THE copy 1.

LAW OF EVIDENCE

IN CIVIL CASES

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IN THE LAW SCHOOL OF THE UNIVERSITY OF WISCONSIN

IN THREE VOLUMES

VOL. II.

SAN FRANCISCO
BANCROFT—WHITNEY CO.
LAW PUBLISHERS AND LAW BOOKSELLERS
1896

EVIDENCE.

CHAPTER 10.

HEARSAY.

§ 299. Definition—Hearsay evidence—Reasons for its exclusion.— One of the most important of the rules excluding certain classes of testimony is that which rejects hearsay evidence. By this is meant that kind of evidence which does not derive its value solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness may have received his information. In the leading case on the subject in this country, Chief Justice Marshall thus stated some of the

grounds for the ancient rule excluding hearsay evidence: "That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay is totally inadmissible."[1] Other considerations are that legal proceedings might be indefinitely delayed and rendered practically fruitless, if mere extrajudicial assertions were to be received as evidence; moreover it is contrary to the spirit of the common law that statements made out of court, without any opportunity for cross-examination and under none of the sanctions of an oath, should be recived as evidence. Moreover it might be urged that the practice of allowing the statements of witnesses to a transaction to be given second-hand would, in criminal cases, be a violation of the spirit of the constitutional provision that the accused shall enjoy the right of being confronted with the witnesses testifying against him. Judges acting as triers of the facts, and skilled in the art of scrutinizing and weighing evidence have sometimes believed that they could admit hearsay testimony without danger; that they could trust themselves entirely to disregard the hearsay evidence or to give it such

little weight as it might seem to deserve.[2] The dangers of admitting hearsay evidence are especially obvious when issues of fact are to be determined by jurors who are not trained to discriminate between different grades of testimony; between those statements which in a legal sense are only gossip and others which are tested by cross-examination and sanctioned by the solemnity of an oath. The rigor with which the rule excluding hearsay has been adhered to under the common law system is no doubt due in part to a jealous preservation of the right of trial by jury.[3] So rigidly is the rule adhered to that, except with the qualifications hereafter stated, the statements of persons who have since died or otherwise become disqualified as witnesses cannot be received as evidence, if such statements are in the nature of hearsay. In other sections we shall see that the declarations of persons since deceased are received under certain well established exceptions to the general rule. But the admission of such declarations depends upon fixed rules, and not upon any theory that it rests in the discretion of the court to admit hearsay because other testimony cannot be obtained.

1, Mima Queen v. Hepburn, 7 Cranch 296; Davis v. Wood, 1 Wheat. 6; 1 Phil. Ev. ch. 7, sec. 1; 1 Greenl. Ev. sec. 99. For a general discussion of hearsay, see articles in 24 Am. Jur. 118; 14 Law Jour. 692; 2 Jour. Jur. 225; 1 Leg. Exam. 250, 297; 14 Sol. Jour. & Rep. 831; 12 Am. L. Reg.

(N. S.) 1; 28 Cent. L. Jour. 167; 5 L. Quart. Rev. 265; 2 Cur. Com. & Leg. Mis. 215. For a discussion of the exception to the rule excluding hearsay, see articles in 69 Law Times 440; 24 Am. Jur. 118; 11 Cent. L. Jour. 401. See also extended note, 19 L. R. A. 733–752; also articles and notes cited under section 347 *infra*.

2, Berkeley Peerage Case, 4 Camp. 414.

3, Berkeley Peerage Case, 4 Camp. 414.

§ 300. Illustrations of the rule.— The following are only a few of the great number of instances which might be cited as illustrations of the exclusion of hearsay evidence: The declarations of third persons as to the loss of papers which had been in their possession are not admissible to let in secondary evidence of their contents;[1] and the declarations of a warrantor or grantor made after giving a deed of land are not evidence to support the title of the grantee.[2] On an indictment for murder the statements of other persons that they killed the deceased are hearsay;[3] and the same is true as to threats made by third persons.[4] The value of property sold under execution cannot be shown as against the owner by the appraisement.[5] So ordinarily public rumors are inadmissible, unless brought to the notice of the party to be affected. Save in the exceptional cases elsewhere discussed, reputation and rumor are pure hearsay.[6] A witness cannot be asked what is the estimated value placed on

certain lands by the neighborhood generally,[7] nor the opinion of others as to the value of property,[8] or to whom a lot is reputed to belong.[9] The fact that property is assessed to a person is not admissible as proof of ownership;[10] nor can one be asked whether he had any information from any source at a stated time as to a given subject.[11] The motive which leads a person, not a party, to do an act cannot be proved by his declarations, when such declarations are no part of the *res gestae*.[12] In an action on a building contract between the contractor and the owner, the statements of the laborers made out of court are not evidence as to the progress of the work.[13] The statements of a person who has been robbed, made to a third party, as to the description of the parties committing the crime, are hearsay and are not admissible on the part of the defendant to show that he was not the person thus described.[14] Other instances in which hearsay evidence has been rejected are: Statements as to what physicians and others have said as to the condition or state of health of a person;[15] the estimate as to the damage to a building, made by an expert since deceased;[16] the certificate of the master of a vessel of the expenses incurred by an agent, in an action between the principal and the agent;[17] declarations by a party that he intended to make his home on certain wild lands to show

that his posession was actual and bona fide;[18] declarations made by a party in his own favor, in the absence of the other party;[19] the testimony as to the contents of a lost instrument by one who cannot read and write,[20] or by one who went to the clerk's office and asked that the document be read to him,[21] as well as evidence of statements made by a person for whom a testator had sent to draft a will, who had declined to go on account of the testator's mental incapacity.[22]

1, Rex v. Denio, 7 Barn. & C. 620; Jackson v. Cris, 11 Johns. 437; Governor v. Barclay, 4 Hawks (N. C.) 20.

2, Jackson v. Vredenburgh, 1 Johns. 159; Bartlet v. Delprat, 4 Mass. 702.

3, State v. Duncan, 6 Ired. (N. C.) 236; State v. Haynes, 71 N. C. 79.

4, State v. Weaver, 57 Iowa 730.

5, Flannigan v. Althouse, 56 Iowa 513.

6, Welch v. Norton, 73 Iowa 721; State v. Evans, 33 W. Va. 417; Abel v. State, 90 Ala. 631; School of Milford v. Powner, 126 Ind. 528; Barker v. Com., 90 Va. 820.

7, Powell v. Governor, 9 Ala. 36.

8, Green v. Caulk, 16 Md. 556; Barrett v. Wheeler, 71 Iowa 662. But see, Cliquot's Champagne, 3 Wall. 114; Fennerstein's Champagne, 3 Wall. 145, when witnesses give their own estimates of market value, such testimony is not to be rejected because it may in part depend on hearsay.

9, Berry v. Osborne, 15 Ga. 194; Barrett v. Wheeler, 71 Iowa 662; Burns v. Fredericks, 37 Conn. 86; Berniaud v. Beecher, 76 Cal. 394.

10, Adams v. Hikcox, 55 Iowa 632; Tuckwood v. Hanthorn, 67 Wis. 326.

11, Xenia Bank v. Stewart, 114 U. S. 224; Lamar v. Pearre, 82 Ga. 354; 14 Am. St. Rep. 168.

12, North Stonington v. Stonington, 31 Conn. 412.

13, Gougales College v. McHugh, 26 Tex. 677.

14, People v. McCrea, 32 Cal. 98.

15, Heald v. Thing, 45 Me. 392; Ponca v. Crawford, 18 Neb. 551; Armstrong v. Ackley, 71 Iowa 76; Alabama Ry. Co. v. Arnold, 80 Ala. 600.

16, Collins v. Langan, (N. J.) 32 At. Rep. 258.

17, Newson v. Douglass, 7 Harr. & J. (Md.) 417; 16 Am. Dec. 317.

18, McKinnon v. Meston, (Mich.) 62 N. W. Rep. 1014.

19, Treadway v. Treadway, 5 Ill. App. 478; Ward v. Ward, 37 Mich. 253; Whitney v. Houghton, 125 Mass. 451; Nourse v. Nourse, 116 Mass. 101; Woodward v. Leavitt, 107 Mass. 453; Wallace v. Story, 139 Mass. 115; Eureka Ins. Co. v. Robinson, 56 Pa. St. 256; 94 Am. Dec. 65.

20, Russell v. Brosseau, 65 Cal. 605.

21, Probst v. Mathis, 115 N. C. 526.

22, Renaud v. Pageot, 102 Mich. 568.

§ 301. Hearsay may relate to what is done or written as well as to what is spoken.— This proposition,[1] as well as the strictness with which the courts adhere to the rule excluding hearsay, is well illustrated in a celebrated case, often cited, in which it was held that letters addressed to a deceased testator indicating that the writers thought him sane, but which were not acted on by him, could not be admitted for the purpose of proving his sanity. By way of illustration Baron Parke stated in his opinion in this case that the conduct of the

family or relatives of a testator in taking the same precautions in his absence as if he were a lunatic, his election in his absence to some high and responsible office, the conduct of a physician who permitted a will to be executed by a sick testator, the conduct of a deceased captain on a question of sea-worthiness, who after examining every part of a vessel embarked in it with his family, would all be mere instances of hearsay evidence,— mere acts or statements not on oath, but implied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound.[2] But in the case just cited it was held that a different rule would have prevailed if it had been shown that the testator himself had read and understood the letters in question, and that he had acted upon them. In that case the letters, although the acts and statements of third parties, would have been strictly relevant as illustrating the conduct of the testator, and would have such probative effect as the jury might deem proper.[3] The same considerations which exclude the naked assertions of third persons as evidence, forbid that any inference should be drawn in favor of or against a party from the mere acts of a stranger.

1, Sussex Peerage Case, 11 Clark & F. 85, 113; Stapylton v. Clough, 22 Eng. L. & Eq. 276; 2 El. & B. 933; Schooler v. State, 57 Ind. 127; Ashcraft v. De Armond, 44 Iowa 229; Hunter v. Randall, 69 Me. 183; Filley v. Angell, 102 Mass. 67; People v. Cox, 21 Hun 47; State v. Haynes, 71 N. C.

79; Campbell v. State, 8 Tex. App. 84; 1 Greenl. Ev. sec. 99; Tayl. Ev. sec. 570.

2, Wright v. Doe *ex dem.* Tatham, 7 Adol. & Ell. 313.

3, Wright v. Doe *ex dem.* Tatham, 7 Adol. & Ell. 313.

§ 302. Hearsay may include things stated under oath or against interest.— The inherent weakness of hearsay testimony is not cured by the fact that the statement has been made under oath, or in any judicial proceedings between other parties. Thus, a voluntary *affidavit* ranks in equal grade with other hearsay testimony in the law of evidence;[1] and the *ex parte deposition* of a pauper as to his place of settlement is inadmissible, although no other testimony can be obtained on the subject.[2] Nor in general are hearsay statements admissible, although they are apparently *contrary to the interest* of the person who made them.[3] Thus, the solemn statement made out of court by one charged with crime, that he in connection with others had committed the offense, might afford the most satisfactory evidence of his own guilt, and, if admitted in evidence in a trial against the others thus implicated, would no doubt have great weight in the minds of a jury in determining their guilt. But whatever moral weight might be given to such statements, they have no place in a court of justice as legal evidence.[4] The same of course would be true respecting such state-

ments admitting that the declarant is jointly liable with others.[5]

1, Patterson v. Maryland Ins. Co., 3 Harr. & J. (Md.) 71; 5 Am. Dec. 419; Bookman v. Stegman, 105 N. Y. 621.

2, Rex v. Ferry Frystone, 2 East 54.

3, See secs. 327 *et seq. infra* as to declarations against interest.

4, Com. v. Felch, 132 Mass. 22; State v. Duncan, 6 Ired. (N. C.) 236; State v. Haynes, 71 N. C. 79.

5, Stark. Ev. 59–60.

§ 303. Statements apparently hearsay may be original evidence.—"It does not follow because the writing or words in question are those of a third person, not under oath, that therefore they are to be considered as hearsay. On the contrary, it happens in many cases that the very fact in controversy is whether such things were written or spoken, and not whether they were true; and in other cases such language or statements, whether written or spoken, may be the natural or inseparable concomitants of the principal fact in controversy."[1] On this principle statements which have been made to a person may be material for the purpose of showing what *knowledge or information* he had respecting a given subject, when such knowledge or information is material to the issue.[2] In determining whether there was probable cause in an action for *malicious prosecution*, the information on

which the defendant acted in bringing the former suit is material and is not hearsay, though consisting of the statements of others. Such statements, if the advice of counsel, may constitute a full defense.[3] If the statements are made by others, they may bear upon the question of good faith, and thus affect the measure of damages.[4] So in actions for *slander and libel* it is plain that the rule excluding hearsay is not violated by proof of the uttering of the language, since it is the fact of uttering and not the truth of the language which is to be proved. In such actions there is authority for the view that the information on which the defendant acted, though derived from the statements of third persons, may constitute original evidence tending to show his good faith, as well as to mitigate the damages.[5] It is hardly necessary to cite authorities to the obvious proposition that when proof is to be made of a parol contract, or when for other reasons the statements of a person are relevant, such statements may be proved by third persons who were present as well as by the one who used the language. In such case the statements are not hearsay, but substantive evidence.[6] In proving self-defence a party may show that he had information from others which led him to apprehend an attack.[7] As we have seen elsewhere, there are also numerous cases in which evidence may be given of

general reputation as to character; and under some circumstances reputed ownership, public rumor and notorious usage may be shown.[8] So in a large class of cases the opinions of witnesses may be received. The date of a person's birth or his age may be testified to by himself or by the members of his family, although the knowledge may be gained only by tradition.[9] Relationship to a family of a particular person may be proved by one acquainted with the family, and who knows that the person was recognized by the family as a relative.[10] There is another class of declarations and acts, often close to the line of hearsay testimony, which are received as original evidence on the ground that they are so intimately connected with the principal fact under investigation as to illustrate its character, in other words, they are parts of the *res gestae*.[11]

1, 1 Greenl. Ev. sec. 100; DuBost v. Beresford, 2 Camp. 511; Bartle. v. Delprat, 4 Mass. 708; People v. Shea, 8 Cal. 538; Turner v. United States, 66 Fed. Rep. 280, that a witness derived his knowledge concerning a boundary from a third peson.

2, Rice v. Bancroft, 11 Pick. 469.

3, Ravenga v. Mackintosh, 2 Barn. & C. 693; Wicker v. Hotchkiss, 62 Ill. 107; 14 Am. Rep. 75; Pullen v. Glidden, 68 Me. 566; Stanton v. Hart, 27 Mich. 539; Laird v. Taylor, 66 Barb. 143.

4, Thomas v. Russell, 9 Exch. 764; Lister v. Perryman, L. R. 5 Exch. 365; Wyatt v. White, 5 Hurl. & N. 371 Lamb v. Gulland, 44 Cal. 606; Hirsh v. Feeney, 83 Ill. 550 Pullen v. Glidden, 68 Me. 562; Bacon v. Towne, 4 Cush

238; Heyne v. Blair, 62 N. Y. 19; Bell v. Pearcy, 5 Ired. (N. C.) 83; White v. Tucker, 16 Ohio St. 468.

5, See sec. 149 *supra*.

6, Blanchard v. Child, 7 Gray 157.

7, People v. Shea, 8 Cal. 538. See sec. 145 *supra*.

8, See secs. 147 *et seq. supra*. But see, Barker v. Com., 90 Va. 820, where it was held that it could not be proved by general reputation that a house at which a person resided was of ill repute; but the same must be established by particular facts. Nor can the making of a note be denied by showing a payee's reputation for being "hard up" at the time when it was purported to have been given by him, Bliss v. Johnson, 162 Mass. 323.

9, Houlton v. Manteuffel, 51 Minn. 185; Hill v. Eldridge, 126 Mass. 234; Com. v. Stevenson, 142 Mass. 466; State v. Best, 108 N. C. 747; State v. McClain, 49 Kan. 730.

10, Backdahl v. Grand Dodge, 46 Minn. 61.

11, See secs. 347 *et seq. infra*.

§ 304. Matters of public and general interest. — One of the well recognized exceptions to the rule excluding hearsay evidence relates to those matters which are of public and general interest to the community. Subject to the limitations hereafter stated, it is well settled that the declarations of *deceased* witnesses may be received when they relate to the existence of any public or general right or custom, or matter of public or general interest.[1] The considerations which have led the courts to admit testimony of this character are the inherent difficulty of obtaining any other evidence than that in the nature of tradition and reputation, when the controversy relates to ancient rights;

and the further fact that since the public are interested in such statements, there is good reason to believe that the falsity or error of such declarations could be exposed or corrected by other testimony. The particular objection which excludes mere hearsay in general does not apply to those cases which are of a public nature, which may be presumed to be matters of public notoriety as in the instance of public prescriptions and customs and where "reliance is placed, not on the credit due to the assertion of a single individual, but is sanctioned by the concurrent opinion and assent of indefinite numbers. In such cases a presumption exists that the truth of the fact is known and faithfully communicated."[2] It may also be observed that since declarations of this character are received only when they deal with matters of public or of general interest, there is less reason to suspect that the statements were made for the purpose of fabricating testimony, than if they related to individual rights.

1, Ellicott v. Pearl, 10 Peters 412; Shutte v. Thompson, 15 Wall. 151; People v. Velarde, 59 Cal. 457; Wooster v. Butler, 13 Conn. 309; Drury v. Midland Ry. Co., 127 Mass. 571; McKinnon v. Bliss, 21 N. Y. 206; Birmingham v. Anderson, 40 Pa. St. 506; Murray v. Spence, 88 N. C. 357; 1 Greenl. Ev. sec. 128.

2, Stark. Ev. 46.

§305. Illustrations of the rule. — As might be expected the cases illustrating this

exception to the general rule are far more numerous in England than in the United States. Testimony of this character has been received where the question related to a right of common existing by immemorial custom,[1] to a custom of mining in a particular district,[2] to the custom of a corporation to exclude foreigners from trading within a town,[3] to the boundaries of towns, counties, parishes, hamlets and manors,[4] to the public character of roads or highways,[5] to the location of a section line[6] or of a line between two commons,[7] to a claim of tolls on a public road,[8] to a prescriptive liability to repair sea-walls[9] or bridges,[10] and to a right of ferry[11] or public landing place.[12] Most of the foregoing illustrations are given by Mr. Taylor in his work on evidence; and the following are some of the instances cited by him in which such evidence has been rejected:[13] Where the question was what usage had obtained in electing the schoolmaster of a grammar school;[14] whether the sheriff of the county of Chester or of the city of Chester was bound to execute criminals;[15] whether certain tenants of a manor had prescriptive rights of common;[16] what were the boundaries of a waste over which many of the tenants of a manor claimed a right of common;[17] whether the tenants of a particular manor had the right of cutting and selling wood,[18] and what were the boundaries between two private es-

tates.[19] Testimony of the class under discussion is competent as well *against a public right* as in its favor.[20] Although cases illustrating this rule are much less numerous in the United States, the doctrine has been accepted as well settled; and, indeed, it will be found as the discussion proceeds that in this country the principle has been extended to a class of cases not included within the common law rule.[21]

1, Weeks v. Sparke, 1 Maule & S. 679. But see, Dunraven Llewellyn, 15 Adol. & Ell. N. S. 791.

2, Crease v. Barrett, 1 Cromp. M. & R. 919.

3, Davies v. Morgan, 1 Cromp., & J. 587.

4, People v. Velarde, 59 Cal. 457; Drury v. Midland Ry. Co., 127 Mass. 571; Reg. v. Mytton, 2 El. & El. 557; Nichols v. Parker, 14 East 331; Brisco v. Lomax, 8 Adol. & Ell. 198; Evans v. Rees, 10 Adol. & Ell. 151; Plaxton v. Dare, 10 Barn. & C. 17; Thomas v. Jenkins, 6 Adol. & Ell. 525; Doe v. Sleeman, 9 Q. B. 298; Barnes v. Mawson, 1 Maule & S. 77.

5, R. v. Bliss, 7 Adol. & Ell. 555; Crease v. Barrett, 1 Cromp., M. & R. 919; Reed v. Jackson, 1 East 355.

6, Mullaney v. Duffey, 145 Ill. 559.

7, Morris v. Callanan, 105 Mass. 129.

8, Brett v. Beales, Moody & M. 416.

9, R. v. Leigh, 10 Adol. & Ell. 398.

10, R. v. Sutton, 8 Adol & Ell. 516; Reg. v. Bedfordshire, 4 El. & B. 535, as to the liability of a county to repair a bridge.

11, Pim v. Currell, 6 M. & W. 234.

12, Drinkwater v. Porter, 7 Car. & P. 181.

13, Tayl. Ev. sec. 614.

14, Withnell v. Gartham, 1 Esp. 324.

15, R. v. Antrobus, 2 Adol. & Ell. 793.

16, Dunraven v. Llewellyn, 15 Q. B. 791; Warrick v. Queen's Coll. Oxford, 40 L. J. 785.

17, Dunraven v. Llewellyn, 15 Q. B. 791.

18, Blackett v. Lowes, 2 Maule & S. 494.

19, Clothier v. Chapman, 14 East 331; Drinkwater v. Porter, 7 Car. & P. 181.

20, 1 Greenl. Ev. sec. 140.

21, Ellicott v. Pearl, 10 Peters 412; Shutte v. Thompson, 15 Wall. 151; McKinnon v. Bliss, 21 N. Y. 206; People v. Velarde, 59 Cal. 457; Drury v. Midland Ry. Co., 127 Mass. 571; Wooster v. Butler, 13 Conn. 309; Birmingham v. Anderson, 40 Pa. St. 506.

§ 306. Distinction between public and merely general rights.—A distinction has long been well recognized between those rights or customs which are strictly *public* and those which are only *general*. The former are common to all the citizens of the state, and as to those the declarations of any citizen are admissible, although such declarations would of course have little weight if made by a person who had no means of knowledge. While the declarations of any citizen may be received in relation to such a subject as the existence of a public highway or ferry, or of other matters of public right, yet declarations cannot be received in respect to general rights or those rights which are only common to a considerable number of persons, unless the declarant appears to have had competent

means of knowledge.[1] Thus, where the dispute relates to the existence of a local custom in a parish or manor in which all the residents of the district have an interest, the declarations in order to be admissible should be those of deceased persons who had resided therein or who are shown to have otherwise gained competent knowledge of the subject.[2] In a New York case the attempt was made to prove by tradition or reputation that the patentee under a royal grant of a large tract of land consisting of parts of several townships had burned his muniments of title. The court held that, while this might be deemed a matter of general interest in the community, the proffered evidence was incompetent because no proof had been made that the settlers upon the tract in question claimed title under the grant referred to, and that consequently it did not appear that they had any interest in or peculiar knowledge on the subject.[3] In Massachusetts it was held inadmissible to show it to have been a notorious fact in a certain county that no license for the sale of liquors had been granted in that county for many years, for the purpose of showing that a resident of another county had knowledge of this fact.[4]

1, Crease v. Barrett, 1 Cromp., M. & R. 919; 1 Greenl. Ev. sec. 128.

2, Dunraven v. Llewellyn, 15 Q. B. 791, 809; Newcastle v. Broxtowe, 4 Barn. & Adol. 273; Crease v. Barrott, 1 Cromp., M. & R. 919.

3, McKinnon v. Bliss, 21 N. Y. 206.

4, Dunbar v. Mulry, 8 Gray 163.

§ 307. Reputation as to private boundaries excluded in England.— The English authorities seem to have limited this exception to the general rule strictly to those cases where the litigation related to public or general interests. This is illustrated by the cases already cited, in some of which the declarations proposed and rejected related to the interests of individuals only. It is true that where *private lines* in dispute were *coincident with public* or *quasi*-public boundaries, evidence of reputation has been received to determine the private right. Thus, where the proof showed that the boundaries of the farm in question and those of a hamlet were the same, evidence of reputation as to the boundaries of the hamlet was admitted to prove the boundaries of the farm. The court held that a fact is to be proved in the same manner when subsidiary, as when it is the very matter in issue.[1] But in respect to *mere private boundaries* and monuments, the English courts have excluded evidence of reputation for the reason that such private interests could not be matter of public knowledge or of any public interest or concern.[2]

1, Thomas v. Jenkins, 6 Adol. & Ell. 525. See note, 15 Am. Dec. 628.

2, Outram v. Morewood, 5 T. R. 121; Didsbury v. Thomas, 14 East 323; Clothier v. Chapman, 14 East 331; Dunraven

v. Llewellyn, 15 Q. B. 791; Curtis v. Aaronson, 49 N. J. L. 68; 60 Am. Rep. 584; Hall v. Mayo, 97 Mass. 416. See full note, 15 Am. Dec. 628.

§ 308. Relaxation of the rule in the United States.—In the courts of some states the exception allowing hearsay in respect to matters of public and general interest has been so extended as to admit hearsay testimony in matters of private boundary. Although the American cases can hardly be fully reconciled with the restrictions that form part of the English law on this subject, the departure is quite natural and is easily traceable to the wholly different methods of making surveys which have prevailed in the two countries. In the United States the surveys are generally under the direction of government officers and made in such a manner that the boundaries between private estates are so often coincident with general boundary lines as to be, to some extent, matters of general interest. Such surveys have often been made many years before the full settlement of the community was effected; and the location of the corners, monuments and boundaries often rests largely in tradition, and is the subject of continued discussion among those having both opportunity and interest to know the facts. In this country the courts have frequently recognized the doctrine that proof of reputation may be received in proof of private boundaries.[1] It

may be a question whether a disputed boundary is of such public character as to permit evidence of reputation concerning it. In the case of lines of counties, towns, townships, highways, large watercourses and the like, the testimony would be admissible as relating to a matter of general interest. But there may be lines and monuments of a less marked public character and yet, by reason of their relation to numerous minor titles and land divisions, a local public interest may arise and a consequent knowledge in the neighboorhood concerning them may be readily supposed to exist. In such cases proof of reputation might be received under the authorities of this country.[2] The weight of general reputation in such cases must depend very much on the circumstances of the case; the boundary must be ancient and its supposed locality must be of sufficient interest in the neighborhood to have been the subject of conversation among the people. The reputation must also have been formed before the controversy arose.[3]

1, Clement v. Packer, 125 U. S. 309; Boardman v. Reed, 6 Peters 328; Hunnicutt v. Peyton, 102 U. S. 333; Morton v. Folger, 15 Cal. 275; Connecticut v. Peters, 1 Peters C. C. 496; Kramer v. Goodlander, 98 Pa. St. 366; Chapman v. Twitchell, 37 Me. 59; 58 Am. Dec. 773; Tate v. Southard, 1 Hawks (N. C.) 45; Mullaney v. Duffy, 145 Ill. 559; Raymond v. Coffey, 5 Ore. 132; Ralston v. Miller, 3 Rand. (Va.) 44; 15 Am. Dec. 704; Nys v. Biemeret, 44 Wis. 104; State v. Mills, 63 N. H. 4; Jackson v. McCall, 10 Johns. 377. See notes, 36 Am. Rep. 749; 15 Am. Dec. 628–631; 60 Am. Rep. 589–591.

2, Curtis v. Aaronson, 49 N. J. L. 68; 60 Am. Rep. 584 and long note; Mullaney v. Duffy, 145 Ill. 559.

3, Tucker v. Smith, 68 Tex. 473; Shutte v. Thompson, 15 Wall. 151.

§ 309. Declarations as to particular facts concerning private boundaries not admissible.—There has been considerable conflict of opinion over the question whether proof may be given of the declarations of persons since deceased, not relating to reputation or tradition respecting a boundary line, but to *particular facts*. In discussing this subject Mr. Justice Strong said: "We do not question that such declarations of reputation respecting ancient public boundaries are admissible; and they have sometimes been admitted in controversies respecting private boundaries. But they are admissible in only a limited class of cases, a class much more limited than that in which such evidence is offered to prove reputation of public boundaries. Proof of reputation is open to rebuttal by witnesses. Not so with declarations of a particular fact respecting a private boundary. They are, therefore, receivable only when made coincidently with pointing out the boundaries and generally as part of the *res gestae*. * * * In questions of private boundary, declarations of particular facts, as distinguished from reputation, made by deceased persons are not admissible, unless they were made by persons who, it is shown,

had knowledge of that whereof they spoke, and who were on the land or in possession of it when the declarations were made. To be evidence they must have been made when the declarant was pointing out or marking the boundaries or discharging some duties relating thereto. A declaration which is a mere recital of something past is not an exception to the rule that excludes hearsay evidence."[1] The above quotation clearly states the rule which obtains in the courts of some of the states which is in accordance with the general rule that hearsay evidence is not admissible to prove a specific fact.[2] But there are numerous authorities which give a much *wider range* to this class of testimony and which admit the declarations of third persons, strangers to the title, made when not engaged in any act like a survey or the pointing out of boundaries.[3] The cases holding this view are confessedly a departure from the common law rule, but they claim that the departure is a necessity growing out of the difficulty, which often arises, of obtaining other and positive proof of the location of boundary marks.[4] These cases generally recognize the limitation that the declarations must have been made before the controversy began and by persons since deceased who, from their situation, appear to have had the means of knowledge respecting the private boundaries and who had no interest to misrepresent,[5]

although it has been held that the declarant need not be wholly disinterested.[6]

1, Hunnicutt v. Peyton, 102 U. S. 363-4.

2, Ellicott v. Pearl, 10 Peters 438; Bartlett v. Emerson, 7 Gray 174; Long v. Colton, 116 Mass. 414; Bender v. Pitzer, 27 Pa. St. 333; Curtis v. Aaronson, 49 N. J. L. 68; 60 Am. Rep. 584 and long note.

3, Clement v. Packer, 125 U. S. 309; Kinney v. Farnsworth, 17 Conn. 355; Lemon v. Hartsook, 80 Mo. 13; Smith v. Forrest, 49 N. H. 230; Whitehurst v. Pettipher, 87 N. C. 179; 42 Am. Rep. 520; Bethea v. Byrd, 95 N. C. 309; 59 Am. Rep. 240; McCausland v. Fleming, 63 Pa. St. 36; Coate v. Speer, 3 McCord (S. C.) 227; 15 Am. Dec. 627 and note; Powers v. Silsby, 41 Vt. 288; Child v. Kingsbury, 46 Vt. 47. A stricter rule prevails in Massachusetts, where declarations as to a private boundary in which only a few persons have interest are not received, Boston Water Power Co. v. Hanlon, 132 Mass. 483; Hall v. Mayo, 97 Mass. 416.

4, Whitehurst v. Pettipher, 87 N. C. 179; 42 Am. Rep. 520.

5, Great Falls Co. v. Wooster, 15 N. H. 437; Smith v. Forrest, 49 N. H. 230; McCausland v. Fleming, 63 Pa. St. 38; Coate v. Speer, 3 McCord (S. C.) 227; 15 Am. Dec. 627; Wood v. Willard, 37 Vt. 377; 86 Am. Dec. 716; Child v. Kingsbury, 46 Vt. 47; Harriman v. Brown, 8 Leigh (Va.) 697; Cline v. Catron, 22 Gratt. (Va.) 378; Hill v. Proctor, 10 W. Va. 84.

6, Child v. Kingsbury, 46 Vt. 47.

§ 310. Declarations of surveyors. — On the more liberal view which prevails in some states that the declarations of deceased persons having the means of knowledge may be received as evidence of private boundaries, the declarations of surveyors have been admitted in numerous cases.[1] Of course the

declarations of surveyors and others acting under competent authority while actually making a survey or pointing out boundaries might be material on other grounds, as that they were a part of the *res gestae.*[2] But where a private surveyor is employed by the plaintiff to ascertain boundaries, and during the survey he makes declarations as to the identity of the original lines and corners, he not having been present at the original survey, such declarations are inadmissible, being pure hearsay.[3] It need hardly be said that reputation is not admissible to prove *acts of ownership* or *possession*, as such facts cannot be proved by reputation;[4] nor can evidence of this character be admitted to *contradict record evidence;*[5] nor is present reputation as to boundary lines admissible, unless it is *traditional*, or derived from ancient sources or from those who had peculiar means of knowing what the reputation was in an early day as to the boundary line.[6]

1, Caufman v. Presbyterian Church, 6 Binn. (Pa.) 59; Hamilton v. Menor, 2 Serg. & R. (Pa.) 70; Coate v. Speer, 3 McCord (S. C.) 227; 15 Am. Dec. 627; Ayres v. Watson, 137 U. S. 584, memorandum made by surveyor.

2, Hunnicutt v. Peyton, 102 U. S. 363. See also, Clement v. Packer, 125 U. S. 309.

3, Russell v. Hunnicutt, 70 Tex. 657.

4, Wendell v. Abbott, 45 N. H. 349.

5, McCoy v. Galloway, 3 Ohio 282; 17 Am. Dec. 591.

6, Shutte v. Thompson, 15 Wall. 151.

§ 311. Maps relating to subjects of public or general interest. — In proving matters of public and general interest the declarations will not be confined to those which are merely oral. Thus, in England ancient maps showing public roads and the boundaries between counties, towns, parishes and manors are admissible, when it is proved that they have been made or recognized by persons having knowledge of the subject who are since deceased.[1] In his work on evidence Mr. Stephen thus expresses his view as to the relevancy of maps in general: "Statements of facts in issue, or relevant or deemed to be relevant to the issue, made in public maps or charts generally offered for public sale as to matters of public notoriety, such as the relative position of towns and countries and such as are usually represented or stated in such maps or charts, are themselves deemed to be relevant facts; but such statements are irrelevant, if they relate to matters of private concern, or matters not likely to be accurately stated in such documents."[2] In a celebrated English case maps of a distant country were received in evidence to show the situation of places at which the defendant said he had lived.[3] Under the rule excluding declarations as to *private boundaries* ancient maps are not admissible in England to prove boundaries of that character.[4] As we have seen in this country the declarations

of persons, since deceased, as to private boundaries have been received in some states more freely than in England;[5] and in such jurisdictions ancient maps are more liberally admitted on the same ground to prove, not only matters of public or general interest, but private boundaries as well.[6] In other states, however, they are not admitted to prove private boundaries.[7] Ancient *maps of villages or cities* which have been kept in public offices and regarded as public records are admissible as evidence of the mode of laying out the village or city,[8] although they are not conclusive evidence of such fact.[9] Maps made by early *explorers*, as for instance of the courses of a river, are admissible in evidence, but may be shown to be incorrect and, when evidence impeaching them is offered, are not to be greatly relied upon.[10] Until maps are shown to be ancient within the meaning of the rule, they are not admissible, unless proved to be correct, even though they were made by officials or other persons having the means of knowledge. But of course they may be relevant as *admissions* against those who may have acted upon or adopted them.[11]

1, Hammond v. Bradstreet, 23 L. J. (Ex.) 332; Pipe v. Fulcher, 28 L. J. (Q. B.) 12; 1 El. & El. 111; Reg. v. Milton, 1 Car. & K. 58.

2, Steph. Ev. art. 35.

3, Tichbourne Case, R. v. Orton.

4, Doe v. Lakin, 7 Car. & P. 481; Bridgman v. Jennings,

1 Ld. Raym. 734; Wilberforce v. Hearfield, 5 Ch. Div. 709.

5, See sec. 308 *supra*.

6, Penny v. Philadelphia, 4 Harris (Pa.) 91; Sample v. Robb, 4 Harris (Pa.) 319; McCausland v. Fleming, 63 Pa. St. 38; Coate v. Speer, 3 McCord (S. C.) 227; 15 Am. Dec. 627 and long note.

7, Boston Co. v. Hanlon, 132 Mass. 483.

8, St. Louis v. Erskine, 31 Mo. 110; Whitehouse v. Bickford, 29 N. H. 471; Blackman v. Riley, 138 N. Y. 318.

9, Schools v. Risley, 10 Wall. 91.

10, Missouri v. Kentucky, 11 Wall. 395.

11, Harris v. Com., 20 Gratt. (Va.) 833; Marble v. McMinn, 57 Barb. 610.

§ 312. Ancient documents in support of ancient possession—Their custody. One of the recognized exceptions to the general rule excluding hearsay relates to the admission of ancient documents.[1] While it may be objected that documents of this class may be fabricated and that they are not corroborated or authenticated as any part of the *res gestae*, yet it may be answered that the fabrication or forgery of documents purporting to be ancient is not likely to escape exposure, when subjected to the tests of public trials, and is not to be presumed. "The rule is that an ancient deed may be admitted in evidence without direct proof of its execution, if it appears to be of the age of at least thirty years, when it is found in proper custody, and either possession under it is shown, or

some other corroborative evidence of its authenticity freeing it from all just grounds of suspicion."[2] Again the inherent difficulty of furnishing strict proof of the execution of ancient documents is another consideration which has influenced the courts to relax the general rule and to admit, under proper restrictions, ancient documents purporting to constitute part of a transfer of title or act of ownership.[3] "The proof of ancient possession is always attended with difficulty. Time has removed the witnesses who could prove acts of ownership of their personal knowledge, and resort must necessarily be had to written evidence."[4]

1, Hewlett v. Cock, 7 Wend. 373; Barr v. Gratz, 4 Wheat. 213; Harlan v. Howard, 79 Ky. 373; Quinn v. Egleston, 108 Ill. 248; Beard v. Ryan, 78 Ala. 37; 1 Greenl. Ev. sec. 141; 1 Phill. Ev. 273; Best Ev. sec. 497. See sec. 544 *infra*.

2. Applegate v. Lexington Co., 117 U. S. 255, 262; Almy v. Church, (R. I.) 26 At. Rep. 58; Havens v. Sea Shore Land Co., 47 N. J. Eq. 365; Greenfield v. Camden, 74 Me. 56; Pettingell v. Boynton, 139 Mass. 244.

3, Bristow v. Cormican, 3 App. Cas. 653; 1 Phill. Ev. 273; Tayl. Ev. sec. 658.

4, Malcomson v. O'Dea, 10 H. L. Cas. 593.

§313. Same—Documents to come from the proper custody.—It is a condition precedent to the admission of such documents, without proof of their execution, that they must come from the proper custody.[1] What is the proper custody is a ques-

tion which must be determined by all the circumstances of the case. While there may be but one place of deposit which is absolutely and strictly proper, there may be various places which are reasonable and natural. It is not necessary that the document should be traced to the place of custody which is strictly the most appropriate. The *test* is "whether the actual custody is so reasonably and probably accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine."[2] Accordingly when an ancient deed forms part of the original papers in a suit in a court of record to determine the title to land to which the deed relates, the record of the case is admissible against persons who are not parties or privies to the suit, in order to prove the antiquity of the deed and to account for its custody.[3] According to this view ancient documents have been rejected where no connection between their possession and any persons having an interest in the estate has been proved.[4] On the other hand it was held sufficient to trace the custody of an expired lease to the lessor.[5] So it was held sufficient to trace an unproved will to the custody of a son of the testator who with other devisees derived a benefit under it, although it was contended that it should have been deposited in the ecclesiastical court of the diocese.[6] By the weight of authority the *custodian* of the

document *should be sworn*, giving such information to the court concerning the custody of the document as he may have; and it has been held sufficient if the present custodian testifies that he received the document as the *representative* or *successor* of the person originally entitled to it, as a paper which had belonged to him.[7] When ancient documents present strong *internal evidence* of their *verity*, they may be received from the present custodian, though they are not traced to their original source and though the present custodian may have no interest in the title. Thus, documents relating to a considerable tract of land were received from the librarian of a state historical society.[8] According to the weight of authority, it is not necessary as a condition to the admission of ancient documents that *acts* in connection with such documents or in reliance upon them should be proved or that acts of *modern enjoyment* must be shown. The absence of such proof *affects the weight* and not the admissibility of the evidence;[9] and when proof of possession of the land under the instrument cannot be given, and there is no evidence raising suspicion as to its genuineness, such genuineness may be shown by other facts as well as that of possession.[10] But when no such corroborating evidence is given, the document should receive the *closest scrutiny*, especially when produced to benefit those in whose custody it is found.[11]

1, Meath v. Winchester, 3 Bing. N. C. 200; Havens v. Sea Shore Land Co., 47 N. J. Eq. 365.

2, Meath v. Winchester, 3 Bing. N. C. 201; 10 Bligh 462; Harris v. Hoskins, 2 Tex. Civ. App. 486.

3, Applegate v. Lexington Co., 117 U. S. 255.

4, Meath v. Winchester, 3 Bing. N. C. 201; Lygon v. Strutt, 2 Anstr. 601; Potts v. Durant, 3 Anstr. 789; 2 Eag. & Y. 432.

5, Rees v. Walters, 3 M. & W. 527.

6, Doe v. Pearce, 2 Moody & Rob. 249; Andrew v. Motley, 12 Com. B. N. S. 526. See other illustrations, Tayl. Ev. sec. 662.

7, Earl v. Lewis, 4 Esp. 1.

8, Goodwin v. Jack, 62 Me. 414. Certificate of recording officers on ancient deed to the effect that it was recorded received as a circumstance to show genuineness, Applegate v. Lexington Mining Co., 117 U. S. 255.

9, Malcomson v. O'Dea, 10 H. L. Cas. 614; Clarkson v. Woohouse, 3 Doug. 189; Rogers v. Allen, 1 Camp. 309; City of Boston v. Richardson, 105 Mass. 357; Harlan v. Howard, 79 Ky. 373; Applegate v. Lexington Mining Co., 117 U. S. 255; Barr v. Gratz, 4 Wheat. 213; Havens v. Sea Shore Land Co., 47 N. J. Eq. 365, elaborate discussion; Tayl. Ev. secs. 665, 666.

10, Harlan v. Howard, 79 Ky. 373; Applegate v. Lexington Mining Co., 117 U. S. 255.

11, Malcomson v. O'Dea, 10 H. L. Cas. 593; Rogers v. Allen, 1 Camp. 309; Tayl. Ev. secs. 658, 665.

§ 314. Declarations must have been made before the controversy arose.—Another important qualification of the rule we have been considering by which evidence of reputation or common fame is admitted, is that the declaration so received must have

been made before any controversy arose touching the matter to which they relate, or as it is usually expressed, *ante litem motam.*[1] The inherent weakness of this class of testimony requires that it should at best be received with considerable *caution;* and it has been deemed a proper restriction that declarations of the character under discussion should not be received at all, if there is any reason to believe that a controversy had been commenced, the existence of which might prejudice the declarant or which might offer him any temptation to deceive. The court will not enter into any inquiry as to the probable effect of such controversy;[2] it is enough that such controversy existed. It need not be proved to have been known to the declarant; and even if the fact appear that the controversy was unknown to him, the rule remains the same.[3] As was said by Lord Mansfield in the Berkeley peerage case:[4] "If an inquiry were to be instituted in each instance whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted and great confusion would be produced." As may be inferred from the statements already made, it is not necessary that the controversy should have ripened into an action.

1, Northrop v. Hale, 76 Me. 306; 49 Am. Rep. 615; Whitelock v. Baker, 13 Ves. 512; Barnum v. Barnum, 42 Md. 251; Rex v. Cotton, 3 Camp. 444; Hodges v. Hodges, 106 N. C.

374; Com. v. Felch, 132 Mass. 22; Caujolle v. Ferrie, 23 N. Y. 90; 1 Greenl. Ev. sec. 131.

2, Berkeley Peerage Case, 4 Camp. 417.

3, Berkeley Peerage Case, 4 Camp. 417; Sheddon v. Atty. Gen. 30 L. J. (Pr. & Mat.) 217; 2 Swab & T. 170.

4, Berkeley Peerage Case, 4 Camp. 417.

§ 315. Same—Meaning of the rule—Lis mota —The term *lis mota* is used in a broad sense and refers to the beginning of a controversy or dispute, and not to the commencement of a suit. It has sometimes been claimed that no actual controversy need have arisen, but that the term *lis mota* means simply the arising of that state of facts on which the claim is founded.[1] But by the weight of authority it is held that there must be not only facts which may lead to a dispute, but that there must be a *suit, or a controversy preparatory* to a suit, upon the *same subject matter* as that involved in the litigation.[2] But if the subject in dispute at the time of the trial was not in controversy when the declarations were made, they are admissible, if otherwise competent. In other words, the *controversy*, as used in this connection, must have related to the particular subject at issue in the trial. Where the point in controversy is foreign to that which was before controverted, there never has been a *lis mota*, and consequently the objection does not apply.[3] But the former controversy need not have

been between the same parties nor have related to the same property, if the *same matters* were *under discussion.*[4] Although declarations of the character under discussion must have been made before the *lis mota*, "they will not be rejected in consequence of their having been made with the express view of preventing disputes."[5] Nor will they be rejected although they are made in direct *support* of the *title* of the declarant, nor although the declarant stood in the same right with the party relying on the declaration.[6] The qualification that declarations as to matters of public or general interest should have been made before the controversy arose, applies with equal force when declarations are offered in matters of *pedigree.* This appears from the cases already cited, most of which relate to questions of pedigree.

1, Walker v. Beauchamp, 6 Car. & P. 552.

2, Davies v. Lowndes, 7 Scott N. R. 214; 6 Man. & G. 528; Elliott v. Piersol, 1 Peters 328; Berkeley Peerage Case, 4 Camp. 401; Slaney v. Wade, 1 Mylne & C. 338, 356.

3, Freeman v. Phillips, 4 Maule & S. 486.

4, Berkeley Peerage Case, 4 Camp. 417; Sussex Peerage Case, 11 Clark & F. 85, 99, 103; Tayl. Ev. sec. 633.

5, Tayl. Ev. sec. 630.

6, Condensed from Tayl. Ev. sec. 630; Berkeley Peerage Case, 4 Camp. 417; Doe *ex dem.* Jenkins v. Davies, 10 Q. B. 314; Caujolle v. Ferrie, 23 N. Y. 91.

§ 316. Declarations as to pedigree—Reason for the exception.—The well

known exception to the general rule excluding hearsay, under which certain declarations of deceased persons may be admitted in cases of pedigree, rests in part on the supposed necessity of receiving such evidence to avoid a failure of justice, and in part on the ground that individuals are generally supposed to know and to be interested in those facts of family history about which they converse, and that they are generally under little temptation to state untruths in respect to such matters which might be readily exposed.[1] Said Lord Chancellor Eldon: "Declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in bibles and registry books, all are admitted upon the principle that they are the natural effusions of a party who must know the truth and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth."[2] The declarations of deceased persons may be received, subject to the qualifications hereafter named, when such declarations refer to the age, relationship, birth, marriage, death or legitimacy of persons legally related by blood or marriage to the declarant, and when such declarations were made before the controversy in relation to which they are to be proved arose.[3] Although it was formerly considered doubtful whether the declarations of *servants* and *neighbors* might not be received,

the rule has become settled as above stated and the declarations are confined to those made by *legal relatives.*[4] The following are instances where the declarations were rejected on the ground that they were not made by lawful relatives: The declarations of a person that his deceased brother had an illegitimate son,[5] and the declaration of an illegitimate son that his natural brother had died without issue.[6] Although the declarations of a wife as to her husband's family are admissible, the statements of the wife's father have been excluded.[7] On the other hand the courts have received as evidence the declarations of a deceased husband to prove that the parents of his wife were not married,[8] and to show the legitimacy of his wife,[9] as well as the declarations of a deceased widow as to statements of her husband as to who his cousins were.[10] So the declarations of a deceased person have been received to show that her sister was the mother of an illegitimate son,[11] as well as declarations of deceased persons that their daughter or sister was the mother of a child which died at three weeks of age.[12] So the declarations of a deceased person as to his own marriage[13] and legitimacy[14] have been received. But it has been said to be a question of great doubt whether under any circumstances the declarations of a deceased person in which he asserted his own illegitimacy can be received, except as an admission

against himself and those who claim under him by some title derived subsequently to the declarations.[15] It has even been held, however, that declarations as to time, place and residence are admissible to identify certain persons as belonging to a certain family.[16] So far as *blood relations* are concerned the law does not seem to have limited the inquiry within any particular degree of relationship, although the declarations of very remote relatives might be entitled to very little weight.[17] The dissolution of the marriage relation does not render inadmissible declarations subsequently made by one of the parties.[18]

1, Stark. Ev. 45; Best Ev. sec. 498; Greenl. Ev. sec. 103. As to family tradition, see articles in 17 Sol. Jour. & Rep. 421; 7 Alb. L. Jour. 269. See also, article in 37 Alb. L. Jour. 130, and note, 12 L. R. A. 838.

2, Whitlocke v. Baker. 13 Ves. 514; People v. Fulton Ins. Co., 25 Wend. 222; Fulkerson v. Holmes, 117 U. S. 389. But see, Smith v. Geer, (Tex. Civ. App.) 30 S. W. Rep. 1108.

3, Vowles v Young, 13 Ves. 140; Goodright v. Moss, 2 Cowp. 594; People v. Fulton Ins. Co., 25 Wend. 205; Boone v. Miller, 73 Tex. 564; Pancoast v. Addison, 1 Harr. & J. (Md.) 350; 2 Am. Dec. 520; Cuddy v. Brown, 78 Ill. 415; Jackson v. King, 5 Cow. 237; 15 Am. Dec. 468; Com. v. Phillips, 162 Mass. 504; Eisenlord v. Clum, 126 N. Y. 552; Shields v. Boucher, 1 DeGex & S. 40; Clark v. Owens, 18 N. Y. 434, as to death; Webb v. Richardson, 42 Vt. 465; Dawson v. Mayall, 45 Minn. 408. *In re* Pickens Estate, 163 Pa. St. 14, hearsay was admitted to prove a marriage eighty-seven years before. See sec. 314 *supra*.

4, Berkeley Peerage Case, 4 Camp. 401; Stein v. Bowman, 13 Peters 209; Chapman v. Chapman, 2 Conn. 347; 7 Am. Dec. 277; Northrop v. Hale, 76 Me. 306; 49 Am. Rep.

615; Com. v. Felch, 132 Mass. 23; Barnum v. Barnum, 43 Md. 251, 304; Jackson v. Browner, 18 Johns. 37; Caujolle v. Ferrie, 23 N. Y. 90; Backdahl v. Grand Lodge, 46 Minn. 61; Boon v. Miller, 73 Tex. 557; Jackson v. Jackson, 80 Md. 176. See also, Butrick v. Tilton, 155 Mass. 461, where declarations of a granddaughter were received.

5, Crispim v. Doglioni, 3 Swab. & T. 44.

6, Doe v. Barton, 2 Moody & Rob. 28; Doe v. Davies, 10 Q. B. 314.

7, Shrewsbury Peerage Case, 7 H. L. Cas. 23.

8, Jewell v. Jewell, 1 How. 219; People v. Fulton Ins. Co., 25 Wend. 205.

9, Vowles v. Young, 13 Ves. 140; Doe v. Harvey, Ryan & M. 297.

10, Monkton v. Atty. Gen., 2 Russ. & M. 165; Slaney v. Wade, 7 Sim. 611; 1 Mylne & C. 355; Robson v. Atty. Gen., 10 Clark & F. 500; Davies v. Lowndes, 7 Scott N. R. 211; 6 Man. & G. 525.

11, Northrop v. Hale, 76 Me. 306; 49 Am. Rep. 615.

12, Branch v. Texas Lumber Co., 56 Fed. Rep. 707.

13, Eisenlord v. Clum, 126 N. Y. 552; Rex v. Bramley, 6 T. R. 330; Craufurd v. Blackburn, 17 Md. 49; 77 Am. Dec. 323.

14, Procur. Gen. v. Williams, 31 L. J. (Prob. Mar. & Adm.) 157.

15, Rex v. Rishworth, 2 Q. B. 487; Procur. Gen. v. Williams, 31 L. J. (Prob. Mar. & Adm.) 157; Tayl. Ev. sec. 637.

16, Byers v. Wallace, 87 Tex. 503.

17, Davies v. Lowndes, 7 Scott N. R. 188; Shrewsbury Peerage Case, 7 H. L. Cas. 23; People v. Fulton Ins. Co., 25 Wend. 205; Butrick v. Tilton, 155 Mass. 461. See also, Byers v. Wallace, 87 Tex. 503.

18, Vowles v. Young, 13 Ves. 140; Doe *ex dem.* Nothey v. Harvey, Ryan & M. 297; Johnson v. Lawson, 2 Bing. 92; 9 Moore 194.

§ 317. Same — Declarant's relationship — How proved — Particular facts. — The relationship of the declarant cannot be proved by the declaration itself. There must be some independent proof of this fact.[1] Thus, the declarations as to the marriage which constitutes the affinity of the declarant are not such evidence *aliunde* as the law requires. In Doe v. Fuller, Chief Justice Best said: "If there were no other evidence than the declarations of John to show that James was a member of the family, they could not have been received as that would be carrying the rule as to the admissibility of hearsay evidence further than has been ever yet done, viz., to allow a party to claim an alliance with a family by the bare assertion of it."[2] This is a preliminary question for the judge to determine.[3] In cases where the relationship is difficult of proof, slight evidence may suffice.[4] Nor need the exact degree of relationship be proved;[5] nor is it necessary that the declarant should name the person from whom he obtained his information.[6] When the declarations come from the proper source, that is, from legal relatives since deceased, they are admissible although they consist of *hearsay upon hearsay*. "Even *general repute* in the family, proved by the testimony of a surviving member of it, has been considered as falling within the rule. Moreover, it is ***not necessary*** to show *that the declarations* were

contemporaneous with the events to which they relate, for, as Lord Brougham has well observed, such a restriction in pedigree 'would defeat the purpose for which hearsay is let in by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence;' and, to use a homely illustration, it would even render inadmissible the statement of a deceased person as to the maiden name of his own grandmother."[7] In cases of pedigree the declarations, to be admissible, need not be part of the *res gestae;* if they were they would be admissible on that ground irrespective of any question of their admissibility as in a case of pedigree.[8] Nor need the declarations to be admissible be upon the *knowledge of the declarant*, as this requirement would defeat the main object of permitting this class of testimony.[9] In cases of pedigree the hearsay testimony is *not confined to ancient facts*, but extends also to matters which have recently transpired; and is not to be rejected although there may be living witnesses to the same fact.[10] As we have seen, when the inquiry relates to matters of public or general interest, statements in regard to *particular facts* are excluded; and only declarations as to general reputation are admitted. But in matters of pedigree the reputation depends upon particular facts such as marriage, birth or death; and

necessarily the hearsay of the family as to these particular facts is admitted.[11] The *times* when any of these events happened may be proved by the same kind of evidence.[12] Thus, such declarations were received to show the time of birth of a child in the family,[13] and to show the relative seniority of three sons born at one time.[14] In England such declarations seem to be admitted, if coming from the proper source, when they relate to the *place* at which any such fact occurred.[15] But by the weight of authority in this country the place of a person's birth or death cannot be proved by hearsay evidence.[16] So hearsay is not admissible under this exception to prove the *legal status* of a person, as that such person was a slave or a freeman,[17] or that he was under guardianship.[18]

1, Berkeley Peerage Case, 4 Camp. 419; Rex v. All Saints, 7 Barn. & C. 789; Attorney General v. Coehler, 9 H. L. Cas. 660; Blackburn v. Crawfords, 3 Wall. 175; Thompson v. Wolf, 8 Ore. 454; Fulkerson v. Holmes, 117 U. S. 389.

2, Doe v. Randall, 2 Moore & P. 22; Blackburn v. Crawfords, 3 Wall. 189.

3, Doe v. Davies, 11 Jur. 607.

4, Doe v. Randall, 2 Moore & P. 20.

5, Vowles v. Young, 13 Ves. 147.

6, Jewell v. Jewell, 1 How. 219.

7, Tayl. Ev. sec. 639, and cases cited; Eaton v. Tallmadge, 24 Wis. 217.

8, Eisenlord v. Clum, 126 N. Y. 552.

9, Eisenlord v. Clum, 126 N. Y. 552; Monkton v. Attorney Gen., 2 Russ. & M. 147.

10, Eisenlord v. Clum, 126 N. Y. 552; Vowles v. Young, 13 Ves. 140.

11, Berkeley Peerage Case, 4 Camp. 415; Eisenlord v. Clum, 126 N. Y. 552; Houlton v. Manteuffel, 51 Minn. 185; 1 Greenl. Ev. sec. 104.

12, Beatty v. Nail, 6 Ir. L. Rec. N. S. 17; Kidney v. Cockburn, 2 Russ. & M. 168; Du Pont v. Davis, 30 Wis. 170.

13, Clements v. Hunt, 1 Jones L. (N. C.) 400.

14, Tayl. Ev. sec. 644.

15, Steph. Ev. art. 31; Tayl. Ev. secs. 646, 647.

16, Union v. Plainfield, 39 Conn. 563; Greenfield v. Camden, 74 Me. 56; Tyler v. Flanders, 57 N. H, 618; McCarty v. Terry, 7 Lans. (N. Y.) 236; Wilmington v. Burlington, 4 Pick. 173; Braintree v. Higham, 1 Pick. 247.

17, Mima Queen v. Hepburn, 7 Cranch 290. But in Vaughn v. Phebe, 1 Mart. & Y. (Tenn.) 1; 17 Am. Dec. 770, a person was allowed to establish his freedom.

18, Jones v. Letcher, 13 B. Mon. (Ky.) 363.

§ 318. Are the declarations limited to cases where pedigree is the direct subject of the suit? — By the weight of authority a case is not necessarily one of pedigree because it may involve questions of birth, parentage, age or relationship. Where these questions are merely *incidental*, and the judgment will simply establish a debt or a person's liability on a contract, or his proper settlement as a pauper or other things of that nature, the case is not one of pedigree, although questions of marriage, legitimacy, death or birth are incidentally inquired into.[1] Mr. Taylor while approving the statement

that there appears to be no foundation for any distinction between cases where a matter of pedigree is the direct subject of the suit and other cases where it occurs incidentally said: "Yet the declarations of relatives will not necessarily be admissible whenever the birth, marriage or death of a party forms the subject of controversy; but such proof would seem to be confined to cases which directly or indirectly involve some question of relationship, and in which the fact sought to be established by hearsay is required to be proved for some genealogical purpose."[2] Mr. Taylor also cites the illustration, among others, that in proof of the plea of infancy, hearsay is inadmissible;[3] and in an insurance case in the supreme court of the United States where proof of age was offered, but not for the purpose of showing parentage or descent, it was held that no question of pedigree was involved.[4] But in Massachusetts the doctrine of the English cases on this subject was rejected. Where the issue was upon the settlement of a pauper, Bigelow C. J. said: "Some of the authorities seem to limit the competency of this species of proof to cases where the main subject of inquiry relates to pedigree, and where the incidents of birth, marriage and death, and the times when these events happened are directly put in issue. But upon principle we can see no reason for such a limitation. If this evidence

is admissible to prove such facts at all, it is equally so in all cases whenever they become legitimate subjects of judicial inquiry and investigation. We are, therefore, of opinion that the rejection of the proof offered at the trial to establish the date of the death of a person who deceased more than fifty years previously was erroneous."[5]

1, Eisenlord v. Clum, 126 N. Y. 552; Whittuck v. Waters, 4 Car. & P. 375; Haines v. Guthrie, 13 Q. B. Div. 818.

2, Tayl. Ev. sec. 645; Shield v. Boucher, 1 De Gex & S. 40.

3, Figg v. Wedderburne, 6 Jur. 218; Haines v. Guthrie, 53 L. J. (Q. B.) 521.

4, Connecticut Life Ins. Co. v. Schwenk, 94 U. S. 593.

5, North Brookfield v. Warren, 16 Gray, 171, 175.

§ 319. Acts and conduct of relatives admissible as well as declarations — Written declarations.— Thus far the discussion has had reference to verbal declarations in matters of pedigree. But the evidence of this character may also consist of proof of acts showing the *conduct of relatives* and the mode of treatment of those whose parentage or descent is in question. For instance, if a son is treated in the family as a legitimate child "this amounts to a daily assertion that the son is legitimate."[1] On the other hand if the birth of a child is concealed, and if it is never recognized in the family as legitimate, these and other similar circum-

stances may be shown in the same manner as verbal declarations.[2] So the giving or withholding property may be a circumstance from which inferences may fairly be drawn as to the question of relationship.[3] On the same principle *written declarations* have often been received in matters of pedigree. When the proper foundation is laid by showing that they are the statements of relatives since deceased, it makes no difference so far as competency is concerned whether the entries or writings have been made in the most formal and solemn manner or whether they are of an *informal* character. Thus, solemn entries in the family bible made by a relative[4] and letters of deceased relatives containing statements as to family matters[5] are admissible on the same ground, although of course entitled to very different degrees of credibility. Other illustrations of written declarations which have been admitted as to questions of pedigree are entries made in almanacs,[6] charts of pedigree[7] or other books or papers which mention births, marriages and deaths. Of the same character are inscriptions on monuments,[8] recitals in wills[9] and in deeds of conveyance,[10] as well as in marriage settlements and certificates.[11]

1, Berkeley Peerage Case, 4 Camp. 416.

2, Hargrave v. Hargrave, 2 Car. & K. 701; Goodright v. Saul, 4 T. R. 356; Morris v. Davies, 5 Clark & F. 163, 241; Banbury Peerage Case, 1 Sim. & St. 153; Reg. v. Mans-

field, 1 Q. B. 444; Townshend Peerage Case, 10 Clark & F. 289; Atchley v. Sprigg, 33 L. J. (Ch.) 345.

3, Robson v. Attorney General, 10 Clark & F. 498; Hungate v. Gascoigne, 2 Phill. 25; 2 Coop. 414; De Roos Peerage Case, 2 Coop. 540.

4, Berkeley Peerage Case, 4 Camp. 401; Weaver v. Leiman, 52 Md. 708.

5, Kansas Ry. Co. v. Miller, 2 Col. 460; State v. Joest, 51 Ind. 287.

6, Herbert v. Tuckal, T. Raym. 84.

7, Moukton v. Attorney General, 2 Russ. & M. 163.

8, Slaney v. Wade, 1 Mylne & C. 338; DeRoos Peerage Case, 2 Coop. 544; Comoys Peerage Case, 6 Clark & F. 801.

9, Gaines v. New Orleans, 6 Wall. 642; Pearson v. Pearson, 46 Cal. 609; Russell v. Jackson, 22 Wend. 277; Shuman v. Shuman, 27 Pa. St. 90; Neal v. Wilding, 2 Str. 1151; DeRoos Peerage Case, 2 Coop. 541; Skeene v. Fishback, 1 A. K. Marsh. (Ky.) 356.

10, Smith v. Tebbitt, L. R. 1 Pro. & D. 354; 36 L. J. (Pr. & Mat.) 35; Doe v. Davies, 10 Q. B. 325; Jackson v. Cooley, 8 Johns. 128; Scharff v. Keener, 64 Pa. St. 376; Fulkerson v. Holmes, 117 U. S. 389.

11, Doe v. Davies, 10 Q. B. 314.

§ 320. Same — Family recognition of writings and records. — In the case of informal declarations of this character greater strictness may be required in proving the handwriting than is necessary in those more solemn statements which are contained in family records.[1] In general *proof must be given* that the *entry* in question *was made by some member of the family* or that it has been *recognized* as genuine by members of the family.[2] Where there is no proof that the

deed or other instrument has been executed or recognized by a lawful relative, it will be rejected.[3] This rule has, however, been relaxed in respect to entries in the *family bible* on the ground that entries therein are presumed to be known to the members of the family and to have been adopted as correct.[4] In a memorable case the supreme court of the United States attached great importance to a declaration in a will as to the legitimacy of a child;[5] and it has been held that even a cancelled will, which was never acted upon, might be admitted on proof that it came from the custody of a descendant of the testator.[6] On the same principle inscriptions on tomb stones,[7] family portraits,[8] rings[9] and other family memorials have been long and frequently received as evidence of the facts they recite; and the courts hold that they are entitled to more or less weight according to the circumstances of the case.

1, Kansas Ry. Co. v. Miller, 2 Col. 460.

2, Crawford & Lindsay Peerage Case, 2 H. L. Cas. 558; Hood v. Beauchamp, 8 Sim. 26.

3, Slaney v. Wade, 1 Mylne & C. 338; Fort v. Clarke, 1 Russ. 604.

4, Berkley Peerage Case, 4 Camp. 421; Monkton v. Atty. Gen., 2 Russ. & M. 162; Rex v. All Saints, 7 Barn. & C. 789; Greenleaf v. Railroad Co., 30 Iowa 301.

5, Gaines v. New Orleans, 6 Wall. 642, 699.

6, Doe v. Pembroke, 11 East 504.

7, Butrick v. Tilton, 155 Mass. 461; Monkton v. Atty. Gen., 2 Russ. & M. 162; Goodright v. Moss, 2 Cowp. 594

Before such declarations are received there must be some proof of the identity of the person whose name is so inscribed, Gehr v. Fisher, 143 Pa. St. 311.

8, Camoys Peerage Case, 6 Clark & F. 801.

9, Vowles v. Young, 13 Ves. 144.

§ 321. Weight of such testimony.— Doubtless in the majority of cases there is no motive for making false statements in inscriptions of this character, but the instances cited by Mr. Phillips well illustrate the fact that even inscriptions on tomb stones are to be received in evidence with due allowance for the errors to which both carelessness and family pride contribute.[1] It is hardly necessary to add that, while hearsay declarations as to pedigree in other forms are admissible, and often valuable in the absence of other evidence, it must be borne in mind that such declarations are subject to many of the objections which may be urged against other hearsay evidence, and hence are to be received with considerable caution. Family pride may have tempted the declarant to allege or deny a relationship contrary to the fact; and although persons may be presumed to know the facts connected with their own family history, yet, as is well known, this presumption is often contrary to the fact. Moreover, it is evident that prejudiced and unscrupulous witnesses can give their own coloring to the statements which they claim to have heard from persons since deceased; and that they

can do so with comparative impunity from exposure or punishment.

1, Phill. Ev. 222, notes; McGoon v. Irvine, 1 Pinn. (Wis.) 526.

§ 322. Declarations only admissible after death of the declarant.— It is evident from the discussion which has preceded and the authorites cited that declarations are not admissible under this exception to the general rule, unless it is shown that the *declarant is dead;* hence it is incumbent upon him who offers testimony of this character to prove the declarant's death.[1] But when this condition is complied with, it is no objection to the competency of the declarations that other persons are living who have the requisite knowledge, and who might be produced as witnesses. Although this fact might afford an unfavorable inference, it would not exclude legal testimony.[2] As in the case of declarations respecting matters of public or general interest, the declarations of deceased relatives concerning pedigree will not be excluded, although they were made *for the purpose of preventing the question from arising.*[3] Nor will the declarations be excluded, if otherwise competent, although the *declarant* may have *had an interest* in the matters about which the declaration was made. This is a fact affecting the weight and not the competency of the evidence.[4] We have already discussed

the rule, which is alike applicable in questions of pedigree and in matters of public and general interest, that the declarations must have been made, *before the controversy arose.*[5] This is the rule generally sustained by the authorities. It is suggested, however, by Mr. Wharton that in view of the statutes allowing parties to testify and the growing liberality in the admission of testimony, subject to the right of the court or jury to decide as to its credibilty, it would be well to apply the test *ante litem motam* leniently, if indeed it is to be applied at all.[6]

1, Pendrell v. Pendrell, 2 Str. 924; Butler v. Mountgarret, 6 Ir. L. Rec. N. S. 77; 7 H. L. Cas. 633; Dupoyster v. Gagoni, 84 Ky. 403, in this last case it was held that general repute of the claimant in the family may be shown by the testimony of the surviving members of the family.

2, Butler v. Mountgarrett, 6 Ir. L. Rec. N. S. 77; 7 H. L. Cas. 633; 2 Phill. Ev. 212.

3, Berkeley Peerage Case, 4 Camp. 401; Steph. Ev. art. 31.

4, Doe v. Davies, 10 Q. B. 325.

5, Elliott v. Piersol, 1 Peters 328.

6, Whart. Ev. sec. 213.

§ 323. Entries in the course of business by deceased persons.—It has long been a settled rule of law both in England and in this country that a minute or memorandum in writing, made at the time when the fact it records took place by a person, since deceased, in the ordinary course of his business, corrobo-

rated by other circumstances which render it probable that the fact occurred, is admissible in evidence.[1] Entries of this class are not received on the theory that they are declarations against the interest of the person who made them, but on the ground that they were made in the *due course of business* as part of the *res gestae;* and this is deemed to afford sufficient presumption that the facts are as stated in the memorandum.[2] Said a learned judge: "What a man has actually done and committed to writing when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury."[3] The entries to be thus admissible should be *contemporaneous* with the act to be proved, that is within so short a time thereafter as reasonably to be considered a part of the transaction,[4] in the due discharge of duty[5] and by persons having *knowledge of the facts.*[6] Such memoranda do not generally afford evidence, except as to those matters necessary to be recorded;[7] in other words, they are *not evidence of collateral matters.* Thus, although the return of an officer, since deceased, was held admissible to show that an arrest was made and also its date, yet such certificate was deemed no evidence of the particular spot where the arrest was made as it was no part of the officer's duty to state such

fact.[8] Illustrations of this kind of evidence are the entries made by deceased clerks and agents in the sale of goods or other regular course of business;[9] entries by deceased notaries to prove such acts as presentment, demand and notice of non-payment,[10] by attorneys in their dockets of the issuing of executions or other process,[11] by magistrates as to the acknowledgment of deeds,[12] by surveyors and deputy surveyors containing results of their labors,[13] receipts by sheriffs or other officers since deceased for the payment of money,[14] books of a bank showing the receipt and payment of money in a controversy with a depositor,[15] private entries of officers containing memoranda of official acts[16] and entries by clergymen in the performance of their duties, for example, a record of baptism.[17] In a Maine case charges in the day book of a physician for a surgical operation were admitted in litigation between third parties, where it became material to show the date of such operation;[18] and in a recent case the account book of a deceased mechanic was received in an action between third parties to show the character and extent of the injuries to a wagon wheel alleged to have been caused by a collision with defendant's locomotive.[19]

1, Doe v. Turford, 3 Barn. & Adol. 898; Pitman v. Maddox, 2 Salk. 690; Hagedorn v. Reed, 3 Camp. 379; Champneys v. Peck, 1 Stark. 404; Pritt v. Fairclough, 3 Camp. 305; Price v. Torrington, 1 Salk. 285; 1 Smith L. C. 344;

Nichols v. Webb, 8 Wheat. 326; Clarke v. Magruder, 2 Harr. & J. (Md.) 77; Everly v. Bradford, 4 Ala. 371; Williamson v. Doe, 7 Blackf. (Ind.) 12; Bank of Tenn. v. Smith. 9 B. Mon. (Ky.) 609; Boston v. Weymouth, 4 Cush. 538; Wheeler v. Walker, 45 N. H. 355; Bland v. Warren, 65 N. C. 372. A full discussion will be found in 1 Smith L. C. 567. See also, extended note, 15 Am. Dec. 191.

2, Chambers v. Bernasconi, 1 Tyrw. 342; 4 Tyrw. 531; Welsh v. Barrett, 15 Mass. 380.

3, Welsh v. Barrett, 15 Mass. 380.

4, Doe v. Turford, 3 Barn. & Adol. 897; Lassone v. Boston & L. R. Ry. Co. (N. H.), 24 At. Rep. 902; Poole v. Dicas, 1 Bing. N. C. 654; Price v. Torrington, 1 Salk. 235; Ray v. Jones, 2 Gale 220; Ingraham v. Bockins, 9 Serg. & R. (Pa.) 285.

5, Lloyd v. Wait, 1 Phill. 61; Chambers v. Bernasconi, 1 Tyrw. 342; 4 Tyrw. 531; Doe *ex dem.* Patteshall v. Turford, 3 Barn. & Adol. 890; Smith v. Blakey, L. R. 2 Q. B. 232.

6, Chaffee v. United States, 18 Wall. 516; Lewis v. Kramer, 3 Md. 365; Smith v. Lane, 12 Serg. & R. (Pa.) 80.

7, Chambers v. Bernasconi, 1 Tyrw. 342; 4 Tyrw. 531.

8, Chambers v. Bernasconi, 1 Tyrw. 342, 4 Tyrw. 531.

9, Nicholls v. Webb, 8 Wheat. 326; James v. Wharton, 3 McLean (U. S.) 492; Hodge v. Higgs, 2 Cranch C. C. 552; Jones v. Howard, 3 Allen 223; Livingston v. Tyler, 14 Conn 493; Palmer v. Maddox, 1 Ld. Raym. 732; Price v. Earl of Tarrington, 2 Ld. Raym. 873; Pritt v. Fairclough, 3 Camp. 305.

10, Halliday v. Martinett, 20 Johns. 168; 11 Am. Dec. 262; Porter v. Judson, 1 Gray 175; Nicholls v. Webb, 8 Wheat. 326; Poole v. Dicas, 1 Bing. N. C. 649; Gawtry v. Doane, 51 N. Y. 84, such an entry by a notary's clerk held admissible.

11, Leland v. Cameron, 31 N. Y. 115.

12, Nourse v. McKay, 2 Rawle (Pa.) 70.

13, Walker v. Curtis, 116 Mass. 98.

14, Livingston v. Arnoux, 56 N. Y. 518.

15, Union Bank v. Knapp, 3 Pick. 96; 15 Am. Dec. 181.

16, Linthieum v. Remington, 5 Cranch C. C. 546; Reg. v. Buckley, 13 Cox. C. P. 293.

17, Kennedy v. Doyle, 10 Allen 161.

18, Augusta v. Windsor, 19 Me. 317.

19, Lassone v. Boston & L. R. Ry. Co., (N. H.) 24 At. Rep. 902, in which the subject is fully discussed and many cases are cited.

§ 324. Same—Principle extended to declarations by persons still living.—It will be noticed from some of the illustrations above cited that under this principle entries may be admitted, although there is no absolute duty to make such entries. "It is sufficient if the *entry* was the *natural concomitant of the transaction* to which it relates and usually accompanies it."[1] Of course the handwriting of the person who made the entries must be proved.[2] On the same principle entries of the character under discussion made by one who has since become *insane* have been admitted.[3] In some of the states entries of this class have been held admissible on proof that the person by whom they were made is beyond the *jurisdiction* of the court, as where he is out of the state.[4] While in other states the rule has not been extended beyond the cases where the person making the entry was dead.[5] The principle under discussion has, however, been extended and applied in the United States to cases where

the *person making the entries is still living* and authenticates the entries by his oath. But such entries are not admissible in the life time of the one making them, unless they would have been admissible after his death on proof of his handwriting.[6]

1, Fisher v. Mayor, 67 N. Y. 73; Leland v. Cameron, 31 N. Y. 115; Nourse v. McKay, 2 Rawle (Pa.) 70; Costello v. Crowell, 133 Mass. 352.

2, Chaffee v. United States, 18 Wall. 516; Union Bank v. Knapp, 3 Pick. 96; 15 Am. Dec. 181.

3, Holbrook v. Gay, 6 Cush. 215; Union Bank v. Knapp, 3 Pick. 96; 15 Am. Dec. 181.

4, Elms v. Chevis, 2 McCord (S. C.) 349; Reynolds v. Manning, 15 Md. 523; Alter v. Berghaus, 8 Watts (Pa.) 77; Sterrett v. Bull, 1 Binn. (Pa.) 234; Crouse v. Miller, 10 Serg. & R. (Pa.) 155; New Haven Co. v. Goodwin, 42 Conn. 230; Union Bank v. Knapp, 3 Pick. 96; 15 Am. Dec. 181; Holbrook v. Gay, 6 Cush. 216.

5, Brewster v. Doane, 2 Hill 537; Moore v. Andrews, 5 Port. (Ala.) 107.

6, Bank of Monroe v. Culver, 2 Hill 532; Spann v. Baltzell, 1 Fla. 302; 46 Am. Dec. 346; Farmers' Bank v. Boraef, 1 Rawle (Pa.) 152; Shove v. Wiley, 18 Pick. 558; Sickles v. Mather, 20 Wend. 72; 32 Am. Dec. 521; Redden v. Spruance, 4 Har. (Del.) 265; Underwood v. Parrott, 2 Tex. 168.

§ 325. Recollection of the fact by the person making the entry.— In such cases as those discussed in the last section, it is not necessary that the witness should remember the facts recorded in the memoranda, if the other conditions are complied with. When properly authenticated, the memoranda them-

selves constitute evidence, although the witness has no recollection on the subject, and even though his memory is not refreshed by such memoranda.[1] Thus, where a bank kept a book in which a clerk regularly made memoranda of notices given by him to indorsers, and the clerk testified that it was his practice to give the notices personally and that he had no doubt they were given as usual, although he could not recollect the fact, the book was admitted to prove a notice mentioned therein.[2] Said Justice Shaw: "It is very obvious to remark that, if such evidence is not sufficient, it would be extremely difficult to prove such acts done. Where bank messengers, notaries and such official persons do hundreds and thousands of such acts every year, it would be contrary to all human experience to believe that they could recall the recollection of each by force of present memory, even after looking at a written memorandum; but the witness may testify to other facts which, with the aid of a memorandum, will afford a very satisfactory inference that the act was done; such as his usual practice and habit, his caution never to make such memoranda, unless such acts were done and his consciousness of the importance and necessity of accuracy in this particular. In this respect it is like the testimony of an attesting witness to an instrument. He recognizes his handwriting,

ne knows he put his hand there, he testifies that he believes he would not have put it there if he had not seen the instrument executed, but he has no present recollection of the fact other than that derived from the recognition of his handwriting. Such evidence, we think, it is every day's practice to admit and, if not controlled by other evidence, a jury might and ought to infer from it the fact of execution."[3]

1, See the cases cited in note 6 of the last section.

2, Shove v. Wiley, 18 Pick. 558. As to books of account in general, see secs. 582 *et seq. infra.*

3, Shove v. Wiley, 18 Pick. 561; Costello v. Crowell, 133 Mass. 352.

