Proposed Reforms in Illinois Criminal Law and Procedure" (Journal of Criminal Law and Criminology, XII, 381): "It is proposed that the present immunity statute of Illinois, which is now limited in its operation to cases of bribery and attempted bribery, be extended by law to make it of general application. No good reason is perceived why this salutary statute should be so limited as it is in its provisions. The proposed immunity statute would provide most effectual means for ferreting out crimes where under existing law in many cases it is quite impossible to obtain the facts, or if obtained, to get them in usable form. Under the present law, excepting in the two cases mentioned in the statute, a number of persons may be engaged in the prosecution of an unlawful enterprise, and if they all claim their constitutional privileges against giving evidence which might tend to incriminate themselves, no evidence of the commission of the crime can be had, and all go unwhipped of justice. The proposed statute would authorize the court to enter an immunity order as to some of the parties to the crime and compel them to furnish evidence upon which others could be tried, and thus prevent a total failure in the administration of justice in such cases. This would materially aid in procuring evidence in gaming cases, cases against disorderly houses, riots, conspiracies and in many others that readily suggest themselves. From the standpoint of the prosecutor, whose business it is to enforce the law and to make it a living power for the general welfare, this reform is much needed."

§ 2284. [1] It was proposed by the Iowa Code Commission in 1919; it is commented on, with sound scholarship, in the following article: D. O. McGovney, "Self-Criminating and Self-Disgracing Testimony; Code Revision Bill," Iowa Law Bulletin, V, 175, March, 1920.

[2] Quoted *ante*, § 2281.

One additional reason for declaring a general power in the judge is that in some classes of cases, as the law now stands, an innocent accused is at an unfair disadvantage in producing testimony, the prosecuting attorney having the exclusive power to induce certain kinds of witnesses to open their mouths; *e. g.* 1893, Grasty's Trial, Md., 5 Amer. St. Tr. 216, 239 (the accused editor had exposed the gambling practiced with tolerance of the police, and was prosecuted for libel, by pressure from a ring of corrupt politicians; the accused endeavored to prove truth; but as each gambler claimed privilege, no testimony from those sources was obtainable).

END OF VOL. IV.