§ 326. Entries by a party himself.— In the cases cited under the preceding section to illustrate the reception of this class of evidence, the entries were made by third persons having no interest in the transactions. But the authorities seem agreed on the proposition that entries made by the parties themselves are admissible on the ground that they are a part of the *res gestae*, and not on the ground that they are made by disinterested persons. It would seem to follow that entries of this class are admissible, although *made by a person in respect to his own business* or by one otherwise interested; but of course the weight to be given to the entry might depend very greatly upon the interest or motive of the person making the entry.[1] Ac-

cordingly we find that long before statutes were enacted allowing parties to testify generally in their own behalf, the practice came to prevail of allowing parties by their own testimony to *verify* their *books of account.* Although the practice was conceded to be repugnant to general common law principles, it was sustained on grounds of necessity.[2] If the person who made the entry be still living, though out of the state, he must be called or his deposition taken.[3] It is a sufficient *authentication*, if the witness states under oath that the entries were made in the regular course of business, and that they were correct and made at the time they purport to have been made.[4] The use of account books as evidence under statutes is elsewhere discussed.[5]

1, 1 Greenl. Ev. sec. 120. See note, 15 Am. Dec. 191.

2, Sheehan v. Hennessey, 65 N. H. 101; Eastman v. Moulton, 3 N. H. 156; Goodyear v. Bradley, 1 Day (Conn.) 104; Foster v. Sinkler, 1 Bay (S. C.) 40; Pratt v. White, 132 Mass. 477; Poultney v. Ross, 1 Dall. 238.

3, Chaffee v. United States, 18 Wall. 541; Brewster v. Doane, 2 Hill 537; Wilbur v. Selden, 6 Cow. 162; Merrill v. Ithaca & O. Ry. Co., 16 Wend. 586; 30 Am. Dec. 130; Pratt v. White; 132 Mass 477. See note, 15 Am. Dec. 193.

4, Shove v. Wiley, 18 Pick. 558; Moots v. State, 21 Ohio St. 653.

5, See secs. 582 *et seq. infra.*

§ 327. Declarations of deceased persons against interest — In general. — In several of the preceding sections the dis-

cussion has related to the admissibility of declarations or entries made in the regular course of business and as part of the *res gestae*. In another chapter we discussed the admissibility of declarations of *parties* and those identified in interest with parties, that is, *admissions*. We now come to the consideration of an entirely different class of declarations which should not be confused with those already mentioned; namely, declarations made by *strangers*, that is, by persons not in privity with the parties to the suit, declarations which are not necessarily made in the regular course of business, but which are received on the ground that they were *against the interest of such stranger* and *irrespective of the fact whether any privity exists* between the person who made them and the party against whom they are offered. It has long been settled as one of the exceptions to the general rule excluding hearsay, that the declarations of persons since deceased are admissible in evidence, provided the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it and if it was opposed to his pecuniary or proprietary *interest*.[1] Thus, in a leading case on the subject an entry of a charge for services made in a ledger on a certain day by a man-midwife for attendance upon a woman when she was delivered of a child was admitted as evidence to show the age of such

child.[2] It is a fair presumption that men will neither falsify accounts nor commit mistakes, when such falsehoods or mistakes would be prejudicial to their own pecuniary interests. This consideration together with the facts that the declaration is not admissible during the life time of the author; that any fraudulent motive for making the statement may be shown, and that such declarations are frequently the only mode of proof available, are deemed of sufficient force to justify the admission of such declarations, although the sanction of an oath and the test of cross-examination are wanting.[3] It is not enough to warrant the admission of declarations against interest that the person who made them cannot be produced as a witness, *his death must be shown.*[4] It is well settled that the declaration must be *against the pecuniary or proprietary interest* of the declarant.[5] This was illustrated in a celebrated case where, for the purpose of proving a marriage, the statements of a clergyman, since deceased, who had performed the ceremony at Rome were offered in evidence on the theory that they were against his interest, since they were admissions that he had violated a statute and exposed himself to a prosecution for penalties. But such statements were rejected on the ground that the interest of the declarant was not a *pecuniary* interest within the meaning of the rule.[6] Said Lord Brougham:

"To say, if a man should confess a felony for which he would be liable to prosecution, that therefore the instant the grave closes over him all that was said by him is to be taken as evidence in every action and prosecution against another person is one of the most monstrous and untenable propositions that can be advanced."[7]

1, Higham v. Ridgeway, 1 East 109; 2 Smith L. C. 361; Gleadow v. Atkin. 1 Cromp. & M. 423; Livingston v. Arnoux, 56 N. Y. 507; Sussex Peerage Case, 11 Clark & F. 85; Middleton v. Melton, 10 Barn. & C. 317; Bowen v. Chase, 98 U. S. 254; Taylor v. Gould, 57 Pa. St. 152; Chenango Bridge Co. v. Paige, 83 N. Y. 178; Bartlett v. Patton, 33 W. Va. 71; Hart v. Kendall, 82 Ala. 144; 1 Phill. Ev. 293; 1 Greenl. Ev. sec. 147, 148; Steph. Ev. art. 28. See also articles in 33 Alb. L. Jour. 84; 3 Am. L. Reg. (N. S.) 641.

2, Higham v. Ridgway, 1 East 109; 2 Smith L. C. (8th ed.) 361 and valuable notes.

3, 1 Phil. Ev. 294 ; 1 Greenl. Ev. sec. 148.

4, Phillips v. Cole, 10 Adol. & Ell. 106; Spargo v. Brown, 9 Barn. & C. 935; Smith v. Whittingham, 6 Car. & P. 78; Currier v. Gale, 14 Gray 504; 77 Am. Dec. 343; Rand v. Dodge, 17 N. H. 343. But see, Harriman v. Brown, 8 Leigh (Va.) 697. In Griffith v. Sauls, 77 Tex. 630, the declaration was received where the witness was incapacitated to testify.

5, Sussex Peerage Case, 11 Clark & F. 85; Davis v. Lloyd, 1 Car. & K. 276; Bartlett v. Patton, 33 W. Va. 71; Hosford v. Rowe, 41 Minn. 247; Smith v. Blakey, L. R. 2 Q. B. 326, interest held too remote.

6, Sussex Peerage Case, 11 Clark & F. 88.

7, Sussex Peerage Case, 11 Clark & F. 111; Tayl. Ev. sec. 670.

§ 328. Sufficient if the entries are prima facie against interest. — If the entries are *prima facie* against the interest of the declarant, it is sufficient to render such entries admissible, even if taken in connection with other entries they may seem to operate in his favor.[1] Thus, the entries will not be rejected although they not only include the receipt of moneys by the declarant, but form a part of a general debtor and creditor account *where the balance is in favor of the person making the entries;* in other words, if the entry charges the one making it with liability, it is admissible, although other entries in the same book may wholly discharge him from liability.[2] It has been urged in such cases as an objection that the declaration is the sole evidence of the demand, and that to admit such declarations might lead to the fabrication of evidence. But it is answered that in such case "in an action brought against the receiver by his employer, the entry would be evidence against him and the jury might, if they thought proper or if evidence tending to that conclusion were produced, believe the part in which he charged himself with the receipt of moneys and disbelieve the part which went to his discharge."[3] Moreover men are not likely to charge themselves for the purpose of getting a discharge.[4]

1, Taylor v. Witham, 3 Ch. Div. 605; 24 W. R. 877; 1 Whart. Ev. sec. 230.

2, Rowe v. Brenton, 3 Moody & Rob. 267; Williams v. Geaves, 8 Car. & P. 592; Clark v. Wilmot, 1 Younge & C. Ch. 53; Steph. Ev. art. 28.

3, 2 Smith L. C. (8th ed.) 374 note. See secs. 295, 296 *supra*.

4, Rowe v. Brenton, 3 Moody & Rob. 268; 2 Smith L. C. (8th ed.) 374.

§ 329. Same — Evidence of collateral facts. — There is a distinction between declarations against interest and the declarations of deceased persons made in the course of business; which is that the former may furnish evidence of *collateral* matters forming part of the declaration which are relevant to the issue, although such collateral matters in themselves are not against the interest of the declarant.[1] This rule was illustrated in a case where one entry admitted the payment of money and another, referring to the former, alleged a custom, and both entries were received;[2] and in another case two separate entries were admitted, the one showing a receipt of money by the declarant from his employer, and the other that, in the discharge of duty, he had made a tender of such money to another party.[3] But the collateral or independent facts thus stated must be *part of the same entry*, or referred to in it, or necessary to explain it.[4]

1, Reg. v. Birmingham, 1 Best & Smith 768; Stead v. Heaton, 4 T. R. 669; Marks v. Lahee, 3 Bing. N. C. 408; Milne v. Leisler, 7 Hurl. & N. 786; Davies v. Humphrey, 6 M. & W. 153.

2, Stead v. Heaton, 4 T. R. 669.

3, Marks v. Lahee, 3 Bing. N. C. 408.

4, Doe *ex dem.* Kinglake v. Bevess, 7 C. B. 456; Livingston v. Arnoux, 56 N. Y. 507; Steph. Ev. art. 28.

§ 330. Rule when the declaration is made by an agent. — When the entry purports to have been made by a person acting as agent for another, or in some other special capacity, there should be some *proof of the agency* or other special relation as a prerequisite to the admission of the entry.[1] Although if the declaration is made in the course of public and *official employment*, it will be presumed that the acting officer had proper authority;[2] and if the entries are *ancient* and came from the proper custody, it will be presumed from slight proof that the person making them acted in the capacity which he assumed, especially if the books themselves have the appearance of genuineness.[3] Where the book comes from the proper custody after thirty years have passed, the handwriting need not be proved.[4] It is not necessary that the entries should have been personally made by the party charged with liability, or signed by him.[5] It is sufficient, if it is shown that they were written by his *agent* or by another person, and adopted or sanctioned by him.[6] It is not a condition to the admission of entries of this class that they must be made in the regular course of business, hence they *need*

not be contemporaneous with the act recorded.[7]

1, Short v. Lee, 2 Jac. & W. 467; Doe v. Stacey, 6 Car. & P. 139; Bradley v. James, 13 C. B. 822; Baron de Rutzen v. Farr, 4 Adol. & Ell. 53; 5 Nev. & Mac. 617; 1 Greenl. Ev. sec. 154.

2, Short v. Lee, 2 Jac. & W. 467; 1 Greenl. Ev. sec. 154.

3, Doe v. Thynne, 10 East 206; Brune v. Thompson, Car & M. 34; Mayor v. Warren, 5 Q. B. 773; Doe v. Michael, 17 Q. B. 276; Attorney General v. Stephens, 1 Kay & J. 724, 740.

4, Wynne v. Tyrwhitt, 4 Barn. & Ald. 376. See sec. 544 *infra*.

5, Rowe v. Brenton, 3 Moody & Rob. 267; Doe v. Colcombe, Car. & M. 155; Doe v. Stacey, 6 Car. & P. 139; Bradley v. James, 13 C. B. 822.

6, Doe v. Stacey, 6 Car. & P. 139; Bradley v. James, 13 C. B. 822; Doe v. Hawkins, 1 Gale & D. 551; Doe v. Mobbs, Car. & M. 1; Mayor v. Warren, 5 Q. B. 773; Attorney Gen. v. Stephens, 1 Kay & J. 740.

7, Doe v. Turford, 3 Barn. & Adol. 890; Short v. Lee, 2 Jac. & W. 475.

§ 331. Declarant need not have actual knowledge of the transaction.— Although it has sometimes been assumed that actual knowledge on the part of the declarant of the facts recorded is a necessary condition, it seems to be settled that the person charged with liability need not have actual knowledge of the transactions. Thus, where a person was liable to his employers for the amount of merchandise received, and he made his entries, not on personal knowledge, but

upon reports made to him by others, it was held that such entries were admissible against all persons and that, although he gained his information by hearsay, this fact affected not the admissibility, but only the weight of the testimony.[1] Nor is it necessary to the admissibility of such declarations that the declarant should have been a *competent witness, if living.*[2]

1, Crease v. Barrett, 1 Cromp., M. & R. 295.

2, Doe v. Robson, 15 East 32; Short v. Lee, 2 Jac. & W. 464; Gleadow v. Atkin, 1 Cromp. & M. 410; Middleton v. Melton, 10 Barn. & C. 317.

§ 332. Such declarations inadmissible to prove contracts. — Although it may suffice if the entry shows only a *prima facie* liability on the part of the declarant, yet the entry is not admissible where it merely shows a *contract* and consequent mutual obligations. In speaking of an entry recording an informal agreement for labor, it was said by Lord Coleridge: "This was not an entry against the party's interest, unless the mere making of a contract be so, and if that were the case, the existence of a contract would be against the interest of both parties to it."[1] In such cases it is to be presumed that the agreement is on fair and equitable terms, and not to the disadvantage of either party.[2] It is on the same principle that *declarations* by a person *that he had made a*

will, or that he had *not executed a will*, or that he had *revoked* his will are not admissible on the principle under discussion. They are not in general regarded as declarations against interest since the acts to which the declarations relate and the consequences of such acts are wholly within the control of the person whose declaration is in question; and it cannot be presumed that the acts are prejudicial to himself. If he has made a will, he can revoke it at pleasure or make another. If he has not executed a will, he can do so whenever he may deem it best.[3] But under peculiar facts it was held that the declarations of one who made an antenuptial agreement with his wife making a provision for her which was less than her dower interest might be received as against the interest of the declarant, when they were to the effect that such agreement had been annulled.[4]

1, Reg. v. Worth, 4 Q. B. 132, 139.

2, See case last cited.

3, Hosford v. Rowe, 41 Minn. 245. As to declarations of testator in general, see secs. 492 *et seq. infra.*

4, See case last cited.

§ 333. General rules on the subject.— There is no particular limitation as to the form of the declaration. It may be in public or private writings or books.[1] Although the statement has often been made that the declaration must be written, and although in

most of the cases the declaration has been in that form, yet by the clear weight of authority it may consist of mere verbal statements, if the other conditions are complied with. These are matters which affect the weight rather than the admissibility of the evidence. The legal incidents of the declaration are the same, whether it is oral or in writing.[2] By the weight of authority an entry charging liability on the part of the declarant is admissible, although such entry is the only evidence of the charge of which it shows the subsequent liquidation.[3] In order to be admissible the declaration must have been made while the interest continued.[4] The fact to be proved need not be expressly stated. Several cases are illustrations of the principle that the main fact to be proved may be inferred from the facts stated. Thus, an entry of payment for drawing a paper was admitted to prove that the paper was really executed subsequent to the time it bore date;[5] and entries of payment for rentals, made by agents, have been received as evidence establishing the *right to property* in behalf of the principal.[6] So if there are living witnesses who might testify to the facts contained in the declaration, this does not exclude the statement, but only affects the weight to be given it.[7]

1. 1 Greenl. Ev. sec. 150 and cases; Clapp v. Engledow, 72 Tex. 252, inventory; Bingham v. Hiland, 53 Hun (N.

Y.) 631, bank reports. But in Framingham Manfg. Co. v. Barnard, 2 Pick. 532, letters were refused admission.

2, Edie v. Kingsford, 14 C. B. 763; R. v. Birmingham, 31 L. J. (M. C.) 63; Stapylton v. Clough, 2 El. & B. 933; Fursdon v. Clogg, 10 M. & W. 572; Coleman v. Frazier, 4 Rich. L. (S. C.) 147; White v. Choteau, 10 Barb. (N. Y.) 202; County of Mahaska v. Ingalls, 16 Iowa 81, full discussion of the authorities in the opinion by Judge Dillon.

3, See note, 2 Smith L. C. 371; Steph. Ev. art. 28; Tayl. Ev. sec. 675–676. But see, Doe v. Vowles, 1 Moody & Rob. 261.

4, Crease v. Barrett, 1 Cromp., M. & R. 925.

5, Doe v. Robson, 15 East 32.

6, Barry v. Bebbington, 4 T. R. 514.

7, Middleton v. Melton, 10 Barn. & C. 317.

§334. Dying declarations. — Another instance in which declarations in the nature of hearsay are received as evidence, although not made under oath or tested by cross-examination, is where the statements are of the character known as dying declarations. In the sense here used, these are declarations made by the victim in cases of homicide, where the death of the deceased is the subject of the charge and the circumstances and cause of the death are the subject of the dying declarations.[1] Although declarations of this character are clearly hearsay, yet there are considerations which have properly led the courts to make some discrimination in their favor. The declarations are made under the sense of impending death and when there is comparatively little temptation on

the part of the declarant to falsify. Moreover the declarant may be the only witness beside the accused that has any knowledge of the facts and, if this be so, the murderer may escape if such declarations are rejected.[1] But since these declarations are in the nature of pure hearsay and are open to the objections which may be urged against that class of testimony, the limitations subject to which they are received must be carefully observed. It is not within the scope of this work to treat of the rules of evidence in criminal actions, except in so far as is necessary to illustrate the rules in other cases, therefore this exception to the general rule excluding hearsay will not be discussed in detail.

1. People v. Olmstead, 30 Mich. 431; Clyde Mattox v. United States, 146 U. S. 140; Starkey v. People, 17 Ill. 21; Sullivan v. State, 102 Ala. 135. See notes, 58 Am. Rep. 184–194; 34 Am. Rep. 479–482; see also, Bouvier Law Dict., title Declarations, and see also the valuable collection of cases in 28 Eng. Rep. (Moak's ed.) 592–595; 27 Fed. Rep. 621. See articles discussing the admissibility of dying declarations in 19 Cent. L. Jour. 128; 3 Crim. L. Mag. 523; 1 Am. L. Jour. 366; 70 Law Times 310; 68 Law Times 146; 12 Ch. Leg. News 157; 27 Cent. L. Jour. 31; 9 Crim. L. Mag. 453. As to evidence of threats by the accused see note, 17 L. R. A. 654–663.

2, Woodcock's Case, Leach (4th ed.) 500; Thayer Cas Ev. 354.

§ 335. Limited to cases of homicide and when made in expectation of impending death.— Although there was fo

merly some doubt as to the proposition, it is now well settled that the declarations are admissible only in cases of *homicide.*[1] Thus, they have been rejected in an indictment for administering drugs with intent to procure an abortion, although death resulted from the act,[2] as well as in a trial for perjury[3] or robbery[4] and in civil actions generally, although such actions are for the injury causing the death.[5] It is another condition that it must appear, either from the statements of the declarant or from all the circumstances of the case, that he was in *actual danger of death*, and that he had *no hope of recovery at the time* the declarations were made.[6] Even a slight hope of recovery entertained by the declarant at the time excludes the declarations.[7] But a prior hope of recovery, which had been abandoned,[8] or a subsequent hope of recovery does not necessarily render the declarations incompetent.[9] It is a preliminary question for the court to determine whether the declarations were made without hope of recovery. But of course, if admitted, the question of credibility is for the jury as in other cases.[10] The preliminary evidence for the court may be given in the presence of the jury.[11] The essential condition is that the declarations should be made with the expectation of speedy death. If this condition is satisfied, the testimony is not excluded, although it appears that the *death did not ensue*

for a considerable time. In most reported cases, however, where such evidence has been received, the death has followed within a few hours or days.[12] And it has been held that one in fear of death may reaffirm statements made before fear of death became imminent.[13] Although it must be shown that the declaration was made under the expectation of impending death, this fact *need not appear from the declaration* itself, but may be inferred from other statements of the deceased or from all the surrounding circumstances.[14]

1, Rex v. Mead, 2 Barn. & C. 605; Reynolds v. State, 68 Ala. 502; Hudson v. State, 3 Coldw. (Tenn.) 355; Lieber v. Com., 9 Bush (Ky.) 13; Hill v. State, 41 Ga. 484; Wilson v. Boerem, 15 Johns. 286; State v. Boban, 15 Kan. 407; Barnett v. People, 54 Ill. 325; State v. Harper, 35 Ohio St. 78; 35 Am. Rep. 596; Montgomery v. State, 80 Ind. 338; 41 Am. Rep. 815; State v. McCanon, 51 Mo. 160; Wright v. State, 41 Tex. 246; People v. Davis, 56 N. Y. 95; Railing v. Com., 110 Pa. St. 100; State v. Furney, 41 Kan. 115; Testard v. State, 26 Tex. App. 260; Cohn v. State, 27 Tex. App. 709; People v. Fong Ah Sing, 70 Cal. 8; Best Ev. sec. 505; 1 Greenl. Ev. sec. 156.

2, Rex v. Mead, 2 Barn. & C. 605; People v. Davis, 56 N. Y. 95; State v. Harper, 35 Ohio St. 78; 35 Am. Rep. 596. Contra, Peoples v. Com., 87 Ky. 487. Although they are admissible in an action for manslaughter caused by an attempted abortion, State v. Dickinson, 41 Wis. 299; State v. Baldwin, 79 Iowa 714.

3, Rex v. Mead, 2 Barn. & C. 605.

4, Rex v. Lloyd, 4 Car. & P. 233.

5, Wilson v. Boerem, 15 Johns. 286; Daily v. New Haven Ry. Co., 32 Conn. 356; 87 Am. Dec. 176; Waldele v. New York C. Ry. Co., 19 Hun (N. Y.) 69; Marshall v. Chicago Ry. Co., 48 Ill. 475; 95 Am. Dec. 561; Jackson v. State, 50 Ala. 456.

6, Reg. v. Morgan, 14 Cox Cr. C. 337; Jordan v. State, 81 Ala. 20; People v. Gray, 61 Cal. 164; Moeck v. People, 100 Ill. 242; 39 Am. Rep. 38; State v. Elliot, 45 Iowa 486; Doolin v. Com., (Ky) 27 S. W. Rep. 1; Com. v. Roberts, 108 Mass. 296; Com. v. Haney, 127 Mass. 455; State v. Cantieny, 34 Minn. 1; State v. Mathes, 90 Mo. 571; Brotherton v. People, 75 N. Y. 159; State v. Blackburn, 80 N. C. 474; Alison v. Com., 99 Pa. St. 17; State v. Patterson, 45 Vt. 308; 12 Am. Rep. 200; People v; Hawes, 98 Cal. 648; Fulcher v. State, 28 Tex. App. 465; Shell v. State, 88 Ala. 14; Archibald v. State, 122 Ind. 122; People v. Callaghan, 4 Utah 49; Hall v. Com., (Va.) 15 S. E. Rep. 517; State v. Nelson, 101 Mo. 464; State v. Bradley, (S. C.) 13 S. E. Rep. 315; State v. Murdy, 81 Iowa 603; Crump v. Com., (Ky.) 20 S. W. Rep. 390; State v. Johnson, 118 Mo. 491.

7, People v. Hodgdon, 55 Cal. 72; 36 Am. Rep. 30; Com. v. Roberts, 108 Mass. 296; Rex v. Crockett, 4 Car. & P. 544; 19 E. C. L. 641. But see, McQueen v. State, (Ala.) 15 So. Rep. 824, and State v. Evans, 124 Mo. 397, where deceased at the time of making the declaration also sent for a doctor. 3 Russ. Crimes (9th Am. ed.) 252.

8, Mockabee v. Com., 78 Ky. 380; Swall v. Com., 91 Pa. St. 304; State v. McEvoy, 9 S. C. 208.

9, State v. Kilgore, 70 Mo. 546; Swisher v. Com., 26 Gratt. (Va.) 963; 21 Am. Rep. 330; State v. Reed, 53 Kan. 767.

10, Com. v. Roberts, 108 Mass. 296; Kehoe v. Com., 85 Pa. St. 127; Owens v. State, 59 Miss. 547; State v. Baldwin, 79 Iowa 714; Roten v. State, 31 Fla. 514; State v. Johnson, 118 Mo. 491; 1 Greenl. Ev. sec. 160.

11, People v. Smith, 104 N. Y. 491; 58 Am. Rep. 537; State v. Murdy, 81 Iowa 603; Sullivan v. Com., 93 Pa. St. 284. See also, Starkey v. People, 17 Ill. 17.

12, R. v. Bernadotte, 11 Cox Cr. C. 316, three weeks; State v. Nocton, 121 Mo. 537; Baxter v. State, 15 Lea (Tenn.) 1657, sixteen days; Jones v. State, 71 Ind. 66, fourteen days; Com. v. Cooper, 5 Allen 495; 81 Am. Dec. 762, seventeen days; Million v. Com., (Ky.) 25 S. W. Rep.

1059; Miller v. State, 27 Tex. App. 63; State v. Wensel, 98 Mo. 137; State v. Jones, (Iowa) 56 N. W. Rep. 427; Hussey v. State, 87 Ala. 121; State v. Banister, 35 S. C. 290, declarations made two months before death; Baulden v. State, (Ala.) 15 So. Rep. 341; Roscoe Crim. Ev. 10th Ed. 37.

13, Snell v. State, 29 Tex. App. 236; 25 Am. St. Rep 723 and note; People v. Crews, 102 Cal. 174; Million v. Com., (Ky.) 25 S. W. Rep. 1059; Johnson v. State, 102 Ala. 1; State v. Evans, 124 Mo. 397.

14, Ward v. State, 78 Ala. 441; Kehoe v. Com., 85 Pa. St. 127; People v. Smith, 104 N. Y. 491; 58 Am. Rep. 537; Donnelly v. State, 26 N. J. L. 601; Swisher v. Com., 26 Gratt. (Va.) 963; 21 Am. Rep. 330; Owens v. State, 59 Miss. 547; Dixon v. State, 13 Fla. 636; Smith v. State, 9 Humph. (Tenn.) 9; State v. Cantieny, 34 Minn. 1; State v. Elliot, 45 Iowa, 486; State v. Johnson, 76 Mo. 121; Jones v. State, 71 Ind. 66; Starkey v. People, 17 Ill. 17; State v. Evans, 124 Mo 397; People v. Glenn, 10 Cal. 32; McHargue v. Com., (Ky.) 23 S. W. Rep. 349; Com. v. Haney, 127 Mass. 455; State v. Cronin, 64 Conn. 293.

§ 336. Declarant must have been competent to testify.— If the declarant could not have been a competent witness while living, his dying declarations will not be received; for example, in those states where infamy is a disqualification, the dying declarations of those convicted of burglary, larceny, robbery and the like will be rejected.[1] But the dying declarations of a *wife or husband* are admissible against each other on the principle that the testimony of one is admissible against the other when the complaint is of violence by the accused against the person of the other.[2] On the same principle the dying declarations of an insane person,[3] or of a

child of too tender age to be a competent witness,[4] or of one incapable of understanding his statements by reason of partial unconsciousness[5] are incompetent. As bearing upon the credibility of the statements, the *bad character* of the declarant may be shown.[6] So it may be shown that he had *no belief in future punishment;*[7] or that he had made *contradictory* or inconsistent *statements,*[8] or that the declarant was in a reckless or irreverent state of mind or actuated by malicious motives.[9] But when proof is offered to impeach the declarant, it is of course competent for the prosecution to *rebut* such evidence.[10]

1, The King v. Drummond, Leach (4th ed.) 337; Thayer Ev. 353; Walker v. State, 39 Ark. 221; State v. Williams, 67 N. C. 12; 1 Greenl. Ev. sec. 159.

2, Moore v. State, 12 Ala. 764; 46 Am. Dec. 276; State v. Belcher, 13 S. C. 459; People v. Green, 1 Den. 614.

3, Bolin v. State, 9 Lea (Tenn.) 516.

4, Rex v. Pike, 3 Car. & P. 598.

5, Binfield v. State, 15 Neb. 484; Mitchell v. State, 71 Ga. 128; Hugh v. State, 31 Ala. 317. But see, Com. v. Silcox, 161 Pa. St. 484.

6, State v. Thomas, 1 Jones (N. C.) 274; State v. Blackburn, 80 N. C. 474; Nesbit v. State, 43 Ga. 238; People v. Knapp, 1 Edm. Sel. Cas. (N. Y.) 577.

7, Hill v. State, 64 Miss. 431; State v. Elliott, 45 Iowa 486; People v. Chin Mook Sow, 51 Cal. 597; People v. Sanford, 43 Cal. 29; State v. Ah Lee, 8 Ore. 214; Goodal v. State, 1 Ore. 333; 80 Am. Dec. 396; Nesbit v. State, 43 Ga. 238; Walker v. State, 39 Ark. 220; Donnelly v. State, 24 N. J. L. 463.

8, Battle v. State, 74 Ga. 101; People v. Lawrence, 21

Cal. 368; Hurd v. People, 25 Mich. 405; Felder v. State, 23 Tex. App. 477; 59 Am. Rep. 777.

9, Tracy v. People, 97 Ill. 101; 3 Russ. Cr. (9th Am. ed.) 272.

10, See cases cited in note 6 *supra*.

§ 337. Declarations must be confined to the homicide.— Under the principle already stated that the declarations must point distinctly to the cause of death and the circumstances producing and attending it, declarations as to previous threats,[1] or as to a prior state of feeling,[2] or that he called the attention of witnesses to the fact that he was unarmed[3] cannot be admitted. But the name of the offender and of the declarant may be proved by such declarations.[4] Mere *statements of opinion* which would not be received if the declarant were a witness are inadmissible.[5] But it has been held that a statement that the accused had no provocation or cause for the commission of the offense, that is, that it was intentional, is a statement of fact and not a mere opinion.[6] It is obvious that the declarations of a person may be received when they are made under such circumstances as to form part of the *res gestae*, although no foundation is laid for their admission as dying declarations.[7]

1, Jones v. State, 71 Ind. 66; State v. Draper, 65 Mo. 335; 27 Am. Rep. 287; Merrill v. State, 58 Miss. 65; State v. Wood, 53 Vt. 560.

2, Ben v. State, 37 Ala. 103; Jones v. State, 71 Ind. 66; Reynolds v. State, 68 Ala. 502.

3, State v. Eddon, 8 Wash. 292.

4, Boyle v. State, 105 Ind. 469; 55 Am. Rep. 218; Sylvester v. State, 71 Ala. 17; State v. Johnson, 76 Mo. 121; Lister v. State, 1 Tex. App. 739.

5, People v. Wasson, 65 Cal. 538; Montgomery v. State, 80 Ind. 338; 41 Am. Rep. 815; Brotherton v. People, 75 N. Y. 159; Reynolds v. State, 68 Ala. 502; Warren v. State, 9 Tex. App. 629; 35 Am. Rep. 745; Walker v. State, 39 Ark. 221; State v. Draper, 65 Mo. 335; 27 Am. Rep. 287; Ratteree v. State, 53 Ga. 570; Savage v. State, 18 Fla. 909; People v. Olmstead, 30 Mich. 431; Moeck v. People, 100 Ill. 242; 39 Am. Rep. 38; Collins v. Com., 12 Bush, (Ky.) 271. But see, Wroe v. State, 20 Ohio St. 460; State v. Gile, 8 Wash 12.

6, Wroe v. State, 20 Ohio St. 460; Boyle v. State, 105 Ind. 469; 55 Am. Rep. 218; Payne v. State, 61 Miss. 161; State v. Nettelbush, 20 Iowa 257; People v. Abbott, (Cal.) 4 Pac. Rep. 769; Sullivan v. State, (Ala.) 15 So. Rep. 264.

7, People v. Brown, 59 Cal 345; Stagner v. State, 9 Tex. App. 440; State v. Porter, 34 Iowa 131; State v. Wagner, 61 Me. 178; Burns v. State, 61 Ga. 192; Com. v. Hackett, 2 Allen 136; Wilkinson v. State, 91 Ga. 729.

§338. Form of the declaration — General rules.— It is not necessary that the declarations should be made in any particular form. While they are generally oral, they may be in writing or by means of signs.[1] When the declarations are *reduced to writing* and signed by the declarant, it is generally held that the writing is the *best evidence* and must be produced.[2] But a different rule obtains when the statement is not read to or signed by the declarant;[3] and the fact that

a written statement has been made does not exclude *prior* or *subsequent* oral declarations, if the written statement cannot be produced.[4] If the declarations are otherwise competent, they should not be rejected on the ground that they have been drawn out by *leading questions*,[5] or because they do not give all of the facts making up the transaction to which they refer.[6] It was well settled that before the adoption of the state constitutions in this country dying declarations were admissible in cases of homicide; hence such declarations are not now excluded by those clauses which secure to the accused in criminal prosecutions the right "to meet the witnesses face to face."[7]

1, Jones v. State, 71 Ind. 66; Com. v. Casey, 11 Cush. 417; 59 Am. Dec. 150; Reg. v. Morgan, 14 Cox Cr. C. 337; 28 Eng. Rep. (Moak's ed.) 583.

2, State v. Sullivan, 51 Iowa 142; State v. Tweedy, 11 Iowa 350; People v. Glenn, 10 Cal. 32; Collier v. State, 20 Ark. 36. See also, State v. Patterson, 45 Vt. 308; 12 Am. Rep. 200; Krebs v. State, 8 Tex. App. 1; Com. v. Haney, 127 Mass. 455.

3, State v. Fraunburg, 40 Iowa 555; Allison v. Com., 99 Pa. St. 17; Anderson v. State, 79 Ala. 5.

4, Rex v. Reason and Trauter, 1 Str. 499; State v. Patterson, 45 Vt. 308; 12 Am. Rep. 200; 1 Greenl. Ev. sec. 161.

5, Com. v. Casey, 11 Cush. 417; 59 Am. Dec. 150; Com. v. Haney, 127 Mass. 455; State v. Foot Yow, 24 Ore 61; Vass v. Com., 3 Leigh (Va.) 786; 24 Am. Dec. 695; North v. People, 139 Ill. 81; Ingram v. State, 67 Ala. 67; Jones v. State, 71 Ind. 66; People v. Sanchez, 24 Cal. 17; People v. Callaghan, 4 Utah 49; State v. Wilson, 24 Kan. 189; 36 Am. Rep. 257; State v. Trivas, 32 La. An. 1086;

36 Am. Rep. 293; Rex v. Fagent, 7 Car. & P. 238; White v. State, 30 Tex. App. 652.

6, State v. Patterson, 45 Vt. 308; 12 Am. Rep. 200; State v. Giroux, 26 La. An. 582. But see, State v. Johnson, 118 Mo. 491, where it was held that a part was inadmissible, unless the omitted parts were irrelevant. Contra, Sullivan v. State, 102 Ala. 135.

7, State v. Dickinson, 41 Wis. 299; Com. v. Cary, 12 Cush. 246; People v. Green, 1 Den. 614; State v. Vansant, 80 Mo. 67; State v. Tilghman, 11 Ired. (N. C.) 513; Walston v. State, 16 B. Mon. (Ky.) 15; Robbins v. State, 8 Ohio St. 131.

§ 339. Evidence of witnesses given in former action or on former trial.—The most serious objections to the admission of hearsay evidence in general are that no opportunity has been given for the cross-examination of the declarant, and that his statements were made without the sanction of an oath. In those cases where these objections are removed, there is good reason for the relaxation of the strict rule forbidding hearsay testimony. It has long been settled as one of the exceptions to the general rule excluding hearsay that the testimony of a witness given in a former action or at a former stage of the same action is competent in a subsequent action or in a subsequent proceeding in the same action, where it is shown that the *witness is dead* and that the *parties and questions in issue are substantially the same.*[1]

1, Clealand v. Huey, 18 Ala. 343; Lane v. Brainerd, 30 Conn. 565; Letcher v. Norton, 5 Ill. 575; Schindler v. Milwaukee Ry. Co., 87 Mich. 400; Ephraims v. Murdock, 7

Blackf. (Ind.) 10; Packard v. McCoy, 1 Iowa 530; Conway v. Erwin, La An. 391; Ruch v. Rock Island, 97 U. S. 693; Berg v. McLafferty, (Pa.) 12 At. Rep. 460; Watson v. Lisbon, 14 Me. 201; Calvert v. Cox, 1 Gill (Md.) 95; Breeden v. Feurt, 70 Mo. 624; Reynolds v. United States, 98 U. S. 145; Harper v. Burrow, 6 Ired. (N. C.) 30; Jackson v. Lawson, 15 Johns. 539; Osborn v. Bell, 5 Den. 370; 49 Am. Dec. 275; Parker v. Legett, 12 Rich. (S. C.) 198; Mathewson v. Sargent, 36 Vt. 142. But the rule forbidding the introduction of evidence from a former trial does not apply when it is introduced for the purpose of impeaching witnesses, Lohr v. Philipsburg, 165 Pa. St. 109.

§340. Exact identity of the parties not necessary.—In view of the reasons for this relaxation of the rule, it is not necessary that there should be exact identity of parties in the two proceedings. Where the right to cross-examine the deceased witness existed, it is enough if in the second proceeding there is *privity of interest*. "The rule is that such evidence is proper, not only when the point in issue is the same in a subsequent suit between the same parties, but also for or against persons standing in the relation of privies in blood, privies in estate or privies in law."[1] Thus in an action concerning land, the testimony of plaintiff's grantor, since deceased, which was given against defendant's grantor may be admitted in a subsequent proceeding on the same issue.[2] The same rule applies when the present action is by a survivor of the partners who brought the former action,[3] or by successors in interest or assignees;[4] or where

the former action was against one of two administrators and the pending action is against both, since they are privies in law and one represents the other;[5] or where the former action was by the agent of parties in the present suit, the other parties and the issues being the same.[6]

1, Jackson v. Lawson, 15 Johns. 539. See also cases cited below.

2, Yale v. Comstock, 112 Mass. 267.

3, Wilbur v. Selden, 6 Cow. 162. See note, 38 Am. Dec. 481.

4, Doe v. Derby, 1 Adol. & Ell. 783, 791 and note; Wright v. Tatham, 1 Adol. & Ell. 3.

5, Bondereau v. Montgomery, 4 Wash. C. C. 186.

6, Ritchie v. Lyne, 1 Call (Va.) 489.

§ 341. Parties should be substantially the same or in privity. — On the same principle it has been held that where an action was brought against a railroad company for personal injury, the testimony of the plaintiff might be used by her child in an action against the company after the injury had resulted in the death of the former plaintiff.[1] The testimony will not necessarily be rejected, although there were other parties to the record in the former proceeding, when the issues are substantially the same and the parties affected by the second suit had the opportunity to cross-examine the witnesses.[2] But the parties must be substantially the same.

Thus, the testimony of a deceased witness in an action by one tenant in common is not admissible in an action by another tenant in common, although the same land is in question.[3] The parties are not the same in this sense, where one proceeding is against an administrator, and the second is against the sureties on his bond.[4] On the same principle an agreed statement of facts between parties in the former suit is not admissible in the second suit, unless the parties are the same or privies.[5] It is no objection to the testimony, where the parties are the same, that the testimony offered by one is that of a witness who, on the former trial, was the witness of the other party.[6]

1, Atlanta Ry. Co. v. Venable, 67 Ga. 697; Indianapolis Ry. Co. v. Stout, 53 Ind. 143.

2, Philadelphia, W. & B. Ry. Co. v. Howard, 13 How. 307; Doe v. Tatham, 1 Adol. & Ell. 3. Such testimony, however, was refused where the issues were changed by an amendment to the complaint, Shindler v. Milwaukee Ry. Co., 87 Mich. 400.

3, Norris v. Monen, 3 Watts (Pa.) 465. So where the relationship of father and son existed, there being no privity of estate, Morgan v. Nicholl, L. R. 2 C. P. 117.

4, Fellers v. Davis, 22 S. C. 425.

5, Frye v. Gregg, 35 Me. 29.

6, Hudson v. Roos, 76 Mich. 173.

§ 342. **Form of proceedings may be different.** — If the parties and the issues are the same in each case, it is not necessary to

the admission of the testimony that the form of the second proceeding should be the same as that of the first. For example, the defendants in one action may be the plaintiffs in the other.[1] The admission of the testimony of the deceased witness is not confined to appeals or new trials in the ordinary courts of law. Thus, where *commissioners* are a duly constituted tribunal to determine disputes relative to land or other subjects, the testimony of a witness, since deceased, given before them, is competent in a later proceeding in court.[2] On the same principle if the former proceeding was before *arbitrators* having jurisdiction, such testimony is admissible on a trial in court.[3] Likewise such testimony given in a *preliminary examination* on a criminal charge, may be admitted at the trial.[4] But if the testimony is given before a tribunal which cannot enforce the attendance of witnesses or administer oaths, a different rule applies.[5] Nor is the testimony of a witness given at a *coroner's inquest* admissible, under this exception, in a subsequent action, as the inquest is not a judicial proceeding between the same parties.[6] Nor is the testimony of the deceased witness admissible, if under the existing statutes such testimony would be incompetent if he were living.[7]

1, Yale v. Comstock, 112 Mass. 267.

2, Jackson v. Bailey, 2 Johns. 17; Cox v. Pearce, 7 Johns. 298; Forney v. Hallagher, 11 Serg. & R. (Pa.) 203; Ot-

tinger v. Ottinger, 17 Serg. & R. (Pa.) 142; Ray v. Bush, 1 Root (Conn.) 81; Lewis v. Roulo, 93 Mich. 475, appeal from justice court.

3, Calvert v. Friebus, 48 Md. 44; Bailey v. Woods, 17 N. H. 365; Walbridge v. Knipper, 96 Pa. St. 48. But see, Jessup v. Cook, 6 N. J. L. 434.

4, Davis v. State, 17 Ala. 354; State v. Hooker, 17 Vt. 658; United States v. Penn, 13 Bank. Reg. 464; State v. Stewart, 34 La. An. 1037; State v. Wilson, 24 Kan. 189; 36 Am. Rep. 257.

5, Montgomery v. Snodgrass, 2 Yeates (Pa.) 230; Parker v. Gonsalus, 1 Serg. & R. (Pa.) 526; Foster v. Shaw, 7 Serg. & R. (Pa.) 156.

6, Pittsburg Ry. Co. v. McGrath, 115 Ill. 172; Cook v. New York C. Ry. Co., 5 Lans. (N. Y.) 401; State v. Campbell, 1 Rich. L. (S. C.) 124; State v. Cecil County, 54 Md. 426; Farkas v. State, 60 Miss. 847; McLain v. Com., 99 Pa. St. 86; Whitehurst v. Com., 79 Va. 556. See also, Brown v. State, 71 Ind. 470; Mack v. State, 48 Wis. 271. Such evidence is admissible where it was reduced to writing, and the witness is since deceased, Dupree v. State, 33 Ala. 380; 73 Am. Dec. 422.

7, Eaton v. Alger, 47 N. Y. 345; Hoover v. Dillon, 11 Ohio St. 624.

§ 343. The opportunity of cross-examination on the former trial.— Although it is one of the controlling reasons for the admission of testimony of this character that in the former proceeding there has been the right of cross-examination, yet it is not to be inferred that the actual cross-examination of the witness in the former trial is a prerequisite. This was well illustrated in a New York case where, after joining issue, the defendant through neglect made default. It

was held by the court of appeals that on a second trial the testimony of a deceased witness should have been received as the defendant had, by his failure to appear and cross-examine when it was in his power, waived that privilege.[1] The view that the real test of the admissibility of the evidence is whether the party to be affected by it had the opportunity or power of cross-examining the witness has been carried to its extreme limit in a few cases where in the first proceeding the action was a criminal suit, in the name of the state, and in the second, a civil action growing out of the same facts. Thus in Wisconsin, where, under the statutes, the complainant in assault and battery has the management and control of the prosecution before the magistrate, it was held that the testimony of a witness, since deceased, given in such an action, might be proved in a subsequent civil action for damages, when the witness in the former proceeding had been cross-examined by the plaintiff's counsel.[2]

1, Bradley v. Mirick, 91 N. Y. 293. See also, State v. Wilson, 24 Kan. 189; 36 Am. Rep. 257.

2, Charlesworth v. Tinker, 18 Wis. 633. See also, Scott v. Wilson, Cooke (Tenn.) 315, malicious prosecution; Gavan v. Ellsworth, 45 Ga. 283. The mere presence of counsel is not sufficient, unless there is an opportunity for cross-examination, Jackson v. Crilley, 16 Col. 103.

§ 344. Death of the former witness — Relaxation of the rule. — Under the English common law the courts seldom, if ever,

admitted the testimony of a witness given on a former trial, except in case of his death.[1] This strictness has, however, since been modified in England by statute; and the present rule, so far as it bears on this subject, is thus stated by Mr. Stephen: "Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding or in a later stage of the same proceeding, when the witness is dead, or is mad, or so ill that he will probably never be able to travel, or is kept out of the way by the adverse party, or in civil, but not it seems in criminal, cases. is out of jurisdiction of the court, or perhaps in civil, but not in criminal, cases, when he cannot be found."[2] Although, as will be seen, there has been considerable conflict in the United States as to how far the ancient rule has been relaxed, there can be but little doubt that in this country the rule has been so far modified as to admit such testimony in at least four cases: first, *where the witness is dead;* second, where he is *insane* or *mentally incompetent;* third, where he is *beyond the seas;* fourth, where he has been *kept away by the contrivance of the opposite party.*[3] The rule has frequently been stated much more broadly. Thus, Mr. Greenleaf, in speaking of testimony of this character, says: "It is also received if the witness, though not dead, is out of the jurisdiction, or cannot be found

after diligent search, or is insane or sick and unable to testify or has been summoned, but appears to have been kept away by the adverse party."[4] In harmony with this view such testimony has been admitted when the witness was unable to testify by reason of *sickness*[5] or *advanced age;*[6] or where he was absent from the jurisdiction of the court, that is, *in another state;*[7] or where the witness was a public officer and away on official business,[8] or where, since the former trial, the witness has become incompetent by reason of *conviction of an infamous crime.*[9] But the mere fact that a witness has forgotten the facts testified to on a former trial does not authorize the admission of the former testimony.[10]

1, 1 Phill. Ev. 337; Best Ev. sec. 496. See also, Le Baron v. Crombie, 14 Mass. 234.

2, Steph. Ev. art. 32; Town of Walkerton v. Erdman, 23 Can. Sup. 352.

3, Drayton v. Wells, 1 Nott & McC. (S. C.) 409; 9 Am. Dec. 718; Howard v. Patrick, 38 Mich. 795; Cook v. Stout, 47 Ill. 530; Rothrock v. Gallaher, 91 Pa. St. 108; Marler v. State, 67 Ala. 55, 42 Am. Rep. 95; Radclyffe v. Barton, 161 Mass. 327; Whiteaker v. Marsh, 62 N. H. 477; St. Louis Ry. Co. v. Sweet, 60 Ark. 550.

4, 1 Greenl. Ev. sec. 163; Rex v. Eriswell, 3 T. R. 707; Howard v. Patrick, 38 Mich. 795.

5, Miller v. Russell, 7 Mart. N. S. (La.) 266; Perrin v. Wells, 155 Pa. St. 299.

6, Thornton v. Britton, 144 Pa. St. 126.

7, Long v. Davis, 18 Ala. 801; Rothrock v. Gallaher, 91 Pa. St. 108; People v. Devine, 46 Cal. 45; Wilder v. St.

Paul, 12 Minn. 192; Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co., 51 Minn. 304; Shearer v. Harber, 36 Ind. 536; Dolan v. State, 40 Ark. 454; Benson v. Shotwell, (Cal.) 37 Pac. Rep. 147; Magill v. Kaufman, 4 Serg. & R. (Pa.) 317; 8 Am. Dec. 713 and note; Howard v. Patrick, 38 Mich. 795; Labor v. Crane, 56 Mich. 585; Rosenfield v. Case, 87 Mich. 295; Schindler v. Milwaukee, L. S. & W. Ry. Co., 87 Mich. 400; McTighe v. Herman, 42 Ark. 285; Omaha St. Ry. Co. v. Elkins, 39 Neb. 480; City of Omaha v. Jensen, 35 Neb. 68. But see, Stein v. Swenson, 46 Minn. 360. The rule is more strict against such testimony in criminal cases, People v. Newman, 5 Hill 295; Collins v. Com., 12 Bush (Ky.) 271; Brogg v. Com., 10 Gratt. (Va.) 722; State v. Staples, 47 N. H. 119; United States v. McComb, 5 McLean (U. S.) 289.

8, Noble v. Martin, 7 Mart. N. S. (La.) 282.

9, LeBaron v. Crombie, 14 Mass. 234. But see note to this case.

10, Stein v. Swenson, 46 Minn. 360, there being no proof of mental imbecility; Drayton v. Wells, 1 Nott & McC. (S. C.) 409; 9 Am. Dec. 718.

§ 345. Same — Absence from state — Other disability — Criminal cases. — As we have already seen there are numerous cases which favor the relaxation of the strict rule against hearsay so far as to admit proof of the former testimony of witnesses permanently absent from the state. In some of these cases it is urged that the modern method of taking down testimony by an official stenographer obviates the principal objection to the use of the evidence taken on the former trial.[1] On the other hand there is perhaps an equal array of authority holding that, where statutes allow the taking of depositions

out of the state, the proper procedure is to take the deposition of the witness, if he can be found; and that mere absence from the state is not one of the grounds for admitting testimony taken on the former trial.[2] It is urged that the facilities now afforded for taking depositions render any such relaxation of the general rules of evidence unnecessary. But the tendency of the later decisions as well as of legislation seems to be in favor of the admission of the former testimony.[3] If, as has been already stated, the witness is *beyond the seas or insane* or otherwise rendered incompetent to testify, this is a sufficient excuse.[4] If, after due diligence, the *residence* of the witness *cannot be ascertained*, this would, on the same principle, be a reason for dispensing with the rule.[5] Although the *sickness* of a witness is generally only ground for the postponement of the trial, the sickness may be of such a character as to amount to a permanent disability to testify; and in such case it would be within the reason of the rule to admit the testimony given on the former trial, and this has been recognized as an exception by English statutes.[6] In *criminal cases* a stricter rule obtains on this subject than in civil actions. It has been held in a few instances that such testimony can not be given in criminal cases, even although the witness is dead.[7] But the rule is well settled that, if the defendant in a criminal case procures the

absence of a witness, the testimony of such witness given on a former trial is competent on the principle that a party cannot thus take advantage of his own wrong. Such evidence is not repugnant to the constitutional provision that the defendent shall be confronted by the witnesses against him.[8] So also, by the weight of authority, such testimony is admissible in criminal cases when it is shown that the witness is dead.[9]

1, See cases cited under the last section. Temporary absence, where there has been no effort to subpœna the witness, is clearly insufficient, Kellogg v. Secord, 42 Mich. 318; Harris v. State, 73 Ala. 495.

2, Berney v. Mitchell, 34 N. J. L. 341; Gerhouser v. North British Ins. Co., 7 Nev. 174; Wilbur v. Selden, 6 Cow. 162; Drayton v. Wells, 1 Nott & McC. (S. C.) 409; 9 Am. Dec. 718; Crary v. Sprague, 12 Wend. 41; Kellogg v. Secord, 42 Mich. 318; Cassady v. Trustees, 105 Ill. 560; Stein v. Swenson, 46 Minn. 360; Kirchner v. Laughlin, (N. M.) 23 Pac. Rep. 175; Savannah Co. v. Flannigan, 82 Ga. 579; Gastrell v. Phillips, 64 Miss. 473; Rosenfield v. Case, 87 Miss. 295. Insufficient diligence shown, Slusser v. Burlington, 47 Iowa 300; Thompson v. State, (Ala.) 17 So. Rep. 512.

3, See cases cited in last section; also California Code sec. 1870; Texas Code Crim. Pro. secs. 2532, 2534; Iowa Code secs. 3721, 3777. The courts construe statutes allowing such testimony strictly, Baldwin v. St. Louis, K. & N. Ry. Co., 68 Iowa 37; People v. Gardner, 98 Cal. 127; People v. Gordan, 99 Cal. 227; Reynolds v. Powers, (Ky.) 29 S. W. Rep. 299; Atlanta & C. Air Line Ry. Co. v. Gravitt, 93 Ga. 369.

4, See sec. 344 *supra*.

5, Sullivan v. State, 6 Tex. App. 319; 32 Am. Rep. 580; Slusser v. Burlington, 47 Iowa 300; Shackelford v. State, 33 Ark. 539; Gunn v. Wade, 65 Ga. 537. But it devolves upon

the proponent to show that due diligence to procure the witness had been used, Young v. Sage, 42 Neb. 37; Thompson v. State, (Ala.) 17 So. Rep. 512.

6, 11 & 12 Vict. ch. 42 sec. 17; R. v. Hogg, 6 Car. & P. 176; R. v. Wilshaw, Car. & M. 145; R. v. Cockburn, 7 Cox Cr. C. 265; Fry v. Wood, 1 Atk. 445; Chase v. Springvale Mills Co., 75 Me. 156; Berney v. Mitchell, 34 N. J. L. 337; Howard v. Patrick, 38 Mich. 795. But it must be shown that the witness is unable to attend the trial, Edwards v. Edwards, (Iowa) 61 N. W. Rep 413

7, Finn v. Com., 5 Rand. (Va.) 701.

8, R. v. Scaife, 2 Den. Cr. C. 281; 17 Q. B. 238; 5 Cox 243; Reynolds v. United States, 98 U. S. 145; State v. Houser, 26 Mo. 431; Sage v. State, 127 Ind. 15. But see, Bergen v. People, 17 Ill. 426; 65 Am. Dec. 672.

9, People v. Sligh, 48 Mich. 54; LeBaron v. Crombie, 14 Mass. 233; Wilbur v. Selden, 6 Cow. 162; State v. Staples, 47 N. H. 115; 90 Am. Dec. 565; Sullivan v. State. 6 Tex. App. 313; 32 Am. Rep. 580; Collins v. Com., 12 Bush (Ky.) 271; State v. Fitzgerald, 63 Iowa 268; State v. Able, 65 Mo. 357; Brown v. Com., 73 Pa. St. 321; 13 Am. Rep. 740; United States v. Macomb, 5 McLean (U. S.) 286, full discussion by Drummond J. In the following criminal cases such evidence has been admitted still more liberally, Hurley v. State, 29 Ark. 17; Sullivan v. State, 6 Tex. App. 319; 32 Am. Rep. 580; People v. Devine, 46 Cal. 45; Shackleford v. State, 33 Ark. 530.

§346. Mode of proving former testimony — Refreshing memory. — It is not necessary that the *exact words* of the deceased witness be given. It is sufficient if the substance of the testimony can be stated. If the exact words were required, this would in effect abrogate the rule allowing secondary evidence in such cases.[1] But it is not competent to prove the legal effect of the testi-

mony.[2] Under this rule a juror, witness, stenographer, attorney or any other person who heard the testimony on the former trial and is able to state its substance may be called.[3] Under the general principles of evidence the notes of testimony taken by stenographers, judges, justices of the peace, attorneys and other officers or persons would seem to be inadmissible as evidence, on the ground that such notes are hearsay.[4] But such notes, when shown to be correct, are often used *to refresh the memory of the witness;* and in some instances they have been received as evidence of the testimony given at former trials.[5] For this purpose witnesses may refresh their memory by reading notes of the testimony taken by them;[6] and the minutes of testimony taken by the judge,[7] by attorneys,[8] stenographers and other officers of the court[9] may be received for such purpose, when their accuracy is proved; and it will be seen from some of the cases just cited that, when the accuracy of such notes was proved, they have been received, not merely to refresh the memory, but as evidence. It has been held that a *bill of exceptions* is not admissible to prove the testimony of a deceased witness. These decisions rest on the view that the bill of exceptions imports verity for the purpose of an appeal, and for no other purpose.[10] But the authorities are divided on this proposition and the view is held by high authority

that, in the nature of things, there can be no other evidence of equal or superior credit or reliability when properly authenticated. These decisions rest upon the ground that bills of exceptions are carefully prepared from the stenographer's notes of the testimony and that they have been subject to the careful inspection of lawyers and judges, thus preventing any mistake.[11] It has been held, however, that an affidavit[12] is not admissible to prove the testimony of a deceased witness. Under the prevailing practice by which testimony is taken by *stenographers* appointed by the court, the most convenient mode of proving the former testimony is to read such notes, properly authenticated. Statutes quite generally exist making the report of the stenographer admissible; and in the absence of such statutes, it may be used to refresh his memory.[13] If the testimony given on the former trial is otherwise admissible, it is no objection that new evidence has been introduced on the second trial on which there was no cross-examination at the other trial.[14] Whenever the evidence of the witness on the former trial is admissible, the evidence as stated by an interpreter may be proved in the same way.[15]

1, Thompson v. State, (Ala.) 17 So. Rep. 512; Luetgert v. Volker, 153 Ill. 385; Ruch v. Rock Island, 97 U. S. 693; State v. Fitzgerald, 63 Iowa 268; Mitchell v. State, 71 Ga. 128; Helper v. Mt. Carmel Sav. Bank, 97 Pa. St. 420; 39 Am. Rep. 813; United States v. McComb, 5 McLean

(U. S.) 286; State v. O'Brien, 81 Iowa 88. Contra, Bruie v. Carver, 73 N. C. 264. See also, Stein v. Swenson, 46 Minn. 360. In Massachusetts it must be given substantially and in all material particulars, Costigan v. Lunt, 127 Mass. 354, and cases cited.

2, Bowie v. O'Neil, 5 Harr. & J. (Md.) 226.

3, Doncaster v. Day, 3 Taunt. 262; Moore v. Moore, 39 Iowa 461, stenographer; Hutchings v. Corgan, 59 Ill. 70, juror; Com. v. McCarty, 152 Mass. 577; Wade v. State, 7 Baxt. (Tenn) 80; Ruch v. Rock Island, 97 U. S. 693; People v. Murphy, 45 Cal. 137; Yale v. Comstock, 112 Mass. 267; Helper v. Mt. Carmel Bank, 97 Pa. St. 420; 39 Am. Rep. 813; Black v. Woodrow, 39 Md. 194; Emery v. Fowler, 39 Me. 326; 63 Am. Dec. 627; Earl v. Tupper, 45 Vt. 275, attorney; Costigan v. Lunt, 127 Mass. 354, attorney. And it seems that if counsel agree on the testimony, the identification by oath is unnecessary, Jackson v. Jackson, 47 Ga. 99; Earl v. Tupper, 45 Vt. 275; Nutt v. Thompson, 69 N. C. 548; Coughlin v. Haenssler, 50 Mo. 126; Rhine v. Robinson, 27 Pa. St. 30; Clark v. Vorce, 15 Wend. 193; 30 Am. Dec. 53; Jones v. Ward, 3 Jones L. (N. C.) 24; 64 Am. Dec. 590; Davis v. Kline, 96 Mo. 401.

4, Drayton v. Wells, 1 Nott & McC. (S. C.) 409; Smith v. State, 42 Neb. 356; Elberfeldt v. Waite, 79 Wis. 284; Reg. v. Child, 5 Cox Cr. C. 197; Schafer v. Schafer, 93 Ind. 586; Miles v. O'Hara, 4 Binn. (Pa.) 108; Huff v. Bennett, 4 Sandf. (N. Y.) 120. See article in 26 Cent. L. Jour. 311 on the general subject of refreshing memory by memoranda.

5, Yale v. Comstock, 112 Mass. 267; Labar v. Crane, 56 Mich. 585; Ashe v. De Rossett, 5 Jones L. (N. C.) 299, notes of an attorney; Philadelphia Ry. Co. v. Spearen, 47 Pa St. 300; Huff v. Bennett, 4 Sandf. (N. Y.) 120; People v. Sligh, 48 Mich. 54.

6, Costigan v. Lunt, 127 Mass. 354; Rounds v. State, 57 Wis. 45, stenographer's notes taken at preliminary hearing; Lipcomb v. Lyon, 19 Neb. 511.

7, R. v. Gazard, 8 Car. & P. 595; Whitcher v. Morey, 39 Vt. 459; Yale v. Comstock, 112 Mass. 267; Chase v. Debolt, 7 Ill. 571.

8, Clark v. Vorce, 15 Wend. 193; 30 Am. Dec. 53; Philadelphia & R. Ry. Co. v. Spearen, 47 Pa. St. 300; 86 Am. Dec. 544; Johnson v. Powers, 40 Vt. 611; Carpenter v. Tucker, 98 N. C. 316. But see, Lightner & Wike, 4 Serg. & R. (Pa.) 203.

9, Stewart v. First Nat. Bank, 43 Mich. 257; Rhine v. Robinson, 27 Pa. St. 30; Yale v. Comstock, 112 Mass. 267; Sage v. State, 127 Ind. 15; Quin v. Halbert, 57 Vt. 178; Lipcomb v. Lyon, 19 Neb. 511; Rounds v. State, 57 Wis. 45; People v. Chung Ah Chue, 57 Cal. 567.

10, Kankakee Ry. Co. v. Horan, 131 Ill. 288; Roth v. Smith, 54 Ill. 431; Stern v. People, 102 Ill. 540; Odell v. Solomon, 55 N. Y. S. 410; Simmons v. Spratt, 22 Fla. 370; Kirk v. Mowry, 24 Ohio St. 581; Fisher v. Fisher, 131 Ind. 462; Sargeant v. Marshall, 38 Ill. App. 642. Contra, Rice Mining Co. v. Musgrave, 14 Col. 79; Franklin v. Gumersell, 11 Mo. App. 306.

11, Wilson v. Noonan, 35 Wis. 321, 345; Woollen v. Wire, 110 Ind. 251; Case v. Blood, 71 Iowa 632; Slingerland v. Slingerland, 46 Minn. 100, case on appeal.

12, Hudson v. Applegate, 87 Iowa 605. As to an agreed statement of facts see, Dwyer v. Rippetoe, 72 Tex. 520; Dwyer v. Bassett, 1 Tex. App. 513; Lathrop v. Atkinson, 87 Ga. 339.

13, See cases above cited.

14, Easton Bank v. Wirebach, 106 Pa. St. 37.

15, Schearer v. Harber, 36 Ind. 536. See note, 17 L. R. A. 813; also sec. 265 *supra*.

CHAPTER 11.

RES GESTAE.

§ 347. Res gestae — Meaning of the term — Illustrations. — When declarations or acts accompany the fact in controversy and tend to illustrate or explain it, they are treated, not as hearsay, but as original evidence, in other words, as part of the *res gestae*. Thus, conversations contemporaneous with the facts

in controversy and explaining such facts are admissible.[1] In the celebrated case in which Lord George Gordon was on trial for treason, the cries of the mob which accompanied the defendant during the acts complained of were received for the purpose of showing that his intentions were unlawful and treasonable.[2] On the same principle, the complaints and statements of an injured party made at the time of the occurrence both as to bodily suffering and the circumstances of the occurrence are admissible.[3] So the declarations and conduct of third persons at the very time of an accident or injury which they witness are admissible.[4] Other illustrations are: Statements as to the conditions of an execution sale,[5] declarations of a party at the time of taking possession of personal property as to the nature of his possession,[6] statements of an officer and of other persons interested made at the time of levying on property,[7] declarations accompanying the payment of money, to show the purpose or application of the payment,[8] statements of a grantor at the time of making a conveyance,[9] declarations of a person at the time of making an entry upon land, explaining the character and purpose of such entry,[10] statements made by a bondsman when he signed a bond[11] and statements of the parties to a sale of personal property made at the time of sale, when such statements bear upon

the question of good faith or other fact in issue.[12] In an action for alienating the affections of a wife, the defendant may show, as part of the *res gestae*, the former acts and declarations of the wife showing maltreatment on the part of the husband.[13] So in an action by a bailor against the bailee for loss by his negligence, the declarations by the bailee contemporaneous with the loss are admissible in his favor to show the nature of the loss.[14] Where the consideration of a mortgage is in issue, all that was said and done by the parties in the course of their negotiations and as part of the agreement is admissible.[15]

1, Stewart v. Brown, 48 Mich. 383; International & G. N. Ry. Co. v. Anderson, 82 Tex. 516; 27 Am. St. Rep. 902 and note; Mack v. State, 48 Wis. 271; State v. Mason, 112 Mo. 374; 34 Am. St. Rep. 390; Bragg v. Massie, 38 Ala. 89; 79 Am. Dec. 82; Brockett v. New Jersey Co., 18 Fed. Rep. 156; Earle v. Earle, 11 Allen 1; Weir v. Borough of Plymouth, 148 Pa. St. 566; Chick v. Sisson, 95 Mich. 412; Spencer v. New York & N. E. Ry. Co., 62 Conn. 242. For illustrations of facts that have been held to be part of the *res gestae* see notes, 93 Am. Dec. 279; 10 Am. St. Rep. 306; 16 Am. St. Rep. 22, 407; 27 Am. St. Rep. 907; 29 Am. St. Rep. 865; and elaborate notes, 95 Am. Dec. 51–76; 19 L. R. A. 733–752. See also articles in 48 Law Times 272; 40 Cent. L. Jour. 167; 2 Intercoll. L. Jour. 51, 224; 30 Week. L. Bull. 309, 329; 29 Cent. L. Jour. 387; 17 Week. L. Bull. 209; see also articles and notes cited under sec. 299 *supra*.

2, R. v. Gordon, 21 How. St. Tr. 514.

3, Aveson v. Kincaid, 6 East 188; Entwhistle v. Feighner, 60 Mo. 214; Harriman v. Stowe, 57 Mo. 93; Elkins v. Mc-

Kean, 79 Pa. St. 493; Little Rock Ry. Co. v. Leverett, 48 Ark. 333; 3 Am. St. Rep. 230; Waldele v. New York C. Ry. Co., 95 N. Y. 274; 47 Am. Rep. 41; Hall v. Accident Association, 86 Wis. 518; Louisville Ry. Co v. Buck, 116 Ind. 566; 9 Am. St. Rep. 883; Leahey v. Cass Ave. Ry. Co., 97 Mo. 165; 10 Am. St. Rep. 300. See also sec. 352 *infra*.

4, Galena Ry. Co. v. Fay, 16 Ill. 558; 63 Am. Dec. 323; Mobile Ry. Co. v. Ashcraft, 48 Ala. 15; Indianapolis Ry. Co. v. Anthony, 43 Ind. 183; Missouri Pac. Ry. Co. v. Collier, 62 Tex. 318; State v. Walker, 78 Mo. 380; State v. Middleham, 62 Iowa 150; Kleiber v. People's Ry. Co., 107 Mo. 240. See also, Travelers Ins. Co. v. Sheppard, 85 Ga. 751; Lake Shore & M. S. Ry. Co. v. Herrick, 49 Ohio St. 25.

5, Arnold v. Gorr, 1 Rawle (Pa.) 223.

6, State v. Schneider, 35 Mo. 533.

7, Pierson v. Hoag, 47 Barb. (N. Y.) 243; Grandy v. McPherson, 7 Jones L. (N. C.) 347; Arnold v. Gorr, 1 Rawle (Pa.) 223; Johnston v. Hamburger, 13 Wis. 175.

8, Bank of Woodstock v. Clark, 25 Vt. 308.

9, Gamble v. Johnston, 9 Mo. 597; Palter v. McDowell, 31 Mo. 62; Badger v. Story, 16 N. H. 168; Cheswell v. Eastham, 16 N. H. 296; Kent v. Harcourt, 33 Barb. (N. Y.) 491.

10, Robinson v. Swett, 3 Greenl. (Me.) 316; 3 Black. Com. 174.

11, State v. Gregory, 132 Ind. 387.

12, Dale v. Gower, 24 Me. 563; Haight v. Hayt, 19 N. Y. 464; Banfield v. Parker, 36 N. H. 353.

13, Rudd v. Rounds, 64 Vt. 432.

14, Doorman v. Jenkins, 2 Adol. & Ell. 256; Thompkins v. Saltmarsh, 14 Serg. & R. (Pa.) 275; Beardslee v. Richardson, 11 Wend. 25; 25 Am. Dec. 596; Frink v. Coe, 4 G. Greene (Iowa) 555; 61 Am. Dec. 141.

15, Colt v. McConnell, 116 Ind. 249.

§ 348. Mere narrations not admissible. — Whether a statement or act is or is not a part of the *res gestae* depends wholly upon the facts of each case; and it is therefore difficult, if not impossible, to frame any satisfactory definition of the term *res gestae*. But there are certain well recognized tests or rules which may be applied in determining whether a given statement or act is to be rejected as hearsay, or admitted as part of the *res gestae*. One of these rules is that declarations are not admissible if they amount to no more than a *mere narrative of a past occurrence*. Thus, when the holder of a check went into a bank and when he came out said he had demanded payment, the declaration was held inadmissible.[1] So where one who was fatally injured by a railway train made statements half an hour after the occurrence, the statements were held no part of the *res gestae;*[2] and in an action against a township for injuries caused by a defective bridge, statements made by the plaintiff as to the cause and circumstances of the injury were held inadmissible.[3] The rule has often been declared that the declarations must be *contemporaneous* with the facts which they illustrate; and many cases might be cited as examples of such rulings. Thus, in a case which has excited much discussion and which has been regarded as an extreme case, it was held that a statement made by a person

immediately after the act, while running out of the room in which her throat had been cut, was incompetent;[4] and in many other cases it has been held that declarations, immediately or a few minutes after the event sought to be explained, could not be received.[5] In these and many similar cases which might be cited the declarations were not so nearly contemporaneous with the transaction in issue as to characterize or explain it. They were mere narratives of transactions wholly completed. These declarations depended for their truth wholly upon the accuracy and reliability of the declarant and the witness, and were not corroborated by any event or fact, then transpiring, by means of which their truth could be tested.

1, Lund v. Tyngsborough, 9 Cush. 42.

2, Waldele v. New York C. & H. R. Ry. Co., 95 N. Y. 274; 47 Am. Rep. 41; Savannah Ry. Co. v. Holland, 82 Ga. 257; 14 Am. St. Rep. 158.

3, Merkle v. Bennington, 58 Mich. 156; 55 Am. Rep. 166; Schillinger v. Town of Verona, 88 Wis. 317.

4, Rex v. Bedingfield, 14 Cox Cr. C. 341; 14 Am. Law Rev. 817.

5, Rosenbaum v. State, 33 Ala. 354; Williams v. English, 64 Ga. 546; Roach v. Western & A. Ry. Co., 93 Ga. 785; Lander v. People, 104 Ill. 248; Wadsworth v. Harrison, 14 Iowa 272; Bangor v. Brunswick, 27 Me. 351; Stone v. Segur, 11 Allen 568; Rowell v. Lowell, 11 Gray 420; Waldele v. New York C. & H. R. Ry. Co., 95 N. Y. 274; 47 Am. Rep. 41; State v. Dominique, 30 Mo. 585; Smith v. Betty, 11 Gratt. (Va.) 752; Luby v. Hudson Riv. Ry. Co., 17 N. Y. 131; Whitaker v. Eighth Ave Ry. Co., 51 N. Y. 295; Roche v. Brooklyn Ry. Co., 105 N. Y. 294; 59 Am.

Rep. 506; Galveston v. Barbour, 62 Tex. 172; 50 Am. Rep. 519; Sullivan v. Oregon Ry. & Nav. Co., 12 Ore. 392; 53 Am. Rep. 364; Sorenson v. Dundas, 42 Wis. 642; Agassiz v. London Tramway Co., 21 Weekly Rep. 199; Leistrilz v. American Zylonite Co., 154 Mass. 382; State v. Deuble, 74 Iowa 509; Gordon v. Grand Rapids & I. Ry. Co., (Mich.) 61 N. W. Rep. 549.

§ 349. Cases in which the rule is relaxed.— But there is another class of cases which hold that declarations may in some cases be received, although made after the act in question, provided they were uttered after the lapse of so brief an interval and in such connection with the principal transaction as to form a legitimate part of it.[1] For example, in a Massachusetts case, upon a trial for murder, a witness testified that at the moment the fatal stabs were given he heard the victim cry out: "I am stabbed," and that he at once went to him and reached him within twenty seconds after that, and that he then heard him say: "I am stabbed. I am gone—Dan Hackett has stabbed me." Although the court conceded that testimony as to declarations of this character should be restricted within narrow limits, it was held that the declarations, although made after the homicidal act, were in fact a part of the transaction.[2] While the English case already mentioned[3] illustrates the strictness of the one class of decisions which hold that the declarations must be contemporaneous with the act, a well known de-

cision of the supreme court of the United States may be cited as one which carries the more liberal rule to the extreme limit. In the case referred to, the action was on a life insurance policy; and for the purpose of proving that the death was caused by falling down stairs at night, the statement of deceased to members of his family soon after the alleged accident, and after he had returned to his room were held admissible.[4] The cases already cited sufficiently illustrate the fact that there is often no little difficulty in determining whether the declarations are so far contemporaneous with the main fact or transaction as to be admissible, and that it is impracticable to fix, by any general rule, any exact instant of time so as to preclude debate and conflict of opinion in regard to this particular point.

1, Com. v. Hackett, 2 Allen 136; Hanover Ry. Co. v. Coyle, 55 Pa. St. 396; Otis v. Thom, 23 Ala. 469; 58 Am. Dec. 303; Augusta Factory v. Barnes, 72 Ga. 217; 53 Am. Rep. 838; Kirby v. Com., 77 Va. 681; 46 Am. Rep. 747; Missouri Pac. Ry. v. Baier, 37 Neb. 235; Hall v. American M. Acc. Ass'n, 86 Wis. 518; Poole v. East Tenn. & V. G. Ry. Co., 92 Ga. 337.

2, Com. v. Hackett, 2 Allen 136. See elaborate note as to declarations made by wounded persons, 58 Am. Rep. 184.

3, R. v. Bedingfield, 14 Cox. Cr. C. 341. See also note, 58 Am. Rep. 184.

4, Insurance Co. v. Mosley, 8 Wall. 397.

§ 350. Time through which res gestae may extend.—It is well settled that the

main transaction is not necessarily confined to a particular point of time. The act or transaction may be completed in a moment or, if there are connecting circumstances, it may extend through a period of days or weeks, or even months. As illustrated by Mr. Wharton, "if in one of our streets there is an unexpected collision between two men, entire strangers to each other, then the *res gestae* of the collision are confined within the few moments that it occupies. When again there is a social feud in which two religious factions, as in the case of the Lord George Gordon disturbances or of the Philadelphia riots of 1844, are arrayed against each other for weeks, and so much absorbed in the collision as to be conscious of little else, then all that such parties do and say under such circumstances is as much part of the *res gestae* as the blows given in homicides for which particular prosecutions may be brought."[1] On this principle the declarations of bankrupts on going from and returning home have been received for the purpose of showing the motive and cause of absence, although a considerable time had elapsed;[2] and the declarations of persons made at the time of going and returning have been received as evidence of this intention, when the issue related to the domicil of the person,[3] or when it was claimed that a debtor had absconded.[4] In such cases the declara

tions, whether verbal or consisting of letters, have been received on the ground that they were a continuous act which showed the intention of the person whose motives were in question.[5]

1, 1 Whart. Ev. sec. 258; Lake Shore & M. S. Ry. Co. v. Herrick, 49 Ohio St. 25; Small v. Williams, 87 Ga. 681.

2, Bateman v. Bailey, 5 T. R. 512; Rouch v. Great Western Ry. Co., 1 Q. B. 61; Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285; Ridley v. Gyde, 9 Bing. 349; Rawson v. Haigh, 2 Bing. 99; Smith v. Cramer, 1 Bing. N. C. 585; Vacher v. Cocks, 1 Moody & M. 353; Thomas v. Connell, 4 M. & W. 267.

3, Bateman v. Bailey, 5 T. R. 512; Rawson v. Haigh, 2 Bing. 99; Newman v. Stretch, 1 Moody & M. 338; Ridley v. Gyde, 9 Bing. 349; Smith v. Cramer, 1 Bing. N. C. 585; The Venus, 8 Cranch 278; Gorham v. Canton, 5 Greenl. (Me.) 266; 17 Am. Dec. 231; Richmond v. Thomaston, 38 Me. 232; Cornville v. Brighton, 39 Me. 333 Thorndike v. Boston, 1 Met. 242; Kilburn v. Bennett, 3 Met. 199; Salem v. Lynn, 13 Met. 544; Carroll v. State, 3 Humph. (Tenn.) 315.

4, Brady v. Parkes, 67 Ga. 636.

5, Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285 and cases cited; Rawson v. Haigh, 2 Bing. 99; New Milford v. Sherman, 21 Conn. 101; Marsh v. Davis, 24 Vt. 363.

§ 351. The statements or acts must be part of a transaction.— Although, as we have seen, different tribunals do not agree as to the degree of strictness or liberality with which they apply the rule that the declaration should be contemporaneous with the transaction in issue, there is no doubt but that the declaration must be a *part of such*

transaction, and that it must illustrate or explain it. "The declarations must be calculated to unfold the nature and quality of the facts which they are intended to explain; they must so harmonize with those facts as to form one transaction. There must be a transaction of which they are considered a part; they must be concomitant with the principal act, and so connected with it as to be regarded as the result and consequence of co-existing motives."[1] Hence, if there is reason to suppose that the declarations are not the natural and spontaneous utterance of the declarant, but that they are *premeditated* or designed for a purpose, they are inadmissible; and if sufficient time has elapsed to give an opportunity for deliberation or the fabrication of evidence, the declarations cannot be deemed a part of the *res gestae*.[2] Declarations are not admissible as part of the *res gestae* when they merely explain acts which would not be admissible in evidence without such declarations.[3] Thus, *a letter* written immediately after the transaction is no part of the *res gestae*.[4] But letters or declarations made immediately preparatory to the litigated act may be received if they tend to give character to and illustrate the act in question. Thus, upon the question whether a person left a certain place with a certain other person, letters in which he stated his intention to leave it with that person, which

were written and mailed by him to his family at that place shortly before the time when other evidence tends to show that he left the place, are competent evidence of such intention.[5]

1, Tilson v. Terwilliger, 56 N. Y. 277; Meek v. Perry, 36 Miss. 190; People v. Vernon, 35 Cal. 49; 95 Am. Dec. 49 and extended note; Mitchum v. State, 11 Ga. 615; Handy v. Johnson 5 Md. 450; Rutland v. Hathorn, 36 Ga. 380.

2, City of Galveston v. Barbour, 62 Tex. 172; 50 Am. Rep. 519; People v. Davis, 56 N. Y. 95; Cleveland Ry. Co. v. Mara, 26 Ohio St. 185. See note, 95 Am. Dec. 64.

3, Gresham Hotel Co. v. Manning, Ir. Rep. 1 C. L. 125.

4, Small v. Gilman, 48 Me. 506.

5, Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285; Hinchcliffe v. Koontz, 121 Ind. 422; 16 Am. St. Rep. 403; Lake Shore & M. S. Ry. Co. v. Herrick, 49 Ohio St. 25; McDowell v. Goldsmith, 6 Md. 319; 61 Am. Dec. 305. Declarations of a servant made at the time of leaving service as to his reasons for doing so are admissible in actions between third persons, Hadley v. Carter, 8 N. H. 40; Elmer v. Fessenden, 151 Mass. 935.

§ 352. Declarations as to bodily feelings.—Whenever it becomes material to show a person's condition of health, or motives, or state of mind, such person's declarations may often be received in evidence for such purpose, provided the requisites already pointed out are complied with; and it appears that such statements are spontaneous and undesigned, and that they illustrate the facts which are the subject of inquiry.[1] It is on

this principle that the *statements of a patient to his physician* or other person as to his sufferings or symptoms are admitted, as a part of the *res gestae.*[2] But, on the grounds already stated, such declarations are confined to the present condition of the declarant. Such evidence is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded; and testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally furnish evidence of a present existing pain or malady.[3] The rule admitting the declarations of a party expressive of pain and bodily feeling in his own behalf was adopted with reluctance and has been generally cautiously applied. The danger that the admission of such declarations may lead to the fabrication of evidence is sufficient reason for receiving them only with caution and scrutiny. Since the adoption of *statutes allowing parties to testify* in their own behalf, the apparent necessity for admitting such declarations is largely removed; and consequently there is an additional consideration in favor of restricting evidence of this character within narrow limits. In a New York case it was held that, although natural expressions of pain, such as moans, sighs or screams, might be admissible, the mere statement of a party made long after the

injury that he suffered pain ought not to be admitted, as in any degree corroborative of his testimony as to the extent of his pain.[4] But when a *physician* is called as an *expert*, his evidence is not thus limited. He may base his opinions upon a statement given by the patient in relation to his condition and sensations, past and present. Thus only, can the expert ascertain the condition of the party; and he may, of course, be guided to some extent by the data thus furnished.[5] The declarations of the party to his physician or to other persons as to the *cause of the injury*, or those charging liability upon other persons are not admissible when not made at the time of the injury.[6] But declarations as to the cause of an injury are competent when made at the time of the accident as a part of the *res gestae*.[7] The narration of past occurrences, for example, the manner in which a party has been injured, are no more competent when related by a physician, than when stated by a non-professional witness.[8] Nor are the declarations of one physician or surgeon to another respecting the injury, made in the absence of the party, competent;[9] nor is the plaintiff, the injured party, allowed to state what the physician told him as to the nature of the injury.[10] Declarations of the character now under discussion are regarded as verbal acts, and, when coming within the rules already given,

are admissible although made during the pendency of an action for the injuries in question or even when an action is contemplated. These are facts which may, of course, materially affect the credibility of the evidence, but they do not render it incompetent.[11] Under such circumstances and, indeed whenever declarations are admissible, it is for the jury to determine whether they express the real feelings of the party or whether they are feigned; and for obvious reasons, whenever there appears a motive to manufacture testimony, the declarations should be subjected to the closest scrutiny.[12]

1, Howe v. Howe, 99 Mass. 88; State v. Kring, 64 Mo. 591; Perkins v. Concord Ry. Co., 44 N. H. 223; Barthelemy v. People, 2 Hill 248; Wetmore v. Mell, 1 Ohio St. 26; 59 Am. Dec. 607; Liles v. State, 30 Ala. 24; 68 Am. Dec. 108; People v. Shea, 8 Cal. 538; Buttram v. Jackson, 32 Ga. 409; Knowlton v. Clark, 25 Ind. 395; Kearney v. Farrell, 28 Conn. 317; 73 Am. Dec. 677; Roach v. Zearing, 59 Pa. St. 74; Atchison Ry. Co. v. Johns, 36 Kan. 769; Hewitt v. Eisenbart, 36 Neb. 794; Mutual Ins. Co. v. Hillmon, 145 U. S. 285. See notes, 33 Am. Rep. 828; 13 L. R. A. 465; 41 Cent. L. Jour. 98. As to dying declarations, see secs. 334 *et seq. supra.*

2, Aveson v. Kennard, 6 East 188; Insurance Co. v. Mosley, 8 Wall. 397; Phillips v. Kelly, 29 Ala. 628; Sanders v. Reister, 1 Dak. 145; Illinois Ry. Co. v. Sutton, 42 Ill. 438; 92 Am. Dec. 81; Carthage Turnpike Co. v. Andrews, 102 Ind. 138; 52 Am. Rep. 653; Gray v. McLaughlin, 26 Iowa 279; Fay v. Harlin, 128 Mass. 244; 35 Am. Rep. 372; Harris v. Detroit City Ry. Co., 76 Mich. 227; Brown v. Railroad Co., 66 Mo. 588; Caldwell v. Murphy, 11 N. Y. 416; Thomas v. Herrall, 18 Ore. 546; Gilchrist v. Bale, 8 Watts (Pa.) 355; 34 Am. Dec. 469; State v. Howard, 32 Vt.

380; Texas & P. Ry. Co. v. Barron, 78 Tex. 421. See also, Hall v. American M. Acc. Assn., 86 Wis. 518. But see, Boston & A. Ry. Co. v. O'Reilly, 158 U. S. 334.

3, Bacon v. Charlton, 7 Cush 581; Roosa v. Boston Loan Co., 132 Mass. 439; Central Ry. Co. v. Smith, 76 Ga. 209; 2 Am. St. Rep. 31; Kelley v. Detroit Ry. Co., 80 Mich. 237; 20 Am. S. Rep. 514; Firkins v. Chicago G. W. Ry. Co., (Minn.) 63 N. W. Rep. 172; Roach v. Western & A. Ry. Co., 93 Ga. 785. Statements of the plaintiff, made long after the accident, that he suffered pain and could not perform certain work are in admissible, Winterv. Central Iowa Ry. Co., 74 Iowa 448.

4, Roche v. Brooklyn Ry. Co., 105 N. Y. 294; 59 Am. Rep. 506.

5. Aveson v. Kinnaird, 6 East 188; Illinois Cent. Ry. Co. v. Sutton, 42 Ill. 438; 92 Am. Dec. 81; Roosa v. Boston Loan Co., 132 Mass. 439; Quaife v. Chicago & N. W. Ry. Co., 48 Wis. 513; 33 Am. Rep. 821. But see, Lush v. McDaniel, 13 Ired. (N. C.) 485; 57 Am. Dec. 566; Rogers v. Crain, 30 Tex. 284; Abbott v. Heath, 84 Wis. 314.

6, State v. Gedicke, 43 N. J. L. 86; Roosa v. Boston Loan Co., 132 Mass. 439; Smith v. State, 53 Ala. 486: Illinois C. Ry. Co. v. Sutton, 42 Ill. 438; 92 Am. Dec. 81; Collins v. Waters, 54 Ill. 485; Carthage T. Co. v. Andrews, 102 Ind. 138; 52 Am. Rep. 653; Morrisey v. Ingham, 111 Mass. 63; Ashland v. Marlborough, 99 Mass. 47; Grand Rapids Ry. Co. v. Huntley, 38 Mich. 537; Lush v. McDaniel, 13 Ired. (N. C.) 485; 57 Am. Dec. 566; Fordyce v. McCants, 51 Ark. 509; 14 Am. St. Rep. 69; Gray v. McLaughlin, 26 Iowa 279. Declarations made four years after the accident were rejected, Laughlin v. Grand Rapids Ry. Co., 80 Mich. 154.

7, North American Acc. Assn. v. Woodson, 64 Fed. Rep. 689; Delaware, L. & W. Ry. Co. v. Ashley, 67 Fed Rep. 209.

8, Dundas v. Lansing, 75 Mich. 499; 13 Am. St. Rep. 457.

9, Ponca v. Crawford, 18 Neb. 551.

10, Armstrong v. Ackley, 71 Iowa 76; Alabama Ry. Co. v. Arnold, 81 Ala. 600.

11, Aveson v. Kinnaird, 6 East 188; Quaife v. Chicago & N. W. Ry. Co., 48 Wis. 513; 33 Am. Rep. 821; Metteson v. New York Central Ry. Co., 35 N. Y. 487; Brown v. New York C. Ry. Co., 32 N. Y. 597; Barber v. Merriam, 11 Allen 322.

12, Central Ry. Co. v. Smith, 76 Ga. 209; 2 Am. St. Rep. 31 and note; 1 Greenl. Ev. sec. 102. Such declarations may be proved by any witness hearing them, Howe v. Plainfield, 41 N. H. 135.

§ 353. Declarations showing motive or intent. — On the grounds already stated, it is the constant practice to receive evidence of the declarations of parties accompanying their acts to show the motive or intent or state of mind with which such acts were performed. Thus, when the issue is one of fraud, the natural and unpremeditated declarations of the parties during the negotiations are admissible.[1] The *declarations* even *of by-standers* at a sheriff's sale may be competent as part of the *res gestae*, when they show a fraudulent interfering with the bidding.[2] In an action by an infant passenger to recover for personal injuries received by jumping from a train in motion, the evidence of one traveling in the car with the injured person to the effect that he told the latter that he thought the train would not stop was held admissible, as it was in immediate connection with the plaintiff's act and explanatory of his motives and mental condition.[3]

In an action for false representations in the sale of property, the defendant may show the statements made to him when he purchased the property, for the purpose of showing his motive, as well as the information on which he had acted; and also that he believed it to be true.[4] The declarations of a grantor made contemporaneously with the execution of a deed, though not in the presence of the grantee, may be admissible in favor of creditors to show a fraudulent intent.[5]

1, Banfield v. Parker, 36 N. H. 353. As to declarations by co-conspirators, see note, 1 L. R. A. 273.

2, Walter v. Gernant, 13 Pa. St. 515; 53 Am. Dec. 491.

3, Hemmingway v. Chicago, M. & St. P. Ry. Co., 72 Wis. 42; 7 Am. St. Rep. 823.

4, Beach v. Bemis, 107 Mass. 498.

5, McDowell v. Goldsmith, 6 Md. 319; 61 Am. Dec. 305; Pearson v. Forsyth, 61 Ga. 537.

§354. Declarations by possessor of personal property.— The declarations of persons in possession of personal property are often received as verbal acts characterizing and explaining the nature of such possession, that is, as part of the *res gestae.* Possession, unexplained, is *prima facie* evidence of ownership in the possessor. But such possession is entirely consistent with ownership in another; and, therefore, the conduct and declarations of the possessor may be material to show the nature of his possession

whether as owner, part owner or agent.[1] Thus, the declarations of a *debtor*, while in possession of personal property after a sale or transfer by him, which show fraud in the transfer are admissible against the vendee, and in favor of creditors.[2] The declarations of employes or other persons in possession of goods, while at work upon them, that they belonged to the plaintiff are admissible in his favor.[3] Other illustrations of the rule are the declarations of a *guardian* at the time of purchasing property, and afterward while in possession of it,[4] or those of a *bailee* in possession.[5] But it has been held that the declarations of a servant, in possession of chattels attached for his debt, to the effect that they are his property, are inadmissible against his master in an action against the attaching officer;[6] and in another case the declarations of the agent in possession were received in favor of the principal on the question of ownership, but on the ground that the declarations were made while the agent was separating different parcels for the purpose of distinguishing what belonged to one person and what to another, and hence the declarations were regarded as a part of the transaction.[7] While declarations which relate to the nature of the possession may be admitted as a part of the *res gestae*, yet they *must be confined to that subject;* and those which relate to the origin of the title, or to

the contract under which possession is held, or to the mode or manner of payment, and other independent facts should be excluded.[8] Declarations relating to the possession of property are received on the ground that they are part of the *res gestae*, and not merely on the ground that they are admissions, or against the interest of the declarant; and hence, if coming within the rule in other respects, they may be *admitted although favorable to* the interest of the *declarant.*[9]

1, Davies v. Pierce, 2 T. R. 53; Doe v. Rickarby, 5 Esp. 4; Doe v. Payne, 1 Stark. 86; Avery v. Clemons, 18 Conn. 306; 46 Am. Dec. 323; Abney v. Kingsland, 10 Ala. 355; 44 Am. Dec. 491; Fellows v. Smith, 130 Mass. 378; Abeel v. Van Gelder, 36 N. Y. 513; Mobile Savings Bank v. McDonald, 89 Ala. 434; 18 Am. St. Rep. 137; Hall v. Young, 37 N. H. 134; Lloyd v. Farrell, 48 Pa. St. 73; 86 Am. Dec. 563; Black v. Thornton, 30 Ga. 361; State v. Schneider, 35 Mo. 533; Durham v. Shannon, 116 Ind. 403; 9 Am. St. Rep. 860; Lowman v. Sheets, 124 Ind. 416; Reiley v. Haynes, 38 Kan. 259; 5 Am. St. Rep. 737; Hardy v. Moore, 62 Iowa 65; Bradley v. Spofford, 23 N. H. 444; 55 Am. Dec. 205. As to declarations by former owners of personal property, see sec. 245 *supra.*

2, Willies v. Farley, 3 Car. & P. 395; Talcott, v. Wilcox, 9 Conn. 134. See sec. 245 *supra.*

3, Bradley v. Spofford, 23 N. H. 444; 55 Am. Dec. 205; Haynes v. Leppig, 40 Mich. 602.

4, Tenney v. Evans, 14 N. H. 343; 40 Am. Dec. 194. But see, Nelson v. Iverson, 24 Ala. 9; 60 Am. Dec. 442.

5, Avery v. Clemons, 18 Conn. 306; 46 Am. Dec. 323. As to declarations of a defendant while in possession of goods in an action for larceny see, R. v. Abraham, 2 Car. & K. 550; Allen v. State, 73 Ala. 23.

6, Abbott v. Hutchins, 14 Me. 390; 31 Am. Dec. 59.

7, Pool v. Bridges, 4 Pick. 377.

8, Abney v. Kingsland, 10 Ala. 355; 44 Am. Dec. 491; Thompson v. Mawhinney, 17 Ala. 362; 52 Am. Dec. 176; Sweet v. Wright, 57 Iowa 510; Ray v. Jackson, 90 Ala. 513. Declarations by a possessor of chattels as to the character of his holding are evidence against him and those holding under him, but not against strangers, Carroll v. Frank, 28 Mo. App. 69.

9, Lowman v. Sheets, 124 Ind. 416; Durham v. Shannon, 116 Ind. 403; 9 Am. St. Rep. 860.

§ 355. Declarations by one in possession of land—When admitted in disparagement of title.—Under the subject of admissions we have discussed the question of the admissibility of declarations of former owners of land as against those in privity with them; and it is now necessary to consider another class of declarations by persons in the possession of lands.[1] Where the declarations of a person in possession of land are clearly in disparagement of his title or adverse to his interest, such declarations may, subject to proper limitations, be received against the declarant or those holding under him on the general principles governing admissions.[2] But it sometimes happens that declarations accompanying the possession of land and explaining or characterizing such possession are *received, although they are not adverse* to the interest of the declarant or those claiming under him. *The test* is whether the declaration forms a part of or tends to explain a transaction which is ma-

terial and relevant to the issue.[3] Thus in ejectment, where the issue is whether the possession of the land in question has been *adverse to*, or as a *tenancy* under the plaintiff, evidence of the acts and declarations of the person in possession tending to explain his relation to the property are admissible, although he is not a party.[4] The declarations of one occupying land to the effect that he occupies it as a tenant of another person are admissible to prove possession by the latter in an action brought against him by a third person claiming title to the land;[5] and in an action for trespass, the declarations of a former occupant, under whom defendant claims, were held admissible for the same purpose.[6] But where it is proved that a *party in possession is a tenant*, his *declarations* are *not admissible against his landlord*, unless such declarations were made known to the landlord.[7] In ejectment where it is shown that an occupant of the land had paid rent, his declarations and statements accompanying the act and relating thereto are admissible to explain his interest and object. But statements made at the same time as to the title of former owners of the land or other *collateral matters* are not competent.[8] *So the declarations* made by the *warrantor in a deed*, while in possession, which go to show in what character and with what intent he entered upon and continued his possession are admissible

in favor of the title derived from him to show in what character he had entered and held possession.[9] If a grantor retains possession of the premises in a manner inconsistent with the terms of the deed, his declarations respecting the ownership or the terms on which he holds possession are competent. But they are not competent, if such possession is consistent with the terms of the conveyance;[10] and when the vendor remains in possession, his declarations as to the claim under which he holds are competent to show his good faith, where that is in issue.[11]

1, See secs. 240 *et seq. supra.*

2, Bowen v. Chase, 98 U. S. 254; Poorman v. Miller, 44 Cal. 269; Deming v. Carrington, 12 Conn. 1; 30 Am. Dec. 591; Marcy v. Stone, 8 Cush. 4; 54 Am. Dec 736; Melvin v. Bullard, 82 N. C. 33; Potts v. Everhart, 26 Pa. St. 493; Miller v. Ternane, 50 N. J. L. 32.

3, Davies v. Pierce, 2 T. R. 53; Doe v. Rickarby, 5 Esp. 4; Jackson v. Bard, 4 Johns. (N. Y.) 230; 4 Am. Dec. 267; Norton v. Pettibone, 7 Conn. 319; 18 Am. Dec. 116; Blake v. White, 13 N. H. 267; Daggett v. Shaw, 5 Met. 223; Abeel v. Van Gelder, 36 N. Y. 513. See also, Robbins v. Spencer, (Ind.) 38 N. E. Rep. 522.

4, Moore v Hamilton, 44 N. Y. 666; Harper v. Morse, 114 Mo. 317. See note, 60 Am. Dec. 449.

5, Marcy v. Stone, 8 Cush. 4; 54 Am. Dec. 736.

6, Morss v. Salisbury, 48 N. Y. 636.

7, Ingram v. Little, 14 Ga. 173; 58 Am. Dec. 549. See sec. 244 *supra.*

8, Rigg v. Cook, 4 Gilm. (Ill.) 336; 46 Am. Dec. 462.

9, Jackson v. Vredenburgh, 1 Johns. (N. Y.) 159.

10, Williams v. Williams, 11 Lea (Tenn.) 355; Mobile Sav. Bank v. McDonnell, 89 Ala. 434; 18 Am. St. Rep. 137.

11, Osgood v. Eaton, 63 N. H. 355.

§ 356. Same — Possession must be shown. — Before declarations of the character under discussion can be received, it must of course be shown that the declarant had possession. This may appear by *actual occupancy* and enclosure, or by partial occupancy under a deed or contract which carries out a *constructive* possession commensurate with its terms of local description, or by other acts of ownership.[1] It was held in an English case that the mere cutting of timber on land was *prima facie* such an evidence of ownership as to admit the declarations of such person to the effect that some other person was owner.[2] But some of the American cases have declined to give such latitude to the declarations of those in mere constructive possession.[3]

1, Phill. Ev. (Cow. & H. Notes) 217, note 166.

2, Doe *ex dem.* Stransbury v. Arkwright, 5 Car. & P. 575.

3, West v. Price, 2 J. J. Marsh. (Ky.) 380.

§ 357. Declarations proper to show character of possession — Not to destroy record title. — Although the declarations of a party in possession of land are competent to show the character of his possession, as that he holds as a tenant or by virtue of an executory contract to purchase,[1] or as agent

of another,[2] or as joint occupant with another,[3] or that the occupancy is adverse to or in subordination to the title of another,[4] yet there are certain limitations which must be observed. Such declarations are only competent to show the *character of* the *possession* of the person making them, and by what title he holds. They are *not* competent to *sustain or destroy the record title;* and declarations contrary to the tenor of deeds or similar documents which a party has executed are not admissible.[5]

1, Dodge v. Freeman's Sav. Co., 93 U. S. 379; Jackson v. Dobbin, 3 Johns. (N. Y.) 223; Gibney v. Marchay, 34 N. Y. 301; Cunningham v. Fuller, 35 Neb. 58.

2, Kirkland v. Trott, 66 Ala. 417.

3, Darling v. Bryant, 17 Ala. 10; 52 Am. Dec. 162.

4, Poorman v. Miller, 44 Cal. 269; Little v. Libby, 2 Greenl. (Me.) 242; 11 Am. Dec. 68; West Cambridge v. Lexington, 2 Pick. 536; Marcy v. Stone, 8 Cush. 4; 54 Am. Dec. 736; Stearns v. Hendersass, 9 Cush. 497; 57 Am. Dec. 65; Potts v. Everhart, 26 Pa. St. 493; Hurt v. Evans, 49 Tex. 311; Beecher v. Parmele, 9 Vt. 352; 31 Am. Dec. 633; Bowen v. Chase, 98 U. S. 254; Peaceable v. Watson, 4 Taunt. 16.

5, Dodge v Freeman's Trust Co., 93 U. S. 379; Bowen v. Chase, 98 U. S. 254; Gibney v. Marchay, 34 N. Y. 301; Parry v. Parry, 130 Pa. St. 94; McKinnon v. Meston, (Mich.) 62 N. W. Rep. 1014; Gilbert v. Odum, 69 Tex. 671. See sec. 242 *supra*.

§ 358. Declarations as to boundary lines.— Declarations of those in possession, in respect to the boundary lines or the extent of their occupation, are sometimes received as

part of the *res gestae.*[1] Thus to establish adverse possession, the plaintiff may prove the declarations of former owners under whom he claims, when such declarations were made during possession and while defining or pointing out the boundaries to a person negotiating for the purchase.[2] But in a Wisconsin case it was held no part of the *res gestae* where the declarations pointing out the boundary were made by the grantor at the time of sale. It was held that the declarations did not accompany the act of possession, but rather the act of parting with the title and possession, and when the declarant was directly interested to claim the largest dimensions for the land.[3] So declarations of the grantor after the conveyance of the land by him are clearly inadmissible.[4] In Massachusetts declarations of owners or persons in possession made while pointing out the boundaries seem to be held inadmissible, unless made by persons deceased who had no motive to misrepresent.[5]

1, Brewer v. Brewer, 19 Ala. 481; Norton v. Pettibone, 7 Conn. 319; 18 Am. Dec. 116; Davis v. Campbell, 1 Ired. (N. C.) 482; Abeel v. Van Gelder, 36 N. Y. 513. In Massachusetts the declarant must be deceased, Fellows v. Smith, 130 Mass. 378. See secs. 308 *et seq. supra.*

2, Abeel v. Van Gelder, 36 N. Y. 513.

3, Lampe v. Kennedy, 60 Wis. 110.

4, Hills v. Ludwig, 46 Ohio St. 373; Castro v. Fry, 33 W. Va. 449; Chase v. Horton, 143 Mass. 118; Vrooman v. King, 36 N. Y. 477; Brown v. Callender, 105 Ill. 88.

5, Long v. Colton, 116 Mass. 414; Morrill v. Titcomb, 8

Allen 100; Adams v. Swansea, 116 Mass. 591; Fellows v. Smith, 130 Mass. 378. As to representations as to private boundaries see, Cobleys v. Ripley, 22 W. Va. 154; 46 Am. Rep. 502.

§ 359. Declarations of agents.—Whatever an agent does in the lawful exercise of his authority is imputable to the principal; and where the acts of the agent will bind the principal, his representations, declarations and admissions respecting the subject matter will also bind him, if made at the same time, and constituting part of the *res gestae.*[1] Thus in an action for purchase money, the false representations of the vendor's agent made during the negotiations may be shown.[2] The same is true in an action for refusing to accept merchandise sold; the declarations of the agent of the defendant as to the quality of the goods, while weighing and receiving of them, are competent.[3] In an action against a railroad company for ejecting a passenger from the car, the language of the employe while in the performance of the act is admissible.[4] Where a corporation, such as a railroad or an insurance company, invests an agent with general authority to adjust claims against it, his declarations made while endeavoring to secure an adjustment of the claim are competent evidence against the principal.[5] An agent who has charge of the construction of a building may bind his employer by his admissions explain-

ing payments relating thereto.[6] Other illustrations of statements admissible against the principal are those of the agent at the time of the sale of personal property,[7] or at the time of a fire, to the effect that it was caused by his negligence.[8] It is of course an indispensable requisite to the admission of the declarations of an agent as part of the *res gestae* that such *agency* or authority *be first proved.*[9] Such agency *cannot be proved by the declarations* themselves, no matter how publicly made;[10] nor by such declarations accompanied by acts purporting to be in behalf of the principal, unless they are brought to his knowledge.[11] It is also a requisite to the admission of such declarations that they be made *during the continuance of the agency*, and in regard to a transaction still pending. Thus, a conversation between agents or employes of a railroad company concerning a past transaction is clearly incompetent as evidence against the company;[12] and the declarations of the president of a corporation relative to its ownership or as to its former dealings with other parties, which are not shown to have been made while in the performance of his duties as such officer or while doing business contemporaneously with the declarations, are not binding on the company.[13]

1, American Fur Co. v. United States, 2 Peters 358; Vicksburg & M. Ry. Co. v. O'Brien, 119 U. S. 99; Converse v. Blumrich, 14 Mich. 109; 90 Am. Dec. 230; Burnham v. Ellis, 39 Me. 319; 63 Am. Dec. 625; Thallhimer v. Brinkeroff,

4 Wend. 394; 21 Am. Dec. 155; Jones v. Jones, 120 N. Y. 589; Gott v. Dinsmore, 111 Mass. 45; Linblom v. Ramsey, 75 Ill. 246; Hawk v. Applegate, 37 Mo. App. 32; St. Louis & St. F. Ry. Co. v. Weaver, 35 Kan. 412; United States v. Gooding, 12 Wheat. 460. See secs. 256 *supra*, 360 *infra*.

2, Wiggins v. Leonard, 9 Iowa 194; Hammatt v. Emerson, 27 Me. 308; 46 Am. Dec. 598. So as to the sale of a note, Labdell v. Baker, 1 Met. 193.

3, Rahm v. Deig, 121 Ind. 283.

4, Marion v. Chicago Ry. Co., 64 Iowa 568. But language used a few minutes afterwards is not admissible, Barker v. St. Louis, I. M. & S. Ry. Co., (Mo.) 28 S. W. Rep. 866.

5, Adams Exp. Co. v. Harris, 120 Ind. 73; 16 Am. St. Rep. 315. As to declarations by agents of corporations see next section.

6, Cook v. Hunt, 24 Ill. 535.

7, Gilson v. Wood, 20 Ill. 37.

8, Shafer v. Lacock, 168 Pa. St. 497.

9, Reynolds v. Continental Ins. Co., 36 Mich. 131; Harker v. Dement, 9 Gill (Md.) 7; 52 Am. Dec. 670; Maxey v. Heckethorn, 44 Ill. 438; Carter v. Burnham, 31 Ark. 212; Dawson v. Landreaux, 29 La. An. 363; Peck v. Ritchey, 66 Mo. 114; French v. Wade, 35 Kan. 391; Stollenwerck v. Thacher, 115 Mass. 224; Wood M. Co. v. Crow, 70 Iowa 340. See also sec. 280 *supra* and cases there cited.

10, Mussey v. Beecher, 3 Cush. 517; Brigham v. Peters, 1 Gray 145; Trustees v. Bledsoe, 5 Ind. 133; McCormick v. Roberts, 36 Kan. 552; Kirchner v. Laughlin, (N. M.) 23 Pac. Rep. 175; Wood M. Co. v. Crow, 70 Iowa 340.

11, Mussey v. Beecher, 3 Cush. 517; Brigham v. Peters, 1 Gray 145; Trustees v. Bledsoe, 5 Ind. 133.

12, Union Pac. Ry. Co. v. Fray, 35 Kan. 700; Erie & W. V. Ry. Co. v. Smith, 125 Pa. St. 259; 11 Am. St. Rep. 895.

13, Ricketts v. Birmingham St. Ry. Co., 85 Ala. 600; Goetz v. Bank of Kansas City, 119 U. S. 551. See sec. 360 *infra*.

§ 360. Declarations by agents of corporations. — This subject is frequently illustrated in the case of declarations of agents and employes of corporations and other defendants in *actions for negligence.* Thus, the declarations of an employe or officer as to who was responsible for an accident, or as to the manner in which it happened, when made at the time of the accident or soon after, have been held incompetent, as against the company, on the ground that his employment did not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which he had performed his duty; and that his declaration *did not accompany the act* from which the injuries arose and was not explanatory of anything in which he was then engaged, but that it was a *mere narration* of a past occurrence.[1] On the same principle reports to the general manager of a railway company concerning the circumstances and results of an accident, and also as to who was to blame therefor, made by the superintendent and conductor several days after the event, are incompetent.[2] But, as we have already pointed out, there is a class of cases in which the rule that the declaration must be contemporaneous with the act is construed less strictly; and in which such declarations are admitted, although *not technically contemporaneous*, if they are spontaneous and tend to explain the transac-

tion, and if so slight an interval of time has elapsed as to render premeditation improbable.[3] Accordingly in numerous cases the declarations of employes and agents, made soon after an accident, have been received as part of the *res gestae*.[4] The transaction may be of such a character as to extend through a considerable period of time; and in such cases the declarations of the agent in reference to the business, if within the scope of his authority, may be received, provided they are made before such transaction is completed. Thus, a letter or other statement of an officer of a corporation respecting a transaction which forms the subject of the controversy is admissible in an action against the corporation, if made *while the transaction is in progress*.[5] The declarations of a baggage-master in answer to inquiries after lost baggage,[6] and the statements of an insurance agent during a controversy about the renewal of insurance, to the effect that he delivered a certificate of renewal, are admissible on the same ground.[7] Although most of the illustrations given above relate to the declarations of agents of corporations, it need hardly be added that the same general principles govern as in the case of the agents of individuals. To bind the principal, the declarations must be *within the agent's authority and must accompany an act* which he is authorized to do.[8] In a leading case on this sub-

ject in Massachusetts, which has often been quoted and approved, the general rules governing the subject are summarized. These rules are illustrated by the cases already cited: *First*, The admission of evidence of this kind is not left to the discretion of the trial judge, but is governed by principles of law which must be applied to particular cases as other principles are applied in the exercise of a judicial judgment; and errors of judgment in this case, as in other cases, may be examined and corrected; *Second*, If a declaration has its force by itself as an abstract statement detached from any particular fact in question, depending for its effect upon the credit of the person making it, it is not admissible, but is mere narrative wholly detached from the fact to be proved; *Third*, When the act of a party may be given in evidence, his declarations made at the time are admissible, when they are calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, deriving its credit from the act itself; *Fourth*, There must be a main or principal fact or transaction; and only such declarations are admissible which grow out of the principal transaction and serve to illustrate its character, and are contemporary with, and derive some degree of credit from it; *Fifth*, The main transaction is not necessarily confined to a particular

point of time, but may extend over a longer or shorter period, according to the nature and character of the transaction.[9]

1, Vicksburg Ry. Co. v. O'Brien, 119 U. S. 99. The same rule has been applied in a great variety of cases, Alabama Ry. Co. v. Hawk, 72 Ala. 112; 47 Am. Rep. 403, similar declarations a few minutes after the accident; Durkee v. Central Pac. Ry. Co., 69 Cal. 533; 58 Am. Rep. 562, five minutes after. In the following cases the declarations were made immediately or soon after the accident and yet they were rejected, Adams v. Hannibal Ry. Co., 74 Mo. 553; 41 Am. Rep. 333; Williamson v. Cambridge Ry. Co., 144 Mass. 148; Leistritz v. American Zylonite Co., 154 Mass. 352; Ryan v. Gilmer, 2 Mont. 517; 25 Am. Rep. 744; Patterson v. St. Louis Ry. Co., 54 Mich 91; Luby v. Hudson River Ry. Co., 17 N. Y. 131; Erie Ry. Co. v. Smith, 125 Pa. St. 259; 11 Am. St. Rep. 895; Lane v. Bryant, 9 Gray 245; 69 Am. Dec. 282; Cleveland Ry. Co. v. Mara, 26 Ohio St. 185; Sutherland v. Wilmington & W. Ry. Co., (N. C.) 11 S. E. Rep. 189; Chesapeake Ry. Co v. Reeves, (Ky.) 11 S. W. Rep. 464; Savannah Ry. Co. v. Holland, 82 Ga. 257; 14 Am. St. Rep. 158; Chicago Ry. Co. v. Becker, 128 Ill. 545; 15 Am. St. Rep. 144; Tennis v. Interstate Co., 45 Kan. 503; Richmond & D. Ry. Co. v. Hammond, 93 Ala. 181; Chattanooga Ry Co. v. Liddell, 85 Ga. 482; 21 Am. St. Rep. 169.

2, Carroll v. East Tenn. Ry. Co., 82 Ga. 452.

3, See sec. 349 *supra*.

4, Keyser v. Chicago & G. T. Ry. Co., 66 Mich. 390, declarations made after 50 minutes; Hooker v. Chicago, M. & St. P. Ry. Co., 76 Wis. 542; Illinois Cent. Ry. Co. v. Troustine, 64 Miss. 834, after fourteen hours at the place of the accident; Wengler v. Missouri Ry. Co., 16 Mo. App. 493, after several days; Pennsylvania Ry. Co. v. Lyons, 129 Pa. St. 113; 15 Am. St. Rep. 701; New York Mining Co. v. Rogers, 11 Col. 6; 7 Am. St. Rep. 198; O'Connor v. Chicago Ry. Co., 27 Minn. 166; Bass v. Chicago Ry. Co., 42 Wis. 654; 24 Am. Rep. 437; Brownell v. Pacific Ry. Co., 47 Mo. 239; Cleveland v. Newsome, 45 Mich. 62; Augusta

Factory v. Barnes, 72 Ga. 218; Leahey v. Cass Ave. Ry. Co., 97 Mo. 165; 10 Am. St. Rep. 300; Ohio & M. Ry. Co. v. Stein, 133 Ind. 243; Hermes v. Chicago Ry. Co., 80 Wis. 590; 27 Am. St. Rep. 69; Texas & Pacific Ry. Co. v. Hall, 83 Tex. 675; Wabash Ry. Co. v. Brow, 65 Fed. Rep. 941; Springfield Consolidated Ry. Co. v. Welsh, 155 Ill. 511; Elledge v. National C. & O. Ry. Co., 100 Cal. 282. But mere exclamations by agents of corporations, not relating to the cause of the accident, are not admissible, Butler v. Manhattan Ry. Co., 143 N. Y. 417; Omaha & R. V. Ry. Co. v. Chollette, 41 Neb. 578.

5, Xenia Bank v. Stewart, 114 U. S. 224; Hamilton Buggy Co. v. Iowa Buggy Co., 88 Iowa 364.

6, Morse v. Connecticut Ry. Co., 6 Gray 450; Illinois Cent. Ry. Co. v. Troustine, 64 Miss. 834; Nichols v. Southern Pac. Ry. Co., 23 Ore. 123, by ticket inspector.

7, Scott v. Home Ins. Co., 53 Wis. 238.

8, Worden v. Humeston Ry. Co., 72 Iowa 201; Fairfield Co. v. Thorp, 13 Conn. 173; Hayward v. Pilgrim Soc., 21 Pick. 270; Crump v. United States Mining Co., 7 Gratt. (Va.) 352; 56 Am. Dec. 116; Troy Ins. Co. v. Carpenter, 4 Wis. 20; Loomis v. New York, N. H. & H. R. Ry. Co., 159 Mass. 39. See also sec. 359 *supra*.

9, Lund v. Inhabitants of Tyngsborough, 9 Cush. 36.

CHAPTER 12.

OPINIONS.

§ 361. Opinions in general inadmissible. — There is no more familiar principle in the law of evidence than that the opinions of witnesses are in general irrelevant. *Omne sacramentum debet esse certae scientiae.* Even when witnesses are limited in their statements to facts within their own knowledge, their bias, ignorance and disregard of the truth are obstacles which too often hinder in the investigation of the truth. If it were a general rule of procedure that witnesses might be allowed to state not only those matters of fact about which they are supposed to have knowledge, but also the opinions they might entertain about the facts in issue, the administration of justice would become little less than a farce. But the general rule rejecting evidence as to the opinions of witnesses is subject to very important exceptions; and it will be the object of this chapter to illustrate those exceptions. By far the most numerous exceptions to the general rule are those found

in cases in which the opinions of *experts* are received in evidence. Evidence of this character is not admissible upon subjects that are within the knowledge of all men of common education and experience. Mere opportunity does not change an ordinary observer into an expert; and special skill will not entitle a witness to give an expert opinion, when the subject is one where the opinion of an ordinary observer is admissible, or where the jury is capable of forming its own conclusions from facts susceptible of proof in common form.[1]

1, Koccis v. State, 56 N. J. L. 44; Atchison, T. & S. F. Ry. Co. v. Lawler, 40 Neb. 356; Connelly v. Hamilton Woolen Co., 163 Mass. 156; Reynolds v. Van Beuren, 31 N. Y. S. 827. These from the multitude of cases will serve to indicate the rule adopted by the courts.

§ 362. **Exceptions to the general rule—Opinions of ordinary witnesses.**—We shall first call attention to a class of exceptions where the opinions of ordinary witnesses are received. It often happens that it is impossible for a witness to detail all the pertinent facts in such a manner as to enable the jury to form a conclusion without the opinion of the witness. Indeed, the witness may not be able to separate the facts and indications from which he has formed a conclusion from the conclusion itself.[1] From many of the illustrations given below it will appear that, from the necessity of the case, the

opinions of ordinary witnesses must often be received. For example, the opinions of those not experts, may be received as to the disposition or temper of animals,[2] as to matters of color, weight, quantity, light, darkness, the state of the weather and similar facts,[3] the state of feeling existing between persons,[4] the appearance of individuals,[5] the age of persons[6] and the reputation of parties or witnesses, when under other rules of evidence such reputation becomes material.[7] Accordingly a witness may testify to his own *state of health.* This is not a matter of opinion in the sense that it calls for expert testimony. Thus, he may testify that he has suffered pain, or as to his general physical condition.[8] So ordinary witnesses have been allowed to express opinions as to whether another person seemed to be suffering pain,[9] or whether he seemed nervous,[10] or sad,[11] or in pain or good health,[12] or whether a person's mind seemed to be clear or had failed,[13] or whether he needed medical assistance,[14] or in what manner a person had acted[15] or whether a child was "fully developed."[16] Although some of the illustrations just given approach very closely to the border line, it is not to be inferred that the opinions of ordinary witnesses are competent as to those subjects which require *special study and skill;* for example, to distinguish between different forms of disease, or to state the causes and consequences of dis-

eases.[17] A common illustration of the same principle is the admission of opinions of witnesses as to the state of intoxication or sobriety of others. The witness is allowed to describe the words, acts and gestures, or he may omit such particulars and state his conclusions.[18]

1, Yahn v. Ottumwa, 60 Iowa 429; Atchison Ry. Co. v. Miller, 39 Kan. 419; Railway Co. v. Schultz, 43 Ohio St. 282; 54 Am. Rep. 812; Bates v. Sharon, 45 Vt. 474; Louisville, N. A. & C. Ry. Co. v. Miller, (Ind.) 37 N. E. Rep. 343; Baltimore & O. Ry. Co. v. Rambo, 59 Fed. Rep. 75.

2, Whittier v. Franklin, 46 N. H. 23; 88 Am. Dec. 185; Sydleman v Beckwith, 43 Conn. 9; Matteson v. State, 55 Ala. 224; Noble v. St. Joseph St. Ry. Co., 98 Mich. 249.

3, Com. v. Sturtivant, 117 Mass. 133; 19 Am. Rep. 405; Bass Co. v. Glasscock, 82 Ala. 452; Filley v. Billings, 26 Neb. 537.

4, Blake v. People, 73 N. Y. 586; McKee v. Nelson, 4 Cow. 355; 15 Am. Dec. 384; Tobin v. Shaw, 45 Me. 331; 71 Am. Dec. 547; Brownell v. People, 38 Mich. 732.

5, Shawneetown v. Mason, 82 Ill. 337; Wilkinson v. Moseby, 30 Ala. 562; South & N. Ala. Ry. Co. v. McLendon, 63 Ala. 266; Barker v. Coleman, 35 Ala. 221; Holland v. Zollner, 102 Cal. 633; State v. Knapp, 45 N. H. 148; Rogers v. Crain, 30 Tex. 284; Thompson v. Shalkop, 71 Pa. St. 161; Healy v. Visalia & T. Ry. Co., 101 Cal. 585; Cannady v. Lynch, 27 Minn. 435; Stone v. Moore, 83 Iowa 186; Hare v. Board of Education, 113 N. C. 9, whether or not a person has African blood in his veins. The same rule has been applied as to the appearance of animals, State v. Ward, 61 Vt. 153; Welch v. Miller, 32 Ill. App. 110.

6, Com. v. O'Brien, 134 Mass. 198; Foltz v. State, 33 Ind. 215; Morse v. State, 6 Conn. 9; De Witt v. Barly, 17 N. Y. 340; Benson v. McFaddon, 50 Ind. 431; Kansas Pac.

Ry. Co. v. Miller, 2 Col. 442; Marshall v. State, 49 Ala. 21; Elsner v. Knights of Honor, 98 Mo. 640.

7, Bryan v. Walton, 20 Ga. 480; Goodwyn v. Goodwyn, 20 Ga. 600; Snow v. Grace, 29 Ark. 131; Childs v. State, 55 Ala. 28, 33.

8, Wright v. Ft. Howard, 60 Wis. 119; 50 Am. Rep. 350; Ferguson v. Davis Co., 57 Iowa 601, that his ribs were broken. But he cannot testify as to his opinion as to whether his injuries will be permanent, Atlanta St. Ry. Co. v. Walker, 93 Ga. 462.

9, South & N. Ala. Ry. Co. v. McLendon, 63 Ala. 266.

10, State v. Baldwin, 36 Kan. 1.

11, Culver v. Dwight, 6 Gray 444; Tobin v. Shaw, 45 Me. 331; 71 Am. Dec. 547.

12, Chicago, B. & Q. Ry. Co. v. George, 19 Ill. 510; 71 Am. Dec. 239; Carthage Turnpike Co. v. Andrews, 102 Ind. 138; 52 Am. Rep. 653; Smalley v. Appleton, 70 Wis. 340; Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544; Heddles v. Chicago & N. W. Ry. Co., 77 Wis. 228; Robinson v. Exempt Fire Co., 103 Cal. 1.

13, People v. Sanford, 43 Cal. 29; Com. v. Brayman, 136 Mass. 438; Chickering v. Brooks, 61 Vt. 554; Johnson v. Culver, 116 Ind. 278; State v. Leehman, 2 S. Dak. 171.

14, Chicago, B. & Q. Ry. Co. v. George, 19 Ill. 510; 71 Am. Dec. 239.

15, For example, that he showed anger, Jenkins v. State, 82 Ala. 25; State v. Shelton, 64 Iowa 333; that he acted in a childish manner, Parsons v. Parsons, 66 Iowa 754; Irish v. Smith, 8 Serg. & R. (Pa.) 573; 11 Am. Dec. 648; or in an eccentric manner, Fraser v. Jennison, 42 Mich. 206; or in a jocular manner, Powers v. State, 23 Tex. App. 42.

16, Hubbard v. State, 72 Ala. 164.

17, State v. Hockett, 70 Iowa 442; Boies v. McAllister, 12 Me. 308; Monongahela Co. v. Stewartson, 96 Pa. St. 436; Lush v. McDaniel, 13 Ired. (N. C.) 485; 57 Am. Dec. 566; Thompson v. Bertrand, 23 Ark. 730; Chicago, B. & Q. Ry. Co. v. George, 19 Ill. 510; 71 Am. Dec. 239; Shawneetown

v. Mason, 82 Ill. 337; United Brethren M. Aid Soc. v. O'Hara, 120 Pa. St. 256; Evans v. People, 12 Mich. 27.

18, People v. Eastwood, 14 N. Y. 562; Choice v. State, 31 Ga. 424; Pierce v. State, 53 Ga. 365; State v. Pike, 49 N. H. 407; 6 Am. Rep. 533; Aurora v. Hillman, 90 Ill. 61; Pierce v. Pierce, 38 Mich. 412; People v. Monteith, 73 Cal. 7; State v. Huxford, 47 Iowa 16; Stacy v. Portland Pub. Co., 68 Me. 279; Gahagan v. Boston Ry. Co., 1 Allen 187; 79 Am. Dec. 724; Cole v. Bean, 1 Ariz. 377.

§ 363. **Same — Identity.** — In like manner witnesses may often testify with reasonable certainty as to the *identity* of persons or things when, if they were merely allowed to specify the details and facts on which their cunclusions depended, their testimony would be of no value.[1] Hence the statements of witnesses as to identity are not necessarily rejected although they are unable to describe the features of the person in question, or his clothing or other *particulars* on which the conclusion depends.[2] For example, the identification may be based upon the voice alone; and it would be obviously impossible for a witness to describe the tones of voice in such a manner that from the description alone the jury could arrive at any satisfactory conclusion.[3] On the same principle the opinions of ordinary witnesses have been received to prove that certain tracks were those of the prisoner,[4] and to identify certain hair as that of a certain individual.[5] So the testimony of ordinary witnesses may be received to show that certain stains are blood stains.[6] The

testimony of the chemist who has analyzed blood, and that of the observer who has merely recognized it belong to the same legal grade of evidence, and though the one may be entitled to much greater weight than the other with the jury, the exclusion of either would be illegal.[7] These are only a few of the many illustrations that might be given to show that ordinary witnesses may thus identify objects in cases where any attempt at description to the jury would be obviously unsatisfactory.

1, Walker v. State, 58 Ala. 393; Wiggins v. Henson, 68 Ga. 819; State v. Babb, 76 Mo. 501; King v. New York C. Ry. Co., 72 N. Y. 607; Woodward v. State, 4 Baxt. (Tenn.) 322; Turner v. McFee, 61 Ala. 468; Com. v. Sturtivant, 117 Mass. 122; 19 Am. Rep. 401; Com. v. Williams, 105 Mass. 62, by a person's voice; Beale v. Posey, 72 Ala. 323, by a person's walk; Com. v. Pope, 103 Mass. 440; State v. Morris, 84 N. C. 756, by the size of a person's foot; State v. Reitz, 83 N. C. 634, by the form of a foot; State v. Folwell, 14 Kan. 105, by peculiar tracks of a wagon which were identified; State v. Ward, 61 Vt. 153. See also, Welch v. Miller, 32 Ill. App. 111.

2, Sydleman v. Beckwith, 43 Conn. 9; Cooper v. State, 23 Tex. 331: Woodman v. State, 4 Baxt. (Tenn.) 322.

3, Com. v. Williams, 105 Mass. 62. But in all cases of identity the testimony must depend upon personal knowledge and not upon information derived from others, Woodman v. State, 4 Baxt. (Tenn.) 322.

4, State v. Reitz, 83 N. C. 634. As to identification by means of the walk of a person see, Beale v. Posey, 72 Ala. 323.

5, Com. v. Dorsey, 103 Mass. 412.

6, Dillard v. State, 58 Miss. 368; Greenfield v. People, 85 N. Y. 75.

7, People v. Deacons, 109 N. Y. 374. Experts may testify whether given blood stains are caused by human or animal blood, Com. v. Sturtivant, 117 Mass. 122; 19 Am. Rep. 401. See also, State v. Knight, 43 Me. 1, 133; Knoll v. State, 55 Wis. 249; 42 Am. Rep. 704; People v. Ganzalez, 35 N. Y. 49.

§ 364. Same — Speed of railroad trains.—It has frequently been held that those who have habitually observed the passage of railroad trains may give an estimate of their rate of speed, and that the testimony on the subject is not confined to experts,[1] although it has been held that such evidence is of an unsatisfactory character, and is to be received with great caution.[2] In Michigan where the court had under consideration the question whether persons riding in the cars could give an estimate as to the rate of speed, it was held that such opinions should not be received, "unless the witnesses first show such extended experience and observation as to qualify them for forming such opinions as would be reliable. It is not presumable that ordinary railway travelers usually form such habits."[3] Of course in all such cases as have been cited, if the witness is unable to give any satisfactory basis or reasons for his opinion, the value of his testimony might be greatly impaired; and it is to be observed that the matters as to which ordinary witnesses are allowed to give their opinions are of such a character that they may be understood without special skill or training.[4]

1, Waller v. Boston Ry. Co., 60 N. H. 483; Detroit Ry. Co. v. Van Steinburg, 17 Mich. 99; Guggenheim v. Lake Shore Ry. Co., 66 Mich. 150; Missouri P. Ry. Co. v. Hildebrand, 52 Kan. 284; Salter v. Utica Ry. Co., 59 N. Y. 631; Pennsylvania Ry. Co. v. Conlan, 101 Ill. 93; Pence v. Chicago, R. I. & P. Ry. Co., 79 Iowa 389; Louisville Ry. Co. v. Hendricks, 128 Ind. 462; Walsh v. Missouri Pac. Ry. Co., 102 Mo. 582; Ball v. Mabry, 91 Ga. 781; Thomas v. Chicago & G. T. Ry. Co., 86 Mich. 496; Smith v. Northern Pac. Ry. Co., 3 N. Dak. 555, locomotive identified. But ordinary witnesses cannot give opinions as to the distance within which a train can be stopped, Gourley v. St. Louis Ry. Co., 35 Mo. App. 87; Igo v. Chicago & A. Ry. Co., 38 Mo. App. 377; Watson v. Minneapolis St. Ry. Co., 53 Minn. 551, conductor competent to testify as to such fact.

2, Hoppe v. Chicago, M. & St. P. Ry. Co., 61 Wis. 357. See also, Citizens' St. Ry. Co. v. Spahr, 7 Ind. App. 23.

3, Grand Rapids Ry. Co. v. Huntley, 38 Mich. 537; 31 Am. Rep. 321. But a more liberal rule prevails in Wisconsin, Ward v. Chicago, St. P., M. & O. Ry. Co., 85 Wis. 601.

4, Com. v. Sturtivant, 117 Mass. 122; 19 Am. Rep. 401.

§365. Same — Values. — The same subject is illustrated by many cases in which evidence as to values has been received. As has been well said, "to describe to a jury a piece of ground, however minutely, with its supposed adaptations to use, advantages and disadvantages, and demand of them, upon this information alone, a verdict as to its value would be merely farcical; and this, indeed, is all that can be done to enable them to arrive at a conclusion as to its value, unless the witnesses are allowed to state their judgment or opinion together with the facts upon which such opinion is founded."[1] The

knowledge of values in most cases does not depend upon professional or other special skill; and witnesses without having any such special experience or training as would entitle them to be called experts, may yet have gained such knowledge of the land, or other subject under inquiry, as to aid the court or jury in arriving at a conclusion.[2] Persons by their common experience and observation necessarily gain some knowledge as to the values of those articles which are in common use by all or nearly all; and their evidence as to such values is not excluded by the fact that experts may have more accurate knowledge as to such values.[3] Obviously the witness must have *some means of knowledge* as to the nature and quality of the articles in question before he is qualified to express an opinion as to values. It would be an idle ceremony to allow witnesses to give their opinions in evidence, unless they had better means of knowledge as to the subject matter of their testimony than the jury might possess in common with all other persons.[4] The *qualification* of the witness is, of course, a *question for the court.*[5]

1, Illinois Ry. Co. v. Van Horn, 18 Ill. 257. See also sec. 389 *infra.*

2, Swan Co. v. Middlesex, 101 Mass. 173; Huff v. Hall, 56 Mich. 456; Pennsylvania Ry. Co. v. Bunnell, 81 Pa. St. 426; Central Ry. Co. v. Wolf, 74 Ga. 664; San Diego Land Co. v. Neale, 78 Cal. 63; Terre Haute Ry. Co. v. Crawford, 100 Ind. 550; Alt v. California Fig Co., 19 Nev. 118; Dalzell v. Davenport, 12 Iowa 437; Whitfield v. Whitfield, 40

Miss. 352; Cantling v. Hannibal Ry. Co., 54 Mo. 385; 14 Am. Rep. 476; Mish v. Wood, 34 Pa. St. 451; Thatcher v. Kaucher, 2 Col. 698; Cooper v. State, 53 Miss. 393; Cooper v. Randall, 59 Ill. 317; Washington Co. v. Webster, 68 Me. 449; Foster v. Ward, 75 Ind. 594; Sullivan v. Lear, 23 Fla. 463; 11 Am. St. Rep. 388; Whiting v. Mississippi Ins. Co., 76 Wis. 592; Raggan v. Kansas City Ry. Co., 111 Mo. 456; Latham v. Brown, 48 Kan. 190; Finch v. Chicago, M. & St. P. Ry. Co., 46 Minn. 250. See also, Roberts v. City of Boston, 149 Mass. 346; Laing v. United N. J. Ry. Co., 54 N. J. L. 576.

3, Chamness v. Chamness, 53 Ind. 301; Maughan v. Burns' Estate, 64 Vt. 316, as to the value of board and lodging. The opinions of witnesses have been received as to the value of a dog, Cantling v. Hannibal Ry. Co., 54 Mo. 385; 14 Am. Rep 476; of a piano, State v. Johnson, 1 Mo. App. 219; of a gun, Cooper v. State. 53 Miss. 398; of articles of clothing, Printz v. People, 42 Mich. 144; 36 Am. Rep. 437; of a seal skin coat, State v. Finch, 70 Iowa 316; 59 Am. Rep. 443; of a horse, Reed v. New, 35 Kan. 727; of a bull, Alabama Ry. Co. v. Moody, 92 Ala. 279; of oxen, Plunkett v. Minneapolis Ry. Co., 79 Wis. 222; of bonds, Murray v. Norwood, 77 Wis. 405.

4, Whitney v. Boston, 98 Mass. 312; Haight v. Kimbak, 51 Iowa 13; Daly v. Kimball Co., 67 Iowa 132; Reed v. Drais, 67 Cal. 491; Russell v. Hayden, 40 Minn. 88; Terpenning v. Corn Ex. Ins. Co., 43 N. Y. 279; Lamoure v. Caryl, 4 Den. 373; Bedell v. Long Island Ry. Co., 44 N. Y. 367; Clark v. Water Co., 52 Me. 68; Frederick v. Case, 28 Ill. App. 215; Chicago Ry. Co. v. Mouriquand, 45 Kan. 170; Omaha Auction Co. v. Rogers, 35 Neb. 61; New York & C. Mining Co. v. Fraser, 130 U. S. 611.

5, Stillwell Manfg. Co. v. Phelps, 130 U. S. 520.

§ 366. Same — Sanity. — In some jurisdictions the rule has prevailed that non-professional witnesses cannot give their opinions as to the sanity or insanity of a party. It is maintained in those cases that such testimony

consists of mere opinions of persons having no peculiar knowledge upon such subjects, and that the court or jury are quite as competent to form opinions from the facts presented as are unskilled witnesses.[1] But the contrary rule is supported by the great *weight of authority;* and the opinions of ordinary witnesses have been received on this issue in many cases upon the obvious ground that it is often impossible for witnesses in such cases to adequately describe to the court or jury the actions, looks and symptoms which properly constitute the basis for determining the question.[2] The opinions of non-professional witnesses, however, are not admissible in such cases, unless such opinions are based upon their *own knowledge and observation* of the person's appearance;[3] and it is generally held that before giving an opinion the witness must state the facts and circumstances on which his opinion is based.[4] But no general rule can be laid down as to what shall be deemed a sufficient opportunity for observation, this being a question for the jury in view of all the circumstances of the case, under proper instructions from the court.[5]

1, Wyman v. Gould, 47 Me. 159; Hastings v. Rider, 99 Mass. 622; Dewitt v. Barley, 9 N. Y. 371; People v. Packenham, 115 N. Y. 200; Holcomb v. Holcomb, 95 N. Y. 316.

2, Connecticut M. Life Ins. Co. v. Lathrop, 111 U. S. 612; Hardy v. Merrill, 56 N. H. 227; 22 Am. Rep. 441; Clary v. Clary, 2 Ired. (N. C.) 78; Norris v. State, 16 Ala.

776; Holland v. Zollner, 102 Cal. 633; Shaver v. McCarthy, 110 Pa. St. 339; Grubb v. State, 117 Ind. 277; State v. Potts, 100 N. C. 457; Holcomb v. State, 41 Tex. 125; People v. Wreden, 59 Cal. 392; Keithley v. Stafford, 126 Ill. 507; Beller v. Jones, 22 Ark. 92; Clark v. State. 12 Ohio 483; 40 Am. Dec. 481; Frizzell v. Reed, 77 Ga. 724; State v. Bryant, 93 Mo. 273; Wise v. Foote, 81 Ky. 10; Chase v. Winans, 59 Md. 475; Burnham v. Mitchell, 34 Wis. 117; Woodcock v. Johnson, 36 Minn. 217; Wood v. State, 58 Miss. 741; State v. Winter, 72 Iowa 627; Fishburne v. Ferguson, 84 Va. 87; Chickering v. Brooks, 61 Vt. 554; State v. Leehman, 2 S. Dak. 171.

3, Hardy v. Merrill, 56 N. H. 227; 22 Am. Rep. 441; Appleby v. Brock, 76 Mo. 314; Ellis v. State, (Tex.) 24 S. W. Rep. 894; Sharp v. Kansas City Ry. Co., 114 Mo. 94; Boorman v. Northwestern Relief Assn., 90 Wis. 144.

4, See case cited in note 2 *supra*.

5, Clary v. Clary, 2 Ired. (N. C.) 78; McClackey v. State, 5 Tex. App. 320; Taylor v. Com., 109 Pa. St. 262; Chase v. Winans, 59 Md. 475; Wood v. State, 50 Miss. 741; Wise v. Foote, 81 Ky. 10.

§ 367. Same—As to sanity in will cases.—Even in those states where in general the opinions of witnesses are not received on the question of sanity, the rule is not held applicable to the subscribing *witnesses to a will*, since they are the persons chosen by the testator for the purpose, and are required to take notice of the state of his mind.[1] It appears from the cases already cited that in Massachusetts the opinions of ordinary witnesses as to the question of sanity or insanity are excluded; but in that state it was held proper to allow such a witness to state that he "observed no incoherence of thought in

the testator nor anything unusual or singular in respect to his memory." [2]

1, Hardy v. Merrill, 56 N. H. 227; 22 Am. Rep. 441; Needham v. Ide, 5 Pick. 510; Potts v. House, 6 Ga. 324; 50 Am. Dec. 329; Van Huss v. Rainbolt, 42 Tenn. 139; Dewitt v. Barley, 9 N. Y. 371; Williams v. Lee, 47 Md. 321; Grant v. Thompson, 4 Conn. 203; 10 Am. Dec. 119; Titlow v. Titlow, 54 Pa. St. 216; 93 Am. Dec. 691; Robinson v. Adams, 62 Me. 369; 16 Am. Rep. 473; Holcomb v. Holcomb, 95 N. Y. 316.

2, Nash v. Hunt, 116 Mass. 237; Com. v. Pomeroy, 117 Mass. 143.

§ 368. Same — In general — Conclusion — It would be obviously impracticable to collect within the limits of this work all the instances in which the opinions of ordinary witnesses have been received as to matters of common knowledge by reason of the necessity of the case. The circumstances under which such opinions are admitted are well summarized in a New Hampshire case in the following language: "Courts and text-writers all agree that, upon questions of science and skill, opinions may be received from persons specially instructed by study and experience in the particular art or mystery to which the investigation relates. But without reference to any recognized rule or principle, 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. . . . Opinions of witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained." [1]

1, Hardy v. Merrill, 56 N. H. 227; 22 Am. Rep. 448. See also, Wilson v. New York, N. H. & H. R. Ry. Co., (R. I.) 29 At. Rep. 300; Healy v. Visalia & T. Ry. Co., 101 Cal. 585; Union Pac. Ry. Co. v. Gilland, (Wy.) 34 Pac. Rep. 953. Such opinions are not admissible in cases in which the jury can draw their own inferences from the facts detailed, McLaughlin v. Webster, 141 N. Y. 76; Manufacturers Co. v. Dorgan, 58 Fed. Rep. 945.

§ 369. Expert testimony — Grounds of admission. — We have seen that in the administration of justice it is often found necessary to admit the opinions of ordinary witnesses as evidence. It might, indeed, be urged with some force that in many of the cases cited in the preceding sections the witnesses testified not as to their opinions, but as to independent facts; and it must be conceded that in the admission of testimony it is often difficult to draw the line between the

domain of fact and that of inference or opinion. It has been suggested that it would be more logically accurate to say that mere opinions, even of experts, are not admissible as such, but that, facts having been proved, the testimony of men skilled in such matters may be admitted to prove the existence of mere general facts or the laws of nature or the course of business, so as to enable the jury to form their own inferences.[1] If the non-professional witness must, on grounds of necessity, be sometimes allowed to state the inferences which irresistibly rise in his mind from those minute facts which he cannot detail, there are still stronger reasons for receiving, under proper limitations, the opinions of those skilled in matters of trade or science. In a great variety of cases where the subjects under investigation are wholly unfamiliar to the jury or even to the judge, there would be no adequate mode of arriving at any satisfactory conclusion, if expert testimony were rejected. In recognition of this fact the courts have adopted the rule of admitting the opinions of witnesses whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study in order to attain a knowledge of it.[2]

1, Mayor of N. Y. v. Pentz, 24 Wend. 668. But illustrations in the succeeding pages will show that experts are themselves constantly allowed to draw inferences and state opinions based upon facts proved. See n., 19 Am. Rep. 410.

2, Folkes v. Chadd, 3 Doug. (Mich.) 157; R. v. Searle, 1 Moody & Rob. 75; Thornton v. Royal Exchange Assurance Co., Peake 25; Chaurand v. Angerstein, Peake 43; McNaghten's Case, 10 Clark & F. 200; Fenwick v. Bell, 1 Car. & K. 312; Kelly v. Richardson, 69 Mich. 430; Nelson v. Sun Ins. Co., 71 N. Y. 453; Best Ev. sec. 513. For various definitions of expert testimony see, Lawson Exp. Ev. 195, rule 35; Rogers Exp. Ev. 1–3.

§ 370. Same — Proof of qualifications of experts. — It now becomes necessary to discuss at some length the conditions under which expert testimony may be given. While it is clear that the witness in order to be competent as an expert must show himself to be skilled in the business or profession to which the subject relates, there is no precise rule as to the mode in which such skill or experience must be acquired. Thus, the witness may have become qualified by actual *experience* or long observation without having made a study of the subject.[1] On the other hand he may be an expert although his knowledge has been derived from the *study* of the subject, and not from actual experience or practice in the business or profession. Thus, it has sometimes been held that a *physician* may give opinions as to matters connected with his profession or with medical science, although in his own practice he may not have had experience as to such matters, and

although his knowledge in respect thereto is derived from study only,[2] even though he may not have made the disease under inquiry a specialty.[3] On the same principle one who is familiar with the diseases of man may be allowed to testify as an expert concerning the diseases of animals.[4] The law of a foreign country or sister state may be proved not only by jurists and lawyers who have practiced their profession in that jurisdiction,[5] but also by those not lawyers who, from their official position or business relations, have become acquainted with such laws.[6] Courts will take notice that certain pursuits are so intimately connected with others as to give those following one of such pursuits unusual facilities for becoming acquainted with the other; and if the occupation and experience of the witness have been such as to give him the requisite means of knowledge of the subject, he may be competent as an expert, although engaged in some *other occupation*[7] or even if he has abandoned the business to which the inquiry relates.[8] It is necessary that the witness should possess the requisite skill either from actual study, experience or observation. The *mere opportunity* of obtaining such skill does not suffice.[9]

1, Slater v. Wilcox, 57 Barb. (N. Y.) 604, testimony of a farmer as to the diseases of cattle; Mason v. Fuller, 45 Vt. 29, of a midwife as to a premature birth; Estate of Toomes, 54 Cal. 509; 35 Am. Rep. 83, held that the experience and training of a priest had fitted him to give an opinion as to

the sanity of a person; Emrick v. Merriman, 23 Ill. App. 24, testimony of a cattleman as to the diseases of cows; McPherson v. St. Louis, I. M. & S. Ry. Co., 97 Mo. 253, opinion of a farmer as to capacity of a railroad culvert to carry away water; Kerns v. Chicago, M. & St. P. Ry. Co., (Iowa) 62 N. W. Rep. 692, of an old railroad man as to the usual mode of coupling cars.

2, Mendum v. Com., 6 Rand. (Va.) 704; State v. Clark, 12 Ired. (N. C.) 151; State v. Wood, 53 N. H. 484. But see, Soquet v. State, 72 Wis. 659, where a physician who had never had a case of arsenical poisoning was held incompetent as an expert. But the opposite rule was declared in Siebert v. People, 143 Ill. 571. See also, Caleb v. State, 39 Miss. 721. In Howard v. Great Western Ins. Co., 109 Mass. 384, a chemist's opinion was received as to a substance in which he had never dealt. In Central Ry. Co. v. Mitchell, 63 Ga. 173, the opinion of a civil engineer derived solely from books was admitted. In Castner v. Sliker, 33 N. J. L. 95, 507, it was held that a physician, not an oculist or surgeon, may testify as to an injury to the eye. See also, sec. 381 *infra*.

3, Hathaway v. National Life Ins. Co., 48 Vt. 335. For example, in cases of insanity, Hastings v. Rider, 99 Mass. 622; State v. Reddick, 7 Kan. 143; Baxter v. Abbott, 7 Gray 71; Schneider v. Manning, 121 Ill. 376; Potts v. House, 6 Ga. 324; 50 Am. Dec. 329; Guetig v. State, 66 Ind. 94; State v. Windsor, 5 Har. (Del.) 512; People v. Schuyler, 106 N. Y. 298. But see, Com. v. Rich, 14 Gray 335; Fayette v. Chesterville, 77 Me. 28; 52 Am. Rep. 741; Russell v. State, 53 Miss. 367; Hutchins v. Ford, 82 Me. 363.

4, State v. Sheets, 89 N. C. 543; Horton v. Green, 64 N. C. 64; Pierson v. Hoag, 47 Barb. (N. Y.) 243; House v. Fort, 4 Blackf. (Ind.) 293.

5, Dyer v. Smith, 12 Conn. 384; Wilson v. Carson, 12 Md. 54; Bollinger v. Gallagher, 163 Pa. St. 245; Baron De Bode's Case, 8 Q. B 208; Mowry v. Chase, 100 Mass. 79; Consolidated Real Estate Co. v. Cashow, 41 Md. 59; Layton v. Chalon, 4 La. An. 318; Wilson v. Smith, 5 Yerg. (Tenn.) 379; McNeil v. Arnold, 17 Ark. 154; Brewer v. Luth. 28

Kan. 581; Temple v. Board of Commissioners, 111 N. C. 36.

6, Vander Donckt v. Thellusson, 8 C. B. 812; 65 E. C. L. 812; Wilcock v. Phillips, 1 Wall. Jr. (U. S.) 47; American Life Ins. Co. v. Rosenagle, 77 Pa. St. 507; Pickard v. Bailey, 26 N. H. 152; Sussex Peerage Case, 11 Clark & F. 134; Bird v. Com., 21 Gratt. (Va.) 800; People v. McQuaid, 85 Mich. 123. See sec. 514 *infra*.

7, Detroit Ry. Co. v. Van Steinberg, 17 Mich. 99, opinion of a mail agent as to the running and stopping of a train; Wilson v. Bauman, 80 Ill. 493, opinion of builders as to the custom of architects; Nelson v. Wood, 62 Ala. 175, of the owner of a tannery, though not a practical tanner, as to the process of tanning; Barnes v. Ingalls, 39 Ala. 193, daguerrean as to photography; Brabbits v. Chicago & N. W. Ry. Co., 38 Wis. 289, of the engineer of a stationary engine as to a locomotive; Mobile Ry. Co. v. Blakely, 59 Ala. 471, of a conductor as to the means of stopping a train; Snyder v. Western Union Ry. Co., 25 Wis. 60, opinion of farmers as to the value of lands. Contra, Kilbourn v. Jennings, 38 Iowa 533, painter not allowed to testify as to the quality of carpenter work, which he painted. The contrary rule has also been held when there is no such opportunity for knowledge, Brown v. Providence Ry. Co., 12 R. I. 238; Teerpenning v. Corn Ex. Ins. Co., 43 N. Y. 279, farmer not allowed to testify as to value of goods destroyed by the burning of a store.

8, Bearss v. Copley, 10 N. Y. 98; Robertson v. Knapp, 35 N. Y. 91, opinion of a farmer who had become a mechanic; Tullis v. Kidd, 12 Ala. 648, of a physician who had become a lawyer; Everett v. State, 62 Ga. 65, of a retired physician. See also, McEwan v. Bigelow, 40 Mich. 215, witness excluded who had abandoned the business for twenty years; Farnum v. Pitcher, 151 Mass. 470, or for twenty-three years.

9, Ellingwood v. Bragg, 52 N. H. 490, opinion of a lawyer as to handwriting; Goldstein v. Black, 50 Cal. 462, a clerk of court as to handwriting; Page v. Parker, 40 N. H. 47; Perkins v. Stickney, 132 Mass. 217.

§ 371. Same — A preliminary question for the court. — When a witness is offered as an expert, it becomes a preliminary question for the court to determine whether he has the requisite qualifications; and for the purpose of determining this question, the *witness himself* may be examined as to his opportunities and means of knowledge of the subject under inquiry.[1] *Other witnesses* may also be called upon this preliminary question; and those who are qualified may give their opinions thereon.[2] But the expert cannot give his own opinion as to his own qualifications.[3] Nor is the evidence of the other witnesses admissible as to such qualifications, *after the evidence* has been received.[4] In determining the question in any given case the court has first to decide whether the subject is one upon which the opinion of an expert can be received, and also what are the qualifications necessary to entitle the witness to testify as an expert.[5] It has sometimes been held that while the decision of the trial judge upon the questions of law is subject to revision, as in other cases, his decision as to the questions of fact is a matter of *discretion* which will not be reversed;[6] and in other cases the rule is broadly declared that the decision of the trial judge in passing upon the qualifications of the witness as an expert will not be reviewed on appeal. But there is a wide diversity of opinion in the courts, as will be seen by the

cases cited in the note.[1] The cases last cited show that the decision of the trial judge has often been reviewed where there was palpable error in his ruling.

1, Boardman v. Woodman, 47 N. H. 120.

2, Mendum v. Com., 6 Rand. (Va.) 704; Tullis v. Kidd, 12 Ala. 648; Laros v. Com., 84 Pa. St. 200; Mason v. Phelps, 48 Mich. 126; State v. Maynes, 61 Iowa 119.

3, Boardman v. Woodman, 47 N. H. 120.

4, Tullis v. Kidd, 12 Ala. 648; DePhul v. State, 44 Ala. 32; Brabo v. Martin, 3 La. 177.

5, Chicago & A. Ry. Co. v. Springfield & N. W. Ry. Co., 67 Ill. 142; Heald v. Thing, 45 Me. 392; State v. Secrest, 80 N. C. 450; Tullis v. Kidd, 12 Ala. 648; State v. Ward, 29 Vt. 225; Tyler v. Todd, 36 Conn. 218; Sandwich Manfg. Co. v. Nicholson, 32 Kan. 666; Nelson v. Sun Ins. Co., 71 N. Y. 453; Lincoln v. Barre, 5 Cush. 590; State v. Cole, 63 Iowa 695; Mutual Fire Ins. Co. v. Alvord, 61 Fed. Rep. 752.

6, Dole v. Johnson, 50 N. H. 452; Hammond v. Schiff, 100 N. C. 161; Wright v. Williams, 47 Vt. 222; State v. Cole, 63 Iowa 695. See sec. 170 *supra*.

7, Gossler v. Eagle Sugar Refinery, 103 Mass. 331; Hill v. Home Ins. Co., 129 Mass. 345; Mendum v. Com., 6 Rand. (Va.) 704; Ardesco Coal Co. v. Gilson, 63 Pa. St. 146; Searle v. Arnold, 7 R. I. 582; Delaware Towboat Co. v. Starrs, 69 Pa. St. 36; Nelson v. Sun Mut. Ins. Co., 71 N. Y. 453; Gulf City Ins. Co. v. Stephens, 51 Ala. 121; Berry v. Reed, 53 Me. 487; Gulf C. & S. F. Ry. Co. v. Norfleet, 78 Tex. 321; Wiggins v. Wallace, 19 Barb. (N. Y.) 338; Perkins v. Stickney, 132 Mass. 217; Southern Life Ins. Co. v. Wilkinson, 53 Ga. 535; Flynt v. Boldenhamer, 80 N. C. 208; Caster v. Silker, 33 N. J. L. 96; Ft. Wayne v. Coombs, 107 Ind. 75; Fayette v. Chesterville, 77 Me. 28; 52 Am. Rep. 741; Bemis v. Central V. Ry. Co., 58 Vt. 636; Stillwell Mfg. Co. v. Phelps, 130 U. S. 520.

§ 372. Mode of examination — Hypothetical questions.— It may be plainly inferred from what has already been stated that the testimony of those found qualified as experts is *not confined* to facts within their own *personal knowledge*, but that they may give their opinion upon an assumed state of facts. Indeed, it is probably true that in the majority of cases in which experts are examined their testimony is based upon *hypothetical questions*, or upon facts assumed for the purposes of the trial, and presented in some other form. While it is impossible to lay down any unyielding rule as to the form of the hypothetical question in such cases, it is clear that the question should be so framed as to fairly and clearly present the state of *facts which the counsel claims* to be proved, and which the testimony on his part *tends to prove.*[1]

1, Cowley v. People, 83 N. Y. 464; 38 Am. Rep. 464; Guetig v. State, 66 Ind. 94; Filer v. New York C. Ry. Co., 49 N. Y. 42; Peterson v. Chicago Ry. Co., 38 Minn. 511; Stearns v. Field, 90 N. Y. 640; Quinn v. Higgins, 63 Wis. 664; 53 Am. Rep. 305; Louisville Ry. Co. v. Falvey, 104 Ind. 409; Conway v. State, 118 Ind. 482; Kerr v. Lunsford, 31 W. Va. 659; People v. Goldenson, 76 Cal. 328; Prentice v. Bates, 88 Mich. 567; Poole v. Dean, 152 Mass. 589.

§ 373. Hypothetical questions to be based upon proof.— If there is no testimony in the case tending to prove the facts assumed in the hypothetical question, such question is improper. The facts must be

proved or offered to be proved;[1] and if there is no evidence to prove such facts, or if the facts assumed in the interrogatory are wholly irrelevant to the issue, the question should be excluded.[2] The question is not necessarily to be rejected by the court although the facts assumed by counsel to be true are not proved, or although the question does not state the facts as they actually exist. The facts are generally in dispute; and it is sufficient if the question fairly states such facts as the proof of the examiner *tends to establish*, and fairly presents his claim or theory.[3] It cannot be expected that the interrogatory will include the proofs or *theory of the adversary*, since this would require a party to assume the truth of that which he generally denies.[4] A question should not be rejected because it does not include all the facts,[5] unless it thereby fails to present the case fairly.[6] It is error to allow an expert to answer a hypothetical question which excludes from his consideration facts already proved by the testimony upon which the question is based, when a consideration of such facts is essential to the formation of an intelligent opinion concerning the matter.[7] But such hypothetical question cannot be based upon testimony given by the witness himself, where this is merely assumed to be true.[8] An expert may, however, include as a basis of his opinion facts known to be true, as well as

those stated in the question, when by the statement of the question he is required to do so.[9] The truth of facts assumed by the question is in doubtful cases a *question for the jury;* and if they find that the assumed facts are not proved, they should disregard the opinions based on such hypothetical questions; and the court will so instruct them.[10] But the court is not required to submit the matter to the jury, unless there is some substantial evidence tending to establish the hypothesis.[11]

1, Turnbull v. Richardson, 69 Mich. 400; People v. Foley, 64 Mich. 148; Quinn v. Higgins, 63 Wis. 664; 53 Am. Rep. 305; Reber v. Herring, 115 Pa. St. 599; Williams v. Brown, 28 Ohio St. 547; Muldowney v. Illinois Cent. Ry. Co., 39 Iowa 615; Haish v. Payson, 107 Ill. 365; Woolner v. Spalding, 65 Miss. 204; Hovey v. Chase, 52 Me. 304; 83 Am. Dec. 514. But the court in its discretion may allow such questions on the claim of counsel that the evidence will be produced, People v. Sessions, 58 Mich. 594; Turnbull v. Richardson, 69 Mich. 400.

2, People v. Augsbury, 97 N. Y. 501; Fairchild v. Bascom, 35 Vt. 398; Williams v. Brown, 28 Ohio St. 547; People v. Harris, 136 N. Y. 423; *In re* Barber's Estate, 63 Conn. 393; North American Acc. Assn. v. Woodson, 64 Fed. Rep. 689.

3, Stearns v. Field, 90 N. Y. 640; Naye v. Tucker, 70 Ind. 15; Hathaway v. National Life Ins. Co., 48 Vt. 335; Daniells v. Aldrich, 42 Mich. 58; Ballard v. State, 19 Neb. 609; State v. Hanley, 34 Minn. 430; People v. Augsbury, 97 N. Y. 501; State v. Anderson, 10 Ore. 448; Meeker v. Meeker, 74 Iowa 352; 7 Am. St. Rep. 489; Woolner v. Spalding, 65 Miss. 204; Conway v. State, 118 Ind. 482; Kraatz v. Brush Electric Co., 82 Mich. 457; Baker v. State, 30 Fla. 41; McFall v. Smith. 32 Ill. App. 463; Jackson v. Burn-

ham, 20 Col. 532; Bever v. Spangler, (Iowa) 61 N. W. Rep. 1072; Quinn v. Higgins, 63 Wis. 664; 53 Am. Rep. 305 and note.

4, Goodwin v. State, 96 Ind. 550.

5, Davidson v. State, 135 Ind. 254; *In re* Barber's Estate, 63 Conn. 393.

6, *In re* Barber's Estate, 63 Conn. 393.

7, Vosburg v. Putney, 80 Wis. 523; Marshall Livery Co. v. McKelvy, 55 Mo. App. 240.

8, *In re* Barber's Estate, 63 Conn. 393.

9, Tebo v. City of Augusta, 90 Wis. 405, 407. See also, Pierce v. City of Boston (Mass.) 41 N. E. Rep. 227.

10, People v. Foley, 64 Mich. 148; Turnbull v. Richardson, 69 Mich. 400. But see, Epps v. State, 102 Ind. 539.

11, Nave v. Tucker, 70 Ind. 15.

§ 374. The expert not to decide questions of fact. — Clearly it is not the province of the expert to act as judge or jury. Hence all questions calling for his opinions should be so framed as not to call upon him to determine controverted questions of fact, or to pass upon the preponderance of testimony.[1] Thus, it would obviously be improper to ask the witness to state his opinion upon all the testimony in the case as to any given question, if the truth of part of such evidence were in dispute.[2] When the question is so framed as to call upon the expert to determine on which side the evidence preponderates or to reconcile conflicting statements, he is in effect asked to decide the merits of the case which is a duty wholly beyond his prov-

ince. Whatever liberality may be allowed in calling for the opinions of experts or other witnesses, they must *not usurp the province of the court and jury* by drawing those conclusions of law or fact upon which the decision of the case depends. Hence it would be improper to inquire whether, in view of the testimony given, a party had acted negligently or prudently, or with ordinary care,[3] or whether certain acts constituted negligence,[4] or whether certain practices of a railroad company in the management of its trains were reasonable or unreasonable,[5] or whether the prisoner was insane,[6] or what had caused the death or a given injury for which the action was brought,[7] or whether rape had been committed in a given case,[8] or whether a physician had or had not been guilty of malpractice,[9] or whether a person had testamentary capacity or the capacity to make contracts.[10] On the same principle it has been held inadmissible to ask witnesses whether certain highways, bridges, crossings or walks were dangerous or safe,[11] or whether certain modes of managing machinery or other property are dangerous,[12] or whether the plaintiff would have been injured if he had used certain precautions,[13] or whether a child of a given age was capable of exercising ordinary care,[14] or whether certain acts were the acts of an ordinarily prudent man.[15] After a surgeon had described the location

and nature of wounds upon the body of a deceased person, it was held that he could not be allowed to testify as to the positions of the parties to the homicide when the fatal blows were given.[16]

1, Inland Coasting Co. v. Tolson, 139 U. S. 551; McNahgten's Case, 10 Clark & F. 200; Walker v. Rogers, 24 Md. 237; Negro Jerry v. Townshend, 9 Md. 445; Page v. State, 61 Ala. 16; Fairchild v. Bascomb, 35 Vt. 399; Chicago & A. Ry. Co. v. Springfield & N. W. Ry. Co., 67 Ill. 142; Printup v. Patton, (Ga.) 18 S. E. Rep. 311; Tingley v. Cowgill, 48 Mo. 291; Muldowney v. Illinois C. Ry. Co., 39 Iowa 615; Hill v. Portland Ry. Co., 55 Me. 438; 92 Am. Dec. 601; Clark v. Detroit Locomotive Works, 32 Mich. 348; State v. Cole, 94 N. C. 958; Baltimore Turnpike Co. v. Cassell, 66 Md. 419; Smith v. Hickenbottom, 57 Iowa 733; Boor v. Lowrey, 103 Ind. 468; Yeaw v. Williams, 15 R. I. 20; Prentis v. Bates, 88 Mich. 567; Louisville, E. & St. L. Ry. Co. v. Berry, 9 Ind. App. 63.

2, State v. Felter, 25 Iowa 67; Reed v. State, 62 Miss. 405; Bennett v. State, 57 Wis. 69; 46 Am. Rep. 26; Buxton v. Somerset Works, 121 Mass. 446; Carpenter v. Eastern Trans. Co., 71 N. Y. 574; State v. Bowman, 78 N. C. 509.

3, Buxton v. Somerset Works, 121 Mass. 446; Carpenter v. Eastern Trans. Co., 71 N. Y. 574; Hopkins v. Indianapolis Ry. Co., 78 Ill. 32; Cincinnati Ins. Co. v. May, 20 Ohio 211: Livingston v. Cox, 8 Watts & S. (Pa.) 61; Lawrence v. Hudson, 12 Heisk. (Tenn.) 671; Seliger v. Bastian, 66 Wis. 521; Harley v. Buffalo Car Co., 142 N. Y. 31; Louisville, E. & St. L. Ry. Co v. Berry, 9 Ind. App. 63.

4, Mantel v. Chicago Ry. Co., 33 Minn. 62; East Tenn. Ry. Co. v. Wright, 76 Ga. 532; Billard v. New York Ry. Co., 126 Pa. St. 141; Bills v. Ottumwa, 35 Iowa 107; Brant v. Lyons, 60 Iowa 172; Carpenter v. Eastern Trans. Co., 71 N. Y. 574; Hoener v. Koch, 84 Ill. 408.

5, Hill v. Portland Ry. Co., 55 Me. 438; 92 Am. Dec. 601; Louisville & N. Ry. Co. v. Hall, 87 Ala. 108; 13 Am. St. Rep. 84.

6, Reed v. State, 62 Miss. 405; Bennett v. State, 57 Wis. 69; 46 Am. Rep. 26.

7, State v. Bowman, 78 N. C. 509.

8, Noonan v. State, 55 Wis. 258.

9, Hoener v. Koch, 84 Ill. 408. But on an assumed state of facts the witness may be asked whether the treatment was proper or improper, skillful or unskillful, Jones v. Angell, 95 Ind. 376; Olmsted v. Gere, 100 Pa. St. 127; Wright v. Hardy, 22 Wis. 348; Twombly v. Leach, 11 Cush. 397.

10, Schneider v. Manning, 121 Ill. 376; Kempsey v. McGinnis, 21 Mich. 123; Gibson v. Gibson, 9 Yerg. (Tenn.) 332; Fairchild v. Bascomb, 35 Vt. 398; Farrell v. Brennan, 32 Mo. 328. But it has been held proper to ask if the mind and memory of the testator were sufficiently sound to enable him to know and understand the business in which he was engaged at the time, McClintock v. Curd, 32 Mo. 411; Pinney's Will, 27 Minn. 280; Woodcock v. Johnson, 36 Minn. 217; Meendy v. Spaulding, 54 Vt. 517.

11, Baker v. Madison, 62 Wis. 137; Kelley v. Fond du Lac, 31 Wis. 179; Weeks v. Lyndon, 54 Vt. 638; Bliss v. Wilbraham, 8 Allen 564; Stillwater Turnpike Co. v. Coover, 26 Ohio St. 520; Brown v. Cape Girardeau Co., 89 Mo. 152; Topeka v. Sherwood, 39 Kan. 690; Barnes v. Newton, 46 Iowa 567; Fairburg v. Rogers, 98 Ill. 554; ; Yeaw v. Williams, 15 R. I. 20. Contra, Taylor v. Monroe, 43 Conn. 36; Laughlin v. Street Ry. Co., 62 Mich. 220; Cross v. Lake Shore Ry. Co., 69 Mich. 363. See also, Miller v. Boone Co., (Iowa) 63 N. W. Rep. 352. See n., 59 Am. Rep. 176.

12, Largan v. Central Ry. Co., 40 Cal. 272; Teall v. Barton, 40 Barb. (N. Y.) 137.

13, Winters v. Hannibal Ry. Co., 39 Mo. 468.

14, Lynch v. Smith, 104 Mass. 52.

15, Stowe v. Bishop, 58 Vt. 498; 56 Am. Rep. 569; Seliger v. Bastian, 66 Wis. 521; Hudson v. Georgia Pac. Ry.

Co., 85 Ga. 203; Hinds v. Keith, 57 Fed. Rep. 10; Ardmore Co. v. Bevil, 61 Fed. Rep. 757.

16, Kennedy v. People, 39 N. Y. 245. But see, Gardner v. People, 6 Park. Cr. Cas. (N. Y.) 155. On the same principle it has been held inadmissible to ask experts as to the safety of certain cattle-guards, St. Louis Ry. Co. v. Ritz, 35 Kan. 404; Pennsylvania Ry. Co. v. Lindley, 2 Ind. App. 111; or gutters, Baker v. Madison, 62 Wis. 143; or to ask whether a certain stock-car was a dangerous place in which to ride, Lawson v. Chicago, St. P., M. & O. Ry. Co., 64 Wis. 447. It was held improper to ask what would be the chances for a stage-coach to tip over at a given place, being driven by an ordinarily prudent driver, Oleson v. Tolford, 37 Wis. 327. It has also been held improper to ask whether the appearance of an elevator suggested to a prudent man the necessity of an examination, Goodsell v. Taylor, 41 Minn. 207; 16 Am. St. Rep. 700. Nor is it admissible for experts to give opinions as to whether certain sheep had been properly cared for, Wolschied v. Thome, 76 Mich. 265.

§ 375. Same, continued. — No doubt there are exceptional cases in which the courts have approved interrogatories which seemed to substantially call for the opinion of the expert as to the merits of the controversy;[1] and it may be conceded that it is sometimes difficult to frame the questions in such manner as to call for an opinion based merely upon assumed facts, and to thus avoid the objection under discussion.[2] But the overwhelming weight of authority sustains the rule already declared, on the obvious ground that the expert is not called upon to perform any part of the functions of the judge or the jury. On the contrary his testimony in connection with all the other testimony in the

case must be weighed by the tribunal to which the final decision is submitted.[3] Although cases almost without limit might be cited which recognize the principle that an expert cannot be called upon to give opinions determining the merits of the case, or to weigh conflicting evidence or judge the credibility of testimony, such witnesses are constantly allowed to state their opinions based upon facts within their own knowledge or facts assumed in hypothetical questions.[4] If the hypothetical question properly presents the fact which the evidence tends to prove, and does not call upon the witness to reconcile conflicting evidence or to pass upon the merits of the case, a wide range may be given by the court, and a liberal discretion allowed as to its form.[5]

1, Johnson v. Central Ry. Co., 56 Vt. 707; Clark v. State, 12 Ohio 483; 40 Am. Dec. 481; Gardner v. People, 6 Park. Cr. Cas. (N. Y.) 155, 202; People v. Clark, 33 Mich. 112; Davis v. State, 38 Md. 15.

2, People v. Lake, 12 N. Y. 358. See also, White v. Bailey, 10 Mich. 155.

3, See cases cited under sec. 374 *supra*.

4, See sec. 369 *supra*.

5, Hunt v. Lowell Gas Co., 8 Allen 169; 85 Am. Dec. 697; Filer v. New York Ry. Co., 49 N. Y. 42.

§ 376. Opinions based upon testimony heard or read by the expert.— It is, no doubt, the better practice to so frame the question that the expert has only to assume

the truth of the facts therein stated. When he is called upon to form an opinion upon testimony which he has heard or read, there is danger that the witness in arriving at a conclusion will unconsciously pass upon the weight or credibility of the evidence; that in determining the facts proved, he will in effect usurp the province of the jury. Questions calling upon the witness to form an opinion based on the evidence which he has heard have often been rejected.[1] This mode of examination is clearly inadmissible if there are inconsistencies or discrepancies in the testimony of the witness or witnesses.[2] But the hypothetical question need not recapitulate the facts proven in all cases. Thus, if the expert has heard a *deposition read*, or has *heard the testimony* of a witness or even of several witnesses in which *no conflict* appears, and if such testimony is not voluminous, he may give an opinion based on the assumption that such evidence is true;[3] and when there is no conflict as to the material facts, the question need not be hypothetical in form.[4] The witness is allowed to give an opinion from the evidence in such cases upon the ground that, by the terms of the question, the witness is required to assume that the facts given in testimony are true; and he is not required to draw any other conclusions or inferences as to the facts.[5]

1, Sills v. Brown, 9 Car. & P. 601; State v. Bowman, 78 N. C. 509; Smith v. Hickenbottom, 57 Iowa 733; Butler v. St. Louis L. Ins. Co., 45 Iowa 93; Woodbury v. Obear, 7 Gray 467.

2, Guiterman v. Liverpool Co., 83 N. Y. 358. Where the evidence is conflicting, see secs. 374 *et seq. supra.*

3, McCullom v. Seward, 62 N. Y. 316; R. v. Searle, 1 Moody & Rob. 75; Negro Jerry v. Townshend, 9 Md. 145; Hunt v. Lowell Gas Co., 8 Allen 169; 85 Am. Dec. 697; Wright v. Hardy, 22 Wis. 348; Dickenson v. Fitchburg, 13 Gray 556; Storer's Will, 28 Minn. 9; State v. Cole, 94 N. C. 958; Bennett v. State, 57 Wis. 69; 46 Am. Rep. 26. In such cases it suffices if he has heard all the material testimony, Carpenter v. Blake, 2 Lans. (N. Y.) 206; Hand v. Brookline, 126 Mass. 324; Davis v. State, 38 Md. 15; State v. Hayden, 51 Vt. 296; State v. Medlicott, 9 Kan. 257. It is not proper for this purpose to read from the minutes of counsel, Thayer v. Davis, 38 Vt. 163.

4, Cincinnati Ins. Co. v. May, 20 Ohio 211; Tefft v. Wilcox, 6 Kan. 46; Page v. State, 61 Ala. 16; Bishop v. Spining, 38 Ind. 143; Guiterman v. Liverpool Co., 83 N. Y. 366; State v. Klinger, 46 Mo. 224; Carpenter v. Blake, 2 Lans. (N. Y.) 206; Coyle v. Com., 104 Pa. St. 117; Henry v. Hall, 13 Ill. App. 343.

5, Hunt v. Lowell Gas Co., 8 Allen 169; 85 Am. Dec. 697. See cases cited *supra.*

§ 377. Opinions based on personal knowledge. — Nor is it necessary that the question should be hypothetical in form when the opinion of the witness is based, not upon assumed facts, but upon his *personal knowledge* or observation.[1] A familiar illustration of this practice is where a physician is called to give his opinion as to the mental or physical condition of one whom he has examined.[2] But

in cases where the opinion of an expert is based upon his personal knowledge of the facts, *such facts should be first stated by him* so that the court and jury may determine whether the alleged facts on which the conclusions are based are real, and whether they justify his conclusions.[3] In several of the cases last cited, questions were held improper because no foundation had thus been laid. The facts on which his opinion is based should have logical connection with the facts under inquiry.[4]

1, Bellefontaine Ry. Co. v. Bailey, 11 Ohio St. 333; Transportation Line v. Hope, 95 U. S. 297; Brown v. Huffard, 69 Mo. 305; Bellinger v. New York Cent. Ry. Co., 23 N. Y. 42; Dunham's Appeal, 27 Conn. 192.

2, State v. Felter, 25 Iowa 67; Bellefontaine & I. Ry. Co., 11 Ohio St. 337; McNaghton's Case, 10 Clark & F. 211. See sec. 380 *infra*.

3, Burns v. Barrenfield, 84 Ind. 43; Louisville Ry. Co. v. Falvey, 104 Ind. 409; Van Deusen v. Newcomer, 40 Mich. 90; Reid v. Piedmont Ins. Co., 58 Mo. 421; Dickinson v. Barber, 9 Mass. 225; 6 Am. Dec. 58; Hitchcock v. Burgett, 38 Mich. 501. If a physician gives an opinion as to the sanity of a person, the symptoms and circumstances should be stated, Hathorn v. King, 8 Mass. 371; 5 Am. Dec. 106.

4, Taylor v. Sutherland, 24 Pa. St. 333; Moore v. State, 17 Ohio St. 521.

§ 378. Opinions based upon hearsay — Conclusions of law, etc. — Although, as we have seen, the opinions of experts may in some cases be based upon personal knowledge gained from their own observation or exam-

ination, they cannot give in evidence opinions based upon information gained from the statements of others outside the court room, since in such case the opinions would depend upon *hearsay*.[1] Thus, when a medical witness is examined as an expert, his opinion is inadmissible if based upon the declaration of nurses or other physicians, made out of court,[2] although, on grounds elsewhere discussed, the declarations of the patient may, under proper limitations, form a part of the basis of such opinions.[3] This was well illustrated in a Wisconsin case where a physician was allowed to state whether in his opinion a party suffered pain, judging from an examination he had made and *from what she said*.[4] On the general principle already stated that experts cannot take the place of the court or jury, it is obvious that questions should not call for their opinions upon *conclusions of law*,[5] or as to abstract questions of *morals or duty*,[6] or as to mere matters of speculation,[7] or as to whether they agree with or differ from the opinions of other experts.[8]

1, Polk v. State, 36 Ark. 117; Baltimore & O. Ry. Co. v. Shipley, 39 Md. 251; Hurst v. Chicago & R. I. Ry. Co., 49 Iowa 76.

2, Heald v. Thing, 45 Me. 392; Wood v. Sawyer, Phill. (N. C.) 251; Wetherbee v. Wetherbee, 38 Vt. 454; Hunt v. State, 9 Tex. App. 166; Louisville Ry. Co. v. Shires, 108 Ill. 617. It must be founded on his personal knowledge or on a hypothetical question, Grand Rapids Ry. Co. v. Huntley, 38 Mich. 537; Hunt v. State, 9 Tex. App. 166; Louisville Ry. Co. v. Shires, 108 Ill. 617.

3, Quaife v. Chicago & N. W. Ry. Co., 48 Wis. 513; 33 Am. Rep. 821; Louisville Ry. Co. v. Snyder, 117 Ind. 435; 10 Am. St. Rep. 60; Illinois Central Ry. Co. v. Sutton, 42 Ill. 438; 92 Am. Dec. 81; Louisville Ry. Co. v. Falvey, 104 Ind. 409; Wilson v. Granby, 47 Conn. 59; Caldwell v. Murphy, 11 N. Y. 416; Denton v. State, 1 Swan (Tenn.) 279; Atchinson Ry. Co. v. Johns, 36 Kan. 769; Hatch v. Fuller, 131 Mass. 574. See sec. 352 *supra*.

4, Quaife v. Chicago & N. W. Ry. Co., 48 Wis. 513; 33 Am. Rep. 821. But the opinion cannot be based upon his own observation and the statements of third persons, Heald v. Thing, 45 Me. 392.

5, Pennsylvania Ry. Co. v. Conlan, 101 Ill. 94; Pittsburg Ry. Co. v. Reich, 101 Ill. 157; Williams v. DeWitt, 12 Ind. 309; Rozirne v. Ball, 51 Iowa 328; Farrell v. Brennan, 32 Mo. 328, 411; May v. Bradlee, 127 Mass. 414; Gibson v. Gibson, 9 Yerg. (Tenn.) 329; White v. Bailey, 10 Mich. 155.

6, Allen v. Burlington, C. R. & N. Ry. Co., 57 Iowa 623; Missouri Ry. Co. v. Mackey, 33 Kan. 298.

7, Cooper v. State, 23 Tex. 331; State v. Pike, 65 Me. 111; Sinnott v. Mullin, 82 Pa. St. 333.

8, Horne v. Williams, 12 Ind. 324.

§ 379. Form of hypothetical questions.— Since the facts sought to be presented in a hypothetical question may be very numerous, it sometimes happens that objection is made to the *length of the question*. But this is a matter to be regulated largely by the *discretion* of the trial judge.[1] There are instances, however, in which it has been held error to permit hypothetical questions so long and complicated that they were likely to confuse witnesses or to baffle their memory.[2] Although, as will be seen, expert witnesses may be asked the grounds and

reasons for their opinions,[2] it is clearly irrelevant on direct examination to ask the witnesses to give the facts or details of *other particular cases*, even though similar, which have come within the range of their experience or observation. This would be a violation of the familiar rule that the testimony must be confined to the point in issue.[4]

1, Forsythe v. Doolittle, 120 U. S. 73. See also sec. 373 *supra.*

2, People v. Brown, 53 Mich. 531; Haish v. Payson, 107 Ill. 365. To obviate this difficulty the court may require the question to be reduced to writing, Jones v. President, 88 Mich. 598.

3, See secs. 370 *et seq. supra.*

4, Horne v. Williams, 12 Ind. 324; St. Louis Gas Co. v. American Ins. Co., 33 Mo. App. 348; California Pac. Ry. Co. v. Pearson, 35 Cal. 247.

§380. Physicians and surgeons.— The opinions of physicians and surgeons may be admitted to show the physical condition of a person,[1] the nature of a disease, whether temporary or permanent,[2] the effect of disease or of physical injuries upon the body or mind,[3] as well as in what manner or by what kind of instruments they were made,[4] or at what time wounds or injuries of a given character might have been inflicted, whether they would probably be fatal, or actually did produce death,[5] the cause, symptoms, nature and peculiarities of a disease, and whether it would be likely to cause death,[6] the probable

future consequences of an injury, when the consequences anticipated are such as in the ordinary course of events may be reasonably expected to happen, and are not merely speculative or possible.[7] While it is improper to ask a physician how certain wounds or injuries were actually given, as this would be trespassing upon the province of the jury,[8] he may be asked by what kinds of weapons wounds of a given description might be caused,[9] or whether wounds of a given character were caused before or after death;[10] and after having made a post-mortem examination, a physician may testify whether a woman was pregnant at the time of her death,[11] or whether the conditions disclosed indicated the cause of death.[12] He may also testify as to the probable effect of a given course of treatment or medicines;[13] what would be proper treatment under a given state of facts;[14] the probabilities of recovery from the effects of an injury;[15] what, under certain circumstances, might cause death or a physical condition of a given character,[16] and as to questions of sanity or insanity;[17] also whether, under a given state of facts, insanity is real or feigned,[18] and whether or not great mental anxiety and suffering would tend to develope insanity, where there is a hereditary predisposition.[19] It has frequently been held that the training and experience of physicians are such as to give them knowledge superior to that possessed by

ordinary witnesses concerning the *diseases of animals;* and, partly on this ground and partly because of the difficulty of procuring other expert testimony upon the subject, ordinary physicians are allowed to give opinions as to the causes, nature and effects of diseases among animals.[20] As a preliminary question as to his qualification as an expert, a medical witness may be asked whether the examination made by him was careful or merely superficial.[21]

1, Knox v. Wheelock, 56 Vt. 191; Spear v. Hiles, 67 Wis. 367; Myers v. State, 84 Ala. 11; Kennedy v. Upshaw, 66 Tex. 442; Jones v. Chicago, M. & St. P. Ry. Co., 43 Minn. 279. In Stone v. Moore, 83 Iowa 186, a person who was a christian scientist doctor was allowed to testify as an expert, it being shown that she had previously been in practice as a physician. See article, 22 Cent. L. Jour., 322.

2, Wilt v. Vickers, 8 Watts (Pa.) 227; Matteson v. New York Central Ry. Co., 35 N. Y. 487; 91 Am. Dec. 67; Rowell v. Lowell, 11 Gray 420; Noblesville Ry. Co. v. Gause, 76 Ind. 142; Goshen v. England, 119 Ind. 368; Turner v. Newburgh, 109 N. Y. 301; Filer v. New York C. Ry. Co., 49 N. Y. 42.

3, Anthony v. Smith, 4 Bosw. (N. Y.) 503; Willey v. Portsmouth, 35 N. H. 303; Bliss v. New York Central & H. R. Ry. Co., 160 Mass. 447; Montgomery v. Scott, 34 Wis. 338; Hardiman v. Brown, 162 Mass. 585; Pidcock v. Potter, 68 Pa. St. 342; 8 Am. Rep. 131; Reed v. City of Madison, 85 Wis. 667; Flynt v. Bodenhamer, 80 N. C. 205; Filer v. New York C. Ry. Co., 49 N. Y. 42; Evansville Ry. Co. v. Christ, 116 Ind. 446; 9 Am. St. Rep. 865; Gulf C. & S. F. Ry. Co. v. Harriet, 80 Tex. 73; State v. Ginger, 80 Iowa 574; Benjamin v. Holyoke St. Ry. Co., 160 Mass. 3; Young v. Johnson, 123 N. Y. 226.

4, Gardner v. People, 6 Park. Cr. Cas. (N. Y.) 202; State v. Morphy, 33 Iowa 270; Davis v. State, 38 Md. 15; Ulrich

v. People, 39 Mich. 245; Rash v. State, 61 Ala. 89; State v. Chee Gong, 17 Ore. 635; People v. Hopt, 4 Utah 247; Johnson v. Steam Gauge Co., 146 N. Y. 152.

5, Linsday v. People, 63 N. Y. 143; State v. Harris, 63 N. C. 1; State v. Clark, 15 S. C. 403; Shelton v. State, 34 Tex. 662; People v. Wilson, 109 N. Y. 345; People v. Hare, 57 Mich. 505; Davidson v. State, 135 Ind. 254.

6, Mobile Life Ins. Co. v. Walker, 58 Ala. 290; Batten v. State, 80 Ind. 394; Eggler v. People, 56 N. Y. 642; Waite v. State, 13 Tex. App. 169; State v. Powell, 7 N. J. L. 244; Livingston v. Com., 14 Gratt. (Va.) 592; State v. Morphy, 33 Iowa 270; Ebos v. State, 34 Ark. 520; State v. Jones, 68 N. C. 443; Smalley v. Appleton, 75 Wis. 18; Illinois Cent. Ry. Co. v. Latimer, 128 Ill. 163; Stouter v. Manhattan Ry. Co., 127 N. Y. 661. So a physician may be asked what was the "exciting cause of the injury," Vosburg v. Putney, 86 Wis. 278.

7, Strohm v. New York Ry. Co., 96 N. Y. 305; Seckinger v. Philibert Manfg. Co., (Mo.) 31 S. W. Rep. 957; Block v. Milwaukee St. Ry. Co., 89 Wis. 371. See also note 3 *supra*. In Johnson v. Central Ry. Co., 56 Vt. 707, a physician was allowed to state that the plaintiff would never be able to do heavy work. But see, Kline v. Kansas Ry. Co., 50 Iowa 656.

8, People v. Hare, 57 Mich. 505; State v. Rainsbarger, 74 Iowa 196. See secs. 274 *et seq. supra*. Contra, State v. Lee, 65 Conn. 265.

9, People v. Hare, 57 Mich. 505; State v. Rainsbarger, 74 Iowa 196; Rowell v. Lowell, 11 Gray 420. See also many illustrations cited, Rogers Exp. Ev. sec. 53. In People v. Wilson, 109 N. Y. 345, a physician was allowed to state whether the injury might have been caused by somebody other than the person injured. They need not have seen the wounds in question or others exactly similar, State v. Powell, 7 N. J. L. 244; Page v. State, 61 Ala. 16; State v. Clark, 12 Ired. (N. C.) 151. But the rule is otherwise if the witness is not an expert, Caleb v. State, 39 Miss. 721; State v. Cross, 68 Iowa 180.

10, Ewell Med. Juris. 31.

11, State v. Smith, 32 Me. 369; 54 Am. Dec. 578.

12, Manufacturers' Acc. Assn. v. Dorgan, 58 Fed. Rep. 945. See also, State v. Lee, 65 Conn. 265.

13, Matteson v. New York C. Ry. Co., 35 N. Y. 487; 91 Am. Dec. 67; Linsday v. People, 63 N. Y. 143; Barber v. Merriam, 11 Allen 322; State v. Slagle, 83 N. C. 630; City of Jackson v. Boone, 93 Ga. 662.

14, Wright v. Hardy, 22 Wis. 348; Hoener v. Koch, 84 Ill. 408; Mertz v. Detweiler, 8 Watts & S. (Pa.) 376; Heath v. Glisan, 3 Ore. 64; Mayo v. Wright, 63 Mich. 32.

15, Wilt v. Vickers, 8 Watts (Pa.) 227; Rumsey v. People, 19 N. Y. 42; Peterson v. Chicago Ry. Co., 38 Minn. 511; Louisville Ry. Co. v. Lucas, 119 Ind. 583; McClain v. Brooklyn City Ry. Co., 116 N. Y. 459; Alberti v. New York, L. E. & W. Ry. Co., 118 N. Y. 77; Griswold v. New York C. Ry. Co., 115 N. Y. 61; 12 Am. St. Rep. 775; Springfield Ry. Co. v. Welsh, 155 Ill. 511.

16, State v. Powell, 7 N. J. L. 244; State v. Morphy, 33 Iowa 270; Shelton v. State, 34 Tex. 662; Curry v. State, 5 Neb. 412; State v. Smith, 32 Me. 369; 54 Am. Dec. 578; State v. Jones, 68 N. C. 443.

17, Davis v. State, 35 Ind. 496; 9 Am. Rep. 760; *In re* Blakely, 48 Wis. 294; Com. v. Rogers, 7 Met. 500; 41 Am. Dec. 458; State v. Windsor, 5 Har. (Del.) 512; Baxter v. Abbott, 7 Gray 71; Hastings v. Rider, 99 Mass. 622; Heald v. Thing, 45 Me. 392; State v. Felter, 25 Iowa 67; Pigg v. State, 43 Tex. 108

18, State v. Hayden, 51 Vt. 296.

19, Dejarnette v. Com., 75 Va. 867. Many illustrations of miscellaneous cases in which the opinions of medical men have been received will be found in Rogers Exp. Ev. sec. 81. The following cases also serve to illustrate the subject of this section: People v. Barker, 60 Mich. 277; 1 Am. St. Rep. 501, physician testified as to the cause of death of a person found in a river; Tompkins v. West, 56 Conn. 478, as to the effect of external pressure on the lungs; Johnson v. Castle, 63 Vt. 452, as to whether a boy is capable of begetting a child; Morganstein v. Nejedlo, 79 Wis. 388, as to

the probable effect of being unable to breathe through the nose; Hickenbotham v. Delaware Ry. Co., 122 N. Y. 91, as to whether a person feels pain in an imaginary limb.

20, State v. Sheets, 89 N. C. 543; Horton v. Green, 64 N. C. 64; House v. Fort, 4 Blackf. (Ind.) 293; Pierson v. Hoag, 47 Barb. (N. Y.) 243.

21, Northern Pac. Ry. Co. v. Urlin, 158 U. S. 271.

§ 381. Same — Testimony of physicians and others as to poisons.— On the same principle chemists and physicians, who are qualified by proper study and experience, may testify as to the nature of poisons and their effect on the system and the symptoms which they produce.[1] But the fact that the witness is a physician does not necessarily qualify him to testify as an expert concerning the presence of poison in the human system, since he may be wholly lacking in the requisite knowledge of chemical science. Although there is some conflict on the question, it has usually been held that he is not qualified, if his knowledge on the subject has been obtained wholly from medical or scientific books or medical instruction, and not from personal observation or experience.[2] Although it is usual for experts to subject compounds to a *chemical analysis* before testifying whether they are poisonous, or as to their ingredients, and although this has sometimes been held indispensable, the better rule is that the opinion may be received, although this test has been omitted, it being a matter

which affects the *weight* rather than the competency of the testimony.[3]

1, State v. Terrill, 12 Rich. (S. C.) 321; People v. Robinson, 2 Park. Cr. Cas. (N. Y.) 235; Polk v. State, 36 Ark. 117; Mitchell v. State, 58 Ala. 417; State v. Hinkle, 6 Iowa 380.

2, Soquet v. State, 72 Wis. 659; Boyle v. State, 57 Wis. 472; Zoldoske v. State, 82 Wis. 580; State v. Cole, 63 Iowa 695. The opposite rule was adopted in Siebert v. People, 143 Ill. 571. See also, sec 370 *supra*.

3, State v. Slagh, 83 N. C. 630. See also, State v. Hinkle, 6 Iowa 380.

§ 382. **Mechanics and machinists as experts.**— On the same principle the opinions of machinists and artisans may be received as evidence when they have by their experience gained an acquaintance with the subject not common to others, and which may aid the court or jury in coming to a conclusion. Thus, their opinions are admissible as to the proper mode of doing work, as in the erection of buildings,[1] the proper mode of constructing machinery,[2] and the comparative merits of different machines.[3] So they may give their opinions as to the value of labor, services or material necessary for a specific work,[4] or as to the time necessary to complete or perform it,[5] or as to the proper mode of measuring or estimating such work,[6] or as to the mode of doing work in such manner as to comply with a certain contract,[7] or as to the amount or kind of work done by certain

machinery,[8] or that which a certain force of men could do,[9] or whether a certain mode of operating a given machine would be safe, as well as whether the machine itself was safe.[10] So the opinions of masons,[11] bridge-builders[12] and other mechanics and artisans,[13] skilled in their respective trades, may be received as to matters pertaining to their occupation.

1, Haver v. Tenney, 36 Iowa 80; Shulte v. Hennessy, 40 Iowa 352; Ward v. Kilpatrick, 85 N. Y. 413; Ford v. Tirrell, 9 Gray 401; 69 Am. Dec. 297; Prendible v. Connecticut Manfg. Co., 160 Mass. 131. But it must first be shown that he has the requisite knowledge to make him an expert, Peteler Manfg. Co. v. Northwestern Manfg. Co., (Minn.) 61 N. W. Rep. 1024.

2, Sheldon v. Booth, 50 Iowa 209; Curtis v. Gano, 26 N. Y. 426; Carroll v. Welch, 26 Tex. 147; Cole v. Clarke, 3 Wis. 323; Taylor v. French Lumber Co., 47 Iowa 662.

3, James v. Hogsden, 47 Vt. 127; Great Western Ry. Co. v. Haworth, 39 Ill. 346; Scattergood v. Wood, 79 N. Y. 263; 35 Am. Rep. 515.

4, Hough v. Cook, 69 Ill. 581; Waco Ry. Co. v. Shirley, 45 Tex. 355; Simmons v. Carrier, 68 Mo. 416; Shepard v. Ashley, 10 Allen 542; Roberts v. Boston, 149 Mass. 346; Kelly v. Rowane, 33 Mo. App. 440; Ruppel v. Adrian Manfg. Co., 96 Mich. 455.

5, Swain v. Naglee, 17 Cal. 416; Stiles v. Neillsville Co., 87 Wis. 266.

6, Shulte v. Hennessey, 40 Iowa 352, measuring masonry; Ford v. Tirrell, 9 Gray 401; 69 Am. Dec. 297.

7, Ogden v. Parsons, 23 How. 167; Haver v. Tenney, 36 Iowa 80.

8, Clifford v. Richardson, 18 Vt. 620; Meiners v. Steinway, 12 Jones & Sp. (N. Y.) 369; Burns v. Welch, 8 Yerg.

(Tenn.) 117; Sheldon v. Booth, 50 Iowa 209; Bemis v Central Vt. Ry. Co., 58 Vt. 636.

9, Salvo v. Duncan, 49 Wis. 151; Allen v. Murray, 87 Wis. 41.

10, Gilbert v. Guild, 144 Mass. 601; Lau v. Fletcher, (Mich.) 62 N. W. Rep. 357; Lang v. Terry, 163 Mass. 138; McGonigle v. Kane, 20 Col. 292. But the question whether a boy is a proper person to put at work upon a machine is not one for an expert, McGuerty v. Hale, 161 Mass. 51.

11, Smith v. Gugerty, 4 Barb. (N. Y.) 614; Montgomery v. Gilmer, 33 Ala. 116; 70 Am. Dec. 562; Miller v. Shay, 142 Mass. 598.

12, Washington, C. & A. Turnpike Co. v. Case, 80 Md. 36; Bonebreak v. Board of Huntington County, (Ind.) 40 N. E. Rep. 141; Blank v. Livonia, 79 Mich. 1.

13, Wintringham v. Hayes, 144 N. Y. 1, opinion of expert as to cost of repairing a yacht; Excelsior Electric Co. v. Sweet, (N. J. L.) 30 At. Rep. 553, as to proper mode of erecting electric lights; Ouilette v. Overman Wheel Co., 162 Mass. 305, as to detection of the want of repair of a shaft by its jarring the building; Judson v. Giant Powder Co., 107 Cal. 549, as to the manufacture of nitro-glycerine; Louisville, N. A. & C. Ry. Co. v. Berkey, 136 Ind. 118, opinion of a blacksmith as to the quality of iron in a coupling pin; Boettger v. Scerpe Iron Co., 124 Mo. 87, as to effect of a knot or cross grain on the strength of a timber; Kershaw v. Wright, 115 Mass. 361, as to the mode of packing hams; Dean v. McLean, 48 Vt. 412; 21 Am. Rep. 130, as to the proper mode of floating logs; State v. Baldwin, 36 Kan. 1, as to the instrument with which a certain panel was cut.

§ 383. Expert testimony as to railroads and their management. — The opinions of those versed in railroad machinery and railway management are admissible as to the proper construction of a track and as to

the mode of laying rails,[1] or proper and safe appliances for cars and tracks,[2] or engines,[3] as to the proper mode of managing trains and engines,[4] as to the distance in which a train could be stopped when the rate of speed and other facts are known,[5] as to the probable cause of a train running off the track, when the facts are stated,[6] as to the comparative danger of running trains forward or backward,[7] as to the probable effect of a given defect upon the operation of an engine,[8] as to the duties of those in the management of trains under given circumstances,[9] and as to the effect of sparks issuing from engines and the probability of their communicating fires.[10] But engineers, conductors and others skilled in railroad matters, like other experts, are not allowed to give their opinions as to whether *ordinary care* or prudence has been exercised in the matter in controversy,[11] or as to the competency of another person to perform his duties,[12] or generally to *usurp the province of the jury* by deciding the real question in controversy.[13]

1, Carpenter v. Central Ry. Co., 4 Daly (N. Y.) 550; Langfitt v. Clinton Ry. Co., 2 Rob. (La.) 217; Grand Rapids Ry. Co. v. Huntley, 38 Mich. 537; Jeffersonville Ry. Co. v. Lanhan, 27 Ind. 171.

2, Baldwin v. Chicago Ry. Co., 50 Iowa 680; Fitts v. Cream City Ry. Co., 59 Wis. 323; Bridger v. Railroad Co., 25 S. C. 24; St. Louis & S. F. Ry. Co. v. Farr, 56 Fed. Rep. 994. See also, Atchison, T. & S. F. Ry. Co. v. Myers, 63 Fed. Rep. 793.

3, Chicago Ry. Co. v. Shannon, 43 Ill. 338.

4, Cooper v. Central Ry. Co., 44 Iowa 134; Cincinnati Ry. Co. v. Smith, 22 Ohio St. 246; Seaver v. Boston Ry. Co., 14 Gray 466; Union Pac. Ry. Co. v. Novak, 61 Fed. Rep. 573.

5, Bellefontaine Ry. Co. v. Bailey, 11 Ohio St. 333, engineer; Maher v. Atlantic & P. Ry. Co., 64 Mo. 267, engineer; Mobile Ry. Co. v. Blakely, 59 Ala. 471, conductor; Detroit Ry. Co. v. Van Steinberg, 17 Mich. 99, mail agent; Eckert v. St. Louis Ry. Co., 13 Mo. App. 352, locomotive builder; Freeman v. Travelers Ins. Co., 144 Mass. 572, conductor; Grimmell v. Chicago Ry. Co., 73 Iowa 93, fireman. See also, Frost v. Milwaukee & N. Ry. Co., 96 Mich. 470; Adams v. Chicago, M. & St. P. Ry. Co., (Iowa) 61 N. W. Rep. 1059.

6, Seaver v. Boston Ry. Co., 14 Gray 466; Murphy v. New York C. Ry. Co., 66 Barb. (N. Y.) 125.

7, Kuhns v. Wisconsin Ry. Co., 70 Iowa 561.

8, Brabbitts v. Chicago Ry. Co., 38 Wis. 289.

9, Cincinnati Ry. Co. v. Smith, 22 Ohio St. 246; Augusta Ry. Co. v. Dorsey, 68 Ga. 228; Reifsnyder v. Chicago, M. & St. P. Ry. Co., 90 Iowa 76; Czezewzka v. Benton B. Ry. Co., 121 Mo. 201.

10, Davidson v. St. Paul, M. & M. Ry. Co., 34 Minn. 51.

11, Gavisk v. Pacific Ry. Co., 49 Mo. 274; Hill v. Portland Ry. Co., 55 Me. 438; 92 Am. Dec. 601; Dooner v. Delaware & H. Canal Co., 164 Pa. St. 17.

12, Moore v. Chicago Ry. Co., 65 Iowa 505; 54 Am. Rep. 26.

13, See secs. 374 *et seq. supra.*

§384. Experts in agriculture.—As illustrations of the same principle, the opinions of those skilled in farming and agriculture may be received as to the proper mode of cultivating[1] and fertilizing land,[2] as well as

to the qualities of soil,[3] the probable amount and value of the products or crops of land under given circumstances, or the yield of a certain crop,[4] of the values of land[5] and of its use,[6] the probable amount of injury to crops occasioned by trespass or other causes,[7] also as to the values,[8] age[9] and weight of domestic animals,[10] and as to the diseases[11] and proper management[12] of stock. So they have been allowed to express an opinion as to whether certain land required draining,[13] and as to the proper time of the year for setting fires upon farming or grazing lands.[14] For further illustrations of the common practice of allowing farmers and stock dealers or graziers to testify as experts concerning matters peculiarly within their knowledge, the notes may be consulted.[15]

1, Spiva v. Stapleton, 38 Ala. 171; Buffum v. Harris, 5 R. I. 243.

2, Young v. O'Neal, 57 Ala. 566.

3, Sarle v. Arnold, 7 R. I. 582.

4, Phillips v. Terry. 3 Abb. Dec. (N. Y.) 607; McLennan v. Lemen, 57 Minn. 317; Townsend v. Bonwill, 5 Har. (Del.) 474; Isaac v. McLean, (Mich.) 64 N. W. Rep. 2.

5, Finch v. Chicago, M. & St. P. Ry. Co., 46 Minn. 250.

6, Cornell v. Dean, 105 Mass. 435.

7, Tucker v. Massachusetts Ry. Co., 118 Mass. 546; Townsend v. Brundage, 4 Hun (N. Y.) 264; Sickes v. Gould, 51 How. Pr. (N. Y.) 22; Seamans v. Smith, 46 Barb. (N. Y.) 320; Slater v. Wilcox, 57 Barb. (N. Y.) 604; Chicago, E. R. I. & P. Ry. Co. v. Larsen, 19 Col. 71, value of crop destroyed.

8, Smith v. Indianapolis Ry. Co., 80 Ind. 233; Browne v. Moore, 32 Mich. 254; Gere v. Council Bluffs Ins. Co., 67 Iowa 272; Bischoff v. Schultz, 5 N. Y. S. 757; Kennett v. Fickle, 41 Kan. 211; Plunkett v. Minneapolis, S. S. M. & A. Ry. Co., 79 Wis. 222; Missouri Pac. Ry. Co. v. Shumaker, 46 Kan. 769; Gleckler v. Slavens, (S. Dak.) 59 N. W. Rep. 323; Mason v. Patrick, 100 Mich. 577, horse dealer.

9, Clague v. Hodgson, 16 Minn. 329; Moreland v. Mitchell Co., 40 Iowa 394.

10, Carpenter v. Wait, 11 Cush. 257; Harpending v. Shoemaker, 37 Barb. (N. Y.) 270; Gilbert v. Kennedy, 22 Mich. 117.

11, Slater v. Wilcox, 57 Barb. (N. Y.) 604; Emrick v. Merriman, 23 Ill. App. 24; Pearson v. Zehr, 31 Ill. App. 199.

12, North Mo. Ry. Co. v. Akers, 4 Kan. 388; 96 Am. Dec. 183.

13, Buffum v. Harris, 5 R. I. 243.

14, Ferguson v. Hubbell, 26 Hun (N. Y.) 250. As to the width of plow land necessary to stop a fire, Krippner v. Biebl, 28 Minn. 139. In other cases their opinions have been rejected as to whether fires were set at proper times, Fraser v. Tupper, 29 Vt. 409. See also, Higgins v. Dewey, 108 Mass. 494; 9 Am. Rep. 63.

15, Donnelly v. Fitch, 136 Mass. 558, where the witness was allowed to state that a horse which had not run away for a year and a half was no more likely to be frightened than if he had not been frightened before; Wabash Ry. Co. v. Pratt, 15 Bradw. (Ill.) 177, as to the number of hogs which might be safely shipped in one car; Albright v. Corley, 40 Tex. 105, as to the number of cattle of a certain brand running in a range; Fleming v. McClafflin, 1 Ind. App. 537, as to the pedigree of horses; Schaeffer v. Philadelphia & R. Ry. Co., 168 Pa. St. 209, as to the cause of injuries sustained by mules in shipment; Barnum v. Bridges, 81 Cal. 604, as to the cost of clearing land.

§ 385. Experts in insurance matters. The opinions of those skilled in insurance

have been held admissible to prove whether certain changes, such as the erection of additions,[1] outbuildings[2] or partitions,[3] or the making of other changes in the buildings increase the risk;[4] such opinions have also been admitted to show which of different classes or occupations are the more hazardous.[5] It is admissible to prove that, by the practice of insurers, the knowledge of certain facts would have increased the risk.[6] There are authorities which receive such testimony to show whether or not a risk would have been taken at any premium on the life of one employed in a given business.[7] These cases proceed on the theory that those qualified by the requisite experience may give an opinion as to the influence which certain facts material to the risk would have with underwriters generally as an element in the contract and in affecting the risk. But there is a decided *conflict of opinion* on this question; and another class of cases will be found in which evidence of this character is rejected.[8] It has been held in numerous cases that expert testimony is inadmissible to prove that it increases the risk to have a building become vacant,[9] or to increase the number of stoves in use.[10] Expert evidence has been rejected in cases in which it was sought to show thereby that one habitually using intoxicating drinks would not be treated as insurable,[11] or that one building would be considered as

an exposure to another.[12] On the same principle those who have had such experience in examining and deciding upon risks as to have acquired special skill may give their opinions, when the question becomes material, as to whether certain facts, if known, would have increased the premium.[13] So insurance experts may give opinions as to the meaning of technical terms according to the customs and usages of insurers,[14] and whether vessels in a given state are seaworthy.[15] Expert evidence is also admissible to determine the present value of an insurance policy which depends partly on the accuracy of an intricate computation.[16]

1, Kern v. St. Louis Ins. Co., 40 Mo. 19.

2, Jefferson Ins. Co. v. Cotheal, 7 Wend. 72; 22 Am. Dec. 567.

3, Daniels v. Hudson River Ins. Co., 12 Cush. 416; 59 Am. Dec. 192.

4, Schenck v. Mercer County Ins. Co., 24 N. J. L. 447.

5, Mitchell v. Home Ins. Co., 32 Iowa 421; Hobby v. Dana, 17 Barb. 111.

6, Hawes v. New England Mut. Ins. Co., 2 Curt. (U. S.) 229.

7, Hartman v. Keystone Ins. Co., 21 Pa. St. 466.

8, Mulry v. Mohawk Valley Ins. Co., 5 Gray 545; 66 Am. Dec. 380; Thayer v. Providence Ins. Co., 70 Me. 531.

9, Joyce v. Maine Ins. Co., 45 Me. 169; 71 Am. Dec. 536; Cannell v. Phœnix Ins. Co., 59 Me. 582; Luce v. Dorchester Ins. Co., 105 Mass. 300; 7 Am. Rep. 522; Liverpool Ins Co. v. McGuire, 52 Miss. 227; Franklin Ins. Co. v. Gruver, 100 Pa. St. 266; Kirby v. Phœnix Ins. Co., 9

Lea (Tenn.) 142; Mulry v. Mohawk Valley Ins. Co., 5 Gray 545; 66 Am. Dec. 380.

10, Schmidt v. Peoria Ins. Co., 41 Ill. 295.

11, Rawls v. American Mutual Life Ins. Co., 27 N. Y. 282; 84 Am. Dec. 280.

12, Milwaukee Ry Co. v. Kellogg, 94 U. S. 472.

13, Martin v. Franklin Ins. Co., 42 N. J. L. 46; Hawes v. New E. Mut. Ins. Co., 2 Curt. (U. S.) 229; Hobby v. Dana, 17 Barb. (N. Y.) 111; Merriam v. Middlesex Ins. Co., 21 Pick. 162; 32 Am. Dec. 252; Luce v. Dorchester Ins. Co., 105 Mass. 297; 7 Am. Rep. 522; Planters Mut. Ins. Co. v. Rowland, 66 Md. 236. It is necessary in such a case that the witness have special knowledge of the subject, Stennett v. Pennsylvania Fire Ins. Co., 68 Iowa 674; Schmitt v. Peoria Ins. Co., 41 Ill. 296.

14, Child v. Sun Mut. Ins. Co., 3 Sandf. (N. Y.) 26, meaning of "whaling voyages;" Niagara Fire Ins. Co. v. Greene, 77 Ind. 590, meaning of "reasonable time;" Johnson v. Northwestern Ins. Co., 39 Wis. 87, meaning of "loading offshore."

15, Thornton v. Royal Exchange Ass. Co., Peake N. P. 26; Beckwith v. Sydebotham, 1 Camp. 116; Walsh v. Wash. Ins. Co., 32 N. Y. 427, as to the effect of heavy storms upon vessels; Lapham v. Atlas Ins. Co., 24 Pick. 1, as to whe her it is more dangerous to carry goods on deck or under deck.

16, Price v. Connecticut Life Ins. Co., 48 Mo. App. 281.

§ 386. Illustrations of expert testimony by surveyors and engineers.— Surveyors may give their opinions as to boundary lines between different tracts of land,[1] as to the location of a certain survey,[2] as to the genuineness of certain alleged survey marks or monuments,[3] as to whether a certain corner was the true quarter section corner,[4] and also whether certain corners,

alleged to have been found, had been found according to the government survey.[5] But surveyors are *not* competent to *construe deeds* or other written instruments by testifying as to the controlling calls in descriptions of land or the meaning of the language used in such instruments.[6] On the same principle the opinions of *civil engineers* are received as to those matters within the range of their profession. Thus, engineers having the requisite skill may testify as to what amount of land would be overflowed if water within certain embankments were kept at a given height,[7] as to the causes and effects of the overflow of a stream at given places,[8] as to the cause of the filling of a certain harbor,[9] as to the effect of a given dam or embankment in causing an overflow,[10] or of a given drain in respect to the flow of water,[11] as to the meaning of technical terms,[12] as to the probability that a lake would overflow a given area,[13] as to the customary and proper modes of doing work within the line of their profession,[14] and as to the cost or value of the same.[15] On the same principle it has been held that *miners* are competent to testify as experts as to matters connected with the operation of mines.[16]

1, Shook v. Pate, 50 Ala. 91; Bridges v. McClendon, 56 Ala. 327; Mincke v. Skinner, 44 Mo. 92; Messer v. Reginnetter, 32 Iowa 312.

2, Jackson v. Lambert, 121 Pa. St. 182.

3, Davis v. Mason, 4 Pick. 156; Knox v. Clark. 123 Mass. 216; Clegg v. Fields, 7 Jones (N. C.) 37; 75 Am. Dec. 450; McGann v. Hamilton, 58 Conn. 69.

4, Toomy v. Kay, 62 Wis. 104.

5, Hockmoth v. Des Grand Champs, 71 Mich. 520.

6, Norment v. Fastnaght, 1 MacArth. (D. C.) 515; Schultz v. Lindell, 30 Mo. 310; Blumenthall v. Roll, 24 Mo. 113; Randolph v. Adams, 2 W. Va. 519.

7, Phillips v. Terry, 3 Abb. App. Dec. (N. Y.) 607.

8, Moyer v. New York C. Ry. Co., 98 N. Y. 645.

9, Folkes v. Chadd., 3 Doug. 157; 26 E. C. L. 63. See also, Grisby v. Clear Lakes W. W. Co., 40 Cal. 396.

10, Ball v. Hardesty, 38 Kan. 540. See also cases last cited. But the fact that damage has resulted from the overflow may be proved without expert testimony, Lincoln & B. H. Ry. Co. v. Sutherland, (Neb.) 62 N. W. Rep. 859.

11, Buffum v. Harris, 3 R. I. 243.

12, Reed v. Hobbs, 3 Ill. 297; Colwell v. Lawrence, 38 Barb. (N.Y.) 643; Skelton v. Fenton Elec. Co., 100 Mich. 87.

13, Clason v. Milwaukee, 30 Wis. 316.

14, Hart v. Hudson R. Bridge Co., 84 N. Y. 56; Stead v. Worcester, 150 Mass. 241.

15, Bryan v. Branford, 50 Conn. 246.

16, Grant v. Varney, (Col.) 40 Pac. Rep. 771, support of a mine; Monahan v. Kansas City Clay Co., 58 Mo. App. 68, support of a mine; Bennett v. Morris, (Cal.) 37 Pac. Rep. 929, operation of a mine; McNamara v. Logan, 100 Ala. 187, as to the proper mode of operating a mine.

§ 387. Opinions of nautical men.—It is a common practice to receive in evidence the opinions of persons skilled in the management of boats and vessels. For example, the opinions of nautical men are received as to the proper management of boats and

vessels under given circumstances,[1] as to the condition, state of repair or seaworthiness of vessels, and of their machinery and appliance,[2] as to the proper mode of loading vessels, and as to what cargoes may be safely carried,[3] as to the probable causes of collisions or the loss of vessels, and the mode of avoiding such collision or loss under given circumstances,[4] as to the proper mode of repairing vessels, and of raising them when sunk, and the feasibility of so doing,[5] as to what constitutes a competent crew for a voyage, and as to the course and usage of business in the relations between master and crew.[6]

1, Union Ins. Co. v. Smith, 124 U. S. 405; Guiterman v. Liverpool Steamship Co., 83 N. Y. 358; Baltimore Elevator Co. v. Neal, 65 Md. 438; Transportation Line v. Hope, 95 U. S. 297.

2, Steamboat Clipper v. Logan, 18 Ohio 375; Beckwith v. Sydebotham, 1 Camp. 117; Baird v. Daly, 68 N. Y. 547; Patchin v. Astor Mut. Ins. Co., 13 N. Y. 268; Western Ins. Co. v. Tobin, 32 Ohio St. 77; Reed v. Dick, 8 Watts (Pa.) 479.

3, Ogden v. Parsons, 23 How. 167; Lapham v. Atlas Ins. Co., 24 Pick. 1; Price v. Powell, 3 N. Y. 322; Weston v. Foster, 2 Curt. (U. S.) 119; Leitch v. Atlantic Ins. Co., 66 N. Y. 100, as to whether a certain mode of loading increased the risk.

4, Western Ins. Co. v. Tobin, 32 Ohio St. 77; Weaver v. Alabama Co., 35 Ala. 176; Fenwick v. Bell, 1 Car. & K. 312; Steamboat Clipper v. Logan, 18 Ohio 375.

5, Steamboat Clipper v. Logan, 18 Ohio 375; Sikes v. Paine, 10 Ired. (N. C.) 280; 51 Am. Dec. 389.

6, McLanahan v. Universal Ins. Co., 1 Peters 170; Mc-

Creary v. Turk, 29 Ala. 244. As to the size of waves, Smith v. Sabine Ry. Co., 76 Tex. 63.

§ 388. Miscellaneous illustrations.— Of the many other instances which might be given of the admission of the opinions of experts as evidence, only a few of a miscellaneous character will be added as illustrative of the general subject. Thus, practical *millwrights* may testify as to the requisite height of water for the proper operation of a mill under given circumstances,[1] as to the sufficiency or need of repairs[2] and as to the adaptability of a given place for a mill site.[3] So *millers* have been allowed to give opinions as to the effect of dams upon other mills on the same stream,[4] as to the capacity of mills and machinery[5] and also for the purpose of identifying wheat and flour from certain peculiarities.[6] The opinions of *artists* may be received as to the genuineness of paintings and as to their value;[7] and *photographers* may testify as to the quality of work of other photographers, and as to other matters pertaining to their employment.[8] So the opinions of those having the requisite skill have been received as to the proper and usual modes of packing and shipping,[9] and importing *merchandise*,[10] as to the results of *computations* in voluminous books or schedules[11] and as to the genuineness of a *post mark*.[12]

1, Detweiler v. Graff, 10 Pa. St. 376.

2, Taylor v. French Lumber Co., 47 Iowa 662; Cooke v. England, 27 Md. 14; 92 Am. Dec. 618.

3, Haas v. Choussard, 17 Tex. 592.

4, Ball v. Hardesty, 38 Kan. 540; Williamson v. Yingling, 80 Ind. 379.

5, Read v. Barker, 30 N. J. L. 378; E. P. Allis Co. v. Columbia Mill Co., 65 Fed. Rep. 52.

6, Walker v. State, 58 Ala. 393. For other cases in which opinions of millers and millwrights have been received see: Hammond v. Woodman, 41 Me. 177; 66 Am. Dec. 219, as to the effect on the machinery of the shutting off the water power; Claggett v. Easterday, 42 Md. 617, as to the existence of a mill site; Walker v. Fields, 28 Ga. 237, as to the skillfulness of work done in a mill; Doster v. Brown, 25 Ga. 24; 71 Am. Dec. 153, as to the capacity of a millwright; Davis v. Mills, 163 Mass. 481, as to the component parts of certain flour.

7, Houston Ry. Co. v. Burke, 55 Tex. 323; 40 Am. Rep. 808. See article, 25 Alb. L. Jour. 144.

8, Barnes v. Ingalls, 39 Ala. 193.

9, Leopold v. Van Kirk, 29 Wis. 548; Kershaw v. Wright, 115 Mass. 361, as to whether hams packed in a certain mode would bear transportation; Shriver v. Sioux City Ry. Co., 24 Minn. 506, as to whether marble was properly packed.

10, Richards v. Doe, 100 Mass. 524.

11, Jordan v. Osgood, 109 Mass. 457; 12 Am. Rep. 731.

12, Abbey v. Lill, 5 Bing. 299.

§389. Expert testimony as to values.— The view has been maintained in one state that the values of lands within the county, when described to the jury, as well as the values of domestic animals are matter of such common notoriety that a jury require no evidence on which to base their decision, and

that expert testimony upon the subject should not be received.[1] But this rule was afterward changed by statute and the practice everywhere prevails of calling experts to prove the values of land and personal property, although as we have seen, this is a subject as to which ordinary witnesses may also give their opinions.[2] It is *not necessary that an expert should have seen the land or article* in question or have personal knowledge concerning it.[3] His knowledge may be gained by *having dealt in similar property*, although at another place,[4] or from the *description* of the articles by other witnesses.[5] Accordingly it has often been held that the values of lands may be proved not only by ordinary witnesses, residents of the vicinity,[6] but by real estate agents, assessors or other public officers, or persons engaged in private business of such a character as gives them special and peculiar knowledge of the subject.[7] It is not necessary that the witness should have bought or sold land in that vicinity;[8] or that he should have known the actual sales of such tracts as the one in question;[9] or that his knowledge of sales should have been personal,[10] or that it should have been derived from the buyer or seller of the land sold.[11] The essentials are: "*First*, a knowledge of the intrinsic properties of the thing; *secondly*, a knowledge of the state of the markets."[12] So those who have become experts in respect to the values

of *personal property* of any kind by means of having dealt in similar articles, or who have gained the requisite knowledge in any other way may give their opinions as to such values.[13] On the same general principle lawyers,[14] physicians,[15] nurses,[16] artists and authors,[17] as well as persons in other walks of life[18] have been allowed to testify as experts as to the value of services rendered by those of their own profession or occupation. Such testimony is, however, not conclusive upon the jury, but merely advisory.[19]

1, Rochester v. Chester, 3 N. H. 349; Robertson v. Stark, 15 N. H. 109; Low v. Connecticut Ry. Co., 45 N. H. 370. For a general discussion of the subject of values, see article, 22 Am. L. Reg. 325.

2, See sec. 365 *supra* and cases there cited.

3, Slocovich v. Orient Ins. Co., 108 N. Y. 56; Mish v. Wood, 34 Pa. St. 451; Stone v. Corell, 29 Mich. 360.

4, Mish v. Wood, 34 Pa. St. 451; Whitbeck v. New York Ry. Co., 36 Barb. (N. Y.) 644; Lawton v. Chase, 108 Mass. 238; Phoenix Ins. Co. v. Copeland, 86 Ala. 551; Miller v. Smith, 112 Mass. 470; Beecher v. Denniston, 13 Gray 354.

5, Mish v. Wood, 34 Pa. St. 451; Whitbeck v. New York Ry. Co., 36 Barb. (N. Y.) 644; Orr v. Mayor of N Y., 64 Barb. (N. Y.) 106; Phoenix Ins. Co. v. Copeland, 86 Ala. 551.

6, Kansas City Ry. Co. v. Ehret, 41 Kan. 22, 69; Stone v. Covell, 29 Mich. 360; Thomas v. Mallinckrodt, 43 Mo. 58; Pennsylvania Ry. Co. v. Bunnell, 81 Pa. St. 426; Robertson v. Knapp, 35 N. Y. 91; West Newbury v. Chase, 5 Gray 421; Lehmicke v. St. Paul Ry. Co., 19 Minn. 464; Crouse v. Holman, 19 Ind. 30; Brainard v. Boston Ry. Co., 12 Gray 407; Galena Ry. Co. v. Haslem, 73 Ill. 494; Hanover Water Co. v. Ashland Iron Co., 84 Pa. St. 279; Keithsburg Ry. Co. v. Henry, 79 Ill. 290; City of Santa

Ana v. Harlin, 99 Cal. 538; Hudson v. State, 61 Ala. 334; Erd v. Chicago Ry. Co., 41 Wis. 65; Ferguson v. Stafford, 33 Ind. 162; Tate v. M., K. & T. Ry. Co., 64 Mo. 149; Northeastern N. Ry. Co. v. Frazier, 25 Neb. 53; Pingery v. Cherokee Ry. Co., 78 Iowa 438; Blake v. Griswold, 103 N. Y. 429; Snodgrass v. City of Chicago, 152 Ill. 600.

7, Swan v. Middlesex, 101 Mass. 173; Bristol Bank v. Keavy, 128 Mass. 298; Haulenbeck v. Cronkright, 23 N. J. Eq. 407; Jarvis v. Furman, 25 Hun (N. Y.) 391.

8, Whitman v. Boston Ry. Co., 7 Allen 313; Lehmicke v. St. Paul Ry. Co., 19 Minn. 464.

9, Frankfort Ry. Co. v. Windsor, 51 Ind. 238; Leroy Ry. Co. v. Hawk, 39 Kan. 638; Kansas City Ry. Co. v. Baird, 41 Kan. 69.

10, Hanover Water Co. v. Ashland Iron Co., 84 Pa. St. 279. But a mere statement that he has "heard" of sales in the neighborhood is not sufficient, Michael v. Crescent Pipe Line Co., 159 Pa. St. 99.

11, Whitman v. Boston & M. Ry. Co., 7 Allen 313.

12, Whart. Ev. sec. 447. See also, Dawson v. City of Pittsburg, 159 Pa. St. 317.

13, Smith v. Frost, 42 N. Y. S. 87, stockbroker; Jonan v. Ferrand, 3 Rob. (La.) 366, stockbroker; Shepard v. Ashley, 10 Allen 542, mechanic; Enos v. St. Paul Insurance Co., 4 S. Dak. 639, clerk; Reed v. Davis Milling Co., 37 Neb. 391, flour merchant; Woods v. Gaar, Scott & Co., 99 Mich. 401, dealer in agricultural implements; Whitney v. Thatcher, 117 Mass. 523, broker; Beecher v. Denniston, 13 Gray 354, gunsmith. The same rule is illustrated by the following cases: Cooper v. State, 53 Miss. 393; Reed v. New, 35 Kan. 727; Moore v. Kenockee, 75 Mich. 332; Hough v. Cook, 69 Ill. 581; Hills v. Home Insurance Co., 129 Mass. 345; Bedell v. Long Island Ry. Co., 44 N. Y. 367; Comstock v. Smith, 20 Mich. 338; Noonan v. Isley, 22 Wis. 27; Board of Commissioners v. Chambers, 75 Ind. 409; Metz v. Detwiler, 8 Watts & S. (Pa.) 376; Coovey v. Campbell, 52 Ind. 157; Williams v. Brown, 28 Ohio St. 547; Thompson v. Boyle, 85 Pa. St. 477; Central Branch Ry. Co. v. Nichols, 24 Kan. 242; Garfield v. Kirk,

65 Barb. (N. Y.) 464; Brown v. Huffard, 69 Mo. 305; Blizzard v. Applegate, 61 Ind. 371; Gilbert v. Kennedy, 22 Mich. 117; Smith v. Wilcox, 4 Hun (N. Y.) 411; Brown v. Moore, 32 Mich. 254; Kennett v. Fickel, 42 Kan. 211.

14, Kelly v. Richardson, 69 Mich. 430; Frye v. Ferguson, (S. Dak.) 61 N. W. Rep. 161; Stevens v. Ellsworth, (Iowa) 63 N. W. Rep. 683; Bourke v. Whiting, 19 Col. 1. See also article, 22 Am. L. Reg. 330; note, 11 L. R. A. 787.

15, Wood v. Barker, 49 Mich. 295.

16, Wallace v. Schaub, (Md.) 32 At. Rep. 324.

17, Babcock v. Raymond, 2 Hilt. (N. Y.) 61.

18, Heffron v. Brown, 155 Ill. 322.

19, Moore v. Ellis, 89 Wis. 108. See also the cases cited in note 13 *supra*.

§ 390. Opinions as to amount of damages. — The question of damages is often so intimately connected with that of the value of property that it becomes necessary to consider whether expert witnesses may ever give their opinion as to the damages which a party has suffered in a given case. On a principle discussed in another section it is evident that, if the witness may give an opinion as to damages, the practice is an exception to general rules, since this is a question for the determination of the jury.[1] Undoubtedly it is the general rule that witnesses cannot give their opinions as to the amount of damages suffered in a given case. But there is a class of cases in which there is a decided *conflict* of authority as to the admissibility of opinions

as to the amount of damages in *condemnation proceedings*. The courts of a number of the states hold that in such cases witnesses cannot state the amount of damages sustained thereby, on the ground that the amount of damages is the very subject referred to the jury.[2] These courts confine the witnesses to a statement of the value of the property *before* and *after* its condemnation.[3] But the weight of authority sanctions the more reasonable rule that opinions as to the damage sustained in such cases should be received in evidence. These decisions are based upon the reasoning that, inasmuch as the amount of damages in such proceedings depends entirely upon opinions as to the value before and after the condemnation, and as these opinions are competent, it can make no material difference whether the witness gives his opinion as to the amount of damages at once or whether he is allowed simply to state to the jury his opinion as to values from which the opinion as to damages must necessarily follow by the processes of subtraction.[4] The tendency of the later decisions seems to be in favor of this rule.

1, See secs. 374 *et seq. infra.*

2, Noonan v. Wells, 17 Wend. 136; Bain v. Cushman, 60 Vt. 343; Yost v. Conroy, 92 Ind. 464; 47 Am. Rep. 156; Central Ry. Co. v. Senn, 73 Ga. 705; Burlington Ry. Co. v. Beebe, 14 Neb. 463; Little Rock Ry. Co. v. Haynes, 47 Ark. 497; Fremont Ry. Co. v. Marley, 25 Neb. 138; Lincoln v. Saratoga Ry. Co., 23 Wend. 433; Terpenning v. Corn Exchange Ins. Co., 43 N. Y. 279; Ohio Ry. Co. v.

Nickless, 71 Ind. 271; Central Ry. Co. v. Kelly, 58 Ga. 107; Wilcox v. Leake, 11 La. An. 178; Cleveland Ry. Co. v. Ball, 5 Ohio St. 568; Harrison v. Iowa Midland Ry. Co., 36 Iowa 323. Contrary to the general rule a witness was allowed to give an opinion as to damages in an action for breach of promise of marriage, Jones v. Fuller, 19 S. C. 66; 45 Am. Rep. 761.

3, Alabama Ry. Co. v. Burkett, 42 Ala. 83; Brunswick Ry. Co. v. McLaren, 47 Ga. 546; Yost v. Conroy, 92 Ind. 464; Harrison v. Iowa Ry. Co., 36 Iowa 323; Ottawa Ry. Co. v. Adolph, 41 Kan. 600; Grand Rapids v. Grand Rapids & I. Ry. Co., 58 Mich. 641; Freemont Ry. Co. v. Whalen, 11 Neb. 585; Cleveland Ry. Co. v. Ball, 5 Ohio St. 568; Brown v. Providence Ry. Co., 12 R. I. 238. See also, Mayor of Baltimore v. Smith Brick Co., 80 Md. 458.

4, Texas Ry. Co. v. Kirby, 44 Ark. 103; Orange Belt Ry. Co. v. Craver, 32 Fla. 28; Spear v. Drainage Commissioners, 113 Ill. 632; Snow v. Boston Ry Co., 65 Me. 230; Swan v. County of Middlesex, 101 Mass. 173; Emmons v. Minneapolis Ry. Co., 41 Minn. 133; Rochester Ry. Co. v. Budlong, 6 How. Pr. (N. Y.) 467; Portland v. Kam, 10 Ore 383; Dawson v. City of Pittsburgh, 159 Pa. St. 317; Rail road Company v. Foreman, 24 W. Va. 662; Washburn v. Milwaukee Ry. Co., 59 Wis. 364. In these states opinion evidence is held admissible as to the increase in the value of property occasioned by public improvements, Pike v. City of Chicago, 155 Ill. 656.

§ 391. Cross-examination of experts — Latitude allowed. — The party cross-examining an expert witness is by no means confined to the theory on which the adversary has conducted his examination. He may go into the details and may put the case before the expert in all its phases. "He has a right to leave out of the hypothetical question facts assumed by the counsel on the direct examination, if he deems them not

proved; and he also has the right to add to the question such facts as he thinks the evidence establishes."[1] The witness may be asked his opinion upon hypothetieal questions which present the facts claimed to constitute the case or defense of the party examining him.[2] As usual in cross-examination great liberty is allowed; and the hypothetical questions may, subject to the reasonable discretion of the court, assume any facts relevant to the case.[3] The inquiry on cross-examination should be allowed as wide a range as may be reasonably necessary to test the skill and reliability of the witness.[4] Even on direct examination expert witnesses are allowed to state the *reasons* for their opinions;[5] and clearly the same latitude is allowed on cross-examination. In ascertaining the grounds or reasons for such opinions, the cross-examiner is not confined to the scope of the evidence already given in the case, but is allowed to ask questions which would be wholly irrelevant except for the purpose of ascertaining the value of such opinions or the degree of credibility to be attached to the testimony of the witness.[6] Although we have seen that on direct examination the hypothetical questions must be based upon facts proved or which the evidence tends to prove, no such limit is imposed upon the cross-examination. For the purpose of testing the accuracy or credibility of the expert, or the

value of his opinions, he may be interrogated as to pertinent hypothetical cases concerning which no evidence has been given.[7] The extent to which the examination may go in respect to such collateral matters rests in the sound *discretion of the court;* and the exercise of such discretion will not be reviewed on appeal, unless abused.[8] In other respects expert witnesses may be subjected on cross-examination, like other witnesses, to such tests as may be necessary to ascertain whether they are accurate, impartial and credible. Thus, they may be asked if they have not on other occasions expressed opinions different from those given on the stand;[9] and they may be asked the reasons for such change of opinion;[10] and whether they have received a special fee for attending the trial and, if so, what amount.[11]

1, Thomp. Trials sec. 628; Louisville Ry. Co. v. Falvey, 104 Ind. 409; Davis v. State, 35 Ind. 496. As to use of scientific books on cross-examination, see sec. 595 *infra.*

2, Davis v. State, 35 Ind. 496; Louisville Ry. Co. v. Falvey, 104 Ind. 409; Williams v. State, 64 Md. 384.

3, Dilleber v. Home Life Ins. Co., 87 N. Y. 79.

4, Dilleber v. Home Life Ins. Co., 87 N. Y. 79; People v. Augsbury, 97 N. Y. 501; Louisville Ry. Co. v. Falvey, 104 Ind. 409; Geisendorf v. Eagles, 106 Ind. 38; People v. Sutton, 73 Cal. 243.

5, Dickenson v. Fitchburg, 13 Gray 546; State v. Hooper, 2 Bailey (S. C.) 37; Fairchild v. Bascomb, 35 Vt. 398; Lincoln v. Taunton Mfg. Co., 9 Allen 181; Keith v. Lothrop, 10 Cush. 457; Com. v. Webster, 5 Cush. 295; 52 Am. Dec.

711; Leache v. State, 22 Tex. App. 279; 58 Am. Rep. 638; Chicago & N. W. Ry. Co. v. Town of Cicero, 154 Ill. 656.

6, Erickson v. Smith, 2 Abb. App. Dec. (N. Y.) 64; Louisville Ry. Co. v. Falvey, 104 Ind. 409; Davis v. State, 35 Ind. 496.

7, Davis v. State, 35 Ind. 496; Louisville Ry. Co. v. Falvey, 104 Ind. 409; Dilleber v. Home Life Ins. Co., 87 N. Y. 79; People v. Augsbury, 97 N. Y. 501; Geisendorf v. Eagles, 106 Ind. 38; People v. Sutton, 73 Cal. 243.

8, People v. Augsbury, 97 N. Y. 501; Bever v. Spangler, (Iowa) 61 N. W. Rep. 1072. See secs. 832 *et seq. infra.*

9, Sanderson v. Nashua, 44 N. H. 492. See secs. 826 *et seq. infra.*

10, People v. Donovan, 43 Cal. 162.

11, Alford v. Vincent, 53 Mich. 555. See valuable note as to expert testimony, 66 Am. Dec. 228.

§ 392. Infirmity of expert testimony. It is the inherent infirmity of expert testimony that it consists largely of matters of opinion. In addition to those elements of weakness and uncertainty which enter into the testimony of those who relate simply what they have seen and heard, we have in expert testimony the *deductions* and *reasoning* of the witness with all the chances of error incident to human reasoning. The notorious fact that experts of equal credibility and skill are found in almost every important cause testifying to directly opposite conclusions illustrates both the fallibility of such testimony and the fact that a conviction for perjury based upon such evidence would be very difficult. It is a matter of common

observation in the courts that witnesses of the highest character and of undoubted veracity may be easily led as experts to espouse and defend a theory with all the zeal of the advocate. Again the practice sometimes prevails of employing expert witnesses and paying them for their services, as *compensation*, amounts depending upon their skill, or, perhaps, the result of the action. These and similar considerations have led to those strictures upon expert testimony so often made in instructions to juries or in judicial decisions.[1]

1, For a general discussion of the value and uses of expert testimony and opinion evidence see articles: 1 Am. L. Rev. 45; 5 *id.* 227; 6 So. L. Rev. (N. S.) 706; 4 Crim. L. Mag. 565; 3 Ch. L. Jour. (N. S.) 133; 5 *id.* 315; 32 Am. L. Reg. 529; 9 Alb. L. Jour. 122, 146, 193; 48 *id.* 404; also extended note, 66 Am. Dec. 228–246, where the whole subject is discussed.

§ 393. **Same, continued.**—It has been said of expert testimony: "It is not desirable in any case where the jury can get along without it, and is only admitted from necessity, and then only when it is likely to be of some value."[1] "The evidence of experts is of the very lowest order and the most unsatisfactory character."[2] All testimony founded upon opinion merely is weak and uncertain, and should in every case be weighed with great caution.[3] "The unsatisfactory nature of such evidence is well known. The facility

with which great numbers of witnesses may be marshalled on both sides of such a question, all calling themselves experts, and each anxious to display his skill and ingenuity in detecting the false or pointing out the true, and equally honest and confident that his own theory or opinion is the only correct one, and yet all on one side directly opposing all on the other, admonishes us of the fallibility of such testimony, and of the great degree of allowance with which it must be received."[4] "Such evidence should be received with great caution by the jury and never allowed except upon subjects which require unusual scientific attainments or peculiar skill."[5] "The evidence of witnesses who are brought upon the stand to support a theory by their opinions is justly exposed to a reasonable degree of suspicion. They are produced, not to swear to facts observed by them, but to express their judgment as to the effect of those detailed by others; and they are selected on account of their ability to express a favorable opinion, which there is great reason to believe is in many instances the result alone of employment, and the bias arising out of it. Such evidence should be cautiously accepted as the foundation of a verdict; and it forms a very proper subject for the expression of a reasonably guarded opinion by the court."[6] We might quote from many other judicial decisions in which the courts have

held it proper to caution the jury in somewhat similar language as to the inherent weakness of expert testimony.[7]

1, Per Cooley J. in People v. Morrigan, 29 Mich. 8.

2, Whittaker v. Parker, 42 Iowa 586.

3, McFadden v. Murdock, I. R. 1 C. L. 211.

4, Daniels v. Foster, 26 Wis. 693, per Dixon C. J.; People v. Kemmler, 119 N. Y. 580.

5, Grigsby v. Clear Lake Water Co., 40 Cal. 405.

6, Templeton v. People, 3 Hun (N. Y.) 357; 60 N. Y. 643; People v. Perriman, 72 Mich. 184.

7, As to such testimony in cases of handwriting see, Foster's Will, 34 Mich. 21; Mutual Benefit L. Ins. Co. v. Brown, 30 N. J. Eq. 193; Pratt v. Rawson, 40 Vt. 183; United States v. Darnand, 3 Wall. Jr. (U. S.) 143; Whittaker v. Parker, 42 Iowa 586; Moye v. Herndon, 30 Miss. 110. See also, 25 Jour. Juris. 409. As to medical witnesses, Kempsey v. McGinnis, 21 Mich. 123; Carpenter v. Calvert, 83 Ill. 62; Clark v. State, 12 Ohio 483; 40 Am. Dec. 481. As to other expert witnesses, Middlings Co. v. Christian, 4 Dill. (U. S.) 448; Gay v. Union Life Ins. Co., 9 Blatch. (U. S.) 142; Smith v. State, 2 Ohio St. 512; Grigsby v. Clear Lake Co., 40 Cal. 396. See valuable note, 66 Am. Dec. 228.

§ 394. Expert testimony—When valuable.— But it is not to be inferred that a court or jury has the right to give such testimony no consideration; and when the instructions to the jury lead to the inference that no reliance is to be placed on the evidence of experts,[1] or that no aid can be gained from it,[2] or that it may be wholly disregarded,[3] such instructions are erroneous. But the jury may properly be instructed

that they may disregard the evidence, if they deem it unreasonable.[4] While it is true that the jury are not bound to accept the opinions of experts, and are not concluded by them,[5] yet such opinions are *entitled to be considered*, and to receive such weight as in view of all the circumtances reasonably belongs to them.[6] In considering the weight and force of the evidence, the jury may act upon their own general knowledge of the subject of the inquiry.[7] There is another class of cases from which many quotations might be made, holding that under some circumstances expert testimony is of great value; and instructions embodying this suggestion have been frequently given to the jury, and sustained by the appellate courts.[8] Nor is there any necessary inconsistency between such instructions and those already alluded to in which the infirmity or weakness of opinion evidence is pointed out. When skilled and experienced experts give their opinions based in part upon facts which have come within their own observation,[9] or where they state precise facts in science, as ascertained and settled, or the necessary and invariable conclusion which results from the facts stated,[10] such opinions may be entitled to great weight; and it not unfrequently happens that such opinions are indispensable in furnishing some guide for the determination of questions unfamiliar to ordinary wit-

nesses.[11] On the other hand when the testimony consists of mere inferences from assumed facts, of opinion against opinion, and especially of the opinions of those zealous witnesses who betray the bias of the advocate, it may be highly proper for the court to caution the jury against the dangers of such evidence. The cases already referred to sufficiently illustrate the rule that the jury must in passing upon expert testimony, like other testimony, finally determine the degree of weight to which under all the circumstances it is entitled.

1, Eggers v. Eggers, 57 Ind. 461; Templeton v. People, 3 Hun (N. Y.) 357; 60 N. Y. 643.

2, Pannell v. Com., 86 Pa. St. 260.

3, Washburn v. Milwaukee, L. S. & W. Ry. Co., 59 Wis. 364.

4, St. Louis v. Ranken, 95 Mo. 189.

5, Olson v. Gjertsen, 42 Minn. 407.

6, United States v. McGlue, 1 Curt. (U. S.) 1; Stone v. Railway Co., 66 Mich. 76.

7, Head v. Hargrave, 105 U. S. 45.

8, As to the testimony of a family physician, Baxter v. Abbot, 7 Gray 71; Jarrett v. Jarrett, 11 W.Va. 584; Beverly v. Walden, 20 Gratt. (Va.) 147. As to physicians generally, Flynt v. Bodenhamer, 80 N. C. 205; Pitts v. State, 43 Miss. 472. See article, 22 Cent. L. Jour. 322; also note, 66 Am. Dec. 234.

9, Baxter v. Abbott, 7 Gray 71.

10, Gay v. Union Ins. Co., 9 Blatchf. (U. S.) 142.

11, Getchell v. Hill, 21 Minn. 464; Wood v. Barker, 4 Mich. 295.

CHAPTER 13.

REAL EVIDENCE.

§ 395. Real evidence — In general. — For obvious reasons there is no class of evidence so convincing and satisfactory to a court or a jury as that which is addressed

directly to the senses of such court or jury. Although comparatively speaking but a small portion of the evidence received in court is of this character, yet, as will be seen from the illustrations which follow in this chapter, it is a familiar practice to supplement other proof by presenting for the inspection of the judge or jury objects to which the testimony refers. Such objects are, when it is convenient, brought into the court room for such inspection. If this is not convenient or possible, the judge or jury may, if it seems practicable and necessary, leave the court room and take a view of the object or premises in question. Evidence thus addressed directly to the senses of the tribunal has been described as *real or natural evidence.* That the courts early paid a high tribute to this class of evidence is shown by the fact that, where the point or issue was evidently the "object of sense," the judges sometimes dispensed with a jury and decided the question in dispute upon the testimony of their own senses.[1]

1, 3 Bl. Com. 331.

§ 396. Same—The ancient practice.—The ancient practice is thus explained by Blackstone: "As in case of a suit to reverse a fine for non-age of the cognizor, or to set aside a statute or recognizance entered into by an infant, here and in other cases of a like sort, a writ shall issue to the sheriff.

commanding him that he shall constrain the said party to appear, that it may be ascertained by the view of his body by the king's justices whether he be of full age or not; *ut per aspectum corporis sui constare poterit justiciariis nostris, si praedictus a sit plenae aetatis necne.* If, however, the court has, upon inspection, any doubt of the age of the party (as may frequently be the case), it may proceed to take proofs of the fact; and, particularly, may examine the infant himself upon an oath *voire dire, veritatem dicere*, that is, to make true answer to such question as the court shall demand of him; or the court may examine his mother, his godfather or the like. In like manner if the defendant pleads in abatement of the suit that the plaintiff is dead, and one appears and calls himself the plaintiff, which the defendant denies, in this case the judges shall determine by inspection and examination whether he be the plaintiff or not. Also if a man be found by a jury an idiot, *a nativitate*, he may come in person into the chancery before the chancellor, or be brought there by his friends to be inspected and examined, whether idiot or not; and if upon such view and inquiry it appears he is not so, the verdict of the jury and all the proceedings thereon are utterly void and instantly of no effect. Another instance in which the trial by inspection may be used is when, upon an appeal of mayhem, the issue joined is whether

it may be mayhem or no mayhem, this shall be decided by the court upon inspection, for which purpose they may call in the assistance of surgeons. And by analogy to this in an action of trespass for mayhem, the court (upon view of such mayhem as the plaintiff has laid in his declaration, or which is certified by the judges who tried the cause to be the same as was given in evidence to the jury) may increase the damages at their own discretion; as may also be the case upon view of an atrocious battery. But then the battery must likewise be alleged so certainly in the declaration, that it may appear to be the same with the battery inspected."[1]

1, 3 Bl. Com. 333.

§ 397. Inspection other than by the court or jury.— There are cases where it would be impracticable to have any inspection in the presence of the court or jury, either within or outside the court room, and yet where, in the absence of any inspection, there would be a manifest failure of justice. Thus it was the ancient practice of the courts of divorce, in determining a question of impotency as affecting the validity of a marriage, to order an inspection of the person of either party by surgeons.[1] This proceeding had its origin in the ecclesiastical courts, and was allowed because of the necessity of the case, and because of the interest which the public,

as well as individuals, had in upholding the marriage state.[2] There was, however, an analogous practice in the common law tribunals by which the writ *de ventre inspiciendo* was issued to ascertain whether a woman convicted of capital crime was quick with child. By virtue of the writ a jury of matrons was sworn to make inspection and make report to the court.[3] In like manner the writ was allowed to protect the rightful inheritance, when a widow was suspected of feigning pregnancy for the purpose of establishing a fraudulent claim of heirship for the pretended child.[4] The persons appointed to perform this duty were thus made officers of the court; it was their duty to make report to the court and, if required, to give evidence in open court.[5] The order requiring the party to submit to the examination could be enforced by an order withholding alimony, or suppressing testimony, or continuing the cause, or staying the proceedings, or other like orders.[6]

1, Newell v. Newell, 9 Paige Ch. 25; Devanbagh v. Devanbagh, 5 Paige Ch. 554; 28 Am. Dec. 443; Le Barron v. Le Barron, 35 Vt. 365; Anonymous, 35 Ala. 226; Shafto v. Shafto, 1 Stew. Ch. (N. J.) 34; 2 Bish. Mar. & Div. secs. 1298–1299; Poynt. Mar. & Div. 126 note.

2, Union Pacific Ry. Co. v. Botsford, 141 U. S. 250 and cases cited. Briggs v. Morgan, 1 Phillim. 325.

3, Union Pacific Ry. Co. v. Botsford, 141 U. S. 250; Reg. v. Wycherly, 8 Car. & P. 262; 1 Bish. Cr. Proc. (2nd ed.) secs. 1142–1144.

4, 1 Bl. Com. 456; Union Pacific Ry. Co. v. Botsford, 141

U. S. 250. The writ was denied by supreme court of New York in 1874, 10 Alb. L. Jour. 3.

5, 2 Bish. Mar. & Div. sec. 1308, more fully as to practice; 1 Thomp. Trials, sec. 855.

6, Newell v. Newell, 9 Paige Ch. (N. Y.) 25; Anonymous, 35 Ala. 226; Shepard v. Missour iPac. Ry. Co., 85 Mo. 629; 55 Am. Rep. 390. It has been suggested that disobedience might be punished by contempt proceedings, 2 Bish. Mar. & Div. sec. 1305.

§ 398. Inspection of person in personal injury cases.— Although the practice of requiring a party to submit his person to inspection was well established in the ecclesiastical courts and was occasionally resorted to in the courts of the common law, there are but few precedents in this country. Quite recently, however, the subject has frequently arisen in the courts in actions for personal injury, where the defendant has demanded that the plaintiff be required to submit to a physical examination. In a late case in the supreme court of the United States the defendant made a motion before the trial judge three days before the trial for an order requiring the plaintiff to submit to an examination by a surgeon in the presence of her own surgeon and counsel, if she desired their presence. The motion was made on the ground that it was necessary to enable a correct diagnosis of the case, and that it was necessary to enable the defendant to prepare for trial. It was held, however, that the court had no power to make such an order; and

this view was sustained on appeal by the supreme court. Mr. Justice Gray in the opinion of the court urged that any such order compelling a party to submit to an examination of the person would be an indignity and a violation of personal right; that in the federal courts it is not a question which is governed by the law or practice of the state in which the trial is had, but depends upon the power of the national courts under the constitution and laws of the United States; and that the practice is not according to the common law, to common usage, or to the statutes of the United States.[1] This view is sustained by the state courts in several instances. It is there held that, in the absence of statutes, a compulsory inspection of the person of a party cannot be had, although the refusal to submit to such examination may perhaps be a proper subject of comment before a jury.[2] But it is by no means clear that this view is sustained by the weight of authority. In the important case in the supreme court of the United States, already referred to, Justices Brewer and Brown dissented. In their dissenting opinion and in numerous decisions of the state courts, it is urged that the supposed inconvenience or embarrassment to the party must yield to the higher consideration that the end of litigation is justice.[3] It is very clear that the practice of requiring a party, in proper cases, to submit to physical inspection has ample warrant in English cases from early times.[4]

1, Union Pacific Ry. Co. v. Botsford, 141 U. S. 250, the leading case which contains an able review of the authorities on this subject; see also a discussion of this case by Howard Benton Lewis in 32 Am. L. Reg. 550. McQuigan v. Delaware, L. & W. Ry. Co, 129 N. Y. 50; 14 L. R. A. 446 and extended note. As to the general subject of physical examination see articles: W. W. Thornton, "Compulsory Physical Examination in Personal Injury Cases," 34 Cent. L. Jour. 442; Seymour D. Thompson, "Trial by Inspection," 25 Cent. L. Jour. 3; Edward G. Buckland, "Power to Compel Physical Examination in Cases of Injury to Person," 1 Yale L. Jour. 57; Clark Bell, "Physical Examination in Personal Injury Cases," 6 Ch. L. Jour. 441; also article on the same subject by James Baird, 28 Ch. L. News 39, "Physical Examination of Plaintiffs in Accident Cases," 8 Nat. Corp. Rep. 125.

2, Pennsylvania Co. v. Newmeyer, 129 Ind. 401; McQuignan v. Delaware, L. & W. Ry. Co., 129 N. Y. 50; Roberts v. Railroad Co., 29 Hun 154; Peoria, D. & E. Ry. Co. v. Rice, 144 Ill. 227; Page v. Page, 51 Mich. 88; Loyd v. Hannibal Ry. Co., 53 Mo. 509; Sidekum v. St. Louis Ry. Co., 93 Mo. 400; 3 Am. St. Rep. 549 and note; Parker v. Enslow, 102 Ill. 272. But see, Shepard v. Railroad Co., 85 Mo. 629.

3, Dissenting opinion in Union Pac. Ry. Co. v. Botsford, 141 U. S. 250; Graves v. Battle Creek, 95 Mich. 266; 19 L. R. A. 641; White v. Milwaukee Ry. Co., 61 Wis. 536; 50 Am. Rep. 154; Terre Haute & I. Ry. Co. v. Brunker, 128 Ind. 542; Stuart v. Havens, 17 Neb. 211; Richmond & D. Ry. Co. v. Childress, 82 Ga. 721; see note, 14 L. R. A. 466. See also, Schroeder v. Chicago Ry. Co., 47 Iowa 375; Miami Turnpike Co. v. Baily, 37 Ohio St. 104.

4, See secs. 396, 397 *supra*.

§ 399. Same, continued.—The general tendency of legislation and of judicial decision is in the direction of increasing the facilities of arriving at the truth. For example, the courts now exercise powers in requiring parties to testify and in compelling the in-

spection of books and papers which would have been deemed a bold usurpation half a century ago. It would seem more consistent with this general tendency for the courts to exercise, in a reasonable manner, the power of compelling a party to submit to an inspection of the person where it seems necessary to serve the ends of justice.[1] It may have a bearing on this subject that in the federal courts, where this power is so strenuously denied, there is no statute similar to those in many states compelling a party to give testimony before trial; and in the federal courts the practice does not prevail.[2] Most of the cases which assert this power of compulsory inspection hold that it is a matter resting in the sound *discretion of the court;* hence it follows that the order will not be made unless it seems necessary to do justice between the parties.[3] Although in most of the cases where an examination has been ordered it was during the trial, courts exercising the power would doubtless also make the order *before the trial*, if deemed necessary to enable the opposite party to prepare for trial. Of course if the order is made, it should contain reasonable safeguards against offending the feelings of the party to be examined.[4] And the party to be examined will be allowed to have friends or physicians of his own choosing present.[5]

1, White v. Milwaukee City Ry. Co., 61 Wis. 536; 50 Am. Rep. 154; 29 Cent. L. Jour. 11; Schroeder v. Chicago, R. I. & P. Ry. Co., 47 Iowa 375. See also, Durgin v. Danville, 47 Vt. 95, 105.

2, Chateaugay Iron Co., Petitioner, 128 U. S. 544; Union Pac. Ry. Co. v. Botsford, 141 U. S. 250.

3, Shepard v. Mo. Pac. Ry. Co., 85 Mo. 629; 55 Am. Rep. 390; Walsh v. Sawyre, 52 How. Pr. (N. Y.) 334. But it has been held to be a matter of right, Miami Co. v. Bailey, 37 Ohio St. 104; Atchison Ry. Co. v. Thul, 29 Kan. 466; 44 Am. Rep. 659; Terre Haute & I. Ry. Co. v. Brunker, 128 Ind. 542; St. Louis Bridge Co. v. Miller, 138 Ill. 465.

4, White v. Milwaukee Ry. Co., 61 Wis. 536; 50 Am. Rep. 154 and note.

5, Louisville Ry. Co. v. Falvey, 104 Ind. 409.

§ 400. Inspection by the jury — Personal injury cases.—Although the evidence, considered in the last three sections, is generally classified as real or natural, it is not the best illustration of that kind of evidence. We have seen, indeed, that formerly the practice prevailed of calling a jury for the special purpose of making an inspection; but in the cases already mentioned the inspection has been made, not by the tribunal determining the cause, but by persons who reported the result of their inspection to the court. The more satisfactory and the more usual illustration of real evidence is where the very object, whose condition or qualities are being investigated, is presented for the *inspection of the court or jury*. Thus in actions for *personal injuries*, it is the con-

stant practice for the plaintiff to voluntarily exhibit the injured part to the jury; and where identity, resemblance or the appearance of things is in question, it is a familiar practice to present such things for the inspection of the jury, if it is practicable. It has been urged that a plaintiff should not be allowed to exhibit his injuries to the jury for the reason that all the evidence submitted should admit of being reproduced in the bill of exceptions, on which the appellate court may be called to pass; and that, if such a practice is allowed, the appellate court can form no accurate opinion as to the influences which may have operated upon the minds of the jury, and hence cannot properly determine whether a new trial should be allowed. The objection has also been urged that such exhibitions tend to unduly excite the feelings of the jury. But it is the well settled practice in such cases to permit the jury to see the injuries complained of. It has been said that it brings before the jury part of the *res gestae*, and enables them to determine the nature and the character of the injury in a more satisfactory manner than when the facts are merely described by witnesses.[1] It is clear that, in civil cases, a party may be compelled to uncover the face in such manner as to be identified by a witness; for example, to remove a veil at the request of the opposite party.[2] The necessity of the

case requires that witnesses and parties should appear in court in ordinary garb and with face uncovered so, that they may be known and indentified; but the court should not permit an indecent exposure of the person in the presence of the jury.[3]

1, Mulhado v. Brooklyn City Ry. Co., 30 N. Y. 370; Barker v. Town of Perry, 67 Iowa 146; Brown v. Swineford, 44 Wis. 282; 28 Am. Rep. 582; Louisville Ry. Co. v. Wood, 113 Ind. 544; Cunningham v. Union Pac. Ry. Co., 4 Utah 206; Disotell v. Henry Luther Co., 90 Wis. 635. Abbott's Tr. Ev. 599.

2, Rice v. Rice, (N. J.) 19 At. Rep. 736.

3, Brown v. Swineford, 44 Wis. 282; 28 Am. Rep. 582.

§ 401. Inspection of articles by jury.— It is the well settled rule daily followed in the courts that, if the material facts in issue may be better explained by the production of articles to which the testimony relates, such articles may be shown to the jury. Thus in an action by a servant against his master for negligence resulting in personal injuries to the plaintiff, the court may allow the torn clothing worn by him at the time of the injury to be shown to the jury.[1] Building material alleged to be defective,[2] or defective tools or appliances in actions for negligence may be so shown.[3] Where the issue related to the question whether a certain mirror was defective in workmanship and construction, such inspection was held proper.[4] In many cases articles, the descrip-

tion of which became material in the litigation or other similar articles, have been exhibited to the jury in order that they might obtain clearer views, and be able to form a better opinion.[5] It has even been held admissible in a few cases to allow domestic animals, when the subject of litigation, to be brought into the presence of the jury for exhibition. This was permitted in an action against the owner of a vicious dog; and in an action against the owner of an elephant for negligence in frightening the plaintiff's horse, the defendants in an English case, were allowed to bring the young elephant into court in order that the jury might see whether it was in fact of unsightly and unusual appearance as was alleged.[6] The courts have, however, declined to make orders compelling the production of chattels in court for inspection.[7] It rests in the *discretion of the court* to deny applications for the production of real evidence in those cases where the order would cause great inconvenience, or where for other reasons it would be impracticable. Thus in a Mississippi case, the court refused to order the exhumation of a dead body, although the defendant, an insurance company, claimed that the deceased had made admissions that he had in childhood received a severe injury to the skull which could only be proven by an examination. It was intimated, however, that under some circumstances such an order might be proper.[8]

1, Tudor Iron Works v. Weber, 129 Ill. 535.

2, People v. Buddensieck, 103 N. Y. 487; 57 Am. Rep. 766.

3, King v. New York C. & H. R. Ry. Co., 72 N. Y. 607; Kinney v. Folkerts, 84 Mich. 616.

4, Hudson v. Roos, 76 Mich. 173, in this case the plaintiff had brought the mirror into the court room and witnesses had testified in relation to it; and it was held error to refuse to allow the jury to inspect it.

5, Express Co. v. Spellman, 90 Ill. 455; Jupitz v. People, 34 Ill. 516; Com. v. Brown, 121 Mass. 69; People v. Buddensieck, 103 N. Y. 487, 498; State v. Mordecai, 68 N. C. 207; Evarts v. Middlebury, 53 Vt. 626, where the shoes of a horse were shown, the issue being whether the horse was properly shod; Morton v. Fairbanks, 11 Pick. 368, where shingles were exhibited; Stevenson v. Michigan Log Towing Co., (Mich.) 61 N. W. Rep. 536, piece of towline shown; Thomas Fruit Co. v. Start, 107 Cal. 206, defective fruit boxes introduced.

6, See amusing account of this case in 20 Alb. L. Jour. 150.

7, Cooke v. Lalance Co., 29 Hun 641; Hunter v. Allen, 35 Barb. (N. Y.) 42.

8, Grangers Life Ins. Co. v. Brown, 57 Miss. 308; 34 Am. Rep. 446; State v. Burnham, 55 Vt. 445; 48 Am. Rep. 801, boxing gloves not allowed to be exhibited; Hood v. Bloch, 29 Va. 244, party not allowed to exhibit cheese, the quality being in issue.

§ 402. Inspection of person in criminal cases. — The principle is firmly engrafted upon our federal and state constitutions that no accused person shall be compelled to give evidence against himself in any criminal case. This constitutional provision clearly distinguishes criminal from civil cases in

such a manner that the same rules of evidence do not necessarily govern in the two classes of cases. There is a line of authorities which hold that in a criminal action the accused may be compelled to furnish evidence by being compelled to submit in some degree to the inspection of his person for the purpose of ascertaining identity or for other purposes. Thus, a defendant was compelled to exhibit his bare arm to the jury to ascertain whether certain tattoo marks, concerning which testimony had been given, existed.[1] In other cases accused persons have been compelled by officers to submit to such experiments as having the foot placed in tracks to which the testimony related, or to other similar experiments; and the officers or other persons have, under such circumstances, been allowed to state the result.[2] These cases proceed on the view that the constitutional provision to the effect that no person shall be compelled in a criminal case to be a witness against himself is to be construed merely to mean that the defendant cannot be compelled, in the strict meaning of the term, to *testify* against himself. But a far more liberal and, in the opinion of the author, a better construction has been placed upon the constitutional provision in other cases, where this class of testimony has been rejected on the ground that the court could not compel a witness to furnish testimony against himself.[3]

But the right of the accused to refuse to submit to such an inspection is *waived* when he voluntarily furnishes such evidence, in the same manner that he waives his constitutional privilege when he voluntarily gives testimony that may criminate himself.[4]

1. State v. Ah Chuey, 14 Nev. 79; 33 Am. Rep. 530 and extended note. On this general subject see interesting article by Irving Browne, 4 Green Bag 555; also article by Seymour D. Thompson, "Trial by Inspection," 25 Cent. L. Jour. 3.

2, State v. Graham, 74 N. C. 646; 21 Am. Rep. 493; Walker v. State, 7 Tex. App. 245; 32 Am. Rep. 595; State v. Sanders, 68 Mo. 202; 30 Am. Rep. 782, where it was held error for the jury, without leave of court, to make this experiment outside the court room. The other rule has been adopted by some courts, Stokes v. State, 5 Baxt. (Tenn.) 619; 30 Am. Rep. 72; Day v. State, 63 Ga. 667; People v. Mead, 50 Mich. 228.

3, McGinnis v. State, 24 Ind. 500; State v. Jacobs, 5 Jones 259; Stokes v. State, 5 Baxt. (Tenn.) 619; 30 Am Rep. 72; People v. Mead, 50 Mich. 228; Day v. State, 63 Ga. 667. Compulsory examination of a female as to pregnancy, People v. McCoy, 45 How. Pr. (N. Y.) 216; Agnew v. Jobson, 13 Cox Cr. C. 625; 19 Eng. Rep. 612 and note. See also, Spicer v. State, 69 Ala. 159. Where a prisoner was ordered to show his limb, Blackwell v. State, 67 Ga. 76; 44 Am. Rep. 717; 3 Crim. L. Mag. 394.

4, State v. Woodruff, 67 N. C. 89; Gallagher v. State, 28 Tex. App. 347; Johnson v. Com., 115 Pa. St. 369, where the district attorney called upon the prisoner to stand up and repeat certain words before a witness and the prisoner did so without objection.

§ 403. Inspection of articles in criminal cases.— In criminal cases, it is the familiar practice to show to the jury articles

which tend to illustrate or explain the material facts to be proven. Thus in prosecutions for forgery, the production of a document on which the action is based is usual and important, if not indispensable.[1] On the same principle surgical instruments, alleged to have been used in an abortion,[2] as well as portions of a woman's body on whom it was alleged that an abortion was performed, which had been preserved in spirits, have been shown to the jury.[3] In trial for homicide the bones,[4] the clothing worn by the deceased,[5] the weapons or bullets used by the prisoner[6] or even the horse upon which the deceased was riding when he received his death wounds[7] have been produced for inspection where, in the judgment of the court, the mode of the killing could be thereby explained.[8] In like manner the burglar's tools may be offered together with evidence tending to show the prisoner's connection with the tools and with the offense. They are received on the ground that they afford better and more satisfactory evidence to the jury than any description of them given by witnesses.[9] In prosecutions for larceny and kindred actions, it is common practice to exhibit to the jury the articles stolen; and it has even been permitted to show to the jury articles similar to those stolen.[10] Such articles may be shown, even though obtained in an irregular or illegal manner.[11]

1, 2 Bish. Crim. Proc. sec. 433.

2, Com. v. Brown, 121 Mass. 69.

3, Com. v. Brown, 14 Gray 419.

4, State v. Weirners, 66 Mo. 14; Turner v. State, 89 Tenn. 547; State v. Moxley, 102 Mo. 374.

5, Hart v. State, 15 Tex. App. 202; 49 Am. Rep. 188; Story v. State, 99 Ind. 413; Gardner v. People, 6 Park. Cr. (N. Y.) 157; People v. Knapp, 71 Cal. 1; Watkins v. State, 89 Ala. 82; People v. Wright, 89 Mich. 70. See also, State v. Baker, 33 W. Va. 319; People v. Fernandez, 35 N. Y. 49. As to the examination of such clothing see, Com. v. Twitchell, 1 Brewst. (Pa.) 561.

6, Moon v. State, 68 Ga. 687; Siberry v. Smith, 133 Ind. 677; Wynne v. State, 56 Ga. 113; State v. Mordecai, 68 N. C. 207; Com. v. Brown, 121 Mass. 69; Hornsby v. State, 94 Ala. 55; People v. Fernandez, 35 N. Y. 49, 64; Leonard v. Railway Co., 21 Ore. 655.

7, Dillard v. State, 58 Miss. 368.

8, For other illustrations, see Com. v. Webster, 5 Cush. 295; 52 Am. Dec. 711, where the teeth of the murdered man were exhibited; Com. v. Brown, 121 Mass. 69, where surgical instruments in possession of defendant, were shown which were suitable for performing an abortion, even though the same may be used for lawful surgical operations.

9, People v. Larned, 7 N. Y. 445; State v. Ellwood, 17 R. I. 763.

10, Jupitz v. People, 34 Ill. 516.

11, Com. v. Tibbetts, 157 Mass. 519; Gindrat v. People, 138 Ill. 103.

§404. Inspection as proof of resemblance — Race — Age, etc. — The reports afford numerous illustrations of real evidence in cases where the attempt has been made to prove resemblance between two persons by directing the attention of the jury to such

persons while they are in court. Thus on the issue of the *paternity of a child*, juries have been frequently allowed to inspect the child in question, and to compare its features with those of the alleged father. In such cases the courts have held that the resemblance is relevant to the issue and that it may be determined by inspection.[1] In respect to this class of evidence, Judge Mansfield used the following language: "I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike; and in an army of a hundred thousand men every one may be known from the other. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gestures, the smile and various other things. Whereas the family likeness runs generally through all these, for in everything there is a resemblance, as in features, size, attitude and action."[2] But in this case the question of parentage arose as to a person of full age. Even in such cases the language of Judge Mansfield has been disapproved; and where the question arose concerning very young children the practice of allowing an inspection, for the purpose of determining resemblance, has been con-

demned by very high authority on the ground that the evidence is of too fanciful and unsatisfactory a character to be received.[3] So it has been held inadmissible to prove by the testimony of witnesses that the child looks like the alleged father.[4] But Lord Chief Justice Cockburn held in the Tichborne case that the resemblance of the claimant to a family daguerreotype of Roger Tichborne was relevant and intimated that comparison of features between the claimant and the sister of Arthur Orton would be permitted.[5] Where the question is one in which *race or color* is concerned, the child may be exhibited for the purpose of showing that it is or is not of the race of its alleged father.[6] If the *age* of a person is in issue, it should be proved by sworn testimony.[7] There is, however, authority for the proposition that the jury may, without any other evidence than mere inspection, determine whether a person to whom liquor has been sold is a minor,[8] or whether a person is of sufficient age to be capable of performing the work given him to do.[9] It is hardly necessary to add that in case of conflicting testimony, a court or jury might consider the appearance of the person whose age is in question in connection with other evidence.

1, State v. Smith, 54 Iowa 104; 37 Am. Rep. 192, child two years old; Gilmanton v. Ham, 38 N. H. 108; Crow v. Jordan, 49 Ohio St. 655; State v. Woodruff, 67 N. C. 89; Scott v. Donovan, 153 Mass. 378; Gaunt v. State, 50 N. J.

L. 490, a leading case with an extended discussion of real evidence; Finnegan v. Dugan, 14 Allen 197.

2, Douglas Case, quoted from Wills Cir. Ev. (5th Am. ed.) 117; Hanawalt v. State, 64 Wis. 84.

3, Clark v. Bradstreet, 80 Me. 456, child six weeks old; State v. Danforth, 48 Iowa 43; 30 Am. Rep. 387, babe of three months; Hanawalt v. State, 64 Wis. 84, child less than one year of age; Risk v. State, 19 Ind. 152; Ingram v. State, 24 Neb. 33; Keniston v. Rowe, 16 Me. 38; Beck's Med. Juris. 650.

4, Eddy v. Gray, 4 Allen 435; Jones v. Jones, 45 Md. 144; Keniston v. Rowe, 16 Me. 38.

5, Gaunt v. State, 50 N. J. L. 490.

6, Warlick v. White, 76 N. C. 175; Clark v. Bradstreet, 80 Me. 454; Garvin v. State, 52 Miss. 207; State v. Arnold, 13 Ired. (N. C.) 184. See also, State v. Jacobs, 5 Jones (N. C.) 259.

7, Stephenson v. Arnold, 28 Ind. 272; Thinger v. State, 53 Ind. 251.

8, Com .v. Emmons, 98 Mass. 6. But see, Bird v. State, 104 Ind. 384. In New York a statute provides for an inspection to determine the age of a child, N. Y. Pen. Code sec. 19.

9, Keith v. New Haven & N. Co., 140 Mass. 175.

§ 405. Effect of non-production of real evidence.— Although the failure or refusal to allow a jury to inspect the subject under investigation, when such inspection would be entirely practicable and would afford the most satisfactory evidence, may be a proper subject for comment before the jury, a party is not obliged to produce such evidence. In other words it is *not* in the technical sense the *best evidence* within the mean-

ing of the rule on that subject. Thus in an action on a policy of life insurance, where the issue is upon the death of the insured, testimony of witnesses that they have seen the insured alive since the time of his alleged death is competent; and the insurer is not bound to bring him bodily before the court.[1] In his work on evidence, Mr. Taylor, after discussing the importance of producing real evidence when it is convenient and practicable to do so, illustrates the subject as follows: "These observations apply to all cases in which the guilt or innocence of a prisoner depends upon the *identity or comparison* of two articles found in different places, as, for example, the wadding of a pistol with portions of a torn letter found on the person of the accused, or the fractured bone of a sheep with mutton found in his house, or fragments of dress with his rent garment, or damaged property with the instrument by which the damage is supposed to have been affected. In all these and the like cases, it is highly expedient, if possible, to produce to the court the articles sought to be compared; and although the law in demanding the best evidence does not expressly require that this course should be adopted, but permits a witness to testify as to his having made the comparison without first proving that the article cannot be produced at the trial, their non-production, when unexplained,

may often *generate a suspicion* of unfairness, and will always furnish an occasion for serious comment. In illustration of this subject reference may be made to an old case. A boy having found a diamond took it to a jeweler, who refused to return it to him. An action of trover was brought, and as the jeweler declined to produce the diamond at the trial, the judge directed the jury to presume that it was of the finest water and they found accordingly. So in the case of Wood v. Peel, where the point at issue was whether the plaintiff's horse, "Running Rein," who had won the Derby in 1844, was foaled by Mab in 1841, the production of the horse, in order to test the accuracy and credit of the witnesses who had sworn to its identity, was considered so material that the plaintiff, being unable to comply with the order of the court to produce it, submitted very prudently to a nonsuit, rather than run the almost inevitable risk of a verdict in favor of the defendant." [2]

1, Schneider v. Ætna Ins. Co., 32 La. An. 1049; 36 Am. Rep. 276, but it is intimated that if the person whose identity was in issue had been himself a party as claimant of some right based on such identity as in the Tichborne case, the opposite party might have demanded a view of his person and the opportuntty of personal examination in the presence of the court.

2, Tayl. Ev. sec. 555.

§ 406.—Experiments and tests in the presence of the jury.— It is proper in the discretion of the court to allow parties reasonable latitude in making experiments or tests in the presence of the jury to illustrate the testimony in the case. Thus after testimony is given as to the identity and similarity of conditions, a machine may be operated in the presence of the jury, as bearing upon the issue whether it is suitable to the use intended;[1] and on the question whether a suit of clothes is a good fit, the court may allow a party to wear the clothing in the presence of the jury.[2] An expert may illustrate his testimony concerning handwriting by the use of a blackboard;[3] and when his handwriting was relevant, the English courts have allowed a party to write in the presence of the jury, but this has been questioned in this country.[4] In a recent case a railroad company was allowed in the trial court to make experiments under practically similiar conditions and circumstances, to show that a rail could not have injured the plaintiff in the manner claimed.[5] So a physician has been allowed by the use of a pin to demonstrate to the jury the plaintiff's loss of feeling in an action for personal injury, when it was claimed that paralysis had taken place.[6] The same rule has been applied as to other experiments by experts in the presence of the jury.[7] On the same

principle operas have been performed in court and comic songs sung, plagiarized papers have been read and the so called materialization of spirits exhibited.[8] In civil cases the courts may require the party to do some physical act in the presence of the jury for the purpose of disclosing identity, or showing the physical health or condition of such person, or his ability to read or write,[9] or the appearance of his handwriting when such matters are relevant to the issue.[10] But the propriety of such an order must usually rest largely in the discretion of the trial court; and it would only be in case of a plain abuse of such discretion that the appellate court would interfere.[11]

1, National Cash Register Co. v. Blumenthal, 85 Mich. 464. As to experiments out of court, see sec. 413 *infra*.

2, Brown v. Foster, 113 Mass. 136; 18 Am. Rep 463.

3, McKay v. Lasher, 121 N. Y. 477; State v. Henderson, 29 W. Va. 147.

4, Osbourne v. Hosier, 6 Mod. 167; Williams' Case, 1 Lew. Cr. C. 137; Reg. v. Taylor, 6 Cox Cr. C. 58. See also, Hayes v. Adams, 2 Thomp. & Cook (N. Y.) 593, where a party was by consent of the parties allowed to write his name. But the rule is different in America, Com. v. Allen, 128 Mass. 46; 35 Am. Rep. 356. See sec. 563 *infra*.

5, Leonard v. Southern Pac. Co., 21 Ore. 555; 15 L. R. A. 221 and note. See also, Stockwell v. C. C. & D. Ry. Co., 43 Iowa 470; Smith v. St. Paul Ry. Co., 32 Minn. 1, when the court refused to allow the jury to leave the court room to witness an experiment. See sec. 413 *infra*.

6, Osborne v. City of Detroit, 32 Fed. Rep. 36.

7, State v. Smith, 49 Conn. 376; Leonard v. Southern Pac.

Ry. Co., 21 Ore. 555; 15 L. R. A. 221; People v. Hope, 62 Cal. 291.

8, Gaunt v. State, 50 N. J. L. 490; Innis v. State, 42 Ga. 477; State v. Linkhaw, 69 N. C. 214; 12 Am. Rep. 647, where a witness was allowed to sing in court, the charge being the disturbance of a religious meeting by singing in a peculiar way. See also, Com. v. Scott, 123 Mass. 222; 25 Am. Rep. 81 as to the identification of a prisoner by his voice. But in United States v. Reid, 42 Fed. Rep. 134 the court refused to allow exhibitions of spiritualistic powers. See an interesting series of articles by Irving Browne, 5 Green Bag 131, 185, 222.

9, Ort v. Fowler, 31 Kan. 478, where the defendant was required to read in court.

10, Huff v. Nims, 11 Neb. 363; State v. Henderson, 29 W. Va. 147. See sec. 563 *infra*.

11, Hatfield v. St. Paul Ry. Co., 33 Minn. 130; 53 Am. Rep. 14, where it was held no error for the court to refuse to compel the plaintiff to walk across the floor; Com. v. Allen, 128 Mass. 46; 35 Am. Rep. 356, as to handwriting; United States v. Reid, 42 Fed. Rep. 134. In Smith v. St. Paul Ry. Co., 32 Minn. 1, it was not held error to refuse the jury to leave the court room to witness experiments with cars.

§407. View—The former practice. A very common illustration of real evidence is afforded by the practice of allowing the jury to go and examine or take a view of the premises or property concerning which the controversy exists. To a limited extent this seems to have been the practice at common law before statutes were adopted on the subject.[1] By the ancient practice there could be no view until the cause had been brought on for trial; and the view was confined at first to real actions, but was afterwards extended

by statute to several personal actions for injuries to the realty, as trespass *quare clausum fregit*, trespass on the case and nuisance.[2] By statutes it was afterwards provided that, by special order of the court, a portion of the jurors to be agreed upon by the parties or, in case of disagreement, to be appointed by the proper officers of court, should at a convenient time before the trial take a view of the premises in question.[3] Under these statutes the number of viewers was generally six; and the statutes provided that such persons were to be the first persons sworn as jurors in the case, and that only a sufficient number of jurors should be drawn to make the requisite number of twelve.[4] Although the practice for a time prevailed of allowing a view as a matter of course upon the demand of either party, the statutes were finally construed to mean that the view should not be allowed unless, in the judgment of the court, the circumstances made it necessary and proper.

1, 4 Bac. Abs. title, Juries; Springer v. City of Chicago, 135 Ill. 552. For a brief history and review of the law of view, see article by J. C. Thompson, "View by Jury," 26 Cent. L. Jour. 436.

2, Burrow's Note, 1 Burr. 253; Springer v. City of Chicago, 135 Ill. 552; 12 L. R. A. 609.

3, Stat. 4 Anne ch. 16 sec. 8; Stat. 3 Geo. II ch. 25 sec. 14; Stat. 6 Geo. IV ch. 50 sec. 23.

4, See statutes last cited.

5, Burrow's Note, 1 Burr. 253.

§ 408. Statutes regulating view. — By recent statutes in England the judge is now allowed to make an order for the *detention, preservation or inspection of any property or thing* which is the subject of the action in order that the judge or jury may take a view of the same; and for this purpose persons may enter upon the premises of a party to make such inspection.[1] It has been held in Illinois and other states that a view cannot be ordered by the court against objection, unless provided for by statute.[2] Yet in a later Illinois case it was held that, as a view was allowed by the common law independent of any statute, a view could be so granted in that state as it had adopted the common law. It was also held that the fact that an express statute had been enacted requiring a view in condemnation proceedings, did not raise the inference that the court could not permit a view in other cases.[3] In this country the subject is generally regulated by *statute.* These statutes substantially agree in providing that the view may be allowed when, in the opinion of the court, it is proper, or, in the language used in some instances, when it is *necessary.* Usually the statutes are so framed as not to confine the view to any particular class of actions or to any particular form of property. The view may be "of the property which is the subject of litigation or of the place in which any material fact occurred."

In other instances, according to the statute, it may be "of the premises or place in question, or any property, matter or thing relating to the controversy between the parties." Some of the statutes provide that the view shall be at the expense of the party asking it; in such cases, however, the expenses may be taxed like other legal costs if the party who advanced them prevail in the action.[4]

1, 46 & 47 Vict. ch. 57, cited in Tayl. Ev. sec. 560.

2, Doud v. Guthrie, 13 Bradw. (Ill.) 653. See also, Com. v. Webster, 5 Cush. 295, 298; Smith v. State, 42 Tex. 444; State v. Bertin, 24 La. An. 46; Bostock v. State, 61 Ga. 635, 639.

3, Springer v. City of Chicago, 135 Ill. 552; 37 Ill. App. 206; 12 L. R. A. 609 and note 611.

4, The practitioner should refer to the statutes and decisions of his own state for further details.

§ 409. View discretionary.—Under statutes of this character there is general concurrence in the view that the granting or refusing the view rests in the sound discretion of the trial judge.[1] Accordingly, the appellate court in numerous instances has refused to review the order of the trial judge denying a view.[2] There is clearly no abuse of discretion in denying a view when it appears that the condition of the premises or property has changed before the demand for a view;[3] or that the facts involved are such that they can be accurately described to the jury by oral testimony,[4] or by the use of maps and dia-

grams with proper explanations,[5] or if the view be unreasonably expensive, or cause unreasonable delay, or would serve no useful purpose.[6] Nor is the rule changed by the fact that there may be a conflict in the testimony.[7] On the principle already stated the decision of the trial judge granting a view will not be reviewed, unless there appears to have been a clear abuse of discretion.[8] Thus, such an order will not be held error for the mere reason that the view is allowed at a time considerably subsequent to the time when the damages are allowed to have been sustained,[9] or that the view was not allowed at a particular stage of the trial.[10]

1, Andrews v. Youmans, 82 Wis. 81; Saint v. Guerrerio, 17 Col. 448; Jenkins v. Wilmington Ry. Co., 110 N. C. 438; Com. v. Knapp, 9 Pick. 496; 20 Am. Dec. 491; Com. v. Webster, 5 Cush. 295; 52 Am. Dec. 711; King v. Iowa Ry. Co., 34 Iowa 458; Kansas Ry. Co. v. Allen, 22 Kan. 285; 31 Am. Rep. 190; Chute v. State, 19 Minn. 271; Brown v. Kohout, (Minn.) 63 N. W. Rep. 248; Pick v. Rubicon Co., 27 Wis. 433; Jenkins v. Railroad Co., 110 N. C. 438; Springer v. Chicago, 37 Ill. App. 206; 135 Ill. 552; 12 L. R. A. 609; Hagee v. Grossman, 31 Ind. 223; Klepsch v. Donald, 4 Wash. 436; Owens v. Missouri Pac. Ry. Co., 38 Fed. Rep. 571; People v. Bonny, 19 Cal. 426. See also, Warner v. State, 56 N. J. L. 686.

2, Board of Com. of Jackson County v. Nichols, 139 Ind. 611, and cases last cited.

3, Stewart v. Cincinnati Ry. Co., 89 Mich. 315; Leidlein v. Meyer, 95 Mich. 586.

4, Ohio Ry. Co. v. Wrape, 4 Ind. App. 100, action for setting fires by locomotive; Richmond v. Atkinson, 58 Mich. 413, action for labor on a building.

5, Clayton v. Chicago Ry. Co., 67 Iowa 238, condemnation proceeding.

6, Springer v. City of Chicago, 135 Ill. 522; 12 L. R. A. 609, where the whole subject is fully discussed.

7, Baltimore Ry. Co. v. Polly, 14 Gratt. (Va.) 447.

8, Gunn v. Ohio R. Ry. Co., 36 W. Va. 165. See cases already cited.

9, Springer v. City of Chicago, 135 Ill. 522; 12 L. R. A. 609.

10, Kentucky Cent. Ry. Co. v. Smith, 93 Ky. 449. In Kentucky a view was allowed upon request of the jury after they had retired to find the verdict, Louisville, N. A. & C. Ry. Co. v. Schiek, 94 Ky. 191.

§ 410. When view may be granted.— From the statement already given of the general purport of the statutes of this country, it is evident that considerable latitude is allowed in the practice of granting a view. It is the constant practice to allow a view in *condemnation proceedings* which involve the issue of the value or the condition of land.[1] The practice is also common in actions for *negligence* where in the judgment of the court a view of the place or property, to which the testimony relates, may throw light upon the subject. In an action on a policy of fire *insurance* it was held admissible to allow the jury to take a view of the ruins of premises destroyed by fire.[2] The view may extend to *personal property* as well as *realty;* thus, in a controversy relating to horses the trial court allowed the jury to go into the court house yard and inspect the horse in

question;[2] and in another case the jury were allowed to leave a court room and inspect an engine similar to the one which had caused the injury.[4] We have seen that the courts frequently allow experiments to be made in the court room in the presence of the jury.[5] But the statutes under consideration do not extend to *experiments made out of the court room* in the presence of the jury; thus, it was held no error for the court to refuse an application for the jury to proceed to the car house of the defendant to witness experiments with its cars as bearing upon the question of the nature of an alleged collision.[6] And in general it is held to be error to allow the admission of statements or the performance of experiments during the view, unless such experiments or evidence are performed or given with the consent of both parties.[7]

1, Washburn v. Railway Co., 59 Wis. 364, 368; Toledo, A. A. & G. T. Ry. Co. v. Dunlap, 47 Mich. 456; Springfield v. Dalbey, 139 Ill. 34.

2, Boardman v. Westchester Ins. Co., 54 Wis. 364.

3, Nutter v. Ricketts, 6 Iowa 92.

4, Owens v. Railway Co., 38 Fed. Rep. 571.

5, See sec. 406 *supra*.

6, Smith v. St. Paul City Ry. Co., 32 Minn. 1. In Stockwell v. Railway Co., 43 Iowa 470, experiments were allowed with an engine by consent of parties and it was held that the experiment was without prejudice to the plaintiff.

7, Heyward v. Knapp, 22 Minn. 5; Garcia v. State, 34

Fla. 311; State v. Lopez, 15 Nev. 407; Jones v. State, 51 Ohio St. 331.

§ 411. Is the view evidence in the case?—The rule is declared in numerous decisions that the information acquired by a jury in making a view or inspection is not evidence in the case. According to the rule in these cases, the view is allowed merely to enable the jury to better understand and apply the evidence given in the case.[1] In support of this claim it is urged that if the facts which came to the knowledge of the jury are to be treated as evidence, the trial judge or appellate court would have no adequate means of determining what evidence has been presented to the jury. It is further urged that if the jurors are allowed to include their personal examination and to thus become silent witnesses in the case, burdened with testimony unknown to the parties or the court, it would be impossible for the court to act understandingly in determining whether the verdict should stand or be set aside.[2] Although this opinion has been entertained by very high authority, and is perhaps sustained by the greater number of decisions, yet it must be conceded that for hundreds of years the courts have allowed jurors to inspect real and personal property, and to base their conclusions, both upon the evidence given in court and the information obtained by their own senses.[3] Moreover, it

may be well questioned whether a direction to a jury that the view is simply for the purpose of enabling them to understand and apply the testimony is of any practical value, since it is hardly probable that a jury, upon any such theoretical distinction, will ignore the facts of which they have gained personal knowledge, or merely apply those facts to the testimony recited in court.

1, Close v. Samm, 27 Iowa 503; Chute v. State, 19 Minn. 271; Wright v. Carpenter, 49 Cal. 607; Brakken v. Minneapolis Ry. Co., 29 Minn. 41; Heady v. Veray Turnpike Co., 52 Ind. 117; Sasse v. State, 68 Wis. 530. But see, Nielson v. Chicago Ry. Co., 58 Wis. 517; Washburn v. Milwaukee Ry. Co., 59 Wis. 364; Parks v. Boston, 15 Pick. 198, 209; Morrison v. Burlington, C. R. & N. Ry. Co., 84 Iowa 663.

2, See cases last cited.

3, See secs. 395 *et seq. supra.*

§ 412. **Same, continued.**— Although it is true that the facts or information acquired by the jury from a view or inspection cannot be preserved in a bill of exceptions, this is not regarded by the weight of authority as sufficient reason for denying to such facts or inspection efficacy as evidence.[1] From the necessity of the case jurors will often receive impressions or draw conclusions from the inspection of objects during the trial or from other circumstances coming within their observation. It would be a vain attempt, even if it were desirable, to require the jury to repudiate the evidence of their

own senses, or to seek to limit the jury to conclusions derived from those forms of evidence which can be included within bills of exceptions.[2] The following statement by a learned author is supported by reason and authority: "The true solution of this difficulty is that cases where there has been a view stand, on appeal or error, on a *special footing;* that, although what the jurors have learned through the view is evidence to be considered by them,— yet, on grounds of public policy, having reference to the known imperfections which attend the conclusions of jurors and even judges in the haste of *nisi prius* work, a reviewing court should set aside a verdict based partly on a view, unless it is supported by substantial testimony, delivered by sworn witnesses."[3] But although a jury may properly act upon an inspection or view as evidence in the case, they are not justified in acting *solely upon such* evidence and in *disregarding the other evidence;* and if their verdict is not supported by the other evidence, it cannot stand.[4] The rule has been declared that in an *equity case,* where a jury is called to determine a question of fact, a view should not be allowed, unless the judge participate therein. This is upon the theory that in such cases the verdict of the jury is merely *advisory;* and it is competent for the court to find the fact against the findings of the jury; but that in order to review the verdict in-

telligently, it is necessary for the court to have all the evidence which the jury had.[5]

1, Tully v. Fitchburg Ry. Co., 134 Mass. 499, citing other Massachusetts cases; Remy v. Municipality No. 2, 12 La. An. 500; Toledo Ry. Co. v. Dunlap, 47 Mich. 456; Jeffersonville Ry. Co. v. Bowen, 40 Ind. 545; Munkwitz v. Chicago Ry. Co., 64 Wis. 403. The same rule holds where the judge viewed the premises, Preston v. Culbertson, 58 Cal. 198. See discussion of this subject in Thomp. Trials secs. 893–894.

2, Disotell v. Henry Luther Co., 90 Wis. 635; Herman v. State, 73 Wis. 248. See sec. 400 *et seq. supra.*

3, Thomp. Trials sec. 902; Hartman v. Reading Ry. Co., (Pa.) 13 At. Rep. 774, and other cases above cited.

4, Washburn v. Milwaukee Ry. Co., 59 Wis. 364; Munkwitz v. Chicago Ry. Co., 64 Wis. 403.

5, Fraedrick v. Flieth, 64 Wis. 184; Jeffersonville Ry. Co. v. Bowen, 40 Ind. 545. On the general subject of view see article by J. C. Thompson, 26 Cent. L. Jour. 436; also Thomp. Trials secs. 875–916.

§413. Experiments out of court.— There are numerous precedents for allowing experiments made out of court and not in the presence of the jury to be proved for the purpose of illustrating the testimony given in court; for example, experts have been allowed to state their experiments made out of court.[1] Testimony has been received as to the results of shooting with the weapon in question,[2] and also as to experiments made out of court in railway damage cases,[3] where it is shown that the *conditions are the same*,[4] and where they do not relate to some collateral matter.[5] Other illustrations might be given, but it is

obvious that testimony ought not to be received as to experiments of this character, unless the testimony shows that they were made under such conditions as to fairly illustrate the point in issue; and from the nature of the case the decision of this question must rest largely in the discretion of the trial judge.[6] The proposition that the jury have no right to listen to *evidence out of court*, such as to statements of witnesses or other persons concerning the facts in issue or the merits of the cause, is too elementary to require discussion.[7] They have no right to gain knowledge concerning the cause by such methods as making experiments out of court or by taking views, except *under the supervision of the court.*[8] But if the knowledge gained in this way could not have affected the verdict rendered, it is not such error as to warrant setting aside the verdict.[9] Nor can they inspect books or documents in the jury room which have not been received in evidence, except upon consent of the parties.[10] Any misconduct of the jury of this character furnishes ground for a new trial.[11]

1, Lincoln v. Taunton Mfg. Co., 9 Allen 191; Williams v. Taunton, 125 Mass. 34; Sullivan v. Com., 93 Pa. St. 284; Burg v. Chicago, R. I. & P. Ry. Co., 90 Iowa 106; Boyd v. State, 14 Lea (Tenn.) 161; State v. Jones, 41 Kan. 309. As to experiments in court, see sec. 406 *supra*.

2, Sullivan v. Com., 93 Pa. St. 284.

3, Byers v. Nashville, C. & St. L. Ry. Co., 94 Tenn. 345; Burg v. Chicago, R. I. & P. Ry. Co., 90 Iowa 106. But see,

Moore v. Chicago, St. P. & K. Ry. Co., (Iowa) 61 N. W. Rep. 992.

4, Chicago, St. L. & P. Ry. Co. v. Champion, 9 Ind. App. 510; Chicago & A. Ry. Co. v. Logue, 47 Ill. App. 292.

5, Libby v. Scherman, 50 Ill. App. 123; 146 Ill. 540.

6, Ulrich v. People, 39 Mich. 245; State v. Smith, 49 Conn. 376; Polin v. State, 14 Neb. 540.

7, Ritche v. Holbrooke, 7 Serg. & R. (Pa.) 458; Hager v. Hager, 38 Barb. (N. Y.) 92, 102; Dower v. Church, 21 W. Va. 23, 55; March v. State, 44 Tex. 64.

8, State v. Sanders, 68 Mo. 202; Yates v. People, 38 Ill. 527; Forehand v. State, 51 Ark. 553; Gim v. State, 4 Humph. (Tenn.) 289; Winslow v. Morrill, 68 Me. 362; Garside v. Ladd Watchcase Co., 17 R. I. 691; Woodbury v. Anoke, 52 Minn. 329; Harrington v. Worcester, L. & S. St. Ry. Co., 157 Mass. 579.

9, People v. Boggs, 20 Cal. 432; Indianapolis v. Scott, 72 Ind. 196.

10, State v. Hartman, 46 Wis. 248; Munde v. Lambie, 125 Mass. 367; State v. Lantz, 23 Kan. 728; McLeod v. Humeston & S. Ry. Co., 71 Iowa 138; Toohy v. Lewis, 78 Ind. 474.

11, This is illustrated by most of the cases cited in the last three notes above.

§414. Models — Diagrams — Photographs.—It is the constant practice in the courts to receive in evidence models, maps and diagrams,[1] for the purpose of giving a more accurate representation of objects or places which cannot conveniently be shown or described to the jury. It has also become the common practice to receive in evidence photographs for the purpose of illustrating to the jury, more satisfactorily than can be done

by description, the appearance of objects, persons or places, where such appearance becomes relevant.[2] It is clearly necessary in order to render diagrams, models, photographs and the like, admissible in evidence that preliminary evidence should be given of the correctness of the representation; and when such evidence is introduced, this is a preliminary question for the determination of the trial judge; and his decision upon this question will not be reviewed by the appellate court.[3] If, however, the accuracy of the representation is questioned, this is a question for the determination of the jury like other questions of fact; and it is well known that even photographs may convey very erroneous impressions.

1, Pennsylvania Coal Co. v. Kelly, 156 Ill. 9; State v. Fox, 25 N. J. L. 566, 602, where the model of a wound was introduced in a criminal case; Weld v. Brooks, 152 Mass. 297; Donohue v. Whitney, 133 N. Y. 178; McVey v. Durkin, 136 Pa. St. 418; McIver v. Walker, 9 Cranch 173; Curtiss v. Aaronson, 49 N. J. L. 68; Coles v. Yorks, 36 Minn. 388; Wolfe v. Scarborough, 2 Ohio St. 362; Davidson v. Arledge, 97 N. C. 172; Vance v. Fore, 24 Cal. 435; Ewing v. State, 81 Tex. 172; Polhill v. Brown, 84 Ga. 338; Whitehead v. Ragan, 106 Mo. 231; Plummer v. Gould, 92 Mich. 1.

2, For a full discussion and illustration of this subject, see sec. 597 *infra*, and cases and articles there cited.

3, Com. v. Morgan, 159 Mass. 375; Blair v. Pelham, 118 Mass. 420; Locke v. Railway Co., 46 Iowa 109; Ortiz v. State, 30 Fla. 256.

CHAPTER 14.

STATUTE OF FRAUDS.

§ 415. Grounds on which evidence is excluded by statute of frauds. — A large part of this work relates to those exclusionary rules of evidence which have had their origin and growth in the courts as a part of the common law. Although as a rule statutes have tended to extend rather than limit the admissibility of evidence, there are important statutes which have been enacted for the purpose of preventing the reception of testimony which would otherwise be competent. By far the most important of these statutes is the celebrated *statute of frauds*. This statute has long been the subject of the most unqualified commendation on the one hand, and of the severest criticism on the other; and the discussion as to its merits is by no means at an end.[1] The fact, however, that for years this statute has held its place in England, and that, with slight changes, it has been adopted and preserved in most of the states of this Union is significant of its great importance, if not of its transcendant value. The statute is based upon the theory that certain contracts are of such importance that they should be reduced to writing, and thus removed from the uncertainties which affect business transactions resting wholly in parol; that in communities where the ability to write is the rule, rather than the exception, the hardship or inconvenience of requiring important contracts to be reduced to writing

is less to be considered than the frauds and perjuries which are apt to follow when such contracts rest only in memory. It is far from the object of this work to enter in detail upon the discussion of those substantive rules of law which depend upon this celebrated statute. It is desirable, however, to briefly call attention to some of the provisions of the statute, and to the general rules of evidence applicable thereto.

1, See many quotations illustrating this in Reed Stat. Frauds secs. 10, 11.

§ 416. As to the conveyance of interests in land.— By the terms of the first and second sections of the statute all conveyances of interests in land, in order to be effectual, excepting only those which create leases or estates at will, must be put in writing and signed by the parties making or creating the same or by their agents, lawfully authorized by writing, except that the rule does not apply to leases not exceeding the term of three years from the making thereof.[1] It will be observed that the statute affects *not* the *credibility or weight* of testimony, but absolutely *excludes* parol proof of a very large class of contracts. It is immaterial whether a large number of witnesses may have knowledge of the terms of a contract within this class, or whether there are no witnesses to controvert their statements, for

the reason that these statements are denied all efficacy as evidence. It is settled by the weight of authority that a deed is not to be rejected as evidence by the terms of this statute, although the signature of the grantor is not actually made by himself, provided it be made in his presence and by his direction.[2] When the deed or conveyance is executed by an attorney in fact, it should be in the name of the principal, and not in the name of the agent.

1, For illustrations of contracts covered by the statute under this head see, Wood Stat. Frauds secs. 192 *et seq.*; Browne Stat. Frauds secs. 228 *et seq.*

2, Jackson v. Murray, 5 T. B. Mon. (Ky.) 184; 17 Am. Dec. 53 and note; Browne Stat. Frauds sec. 12 b.

§ 417. The statute as affecting leases. Questions of evidence frequently arise under the statute in controversies respecting leases, not executed according to the statute, and the surrender of such leases; and attention will be called to the rules governing those subjects. The provisions of the statute of frauds respecting leases have been quite generally adopted in the United States with the qualification that the excepted term is limited in many states to one year, instead of three. The original statute applied only to those leases where the rent reserved should amount to *two-thirds of the improved value.* But this provision has generally been omitted in this

country. It is to be observed that these statutes do not generally declare leases of the class enumerated to be *void*, but, like the English statute, declare such leases to have the effect of *estates at will*.[1] In some states, however, the lease is declared void; and in others, the statute provides that no action shall be maintained upon such leases. It is the well settled rule that tenancies within the statute are to be treated as *estates at will*, which may be converted into *tenancies from year to year* by acts on the part of the landlord and tenant showing such intention. Thus, where the tenant enters and pays rent for the year or some aliquot part of a year, such intention may be inferred.[2] Even under statutes declaring leases of this character void, it has been held that while a parol lease for more than the prescribed period creates in the first instance only an estate at will, yet such estate, when once created, may, like any other estate at will, be converted into a tenancy from year to year by payment of rent or by other circumstances which indicate an intention to create such yearly tenancy.[3] Although a contract beyond the time prescribed is declared void by statute, yet if the tenant enters under such void contract and occupies the premises, he may be compelled to pay for the use and occupation.[4] When the tenancy from year to year has been established by proof of

this character, *evidence* may be given *of the terms of the original parol contract*, so far as they are consistent with the new agreement which the law has created;[5] for example, covenants as to the time of paying rent and the amount of rent,[6] and those as to making repairs[7] may be proved. When the parties have apparently acted upon the terms of the invalid lease, it may be fairly presumed, in the absence of other testimony, that they expect such agreements to continue in the new contract implied by law.[8] So in an action for *use and occupation*, where the tenancy begins under an agreement declared void by statute, such original agreement may be proved merely for the purpose of showing the rental value as recognized by the parties.[9] When a valid parol lease is shown, it is inadmissible to prove by parol a *collateral agreement to extend* such lease beyond the period limited by the statute, since this would be allowing the very object of the statute to be thwarted by indirection.

1, See the statutes of the jurisdiction.

2, Camden v. Bratterbury, 5 C. B. N. S. 817; Braythwayte v. Hitchcock, 10 M. & W. 497; Anderson v. Prindle, 23 Wend. 616; Barlow v. Wainwright, 22 Vt. 88; Wood Stat. Frauds secs. 19-22.

3, Evans v. Winona Lumber Co., 30 Minn. 515; Koplitz v. Gustavus, 48 Wis. 48.

4, Thomas v. Nelson, 69 N. Y. 118 and cases cited.

5, Evans v. Winona Lumber Co., 30 Minn. 515; Crawford v. Jones, 54 Ala. 460; Reed Stat. Frauds sec. 807 and cases cited.

6, Doe v. Bell, 5 T. R. 471; Maverick v. Donaldson, 1 Ala. 536; Morehead v. Watkyns, 5 B. Mon. (Ky.) 228; Barlow v. Wainwright, 22 Vt. 88; De Medina v. Polson, Holt 47; Norris v. Morrill, 40 N. H. 395.

7, Beale v. Sanders, 3 Bing. N. C. 850; Richardson v. Gifford, 1 Adol. & Ell. 52.

8, Dorrill v. Stephens, 4 McCord (S. C.) 59.

9, De Medina v. Polson, Holt 47; Morehead v. Watkyns, 5 B. Mon. (Ky.) 228.

§ 418. Proof of surrender of interests in land.—By the third section of the statute of frauds it was provided that no leases, estates or interests either of freeholds or terms of years, or any uncertain interest in lands, tenements or hereditaments should be assigned, granted or surrendered, unless it be by deed or note signed by the party so assigning, granting or surrendering the same, by their agents thereunto lawfully authorized by writing or by act and operation of law.[1] It will be observed that the leases mentioned in this statute are not limited to three year leases. In England the courts have followed the exact language of the statute, and have held that no leases can be surrendered except in the manner provided by the statute; and the statute has been held to *exclude* alike *parol assignments* and *parol surrenders* of mere leases *from year to year*, though such leases have been created by verbal agreement.[2] In this country, however, although there is some conflict of opinion upon this

subject, the view has generally prevailed that the first three sections should be construed together, and that the language of the third section should be liberally construed, and in view of the language contained in the other sections. And it has been urged with much force that the act could not have been intended to require that contracts should be dissolved by writing which might be created by parol.[3] The statute prescribes *no particular form of words* as necessary to constitute a surrender; hence any writing signed by the tenant, which is accepted or not objected to by the other party, and which clearly evinces the intention to terminate the lease, is sufficient.[4]

1, For the exact language see the statute itself.

2, Botting v. Martin, 1 Camp. 319; Mollett v. Brayne, 2 Camp. 103; Thompson v. Wilson, 2 Stark. 378; Doe v. Wells, 10 Adol. & Ell. 435.

3, Strong v. Crosby, 21 Conn. 398; McKinney v. Reader, 7 Watts (Pa.) 123; Greider's Appeal, 5 Pa. St. 422; Swanzey v. Moore, 22 Ill. 65; Webster v. Nichols, 104 Ill. 160; Ross v. Schneider, 30 Ind. 423.

4, Greider's Appeal, 5 Pa. St. 422; Strong v. Crosby, 21 Conn. 398; Shepard v. Spaulding, 4 Met. 416; Reed Stat. Frauds 780.

§ 419. Surrender by operation of law.— Under the statute there may be a surrender of a lease "by act or operation of law." This language in the act has given rise to much discussion. It has been said to apply "to cases where the owner of

a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid, if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if a lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former."[1] On the same principle a surrender takes place after such acts on the part of the lessee as clearly give rise to the inference that he intends to terminate the former estate. The most common illustration of such acts is where the *lessee accepts a new lease* during the continuance of the old one, and thereby shows his own intention, and at the same time recognizes the power of the lessor to make a valid lease.[2] A surrender will not be implied against the intent of the parties as manifested by their acts; and when such intention cannot be presumed without doing violence to common sense, the presumption will not be supported.[3] So it is proof of the surrender, if the lessee accepts a new lease from the assignee of the lessor.[4] To constitute proof of surrender, the new lease accepted in the

place of the old one must be a *valid lease.*[5] As stated in a New York case, "the farthest that our courts have gone is to hold that, to effect a surrender of an existing lease by operation of law, there must be a new lease, valid in law to pass an interest according to the contract and intention of the parties."[6] It is not necessary, however, that the interest acquired by the new arrangement be of *equal value* with the lease surrendered. Thus, if the tenant accepts from the landlord a valid lease for a shorter term, it operates as a surrender.[7]

1, Lyon v. Reed, 13 M. & W. 306, quoted in Tayl. Ev. sec. 1005.

2, Wilson v. Sewell, 4 Burr. 1975; Donnellan v. Reed, 3 Barn. & Adol. 899; Davison v. Stanley, 4 Burr. 2210; Van Rensselaer v. Penniman, 6 Wend. 569. The rule is the same where the landlord takes possession himself with assent of the tenant, Talbot v. Whipple, 14 Allen 177; Shahour v. Herzberg, 73 Ala. 59; Porter v. Noyes, 47 Mich. 55.

3, Coe v. Hobby, 72 N. Y. 141.

4, Donkersley v. Levy, 38 Mich. 54.

5, Doe v. Bridges, 1 Barn. & Adol. 860; Schieffelin v. Carpenter, 15 Wend. 400; Smith v. Niver, 2 Barb. (N. Y.) 180; Watt v. Maydewell, Hut. 104.

6, Coe v. Hobby, 72 N. Y. 147.

7, Whitley v. Gough, Dyer 140; Van Rennsselaer v. Peninman, 6 Wend. 569; Flagg v. Dow, 99 Mass. 18.

§ 420. Cancellation of instruments creating interests in land. It is a rule, too well settled to require discussion, that the cancellation, destruction or re-delivery o

the instrument which created an estate in land does not operate to divest the grantee of his estate or to surrender it.[1] Even though the parties fully consent to the transaction, this does not change the rules of law which provide the modes in which estates in land may be conveyed and surrendered. Although the cancellation, re-delivery or alteration of the instrument of conveyance is not a surrender within the meaning of the statute, its practical operation may be such as to deprive the grantee of the means of proving his title, since he cannot be heard to prove by parol testimony the facts necessary to maintain his title.[2] The instruments may become invalid, so that no action can be maintained upon the covenants contained in them, and yet the titles which have been acquired under them may remain unaffected. When a person has become the legal owner of real estate, he cannot transfer it or part with his title, except in some of the forms prescribed by law. The grantee may destroy his deed, but not his estate. He may deprive himself of his remedies upon the covenants, but not of his right to hold the property.[3] The rule seems to prevail in some states that when the grantee of a deed, not recorded, voluntarily surrenders or cancels it, and the grantor executes a new deed to a purchaser in good faith, the latter obtains the legal title.[4] These cases rest on the principle that,

since the grantor has put it beyond his power to produce his deed, the law will not allow him to introduce secondary evidence in violation of his undertaking and to defeat the fair intention of the parties.[5]

1, Browne Stat. Frauds sec. 58. See many authorities cited in Reed Stat. Frauds sec. 782; sec. 572 *infra*.

2, Chesley v. Frost, 1 N. H. 145; Barrett v. Thorndike, 1 Greenl. (Me.) 73; Jackson v. Gould, 7 Wend. 364.

3, Chessman v. Whittemore, 23 Pick. 234.

4, Holbrook v. Tirrell, 9 Pick. 105; Nason v. Grant, 21 Me. 160; Mussey v. Holt, 24 N. H. 248; Mallory v. Stodder, 6 Ala. 801; Cravener v. Bowser, 4 Pa. St. 259; Gilbert v. Bulkley, 5 Conn. 262; Holmes v. Trout, 7 Peters 171; Raynor v. Wilson, 6 Hill (N. Y.) 469; Corliss v. Corliss, 8 Vt. 373; Chase v. Hinkley, 74 Me. 181.

5, Mussey v. Holt, 24 N. H. 252.

§ 421. Trusts — How proved — Need not be created by writing. — By the seventh and eighth sections of the statute of frauds, it is provided that declarations or creations of trusts or confidences in lands shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing; otherwise they shall be void. The exception is made, however, as to trusts or confidences resulting by the implication or construction of law. In considering the class of express trusts referred to in this statute, it is to be observed that the trust need not be *created* by writing. It is a compliance

with the terms of the statute, if the trust be *manifested and proved* by writing, and, if so proved, it may be created by parol; and it is sufficient to show the existence of the trust by written evidence.[1] The writing need not be in the form of an agreement between parties; and *any writing subscribed by the party* will be sufficient, if it contain the requisite evidence.[2] Thus, letters,[3] promissory notes,[4] recitals in deeds or other agreements,[5] statements addressed to third persons,[6] memoranda in books of the trustee,[7] receipts,[8] the answer or other pleading of the alleged trustee in the suit to enforce the trust or in an action with another party,[9] and other informal writings have been held sufficient to satisfy the statute. It is not necessary that the writing should have been prepared *for the purpose* of declaring a trust, or intended for the use of the *cestui que trust.* The trustee may be held to the legal effect of the writings.[10]

1, Miller v. Cotten, 5 Ga. 341; Evans v. Chism, 18 Me. 220; Urann v. Coates, 109 Mass. 581.

2, Cook v. Barr, 44 N. Y. 156.

3, Day v. Roth, 18 N. Y. 448; Steere v. Steere, 5 Johns. Ch. (N. Y.) 1; 9 Am. Dec. 256; Maccubbin v. Cromwell, 7 Gill & J. (Md.) 15; Forster v. Hale, 5 Ves. 308; Crook v. Brooking, 2 Vern. 50.

4, Murray v. Glasse, 23 L. J. (Ch.) 126; Campbell v. Campbell, 2 Lea (Tenn.) 66.

5, Wolfe v. Frost, 4 Sandf. (N. Y.) 72; Hutchinson v. Tindall, 2 Green Ch. (N. J.) 357; Wright v. Douglass, 7 N. Y. 564.

6, Morton v. Teward, 2 Younge & C. 67.

7, Keller v. Kunkel, 46 Md. 565; Lewin Trusts 30. Contra, Homer v. Homer, 107 Mass. 82.

8, Miller v. Antle, 2 Bush (Ky.) 407; 92 Am. Dec. 495.

9, Cook v. Barr, 44 N. Y. 156; Maccubbin v. Cromwell, 7 Gill & J. (Md.) 157. See also, Jones v. Slubey, 5 Harr. & J. (Md.) 372.

10, Forster v. Hale, 5 Ves. 308; Roberts Frauds 102.

§ 422. The trust to be proved by writing.— Although the authorities fully justify the rule that the proof of the trust may consist of informal writings, and that no particular form of expression is necessary for that purpose, yet the writing or writings must clearly "manifest and prove" that a trust relation exists, as well as the terms of the trust.[1] Although it is the general rule that the trust and the whole trust must be proved by the writing, there are authorities to the effect that, if the existence of a trust is proved by writing, *parol evidence* may be received to explain and complete the trust, if it is *imperfectly expressed* in the writing.[2] In other cases, however, such testimony has been refused, and the other rule is held that *parol testimony is not admissible* to supply any defects or omissions in the written evidence. Thus in a New York case, although the parol evidence which had been admitted, as well as the acts of the parties, clearly showed the alleged trust, it was held that they could not be resorted to to help out the proof furnished

by the writings.[3] It is conceded in those cases where parol evidence is admitted to explain or help out the writing that it should be received with great caution.[4] The question has sometimes been raised *whether parol evidence is admissible to contradict* the inference drawn from the writings relied on to prove the trust. In an action of this character Chancellor Kent expressed the following view: "If the written proof was clear and positive, it could not be rebutted by parol proof; but considering the loose and ambiguous nature of it, I am inclined to think the parol evidence is competent in support of the sheriff's deed, and to explain the obscurity of the case, by showing what was the understanding of all the parties concerned."[5] The proof of the trust is not necessarily confined to any single writing, but *may consist of several papers*. Nor is it necessary, in such case, that all of the writings be signed, provided they are so linked together in meaning as to be understood without the aid of parol evidence.[6] It is not necessary that the writing relied upon to prove the trust should be contemporaneous with the creation of the trust. On the contrary, the *declaration of trust* may be long *subsequent to such creation.*[7] The statute under consideration does not purport to relate to personal property; and its operation is *confined to real estate.*[8]

1, Steere v. Steere, 5 Johns. Ch. (N. Y.) 1; 9 Am. Dec. 256; Forster v. Hale, 5 Ves. 308; Miller v. Stokely, 5 Ohio St. 194. See also, Olliffe v. Wells, 130 Mass. 221.

2, Kingsbury v. Burnside, 58 Ill. 310; 11 Am. Rep. 67; Cagney v. O'Brien, 83 Ill. 72; Cripps v. Jee, 4 Brown Ch. 472; Pring v. Pring, 2 Vern. 99, where the will making the declaration of trust did not mention for whom, but the confession of the executors and other proof was used to show what was meant.

3, Cook v. Barr, 44 N. Y. 156; Campbell v. Taul, 3 Yerg. (Tenn.) 548; Leaman v. Whitley, 4 Russ. 423.

4, Sayer v. Fredericks, 1 C. E. Green (N. J.) 205; Jackson v. Cary, 16 Johns. 302. See also, Mead v. Randolph, 8 Tex. 191.

5, Steere v. Steere, 5 Johns. Ch. (N. Y.) 1; 9 Am. Dec. 263.

6, Forster v. Hale, 5 Ves. 308.

7, Barrell v. Joy, 16 Mass. 221; Forster v. Hale, 5 Ves. 308.

8, Kimball v. Morton, 1 Halst. Ch. (N. J.) 26; 43 Am. Dec. 621; Roberts Frauds 94.

§ 423. Exception as to resulting trusts. It will be noticed that a large class of trusts, those which arise from implication of law and are commonly called resulting trusts, are excepted by the terms of the act. The familiar classification of these trusts is that of Lord Hardwicke, as follows: "*First*, where an estate is purchased in the name of one person, but the money or consideration is given by another, and a trust in the estate results to him who gave the money or consideration; *Second*, where a trust is declared only as to part, and nothing said as to the rest, and what remains

undisposed of results to the heir-at-law; and *Third*, where transactions have been carried on *mala fide*."[1] In order to establish the fact that a trust has been created by implication, on the ground that an estate has been purchased in the name of one person, but the money or consideration given by another, it must be clearly proved that such payment has been made,[2] and it must be proved to have been made by the person who claims the benefit of the trust,[3] and at or before the time of the purchase.[4]

1, Lloyd v. Spillit, 2 Atk. 148.

2, Whiting v. Gould, 2 Wis. 588; Olive v. Dougherty, 3 G. Greene (Iowa) 371.

3, Burden v. Sheridan, 36 Iowa 125; 14 Am. Rep. 505; Wright v. King, Har. (Mich.) 12.

4, Jackson v. Moore, 6 Cow. 706; Botsford v. Burr, 2 John. Ch. (N. Y.) 405; Buck v. Swazey, 35 Me. 41; 56 Am. Dec. 681; Alexander v. Tams, 13 Ill. 221; Graves v. Dugan, 6 Dana (Ky.) 331; Brooks v. Shelton, 54 Miss. 353; Preston v. McMillan, 58 Ala. 84; Boyer v. Libey, 88 Ind. 235.

§ 424. **Same, continued.**—The following is a statement by a learned writer of some of the other rules of evidence applicable to this subject: "It is obvious that the purchase money must, at the time of payment, be the property of the party paying it and setting up the trust; and the fact that the purchase was made with borrowed money will not establish a resulting trust in favor of the lender. If, however, the party who takes

the deed lend or advance the price to the party who claims the benefit of it, before or at the time of the purchase, so that the money or property paid actually belongs to the latter, a trust results. But it is otherwise where the party taking the deed pays his own money for it, with an understanding or agreement that it may afterwards be repaid, and the land redeemed by him who sets up the trust. If a trustee or executor purchase estates with the trust money, and take a conveyance to himself without the trust appearing on the deed, the estate will be liable to the trusts, if the application of the trust money to the purchase be clearly proved. And so if one partner make a purchase of land to himself, paying for it with the partnership funds, a trust results to his co-partners, though it is otherwise if the co-partnership be not at the time actually existing, but only resting in executory agreement. The fact of payment or of the ownership of the money may always be shown by *parol evidence*, but such evidence must be clear and strong particularly after a considerable lapse of time, or when the trust is not claimed until after the death of the alleged trustee. The testimony of the trustee is competent for this purpose; but mere evidence, given during his life-time, of his declarations to that effect seems to be inadmissible, as not being the best existing evidence. So if it appears

upon the face of the conveyance, by recital or otherwise, that the purchase was made with the money of a third person, that is clearly sufficient to create a trust in his favor. Evidence is also admissible of the mean circumstances of the pretended owner of the estate, tending to show it impossible that he should have been the purchaser, although that fact alone would not probably be sufficient to establish the trust."[1]

1, Browne Stat. Frauds sec. 90 and cases cited. As to the admissibility of parol evidence to explain defective trusts, see article, 29 Cent. L. Jour. 269.

§425. Same — Mode of proving the trust — Amount of evidence. — The real facts as to the payment of the money by a third person may be proved by parol, even though the deed recites that the consideration was paid by the person named as grantee therein;[1] and it may be shown by parol that the purchase price was wholly or partly paid by another person, and a trust *pro tanto* may thus be created.[2] But it is well settled that in such case the testimony must be strong and unequivocal, and of such character as to disclose the exact rights and relations of the parties.[3] Indeed, it may be stated more generally that the proof of trusts by parol is *not regarded with favor* by the courts.[4] The proof should be sufficient in amount, and of such a character as to lead to definite conclu-

sions. When the evidence is so ambiguous and indefinite, or when it relates to transactions so remote as to fall short of such a test, it should be held inadequate to establish the trust.[5]

1, Blodgett v. Hildreth, 103 Mass. 484; Page v. Page, 8 N. H. 187; Gardiner Bank v. Wheaton, 8 Greenl. (Me.) 373. See also, Botsford v. Burr, 2 Johns. Ch. (N. Y.) 405.

2, Case v. Codding, 38 Cal. 191; Mason v. Showalter, 85 Ill. 133; Bragg v. Paulk, 42 Me. 502; Nelson v. Worrall, 20 Iowa 470.

3, Baker v. Vining, 30 Me. 121; 50 Am. Dec. 617. See also, Perry v. McHenry, 13 Ill. 238; Perry v. Perry, 65 Me. 399; Whiting v. Gould, 2 Wis. 552.

4, Whitmore v. Learned, 70 Me. 276; Getman v. Get man, 1 Barb. Ch. (N. Y.) 499; Parmlee v. Sloan, 37 Ind 469; Miller v. Blake, 30 Gratt. (Va.) 744.

5, Barrow v. Greenough, 3 Ves. Jr. 152; Trout v. Trout 44 Iowa 471; Browne Stat. Frauds sec. 91; Reed Stat Frauds sec. 974.

§ 426. Statutes limiting resulting trusts.—In some of the states those resulting trusts which arise where the title to land is taken in the name of one person, and the price is paid by another have been abolished by statute. Although these statutes vary in form, that of New York may be given as an illustration: "When a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment is made; but the title shall vest in the person

named as the alienee in such conveyance, subject only to the provisions of the next section.[1] Every such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration; and when a fraudulent intent is not disproved, a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their just demands.[2] The provisions of section fifty-one shall not extend to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance in his own name without the knowledge or consent of the person paying the consideration, or when such alienee, in violation of some trust, shall have purchased the lands so conveyed with moneys belonging to another person."[3] It is to be observed that, although these statutes have in some states made very important changes, they do not change the rule in those cases where the *grantee takes the conveyance in his own name without the knowledge or consent of the person paying the consideration*, or where the grantee, in *violation of some trust*, purchases the land with the money of another.

1, Rev. Stat. N. Y. 717 sec. 51.

2, Rev. Stat. N. Y. 717 sec. 52.

3, Rev. Stat. N. Y. 717 sec. 53. See 2 Pom. Eq. Jur. where the statutes of other states are cited.

§ 427. Same—Object of the statute.—The statutes were enacted *to prevent frauds*

on creditors, and not to protect and shield an agent acting in a fiduciary or trust relation in the perpetration of an actual fraud, or in the violation of a trust.[1] Hence the statute does not apply in those cases where the person furnishing the money is not aware that the deed is taken in the name of another. The statute implies the assent and co-operation of two persons, one paying the money and so inducing the grant, and the other receiving it;[2] and if it does not appear that the absolute character of the deed was known to or designed by the person paying the consideration, it will be presumed that it was so written by fraud or mistake, and without any intention to violate the statutes.[3] If a debtor buys land, paying for it with his own money, and knowingly takes title in the name of another, he gains no title to the land, and runs the risk of incurring a forfeiture of his estate. The grantee gains absolute title, except that the creditors may prove the trust which has resulted in their favor in a court of equity, after exhausting their remedies at law.[4]

1, Kluender v. Fenske, 53 Wis. 118.

2, Reitz v. Reitz, 80 N. Y. 538, agent; Siemon v. Schurck, 29 N. Y. 598, parent and child; Marvin v. Marvin, 53 N. Y. 607, partner; Fairchild v. Fairchild, 64 N. Y. 471, partner; Reid v. Fitch, 11 Barb. (N. Y.) 399, insane person.

3, Siemon v. Schurck, 29 N. Y. 598.

4, Garfield v. Hatmaker, 15 N. Y. 475; Kluender v. Fenske, 53 Wis. 118; Siemon v. Schurck, 29 N. Y. 598. See also, Trask v. Green, 9 Mich. 358.

§ 428. Proof of trusts between those holding fiduciary relations.— It is elementary that the statute of frauds does not prevent the proof and enforcement of those implied trusts which arise when one sustaining a fiduciary relation obtains the legal title to property by fraud or in any other such manner that he cannot equitably hold the property which justly belongs to another. This is illustrated in the cases where *executors* or administrators purchase land with the funds of the estate in their own names.[1] The same rule applies to *guardians*,[2] *trustees*[3] and *agents* in the management of the property of their principals,[4] and to an *attorney* who takes title in his own name to property purchased with his client's money, or in violation of his duty as attorney.[5] The same principle has often been applied where the proofs showed that a relation of trust and confidence existed by reason of the *relationship of the parties*,[6] as well as in transactions where the money of a *wife* has been invested in lands deeded to the *husband*,[7] and in those cases where a *partner*, by means of fiduciary relations, has gained the legal title to property which in equity and good conscience belongs to the firm.[8] On the same general principle parol evidence may be given, notwithstanding the statute of frauds, to establish a trust where a person by agreement acts for another or falsely represents that he

is *bidding* for another at *a public sale*, and thereby gains an unjust advantage.[1]

1, Seamans v. Cook, 14 Ill. 501; Osborne v. Graham, 30 Ark 66; Mosley v. Lane, 27 Ala. 62; 62 Am. Dec. 752; Johnson v. Quarles, 46 Mo. 423.

2, Paschall v. Hindever, 28 Ohio St. 568; Sweet v. Jacocks, 6 Paige Ch. (N. Y.) 355; 31 Am. Dec. 252; O'Hara v. Dilworth, 72 Pa. St. 403.

3, Brown v. Brown, 1 Strob. Eq. (S. C.) 363; Sanford v. Weeden, 2 Heisk (Tenn.) 74.

4, Malin v. Malin, 1 Wend. 625; Forestone v. Forestone, 49 Ala. 128; Hardanbergh v. Bacon, 33 Cal. 357; Pillsbury v. Pillsbury, 17 Me. 107; Kluender v. Fenske, 53 Wis. 122. See also, Burden v. Sheridan, 36 Iowa 125; 14 Am. Rep. 505; Minot v. Mitchell, 30 Ind. 228; 95 Am. Dec. 685.

5, Linsley v. Sinclair, 24 Mich. 380; Cameron v. Lewis, 56 Miss. 76; Leisenring v. Black, 5 Watts (Pa.) 303; 30 Am. Dec. 322; Howell v. Baker, 4 Johns. Ch. (N. Y.) 118, where property was bought at a nominal price by plaintiff's attorney at sheriff's sale.

6, Robinson v. Leflore, 59 Miss. 148; Corse v. Leggett, 25 Barb. (N. Y.) 389, grandfather and his grandchildren; Warmouth v. Johnson, 58 Cal. 621, purchase by son for the benefit of his mother. See secs. 188, 139 *supra* as to burden of proof where fiduciary relations exist.

7, Gidney v. Moore, 86 N. C. 484; Hayward v. Cain, 110 Mass. 273; Thomas v. Standiford, 49 Md. 181; Newton v. Taylor, 32 Ohio St. 399; Loften v. Witboard, 92 Ill. 461; Pembroke v. Allenstown, 21 N. H. 107, where the money was paid by the husband and the title taken in name of the wife, she was held to be a trustee for the husband. But see, Hocker v. Gentry, 3 Met. (Ky.) 463.

8, Dewey v. Dewey, 35 Vt. 555; Anderson v. Lemon, 8 N. Y. 239; Nicoll v. Ogden, 29 Ill. 323; 81 Am. Dec. 311.

9, Ryan v. Dox, 34 N. Y. 307; McQuat v. Cathcart, 84 Ind. 571; McRarey v. Huff, 32 Ga. 681; Paine v. Wilcox, 16 Wis. 202; Rives v. Lawrence, 41 Ga. 283; Green v.

Ball, 4 Bush (Ky.) 586; Wolford v. Herrington, 86 Pa. St. 39; Bethel v. Sharp, 25 Ill. 173; 76 Am. Dec. 790; Lindsey v. Planter, 23 Miss. 576. This principle is illustrated by many cases cited in Reed Statute Frauds sec. 930.

§ 429. Wills — Procuring devise by fraud. — Under another head there will be found a discussion of those rules of evidence which relate to the explanation and revocation of wills. It is beyond the province of this work to discuss the section of the statute of frauds and the other English and American statutes which relate to the mode of executing and proving wills.[1] It has frequently been held that, if a person procures an absolute devise or bequest to himself by orally promising the testator that he will convey the property to, or hold it for, the benefit of third persons, and afterwards refuses to perform his promise, a trust arises out of the confidence reposed in him by the testator and his own fraud, which a court of equity, upon clear and satisfactory proof of the facts, will enforce against him at the suit of such third persons. In the leading case in this country it is said: "It is contended that parol evidence of a trust is contrary to our statute of wills which corresponds, as far as regards the point in dispute, with the British statute of frauds. Undoubtedly every part of a will must be in writing; and a naked parol declaration of a trust in respect of land devised is void. The trust insisted on here, how-

ever, owes its validity not to the will or the declaration of the testator, but to the fraud of the devisee. It belongs to a class in which the trust arises *ex maleficio*, and in which equity turns the fraudulent procurer of the legal title into a trustee to get at him; and there is nothing in reason or authority to forbid the raising of such a trust from the surreptitious procurement of a devise."[2] We have seen that, in a large class of cases, the statute of frauds is no bar to the proof by parol of those facts which create a trust *ex maleficio*; that the courts do not allow the statute to be thus interposed as a shield for fraud. But the cases cited also illustrate the rule that in order to constitute proof of fraud, in such cases, a mere *refusal to perform* the trust is *not enough*. It is necessary that there should be an *agency*, active or passive, on the part of the alleged trustee *in procuring the title*.[3]

1, As to parol revocation and explanation of ambiguities in wills, see secs. 482 *et seq. infra*, 189 *supra*.

2, Hoge v. Hoge, 1 Watts (Pa.) 163; 26 Am. Dec. 52; Brook v. Chappell, 34 Wis. 405; Oldham v. Litchfield, 2 Vern. 506; Chamberlain v. Chamberlain, 1 Freem. 34; Barrel v. Harnick, 42 Ala. 60; Hooker v. Oxford, 33 Mich. 453.

3. Lantry v. Lantry, 5 Ill. 458; 2 Am. Rep. 310. See also, Hoge v. Hoge, 1 Watts (Pa.) 163; 26 Am. Dec. 52; Brook v. Chappel, 34 Wis. 405.

§ 430. **Proof of guaranty.**— Written evidence signed by the party charged therewith or by his agent is by the same statute

required in every case of contract by executors or administrators to answer damages out of their own estate; in case of every promise of one person to answer for the debt, default or miscarriage of another person; every agreement made in consideration of marriage, or which is not to be performed within a year from the time of making it, and every contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them. Without entering upon any general discussion of the broad subject of guaranties, it is important to state the principle that the statute does not exclude parol proof to show that the promise in question, although in form a guaranty, is in reality a *promise to pay the debt of the person himself.*[1] This is illustrated in those cases where the promise relates to a debt on which the promisor was already liable with others.[2] An original promise to pay may be proved by parol, although the *goods* or other consideration are *furnished*, not to the promisor, but *to some third person.* In such a case the undertaking is in no sense a collateral undertaking, and is not within the statute.[3] The real question which arises is, *to whom was the credit given.* The rule is generally stated that if any credit at all is given to the person for whose benefit the promise is made, there should be written proof of the promise made by the one sought to be held as defend-

ant.[4] Nor does the statute apply where the owner of a note transfers it to his creditor in payment of his own debt, and represents the note to be collectible.[5] The statute does not apply in those cases where the promise is to pay a *debt which attaches to the promisor's own property*, though the debt in the first instance is that of a third person.[6] It is generally held that before the provisions of the statute can apply, it must appear that the *liability* of the third person in whose behalf the promise is made *continues*; and the two obligations must concur.[7] In the application of the statute it makes no difference whether the guaranty relates to a *past, present or future debt* of another.[8] The rule has often been stated that a *new* and sufficient *consideration* moving directly to the guarantor will take the case out of the statute of frauds.[9] But the rule is not accepted without objection; and in many states the existence of such new consideration does not avail to take the promise out of the statute, if the original liability continues to exist, and unless a new promise is substituted for the original liability.[10]

1, Hubon v. Park, 116 Mass. 541; Randall v. Kelsey, 46 Vt. 158; Smart v. Smart, 97 N. Y. 559; Darst v. Bates, 95 Ill. 493; DeWitt v. Root, 18 Neb. 567; Eastwood v. Kenyon, 11 Adol. & Ell. 438; Morin v. Martz, 13 Minn. 191; Dyer v. Gibson, 16 Wis. 557; Sutherland v. Carter, 52 Mich. 151.

2, Orrell v. Coppock, 26 L. J. (Ch.) 269, trustees; Dur-

ham v. Manrow, 2 N. Y. 533; Stephens v. Squire, 5 Mod. 205; Hopkins v. Carr, 31 Ind. 260.

3, West v. O'Hara, 55 Wis. 645; Bulkmyr v. Darnell, 2 Ld. Raym. 1085; Chicago Coal Co. v. Liddell, 69 Ill. 639; Walker v. Hill, 119 Mass. 249; Brown v. Harrell, 40 Ark. 429; Davis v. Tilt, 70 Ga. 52.

4, Larson v. Wyman, 14 Wend. 246; Foster v. Napier, 74 Ala. 393; Bugbee v. Kendricken, 130 Mass. 437; Barber v. Fox, 1 Stark. 270; Hall v. Wood, 4 Chand. (Wis.) 36; Langdon v. Richardson, 58 Iowa 610; Wills v. Ross, 77 Ind. 1.

5, Cardell v. McNeil, 21 N. Y. 336; Fears v. Story, 131 Mass. 47; Wyman v. Goodrich, 26 Wis. 21; Shafer v. Ryan, 84 Ind. 140; Mobile Ry. Co. v. Jones, 57 Ga. 198; Power v. Rankin, 114 Ill. 52; Bruce v. Burr, 67 N. Y. 237; Wilson v. Hentges, 29 Minn. 102. See article by Isaac Redfield, 4 Am. Law Reg. (N. S.) 460.

6, Wills v. Brown, 118 Mass. 137; Weisel v. Spence, 59 Wis. 301; Walden v. Karr, 88 Ill. 49; Walker v. Taylor, 6 Car. & P. 752; Stewart v. Campbell, 58 Me. 439; Morgan v. Overmann Mining Co., 37 Cal. 534; Mitchell v. Griffin, 58 Ind. 559.

7, Booth v. Eighmie, 60 N. Y. 238; Stone v. Symmes, 18 Pick. 467; Goodman v. Chase, 1 Barn. & Ald. 297; Watson v. Jacobs, 29 Vt. 169; Armstrong v. Flora, 3 T. B. Mon. (Ky.) 43.

8, Emerson v. Slater, 22 How. 28; Doyle v. White, 26 Me. 341; Waller v. Richards, 39 N. H. 259; Reed Stat. Frauds sec. 31.

9, Westmoreland v. Porter, 75 Ala. 452: Maxwell v. Haynes, 41 Me. 559; Britton v. Angier, 48 N. H. 420; Fears v. Story, 131 Mass. 47; Kelly v. Schupp, 60 Wis. 76; Reed Stat. Frauds secs. 64, 65.

10, Dows v. Swett, 134 Mass. 140; Vaughn v. Smith, 65 Iowa 579; Ackley v. Parmenter, 98 N. Y. 425. See other cases and discussion in 8 Am. & Eng. Ency. Law 682; Reed Stat. Frauds secs. 66, 67.

§ 431. Sale of goods.— According to the same statute no contract for the sale of goods for the price of ten pounds or upwards shall be good, unless the buyer shall accept part of the goods, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or except some note or memorandum in writing of the bargain be made and signed by the parties to be charged by the contract or by their agents, lawfully authorized thereto. This provision of the statute has been adopted quite generally in the United States, although such statutes in this country most generally fix the limit of value at the sum of fifty dollars instead of ten pounds. It frequently becomes necessary *to determine whether some part of the goods has been accepted* and actually received within the meaning of the statute and in such manner as to render the memorandum unnecessary. Ordinarily this is a matter to be proved by *parol evidence*, which will generally consist of the language and acts of the buyer. Among other acts relevant to this issue are the continued possession of the buyer without objection;[1] the opportunity for the full examination of the goods, and the failure to make any objection to them,[2] and the exercise of such control or dominion over the goods as seems inconsistent with ownership in another.[3] To satisfy the language of the statute it is

necessary to prove, *not only that the buyer has accepted, but that he has received part* of the goods. In other words there must be a delivery with the intent on the part of the seller to transfer the ownership, and on the part of the buyer to accept.[4] The *delivery*, however, *may be constructive* or symbolical, or by the agents of the parties.[5] It has sometimes been stated that in order to constitute the acceptance and receipt contemplated by the statute, there must be proof of more than mere words or promises; that the evidence must show acts and conduct as well.[6] This statement, however, has been criticised by high authority on the ground that the statute does not prescribe any mode of proving the change of possession.[7]

1, Bushel v. Wheeler, 15 Q. B. 442; Coleman v. Gibson, 1 Moody & Rob. 168; Wilcox Co. v. Green, 72 N. Y. 17.

2, See cases last cited.

3, Currie v. Anderson, 2 El. & El. 592; Marton v. Tibbett, 15 Q. B. 428; Rogers v. Phillips, 40 N. Y. 519.

4, Atherton v. Newhall, 123 Mass. 141; Messer v. Woodman, 22 N. H. 172; Jones v. Mechanics Bank, 29 Md. 287; Taylor v. Mueller, 30 Minn. 343; Stone v. Browning, 68 N. Y. 598.

5, Outwater v. Dodge, 6 Wend. 397; Chaplin v. Rogers, 1 East 191; Cross v. O'Donnell, 44 N. Y. 661; Dodsley v. Varley, 12 Adol. & Ell. 632; Snow v. Warner, 10 Met. 132; King v. Jarman, 35 Ark. 190; 37 Am. Rep. 11 and long note. Brown Stat. Frauds sec. 319.

6, Basset v. Camp, 54 Vt. 232; Malone v. Plato, 22 Cal. 103; Edwards v. Grand Trunk Ry. Co., 54 Me. 105; Shepard v. Pressey, 32 N. H. 49.

7, Browne Stat. Frauds sec. 320.

§ 432. What the memorandum is to contain.— Since it was the object of the statute of frauds to compel parties to prove certain kinds of contracts by written evidence, it follows that the memorandum relied on should contain the terms of the contract with such definiteness that no resort to parol testimony is necessary.[1] Hence, if the memorandum is manifestly incomplete or fails to state the essential terms of the contract, it cannot be helped out by parol evidence.[2] Accordingly the memorandum contract cannot be added to by parol proof of the *names of the parties* to be bound.[3] But several letters or other writings may be construed together as constituting the memorandum; and if the names of the parties appear from all the writings or from the initials or words used so that the parties can be identified, it is enough.[4] Where the description within the memorandum "points directly to one set of persons, and but one, and their identity can be shown from the writing or from other written evidence or by parol evidence which can indicate the persons described in the writing without involving inadmissible parol proof of anything in the contract itself, the writing is sufficient."[5] It is not necessary that the memorandum should state the *time of payment*, as in such cases it will be presumed that cash payment is intended.[6] If, however, the memorandum shows that credit

is intended, and the terms are so incomplete that the real intent cannot be ascertained without a resort to parol evidence, the omission is fatal.[7] Those *provisions* which are *merely formal* and are not essential need not be expressed, as they will be implied. In illustration of the rule that the memorandum must contain the full terms of the contract, it may be added that the *price* should be stated.[8] But if the memorandum contains the recital that the price has been received, it is then unnecessary.[9] It is also unnecessary if no price has been named or the property has been sold for what it is reasonably worth.[10] In further illustration of the same general subject, if the memorandum is relied upon as a contract relating to land, the *land must be so described* as to be capable of identification.[11] While parol evidence is admissible to apply the description to the property intended, and to show the surrounding circumstances, it cannot be allowed to add to the memorandum.[12] If any such reference is made to the land that it can be definitely ascertained, as where it is designated as the land of a certain estate, or land having known names, it is sufficient.[13] Obviously the same general principle applies when the contract within the statute of frauds relates to sales of *personal property*.[14]

1, Williams v. Morris, 95 U. S. 444; Lee v. Hills, 66 Ind. 474; Hales v. Van Berchem, 2 Vern. 617; Fry v. Platt, 32

Kan. 62; Brown v. Whipple, 58 N. H. 229; Guy v. Barnes, 29 Ind. 103; Vaughn v. Smith, 58 Iowa 553; Wright v. Weeks, 25 N. Y. 153; Williams v. Robinson, 73 Me. 186. As to the general requirements, see notes, 65 Am. Dec. 668; 47 Am. Rep. 532.

2, See cases last cited. On the general subject of what the memorandum is to contain with *certainty*, see elaborate note, 26 Am. Dec. 661.

3, Phelan v. Tedcastle, 15 L. R. Ir. 169; Graton v. Cummings, 99 U. S. 100; Lang v. Henry, 54 N. H. 57; Horton v. McCarty, 53 Me. 394; Raubitschek v. Blank, 80 N. Y. 478; Drury v. Young, 58 Md. 546; 42 Am. Rep. 343 and long note. As to whether such memorandum is to be signed by both parties, see long notes, 25 Am. Rep. 543; 55 Am. Dec. 344. See also many examples cited in Reed Stat. Frauds secs. 401 *et seq.*

4, Salmon Falls Co. v. Goddard, 14 How. 454; Barry v. Coombe, 1 Peters 640; Clark v. Rawson, 2 Den. 135; Drury v. Young, 58 Md. 546; 42 Am. Rep. 343 and long note; Reed Stat. Frauds sec. 401; Browne Stat. Frauds secs 374 *et seq.*

5, Reed Stat. Frauds sec. 407; Newell v. Radford, L. R. 3 C. P. 52, parol evidence received to identify a party by showing his occupation; Bateman v. Phillips, 15 East 272, parol evidence to show agency; Reed Stat. Frauds sec. 377.

6, Atwood v. Cobb, 16 Pick. 227; O'Donnell v. Leeman, 43 Me. 158; Hawkins v. Chace, 19 Pick. 502, as to time of delivery of goods.

7, Ryan v. Hall, 13 Met. 520; Grace v. Denison, 114 Mass. 16; Schmeling v. Kriesel, 45 Wis. 328.

8, Morgan v. Milman, 3 De Gex, M. & G. 24; Grace v. Denison, 114 Mass. 16; Browne Stat. Frauds sec. 377.

9, Browne Stat. Frauds sec. 379.

10, Hoadley v. McLaine, 10 Bing. 482; Browne Stat. Frauds sec. 377.

11, Miller v. Campbell, 52 Ind. 125; Pulse v. Miller, 81 Ind. 190; McGuire v. Stevens, 42 Miss. 724; Church v.

Farrow, 7 Rich. Eq. (S. C.) 378; Meadows v. Meadows, 3 McCord (S. C.) 457; Coles v. Bowne, 10 Paige Ch. (N. Y.) 526; Stafford v. Lick, 10 Cal. 12.

12, See cases last cited. See also, Eggleston v. Wagner, 46 Mich. 610; Smith's Appeal, 69 Pa. St. 474. Many illustrations will be found in Reed Stat. Frauds chap. 18.

13, Smith v. Freeman, 75 Ala. 285; Springer v. Klinsorge, 83 Mo. 152; Scanlon v. Geddis, 112 Mass. 15.

14, See cases illustrating the subject, cited in Reed Stat. Frauds secs. 413 *et seq.* See secs. 446, 449 *infra.*

§ 433. Same, continued.—It has been the subject of infinite discussion and controversy whether, under the statute, the memorandum must show the *consideration.* In some states statutes have been enacted requiring a statement of the consideration. In others, statutes declare that the consideration need not be expressed. The English rule requiring the memorandum to state the consideration has been rejected in this country in the greater number of states, but it remains an open question as to which view is sustained by the greater weight of authority.[1] But even in those jurisdictions where the consideration must be expressed in the memorandum, it *need not be expressly stated.* It suffices if the consideration appears in the writing and the surrounding circumstances to be gathered therefrom.[2] And where the *language* of the memorandum is *ambiguous,* and may refer to different subjects, parol evidence may, under a familiar rule, be received to show the *situation and circumstances*

of the parties at the time in order to construe their agreement.[3] It is to be borne in mind that the memorandum required in the various sections of the statute of frauds is *not the contract* itself. The writing is only the evidence of the contract showing the terms and the parties.[4] Hence the *memorandum may be subsequent* to the making of the contract,[5] but must be made *before* the *action* is brought,[6] and cannot be before the making of the contract itself.[7] If the memorandum is shown to have been lost, its contents may be proved by parol.[8] The memorandum *need not* on its face *purport to be an agreement*, nor need it be executed for the purpose of creating or recognizing a liability. If it is delivered and accepted by the other party, it may suffice.[9] Indeed, it has frequently been held that such a memorandum may be binding within the statute, *although it disclaims* all *liability*.[10] And letters addressed to third persons stating the terms of the contract might be sufficient evidence to satisfy the statute.[11] The memorandum *need not be a formal* instrument, but may exist in almost any form, provided it contains the signature of the party or parties to be charged, and the terms of the agreement.[12] The entire memorandum *need not be* contained in a *single writing*, but may consist of several, provided they so refer to each other that parol evidence is not necessary to show the relation between them.[13]

1, See cases cited *pro* and *con* in 8 Am. & Eng. Ency. Law 727. See article by H. Campbell Black, 22 Cent. L. Jour. 65.

2, Shadwell v. Shadwell, 9 C. B. N. S. 159, 173; Church v. Brown, 21 N. Y. 315; Otis v. Hazeltine, 27 Cal. 80; Simons v. Steele, 36 N. H. 73. The words "value received" are sufficient, Violett v. Patton, 5 Cranch 151; Dahlman v. Hammel, 45 Wis. 466; Marshall v. Cobleigh, 18 N. H. 485.

3, Walrath v. Thompson, 4 Hill 200; Haigh v. Brooks, 10 Adol. & Ell. 309; Ellis v. Bray, 79 Mo. 227. See also, Doherty v. Hill, 144 Mass. 465.

4, Coles v. Trecothick, 9 Ves. 234; Bradford v. Roulston, 8 Ir. C. L. Rep. 468; Grimes v. Hamilton Co., 37 Iowa 290; Bluck v. Gompertz, 7 Exch. 862.

5, Jenkins v. Harrison, 66 Ala. 345; Thayer v. Luce, 22 Ohio St. 62; Gale v. Nixon, 6 Cow. 445; Phillips v. Ocmulgee Mills, 55 Ga. 633.

6, Williams v. Bacon, 2 Gray. 387; Heideman v. Wolfstein, 12 Mo. App. 366.

7, Reed Stat. Frauds sec. 357.

8, Raubetschek v. Blank, 80 N. Y. 478; Irwin v. Irwin, 34 Pa. St. 525; Wiley v. Mullins, 22 Ark. 394; Blackburn v. Blackburn, 8 Ohio 81; Bent v. Smith, 22 N. J. Eq. 560.

9, Shippey v. Derrison, 5 Esp. 190; Thayer v. Luce, 22 Ohio St. 62; Ellis v. Deadman, 4 Bibb (Ky.) 466.

10, Bailey v. Sweeting, 9 C. B. N. S. 843; Shippey v. Derrison, 5 Esp. 190; Buxton v. Rust, L. R. 7 Exch. 279; Townsend v. Hargraves, 118 Mass. 325.

11, Moss v. Atkinson, 44 Cal. 3; Wright v. Cobb, 5 Sneed (Tenn.) 143; Wood v. Davis, 82 Ill. 311; Moore v. Mountcastle, 61 Mo. 424.

12, A receipt containing the terms of the agreement was received in Raubetschek v. Blank, 80 N. Y. 478; a telegram in North v. Mendel, 73 Ga. 400; 54 Am. Rep. 879; and mere written offer with proof of acceptance in Argus Co. v.

Albany, 55 N. Y. 495; Western Union Co. v. Chicago Ry. Co., 86 Ill. 246.

13, Raubetschek v. Blank, 80 N. Y. 478; Boydell v. Drummond, 11 East 142; Hawkinson v. Harmon, 69 Wis. 551; Peck v. Vandemark, 99 N. Y. 29; Hollis v. Burgess, 37 Kan. 487; Tice v. Freeman, 30 Minn. 389; Lerned v. Wannemacher, 9 Allen 412; Peabody v. Speyers, 56 N. Y. 230.

§ 434. Subsequent modification by parol — Fraud — Mistake. — Under another head it will be seen that the statute of frauds does not stand as an imperative bar to the *subsequent parol rescission or change* of agreements within its terms.[1] The courts have held, with much less difficulty and reluctance, that the statute of frauds can not stand in the way of oral *proof of fraud*, when it is charged. It has been said to be "absurd that a statute made to prevent frauds shall be made a handle to support them."[2] For example, parol evidence may be received to prove that a conveyance or other contract has been obtained by fraud,[3] or that the wrong boundaries have been pointed out in the sale of land.[4] So where there was an oral agreement to make an absolute conveyance, and a further one that the grantee should execute a defeasance, the court compelled the grantee to execute the full agreement, when he, having received the conveyance, relied on the statute and refused to execute the defeasance.[5] Under another heading the rule has been discussed that in

equitable proceedings it may be shown by parol that, by reason of mistake, surprise or fraud, a written contract fails to state the actual agreement between the parties.[6] Many of the illustrations there given show that the rule applies as well when the contract is one which by the statute of frauds is required to be in writing.

1, See sec. 449 *infra*.

2, Peachy's case (not reported) Rolls E. T. 1759; Day v. Lown, 51 Iowa 364; Sanford v. Rose, 2 Tyler (Vt.) 428; Lamm v. Homestead Assn., 49 Md. 233; Ochsenkehl v. Jeffers, 32 Mich. 482; 2 Reed Stat. Frauds ch. 21.

3, Thompson v. Mason, 4 Bibb (Ky.) 195; Day v. Lown, 51 Iowa 364.

4, Sanford v. Rose, 2 Tyler (Vt.) 428.

5, 5 Vin. Abr. 523.

6, See secs. 440 *et seq. infra*.

§ 435. Reformation— Part performance.— The court may, in a proper proceeding, thus correct and reform such instruments as those just mentioned either by striking out terms or clauses improperly contained in the writing, or by adding others which, according to the real agreement, belong there.[1] But the *mere refusal to carry out an oral agreement*, otherwise defective under the statute of frauds, is not a ground of action; and oral evidence is not rendered admissible to prove such a contract, merely by reason of its breach. There can be no fraud or legal wrong in a breach of trust from which the

statute withholds the right of judicial recognition.[2] It is, however, a well recognized power of the courts of equity to compel the *specific performance* of a verbal agreement within the statute of frauds, where the refusal to execute would be equivalent to a fraud. Although the statute of frauds is binding alike upon courts of law and equity, and although a mere breach of or refusal to execute a parol agreement, not valid according to the statute of frauds, is not a ground for equitable jurisdiction, yet if one party to such an agreement induces the other to *partially perform it*, and to change materially his situation, the refusal to complete the agreement is tantamount to a fraud.[3] In such cases, where the circumstances are such that the injured party cannot be restored to his former condition, courts of equity receive *parol evidence of the contract* and of the facts relied on to constitute a partial performance; and they compel the wrongdoer to perform his agreement, or give compensation in damages.[4] A familiar illustration of the part performance which will remove an oral contract from the operation of the statute of frauds is when the contract relates to land, and possession is taken or valuable improvements are made.[5] The proof must show that the possession is pursuant to the contract relied on,[6] and it must be notorious and exclusive.[7] Although the possession is gen-

erally accompanied by other acts, *possession alone is sufficient* part performance;[8] and although the acts constituting part performance may be proved by parol, such evidence should be clear and convincing.[9]

1, Beardsley v. Duntley, 69 N. Y. 577; Tilton v. Tilton, 9 N. H. 385; Quinn v. Roath, 37 Conn. 16; Keisselbrack v. Livingston, 4 Johns. Ch. (N. Y.) 144; Coles v. Bowne, 10 Paige (N. Y.) 526. See sec. 442 *infra*.

2, Campbell v. Dearborn, 109 Mass. 130; Montacue v. Maxwell 1 P. Wms. 618; Dunphy v. Ryan, 116 U. S. 491; Scott v. Harris, 113 Ill. 447; Pusey v. Gardner, 21 W. Va. 469; McClain v. McClain, 57 Iowa 167; Reed Stat. Frauds sec. 478.

3, Attorney-General v. Day, 1 Ves. Sr. 218; Williams v. Morris, 95 U. S. 444; Graham v. Theis, 47 Ga. 479; Sands v. Thompson, 43 Ind. 21; Glass v. Hulbert, 102 Mass. 24; Ham v. Goodrich, 33 N. H. 32; Freeman v. Freeman, 43 N. Y. 34; Horn v. Ludington, 32 Wis. 73; Lodge v. Leverton, 42 Tex. 18; Reed Stat. Frauds sec. 550; Browne Stat. Frauds sec. 437. As to what acts constitute part performance, so as to take the contract out of the statute of frauds, see extended notes, 53 Am. Dec. 539; 32 Am. Dec. 129; 49 Am. Dec. 325.

4, See cases last cited.

5, Cummings v. Gill, 6 Ala. 562; Terry v. Rosell, 32 Ark. 478; Alderman v. Chester, 34 Ga. 152; McDowell v. Lucas, 97 Ill. 489; Glass v. Hulbert, 102 Mass. 24; Miller v. Ball, 64 N. Y. 286; Milliken v. Dravo, 67 Pa. St. 230; Smith v. Armstrong, 24 Wis. 446; Reed Stat. Frauds secs. 574 *et seq*.

6, Gorham v. Dodge, 122 Ill. 528; Brown v. Brown, 33 N. J. Eq. 650.

7, Brown v. Lord, 7 Ore. 302: Moore v. Small, 19 Pa. St. 461; Charpiot v. Sigerson, 25 Mo. 63.

8, Reed Stat. Frauds sec. 584 and cases ited.

9, Purcell v. Miner, 4 Wall. 513; Worth v. Worth, 84 Ill. 442; Reese v. Reese, 41 Md. 554; Force v. Dutcher, 18

N. J. Eq. 401; Niver v. Belknap, 2 Johns. 573; Blanchard v. McDougal, 6 Wis. 167; Ackerman v. Fisher, 57 Pa. St. 457; Reed Stat. Frauds sec. 637.

§ 436. Same — Original agreement must be proved. — Part performance in no way dispenses with the necessity of proving the original agreement. It is not the province of the courts to make contracts; and it is a familiar rule that the party who relies on part performance as removing the bar of the statute of frauds must produce definite and convincing proof as to the nature and terms of the oral contract on which he relies.[1] The consideration and the subject matter,[2] as well as the other terms of the agreement, must be proved by a clear preponderance of testimony in such a manner that the court may know that the minds of the parties have met, and that a definite and complete contract has been made.[3] Although acts of part performance may illustrate and indicate the contract, they need not afford complete proof of its terms. It is sufficient if they are referable and consistent with the oral contract.[4]

1, Kinyon v. Young, 44 Mich. 339; Nicol v. Tackaberry, 10 Grant Ch. 109; Smith v. Crandall, 20 Md. 482.

2, Hart v. Carroll, 85 Pa. St. 508; Cooper v. Carlisle, 17 N. J. Eq. 525.

3, Blanchard v. McDougal, 6 Wis. 167; Purcell v. Miner, 4 Wall. 513; Aday v. Echols, 18 Ala. 353; Brewer v. Wilson, 17 N. J. Eq. 180.

4, Sitton v. Shipp, 65 Mo. 297; Church v. Sterling, 16 Conn. 388; Bard v. Elston, 31 Kan. 274.

CHAPTER 15.

PAROL EVIDENCE TO EXPLAIN WRITINGS.

§ 437.– Parol evidence inadmissible to vary written instruments—Reasons for the rule.— There is another ancient rule of

evidence of wide application which rests upon the same general principle as the rule discussed in the last chapter. Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a valid written instrument.[1] Mr. Stephen states the rule more fully and in much more guarded language as follows: "When any judgment of any court, or any other judicial or official proceeding, or any contract or grant, or any other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained. Nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence."[2] It is hardly necessary to cite authorities in support of the general rule above stated as it is recognized in nearly all the cases hereafter cited in this chapter. The numerous exceptions and qualifications which limit the rule will appear in the discussion that follows. If the rule were strictly applied to those writings which are incomplete, informal or transitory in their character, it might be deemed unreasonably rigid and harsh, but there can be no such criti-

cism of the rule when applied to those more solemn documents in which parties have made a distinct and complete memorial of their agreement. In such cases it is impliedly, if not expressly, agreed that, in the event of misunderstanding, the document shall be taken as the best evidence of their intention. For many reasons such written instruments deliberately agreed to by the parties must be deemed better evidence than the "uncertain testimony of slippery memory." It is but a corollary of the main proposition that, where there is no imperfection or ambiguity in the language of a contract, it will be *deemed to express the entire and exact meaning* of the parties,— that every material part of the contract is therein expressed.[3] On the same principle all *conversations* and parol *agreements* between the parties *prior* to the written agreement are so *merged* therein that they cannot be given in evidence for the purpose of changing the contract or showing an intention or understanding different from that expressed in the written agreement.[4] It is a principle, to which we shall frequently have occasion to allude, that, "in order to exclude oral evidence of a contract, it *must be first established that there is* a subsisting *written contract* between the parties; and where the immediate issue is whether there is or was a writing covering the contract, it is not competent to

exclude oral testimony bearing on that issue upon an assumption of such writing. To do so is to beg the question." [5]

1, Tayl. Ev. sec. 1132; Greenl. Ev. sec. 275. For a general discussion of the admissibility of parol evidence and collection of the authorities, see articles by James B. Thayer, 6 Harv. Law Rev. 325, 417. Valuable notes discussing the general subject of parol proof will be found in 11 Am. St. Rep. 394; 53 Am. Dec. 187; 5 Am. Rep. 241; 28 Am. Rep. 210; 6 Am. Rep. 678; 1 Am. Dec. 257; 51 Am. Dec. 546; 3 L. R. A. 308, 330, 761, 796, 801; 6 L. R. A. 33-47; 13 L. R. A. 621; 17 L. R. A. 270; 25 Cent. Law Jour. 35; 29 *id.* 321.

2, Steph. Ev. art. 90.

3, Preston v. Mercean, 2 W. Black. 1249; Adams v. Wordley, 1 M. & W. 374; Bayard v. Malcolm, 1 Johns. 453; Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; 54 Am. Dec. 309; Boorman v. Jenkins, 12 Wend. 566; 27 Am. Dec. 158; Whitworth v. Brown, 85 Wis. 375; Packer v. Roberts, 140 Ill. 671; Culver v. Wilkinson, 145 U. S. 205; Rigdon v. Conley, 145 Ill. 565; National Gas Co. v. Bixby, 48 Minn. 323.

4, DeWitt v. Berry, 134 U. S. 306; Cole v. Spann, 13 Ala. 537; Dean v. Mason, 4 Conn. 428; 10 Am. Dec. 162; Logan v. Bond, 13 Ga. 192; Taylor v. Davis, 82 Wis. 455; Savercool v. Farwell, 17 Mich. 308; Herndon v. Henderson, 41 Miss. 584; Cox v. Bennet, 13 N. J. L. 165; Societa v. Sulzor, 138 N. Y. 468; Walker v. Engles, 30 Mo. 130; Beall v. Fisher, 95 Cal. 568; Cook v. First Nat. Bank, 90 Mich. 214; Smith v. Higbee, 12 Vt. 113; Watson v. Roods, 30 Neb. 264; Chadwick v. Perkins, 3 Me. 399; Downie v. White, 12 Wis. 176; 78 Am. Dec. 731; Cincinnati Ry. Co. v. Pearce, 28 Ind. 502; Gelpcke v. Blake, 15 Iowa 387; 83 Am. Dec. 418; Bedford v. Flowers, 11 Humph. (Tenn.) 242; Ellmaker v. Franklin Fire Ins. Co., 5 Pa. St. 183; Pilmer v. State Bank, 16 Iowa 321. The same rule has been held to apply although the written agreement is lost and must itself be proved by parol, Nicholson v. Tarpey, 89 Cal. 617. Letters

cannot be received to change a contract subsequently made, Gage v. Phillips, 21 Nev. 150.

5, Benj. Sales sec. 232, note; Kalamazoo Works v. Macalister, 40 Mich. 84; Thomas v. Barnes, 156 Mass. 581; Edwards Lumber Co. v. Baker, 3 N. Dak. 170; Bank of British N. America v. Cooper, 137 U. S. 473.

§ 438. Illustrations of the rule.—We will now cite some of the cases which illustrate the application of the general rule, after which we will discuss its exceptions and limitations. In a leading case a policy of insurance covered goods "in ships from Surinam to London." Parol evidence was held inadmissible to show that a particular ship which was lost had been verbally excepted at the time of the contract.[1] In an action against the acceptor of a draft, it was held inadmissible to show that there was a contemporaneous oral agreement that the acceptor should not be called on to pay.[2] The same rule was held where proof was offered that an indorsement of a note in blank was agreed to be without recourse;[3] and also where proof was offered to show a guaranty of payment, the indorsement being without recourse.[4] When the agreement is to pay at a specified time, it is not competent to show a contemporaneous oral agreement to change the date of payment;[5] nor that the payment should be out of a particular fund,[6] or out of the profits of a business,[7] or on a contingency;[8] nor that a certificate of deposit

should bear interest;[9] nor that an agreement might be revoked by giving notice;[10] nor that an obligor on a bond of indemnity should not be liable thereon;[11] nor that a promissory note was intended as a mere receipt,[12] nor that articles, not described in a contract of sale, might be included.[13] When there was a contract to convey a right of way for a railroad "as it shall be laid out," it was held not competent to show that the agreement contemplated a line already established;[14] where the contract provided for the cutting of standing timber within a reasonable time, it was held not competent to prove an understanding that it should be cut by a certain time;[15] where an insurance policy described the two termini of a voyage, parol evidence was rejected, when offered, to show that the risk was not to commence until the vessel reached a certain point,[16] and where certain exceptions are stated, it is not competent to give parol proof of others.[17] It has frequently been held that where a contract of sale is apparently complete upon its face, parol evidence cannot be offered to show a prior or contemporaneous warranty, not expressed in the writing.[18] So where an agreement of sale is for cost price or current rates, it is not competent to give parol evidence that it should be for a price agreed on.[19]

1, Weston v. Emes, 1 Taunt. 115.

2, Davis v. Randall, 115 Mass. 547; 15 Am. Rep. 146.

3, Martin v. Cole, 104 U. S. 30; Thompson v. McKee, 5 Dak. 172; Knoblanch v. Foglesong, 38 Minn. 352; Cake v. Pottsville Bank, 116 Pa. St. 264; 2 Am. St. Rep. 600.

4, Youngberg v. Nelson, 51 Minn. 172.

5, Wells v. Baldwin, 18 Johns. 45; Wright v. Taylor, 9 Wend. 538; Hoare v. Graham, 3 Camp. 57; Besant v. Cross, 10 C. B. 895; Hanson v. Stetson, 5 Pick. 506; Van Syckle v. Dalrymple, 32 N. J. Eq. 233; Spring v. Lovett, 11 Pick. 416. The rule is the same as to showing a different mode of payment, Stull v. Thompson, 154 Pa. St. 43.

6, Campbell v. Hodgson, Gow. 74.

7, Smith v. Kemp, 92 Mich. 357.

8, Abrey v. Crux, L. R. 5 C. P. 37; Rawson v. Walker, 1 Stark. 361; Adams v. Wordley, 1 M. & W. 374; Erwin v. Saunders, 1 Cow. 249; 13 Am. Dec. 520; Hunt v. Adams, 7 Mass. 518.

9, Read v. Bank of Attica, 124 N. Y. 671.

10, Wemple v. Knopf, 15 Minn. 440; 2 Am. Rep. 147.

11, Cowel v. Anderson, 33 Minn. 374.

12, Phillips v. Jarvis, 19 Wis. 204.

13, Osborn v. Hendrickson, 7 Cal. 288; Angomar v. Wilson, 12 La. An. 857.

14, Applegate v. B. & S. W. Ry. Co., 41 Iowa 214.

15, Jenkins v. Sykes, 19 Fla. 148.

16, Kaines v. Knightly, Skin. 54.

17, Hovey v. Newton, 7 Pick. 28.

18, See section 446 *infra* and cases cited.

19, Sharp v. Radebaugh, 70 Ind. 547.

§ 439. Same—Illustrations.—As further illustration of the rule stated in the last section, it has been held that where the agreement was to deliver a gross amount of merchandise

at a given place, it was inadmissible to prove by parol an understanding that it might be delivered in parcels.[1] Parol evidence cannot be given to contradict a legal presumption,[2] or to change the legal effect of a written contract; for example, when the contract for doing certain work states no time of payment, the presumption that the work is to be paid for when completed cannot be rebutted by parol.[3] And where a contract of sale, by fixing no time of payment, implies payment on delivery, evidence that credit was intended is not competent.[4] So when the contract is silent as to the time of doing an act, the law implies that it is to be done in a reasonable time; and the legal effect cannot be changed by evidence of a parol contemporaneous agreement.[5] Nor can a written agreement of sale be changed by parol evidence that the seller agreed to furnish the buyer the money with which to buy;[6] nor can it be thus shown that an unconditional contract of sale was intended as a bailment;[7] nor in such case that a condition was intended;[8] nor can any inconsistent condition, reservation or limitation be thus attached to a deed;[9] nor that omissions were made in a will;[10] nor that the testator by the word "children" meant "illegitimate children;"[11] nor that there is a mistake in a will as to the description of land, when there is nothing on the face of the will indicating such mistake;[12] nor that there was a parol

agreement or warranty that premises are in good repair, there being a written lease.[13] Other illustrations will be given under the special subjects discussed in this chapter.

1, Baker v. Higgins, 21 N. Y. 397.

2, Central Ry. Co. v. Hasselkus, 91 Ga. 382; Schultz v. Plankington Bank, 141 Ill. 116.

3, Thompson v. Phelan, 22 N. H. 339.

4, Ford v. Yates, 2 Man. & G. 549.

5, Barringer v. Sneed, 3 Stew. (Ala.) 201; 20 Am. Dec. 74; Simpson v. Henderson, 1 Moody & M. 300.

6, Snyder v. Koons, 20 Ind. 389.

7, Allen v. Bryson, 67 Iowa 591.

8, Daly v. Kimball, 67 Iowa 132.

9, See secs. 495 *et seq. infra*.

10, Abercombie v. Abercombie, 27 Ala. 489. See sec. 482 *infra*.

11, Shearman v. Angel, 1 Bailey Eq. (S. C.) 351.

12, Funk v. Davis, 103 Ind. 281. See secs. 482 *et seq. infra*.

13, Naumberg v. Young, 44 N. J. L. 331, with full discussion of the rule.

§ 440. The rule does not prevent proof of fraud—Sealed and unsealed instruments.—It may always be shown that the document in question never had any legal existence. On this ground rests the very important exception that *duress or fraud* in the inception of the contract may be proved, although accompanied by the most solemn formalities. Such proof does not recognize the

contract as ever existing as a valid agreement, and is received, from the necessity of the case, to show that that which appears to be a contract is not and never was a contract.[1] If the fraud is clearly proven, one of the essential elements of the contract — *consent* — is wanting. Thus, it may be proved by parol that any material part of the contract was fraudulently omitted or inserted by the other party;[2] or that it was fraudulently misread to one not able to read, and that he was thus induced to give his signature;[3] or that a part of the contract was not reduced to writing because of the fraud of one of the parties, in which case the whole transaction is open to explanation by parol evidence.[4] For the purpose of proving the fraud, verbal statements which are material and fraudulent, although made before or at the same time with the written agreement, may be proved. In such case the rule that prior negotiations are merged in the written agreement does not apply.[5] No rule is better settled than this,— where fraud is alleged, a very *broad range* is given to the testimony. This is perhaps most often illustrated in those cases where creditors attack *transfers of property alleged to be fraudulent.* In such cases any secret agreement or trust may be shown by them, although directly contradicting the face of the conveyances. The consideration may be inquired into,[6] the purpose and object of mortgages or assign-

ments may be shown,[7] and generally the entire transaction may be investigated. Again in actions upon a written contract brought by one of the contracting parties against the other, the rule under discussion is constantly invoked; and parties are allowed to prove fraudulent representations or conduct which formed an inducement to the contract. But in such cases the *evidence should be strong and clear;* and the written contract should not be impeached or changed, unless it appears that one of the parties was fraudulently misled or deceived. The rule which prefers written to unwritten evidence does not so apply as to exclude the latter, when its object is to prove that the former had been fraudulently obtained, and thereby to avoid the contract evidenced by it, or to secure indemnity to the party injured.[8] Thus, in actions for fraudulent representations on sales of chattels, or in defenses on the ground of fraud, other representations than those contained in the written agreement may be received;[9] and the same rule applies to contracts respecting the sale of lands.[10] It was formerly held that, in an *action on a specialty*, fraud could not be given in evidence as a defense, unless it went to the very execution of the instrument. Although it might be proved that the contract was falsely read or that the party was deceived as to the nature of the instrument,[11] yet it could not be proved that the contract

was procured by false representations as to other material facts.[1] But later cases have applied the general rule to contracts under seal, and have held in such cases that false representations, material to the contract, may be shown as a defense in courts of equity or of law.[2]

1, Waddell v. Glassell, 18 Ala. 561; 54 Am. Dec. 170; Bottomley v. United States, 1 Story 135; Gatling v. Newell, 9 Ind. 572; Hamilton v. Conyers, 28 Ga. 276; Akin v. Drummond, 2 La. An. 92; Farrell v. Bean, 10 Md. 217; Holbrook v. Burt, 22 Pick. 546; Sanford v. Handy, 23 Wend. 260; Hunter v. Bilyen, 30 Ill. 228; Razor v. Razor, 39 Ill. App. 527; 142 Ill. 375; Baltimore Steamboat Co. v. Brown, 54 Pa. St. 77; Stark v. Littlepage, 4 Rand. (Va.) 368; Isenhoot v. Chamberlain, 59 Cal. 630; Vicknair v. Trosclair, 45 La. An. 373; Benicia Works v. Estes, (Cal.) 32 Pac. Rep. 938; Thomas v. Scutt, 127 N. Y. 133. See note, 6 L. R. A. 45.

2, See cases last cited.

3, McKesson v. Sherman, 51 Wis. 303; Kranich v. Sherwood, 92 Mich. 397; Gross v. Drager, 66 Wis. 150, where the person could not read English.

4, Phyfe v. Wardell, 2 Edw. Ch. (N. Y.) 47; Elliott v. Connell, 13 Miss. 91; Kennedy v. Kennedy, 2 Ala. 571; Blanchard v. Moore, 4 J. J. Marsh. (Ky.) 471; Wesley v. Thomas, 6 Harr. & J. (Md.) 24; Chetwood v. Brittain, 2 N. J. Eq. 438.

5, Prentiss v. Russ, 16 Me. 30; Mallory v. Leach, 35 Vt. 156; 82 Am. Dec. 625; Holbrook v. Burt, 22 Pick. 546; Scrogin v. Wood, 87 Iowa 497; Dano v. Sessions, 65 Vt. 79; Hick v. Thomas, 90 Cal. 289. In State v. Cass, 52 N. J. L. 77, evidence of fraudulent representations was received, although there was also a written warranty.

6, Gray v. Handkinson, 1 Bay (S. C.) 278; Adams v. Wylie, 1 Nott & McC. (S. C.) 70.

7, Winner v. Hoyt, 66 Wis. 227; 57 Am. Rep. 257.

8, Cozzens v. Whitaker, 3 Stew. & P. (Ala.) 329; Beecker v. Vrooman, 13 Johns. 302; Johnson v. Miln, 14 Wend. 195; Tayloe v. Riggs, 1 Peters 591; State v. Perry, 1 Wright (Ohio) 662.

9, Cozzens v. Whitaker, 3 Stew. & P. (Ala.) 329; McFarlane v. Moore, 1 Overt. (Tenn.) 174; 3 Am. Dec. 752; Fleming v. Slocum, 18 Johns. 403; 9 Am. Dec. 224.

10, Monell v. Colden, 13 Johns. 395; 7 Am. Dec. 390; Russell v. Rogers, 15 Wend. 351.

11, Thoroughgood's Case, 2 Coke 4; Greenfield's Estate, 14 Pa. St. 489; Jackson v. Hayner, 12 Johns. 469; Farmers & Mechanic's Bank v. Whinfield, 24 Wend. 419; Anthony v. Wilson, 14 Pick. 303; Chestmet Hill Reservoir Co. v. Chase, 14 Conn. 123; Franchot v. Leach, 5 Cow. 506; Dale v. Roosevelt, 5 Johns. Ch. (N. Y.) 174; Schuykill County v. Copley, 67 Pa. St. 386. As to subsequent modification of specialty by parol, see sec. 448 *infra*.

12, Vrooman v. Phelps, 2 Johns. 177; Stevens v. Judson, 4 Wend. 471; Burrows v. Alter, 7 Mo. 424; Hartshorne v. Day, 19 How. 211; Taylor v. King, 6 Munf. (Va.) 358; 8 Am. Dec. 746; Franchot v. Leach, 5 Cow. 506; Parker v. Parmele, 20 Johns. 130; 11 Am. Dec. 253; Dale v. Roosevelt, 9 Cow. 307.

13, Partridge v. Messer, 14 Gray 180; Hoit v. Holcomb, 23 N. H. 535; Chew v. Moffett, 6 Munf. (Va.) 120; Tomlinson v. Mason, 6 Rand. (Va.) 169; Phillips v. Potter, 7 R. I. 289; 82 Am. Dec. 598; Hartshorne v. Day, 19 How. 222; Hazard v. Irwin, 18 Pick. 95; Johnson v. Miln, 14 Wend. 195, by reason of statute.

§ 441. Illegality of contract may be shown — Incapacity. — Since it may always be shown that the document in question never had legal existence, it follows that it may also be shown to be tainted with illegality. For example, no formalities in the

writing can stand in the way of proof that the contract is usurious [1] or champertous; [2] or that a lease was for an unlawful purpose; [3] or that the contract was in furtherance of an adulterous intercourse, [4] or for compounding a felony, [5] or for suppressing evidence on a criminal prosecution, [6] or for the sale of an office, [7] or for money won at play [8] or for any other contract forbidden by statute or common law. [9] In all such cases the court will go behind the apparently valid written instrument, and deal with the transaction on its merits; and it is immaterial whether the illegality of the instrument is created by the statute, or whether it is immoral, or in some other way contravenes the general policy of the law. Under such circumstances the parol agreement cannot be said to be merged in the pretended written agreement, for it is only by virtue of its superior obligation that a written contract has the effect of extinguishing the verbal contract upon which it is founded; and of course when it has no obligation, it can have no such effect. [10] On the same general principle now under discussion it may be shown by parol that the apparent written contract has no legal existence by reason of the *incapacity* of the party to make a a contract, as where he was intoxicated, [11] insane or otherwise mentally incompetent; [12] or that some legal impediment, such as infancy [13] or coverture, [14] prevented the making of a binding contract.

1, Fenwick v. Ratcliff, 6 T. B. Mon. (Ky.) 154; Newsom v. Thighen, 30 Miss. 414; Ferguson v. Sutphen, 8 Ill. 547; Chamberlain v. McClurg, 8 Watts & S. (Pa.) 31; Hammond v. Hopping, 13 Wend. 505.

2, Martim v. Clarke, 8 R. I. 389; 5 Am. Rep. 586.

3, Sherman v. Wilder, 106 Mass. 537.

4, Succession of Fletcher, 11 La. An. 59.

5, Dale v. Roosevelt, 9 Cow. 307; Inhabitants of Worcester v. Eaton, 11 Mass. 368.

6, Dale v. Roosevelt, 9 Cow. 307.

7, Dale v. Roosevelt, 9 Cow. 307.

8, Pope v. St. Leger, 5 Mod. 3.

9, Bank of United States v. Owens, 2 Peters 527; Roby v. West, 4 N. H. 285; 17 Am. Dec. 423; Pettit v. Pettit, 32 Ala. 288; Chandler v. Johnson, 39 Ga. 85; Sherman v. Wilder, 106 Mass. 537; Snyder v. Willey, 33 Mich. 483; Lindsay v. Smith, 78 N. C. 328; Shackell v. Rosier, 2 Bing. N. C. 634.

10, Lear v. Yarnel, 3 Marsh. (Ky.) 421; Kranich v. Sherwood, 92 Mich. 397.

11, Barrett v. Buxton, 2 Aik. (Vt.) 167; Prentice v. Achorn, 2 Paige Ch. (N. Y.) 30.

12, Den v. Clark, 10 N. J. L. 217; Grant v. Thompson, 4 Conn. 203; 10 Am. Dec. 119; Jackson v. King, 4 Cow. 207; 15 Am. Dec. 354; Mitchell v. Kingman, 5 Pick. 431; Rice v. Peet, 15 Johns. 503.

13, Van Valkenburgh v. Rourk, 12 Johns. 338; Webster v. Wodoford, 3 Day (Conn.) 90.

14, Dale v. Roosevelt, 9 Cow. 307.

§442. As to mistakes of fact — Reformation of contract. — One of the well recognized exceptions to the general rule against varying the terms of a written contract by parol evidence is that the rule does

not apply in all cases to exclude evidence of mistake of fact. But here no such broad latitude is allowed as in the case of fraud. Indeed, the right to vary a written instrument by proof of mistake has often been based solely on the ground that it would operate as a fraud upon the party in the given case, if the alleged mistake could not be corrected. The question is attended with the least difficulty where *actions* are brought expressly *to reform* or correct a written instrument on the ground that a mutual mistake of fact has been made in reducing it to writing. For the purpose of reforming or rescinding written agreements on the ground of mutual mistake, courts of equity allow full inquiry into all the facts. But it is well settled that, before the writing can be thus changed or reformed, the alleged *mistake must be clearly proved* by a strong preponderance of evidence.[1] It is also well settled that where actions are brought to compel a defendant to specifically perform a written contract, parol evidence may be given by him to show that the alleged agreement is not the true agreement, in other words, that by reason of some mistake there was *no consent* to the apparent agreement.[2] Under proper pleadings the defendant may have the *mistake corrected in the same proceeding* by showing the actual agreement; this is especially true in those states where the modern system of pleadings has

been adopted.[3] So in other actions, legal or equitable in their nature, brought on written instruments, the defendant is at liberty under proper pleadings to prove a mistake, and to have reformation of the contract.[4] In some cases it has been held that such a defense can be proved, *though no equitable relief is asked* by the defendant in his pleading.[5] But in other states a different rule prevails. The question is, however, rather one of pleading than of evidence.[6] Parol evidence may be received in *actions* at law *upon insurance policies* to show an omission or insertion made by mistake by the insured in the application for insurance, where it is claimed that the insured made true answers and that the agent of the insurance company wrote the answers incorrectly. Such evidence is received on the theory of estoppel.[7]

1, Brantley v. West, 27 Ala. 542; Fudge v. Payne, 86 Va. 306; Peterson v. Grover, 20 Me. 363; Blanchard v. Moore, 4 J. J. Marsh. (Ky.) 471; Perry v. Pearson, 1 Humph. (Tenn.) 431; Van Ness v. City of Washington, 4 Peters 432; Gibson v. Watts, 1 McCord Eq. (S. C.) 490; Brown v. Lamphear, 35 Vt. 252; Stockbridge Co. v. Hudson Co., 102 Mass. 45; Mead v. Westchester Ins. Co., 64 N. Y. 453; Tesson v. Atlantic Ins. Co., 40 Mo. 33; 93 Am. Dec. 293; Lestrade v. Barth, 19 Cal. 660; Newton v. Holley, 6 Wis. 592; Lyman v. Utica Ins. Co., 17 Johns. 373; Shay v. Peters, 35 Ill. 360; Edmond's Appeal, 59 Pa. St. 220; Potter v. Potter, 27 Ohio St. 84; Heavenridge v. Mondy, 49 Ind. 434. See article, 54 Law Times 378. See also note, 6 L. R. A. 46. See sec. 435 *supra*.

2, Webster v. Cecil, 30 Beav. 62; Goode v. Riley, 153 Mass. 585; Quinn v. Roath, 37 Conn. 16; Best v. Stow, 2

Sandf. Ch. (N. Y.) 298; Coles v. Bowne, 10 Paige (N. Y.) 526; Ryno v. Darby, 20 N. J. Eq. 231; Towner v. Lucas, 13 Gratt. (Va.) 705; Chambers v. Livermore, 15 Mich. 381; Cathcart v. Robinson, 5 Peters 263; Fitschen v. Thomas, 9 Mont. 52; Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 587; 7 Am. Dec. 559; Newcomer v. Kline, 11 Gill & J. (Md.) 457; 37 Am. Dec. 74.

3, Bradford v. Union Bank, 13 How. 57; Quinn v. Roath, 37 Conn. 16; McCowcas v. Easley, 21 Gratt. (Va.) 23; Chambers v. Livermore, 15 Mich. 381; Murphy v. Rooney, 45 Cal. 78.

4, Andrews v. Gillespie, 47 N. Y. 487.

5, Dobson v. Pearce, 12 N. Y. 156; 62 Am. Dec. 152; Seely v. Engell, 13 N. Y. 542; New York Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85.

6, Follett v. Heath, 15 Wis. 601; Lombard v. Cowham, 34 Wis. 486; Van Horn v. Van Horn, 49 N. J. Eq. 327; Frost v. Brigham, 139 Mass. 43; Van Syckel v. Dalrymple, 32 N. J. Eq. 233.

7, Moliere v. Pennsylvania Ins. Co., 5 Rawle (Pa.) 342; 28 Am. Dec. 675; Manhattan Ins. Co. v. Webster, 59 Pa. St. 227; 98 Am. Dec. 332; North Am. F. Ins. Co. v. Throop, 22 Mich. 146; 7 Am. Rep. 638; Plumb v. Cattaraugus Ins. Co., 18 N. Y. 392; 72 Am. Dec. 526 and note; Insurance Co. v. Williams, 39 Ohio St. 584; 48 Am. Rep. 474; Planters Ins. Co. v. Sorrels, 1 Baxt. (Tenn.) 352; 25 Am. Rep. 780; Planters' Ins. Co. v. Myers, 55 Miss. 479; 30 Am. Rep. 521; Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302; 25 Am. Rep. 386; Flynn v. Equitable L. Ins. Co., 78 N. Y. 568; 34 Am. Rep. 561; Grattan v. Metropolitan L. Ins. Co., 80 N. Y. 281; 36 Am. Rep. 617; 92 N. Y. 274; 44 Am. Rep. 372; McCall v. Phœnix Ins. Co., 9 W. Va. 237; 27 Am. Rep. 558.

§ 443. Mistakes as to dates.— Dates of written instruments are, like the consideration, *prima facie* correct. But the date is treated as one of the mere formal parts of the

instrument; and parol evidence is often admitted to show that, through mistake or some other reason, the date named is incorrect. Thus, it may be shown that a note offered in evidence is the one secured by a mortgage, though it vary in date from the description of it given in the mortgage.[1] So it may be shown that a deed was executed[2] or delivered[3] before or after the date stated therein; that a writ bearing date on Sunday was in fact made on a different day;[4] that a release was made subsequent to its date,[5] and parol evidence has also been allowed to correct mistakes in the date of letters,[6] notes,[7] wills,[8] deeds[9] and other instruments.[10] The rule that dates are presumed to be correct does not apply where there is reason to suspect that the date is false because of *collusion*. The most common illustration of this is in cases where adultery is the issue, and the dates of letters between the parties become material. In such cases no presumption of correctness should be relied upon, but the dates should be proved to be correct.[11]

1, Sweetser v. Lowell, 33 Me. 446; Clark v. Houghton, 12 Gray 38; Goddard v. Sawyer, 9 Allen 78; Partridge v. Swazey, 46 Me. 414.

2, Miller v. Hampton, 37 Ala. 342; McComb v. Gilkey, 29 Miss. 146; Draper v. Snow, 20 N. Y. 331; 75 Am. Dec. 408; Moore v. Smead, 89 Wis. 558.

3, Bruce v. Slemp, 82 Va. 352; Moody v. Hamilton, 22 Fla. 298.

4, Trafton v. Rogers, 13 Me. 315.

5, Churchill v. Bailey, 13 Me. 64.

6, Stockham v. Stockham, 32 Md. 196.

7, Barlow v. Buckingham, 68 Iowa 169.

8, Reffell v. Reffell, L. J. 35 P. & M. 121.

9, Harrison v. Trustees of Phillips Academy, 12 Mass. 456; Jackson v. Schoonmaker, 2 Johns. 230.

10, Hall v. Cazenove, 4 East 476; Hartsell v. Myers, 57 Miss. 135; Gately v. Irvine, 51 Cal. 172.

11, Trelawney v. Coleman, 2 Stark. 193; Houliston v. Smyth, 2 Car. & P. 24; Sinclair v. Baggaley, 4 M. & W. 318.

§ 444. Proof of independent or collateral contracts.—The general rule under discussion is not violated by allowing parol evidence to be given of the contents of a distinct, valid, contemporaneous agreement between the parties which was not reduced to writing, when the same is not in conflict with the provisions of the written agreement.[1] The exception is thus stated somewhat more guardedly by Mr. Stephen: The parties may prove "the existence of any separate, oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if, from the circumstances of the case, the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them."[2] Thus, parol evidence may be received of a collateral agreement to show that the contract never had any legal existence,[3] of a contemporaneous agreement

by the vendor of property not to carry on a competing business,[4] of an agreement of one, not an attorney, not to charge for certain services performed under a written power of attorney authorizing him to defend a suit,[5] of an agreement as to the place of carrying out a contract, the written agreement being silent on that point,[6] of an oral agreement of an indorser, as between indorser and indorsee, to waive demand and notice,[7] of an agreement by all the parties to a note that payment should be demanded of the maker at a particular bank, the note being silent as to the place of payment or demand,[8] of an agreement by the payee to hold the sureties harmless by paying the note out of a particular fund,[9] of an oral agreement for transportation by a common carrier, though a ticket is given,[10] of an agreement to pay for property sold by bill of sale by taking up the vendor's note or acceptance,[11] or in some other way,[12] of an agreement of warranty where the bill of sale is silent on the subject,[13] of an agreement between two endorsers as to the mode of adjusting the loss between them,[14] of an agreement by a grantor to pay for a sewer in process of construction at the time of the execution of the deed and adjacent to the property sold,[15] and of the mode of paying for land, the contract of sale being silent on the subject.[16]

1, Juilliard v. Chaffee, 92 N. Y. 529; Hahn v. Doolittle, 18 Wis. 196; 86 Am. Dec. 757; Willis v. Hulbert, 117 Mass. 151; Naumberg v. Young, 44 N. J. L. 331; 43 Am. Rep. 380; Green v. Randall, 51 Vt. 67; Heyworth v. Hutchinson, L. R. 2 Q. B. 447; Bradshaw v. Combs, 102 Ill. 428; Bonney v. Morrill, 57 Me. 368; Hersom v. Henderson, 21 N. H. 224; 53 Am. Dec. 185; Lindley v. Lacey, 17 C. B. N. S. 578; Chapin v. Dobson, 78 N. Y. 74; 34 Am. Rep. 512; Morgan v. Griffith, L. R. 6 Exch. 70; Phœnix Co. v. Riverside Co., 54 Minn. 205; Harvey v. Million, 67 Ind. 90; Hubbard v. Marshall, 50 Wis. 322; Shaw v. Mitchell, 2 Met. 65; Doty v. Martin, 32 Mich. 462; Coates v. Langston, 5 Md. 121. See article, 8 Alb. Law Jour. 397.

2, Steph. Ev. art. 90; Hope v. Balen, 58 N. Y. 380.

3, Brewster v. Reel, 74 Iowa 506. See cases cited in secs. 440 *et seq. supra.*

4, Fusting v. Sullivan, 41 Md. 162; Pierce v. Woodward, 6 Pick. 206. Contra, Smith v. Gibbs, 44 N. H. 335; Costello v. Eddy, 128 N. Y. 650.

5, Joannes v. Mudge, 6 Allen 245.

6, Cummings v. Putnam, 19 N. H. 569; Musselman v. Stoner, 31 Pa. St 265.

7, Sanborn v. Southerd, 25 Me. 409; 43 Am. Dec. 288; Fullerton v. Rundlett, 27 Me. 31; Dye v. Scott, 35 Ohio St. 194; 35 Am. Rep. 604. See sec. 508 *infra.*

8, Brent's Ex. v. Bank of the Metropolis, 1 Peters 89. As to notes and bills in general, see secs. 505 *et seq. infra.*

9, Stewart v. Albuquerque Bank (Ariz.), 30 Pac. Rep. 303.

10, Van Buskirk v. Roberts, 31 N. Y. 661.

11, Lindley v. Lacey, 17 C. B. N. S. 578.

12, Sowers v. Eaenhart, 64 N. C. 96.

13, See discussion and cases, sec. 446 *infra.*

14, Phillips v. Preston, 5 How. 278.

15, Carr v. Dooley, 119 Mass. 294; Cole v. Hadley, 168 Mass. 579.

16, Paul v. Owings, 32 Md. 402; Sivers v. Sivers, 97 Cal. 518, as to time of the performance of the contract.

§ 445. Parol evidence when the writing is incomplete.— The examples given in the last section were cited more particularly for the purpose of illustrating what the rule is when there is a distinct and independent oral contract. Some of the cases there cited also afford instances of the admission of parol evidence on the ground of the incompleteness of the written contract. "In all cases where a writing, although embodying an agreement, is manifestly incomplete, and is not intended by the parties to exhibit the whole agreement, but only to define some of its terms, the writing is conclusive as far as it goes. But such parts of the actual contract, as are not embraced within its scope, may be established by parol."[1] For example, where there was a sale of standing timber, and the place where it should be cut was not stated in the writing, this was supplied by parol;[2] and where the contract fails to state the amount of merchandise to be delivered under it,[3] or the amount of compensation to be paid for services,[4] these facts may be supplied by parol. Under similar circumstances it has been held proper to show the date of delivery,[5] or to supply omitted terms of a contract which is clearly ambiguous.[6] Where there is a verbal acceptance of a written proposal, this may be proved;[7] and where there is a

memorandum, not amounting to a contract, concurrent verbal statements may be proven to show the entire contract.[8] So where there was a written description of stock sold at auction, and a statement was made by the owner that he warranted nothing, the declarations made at the sale were held admissible to accompany the written description;[9] and where there is a direct reference in the written agreement to an oral contract, the former may be proved by parol, even though the effect is to add material terms to the written instrument.[10]

1, Wood Ev. sec. 23; Franklin Co. v. Layman, 145 Ill. 138; Sheffield v. Page, 1 Sprague (U. S.) 285; Keith v. Kerr, 17 Ind. 284; Taylor v. Galland, 3 G. Greene (Iowa) 17; Palmer v. Roath, 86 Mich. 602; Moss v. Green, 41 Mo. 389; Webster v. Hodgkins, 25 N. H. 128; Kentucky Cement Co. v. Cleveland, 4 Ind. App. 171; Miller v. Fichthorn, 31 Pa. St. 252; Winn v. Chamberlin, 32 Vt. 318; Gilbert v. Stockman, 76 Wis. 62; 20 Am. St. Rep. 23.

2, Pinney v. Thompson, 3 Iowa 74.

3, Potter v. Hopkins, 25 Wend. 417; Norton v. Woodruff, 2 N. Y. 153.

4, Sayre v. Wilson, 86 Ala. 151; Guidery v. Green, 95 Cal. 630.

5, Johnson v. McRary, 5 Jones (N. C.) 369.

6, Hurd v. Bovee, 134 N. Y. 595; Wolfort v. Pittsburg Ry. Co., 44 Mo. App. 330; Neal v. Rears, 88 Ga. 298; Paugh v. Paugh, 40 Ill. App. 143; Martin Cooker Co. v. Olive, 82 Iowa 122; MacDonald v. Dana, 154 Mass. 152.

7, Pacific Works v. Newhall, 34 Conn. 67.

8, Mobile Marine Dock Co. v. McMillan, 31 Ala. 711; Kreuzberger v. Wingfield, 96 Cal. 251.

9, Hadley v. Clinton Co., 13 Ohio St. 502; 82 Am. Dec. 454.

10, Ruggles v. Swanwick, 6 Minn. 526.

§ 446. Sales of personal property.— It is clear, on principles already stated, that where a written contract for the sale of personal property is manifestly a deliberate and complete contract between the parties, and there is no claim of fraud or mistake, the general rule excluding parol evidence applies in full force.[1] But, as we have also seen, where the contract is manifestly incomplete, or where an agreement wholly independent of and collateral to the written instrument is entered into, parol evidence is admissible.[2] On these grounds, when a *bill of sale contains no warranties*, it has been held in numerous cases that a parol warranty may be shown.[3] These cases rest on the reasoning that such instruments as assignments, bills of sale and others of that character do not generally purport or attempt to state the entire agreement, but are adapted merely to transfer title in execution of an agreement they do not profess to show; and hence that the writing is not presumed to state the whole contract.[4] Thus, where there was an agreement in writing between the parties for the delivery of machinery at a designated time and place, it was held admissible to show a guaranty that the machinery would do good work.[5] So a parol warranty that a mortgage security is

good, made at the assignment of the note and mortgage, may be shown.[6] It is well settled that a mere receipt or bill of parcels does not give rise to any such presumption.[7] Where there is a written agreement of sale, parol evidence has been received to show that the *sale* was by *sample*, and that the goods did not compare with the sample, although the contract was silent on this subject.[8] But the contrary view is maintained by the greater weight of authority.[9] But it has been held in many cases that where the instrument for the sale of personal property seems to be reasonably explicit, and to define the object and to measure the extent of the engagement, the *writing will be presumed to contain the entire agreement*, and hence that, in the absence of fraud or mistake, no warranty can be added by parol.[10] But if it does not purport to disclose the contract, but is merely the execution of some part or detail of an unexpressed contract, and *is the act of one of the parties only* in the performance of his promise, the oral agreement, as we have already seen, may be shown.

1, Thomas v. Scutt, 127 N. Y. 133; Kinnard v. Cutter Tower Co., 159 Mass. 391; Lilienthal v. Brewing Co., 154 Mass. 185; 26 Am. St. Rep. 234; Willis v. Byars, 2 Tex. Civ. App. 134; American Manfg. Co. v. Klarquist, 47 Minn. 344; National Cash Register v. Blumenthal, 85 Mich. 464; Rennell v. Kimball, 5 Allen 356; Exhaust Ventilator Co. v. Chicago Ry. Co., 69 Wis. 454; Epping v. Mockler, 55 Ga. 376; Woodcock v. Farrel, 1 Met. (Ky.) 437; Picard v. McCormick, 11 Mich. 68; Cushing v. Rice, 46 Me. 303; 71

Am. Dec. 579; Robinson v. McNeil, 51 Ill. 225; Proctor v. Cole, 66 Ind. 576; Smith v. Deere, 48 Kan. 416. See note, 12 L. R. A., 24.

2, See secs. 444 *et seq. supra.*

3, Herson v. Henderson, 21 N. H. 224; 53 Am. Dec. 185; Perrine v. Cooley, 39 N. J. L. 449; Filkins v. Whyland, 24 N. Y. 338; Allen v. Pink, 4 M. & W. 140; Atwater v. Clancy, 107 Mass. 369; Foot v. Bentley, 44 N. Y. 166; 4 Am. Rep. 652; Boorman v. Jenkins, 12 Wend. 566; 27 Am. Dec. 158; Harris v. Johnson, 3 Cranch 311; Irwin v. Thompson, 27 Kan. 643; Chapin v. Dobson, 78 N. Y. 74; 34 Am. Rep. 512; Thomas v. Barnes, 156 Mass. 581. See note, 5 Am. St. Rep. 198.

4, Red Wing Manfg. Co. v. Moe, 62 Wis. 240; Hahn v. Doolittle, 18 Wis. 196; 86 Am. Dec. 757. See also cases above cited. As to parol proof of warranties not expressed in contracts, see note, 5 Am. St. Rep. 197–199.

5, Chapin v. Dobson, 78 N. Y. 74; 34 Am. Rep. 512.

6, Hahn v. Doolittle, 18 Wis. 196; 86 Am. Dec. 757.

7, Filkins v. Whyland, 24 N. Y. 338; Bank v. Cooper, 137 U. S. 473; Brigg v. Hilton, 99 N. Y. 517; Webster v. Hodgkins, 25 N. H. 128; Smith v. Coleman, 77 Wis. 343; Atwater v. Clancy, 107 Mass. 369. As to order of goods see, Boynton Co. v. Clark, 42 Minn. 335. See sec. 502 *infra.*

8, Koop v. Handy, 41 Barb. (N. Y.) 454; Boorman v. Jenkins, 12 Wend. 566; 27 Am. Dec. 158; Cassidy v. Begoden, 6 Jones & S. (N. Y.) 180.

9, Meyer v. Everth, 4 Camp. 22; Gardiner v. Gray, 4 Camp. 144; Weiner v. Whipple, 53 Wis. 298; 40 Am. Rep. 775; Harrison v. McCormick, 89 Cal. 327; 23 Am. St. Rep. 469; Thompson v. Libby, 34 Minn. 374.

10, Reed v. Van Ostrand, 1 Wend. 424; 19 Am. Dec. 529; Englehorn v. Reitlinger, 122 N. Y. 76; Reed v. Wood, 9 Vt. 285; Mast v. Pearce, 58 Iowa 579; 43 Am. Rep. 125 and note; Mumford v. McPherson, 1 Johns. 414; 3 Am. Dec. 339; Wilson v. Marsh, 1 Johns. 503; Willard v. Ostrander, 46 Ky. 591; Lamb v. Crafts, 12 Met. 353; Dean v. Mason,

4 Conn. 428; 10 Am. Dec. 162; Randall v. Rhodes, 1 Curt. (U. S.) 90; Shepherd v. Gilroy, 46 Iowa 193; Rice v. Forsythe, 41 Md. 389; Frost v. Blanchard, 97 Mass. 155; Thompson v. Libby, 34 Minn. 374; Linsley v. Lovely, 26 Vt. 120; DeWitt v. Berry, 134 U. S. 306; Mirriam v. Field, 24 Wis. 640; Milwaukee Boiler Co. v. Duncan, 87 Wis. 120; 41 Am. St. Rep. 33; Smith v. Williams, 1 Murph. (N. C.) 426; 4 Am. Dec. 564; National Cash Register v. Blumenthal, 85 Mich. 464. This is clearly the rule, when the instrument contains a warranty, DeWitt v. Berry, 134 U. S. 312; McQuaid v. Ross, 77 Wis. 470; Cosgrove v. Bennett, 32 Minn. 371; Johnson v. Latimer, 71 Ga. 470; Shepherd v. Gilroy, 46 Iowa 193.

§ 447. Parol proof of subsequent agreement. — The general rule under discussion does not prevent the proof of "the existence of any distinct, subsequent, oral agreement to rescind or modify any such contract, grant or disposition of property, provided that such agreement is not invalid under the statute of frands or otherwise."[1] The general rule does not purport to exclude negotiations respecting written contracts, unless they are prior to or contemporaneous with the making of the written instrument, and in a great variety of cases it has been held admissible to prove by parol a subsequent modification or discharge. For example, it is admissible to show by parol that the written contract has been *abandoned*, except in so far as it has been modified by a new parol agreement;[2] that the *time or place of payment* or of performance of the contract has been *changed;*[3] that *performance*

has been *prevented or waived* by the other party,[4] or that the contract has been *wholly discharged.*[5] It is no objection to the competency of such testimony that the parol agreement is made soon after the written one, but it must clearly appear to be subsequent to it, and, if this is left in doubt, it will be presumed to be merged in the written agreement.[6] It is not necessary to the admission of this kind of testimony that any *new consideration* be proved. "The same consideration which existed for the old agreement is imported into the new agreement which is substituted for it."[7] This subject gives little difficulty so long as the instrument sought to be altered or discharged relates to *simple contracts.* As to such contracts the rule broadly declared by Lord Denman in an early case has been followed: "After the agreement has been reduced into writing, it is competent to the parties at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve or annul the former agreements, or in any manner to add to or subtract from or vary or qualify the terms of it; and thus to make a new contract which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement."[8]

1, Steph. Ev. art. 90 p. 163; Goss v. Lord Nugent, 5 Barn. & Adol. 58; Homer v. Life Ins. Co., 67 N. Y. 478; Meech v. Buffalo, 29 N. Y. 198; Kennebec Co. v. Augusta Ins. Co., 6 Gray 204; Piatt's Adm. v. United States, 22 Wall. 496; Allen v. Sowerby, 37 Md. 410; White v. Soto, 82 Cal. 654; Smith v. Lilley, 17 R. I. 119; Frick Co. v. Western Mill Co., 51 Kan. 370; Bannon v. Aultman, 80 Wis. 307; 27 Am. St. Rep. 37; Keating v. Price, 1 Johns. Cas. (N. Y.) 22; 1 Am. Dec. 92; LeFevre v. LeFevre, 4 Serg. & R. (Pa.) 241; 8 Am. Dec. 696; Cummings v. Arnold, 3 Met. 486; 37 Am. Dec. 155; Morgan v. Butterfield, 3 Mich. 623; Julliard v. Chaffee, 92 N. Y. 529; McCauley v. Keller, 130 Pa. St. 53; 17 Am. St. Rep. 758.

2, Willey v. Hall, 8 Iowa 62; Chiles v. Jones, 3 B. Mon. (Ky.) 51; Raffensberger v. Cullison, 28 Pa. St. 426; Bryan v. Hunt, 4 Sneed (Tenn.) 543; 70 Am. Dec. 262; Toledo Ry. Co. v. Levy, 127 Ind. 168; Graham v. Houghton, 153 Mass. 384.

3, Keating v. Price, 1 Johns. Cas. (N. Y.) 22; 1 Am. Dec. 92; Frost v. Everett, 5 Cow. 497; Franklin v. Long, 7 Gill & J. (Md.) 407; Robinson v. Batchelder, 4 N. H. 45; Niel v. Cheves, 1 Bailey (S. C.) 537; Stallings v. Gottschalk, 77 Md. 429; Baker v. Whitesides, Breese (Ill.) 174; 12 Am. Dec. 168; Strauss v. Gross, 2 Tex. Civ. App. 432.

4, Medomak Bank v. Curtis, 24 Me. 36.

5, Law v. Treadwell, 12 Me. 441; Bailey v. Johnson, 9 Cow. 119; Erwin v. Saunders, 1 Cow. 250; 13 Am. Dec. 520; Trumbo v. Cartwright, 1 Marsh. (Ky.) 582.

6, Brewster v. Countryman, 12 Wend. 446; Richardson v. Hooper, 13 Pick. 446.

7, Lord Denman in Stead v. Dawber, 10 Adol. & Ell. 57, 66; Brown v. Everhard, 52 Wis. 205; Thomas v. Barnes, 156 Mass. 581.

8, Goss v. Lord Nugent, 5 Barn. & Adol. 58, 65.

§ 448. Same — As to specialties.—Much more conflict of opinion has arisen as to contracts by specialty, and especially as to those

contracts which are by statute required to be in writing. It was a familiar rule of the common law that an agreement by *deed* could only be dissolved by an instrument of an equally solemn character;[1] and yet in quite early cases in this country the rule was recognized that bonds or other sealed in struments might be defeated by parol evidence of payment,[2] or abandonment of the contract,[3] or by parol proof of waiver of literal performance by the obligee,[4] or by such proof of partial abandonment of the written contract and of continuance under it as modified by parol,[5] as well as of a different place or mode of performance.[6] So there are many authorities which hold that in actions on insurance policies a waiver of a breach of condition or warranty may be shown after the breach.[7] In most of the cases where evidence of this character has been received to show a subsequent modification of a written agreement, the parol contract had been executed, or so acted upon by the parties that the enforcement of the original agreement would have operated as a fraud upon one of the parties.[8] There have been many cases, especially the earlier ones, holding a somewhat stricter rule, but even those cases recognized the doctrine that courts of equity might give relief, although the subsequent parol agreement might not be allowed in courts of law. In view of the modern ten-

dency to administer legal and equitable relief in the same courts, and in view of the fact that specialties are rapidly losing their former superiority, as compared with other written contracts, it is suggested that, so far as the rule under discussion is concerned, no distinction between the two classes of contracts should be made.

1, Harris v. Goodwyn, 2 Man. & G. 405; Doe v. Gladwin, 6 Q. B. 953; Rawlinson v. Clarke, 14 M. & W. 187. As to parol proof of fraud affecting specialties, see sec. 440 *supra*.

2, Munroe v. Perkins, 9 Pick. 298; 20 Am. Dec. 475; McCreery v. Day, 119 N. Y. 1; 16 Am. St. Rep. 793; Kane v. Cortesy, 100 N. Y. 132.

3, Dearborn v. Cross, 7 Cow. 48.

4, Dearborn v. Cross, 7 Cow. 48.

5, Munroe v. Perkins, 9 Pick. 298; 20 Am. Dec. 475; Lattimore v. Harsen, 14 Johns. 330.

6, Franchot v. Leach, 5 Cow. 506; Canal Co. v. Ray, 101 U. S. 522; Dearborn v. Cross, 7 Cow. 48; Fleming v. Gilbert, 3 Johns. 528.

7, Elliott v. Lycoming Ins. Co., 66 Pa. St. 22; 5 Am. Rep. 323; Oshkosh Gaslight Co. v. Germania F. Ins. Co., 71 Wis. 454; 5 Am. St. Rep. 233; Wilson v. Minnesota F. M. F. Ins. Assn., 36 Minn. 112; 1 Am. St. Rep. 659; Sims v. State Ins. Co., 47 Mo. 54; 4 Am. Rep. 311; Pratt v. New York Cent. Ins. Co., 55 N. Y. 505; 14 Am. Rep. 304; Miner v. Phœnix Co., 27 Wis. 693; 9 Am. Rep. 479; Webster v. Phœnix Ins. Co., 36 Wis. 67; 17 Am. Rep. 479; Insurance Co. v. Wilkinson, 13 Wall. 222; Van Schoick v. Niagara Ins. Co., 68 N. Y. 434; Combs v. Hannibal Ins. Co., 43 Mo. 148; Commercial Ins. Co. v. Spankneble, 52 Ill. 518; 4 Am. Rep. 582; Keith v. Globe Ins. Co., 52 Ill. 518; 4 Am. Rep. 624. See also the authorities collected in Browne Parol Ev. 113–115.

8, McKenzie v. Harrison, 120 N. Y. 260.

§ 449. Subsequent agreement as to contracts within statute of frauds. — A question of greater difficulty is whether those contracts required by the statute of frauds to be in writing can be discharged or modified by subsequent parol agreement. On this question there have been many diverse decisions in the English and American courts. The earlier cases held that the written agreement might be modified in this manner on the ground that the statute did not declare contracts affected by it void unless in writing.[1] Later cases have, however, adopted a stricter rule;[2] and the more recent English cases have very much guarded and limited the application of the rule laid down in the early cases.[3] In his valuable work Mr. Taylor concludes that although it is the better opinion that such contracts may be wholly waived or abandoned by a subsequent oral agreement so as to prevent either party from recovering on the original written agreement, yet it is certain that no verbal agreement to abandon the contract in part or to add to or to modify its terms can be received.[4]

1, Cuff v. Penn, 1 Maule & S. 21; Cummings v. Arnold, 3 Met. 486; 37 Am. Dec. 155; Stearns v. Hall, 9 Cush. 31; Stryker v. Vanderbilt, 25 N. J. L. 482; Negley v. Jeffers, 28 Ohio St. 90; Marsh v. Bellew, 45 Wis. 36; Keating v. Price, 1 Johns. Cas. (N. Y.) 22; 1 Am. Dec. 92. On the general subject of this section see note, 100 Am. Dec. 169–172.

2, Emerson v. Slater, 22 How 28; Swain v. Seamens, 9 Wall. 254; Abell v. Munson, 18 Mich. 306; 100 Am. Dec.

165; Stowell v. Robinson, 3 Bing. N. C. 928; Marshall v. Lynn, 6 M. & W. 109; Hasbrouck v. Tappen, 15 Johns. 200; Blood v. Goodrich, 9 Wend. 68; 24 Am. Dec. 121.

3, Ogle v. Earl Vane, L. R. 2 Q. B. 275; Leather Cloth Co. v. Heironimus, L. R. 10 Q. B. 140; Hickman v. Haynes, L. R. 10 C. P. 598.

4, Tayl. Ev. secs. 1143, 1144.

§ 450. Same — Tendency of decisions in the United States. — It would be a difficult matter to reconcile the decisions in the United States on this subject, and to formulate from them any satisfactory rule. It was held in New York that a contract for the sale of goods which was within the statute could not thus be changed to show that an increased amount was to be delivered.[1] So it was held that, where a contract for the sale of land specified that the same should be surveyed by a certain person, it could not be shown by parol that another had been agreed upon.[2] In numerous other cases it has been held that substantial parts of a written contract which are necessary to its existence cannot be subsequently modified by parol, even when the contract itself would not have been valid, if made by parol.[3] On the other hand it has frequently been held that the time or manner of payment or mode of performing a contract which is within the statute of frauds might be changed by parol.[4] Thus, it has been held that parol evidence is admissible to prove such an agreement to reduce

the rate of interest on a mortgage, and to pay the interest semi-annually.[5] So it has been held that a vendee may by subsequent parol agreement waive a vendor's agreement to remove encumbrances from the land sold;[6] and it has likewise been proved by parol that a time for the delivery of goods has been agreed upon, no time having been stated in the original contract.[7] In the discussion of this class of contracts, Mr. Benjamin says: "No verbal agreement to abandon it in part or to add to or omit or modify any of its terms is admissible."[8] This is the view taken by most of the text writers on the subject, and it is, perhaps, supported by the weight of authority. Yet the cases already cited have shown no little departure from the rule; and other cases have limited or qualified the rule by allowing parol evidence of a substituted agreement, especially when the latter has been partly performed or so relied upon that its denial would operate as a fraud, or when the enforcement of the original contract would cause serious injury.[9] There is also conflict of authority as to whether it may be shown by parol that there has been a subsequent agreement for abandonment or *rescission of the whole contract.* The view that such testimony is admissible is, in the opinion of the author, sustained by the weight of authority, especially if the subsequent agreement has been executed.[10]

1, Schultz v. Bradley, 57 N. Y. 646. On the subject of this section see note, 100 Am. Dec. 169–172. See sec. 434 *supra*.

2, Dana v. Hancock, 30 Vt. 616.

3, Hill v. Blake, 97 N. Y. 216; Blood v. Goodrich, 9 Wend. 68; 24 Am. Dec. 121; Swain v. Seamens, 9 Wall. 254; Cook v. Bell, 18 Mich. 387; Noble v. Ward, L. R. 1 Exch. 117; Brown v. Sanborn, 21 Mich. 402.

4, Cummings v. Arnold, 3 Met. 486; 37 Am. Dec. 155; Stearns v. Hall, 9 Cush. 31; Vanhouten v. McCarty, 4 N. J. Eq. 141; Negley v. Jeffers, 28 Ohio St. 90; Marsh v. Bellew, 45 Wis. 36; Reed's Heirs v. Chambers, 6 Gill & J. (Md.) 490.

5, Sharp v. Wyckoff, 39 N. J. Eq. 376.

6, Negley v. Jeffers, 28 Ohio St. 90; Devling v. Little, 26 Pa. St. 502.

7, Neil v. Cheves, 1 Bailey (S. C.) 537.

8, Benj. Sales sec. 240.

9, Marsh v. Bellew, 45 Wis. 36; Price v. Dyer, 17 Ves. 356; Long v. Hartwell, 34 N. J. L. 116.

10, Goss v. Lord Nugent, 5 Barn. & Adol. 58; Johnson v. Worthy, 17 Ga. 420; Morrill v. Colehour, 82 Ill. 618; Norton v. Simonds, 124 Mass. 19; Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425; 7 Am. Dec. 499; Dearborn v. Cross, 7 Cow. 48; Phelps. v. Seely, 22 Gratt. (Va.) 573; Reed Stat. Frauds sec. 461; Browne Stat. Frauds secs. 434–436.

§ 451. To show that instruments apparently absolute are only securities.— It has long been the settled rule that in courts exercising equitable jurisdiction it is admissible to prove by parol that instruments in writing apparently transferring the absolute title are in fact only given as security. The doctrine is thus stated by Mr. Justice Field: "It is an established doctrine that a court of

equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the *language* used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the *object* of the parties in executing and receiving the instrument."[1] Although in some of the earlier cases this evidence was received only on the grounds of fraud or mistake,[2] yet in later cases it was deemed sufficient evidence of fraud for the grantee to treat the conveyance as absolute, when in fact it was not.[3] But the tendency of the modern decisions is that such evidence may be received to show the real nature and object of the transaction, although no fraud or mistake of any kind is alleged or proved.[4]

1, Peugh v. Davis, 96 U. S. 336; Brick v. Brick, 98 U. S. 514; Swart v. Service, 21 Wend. 36; 34 Am. Dec. 211 and note. On this general subject, see also notes, 15 Am. Dec. 47; 50 Am. Dec. 195; 17 Am. Dec. 300-306.

2, Patchin v. Pierce, 12 Wend. 61; Swart v. Service, 21 Wend. 36; 34 Am. Dec. 211; Strong v. Stewart, 4 Johns. Ch. 167; Marks v. Pell, 1 Johns. Ch. 594; Webb v. Rice, 6 Hill 219; Richard v. Harrill, 2 Jones Eq. (N. C.) 209; Chaires v. Brady, 10 Fla. 133; McDonald v. McLeod, 1 Ired. Eq. (N. C.) 221.

3, Strong v. Stewart, 4 Johns. Ch. (N. Y.) 167.

4, Washburn v. Merrills, 1 Day (Conn.) 139; 2 Am. Dec. 59; Ross v. Norrell, 1 Wash. (Va.) 14; 1 Am. Dec. 422; Walker v. Walker, 2 Atk. 99; Johnson v. Smith, 39 Iowa 549; Sweet v. Parker, 22 N. J. Eq. 453; Horn v. Keteltas, 46 N. Y. 605; Cotterell v. Long, 20 Ohio 464; Nichols v. Cabe, 3 Head (Tenn.) 93; Snavely v. Pickle, 29 Gratt. (Va.) 27; Anthony v. Anthony, 23 Ark, 479; Ruckman v. Alwood, 71 Ill. 155; Heath v. Williams, 30 Ind. 495; Pond v. Eddy, 113 Mass. 149; McDonough v. O'Niel, 103 Mass. 92; Price v. Gover, 40 Md. 102; Klein v. McNamara, 54 Miss. 90; Shade v. Bessinger, 3 Neb. 140; Edrington v. Harper, 3 J. J. Marsh. (Ky.) 353; 20 Am. Dec. 145.

§ 452. Same—Real intention of the parties to be ascertained.—In applying the exception under discussion, the extrinsic evidence will not be received because of any particular form of language which the parties may have adopted. The *intention* of the parties *must govern;* and it matters not what peculiar form the transaction may have taken. The inquiry always is, was a security for the loan of money or other property intended.[1] But where the deed and accompanying papers on their face constitute a mortgage, parol evidence is not competent to show the contrary.[2] In arriving at the real intent of the parties, their statements and acts at the time of the transaction,[3] the inadequacy of

the consideration named in the deed,[4] the prior existence of a debt[5] and the recognition of its continuance, as by the payment of interest or other acts,[6] are all facts to be considered, and are relevant to the issue. But although parol evidence is received in such cases to show the real nature of the transaction, the presumption is that the instrument is what it purports to be; and before a deed absolute in form can be shown to be a mortgage, the *proof* should be *clear and convincing.*[7] As the rule has often been stated, "to convert a deed absolute into a mortgage, the evidence should be so clear as to leave no substantial doubt that the real intention of the parties was to execute a mortgage."[8]

1, Dunham v. Dey, 15 Johns. 554; 8 Am. Dec. 282; Klock v. Walter, 70 Ill. 416; Lane v. Shears, 1 Wend. 433; Marshall v. Stewart, 17 Ohio 356; Colwell v. Woods, 3 Watts (Pa.) 188; 27 Am. Dec. 345; Brinkman v. Jones, 44 Wis. 498; Campbell v. Dearborn, 109 Mass. 130; 12 Am. Rep. 671; Knowlton v. Walker, 13 Wis. 273; Kerr v. Gilmore, 6 Watts (Pa.) 405.

2, Snyder v. Griswold, 37 Ill. 216; Haines v. Thompson, 70 Pa. St. 434.

3, Russell v. Southard, 12 How. 139; Crane v. Bonnell, 2 N. J. Eq. 264; Freeman v. Wilson, 51 Miss. 329; Montgomery v. Spect, 55 Cal. 352; Tibeau v. Tibeau, 22 Mo. 77; Reigard v. McNeil, 38 Ill. 400; Eiland v. Radford, 7 Ala. 724; 42 Am. Dec. 610; Carter v. Carter, 5 Tex. 93; Ingalls v. Atwood, 53 Iowa 283; Staples v. Edwards Lumber Co., 56 Minn. 16; Thomas v. Barnes, 156 Mass. 581; Work v. Beach, 129 N. Y. 651; Edwards Lumber Co. v. Baker, 2 N. Dak. 289; Stahelin v. Sowle, 87 Mich. 124.

4, Crews v. Threadgill, 35 Ala. 334; Gibbs v. Penny, 43

Tex. 560; Klein v. McNamara, 54 Miss. 90; Davis v. Stonestreet, 4 Ind. 101.

5, Ford v. Irwin, 14 Cal. 428; 18 Cal. 117; Snavely v. Pickle, 29 Gratt. (Va.) 27; Montgomery v. Spect, 55 Cal. 352.

6, Ruffier v. Womack, 30 Tex. 332; Eaton v. Green, 22 Pick. 526; Westlake v. Horton, 85 Ill. 228; Klein v. McNamara, 54 Miss. 90; Budd v. Van Orden, 33 N. J. Eq. 143; Montgomery v. Spect, 55 Cal. 352; Lawrence v. DuBois, 16 W. Va. 443.

7, Howland v. Blake, 97 U. S. 624; Bingham v. Thompson, 4 Nev. 224; Williams v. Stratton, 18 Miss. 418; Moore v. Ivey, 8 Ired. Eq. (N. C.) 192; Williams v. Cheatham, 19 Ark. 278; Butler v. Butler, 46 Wis. 430; Johnson v. Van Velsor, 43 Mich. 208; Maher v. Farwell, 97 Ill. 56.

8, Becker v. Howard, 75 Wis. 415.

§ 453. Not limited to deeds and mortgages. — Although evidence to show that an instrument, absolute in form, is not such in fact is most frequently used to show that an apparent deed is a mortgage, it is not limited to this class of cases. Thus, it is admissible to prove by parol that a transfer of stock, absolute on its face, is merely as security for a loan;[1] that a deed absolute on its face was made on condition that the grantee should pay the grantor's debts,[2] and that a bill of sale[3] or an assignment is a mere security for a debt or loan.[4] The rule that deeds and other instruments, absolute in terms, can be thus transformed into instruments for the security of money is purely an *equitable doctrine;* and it has sometimes been held that in actions at law evidence for this

purpose is not admissible.[5] But in some states such evidence has been held proper in legal actions as well as in those of an equitable nature;[6] and as the differences between legal and equitable procedure become less marked, there will doubtless be a tendency toward the adoption of the same rule of evidence both in legal and in equitable proceedings. We have discussed under another head the mode of proving trusts.[7]

1, Reeve v. Dennett, 137 Mass. 315; Burgess v. Seligman, 107 U. S. 20; Butman v. Howell, 144 Mass. 66; Brick v. Brick, 98 U. S. 514.

2, Coffman v. Coffman, 79 Va. 504.

3, Seavey v. Walker, 108 Ind. 78; Booth v. Robinson, 55 Md. 419; Votaw v. Diehl, 62 Iowa 676; Howard v. O'Dell, 1 Allen 85; Blanchard v. Fearing, 4 Allen 118; Hazard v. Loring, 10 Cush. 267; Caswell v. Keith, 12 Gray 351; Manufacturers' Bank v. Rugee, 59 Wis. 221.

4, Hazard v. Leving, 10 Cush. 267; Caswell v. Keith, 12 Gray 351; Booth v. Robinson, 55 Md. 419; Marsh v. McNair, 99 N. Y. 174.

5, Bryant v. Crosby, 36 Me. 562; 58 Am. Dec. 767; Stinchfield v. Milliken, 71 Me. 567; Benton v. Jones, 8 Conn. 186; Reading v. Weston, 8 Conn. 117; 20 Am. Dec. 97; Farley v. Goocher, 11 Iowa 570; Webb v. Rice, 6 Hill 219; Bragg v Massie, 38 Ala. 89; 79 Am. Dec. 82; Belote v. Morrison, 8 Minn. 87; Moore v. Wade, 8 Kan. 380.

6, Tillson v. Moulton, 23 Ill. 648; Kent v. Agard, 24 Wis. 378; Emery v. Fugina, 68 Wis. 505; Odenbaugh v. Bradford, 67 Pa. St. 96; Moreland v. Barnhart, 44 Tex. 275; Ruffier v. Womack, 30 Tex. 332; Reeve v. Dennett, 137 Mass. 315.

7, See secs. 421 *et seq.* *supra.*

§ 454. Rule as to parol evidence not applicable to strangers to the instrument.— The general rule under discussion does not apply as against strangers to the instrument. Mr. Greenleaf thus states the law on the subject: "The rule under consideration is applied only (in suits) between the parties to the instrument, as they alone are to blame if the writing contains what was not intended or omits that which it should have contained. It cannot affect third persons who, if it were otherwise, might be prejudiced by things recited in the writings contrary to the truth through the ignorance, carelessness or fraud of the parties; and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written statements of others."[1] Thus, when the debt secured by a mortgage is incorrectly described or the relation of the parties incorrectly stated, these facts are admissible against a stranger to the instrument.[2] So it has been held admissible, as between those not parties to the instrument, to show a mistake in the language of the instrument,[3] or that lands described in a conveyance as in one parish were in fact situated in another.[4] On this principle in an action on an insurance policy the plaintiff was allowed to show that another policy which came in question did not cover the property insured, although so purporting on its face.[5] There

are many other cases which hold that in a controversy between a party to an instrument and a stranger to it, either party may show that the instrument does not speak the truth, and that the general rule does not apply as it does in cases where the controversy arises between the parties to an instrument which they have made the written memorial of their agreement.[6] It is to be observed, however, that the *right of a stranger to vary* a written contract by parol is *limited to rights which are independent of the instrument.* Thus, it has been held that the wife of a tenant who had engaged in the lease to keep the demised premises in repair cannot, in an action against the landlord for personal injuries occasioned by the falling of a floor, prove a parol agreement for repairs by the lessor, contemporaneous with the lease. The wife could have no right springing out of the occupancy except as founded on the lease; and her right must be bounded by the provisions of the lease, which in this respect being conclusive against the husband were conclusive against her.[7] Even in respect to strangers; the writing itself is the best evidence *of its contents;* and must, if possible, be produced.[8]

1, 1 Greenl. Ev. sec. 279; Cunningham v. Milner, 56 Ala. 522; Talbot v. Wilkins, 31 Ark. 411; Hussman v. Wilke, 50 Cal. 250; Brown v. Thurber, 77 N. Y. 613; Edgerly v. Emerson, 23 N. H. 555; 55 Am. Dec. 207; Highstone v. Burdette, 61 Mich. 54; Fonda v. Burton, 63 Vt. 355; National Car Co. v. Cyclone Co., 49 Minn. 125; Clerk

hew v. West Side Bank, 50 Minn. 538; Kellogg v. Tompson, 142 Mass. 76; Randolph v. Junker, 1 Tex. Civ. App. 517.

2, Bruce v. Roper Lumber Co., 87 Va. 381; 24 Am. St. Rep. 657; Lee v. Adsit, 37 N. Y. 78; Powell v. Young, 51 Ala. 518.

3, Fuller v. Acker, 1 Hill 473.

4, Rex v. Cheadler, 3 Barn. & Adol. 833.

5, Lowell Mfg. Co. v. Safeguard Fire Ins. Co., 88 N. Y. 591.

6, McMaster v. Insurance Co., 55 N. Y. 222; 14 Am. Rep. 239; Furbush v. Goodwin, 25 N. H. 425; Venable v. Thompson, 11 Ala. 147; Strader v. Lambeth, 7 B. Mon. (Ky.) 589; Van Eman v. Stanchfield, 10 Minn. 255; Hussman v. Wilke, 50 Cal. 250; Talbot v. Wilkins, 31 Ark. 411; Powell v. Young, 51 Ala. 518; Burns v. Thompson, 91 Ind. 146; Brown v. Thurber, 77 N. Y. 613.

7, Wodock v. Robinson, 148 Pa. St. 503; Browne Parol Ev. see. 28.

8, Clow v. Brown, 134 Ind. 287; Browne Parol Ev. sec. 29.

§455. Parol evidence to identify the subject matter.—It is a doctrine which, perhaps, has its most frequent application in respect to wills, but which is by no means confined to such instruments, that parties have the right to claim that the court in construing written instruments shall, if necessary, *place itself in the situation of the parties to the instrument* by means of extrinsic evidence in order that the true meaning of the language may be ascertained.[1] Extrinsic evidence may be necessary for this purpose to *identify the subject matter* to which the instru-

ment refers; and in such case the admission of parol evidence is not forbidden by the general rule under discussion.[2] To use the familiar illustration, if an estate is correctly described as "Blackacre," extrinsic evidence is necessary to identify the land intended by that description. The same rule has been adopted in this country as to any similar phrase of description.[3] For example, in a late Massachussets case certain land was described in a contract as a certain parcel of real estate known as the "Aldrich farm," and described in another certain deed. The court held that the evidence as to the subject matter, the situation of the parties and the circumstances under which the agreement was made were admissible to make plain the meaning of the parties.[4] The same rule applies where a mill and its appurtenances are conveyed by a mere general description;[5] and where an instrument grants a lot to the use of the Presbyterian church, parol evidence may be given to show what particular church is intended.[6] If land is described differently in different conveyances, it may be shown by parol that both descriptions refer to the same land.[7] The same rule holds where land is attached under one description, and levied on under another.[8] Extrinsic evidence is admissible to identify land described in an instrument by metes and bounds,[9] to identify a monument named in a deed,[10] to locate a highway referred to in a

deed,[11] to show what is included by the term "farm" used in a deed,[12] to show what buildings are included in a building described in a policy of insurance as "D's car factory."[13] And it may be stated generally that when an estate consisting of any such property as that mentioned in the foregoing illustrations is conveyed or devised, and designated in general terms, for example, as a "farm" or as a "factory," and the question arises as to what was actually included, parol evidence is admissible to show the situation and limits or extent of the property, and the manner in which it was acquired or occupied.[14] Such evidence is also admissible to identify the particular animals or other personal property sold under a written contract of sale;[15] and where a chattel mortgage covered fifty cords of wood piled on a designated lot, parol evidence was held admissible to identify and distinguish this from other wood on the same lot.[16]

1, Guy v. Sharp, 1 Mylne & K. 602; Brown v. Thorndyke, 15 Pick. 388; Sargent v. Towne, 10 Mass. 303; Doe v. Provoost, 4 Johns. 61; Webster v. Atkinson, 4 N. H. 21; Ely v. Adams, 19 Johns. 313; Etting v. United States Bank, 11 Wheat. 59; Bagley v. Saranac Co., 135 N. Y. 626; Kretschmer v. Hard, 18 Col. 223. See secs. 482 *et seq. infra.*

2, Buckley v. Devine, 127 Ill. 406; Lynch v. Henry, 75 Wis. 631; Skinker v. Haagsma, 99 Mo. 208; Sturgis v. Work, 122 Ind. 134; 17 Am. St. Rep. 349; Harris v. Alden, 104 N. C. 86; Carter v. Bacigalupi, 83 Cal. 187; Borer v. Lange, 44 Minn. 281; Ham v. Johnson, 55 Minn. 115; Kennedy v. Gramling, 33 S. C. 367; 26 Am. St. Rep. 676; Galen v. Brown, 22 N. Y. 37. See secs. 482 *et seq. infra.*

3, Doe *ex dem.* Preedy v. Holtom, 4 Adol. & Ell. 76, 81; Doe *ex dem.* Gore v. Langton, 2 Barn. & Adol. 680; Doolittle v. Blakesley, 4 Day (Conn.) 265; 4 Am. Dec. 218; Venable v. McDonald, 4 Dana (Ky.) 336; Whitaker v. Sumner, 9 Pick. 308; Jackson *ex dem.* Van Vechten v. Sill, 11 Johns. 201; 6 Am. Dec. 363; Peart v. Brice, 152 Pa. St. 277; Vejar v. Mound City Co., 97 Cal. 659; Baker v. Hall, 158 Mass. 361.

4, Aldrich v. Aldrich, 135 Mass. 153.

5, Scheibel v. Slagle, 89 Ind. 323; Hall v. Benner, 1 Pen. & W. (Pa.) 402; 21 Am. Dec. 394.

6, Wyandotte County Com. v. Wyandotte Presbyterian Church, 30 Kan. 620.

7, Stewart v. Chadwick, 8 Iowa 463.

8, McGregor v. Brown, 5 Pick. 170; Webster v. Blount, 39 Mo. 500.

9, Robertson v. McNiel, 12 Wend. 581; Scott v. Sheakley, 3 Watts (Pa.) 50.

10, McAfferty v. Conover's Lessee, 7 Ohio St. 99; 70 Am. Dec. 57.

11, Rich v. Rich, 16 Wend. 663.

12, Madden v. Tucker, 46 Me. 367. See sec. 495 *et seq. infra.*

13, Blake v. Exchange Mutual Ins. Co., 12 Gray 265.

14, Doe v. Martin, 4 Barn. & Adol. 785; Doe v. Burt, 1 T. R. 704; Castle v. Fox, L. R. 11 Eq. 542; Ropps v. Barker, 4 Pick. 239; Farrar v. Stackpole, 6 Greenl. (Me.) 154; 19 Am. Dec. 201.

15, Marshall v. Gridley, 46 Ill 247; Rugg v. Hale, 40 Vt. 138; Haller v. Parrott, 82 Iowa 42; Clark v. Crawfordville Co., 125 Ind. 277.

16, Sargeant v. Solberg, 22 Wis. 132.

§ 456. Same — Use of property — Identifying parties. — It is under the same rule that evidence is sometimes admitted to show

how property has been formerly used or where it has been kept, as these circumstances may throw light upon the meaning of the instrument. For example, if the question arises whether a bequest of stock is specific or pecuniary, the court will not only look to the context of the will and the terms of the gift, but will ascertain by extrinsic evidence as well, the state of the testator's funded property.[1] Mr. Stephen thus states in very general terms the rule which governs in respect to the subjects discussed in this and the following section: "In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers, or may probably have been intended to refer, or which identifies any person or thing mentioned in it."[2] On the same principle parol evidence is admissible *to identify the parties.* It has long been well settled that, if the description of the person intended is applicable to more than one person, extrinsic evidence may be introduced for the purpose of explaining the real meaning of the instrument, and of applying the same to the person intended. Thus, an administration, which *prima facie* would be deemed to be granted on the estate of the father, may be shown to be granted on that of the son, where their names are alike;[3] and if a deed is made to the son having the same name as the father, it may be shown by parol which one was intended.[4]

Where a fund was deposited in a bank in the name of the depositor, "in trust for Sarah," the beneficiary may be identified by parol.[5] So it may be shown that a certificate of deposit made by a guardian in his own name was for the benefit of his ward.[6] The plaintiff in ejectment may show by parol that he is the person named in a deed delivered to him, although there is an inaccuracy in the name in such deed.[7] There are numerous instances in which parol evidence has been held admissible to identify persons as the ones intended in conveyances, although inaccurately named or described therein.[8] So where a note was made payable to a person by name "as cashier," without indicating the bank, it was held admissible to prove by parol that the person named is cashier of the bank for which he acted, and that he was acting in that capacity at that time. Such evidence *does not contradict* the instrument, *but only explains* the transaction.[9] The addition of the official character of the person to the name signed to a contract is such an indication of the representative character of such signer as will warrant a resort to parol evidence to prove extrinsic circumstances, such as to whom the consideration passed, and to whom credit was given, the agent's authority and similar facts by which the respective liability of the principal and agent may be determined.[10] Where a deed was made to "an association of

persons" without naming all of them, the court may ascertain by parol evidence what persons compose the association.[11]

1, Colpoys v. Colpoys, Jac. 451.

2, Steph. Ev. art. 91; Scraggs v. Hill, 37 W. Va. 706.

3, Moseley v. Mastin, 37 Ala. 216. See secs. 484 *et seq. infra.*

4, Coit v. Starkweather, 8 Conn. 289.

5, Bartlett v. Remington, 59 N. H. 364.

6, Beasley v. Watson, 41 Ala. 234.

7, Mobberly v. Mobberly, 60 Md. 376.

8, Henderson v. Hackney, 23 Ga. 383; 68 Am. Dec. 529; Williams v. Carpenter, 42 Mo. 327; Henderson v. Hackney, 16 Ga. 521; Scanlan v. Wright, 13 Pick. 523; 25 Am. Dec. 344; Beauvais v. Wall, 14 La. An. 199; Peabody v. Brown, 10 Gray 45; Coit v. Starkweather, 8 Conn. 289; Avery v. Stites, Wright (Ohio) 56; Walker v. Wells, 25 Ga. 141; 71 Am. Dec. 164; Tuggle v. McMath, 38 Ga. 648; Simons v. Marshall, 3 G. Greene (Iowa) 502. See secs. 496 *et seq. infra.*

9, Baldwin v. Bank of Newbury, 1 Wall. 234; Michigan State Bank v. Peck, 28 Vt. 200; 65 Am. Dec. 234.

10, Smith v. Alexander, 31 Mo. 193; Michigan State Bank v. Peck, 28 Vt. 200; 65 Am. Dec. 234.

11, Pratt v. California Mining Co., 24 Fed. Rep. 869.

§ 457. Same — Further illustrations — General rule. — Extrinsic evidence is admissible to *identify the parties* to an instrument or record, and to show that the parties in interest in a former suit are the same as in the one on trial.[1] The fact that an agreement, not under seal, was signed by two defendants does not prevent plaintiff from proving that

other defendants are interested in the contract.[2] So it may be shown that goods sold at auction were actually bid off by two persons, although the memorandum mentions but one.[3] Although if one signs an agreement without indicating in any way that he acts as *agent* for a *principal*, he cannot in order to escape liability prove by parol that he was merely acting for another,[4] yet such agency may be proved for the purpose of binding the principal, or for the purpose of giving the principal the benefit of the contract.[5] In the one case such testimony is rejected because it clearly contradicts the written instrument, in the other it is received because the testimony does not change the written instrument, but merely identifies the person who is charged or benefited thereby. In a Massachusetts case it was held admissible, where a contract was signed "B. by C.," to show by parol that B. was only an agent of A., and thus to charge A. as principal, although there was no intimation of such agency in the contract.[6] It will be seen that most of the cases cited in this and the foregoing section are examples of the principle which has been stated in the following language: "If the language of the instrument be alike applicable to each of several persons, parcels of land, species of goods, monuments, boundaries, writings or circumstances, or if the terms be vague and general or have divers meanings,

parol evidence will always be admissible of any *extrinsic circumstances* tending to show what person or persons or what things were intended by the party, or to ascertain his meaning in any other respect." [7]

1, Garwood v. Garwood, 29 Cal. 514; Shirley v. Fearne, 33 Miss. 653; 69 Am. Dec. 375; Sawyer v. Boyle, 21 Tex. 28; Walker v. Wells, 25 Ga. 141; 71 Am. Dec. 164; Simons v. Marshall, 3 G. Greene (Iowa) 502; Tuggle v. McMath, 38 Ga. 648.

2, Woodhouse v. Duncan, 106 N. Y. 527. But the contrary was held where the contract was under seal, Bridge v. Partridge, 64 N. Y. 357.

3, Scott v. McKinney, 98 Mass. 344.

4, Higgins v. Senior, 8 M. & W. 834; Sowerby v. Butcher, 2 Car. & M. 371; Stackpole v. Arnold, 11 Mass. 27; 6 Am. Dec. 150; Shankland v. Washington, 5 Peters 394; Osgood v. Bauder, 82 Iowa 171.

5, Paterson v. Gandasequi, 15 East 62; Calder v. Doebell, L. J. 40 C. P. 89; Higgins v. Senior, 8 M. & W. 834; Garrett v. Handley, 4 Barn. & C. 664; Bateman v. Phillips, 15 East 272; Weston v. McMillan, 42 Wis. 567; Northern Bank v. Lewis, 78 Wis. 475.

6, Learned v. Johns, 9 Allen 419.

7, Tayl. Ev. sec 1195; First National Bank v. North, 2 S. Dak. 480; Neal v. Reams, 88 Ga. 298.

§ 458. Proof of surrounding facts.— It may frequently be necessary, in order to construe written instruments, to receive evidence of other accompanying facts than those which serve to apply the instrument to the subject matter or the persons intended. There is a class of cases which have carried

the rule somewhat further than is indicated by the illustrations in the last three sections. These cases hold that under some circumstances, not only the situation and relations of the parties, but their *acts, negotiations and statements* may be proved as part of the surrounding facts which throw light on the transaction. It would be impossible to prescribe by general rule the precise limits within which, under the ever varying facts, such testimony may be admitted. The circumstances under which such testimony is admissible will be best understood from instances of adjudicated cases. Thus, in construing a memorandum of sale, the Massachusetts court held that, although parol evidence is not admissible to prove that other terms than those expressed are agreed to or that the parties have other intentions than those to be inferred from it, yet that it is competent to prove not only the relations of the parties and the nature and conditions of the property, but also the acts of the parties at and subsequent to the date of the contract as a means of showing their own understanding of its terms. The same rule has been adopted by other courts in the interpretation of written instruments.[1]

1, Knight v. Worsted Co., 2 Cush. 271; Block v. Columbia Ins. Co., 42 N. Y. 393; Excelsior Needle Co. v. Smith, 61 Conn. 56; Case Manufacturing Co. v. Soxman, 138 U. S. 431; Birch v. Depeyster, 1 Stark. 167; Bradley v. Washington Packet Co., 13 Peters 89; Bainbridge v. Wade, L. J. 20 Q. B. N. S. 7.

§ 459. Same—Illustrations.— In an action on a building contract wherein the defendant had agreed to pay "one thousand seven hundred dollars, lawful money of the United States and five hundred dollars in an order" on W. & T., the defendant was allowed to prove by parol that this expression as to the $500 meant an order payable in building material manufactured by W. & T.[1] In an action on a written agreement to pay the plaintiff "$50 for inserting a business card on 200 copies of his advertising chart," parol evidence was allowed to show that at the time of making the agreement the plaintiff represented that his chart should be of certain material and quality. The court recognized the rule that the obligation of the written contract could not be modified by a contemporaneous parol agreement, but held that, for the purpose of explaining an ambiguity, parol evidence as to all the facts of the transaction might be received including the terms of the negotiation and statements made therein.[2] In an action by the payee against the acceptor of an order in which the words "to be paid out of the last payment" were used, it was held admissible to prove a conversation between the parties before the acceptance to show the circumstances under which it was made and to aid in the construction of the instrument.[3] In the supreme court of the United States it was held competent to show

by a parol contemporaneous agreement that a note, payable in "dollars," executed in Alabama during the civil war while the confederate currency was in use, should in fact be paid in such currency.[4] Evidence of surrounding circumstances has been held admissible to show that a guaranty was intended to be a continuing one,[5] to show the occupancy of the premises at the time of making a lease, as affecting the question whether they were wholly or partly included in the lease,[6] and to show the acts, dealings and situation of parties to an instrument, in determining whether a given instrument created a joint tenancy or a tenancy in common.[7] It is a familiar rule that where the language of the written instrument is ambiguous or indefinite, *the practical interpretation of the parties* may be proved, and is often entitled to great weight.[8]

1, Hinnemann v. Rosenback, 39 N. Y. 98.

2, Stoops v. Smith, 100 Mass. 63; 1 Am. Rep. 85.

3, Proctor v. Hartigan, 139 Mass. 554.

4, Thorington v. Smith, 8 Wall. 1; Confederate Note Case, 19 Wall. 548; Danley v. Tindall, 32 Tex. 43; Austin v. Kinsman, 13 Rich. Eq. (S. C.) 259; Craig v. Pervis, 14 Rich. Eq. (S. C.) 150; Hightower v. Maull, 50 Ala. 495.

5, Heffield v. Meadows, L. R. 4 C. P. 596.

6, Doe v. Burt, 1 T. R. 701.

7, Harrison v. Barton, 30 L. J. (Ch.) 213.

8, Ganson v. Madigan, 15 Wis. 144; 82 Am. Dec. 659; Lent v. North American Co., 49 N. Y. 390; Ellmaker v. Franklin Ins. Co., 5 Pa. St. 183; Bedford v. Flowers, 11 Humph. (Tenn.) 242.

¿ 460.— Such evidence only received when the language is of doubtful import.— The rule has frequently been laid down in the adjudicated cases that no evidence of the language employed by the parties in making the contract can be given in evidencee except that which is furnished by the writing itself.[1] It has been seen, however, from th, examples already given that in numerous cases much greater latitude has been given to the introduction of parol evidence than is implied in the statement just given. It will be found that nearly all, if not all, the illustrations given in the last section recognize the general rule that the written contract must govern, and that proof of the acts, situation and statements of the parties can have no other effect than to ascertain the meaning of the parties *as expressed in the writing.*[2] It will also be found that in the cases where evidence of the declarations of parties has been received the language of the writing *admitted of more than one construction*, either upon its face or as explained by the parol evidence concerning the surrounding facts or identifying the subject matter or the parties. Where the language of the writing does thus admit of more than one construction, there is considerable authority for the view that such language may be construed by the court in the light of the statements and acts of the parties contemporaneous with and subsequent

to the contract, in other words, that such language and statements of the parties may be used *to explain the ambiguity.* But it must be borne in mind that, although declarations of the parties may in some cases be received to explain contracts or words of doubtful meaning, yet *no other words can be added* to or substituted for those of the writing. The courts are not at liberty to speculate as to the general intention of the parties, but are charged with the duty of ascertaining the meaning of the written language. It is no doubt true that, with the aid of the proper extrinsic evidence, instruments are construed and made effective which could not otherwise be construed to have any effect at all; and in these cases a very different construction is given from that which would follow from the bare inspection of the writing. But the court cannot give effect to any intention which is not expressed by the language of the instrument, when examined in the light of facts that are properly before the court.[3] For still stronger reason such evidence *cannot be received to contradict* the clear and settled meaning of the contract.[4]

1, Dent v. No. Am. Steamship Co., 49 N. Y. 390; Ellmaker v. Insurance Co., 5 Pa. St. 183; Bedford v. Flowers, 11 Humph. (Tenn.) 242.

2, See articles, 9 Alb. Law Jour. 117, 281.

3, Farmers Loan & Trust Co. v. Commercial Bank of Racine, 15 Wis. 424; 82 Am. Dec. 689; Jones v. Swearingen, 42 S. C. 58.

4, The Delaware, 14 Wall. 579; Gilbert v. Moline Plough Co., 119 U. S. 491; Corse v. Peck, 102 N. Y. 513; Elofrson v. Lindsay, 90 Wis. 203.

§ 461. Proof of meaning of words.— A distinction is often made between that testimony which is offered to contradict a written instrument and that which is offered merely to explain or to assist in construing the document. It is a familiar principle that the court may ascertain the situation of the parties to a contract and all the surrounding circumstances, whenever this may be necessary to interpret or construe the writing in question or to apply the contract to the proper subject matter. It has long been settled that if the language of the writing is such that, the court does not understand it, evidence may be received to ascertain the real meaning. For example, if the writing is in a foreign language, if technical words are used or if there are any expressions which at the time of the contract had gained a definite meaning generally or by local usage, extrinsic evidence may be received to enable the court to understand such meaning.[1] It is on this principle that, in a great variety of cases in England and in this country, the courts have received testimony as to the meaning of words and phrases in written instruments; and that such testimony has not been held repugnant to the general rule under discussion. It will

be seen in some of the cases that the words used were of a technical character, or that they were words having a local meaning; and in other cases, while the words had a common or popular meaning, they also had a limited meaning as used in some locality or some branch of business. For example, parol evidence has been allowed to show the commercial meaning of the term "cotton in bales,"[2] the meaning of the expression "in the month of October," as fixing the part of the month within which a vessel was to sail,[3] of the use and meaning in a given trade of the "two next months,"[4] of the meaning of the words "duly honored," referring to a bill of exchange,[5] and also that by mercantile men the Gulf of Finland was considered part of the Baltic sea,[6] and that the term "bale" in a given trade means a compressed package of given average weight.[7] Where a ship is warranted to "depart with convoy," such evidence was allowed to show at what place convoy for such a voyage was usually taken;[8] and on the same principle such evidence has been allowed of the meaning of the words "loading off shore" in a marine policy,[9] and of the word "assist" as used in making up trains.[10] In an action on an insurance policy, evidence was allowed to show that although in other cases by the use of the words "at and from" the policy was made to attach upon the ship's first mooring in a harbor on the coast, yet

that in voyages to Newfoundland the risk did not so commence.[11]

1, Shore v. Wilson, 9 Clark & F. 355; Birch v. Depeyster, 1 Stark. 210; Sheldon v. Benham, 4 Hill 129; 40 Am. Dec. 271; Com. v. Morgan, 107 Mass. 199; Atlanta v. Schmeltzer, 83 Ga. 609; Scott v. Neeves, 77 Wis. 305; Clay v. Field, 138 U. S. 464; Converse v. Wead, 142 Ill. 132, meaning of abbreviations used in the record. See notes, 6 Am. Rep. 678–682; 42 Am. Rep. 679; 6 L. R. A. 42.

2, Taylor v. Briggs, 2 Car. & P. 525.

3, Chaurand v. Angerstein, Peake 43.

4, Bissell v. Beard, 28 Law T. 740.

5, Lucas v. Groning, 7 Taunt. 164.

6, Udhe v. Walters, 3 Camp. 16.

7, Gorrissen v. Perrin, 2 C. B. N. S. 681.

8, Luthulier's Case, 2 Salk. 443.

9, Johnson v. Northwestern Nat. Ins. Co., 39 Wis. 87.

10, Memphis Ry. Co. v. Graham, 94 Ala. 545.

11, Vallance v. Dewar, 1 Camp. 503.

§ 462. **Same — Illustrations.** — In like manner such evidence has been held admissible to explain the meaning of such words and phrases as "British weight," in a charter party,[1] "thousand,"[2] "good custom cowhide,"[3] "weeks," as used in a theatrical contract,[4] "farm" and "homestead farm,"[5] "coppered ship," in a policy of insurance,[6] "per foot"[7] or "per square yard,"[8] as used in plastering, "Canada money,"[9] what is meant to be included by the term "cargo,"[10] "north," as used in a deed,[11] "team,"[12] "dollars,"[13]

"months,"[14] "freight,"[15] the meaning of "barrels," in a contract for petroleum,[16] of the term "product of hogs" when used in a contract,[17] of "hard pan,"[18] "cost,"[19] "your account,"[20] "winter strained lamp oil,"[21] and that "horn chains" were made partly of hoof horn.[22] So it was held admissible to prove that the phrase "to be discharged in fourteen days" meant fourteen working days;[23] that sarsaparilla was not a "root" within the meaning of a policy of insurance;[24] that, by the understanding of the trade, "furs" were not included in the phrase "skins and hides,"[25] and that in a contract for the sale of goods the phrase "with all faults" has a specific meaning.[26] Many other illustrations might be given of cases in which it has been held admissible to prove the meaning of words used in written instruments,[27] but a sufficient number has been given to fully illustrate the rule both in cases where technical terms and where words having a meaning apparently plain are used. In many of the cases cited the claim was made that the meaning of the words was so plain that there could be but one conclusion as to the intention, but in such cases it was held that where the evidence showed an ambiguity in the meaning, the court might receive evidence to remove the doubt.

1, Goddard v. Bulow, 1 Nott & McC. (S. C.) 45; 9 Am. Dec. 663.

2, Smith v. Wilson, 3 Barn. & Adol. 728.

3, Wait v. Fairbanks, Brayt. (Vt.) 77.

4, Grant v. Maddox, 15 M. & W. 737.

5, Locke v. Rowell, 47 N. H. 46.

6, Hazzard v. Marine Ins. Co., 1 Sum. (U. S.) 218.

7, Ford v. Tirrell, 9 Gray 401; 69 Am. Dec. 297.

8, Walls v. Bailey, 49 N. Y. 464; 10 Am. Rep. 407.

9, Thompson v. Sloan, 23 Wend. 71; 35 Am. Dec. 546.

10, Allegre v. Maryland Ins. Co., 2 Gill & J. (Md.) 136; 20 Am. Dec. 424.

11, Jenny Lind Co. v. Bower, 11 Cal. 194.

12, Ganson v. Madigan, 15 Wis. 144; 82 Am. Dec. 659.

13, Thorington v. Smith, 8 Wall. 9; Confederate Note Case, 19 Wall. 548; Austin v. Kinsman, 13 Rich. Eq. (S. C.) 259; Craig v. Pervis, 14 Rich. Eq. (S. C.) 150; Hightower v. Maull, 50 Ala. 495; Donley v. Tindall, 32 Tex. 43.

14, Jolly v. Young, 1 Esp. 186.

15, Paisch v. Dickson, 1 Mason (U. S.) 11; Lewis v. Marshall, 7 Man. & G. 729.

16, Miller v. Stevens, 100 Mass. 518; 97 Am. Dec. 123; 1 Am. Rep. 139.

17, Stewart v. Smith, 28 Ill. 397.

18, Blair v. Colby, 37 Mo. 313.

19, Gray v. Harper, 1 Story 574.

20, Walrath v. Thompson, 4 Hill 200.

21, Hart v. Hammett, 18 Vt. 127.

22, Swett v. Shumway, 102 Mass. 365; 3 Am. Rep. 471.

23, Cochran v. Retberg, 3 Esp. 121.

24, Coit v. Commercial Ins. Co., 7 Johns. 385; 5 Am. Dec. 282.

25, Astor v. Union Ins. Co., 7 Cow. 202.

26, Whitney v. Boardman, 118 Mass. 242.

27, Birch v. Depeyster, 1 Stark. 210; Almgren v. Dutilh, 5 N. Y. 28; Goodrich v. Stevens, 5 Lans. (N. Y.) 230; French v. Hayes, 43 N. H. 30; 80 Am. Dec. 127. See also extended note, 6 Am. Rep. 678–682, and article, "Parol Evidence in Explanation of Contracts," 9 Alb. Law Jour. 117. For the meaning of a great variety of words and phrases see, Browne Parol Ev. under index "words and phrases."

§ 463. Same — Intention — Meaning of words and phrases. — Although some of the cases, which have been referred to as illustrations of the rule that the surrounding facts and circumstances may be proved in evidence, may be deemed to have trenched unduly upon the ancient rule, it will be found that even those decisions recognize that written contracts cannot in general be varied by parol. The real difficulty arises in determining in each case whether the language of the instrument is ambiguous as shown, either by the context or by the circumstances attending the making of the same. If *no* such *ambiguity exists, no extrinsic evidence can be received* to show the secret intention of the parties or that any other than the natural and primary meaning of the language used was intended.[1] We shall see that this view is not inconsistent with the admission of proof of usage to explain the writing; nor is it at all inconsistent with the well settled rule that parol evidence may be given of the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of common

words which, from the context, appear to have been used in a peculiar sense.[2] Thus, the testimony of experts was received in a New York case to show that the word "port-risk" in a marine insurance policy meant a risk upon a vessel while lying in port and before she has taken her departure.[3] Again in an action on an insurance policy covering "stereotpye, electrotype and steel plates and cuts," proof was allowed to show the meaning of the word "cuts" as used in the business; and the court held that when words have acquired an exact and technical meaning in any trade or business and are used in a contract relating to such trade or business, they are *prima facie* to be construed in the meaning or sense which they have acquired in that business.[4] In all these cases the court is simply ascertaining the meaning of the *written language* and the intention of the parties, not their secret or unexpressed intention, but the intention as stated in the writing. Words are to be understood in their ordinary and popular sense, unless they have acquired a particular sense in respect to the subject matter, distinct from the popular sense.[5] Another old and familiar illustration of the rule is the case in which testimony was allowed to show the meaning of the words "bankers" and "mod" in a sculptor's will.[6] Another singular illustration is found in a Kentucky case where it was held admissible

on an indictment under the statute against dueling to prove that a letter demanding the "satisfaction due from man to man" and authorizing a friend to make the "necessary arrangements" meant a challenge to a duel.[1] In the same way if the handwriting is obscure or blurred, defaced or for any reason difficult to be read, the testimony of experts may be received to ascertain the real language.[2]

1, Shore v. Wilson, 9 Clark & F. 525; American Bible Society v. Pratt, 9 Allen 109; Best v. Hammond, 55 Pa. St. 409; Drew v. Swift, 46 N. Y. 204; Jackson v. Sill, 11 Johns. 201; 6 Am. Dec. 363; Cotton v. Smithwick, 66 Me. 360; Sherwood v. Sherwood, 45 Wis. 357; 30 Am. Rep. 757; Fitzpatrick v. Fitzpatrick, 36 Iowa 674; 14 Am. Rep. 538; Kurtz v. Hibner, 55 Ill. 514; 8 Am. Rep. 665; King v. Merriman, 38 Minn. 47; Hill v. Priestley, 52 N. Y. 635; Morss v. Salisbury, 48 N. Y. 637; Yates v. Pym, 6 Taunt. 446.

2, Nelson v. Sun Ins. Co., 71 N. Y. 453; Loom Co. v. Higgins, 105 U. S. 580; Houghton v. Watertown Ins. Co., 131 Mass. 300; Mercer Co. v. McKee's Adm., 77 Pa. St. 170; Hatch v. Douglas, 48 Conn. 116; 40 Am. Rep. 154; Walrath v. Whittekind, 26 Kan. 482.

3, Nelson v. Sun Ins. Co., 71 N. Y. 453.

4, Houghton v. Watertown Ins. Co., 131 Mass. 300.

5, Robertson v. French, 4 East 135; Taylor v. Briggs, 2 Car. & P. 525; Smith v. Wilson, 3 Barn. & Adol. 728; Clayton v. Gregson, 4 Nev. & M. 602; United States v. Peck, 102 U. S. 64; Emery v. Webster, 42 Me. 204; 66 Am. Dec. 274; French v. Hayes, 43 N. H. 30; 80 Am. Dec. 127; Cornwell v. Cornwell, 91 Ill. 414; Nelson v. Morse, 52 Wis. 240.

6, Goblet v. Beechey, 3 Sim. 24.

7, Com. v. Pope, 3 Dana (Ky.) 418.

8, Masters v. Masters, 1 Wms. (P.) 425; Norman v. Morrell, 4 Ves. 769; Goblet v. Beechey, 3 Sim. 24; Armstrong, v. Burrows, 6 Watts (Pa.) 266; Fenderson v. Owen, 54 Me. 372; 92 Am. Dec. 551; Paine v. Ringold, 43 Mich. 341; County of Des Moines v. Hinkley, 62 Iowa 642.

§464. Usages of trade — Illustrations. In respect to contracts, parol evidence is often received on the ground that the parties have not stated the contract in all its details, but only those which were necessary to be stated by specific agreement; and that there has been left to implication those incidents which a uniform usage would annex, and according to which the parties must be understood to contract, unless they expressly exclude them. It is on this principle that, in a great number and variety of cases in England and in this country, parol evidence has been admitted of local or general *usages of trade* and commerce to ascertain the true meaning of written contracts.[1] For example, in a contract for the sale and delivery of a large quantity of barley, evidence was held admissible to show, in the absence of any special agreement as to the mode of delivery, that it was the custom of the trade to deliver grain in sacks;[2] and in an action against the buyer for refusing to accept a quantity of flax described in the contract as the plaintiff's "crop of flax," it was held admissible to show that, by the usage in the trade, the term included the amount of the current year's pro-

duction which the party had on hand whether purchased or produced by him.[3] So it was held admissible to prove that in the lumber trade a general usage prevailed by which two packs of shingles of given dimensions were estimated as a thousand.[4] The case just cited is only one of the many cases in which it has been held admissible to prove by parol a general usage as to the mode of estimating, weighing or measuring the quantity of goods sold or materials furnished.[5] Evidence of usage is admissible to prove that a person whose name appears at the head of an invoice as vendor is not the contracting party,[6] and that by the custom of the trade sales of a given article are by sample, although the memorandum of sale is silent on the subject.[7] In an English case the written contract of sale was silent as to any allowance for warehouse rent; one party sought to prove that one month was the time allowed by the usage of trade; the other party offered evidence that an agreement by parol, not expressed, had been made for a different time. The evidence of the alleged parol agreement was excluded on the ground that it changed the written contract, but the proof of usage was held admissible.[8] On the same principle parol evidence of a usage is admissible for the purpose of showing that a contract which on its face would otherwise be construed as a bailment or other contract is in fact a sale.[9]

1, Southwell v. Bowditch, 1 C. P. Div. 374; 45 L. J. (C. P.) 374, 630; Fleet v. Murton, L. R. 7 Q. B. 126; 41 L. J. (Q. B.) 49; Humphrey v. Dale, 7 El. & B. 266; 26 L. J. (Q. B.) 137; Imperial Bank v. London Docks Co., 5 Ch. Div. 195; 46 L. J. (Ch.) 335; Hutchinson v. Tatham, L. R. 8 C. P. 482; 42 L. J. (C. P.) 260; Smith v. Wilson, 3 Barn. & Adol. 728; Brown v. Byrne, 3 El. & B. 702; 77 E. C. L. 702; Cochran v. Retberg, 3 Esp. 121; Moxon v. Atkins, 3 Camp. 200; Willmering v. McGaughey, 30 Iowa 205; 6 Am. Rep. 673 and note; Lamb v. Klaus, 30 Wis. 94. But see, Sweeney v. Thomason, 9 Lea (Tenn.) 359; 42 Am. Rep. 676 and note. On this general subject see exhaustive note, 1 Smith L. C 934–965; also articles, 2 Alb. Law Jour. 366; 49 Law Times 417; 22 Leg. Obs. 21, 118, 184; 15 *id.* 3; 12 Sol. Jour. & Rep. 514, 536, 562. See notes, 6 Am. Rep. 678–682; 10 L. R. A. 786.

2, Robinson v. United States, 13 Wall. 363.

3, Goodrich v. Stevens, 5 Lans. (N. Y.) 230.

4, Soutier v. Kellerman, 18 Mo. 509.

5, Merrick v. McNally, 26 Mich. 374; Heald v. Cooper, 8 Me. 32; Newhall v. Appleton, 114 N. Y. 140; Humphreysville Co. v. Vermont Co., 33 Vt. 92; Patterson v. Crowther, 70 Md. 124; Breen v Moran, 51 Minn. 525; Jones v. Hoey, 128 Mass. 585; Merchant v. Howell, 53 Minn. 295; Destrehan v. Louisiana Co., 45 La. An. 920; Thompson v. Brannon, 94 Ky. 490. See also cases cited in the last section.

6, Holding v. Elliott, 5 Hurl. & N. 117.

7, Syers v. Jones, 2 Exch. 111; Boorman v. Jenkins, 12 Wend. 566; 27 Am. Dec. 158; Oneida Manfg. Co. v. Lawrence, 4 Cow. 440.

8, Fawes v. Lamb, 8 Jur. N. S. 385.

9, Dawson v. Kittle, 4 Hill 107; Goodyear v. Ogden, 4 Hill 104; Irwin v. Clark, 13 Mich. 10; Chase v. Washburn, 1 Ohio St. 244; 59 Am. Dec. 623; Carlisle v. Wallace, 12 Ind. 252; 74 Am. Dec. 207; Hughes v. Stanley, 45 Iowa 622.

§ 465. Same — Principal and agent.— It has frequently been found necessary to prove some usage which added to the contract of principal and agent some incident or term not expressed therein. Contracts by agents for their principals are frequently mere memoranda in which only a few of the details are expressed. In such cases the usages or customs governing the trade must necessarily be proved by parol. It has been held competent to show that, by a custom of trade, where a broker purchases without disclosing the name of his principal, he is liable as principal.[1] A principal who deals in a market must be presumed to deal according to the custom of that market, thus making that custom a part of his contract.[2] As between principal and broker, a usage in London was allowed to be proved whereby, when the goods sold were to be paid for by a bill of exchange, the principal had five days in which to annul the contract, if not satisfied with the security.[3] But no usage can be proved for the purpose of showing that a broker has the right to disregard the positive written instructions of the principal,[4] as that, when directed to sell for cash, he may properly sell in some other manner.[5]

1, Dale v. Humfrey, El., Bl. & El. 1004; Hutchinson v. Tatham, L. R. 8 C. P. 482. But see, Trueman v. Loder, 11 Adol. & Ell. 589.

2, Sutton v. Tatham, 10 Adol. & Ell. 27; Bayliffe v. Butterworth, 1 Exch. 425. See also articles cited under last sec-

tion, and extended notes, 1 Smith L. C. 934–965; 50 Am. Dec. 103–105.

3, Hodgson v. Davies, 2 Camp. 536.

4, Barksdale v. Brown, 1 Nott & McC. (S. C.) 517; 9 Am. Dec. 720; Hall v. Storrs, 7 Wis. 253; Bliss v. Arnold, 8 Vt. 252; 30 Am. Dec. 467; Hutchins v. Ladd, 16 Mich. 493; Leland v. Douglass, 1 Wend. 490; Catlin v. Smith, 24 Vt. 85; Day v. Holmes, 103 Mass. 306; Parsons v. Martin, 11 Gray 111.

5, Catlin v. Smith, 24 Vt. 85; Hall v. Storrs, 7 Wis. 253; Bliss v. Arnold, 8 Vt. 252; 30 Am. Dec. 467; Barksdale v. Brown, 1 Nott & McC. (S. C.) 517; 9 Am. Dec. 720.

§ 466. Proof of usage — Bills of lading — Insurance. — Evidence of usage is often admitted to show the real intention of the parties in shipping contracts. Thus in a New York case, it was held admissible to prove that in transportation contracts the words "quantity guaranteed," used in a bill of lading, meant that the carrier should pay for any shortage;[1] and where a railroad company gave a bill of lading for goods to the terminus of its line, it was held admissible to prove a usage to deliver to the next common carrier, when the goods were billed to a point beyond such terminus.[2] In an English case it was held that where the bill of lading was silent on the subject, it was admissible to prove the custom of Liverpool whereby the ship owner was entitled to a deduction of three months' discount from the freight.[3] In like manner usage was proved to show that an agreement for the carriage

of a "full and complete cargo of sugar and molasses," means such cargo packed in the way in which such merchandise is generally packed to be carried.[4] But *where the law has attached a fixed and certain meaning* to words used in a bill of lading, evidence of a usage to change this meaning is not proper. A familiar case illustrating this rule is that in which Justice Story refused to admit evidence offered to prove that the exception of damages of the sea extended to all losses, except those arising from the carrier's neglect.[5] In numerous cases there has been proof of usage to explain the meaning of *insurance contracts.* Many of the cases cited in a foregoing section were illustrations of this character, where proof of the meaning of words and phrases was held necessary and competent. The general doctrine is that, in such contracts, where the meaning of the words appears from the face of the contract to be ambiguous, or where it is made so by proof of extrinsic circumstances, parol evidence is admissible to explain the usage.[6] Thus, when the policy stipulated, "a watchman kept on the premises," it was held admissible to prove a usage among similar establishments to keep a watchman only during certain hours each day.[7] And when a policy on a factory provided for the keeping of water on each floor, together with a watchman at night, it was held proper to show that, by the usage of trade, the attic and basement were not considered floors.[8]

1, Bissell v. Campbell, 54 N. Y. 353.

2, Hooper v. Chicago & N. W. Ry. Co., 27 Wis. 81; 9 Am. Rep. 439.

3, Browne v. Byrne, 3 El. & B. 703; 18 Jur. 700.

4, Cathbert v. Cumming, 10 Exch. 809; 11 Exch. 405.

5, The Reeside, 2 Sum. (U. S.) 567. But see, Sampson v. Gazzam, 6 Port. (Ala.) 123; 30 Am. Dec. 578; Boon v. The Belfast, 40 Ala. 184.

6, Coit v. Commercial Ins. Co., 7 Johns. 385; 5 Am. Dec. 282; Sleght v. Rhinelander, 1 Johns. 193, 2 Johns. 532; Astor v. Union Ins. Co., 7 Cow. 203. See secs. 461 *et seq. supra.*

7, Crocker v. People's Ins. Co., 8 Cush. 79.

8, New York Bolting Co. v. Washington Ins. Co., 10 Bosw. (N. Y.) 428.

§ 467. Same—Contracts for services. The rule under discussion has been frequently applied in contracts for rendering services, and in contracts for furnishing materials, or erecting buildings, and in other similar contracts. Thus, under a written contract to work for a year and to lose no time, it was held admissible to prove a custom of the trade whereby the workmen were in the habit of taking certain holidays, and of being absent without the master's permission.[1] So under a contract wherein the plaintiff engaged as an actor for three years at a given salary per week, the defendant was allowed to prove the usage that, under an agreement in that business to continue for one or more years, actors were only paid during the theatrical season.[2] In cases where the written agree-

ment does not specifically state the nature of the services to be rendered or the mode or place, evidence of the usages of the trade is admissible to show the true meaning of the contract.[3] On the same principle parties have been allowed to prove by parol the customs of the trade as to the mode of estimating the number of brick in a pavement or wall,[4] as well as the custom of making deductions for openings in walls in the estimation of the work of masons or plasterers.[5] So when there is an agreement to pay a certain price per day for each man employed, it has been held admissible to prove the usage of the trade that ten hours constitute a day's work, as well as the right to charge a day and a quarter for each full day of twelve hours and a half.[6]

1, R. v. Stoke-upon-Trent, 5 Q. B. 303.

2, Grant v. Maddox, 15 M. & W. 737.

3, Hagan v. Domestic Co., 9 Hun 73; Price v. Mouat, 11 C. B. N. S. 509; Mumford v. Gething, 7 C. B. N. S. 305; Baron v. Plande, 7 La. An. 229.

4, Lowe v. Lehman, 15 Ohio St. 179. Contra, Sweeney v. Thomason, 9 Lea (Tenn.) 359; 42 Am. Rep. 676.

5, Walls v. Bailey, 49 N. Y. 464; 10 Am. Rep. 407; Symonds v. Lloyd, 6 C. B. N. S. 691. But see, Kendall v. Russell, 5 Dana (Ky.) 501; 30 Am. Dec. 696. It has also been held admissible to show by parol the meaning of the expression, "a frame house filled with brick," Fowler v. Ætna Ins. Co., 7 Wend. 270.

6, Hinton v. Locke, 5 Hill 437.

§ 468. Proof of custom between landlord and tenant — Other contracts.— The relaxation of the general rule in such manner as to allow parol evidence of customs and usage for the purpose of annexing incidents to or explaining the meaning of certain contracts has for a long time been of frequent occurrence in respect to contract dealings between landlord and tenant. In a well-known case Baron Parke explained that the courts had looked with favor upon evidence of usage and custom in this class of cases for the reason that the common law had done little to prescribe the relative duties of landlord and tenant; and that justice required proof of those usages which had grown up and become beneficial to the parties.[1] It was held in the leading English case on this subject that the tenant could have the benefit of a usage allowing the tenant his way-going crop after the expiration of his term, if not repugnant to the lease;[2] and in a leading case in this country, the court allowed proof of a local usage for the tenant to remove fixtures erected by himself during the term.[3] In each of the cases just cited, the lease was a formal written instrument. These decisions rest on the doctrine that, *as to those matters concerning which the lease is silent*, proof of general usage is competent, for the persons are deemed to contract with reference thereto. Other special usages which have been held

admissible to explain the intention of those making written leases have been the right to receive compensation for seed and labor, known as tenant right;[4] a custom that the incoming tenant should pay the outgoing tenant for straw left on the farm;[5] the usage of the country to show whether a structure of a given character is removable by the tenant;[6] the usage as to the time of paying rent,[7] and a custom by which the way-going tenant for years may harvest the grain sown the autumn before the determination of the lease.[8] But it has been held that a custom cannot be proved for the purpose of making the landlord liable for repairs.[9] Nor is parol evidence of a custom to repair admissible to control the express covenant of the landlord to repair.[10] It is obvious from the illustrations given in this and in the preceding sections that very wide latitude has been given for the explanation of written contracts by parol proof of usage. For the purposes of illustration, instances have been selected from those classes of written instruments in which such evidence is most frequently offered, but it need hardly be added that the *same principle applies to other contracts* and that, when the requisite conditions exist, the real meaning of any written contract may in the same manner be affected by proof of the usages which must have been relied upon by the parties. In order to ascertain the

intention of those who have executed written instruments the courts have often found it necessary to receive proof of usage not only in respect to informal contracts, but in respect to those more formal and solemn instruments *like deeds and grants* which are generally assumed to state in detail the full meaning of the parties.[11]

1, Hutton v. Warren, 1 M. & W. 474. See also note, 3 L. R. A. 331.

2, Wigglesworth v. Dallison, Doug. 201; 1 Smith L. C. 928 and extended note; Stultz v. Dickey, 5 Binn. (Pa.) 285.

3, Van Ness v. Pacard, 2 Peters 138.

4, Senior v. Armitage, Holt N. P. 197.

5, Muncy v. Dennis, 1 Hurl. & N. 216.

6, Wade v. Johnston, 25 Ga. 331; Youngblood v. Eubank, 68 Ga. 630; Thomas v. Davis, 76 Mo. 72; 43 Am. Rep. 756; Keogh v. Daniell, 12 Wis. 163; Van Ness v. Pacard, 2 Peters 138; Davis v. Jones, 2 Barn. & Ald. 166.

7, Doe v. Benson, 4 Barn. & Ald. 588; Buckley v. Taylor, 2 T. R. 600; Slay v. Milton, 64 Tex. 421.

8, Templeman v. Biddle, 1 Har. (Del.) 522; Howell v. Schenck, 24 N. J. L. 89; Foster v. Robinson, 6 Ohio St. 90; Biggs v. Brown, 2 Serg. & R. (Pa.) 14; Shaw v. Bowman, 91 Pa. St. 414.

9, Biddle v. Reed, 33 Ind. 529; Weinstein v. Harrison, 66 Tex. 546.

10, Stultze v. Locke, 47 Md. 562.

11, Shore v. Wilson, 9 Clark & F. 355; Doe v. Allen, 12 Adol. & Ell. 451; Amer. Bible Soc. v. Wetmore, 17 Conn. 186; Howard v. Amer. Peace Soc., 49 Me. 298; Button v. Amer. Tract Soc., 23 Vt. 349; Cortelyou v. Van Brundt, 2 Johns. 357; 3 Am. Dec. 439; Mitchell v. United States, 9 Peters. 711.

§ 469. General requisites of usages — Must be reasonable.—In this chapter the discussion of the admissibility of evidence to prove usage has been confined to those cases in which the object is to vary or explain written instruments by parol. This is not the place for any detailed treatment of those general rules of evidence which govern when parol contracts are to be affected by proof of custom. There are, however, certain essentials which should be shown to exist before any proof of usage can be given to affect any contract, either written or oral. To these essentials or qualities of usages we will now briefly call attention in this and in the following sections. *The usage must be reasonable.* The view has been suggested that usages of trade which are unreasonable will not gain a permanent foothold, and that if a usage has grown up this is of itself well nigh conclusive evidence that the usage is not unreasonable;[1] but it is, perhaps, a sufficient concession to this line of argument to admit that clear *proof of the existence of a custom raises a presumption in favor of its being a reasonable custom* and one not injurious to the community or to those who acquiesce in it.[2] Usages, although clearly proved to exist, do not necessarily have the force of law; and, as appears from the cases cited below, the courts have very generally claimed the right to reject those usages which

they have deemed prejudicial to the public interests or likely to work injury to the persons whom they affect. Thus, it was held in Maryland that a custom was unreasonable by which an agent may take compensation from both buyer and seller.[3] It is not a reasonable custom for an agent to accept checks as payment for the claim of his principal against third parties;[4] nor for an insurance agent, after the termination of the agency, to cancel all former policies and transfer the insurance to other companies;[5] nor for a mechanic who works up the material of an employer to keep for his own use so much of the material as may remain without the consent of the employer;[6] nor to show that a badly constructed building is according to custom;[7] nor that a miller's receipt for wheat is intended as a sale, and not bailment;[8] nor on a sale of sheep, that the wool did not go to the purchaser;[9] nor to deny days of grace on a bill of exchange;[10] nor for a railroad company to require all claims for losses to be made on the delivery of the goods,[11] nor for a railroad company to leave all turntables unfastened.[12] In a Massachusetts case the attempt was made to establish by parol a usage of the trade in the sale of cotton that no title should pass on sale and delivery without payment of the consideration within ten days, but it was held that the uncertainty as to the title of goods and the embarrassments to which commercial

transactions would be exposed were such objections to this usage as to require its rejection.[13] So a custom that banks should not correct mistakes unless discovered before the customer leaves the room was held unreasonable.[14] Numerous cases might be cited to show that the courts will not sustain a usage as unreasonable which tends to promote dishonesty or unfair dealing;[15] or which gives to one class an unfair advantage over another or takes away from any class the right to direct enjoyment of their own labor;[16] or which clearly tends to promote indecency or immorality;[17] or which is in restraint of trade;[18] nor is it admissible, when negligence is the issue, to justify carelessness by proof of facts showing a custom of negligence.[19] But the rules and customs which govern in the running of railway trains are proper subjects of proof in determining the question of negligence.[20]

1, McMasters v. Pennsylvania Ry. Co., 69 Pa. St. 374; 8 Am. Rep. 264; Barksdale v. Brown, 1 Nott & McC. (S. C.) 517; 9 Am. Dec. 720.

2, Cox v. Charleston Ins. Co., 3 Rich. L. (S. C.) 331; 45 Am. Dec. 771.

3, Raisin v. Clark, 41 Md. 158; 20 Am. Rep. 66.

4, Whitney v. Esson, 99 Mass. 308; 96 Am. Dec. 762.

5, Merchants' Ins. Co. v. Prince, 50 Minn. 53; 36 Am. St. Rep. 626.

6, Wadley v. Davis, 63 Barb. 500.

7, Anderson v. Whitaker, 97 Ala. 690; Cook v. Hawkins, 54 Ark. 423.

8, Wadsworth v. Allcott, 6 N. Y. 64.

9, Groat v. Gile, 51 N. Y. 431.

10, Woodruff v. Merchant Bank, 25 Wend. 673.

11, Memphis Ry. Co. v. Holloway, 4 Law & Eq. Rep. 425.

12, Ilwaco Ry. Co. v. Hedrick, 1 Wash. 446.

13, Haskins v. Warren, 115 Mass. 514.

14, Gallatin v. Bradford, 1 Bibb (Ky.) 209.

15, Paxton v. Courtnay, 2 Fost. & F. 131. See sec. 474 *infra*.

16, Metcalf v. Weld, 14 Gray 210.

17, Seagar v. Sligerland, 2 Caines (N. Y.) 219; Holmes v. Johnson, 42 Pa. St. 159.

18, Mayor v. Wilkes, 11 Mod. 48.

19, Calf v. Chicago, St. P., M. & O. Ry. Co., 87 Wis. 273; Rumpel v. Oregon Co., (Idaho) 35 Pac. Rep. 700; Congdon v. Howe Scale Co., 66 Vt. 255; East T., V. & G. Ry. Co. v. Kane, 92 Ga. 187; Kansas City, M. & B. Ry. Co. v. Burton, 97 Ala. 240; Earl v. Crouch, 16 N. Y. S. 770, affirmed in 131 N. Y. 613.

20, Kansas City Ry. Co. v. Webb, 97 Ala. 157; Flanders v. Chicago, St. P., M. & O. Ry. Co., 51 Minn. 193; O'Mellia v. Kansas City, St. J. & C. B. Ry. Co., 115 Mo. 205.

§ 470. The usage must be an established one.—It was the familiar common law doctrine that, in order to be binding, a usage must have existed time out of mind, or, to use the old phrase, "so long that the memory of man runneth not to the contrary."[1] But this rule was greatly relaxed in England, and has not in this country been deemed applicable to usages of trade.[2] In a New

York case the testimony showed that a usage had existed for thirty years. The court held this sufficient, and thus stated the rule: "The true test of a commercial usage is its having existed a *sufficient length of time to have become generally known*, and to warrant a presumption that contracts are made in reference to it."[3] Substantially the same rule has been declared by the supreme court of the United States.[4] If the usage is well established and generally known at the time of the execution of the contract, and the contract is executed with reference to it, it is not necessary to show how long the usage has existed.[5]

1, R. v. Johns, Lofft. 76; R. v. Joliffe, 2 Barn. & C. 54; Jenkins v. Harvey, 1 Cromp., M. & R. 877; Simpson v. Welles, L. R. 7 Q. B. 214; Beaufort v. Smith, 4 Exch. 450; Bailey v. Appleyard, 3 Nev. & P. 257; Scales v. Key, 11 Adol. & Ell. 819; Welcome v. Upton, 5 M. & W. 398.

2, Sewell v. Corp, 1 Car. & P. 392; Gould v. Oliver, 4 Bing. N. C. 134; Noble v. Kennoway, 1 Doug. 510.

3, Smith v. Wright, 1 Caines (N. Y.) 45; 2 Am. Dec. 162.

4, Adams v. Otterback, 15 How. 539.

5, Lamb v. Klaus, 30 Wis. 94. The following are cases in which different periods of time have been held sufficient or insufficient according to circumstances: Lowe v. Lehman, 15 Ohio St. 179, seven years; Cooper v. Berry, 21 Ga. 526; Adams v. Otterback, 15 How. 539.

§ 471. The usage must be known.— There are certain commercial customs and usages of which every person in the community is deemed to be cognizant, such, for ex-

ample, as those belonging to the law merchant. But the usages of *special trades*, and those *local usages* which may be limited to certain communities can not, of course, be presumed to be known to all.[1] These have been called usages, as contradistinguished from the generally recognized customs of business.[2] In respect to these usages there should be either proof of actual knowledge on the part of the person to be affected, or proof of circumstances from which such knowledge may be fairly implied.[3] But the exact reverse is held in regard to *notorious and uniform usages* of trade, for one who seeks to avoid the effect of such a usage must show that he was ignorant of it, the presumption being that all persons know general usages of trade.[4] The *customs of an individual* in his private business are not binding upon others, unless known. Thus, a guest who has no knowledge of the custom at a particular hotel to deposit large sums of money and other valuables with the clerk is not bound by such custom.[5] The same is true of the usage of a single lessor,[6] or of a particular mill,[7] railroad company[8] or bank.[9] In a New York case an attempt was made to establish by parol a usage in New York city whereby brokers were allowed to receive payment for goods sold for principals living out of the city, but it was held that, as the usage was local, it should have been clearly proved to be known to the principal at the time.[10]

So the usage of a particular merchant to charge his customers interest is not binding upon one who has no notice of the usage;[11] and the custom of an employer to require that notice be given by servants before they leave his employ must be shown to have been known by the servant at the time of the contract.[12] The same rule has been frequently applied in actions on insurance policies where evidence was offered to prove the special usages of the defendant company.[13] It is obvious, however, that a different rule should prevail when the usage relates, not to the mode of business of a particular individual, but to that *of a profession or trade.* It has frequently been declared that, if there is a general usage applicable to a particular profession, parties employing a professional or business man are supposed to deal with him according to that usage.[14] Although this may be a reasonable presumption, it is a presumption of fact merely which may be rebutted. In a New York case the proof showed that there was a uniform usage among the plasterers of Buffalo as to the mode of measuring work, and that the party against whom evidence of the usage was given was a builder who had resided in the city for ten years, yet in the decision Folger J., after reviewing the authorities, held that the defendant might testify that he had no knowledge of the usage.[15] The question under discussion has frequently arisen in

the dealings of *principals with their brokers.* It has been held that one who employs a broker to deal in a particular market is bound by the usages of that market, whether he has actual knowledge of such usages or not. These decisions have been placed on the ground that the agent could not act for his principal at all without conforming to the prescribed rules or usages; and that the principal must be deemed to know that fact.[16]

1, Sleight v. Hartshorne, 2 Johns. 531.

2, Clark v. Baker, 52 Mass. 186. As to customs and usages in general, see extended note, 1 Smith L. C. 934–965.

3, Moore v. Voughton, 1 Stark. 396; Brunnell v. Hudson Saw Mills, 86 Wis. 587; Chateaugay Co. v. Blake, 144 U. S. 476; National Bank v. Burkhardt, 100 U. S. 691; Milwaukee Investment Co. v. Johnston, 35 Neb. 554; Miller v. Burke, 68 N. Y. 615; Caldwell v. Dawson, 4 Met. (Ky.) 121; Pierce v. Whitney, 29 Me. 188; Martin v. Maynard, 76 N. H. 165; Mills v. Ushe, 16 Tex. 295; Pennell v. Delta Co., 94 Mich. 247; Marlatt v. Clary, 20 Ark. 251; Walsh v. Mississippi Trans. Co., 52 Mo. 434; Scott v. Whitney, 41 Wis. 504; Insurance Co. of North America v. Hibernia Insurance Co., 140 U. S. 565; Hostetter v. Park, 137 U. S. 30.

4, Robertson v. National Steamship Co., 139 N. Y. 416.

5, Berkshire Woolen Co. v. Procter, 7 Cush. 417.

6, Beatty v. Gregory, 17 Iowa 109; 85 Am. Dec. 546.

7, Schlessinger v. Dickinson, 5 Allen 47.

8, Detroit Ry. Co. v. Van Steinburg, 17 Mich. 99.

9, Allen v. Merchants' Bank, 22 Wend. 215; 34 Am. Dec. 289; Chesapeake Bank v. Brown, 29 Md. 483.

10, Farmers' Bank v. Sprague, 52 N. Y. 605.

11, Wood v. Hickock, 2 Wend. 501; Trotter v. Grant, 2 Wend. 413; Fisher v. Sargent, 10 Cush. 250; Turner v. Dawson, 50 Ill. 85; Goodnow v. Parsons, 36 Vt. 47.

12, Stevens v. Reeves, 9 Pick. 198.

13, Carter v. Boehm, 3 Burr. 1905; Luce v. Dorchester Ins. Co., 105 Mass. 297; 7 Am. Rep. 522; Taylor v. Ætna Life Ins. Co., 13 Gray 434; Stebbins v. Globe Ins. Co., 2 Hall (N. Y.) 632; Washington Ins. Co. v. Davison, 30 Md. 91; Hartford Ins. Co. v. Harmer, 2 Ohio St. 452; 59 Am. Dec. 684; Illinois Mut. Ins. Co. v. O'Neile, 13 Ill. 89; Schwartz v. Germania Ins. Co., 18 Minn. 448; Goodall v. New England Ins. Co., 25 N. H. 169; North Am. Ins. Co. v. Hibernia Ins. Co., 140 U. S. 565.

14, Sewell v. Corp, 1 Car. & P. 392; Pollock v. Stables, 12 Q. B. 765; Clayton v. Gregson, 5 Adol. & Ell. 302; Mayor v. O'Neill, 1 Pa. St. 342; Walls v. Bailey, 49 N. Y. 472; 10 Am. Rep. 407.

15, Walls v. Bailey, 49 N. Y. 464; 10 Am. Rep. 407.

16, Sutton v. Tatham, 10 Adol. & Ell. 27; Bayliffe v. Butterworth, 1 Exch. 425; Walls v. Bailey, 49 N. Y. 464; 10 Am. Rep. 407; Harris v. Tumbridge, 83 N. Y. 92; 38 Am. Rep. 398; Samuel v. Oliver, 130 Ill. 73.

§ 472. The usage must be consistent with the contract. — Since evidence of usage is received for the very purpose of ascertaining the true meaning of the contract, on the theory that the parties entered into their contract with reference to such usage, it is clear that proof of the usage should not be received, if it contradicts expressly or by implication the language of the contract. As was said by Lord Lyndhurst: "Usage may be admissible to explain what is doubtful, it is *never admissible to contradict what is plain.*"[1] This principle has long been generally recog-

nized as the one which should govern, although it would be difficult to reconcile many of the decisions which have attempted to apply the rule to the special contracts which were under consideration. A few instances will now be given of the application of this rule to different contracts. Such evidence was refused when offered, under written contract to deliver particular brands of flour, to prove a custom by which other brands of equal quality might be delivered.[2] In an action relating to the sale of hogs, to be delivered at the buyer's option, "by giving ten days' notice at any time in December," it was held that parol evidence was not admissible to show how such contracts were understood by stock dealers with respect to the notice.[3] Where the contract provided for delivery of goods on the cars at the place of shipment, a usage cannot be shown to prove that the place of delivery and payment is the place of destination;[4] and where a contract provides specifically for the amount of the services or for the mode of compensation, it is inadmissible to prove a usage for a different mode.[5] So where a note was given to a bank with authority to sell certain stock as security for the non-performance of a promise, it was held incompetent to show that, by the usage of the business, the bank had the right to dispose of the collaterals at pleasure, and on payment or ten-

der of the debt to return an equal number of the shares of the same kind of stock.[6] Nor can proof of usage be admitted to change the well known meaning of the letters C. O. D. in an express receipt;[7] nor, when the contract is to transport stock in open cars, can it be proved, to avoid responsibility, that there is a custom to carry stock in either kind of cars;[8] nor is it admissible to vary an express contract for the sending of a telegram by proof of an inconsistent usage.[9] The rule has frequently been applied in case of insurance policies. Thus, it was held inadmissible to show that a policy in blank is equivalent to one "for whom it may concern;"[10] that a usage could not be proved to establish a rate of premium different from that agreed upon,[11] or a different liability on the part of the company.[12] On the same principle if a lease provides that the landlord shall have the way-going crop, a usage giving it to the tenant cannot be proved;[13] and where a lease or contract for hiring is for a stated time, a custom cannot be proved to establish the right of either party to terminate it without notice at any time.[14] It need hardly be stated that *parties are not compelled to incorporate usages*, no matter how well established, *into their written agreements*. It may, however, be the main object of the writing to furnish evidence that in the particular case the usage has been dispensed with. The rule on this subject was

stated by Davis J. in a decision by the supreme court of the United States: "The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses according to the subject matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it."[15] An English case well illustrates the rule that, if there is an implied contradiction of the contract, the usage is not admissible. The custom of the country required a tenant to plow, sow and manure a certain portion of the land in the last year of his tenancy and entitled him on quitting to receive from the landlord a reasonable compensation for his labor, seed and manure. It was held that evidence of such custom should be rejected where the tenant had covenanted to plow, sow and manure in accordance with the custom, and where he was to be paid for the ploughing.[16]

1, Blackett v. Royal Ins. Co., 2 Cromp. & J. 249; DeCordora v. Barnum, 130 N. Y. 615; 27 Am. St. Rep. 538; Sheffield Furnace Co. v. Hull Co., 101 Ala. 446; Baltimore Base Ball Club v. Pickett, 78 Md. 375; Gilbert v. McGinnis, 114 Ill. 28.

2, Beals v. Terry, 2 Sandf. (N. Y.) 127.

3, Willmering v. McGaughey, 30 Iowa 205; 6 Am. Rep. 673 and note.

4, Duncan v. Green, 43 Iowa 678.

5, Partridge v. Insurance Co., 15 Wall. 573; Detroit Advertiser v. Detroit, 43 Mich. 116; Lonergan v. Courtney, 75 Ill. 580.

6, Allen v. Dykers, 3 Hill 593.

7, Collender v. Dinsmore, 55 N. Y. 200; 14 Am. Rep. 224.

8, Sager v. Portsmouth Ry. Co., 31 Me. 228; 50 Am. Dec. 659.

9, Grinnell v. Western U. Tel. Co., 113 Mass. 299; 18 Am. Rep. 485.

10, Turner v. Burrows, 5 Wend. 541.

11, Insurance Co. v. Wright, 1 Wall. 456.

12, Bargett v. Orient Ins. Co., 3 Bosw. (N. Y.) 385.

13, Stultz v. Dickey, 5 Binn. (Pa.) 285; 6 Am. Dec. 411.

14, Peters v. Stavely, 15 Law T. N. S. 275.

15, Barnard v. Kellogg, 10 Wall. 390.

16, Hutton v. Warren, 1 M. & W. 477; Webb v. Plummer, 2 Barn. & Ald. 746.

§ 473. Proof that the usage is general.—Since it is necessary that there should be knowledge of the usage, either actual or presumptive, before parties are bound thereby, it frequently becomes important to show

that the usage is general in its character. In most cases it may not be possible to prove the actual knowledge of the usage; and in such cases the usage must be shown to be so notorious or general that notice may be presumed. It is, of course, not necessary to the validity of a usage that it should exist throughout the whole country. *It suffices to show that the usage exists generally among the persons of any given class* in a city or locality.[1] It is very clear that a few isolated instances of a mode of doing business do not establish a usage of trade.[2] The rule was thus stated in a Massachussetts case in the charge to the jury which was approved by the supreme court: "It must be a custom of sufficiently long continuance that all parties may be presumed to know it; it must be uniform; it must be universal. It does not show a usage of trade to show that many persons or a majority of persons engaged in the business practice in a particular mode. To constitute a usage of trade, so as to have it affect the contract, the practice must be universal. It must be the mode in which persons in that trade do their business."[3] It has been held, however, that there may be exceptions to the usage, provided they are such as prove the rule.[4]

1, Gleason v. Walsh, 43 Me. 397; Thompson v. Hamilton, 12 Pick. 425; 23 Am. Dec. 619; Perkins v. Jordan, 35 Me. 23; Clark v. Baker, 11 Met. 186; 45 Am. Dec. 199; Lane v. Union Nat. Bank, 3 Ind. App. 299.

2, Berry v. Cooper, 28 Ga. 543; Champion v. Wilson, 94 Ga. 184; Bank v. Abell, 29 Md. 483; Larkin v. Lumber Co., 42 Mich. 296.

3, Porter v. Hills, 114 Mass. 110.

4, Champion v. Wilson, 64 Ga. 184; Berry v. Cooper, 28 Ga. 543; Bank v. Abell, 29 Md. 483; Larkin v. Lumber Co., 42 Mich. 296.

§ 474. To admit parol proof the usage must be lawful.—Evidence is not admissible to prove a usage which would *contravene the statute law* of the forum. Thus, it has been held that evidence of a usage to collect usurious interest is not admissible.[1] The same rule was applied in case of usage by which notaries in New York made demand on bills of exchange different from that provided by statute;[2] and where an attempt was made to enlarge the power of officers whose authority is defined by statute.[3] On the same principle where the statute gives a specific meaning to a word or phrase, that meaning cannot be varied by proof of usage. For example, where the statute requires that "two thousand pounds shall make one ton," a custom among dealers in a given article to sell by a larger number of pounds to the ton is inadmissible;[4] and where the statute provided that every pound of butter should weigh sixteen ounces, a custom that they should weigh eighteen ounces was held of no effect.[5] It has frequently been declared that no usage can be shown in opposition to the established

rules of *common law;*[6] but many cases might be cited in which proof has been allowed of usages inconsistent with common law rules. In his work on usages Mr. Lawson has collected a large number of cases in which usages in conflict with legal rules have been admitted, and also the principal cases in which such usages have been rejected.[7] He comes to the conclusion after reviewing the cases that a "usage is not invalid simply because it is different in its effect from the general principles of law applicable to the particular circumstances in its absence. But if it conflicts with an established rule of *public policy,* which it is not to the general interest to disturb, if its effect is injurious to the parties themselves in their relations to each other, if, in short, it is an unjust, oppressive or impolitic usage, then it will not be recognized in courts of justice, for it will lack one of the requisites of a valid custom, viz. *reasonableness.*"

1, Dunham v. Dey, 13 Johns. 40; Dunham v. Gould, 16 Johns. 367; 8 Am. Dec. 323; Greene v. Tyler, 39 Pa. St. 361; Jones v. McLean, 18 Ark. 456; Niagara Bank v. Baker, 15 Ohio St. 68; Gare v. Lewis, 109 N. C. 539.

2, Ostego Bank v. Warren, 18 Barb. 290; Commercial Bank v. Varnum, 3 Lans. (N. Y.) 86.

3, Walters v. Senf, 115 Mo. 524.

4, Evans v. Myers, 25 Pa. St. 114; Weaver v. Fegely, 29 Pa. St. 27; 70 Am Dec. 151.

5, Noble v. Durell, 3 T. R. 271.

6, Edie v. East India Co., 1 W. Black. 295; 2 Burr. 1216; Eager v. Atlas Ins. Co., 14 Pick. 141; 25 Am. Dec. 363;

Rapp v. Palmer, 3 Watts (Pa.) 178; Raisin v. Clark, 41 Md. 158; 20 Am. Rep. 66; Thompson v. Riggs, 5 Wall. 663; Barnard v. Kellogg, 10 Wall. 383; Frith v. Barker, 2 Johns. 327; Southwestern Freight Co. v. Stanard, 44 Mo. 71; 100 Am. Dec. 255; Meaher v. Lufkin, 21 Tex. 383; Inglebright v. Hammond, 19 Ohio 337; 53 Am. Dec. 430.

7, Lawson Usages 465 *et seq.* and cases cited. See sec. 469 *supra.*

§ 475. Parol evidence as to consideration.— It is another exception to the general rule under discussion that, in actions where written agreements are involved, the consideration stated is generally open to explanation. Thus, in actions on notes or other contracts, the defense is frequently interposed that the agreement was without consideration, or that the consideration has failed; and proof sustaining such a defense is admissible, provided it does not in other respects vary the legal effect of the contract.[1] For example, when the consideration stated has failed, another can be proved;[2] and if a bill of sale,[3] release or other written instrument[4] fails to state the entire consideration, the same may be shown; or if the consideration of a mortgage is stated to be for money advanced, it may be shown to have been as security for the indorsement of a note,[5] or that it was given partly as security for the debt of a third person,[6] to secure future responsibilities[7] or merely as collateral security.[8] So it may be shown that an instrument silent upon the subject was executed for a sufficient

consideration.[9] But if the parol *testimony proposed tends to change the contract* itself, instead of the consideration, *it should be rejected.*[10]

1, Long v. Davis, 18 Ala. 801; Waymack v. Heilman, 26 Ark. 449; Pettibone v. Roberts, 2 Root (Conn.) 258; Smith v. Brooks, 18 Ga. 440; Stackpole v. Arnold, 11 Mass. 27; 6 Am. Dec. 150; Erwin v. Saunders, 1 Cow. 249; Foy v. Blackstone, 31 Ill. 538; 83 Am. Dec. 246; Meyer v. Casey, 57 Miss. 615; Griffin v. Cowan, 15 La. An. 487; Anthony v. Harrison, 74 N. Y. 613; Herrick v. Bean, 20 Me. 51; Eaton v. Eaton, 35 N. J. L. 290; Thompson v. Thompson, 9 Ind. 323; 68 Am. Dec. 638 and note; Cross v. Rowe, 22 N. H. 77; Fechheimer v. Trounstine, 15 Col. 386; Barbee v. Barbee, 108 N. C. 581; Macomb v. Wilkinson, 83 Mich. 486; Halpin v. Stone, 78 Wis. 183; Fitzpatrick v. Moore, 53 Ark. 4; Walker v. Haggerty, 30 Neb. 120; Pray v. Rhodes, 42 Minn. 93; Volkenand v. Drum, 154 Pa. St. 616. See note, 1 L. R. A. 816–817.

2, Leifchild's Case, L. R. 1 Eq. 231; Tull v. Parlett, 1 Moody & M. 472; Dorsey v. Hagard, 5 Mo. 420; Cowan v. Cooper, 41 Ala. 187; Barbee v. Barbee, 109 N. C. 299, where the consideration stated was an advancement.

3, Nedvidek v. Meyer, 46 Mo. 600; Halpin v. Stone, 78 Wis. 183.

4, Pennsylvania Ry. Co. v. Dolan, 6 Ind. App. 109; Osborne v. Stringham, 1 S. Dak. 406.

5, McKinster v. Babcock, 26 N. Y. 378; Harrington v. Samples, 36 Minn. 200.

6, Metzner v. Baldwin, 11 Minn. 150.

7, Foster v. Reynolds, 38 Mo. 553; McKinster v. Babcock, 37 Barb. 265; Truscott v. King, 6 N. Y. 147; Lawrence v. Tucker, 23 How. 14.

8, Chester v. Bank of Kingston, 16 N. Y. 336; Pond v. Eddy, 113 Mass. 149; Fullwood v. Blanding, 26 S. C. 312; Kimball v. Myers, 21 Mich. 276; 4 Am. Rep. 487; Mulford v. Muller, 1 Keyes (N. Y.) 31; Aller v. Aller, 40 N. J. L. 446.

9, Trustees v. Saunders, 84 Wis. 570; Guidery v. Green, 95 Cal. 630.

10, Stillings v. Timmins, 152 Mass. 147.

§476. Proof of consideration in deeds.— Among the earlier decisions there was much conflict as to the rule in respect to deeds and other instruments under seal; and in numerous cases it was held that the *clause stating the consideration* must *be held conclusive* like other parts of the instrument, and not open to contradiction and explanation.[1] But the rule is now well settled that, although the consideration expressed in the deed is *prima facie* the sum agreed to be paid,[2] it *may still be shown*, as between the parties, that the real consideration of a deed or mortgage *is different from that expressed.*[3] Thus, the true consideration may be shown where none is expressed in the deed,[4] or where the consideration is expressed in general terms.[5] When the consideration is expressed in general terms, the particular consideration may be shown, as that the grantee agreed to assume a certain incumbrance,[6] or it may be shown to have been property, instead of money, as expressed.[7] So the sum named in the deed may be shown to include payment of a debt as well as the purchase price,[8] or to be in satisfaction for all the grantee's prior trespasses on the land conveyed.[9] So it may be shown that the real consideration was the extinguishment of a

debt;[10] that the consideration was paid by another person than the one named in the instrument,[11] and also that there was a consideration in addition to the one stated.[12] When, after the mention of a particular consideration, the clause in the deed read "and for various other considerations," proof of such other considerations was allowed.[13] In an action for breach of the covenant in a deed against incumbrances, parol evidence may be received of an agreement that the grantee should hold the entire consideration and apply it to extinguish existing incumbrances.[14] The rule on this subject has been thus stated in a Maine case: "The *only effect of the consideration clause* in a deed is to estop the grantor from alleging that it was executed without consideration, and to prevent a resulting trust in the grantor. For every other purpose, it may be varied or explained by parol proof. The grantor may show, nothwithstanding the acknowledgment of payment, that no money was paid, and recover the price, in whole or part, against the grantee."[15] It has been held in numerous cases that while the grantor cannot so far impeach the deed as to defeat the title which has passed by showing want of consideration, yet he may show that the consideration remains unpaid in an action to recover the same.[16] So in *actions on a warranty* in a deed, the defendant may show for the purpose of reducing

damages that the real consideration was less than that stated.[17] But in an action on a covenant of warranty brought by one to whom the grantee in a deed had conveyed, it was held that the grantor was not at liberty to show that the consideration was less than the sum stated in the deed.[18] Although the grantor cannot show want of consideration to defeat the conveyance, it need hardly be said that, as against strangers who attack the conveyance for *fraud*, no conclusive force can be claimed for the recital which states the consideration.[19] Generally, as against third persons, the recital of consideration is no evidence whatever;[20] and as against creditors or innocent purchasers without notice, the mere statement that a nominal consideration has been paid raises no presumption of a substantial consideration. In such cases the burden is on the the grantee to prove a sufficient consideration.[21] It will be seen from the illustrations already given that the tendency of later decisions is in the direction of the doctrine that the acknowledgment of payment in a deed is open to *almost unlimited explanation*, — in short, that the consideration clause is of no greater effect than a separate receipt for the money which might always be explained.[22]

1, Schemerhorn v. Vanderheyden, 1 Johns. 139; 3 Am. Dec. 304 and note; Maigley v. Hauer, 7 Johns. 341. See valuable note discussing the whole subject of parol evidence as to the consideration of deeds in 20 L. R. A. 101–114.

2, Clements v. Landrum, 26 Ga. 401; Belden v. Seymour, 8 Conn. 304; 21 Am. Dec. 661; McCrea v. Purmort, 16 Wend. 460; 30 Am. Dec. 103 and note; Barbee v. Barbee, 108 N. C. 581.

3, Morris Canal Co. v. Ryerson, 27 N. J. L. 467; Fall v. Glover, 34 Neb. 522; Rabsuhl v. Lack, 35 Mo. 316; Hill v. Whidden, 158 Mass. 267; Louisville Ry. Co. v. Neafus, 93 Ky. 53; Pierce v. Brew, 43 Vt. 292; Cutler v. Steele, 93 Mich. 204; Harper v. Perry, 28 Iowa 63; Parker v. Foy, 43 Miss. 260; 5 Am. Rep. 484; Reynolds v. Vilas, 8 Wis. 471; 76 Am. Dec. 238; McCrea v. Purmort, 16 Wend. 460; 30 Am. Dec. 103; Halpin v. Stone, 78 Wis. 183.

4, Warren v. Walker, 23 Me. 453.

5, Pierce v. Brew, 43 Vt. 292.

6, Hays v. Peck, 107 Ind. 389; McDill v. Gunn, 43 Ind. 315; Bristol Bank v. Stiger, 86 Iowa 344.

7, Carneal v. May, 2 A. K. Marsh. (Ky.) 587; 12 Am. Dec. 453; Steele v. Worthington, 2 Ohio 182; McCrea v. Purmort, 16 Wend. 460; 30 Am. Dec. 103.

8, Harwood v. Harwood, 22 Vt. 507.

9, Hodges v. Heal, 80 Me. 281; 6 Am. St. Rep. 199.

10, Mason v. Buchanan, 62 Ala. 110.

11, Anthony v. Chapman, 65 Cal. 73; Marks v. Spencer, 81 Va. 751.

12, Vail v. McMillan, 17 Ohio St. 617; Miller v. Goodwin, 8 Gray 542; Henderson v. Dodd, 1 Bailey Ch. (S. C.) 138; Perry v. Central Ry. Co., 5 Coldw. (Tenn.) 138; Hayden v. Mentzer, 10 Serg. & R. (Pa.) 329; Wood Machine Co. v. Gaertner, 55 Mich. 453; Bolles v. Sachs, 37 Minn. 315; Nichols v. Burch, 128 Ind. 324; Mobile Bank v. McDonnell, 89 Ala. 434; 18 Am. St. Rep. 137; Fraley v. Bentley, 1 Dak. 25; Nedvidek v. Meyer, 46 Mo. 600.

13, Benedict v. Lynch, 1 Johns. Ch. (N. Y.) 381; 7 Am. Dec. 491; Norris v. Ham, R. M. Charlt. (Ga.) 267; Pomeroy v. Bailey, 43 N. H. 118; Chesson v. Pettijohn, 6 Ired. (N. C.) 121; Tull v. Parlett, 1 Moody & M. 472.

14, Becker v. Knudson, 86 Wis. 14.

15, Goodspeed v. Fuller, 46 Me. 147; 71 Am. Dec. 576 and note; Cardinal v. Hadley, 158 Mass. 352; 35 Am. St. Rep. 492.

16, Wilkinson v. Scott, 17 Mass. 249; Kumler v. Ferguson, 7 Minn. 442; Rhine v. Ellen, 36 Cal. 362; Bullard v. Briggs, 7 Pick. 533; 19 Am. Dec. 292; McCrea v. Purmort, 16 Wend. 460; 30 Am. Dec. 103; Belden v. Seymour, 8 Conn. 304; 21 Am. Dec. 661; Watson v. Blaine, 12 Serg. & R. (Pa.) 131; 14 Am. Dec. 669; Whitbeck v. Whitbeck, 9 Cow. 266; 18 Am. Dec. 503; Eppes v. Randolph, 2 Call (Va.) 185; Duval v. Bibb, 4 Hen. & M. (Va.) 113; 4 Am. Dec. 506.

17, Garrett v. Stewart, 1 McCord (S. C.) 514.

18, Greenvault v. Davis, 4 Hill 643.

19, Rose v. Taunton, 119 Mass. 99; Spaulding v. Knight, 116 Mass. 148.

20, Tutwiler v. Munford, 68 Ala. 124; Rose v. Taunton, 119 Mass. 99.

21, Kelson v. Kelson, 10 Hare 385.

22, McCrea v. Purmort, 16 Wend. 460; 30 Am. Dec. 103; Goodspeed v. Fuller, 46 Me. 141; 71 Am. Dec. 572; Witbeck v. Waine, 16 N. Y. 532; McKinster v. Babcock, 26 N. Y. 378; Wilkinson v. Scott, 17 Mass. 249; Collins v. Tillou, 26 Conn. 368; 68 Am. Dec. 398; Harrison v. Castner, 11 Ohio St. 339; Holbrook v. Holbrook, 30 Vt. 432; Swafford v. Whipple, 3 Iowa 261; 54 Am. Dec. 498; Bolles v. Beach, 22 N. J. L. 680; Hamilton v. Maguire, 3 Serg. & R. (Pa.) 355; Prichard v. Brown, 4 N. H. 400; Peck v. Vandenberg, 30 Cal. 23; Ewing v. Wilson, 132 Ind. 223. See note, 3 Am. Dec. 306, as to parol proof. As to execution and delivery of deeds, see sec. 478 *infra*.

§ 477. Same — In cases of fraud. — As has been stated, the widest latitude is allowed to those attacking a conveyance for fraud. Whatever the consideration that is stated, they may show the actual facts, as

that the conveyance was a gift or advancement, or that it was for a less consideration than the one stated.[1] In order to support the deed when attacked by third persons it has in such cases been held admissible to show that there was another consideration or one in addition to that named in the deed, as that, in addition to the expressed consideration of love and affection, there was also a valuable consideration.[2] As between the parties and privies to a deed, evidence was held admissible to show that a conveyance was in reality an advancement from father to son, although a money consideration was the only one recited.[3] But in other cases it has been held that, where only a consideration of love and affection is stated, a money consideration cannot be proved, in other words, that the deed cannot be changed by showing a consideration of an entirely different species.[4] It must be borne in mind that, although wide latitude is given in other cases, it is not admissible as between parties and their privies, in the absence of fraud, to explain or contradict the consideration expressed for the *purpose of defeating or changing the legal effect of the conveyance.*[5]

1, Gelpcke v. Blake, 19 Iowa 263; Johnson v. Taylor, 4 Dev. (N. C.) 355; Myers v. Peek, 2 Ala. 648; Gordon v. Gordon, 1 Met. (Ky.) 285; Abbott v. Marshall, 48 Me. 44; McKinster v. Babcock, 26 N. Y. 378; Foster v. Reynolds, 38 Mo. 553; Metzner v. Baldwin, 11 Minn. 150.

2, Gale v. Williamson, 8 M. & W. 405; Brown v. Lunt, 37 Me. 423; Wait v. Wait, 28 Vt. 350; Buckley's Appeal, 48 Pa. St. 491; 88 Am. Dec. 468; Potter v. Everitt, 7 Ired. Eq. (N. C.) 152; Gordon v. Gordon, 1 Met. (Ky.) 285; Miller v. Bagwell, 3 McCord (S. C.) 562; Hair v. Little, 28 Ala. 236; Eystra v. Capelle, 61 Mo. 578; Reynolds v. Vilas, 8 Wis. 471; 76 Am. Dec. 238. But see, Ellinger v. Crowl, 17 Md. 361; Harrison v. Castner, 11 Ohio St. 339.

3, Clifford v. Turrill, 9 Jur. 633; Harrison v. Castner, 11 Ohio St. 339; Rockhill v. Spraggs, 9 Ind. 30; 68 Am. Dec. 607.

4, Emery v. Chase, 5 Me. 232; Hurn v. Soper, 6 Harr. & J. (Md.) 276; Griswold v. Messenger, 6 Pick. 517; Ellinger v. Crowl, 17 Md. 361; Peacock v. Monk, 1 Ves. Sr. 127.

5, Wilkinson v. Scott, 17 Mass. 257; Shephard v. Little, 14 Johns. 211; Morse v. Shuttuck, 4 N. H. 229; 17 Am. Dec. 419; Emery v. Chase, 5 Me. 332; Brooks v. Maltbie, 4 Stew. & P. (Ala.) 96; McCrea v. Purmort, 16 Wend. 460; 30 Am. Dec. 103; Belden v. Seymour, 8 Conn. 304; 21 Am. Dec. 661.

§ 478. Parol proof as to execution and delivery.— On the principle so often referred to that parol evidence is admissible to show that there never was any actual agreement, it may of course be shown that there was no proper execution or delivery of the apparent agreement.[1] Thus, it may be shown that the party signing the instrument was deceived; that its contents were falsely stated to him; or that his signature was obtained by the fraudulent substitution of a spurious document;[2] or that the note was signed with a fictitious name;[3] or that the paper was never intended as a contract;[4] or that the paper was a *mere memorandum*, and

not a contract.[5] The question has most frequently arisen in respect to negotiable paper, and is elsewhere discussed.[6] If a *deed* has never been delivered or if a party to an instrument obtains possession thereof by fraud or in any improper manner, this of necessity must be shown by parol; and such evidence is no contradiction of the writing.[7] So it may be shown that a deed was delivered in escrow,[8] and when an agreement was without consideration and was *delivered on conditions*, such conditions may be proved.[9] The rule was thus stated in a Massachusetts case: "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but to show that it never became operative, and that its obligation never commenced."[10] The question whether a paper setting forth a bilateral executory contract, signed only by one of the parties, was delivered and assented to as containing the whole contract is one for the jury under suitable instructions; and evidence of previous and contemporaneous conversations between the parties to prove that the paper was only a partial memorandum is admissible, this being consistent on its face with that view.[11] So it may be shown by parol that a deed was delivered to the grantee to await

his decision whether he would accept or not;[12] or that it was to be carried by the grantee to a third party;[13] or that it was to be examined and returned, if found defective,[14] or that it was delivered to await complete execution by other parties.[15] In a recent New York case it was held that, in an action on a written contract for the sale of lumber on credit, the defendants might show a verbal agreement with the plaintiff that their *obligation* to sell *should be contingent* on their obtaining satisfactory reports as to the plaintiff's financial condition. The court held the case within the rule, now quite well established, that parol evidence is admissible to show that a written paper, which in form is a complete contract of which there has been a manual tradition, was nevertheless not to become a binding contract until the performance of some *condition precedent* resting in parol.[16] But it cannot be shown that an agreement was made to the effect that a deed should not be operative, or that the land should be reconveyed without consideration.[17] It is on the same principle that it has often been held that one of the signers of a bond, when it is not executed by all whose names appear on its face, may show that there was an express agreement that it should not be operative, unless signed by all.[18] It is no violation of the general rule to admit parol proof that a written instrument was in fact

executed, when this fact comes in issue incidentally or collaterally; and where no attempt is made to prove the contents, the paper need not be produced.[19] In this connection we will give one of the exceptions as stated very broadly by Mr. Stephen: Parol evidence may be given to prove "the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property."[20] In an English case which illustrates this rule, a lease was to be given on a parol promise that the rabbits of the premises would be destroyed. The lease, however, did not mention the destruction of the rabbits, but simply reserved sporting rights. Parol proof of the verbal agreement was allowed.[21]

1, See secs. 440, 441 *supra.*

2, Franchot v. Leach, 5 Cow. 506; Dale v. Roosevelt, 9 Cow. 311; Van Valkenburgh v. Rouk, 12 Johns. 337; Johnson v. Miln, 14 Wend. 195; Tribble v. Oldham, 5 J. J. Marsh. (Ky.) 141.

3, Bartlett v. Tucker, 104 Mass. 336; 6 Am. Rep. 240.

4, Jones v. Hardesty, 10 Gill & J. (Md.) 404; 32 Am. Dec. 180.

5, Lathrop v. Bramhill, 64 N. Y. 365.

6, See sec. 507 *infra.*

7, Roberts v. Jackson, 1 Wend. 478; Clark v. Gifford, 10 Wend. 310; Black v. Sharkey, 104 Cal. 279; Jackson v. Myers, 11 Wend. 533. As to deeds in general, see secs. 495 *et seq. infra.*

8, Beall v. Poole, 27 Md. 645; Demesmey v. Gravelin, 56 Ill. 93. But not that the deed was delivered in escrow di-

rectly to the grantee or his agent, Hubbard v. Greeley, 84 Me. 340; Morrall v. Munn, 5 N. Y. 229; Duncan v. Pope, 47 Ga. 445.

9, Cuthrell v. Cuthrell, 101 Ind. 375; Julliard v. Chaffee, 92 N. Y. 535; Wilson v. Powers, 131 Mass. 539; Skaarass v. Finnegan, 31 Minn. 48; Beall v. Poole, 27 Md. 675; Clever v. Kirkman, 33 L. T. Rep. N. S. 672.

10, Wilson v. Powers, 131 Mass. 539; Michels v. Olmstead, 14 Fed. Rep. 219; Westeman v. Krumweide, 30 Minn. 313; Sweet v. Stevens, 7 R. I. 375; Rawlins v. Fisher, 24 Ind. 52; Reynolds v. Robinson, 110 N. Y. 654.

11, Thomas v. Barnes, 156 Mass. 581; Edwards Lumber Co. v. Baker, 2 N. Dak. 289; Courtenay v. Fuller, 65 Me. 156; Pym v. Campbell, 6 El. & B. 370; 88 E. C. L. 370.

12, Brackett v. Barney, 28 N. Y. 340.

13, Gilbert v. North Am. Fire Ins. Co., 23 Wend. 43; 35 Am. Dec. 543.

14, Graves v. Dudley, 20 N. Y. 76.

15, Chouteau v. Suydam, 21 N. Y. 179; Brackett v. Barney, 28 N. Y. 333.

16, Reynolds v. Robinson, 110 N. Y. 654.

17, Hutchins v. Hutchins, 98 N. Y. 56.

18, Pawling v. United States, 4 Cranch 219; State Bank v. Evans, 15 N. J. L. 155; 28 Am. Dec. 400; Fletcher v. Austin, 11 Vt. 447; 34 Am. Dec. 698; Guild v. Thomas, 54 Ala. 414; 25 Am. Rep. 703 and note; Chouteau v. Suydam, 21 N. Y. 179; Whitford v. Laidler, 94 N. Y. 145; 46 Am. Rep. 131. The same rule is applied to stock subscriptions, Gibbons v. Ellis, 83 Wis. 434.

19, Roberts v. Burgess, 85 Ala. 192.

20, Steph. Ev. art. 90 p. 163; Richards v. Day, 137 N. Y. 183; 33 Am. St. Rep. 704.

21, Morgan v. Griffiths, 6 Exch. 70.

§ 479. Parol proof of latent ambiguities. — A latent ambiguity is described by

Lord Bacon to be "that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity."[1] In a will case, the supreme court of the United States thus classified latent ambiguities: "Latent ambiguities are of two kinds: first, where the description of the devisee or the property devised is clear upon the face of the will, but it turns out that there is more than one estate or person to which the description applies; and second, where the devisee or property devised is imperfectly or, in some respects, erroneously described, so as to leave it doubtful what person or property is meant."[2] An illustration of a latent ambiguity which has borne the test since the time of Lord Bacon was thus stated by him: "If I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all, but if the truth be that I have the manors both of South S. and North S., this ambiguity is matter of fact; and, therefore, it shall be holpen by averment whether of them was that the party intended should pass."[3] To give other illustrations, if a conveyance is made to John Smith, and it appears that there are father and son or other persons bearing that name, or if a grant is made to a Presbyterian church of a given city, and the testimony shows that there are two Presbyterian churches in that

city,[5] if land is described as in a certain section, the township and range being omitted,[6] or if fifty cords of wood situated on a certain lot are mortgaged, and it appears that there was other wood on the same lot,[7] in each case, there arises a latent ambiguity. No ambiguity is apparent in such cases to the person construing the written instrument, until from the evidence of relevant surrounding circumstances, it is found that there is more than one person or thing answering the description given. In other words, the *ambiguity does not appear on the face of the instrument*, but lies hidden in the person or subject whereof it speaks.[8] It is an old and familiar rule that, when the ambiguity is thus raised by extrinsic evidence, it may be removed by the same means.[9] The general rule is stated by Tyndal C. J. that "in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject matter really intended to be devised."[10] This explanatory evidence is, of course, not admissible *to contradict, or add to, or subtract from the writing*. The theory on which the testimony is allowed is that the

instrument does describe the person or subject intended, and that the extrinsic evidence only enables the court to reject one of the subjects to which the description might apply, and to determine which was intended. Although a latent ambiguity does not usually render the instrument void, yet it may be as fatal as a patent ambiguity. This is true where the extrinsic evidence proves entirely unsatisfactory, and results in leaving the matter wholly to conjecture.[11]

1, Bacon Max. 23; Broom Leg. Max. 608. In general, see note, 6 L. R. A. 42.

2, Patch v. White, 117 U. S. 210; Gilmer v. State, 120 U. S. 586.

3, Bacon Max. 25; Putnam v. Bond, 100 Mass. 58; 1 Am. Rep. 82.

4, Coit v. Starkweather, 8 Conn. 289.

5, Wyandotte County Com. v. Wyandotte Presbyterian Church, 30 Kan. 620.

6, Halladay v. Hess, 147 Ill. 588.

7, Sargent v. Solberg, 22 Wis. 132. See also, Thacker v. Howell, (Ky.) 26 S. W. Rep. 82.

8, Hand v. Hoffman, 8 N. J. L. 78; Storer v. Freeman, 6 Mass. 435; 4 Am. Dec. 155; Peisch v. Dickson, 1 Mason (U. S.) 10; Mann v. Mann, 1 Johns. Ch. (N. Y.) 231.

9, Putnam v. Bond, 100 Mass. 58; 1 Am. Rep. 82; Patch v. White, 117 U. S. 210; Clay v. Field, 138 U. S. 464; Webster v. Atkinson, 4 N. H. 21; Jackson v. Sill, 11 Johns. 201; 6 Am. Dec. 363; Vernor v. Henry, 3 Watts (Pa.) 385.

10, Miller v. Travers, 8 Bing. 244; Atkinson v. Cummings, 9 How. 486.

11, Thomas v. Thomas, 6 T. R. 671; Tayl. Ev. sec. 1214.

§ 480. Parol evidence not allowed in case of patent ambiguities.— A patent ambiguity has been defined as one "which appears to be ambiguous upon the deed or instrument."[1] The following have been given as instances of patent ambiguities: a bequest to the "poor children" of a certain church,[2] "a handsome gratuity to each of my executors,"[3] a "bequest of some of my best linen,"[4] a devise to the "best men of the White Towers,"[5] a devise to the "heirs of A. B.," who is living[6] and a contract for a "team."[7] So in an agreement for the sale of land containing the clause "the vendor reserves the necessary land for making a railway through the estate to P.," such an ambiguity exists, and the agreement is void for uncertainty.[8] In the illustrations which have just been given the *persons or the subjects* named in the instrument *could not be definitely ascertained*, either from the paper itself or from such testimony as to the surrounding circumstances as is admissible under the rules already given. It has long been stated as a familiar rule that patent ambiguities cannot be explained by extrinsic evidence.[9] But the broad language in which this rule has been stated and the widely different meanings which have been attached to the phrase "patent ambiguity" have led to such confusion in the cases that it has frequently been suggested that the old distinction be-

tween latent and patent ambiguities is of little practical value.[10] While the rule is still generally recognzied, the difficulty arises in determining whether the ambiguity is patent within the meaning of the rule. It is very clear that all extrinsic evidence is not to be rejected merely because the instrument is of such doubtful meaning on its face as to admit of more than one interpretation. A great number of cases already cited in former sections show that words or phrases having an equivocal meaning may be thus explained.[11] But if the *instrument is unintelligible on its face* or inconsistent with itself, *and remains so after all the extrinsic evidence* as to the situation of the parties and the surrounding circumstances have been received, then a patent ambiguity exists.[12] In such cases no further extrinsic evidence can be received of the intention of the parties. As stated by Mr. Stephen: "If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say." [13]

1, 1 Greenl. Ev. sec. 297. See also note, 6 L. R. A. 41.

2, Dashiell v. Attorney General, 5 Harr. & J. (Md.) 392; 9 Am. Dec. 572; Estate of Hoffen, 70 Wis. 522, where a bequest to "the poor of Green Bay" was held void for uncertainty.

3, Jubber v. Jubber, 9 Sim. 503.

4, Peck v. Halsey, 2 P. Wms. 382.

5, Year-Book, 49 Ed. 3, cited in Winter v. Perratt, 9 Clark & F. 688.

6, Hall v. Leonard, 1 Pick. 27.

7, Ganson v. Madigan, 15 Wis. 153.

8, Pearce v. Watts, L. R. 20 Eq. 492.

9, Broom Leg. Max. 608.

10, Fish v. Hubbard, 21 Wend. 651; 2 Pars. Cont. 563. But see, Tayl. Ev. sec. 1213.

11, Fish v. Hubbard, 21 Wend. 651; Ely v. Adams, 19 Johns. 313; Gallagher v. Black, 44 Me. 99; Fenderson v. Owen, 54 Me. 372; 92 Am. Dec. 551; Crawford v. Jarrett, 2 Leigh (Va.) 630; Ennis v. Smith, 14 How. 400; Smith v. Bell, 6 Peters 68. See secs. 461 *et seq. supra.*

12, Elphinstone Deeds 105; 4 Phill. Ev. 524.

13, Steph. Ev. art. 91; Campbell v. Johnson, 44 Mo. 247.

§ 481. Patent ambiguity — How ascertained — Inaccuracies. — There are comparatively few cases in which a bare inspection of the instrument will show that no proper extrinsic evidence will afford any light on the construction of the writing. Hence the court cannot generally determine whether there is a patent ambiguity until extrinsic evidence of the surrounding circumstances has been received.[1] A distinguished writer has more fully expressed this view in the following language: "Words cannot be ambiguous because they are unintelligible to a man who cannot read; nor can they be ambiguous merely because the court which is called upon to explain them may be ignorant of a particular fact, art or science which was

familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this be not a just conclusion, it must follow that the question whether a will is ambiguous might be dependent, not upon the propriety of the language the testator has used, but upon the degree of knowledge, general or even local, which a particular judge might happen to possess, nay, the technical precision and accuracy of a scientific man might occasion his intestacy, a proposition too absurd for an argument."[2] The courts are reluctant to declare contracts void for uncertainty. It has been said that every shift will be resorted to rather than declare the gift void for uncertainty.[3] It by no means necessarily follows that an instrument fails as unmeaning or ambiguous because it may contain inaccuracies of description.[4] In conformity with the old maxim, *falsa demonstratio non nocet*, the instrument does not become inoperative by reason of some inaccuracy when there remains a sufficient description after rejecting the erroneous addition.[5] Thus, if one grants his house in A., which formerly belonged to B., and it appears that the grantor had at the time only one house in A., it will pass, though it never belonged to B.[6]

1, Wig. Wills 260.

2, Wig. Wills 259.

3, Doe *ex dem.* Winter v. Perratt, 6 Man. & G. 362.

4, Greenl. Ev. sec 299; Wig. Wills 174.

5, Goodtitle v. Southern, 1 Maule & S. 299; Miller v. Travers, 8 Bing. 244; Esty v. Baker, 50 Me. 325; 79 Am. Dec. 616; Bailey v. White, 41 N. H. 343; Park v. Pratt, 38 Vt. 552; Sargent v. Adams, 3 Gray 72; 63 Am. Dec. 718; Putnam v. Bond, 100 Mass. 58; 1 Am. Rep. 82; Loomis v. Jackson, 19 Johns. 449; Lodge v. Barnett, 46 Pa. St. 484; Hildebrand v. Fogle, 20 Ohio 147; Evansville v. Page, 23 Ind. 527; Colton v. Seavey, 22 Cal. 496; Atkinson v. Cummins, 9 How. 479; Broom Leg. Max. 629; Elphinstone Deeds 159. See note, 16 L. R. A. 321.

6, Proctor v. Pool, 4 Dev. (N. C.) 374; Den v. Leggatt, 3 Murph. (N. C.) 543; Boardman v. Reed, 6 Peters 344.

§ 482. Parol evidence as to wills — In general. — Every consideration which can be urged in favor of the rule that written contracts can not be varied or contradicted by parol evidence applies with peculiar force to wills. Such instruments are formal and solemn documents, often diverting from the natural course of inheritance large estates. They are presumed to have been made after due deliberation, and to express the final and full intention of the testator. Yet the illustrations already given, as well as those which follow, show that the books abound in cases where it has been held necessary in the construction of wills to ascertain their intent, not only from their face, but from the surrounding circumstances. As in the case of other instruments, the judges may, in interpreting the documents, put themselves in the place of the party as far as that is possible.[1] While extrinsic evidence of the circumstances, sit-

uation and surroundings of the testator and of his property is legitimate to place the court which expounds the will in the situation of the testator and thus to enable the court to understand the meaning and application of his language, yet the intention must be determined from the language of the instrument as explained by such extrinsic evidence, and no proof, however conclusive in its nature, can be admitted with a view of setting up an intention inconsistent with the writing itself.[2]

1, Smith v. Bell, 6 Peters 74; 1 Greenl. Ev. sec. 287.

2, Kurtz v. Hibner, 55 Ill. 514; Whitmore v. Learned, 70 Me. 276; Fitzpatrick v. Fitzpatrick, 36 Iowa 674; Magee v. McNeal, 41 Miss. 17; 90 Am. Dec. 354; Heidenheimer v. Bauman, 84 Tex. 174; 31 Am. St. Rep. 29; Waldron v. Waldron, 45 Mich. 350; Bingel v. Volz, 142 Ill. 214; 34 Am. St. Rep. 64; Charter v. Charter, L. R. 7 H. L. 364; Earl of Newburgh v. Countess of Newburgh, 5 Madd. 364; Miller v. Travers, 8 Bing. 244; Pickering v. Pickering, 50 N. H. 349; Griscom v. Evens, 40 N. J. L. 402; 29 Am. Rep. 251; Weston v. Foster, 7 Met. 297; Judy v. Gilbert, 77 Ind. 96; 40 Am. Rep. 289 and note; Avery v. Chappel, 6 Conn. 270; 16 Am. Dec. 53; Collins v. Hope, 20 Ohio 492; Thomas v. Thomas, 6 T. R. 671; Hodgson v. Hodgson, 2 Vern. 593; Beaumont v. Fell, 2 P. Wms. 141. On the general subject of this and the succeeding sections see notes, 3 Am. Dec. 395; 40 Am. Rep. 292–295; 6 L. R. A. 321–324; 8 L. R. A. 740–749; also article, 28 Am. L. Rev. 321.

§ 483. Same — Illustrations.—It has been held that it cannot be proved by parol that a devise, absolute on its face, was intended to be held in trust;[1] or that a bequest was intended to be in lieu of dower;[2] or that

a clause was omitted by mistake;[3] or that a legacy was intended to be a charge on land,[4] or that the word "children" was intended to include illegitimate children.[5] Nor is a memorandum of the draughtsman of the will admissible to show that some other language than that used was intended.[6] Nor is testimony admissible to supply a complete blank in the name[7] of the devisee, or in the description of the land.[8] Although in some cases courts of equity have corrected *mistakes in wills* by supplying names or clauses,[9] as a general rule, no such omission can be supplied by parol.[10] When the word "revoke" was used in a codicil, where the word "confirm" was intended, it was held that the mistake could not be corrected by parol.[11] To what extent the general rule has been relaxed in respect to latent ambiguities and declarations of the testator will be seen in other sections.[12] It has been held inadmissible to prove by parol that a testatrix, who had made no provision for a child, believed him dead, there being nothing in the will to indicate such belief.[13] It by no means follows, however, that a will necessarily fails because a mistake has been made. In many of the cases hereafter cited extrinsic evidence was held admissible to ascertain which of the two persons or subjects answering the description equally well was in the mind of the testator, and intended by him. In many such cases the

extrinsic evidence enables the court to ascertain the intention and apparently to correct the mistake, while in fact, *no violence is done to the terms of the will.*

1, Elliott v. Morris, 1 Harp. Eq. (S. C.) 281.

2, Timberlake v. Parish; 5 Dana (Ky.) 345.

3, Webb v. Webb, 7 Mon. (Ky.) 626.

4, Massaker v. Massaker, 13 N. J. Eq. 264.

5, Shearman v. Angel, 1 Bailey Eq. (S. C.) 351; 23 Am. Dec. 166.

6, Taylor v. Morris, 90 N. C. 619.

7, Higgins v. Carlton, 28 Md. 115; 92 Am. Dec. 666.

8, Sewell v. Slingluff, 57 Md. 537.

9, Geer v. Winds, 4 Desaus. (S. C.) 85; Webb v. Webb, 7 Mon. (Ky.) 626.

10, Abercombie v. Abercombie, 27 Ala. 489; Sherwood v. Sherwood, 45 Wis. 357; 30 Am. Rep. 757.

11, *In re* Davy, 5 Jur. N. S. 252.

12, See secs. 479 *supra*, 484 *et seq. infra.*

13, Gifford v. Dyer, 2 R. I. 99; 57 Am. Dec. 708.

§ 484. Wills — Parol evidence to identify property.— The rule so often referred to, that extrinsic evidence may be given to apply the instrument to its proper subject matter or to the person intended, is one of frequent application in the construction of wills, as has already appeared from the cases heretofore cited. It requires but little examination of the cases or but little actual experience in the courts to ascertain that the descriptions

of property in wills, and even the descriptions of the intended beneficiaries are very often somewhat indefinite and even inaccurate. The courts deal somewhat leniently with such cases and seek to ascertain the intent of the testator, if this can be done without violation of the settled rules of evidence.[1] "Where the words of a will, aided by evidence of the material facts of the case are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended; and the will will be void for uncertainty."[2] On this general principle it often becomes necessary to prove by extrinsic evidence whether or not the testator had property answering to the exact description in the will, and, if not, what property he did have which sufficiently answers such description. The books abound in cases in which *wills have been upheld, although the subject matter has been indefinitely or inaccurately described.* Thus, in a celebrated case the testator bequeathed "£4 per cent. stock;" although several years before the bequest he had sold the stock and purchased annuities with the proceeds, extrinsic evidence of the situation of the testator and his property and of the surrounding facts was received by the aid of which the court construed the will to carry the annuities.[3] The same rule was applied where land was described correctly as land purchased of P., but the description was

erroneous in other respects;[4] and where land was described in a township in which the testator owned no land, the devise was upheld, there being in the will a reference to a "big spring" which was relied on to designate the land intended.[5] A recent decision of the supreme court of the United States well illustrates the principle under discussion. A testator in his will described a lot as numbered six in square number four hundred and three; parol evidence was received to show that he did not own the lot described, but did own lot number three in square number four hundred and six. It was held by a divided court that the extrinsic evidence raised a latent ambiguity and, taken in connection with the context of the will, showed that the lot really devised was the latter one.[6] This case and some of those last cited seem to hold that where there is an erroneous particular description of the devise, the express *assertion of ownership* by the devisor *is in the nature of a description*, and is sufficient to authorize extrinsic evidence to identify the land. The foregoing instances sufficiently illustrate the liberality with which the modern decisions admit evidence to identity the subject matter of the devise. It is clear that the maxim, *falsa demonstratio non nocet*, is given full effect, and that errors of description do not make void the bequest, provided enough is given to show with rea-

sonable certainty what was intended.[7] References will be found in the notes to other decisions in which a less liberal view has been taken.[8]

1, Townsend v. Downer, 23 Vt. 225; Jackson v. Wilkinson, 17 Johns. 146; McCorry v. King's Heirs, 3 Humph. (Tenn.) 267; 39 Am. Dec. 165; Merrick v. Merrick, 37 Ohio St. 126; 41 Am. Rep. 493; Chambers v. Watson, 60 Iowa 339; 46 Am. Rep. 70; Patch v. White, 117 U. S. 210. See elaborate notes, 8 Am. Rep. 669; 10 Am. L. Reg. N. S. 97; 16 L. R. A. 321; 6 L. R. A. 43.

2, Wig. Wills, prop. VI; Estate of Hoffen, 70 Wis. 522, bequest to the "Poor of the City of Green Bay."

3, Lindgrew v. Lindgrew, 9 Beav. 358; Selwood v. Mildmay, 3 Ves. Jr. 306. See note, 8 Am. Rep. 669.

4, Winkley v. Kaime, 32 N. H. 268; Allen v. Lyons, 2 Wash. C. C. 475. Contra, Kurtz v. Hibner, 55 Ill. 514; 8 Am. Rep. 665; 10 Am. L. Reg. N. S. 93; Fitzpatrick v. Fitzpatrick, 36 Iowa 674; 14 Am. Rep. 538; Judy v. Gilbert, 77 Ind. 96; 40 Am. Rep. 289; Sherwood v. Sherwood, 45 Wis. 357; 30 Am. Rep. 757; Bishop v. Morgan, 82 Ill. 358; 25 Am. Rep. 327.

5, Riggs v. Myers, 20 Mo. 239. Other illustrations of the same rule, Jackson v. Sill, 11 Johns. 201; 6 Am. Dec. 363; Allen v. Lyons, 2 Wash. C. C. 475; Winkley v. Kaime, 32 N. H. 268.

6, Patch v. White, 117 U. S. 210. The same rule was applied in the following cases: Hawkins v. Young, 52 N. J. Eq. 508; Eckford v. Eckford, 91 Iowa — ; 58 N. W. Rep. 1093; Skinner v. Harrison, 116 Ind. 139; Pocock v. Reddinger, 108 Ind. 573; 58 Am. Rep. 71; Grubb v. Foust, 99 N. C. 286; Decker v. Decker, 121 Ill. 341; Covert v. Sebern, 73 Iowa 564; Seebrock v. Fedawa, 33 Neb. 413; 29 Am. St. Rep. 488; Chambers v. Watson, 60 Iowa 339; 46 Am. Rep. 70 and long note.

7, Selwood v. Mildmay, 3 Ves. Jr. 306; Jackson v. Sill, 11 Johns. 201; 6 Am. Dec. 363; Eckford v. Eckford, 91 Iowa

— ; 58 N. W. Rep. 1093; Heidenheimer v. Bauman, 84 Tex. 174; 31 Am. St. Rep. 29 and note. See elaborate notes, 8 Am. Rep. 669; 10 Am. L. Reg. N. S. 97.

8, Kurtz v. Hibner, 55 Ill. 514; 8 Am. Rep. 665 and note; 10 Am. L. Reg. N. S. 93 and note; Doe v. Oxenden, 3 Taunt. 147; Bingel v. Volz, 142 Ill. 214; 34 Am. St. Rep. 64; Doe v. Hiscocks, 5 M. & W. 363; Miller v. Travers, 8 Bing. 244; Jackson v. Sill, 11 Johns. 212; 6 Am. Dec. 363; Jackson v. Wilkinson, 17 Johns. 146; Mann v. Mann, 1 Johns. Ch. (N. Y.) 231. See dissenting opinion, Eckford v. Eckford, 91 Iowa —; 58 N. W. Rep. 1093 citing many cases.

§ 485. Wills — Evidence to identify legatee.— On the same principle stated in the last section, extrinsic evidence of the character there referred to is frequently allowed to identify the legatee or devisee named in a will. Hence a misnomer or *misdescription* of a legatee or devisee *does not invalidate* the bequest, if either from the will itself or from some relevant extrinsic evidence the object of the testator's bounty can be ascertained.[1] Where a latent ambiguity of this kind is apparent, and it appears that there is no person in existence precisely answering the description in the will, parol evidence may be received to ascertain who was intended.[2] This principle has been applied in a great number of English cases. In a comparatively recent case it was extended somewhat beyond the usual rule. The devise was to "my nephew, Joseph Grant;" and it was found that both the testator's brother and the brother of the testator's wife had a son by that name. As

the term "my nephew" was applicable to both these persons, the court held it a latent ambiguity which could be explained by parol evidence.[3] Extrinsic evidence is, however, most frequently introduced *where there is no person precisely answering the description* in the will. In such cases the evidence is in perfect harmony with this rule of construction given by Sir James Wigram: "Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."[4]

1, St. Luke's Home v. Association, 52 N. Y. 191; 11 Am. Rep. 697; Holmes v. Mead, 52 N. Y. 332; Gardner v. Heyer, 2 Paige (N. Y.) 11; Andrews v. Dyer, 81 Me. 104; Covert v. Sebern, 73 Iowa 564; Smith v. Kimball, 62 N. H. 606. See note, 6 L. R. A. 43.

2, Webster v. Morris, 66 Wis. 366; 57 Am. Rep. 278.

3, Grant v. Grant, 5 C. P. 727.

4, Wig. Wills prop. II.

§ 486. Same, continued.— Mr. Wigram thus illustrates the proposition laid down in the last section: "Though the word child may be construed to mean illegitimate child, where the proper meaning of the word is of absolute necessity excluded, yet, if no such absolute necessity exist, the word shall receive no other than its strict and proper interpretation."[1] "So although the words son, child, grandchild etc. may be construed in a secondary sense, where the will would be insensible, if the primary meaning of the words were adhered to, yet it is only where that is the case that a departure from the strict sense of the words is permitted."[2] Extraneous evidence was also received when the bequest was to "my son John," and the testator had two sons of that name.[3] So where the devise was to J. C., and there were two persons, father and son, of that name,[4] and where the bequest was to "Robert Careless, my nephew, the son of Joseph Careless," and the extrinsic evidence showed that the testator had two nephews by the name of Robert, one a son of his brother John and the other son of his brother Thomas, but that he had no brother Joseph, the court, notwithstanding the misnomer, found that the extrinsic evidence sufficiently identified the nephew intended.[5] So extrinsic evidence was allowed to show the surrounding circumstances for the purpose of ascertaining who was intended where a legacy

was given to "—— Price, the son of —— Price."[6] The same rule has often been illustrated by American cases in which legacies have been sustained, although the parol evidence showed a misnomer or misdescription of individuals or corporations. Thus, evidence of all surrounding circumstances was allowed when neither of two claimants bore the name of the legatee in the will,[7] and where there were two or more of the same name as that given in the will.[8] Where the devise was to "the four boys," and it appeared that the testator had seven sons, parol evidence of the surrounding circumstances was allowed to identify the four that were intended.[9] And where a bequest was to Samuel, such evidence was allowed to show that William was intended, though there were persons of both names.[10] So it has been shown by parol that a devise to a person of one name was intended for a person of another name, where there is no person bearing the name mentioned in the will.[11]

1, Wig. Wills prop. II. sec. 25.

2, Wig. Wills prop. II. sec. 28.

3, Cheney's Case, 5 Coke 68 b.

4, Jones v. Newman, 1 W. Black. 60.

5, Careless v. Careless, 19 Ves. 601; 1 Mer. 384.

6, Price v. Page, 4 Ves. Jr. 680. *In re* De Rosaz, 2 Prob. Div. 66; 20 Eng. Rep. 597.

7, Washington v. Lee W. Appeal, 111 Pa. St. 572. As to corporations see, St. Luke's Home v. Association, 52 N. Y.

191; 11 Am. Rep. 697; Chappel v. Missionary Society, 3 Ind. App. 356; Lefevre v. Lefevre, 59 N. Y. 434; Faulkner v. National Sailors' Home, 155 Mass. 458; Tucker v. Aid Society, 7 Met. 188; Tilton v. American Bible Soc., 60 N. H. 377; 49 Am. Rep. 321.

8, Bodman v. American Tract Soc., 9 Allen 447.

9, Bradley v. Rees, 113 Ill. 327; 55 Am. Rep. 422.

10, Powell v. Biddle, 2 Dall. (Pa.) 70; 1 Am. Dec. 263; Thomas v. Stevens, 4 Johns. Ch. 607. Other illustrations: *In re* Gregory, 34 Beav. 600; Masters v. Masters, 1 P. Wms. 421; Lee v. Pain, 4 Hare 251; Gallup v. Wright, 61 How. Pr. (N. Y.) 286.

11, Hawkins v. Garland, 76 Va. 149; 44 Am. Rep. 158; Connolly v. Pardon, 1 Paige (N. Y.) 291; 19 Am. Dec. 433; Hockinsmith v. Slusher, 26 Mo. 237; Cresson's Appeal, 30 Pa. St. 437; Mound v. McPhail, 10 Leigh (Va.) 199.

§ 487. The rule where the description is more applicable to one subject or person than another.— The rule under discussion has been applied in a large number of cases where there is no person or corporation which corresponds in all particulars to the description given in the will, but where there is one which corresponds in many particulars, and no other which can be intended. In such case, the corporation or person will take under the will.[1] Thus, where a bequest was to be "equally divided between the Board of Foreign and the Board of Home Missions," extrinsic evidence was allowed to show that the testator had in mind the Board of Foreign Missions and the Board of Home Missions of the Presbyterian Church of the United

States.[2] "If the document has one distinct meaning in reference to the circumstances of the case, it must be construed accordingly; and evidence to show that the author intended to express some other meaning is not admissible."[3] We have seen that the courts deal very liberally in cases of misdescription where it is possible by *rejecting erroneous particulars* to arrive at the real intention of the testator. But it is to be constantly borne in mind that the extrinsic evidence of the character which has been discussed is to be received to apply the will to the subject matter or person, in other words, to ascertain the real intent expressed in the will, and *not to correct* the *mistakes* of the testator, *or to change the terms* of the will, *or to interpolate new provisions* therein.[4]

1, American Bible Society v. Wetmore, 17 Conn. 181; Ayers v. Weed, 16 Conn. 291; Trustees v. Teaslee, 15 N. H. 317; Dunham v. Averill, 45 Conn. 621; 29 Am. Rep. 642; Howard v. American Soc., 49 Me. 288; Webster v. Morris, 66 Wis. 366.

2, Gilmer v. Stone, 120 U. S. 586. Other cases illustrating rule as corporations: Tilton v. American Bible Soc., 60 N. H. 377; 49 Am. Rep. 321; Webster v. Morris, 66 Wis. 366; St. Luke's Home v. Association, 52 N. Y. 191; 11 Am. Rep. 697; Holmes v. Mead, 52 N. Y. 332; Gardner v. Heyer, 2 Paige (N. Y.) 11; Dunham v. Averill, 45 Conn. 61; 29 Am. Rep. 642; Tucker v. Seaman's Aid Soc., 7 Met. 188; 1 Jarm. Wills 330. See extended note, 46 Am. Rep. 72.

3, Steph. Ev. art. 91 sec. 6; American Bible Soc. v. Pratt, 9 Allen 109; Best v. Hammond, 55 Pa. St. 409; Jackson v. Sill, 11 Johns. 201; 6 Am. Dec. 363; Cotton v. Smith-

wick, 66 Me. 360; Sherwood v. Sherwood, 45 Wis. 357; 30 Am. Rep. 757; Fitzpatrick v Fitzpatrick, 36 Iowa 674; 14 Am. Rep. 538; Kurtz v. Hibner, 55 Ill. 514; 8 Am. Rep. 665; Van Nostrand v. Moore, 52 N. Y. 12.

4, Andrews v. Dobson, 1 Cox 425; Dowsett v. Sweet, Ambler 175; Francis v. Dichfield, 2 Coop. 531; Miller v. Travers, 8 Bing. 244; Doe v. Hiscocks, 5 M. & W. 370; Patch v. White, 117 U. S. 210; Eckford v. Eckford, 91 Iowa —; 58 N. W. Rep. 1093; Wallize v. Wallize, 55 Pa. St. 242.

§ 488. Meaning of words and terms in wills.—It is well settled that it may be shown by extrinsic evidence, for the purpose of identifying the person or subject matter, that the testator was accustomed to apply special names to certain persons as nicknames, or that he used to designate his property in some peculiar manner.[1] Thus, where a testator had owned two farms, parol evidence was received to show that he habitually described one of them as the "home farm;"[2] and in another case it was received to show that the testator and his neighbors had habitually described certain lands as "back lands."[3] Parol evidence has been received to show that a testator had habitually called a person by a wrong name.[4] So where property was conveyed in trust for the support of "Godly preachers of Christ's holy Gospel," evidence was received to show what class of ministers were known by that name;[5] and where land was described as "sixty acres, sec. 25, town 7 and forty acres, sec. 24, town 6, Jasper

county," evidence was received that the testator stated at the time of the drawing of the will that he did not remember the range, but that the will was to include all the land that he owned in that county.[5] Evidence of mere *collateral statements* of the character mentioned in this section respecting persons or things which it is necessary to identify are not regarded as declarations of intention within the meaning of the general rule that declarations of intention are not admissible. In accordance with rules already stated, if a will is in a foreign language,[7] in shorthand, in a cipher,[8] or obscurely written[9] or if technical terms are used,[10] parol evidence as to the meaning may be received; "and where the testator makes use of words which in their ordinary sense are intelligible, but which are used, by a certain class of persons to whom the testator belonged or in a certain locality where he dwelt, in a peculiar sense, parol evidence may be given to show the *fact* of such usage, unless it appears on the face of the will that the testator used the word in its ordinary sense."[11]

1, Austee v. Nelms, 1 Hurl. & N. 225; Lee v. Paine, 4 Hare 251; Doe v. Collins, 2 T. R. 498; Goodlittle v. Southern, 1 Maule & S. 299.

2, Boggs v. Taylor, 26 Ohio St. 604.

3, Ryerss v. Wheeler, 22 Wend. 148.

4, Lee v. Paine, 4 Hare 251.

5, Shore v. Wilson, 9 Clark & F. 565.

6, Chambers v. Watson, 60 Iowa 339; 46 Am. Rep. 70 and valuable note.

7, Masters v. Masters, 1 P. Wms. 421.

8, Clayton v. Lord Nugent, 13 M. & W. 200.

9, Goblet v. Beechy, 3 Sim. 24.

10, Goblet v. Beechy, 3 Sim. 24.

11, Jarm. Wills (R. & T. ed.) 732.

§ 489. Wills — Proof in case of latent ambiguity — Declarations of testator. — The rule has been established by a long line of cases that, when the words of the will apply with equal propriety to two or more subjects or persons, in other words, when there is a latent ambiguity, the intention of the testator may be shown by his declarations.[1] When the bequest was to "—— Price, the son of —— Price," a question was raised as to the identity of the legatee, as the description applied equally well to the father of the claimant; parol evidence was received of the declarations of the testator that he had made or would make provision by will for the claimant;[2] and so where the bequest was to "W. R., my farming man," and it appeared that the testator had two farming men answering to the description, evidence of his declarations was received.[3] Where a bequest was made for the benefit of the "children in G. S. District," and, from extrinsic evidence, it appeared doubtful which district was intended, the testator's declarations were

allowed to show his intention.[4] Where there was a devise to "the four boys," and the testator had seven sons, his declarations both before and after the execution of the will were received to identify the four intended.[5] In a Wisconsin case the will, together with extrinsic evidence of the situation of the premises described showed a latent ambiguity; and it was held admissible to prove by the declarations of the testator made at the time of the execution of the will that he intended to include in one of the devises the land upon which a certain barn was situated.[6]

1, *In re* Wolverton, 7 Ch. Div. 197; Reynolds v. Whelan, 16 L. J. (Ch.) 434; Doe v. Allen, 12 Adol. & Ell. 451; Burnet v. Burnet, 30 N. J. Eq. 595; Griscom v. Evans, 40 N. J. L. 402; Morgan v. Burrows, 45 Wis. 211; Turner v. Hollowell Sav. Inst., 76 Me. 527; Grant v. Grant, 3 L. J. Rep. N. S. 17. See elaborate note, 46 Am. Rep. 72.

2, Price v. Page, 4 Ves. Jr. 680.

3, Reynolds v. Whelan, 16 L. J. (Ch.) 434.

4, Gass v. Ross, 3 Sneed (Tenn.) 211.

5, Bradley v. Rees, 113 Ill. 327; 55 Am. Rep. 422.

6, Morgan v. Burrows, 45 Wis. 211; 30 Am. Rep. 717.

§ 490. Where there is no latent ambiguity, declarations of testator rejected.— "But if there is anything in the words of the will which renders the bequest obviously more applicable to one object or subject, than to any other, that must prevail; and no case for the admission of extrinsic evidence

exists."[1] In other words the rule that direct evidence to prove the intention of the testator should be excluded, unless there appears to be a latent ambiguity, should be applied with some strictness. In the absence of such latent ambiguity the declarations of the testator cannot be proved by the scrivener who drew the will to show that the will does not accord with the instructions given.[2] Nor are such declarations admissible to prove the reason for the striking out of certain words which were in the original draft of the will;[3] nor to show that in a gift to "children" he did not intend to include "daughters;"[4] nor to show that a bequest of property described with legal certainty was intended to cover other property, not included in such description;[5] nor that he intended to charge legacies upon land,[6] nor to show the extent of the interest given to a devisee.[7] The question sometimes arises *whether a given document is to be construed as a will or as a deed* or other disposition of property. This is a question to be settled, not by the declarations of the testator, but *by the language of the document*,[8] although when such doubt of the nature of the instrument is raised, the situation of the parties and the surrounding circumstances may be shown as in other cases.[9] In all such cases, there being no latent ambiguity, the admission of the declarations of the testator would be repugnant to the general rule of

evidence that the written instrument must be interpreted according to its terms. A further limitation in respect to the admission of the declarations of a testator has been thus declared: "If the description of the person or thing be *partly applicable* and *partly inapplicable to each of the several subjects*, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declarations of intention will be inadmissible." [10] In some of the states there are statutes making provision for children unintentionally omitted from the will. It has been held by several courts that the declarations of the testator may be received when this question is raised to show whether the omission was intentional or not.[11]

1, 1 Redf. Wills, 565; Doe v. Westlake, 4 Barn. & Ald. 57; Doe v. Hiscocks, 5 M. & W. 363; Jefferies v. Michell, 20 Beav. 15.

2, Canfield v. Bostwick, 21 Conn. 550; Dew v. Kuehn, 64 Wis. 293. See also, Jackson v. Sill, 11 Johns. 201; 6 Am. Dec. 363; Tucker v. Seaman's Aid Soc., 7 Met. 188.

3, Canfield v. Bostwick, 21 Conn. 550.

4, Den v. Baskerville, 11 How. 329.

5, Crosby v. Mason, 32 Conn. 482.

6, Massaker v. Massaker, 13 N. J. Eq. 264.

7, Kirkland v. Conway, 116 Ill. 438.

8, Burlington University v. Barrett, 22 Iowa 60; 92 Am. Dec. 376 and note; Jordan v. Jordan, 65 Ala. 301; Pat-

terson v. English, 71 Pa. St. 454; Hester v. Young, 2 Ga. 31; Walker v. Jones, 23 Ala. 448; Robertson v. Dunn, 2 Murph. (S. C.) 133; 5 Am. Dec. 525; Edwards v. Smith, 35 Miss. 197; Habergham v. Vincent, 2 Ves. Jr. 204; Gage v. Gage, 12 N. H. 371. See valuable note, 92 Am. Dec. 383–389.

9, Evans v. Smith, 28 Ga. 98; 73 Am. Dec. 751; Gage v. Gage, 12 N. H. 371; Robertson v. Smith, 2 Pro. & Div. 43.

10, Tayl. Ev. sec. 1226; Doe v. Hiscocks, 5 M. & W. 369.

11, Converse v. Wales, 4 Allen 512; Ramsdill v. Wentworth, 101 Mass. 125; 106 Mass. 320; Buckley v. Gerard, 123 Mass. 8; Lorings v. Marsh, 6 Wall. 337; Geer v. Winds, 4 Desaus. (S. C.) 85; Lorieux v. Keller, 5 Iowa 196; 68 Am. Dec. 696; Wilson v. Fosket, 6 Met. 400; 39 Am. Dec. 736. See valuable note, 39 Am. Dec. 740–744. But see the different rule adopted under the statutes of other states, Garraud's Estate, 35 Cal. 336; Bradley v. Bradley, 24 Mo. 311; Estate of Stevens, 83 Cal. 322; 17 Am. St. Rep. 252 and note; Pounds v. Dale, 48 Mo. 270; Chace v. Chace, 6 R. I. 407; 78 Am. Dec. 446.

¢ 491. Proof of declarations of testator — Time of making. — The earlier cases intimated that the declarations of the testator were not admissible, unless *contemporaneous* with the execution of the will.[1] But the later cases have rejected this distinction; and although contemporaneous declarations may be entitled to greater weight than those made before or after, they are admissible in evidence on the same principle.[2] In a well known English case it was held after the consideration of former cases that declarations made by the testatrix ten months after the execution of the will should not be rejected on the ground that they were not contempo-

raneous with the will;[3] and the same rule applies where the declarations are made *prior to the execution* of the will.[4] "Neither will the admissibility of declarations rest on the *manner* in which they were made, or on the *occasions* which called them forth, for whether they consist of statements gravely made to the parties chiefly interested, or of instructions to professional men, or of light conversations, or of angry answers to impertinent inquiries of strangers, they will be alike received in evidence, though the credit due to them will of course vary materially according to the time and circumstances."[5]

1, Thomas v. Thomas, 6 T. R. 671; Wagner's Appeal, 43 Pa. St. 102; Langham v. Sanford, 19 Ves. Jr. 649; Whitaker v. Tatham, 7 Bing. 637. So evidence may be given of declarations, showing testator's intention to revise a former will by cancelling one made subsequently, Pickens v. Davis, 134 Mass. 252; 45 Am. Rep. 322; Couch v. Eastham, 27 W. Va. 796; 55 Am. Rep. 346.

2, Doe v. Allen, 12 Adol. & Ell. 455; Doe v. Hiscocks, 5 M. & W. 369; Robinson v. Hutchinson, 26 Vt. 38.

3, Doe v. Allen, 12 Adol. & Ell. 455.

4, Jarm. Wills 756.

5, Tayl. Ev. sec. 1209; Trimmer v. Bayne, 7 Ves. Jr. 508.

§ 492. Same — To show mental condition, etc.— Where the issue is whether the will was obtained through *undue influence* or executed while the testator was mentally *incompetent*, the testimony takes a very wide range. The declarations of the testator may

then be relevant as to his mental condition.[1] Necessarily in this case the declarations are *not confined to the time of the execution of the will*, but those both before and after may be received, provided these are not too remote to throw light upon the mental condition of the testator at the time of the execution of the will.[2] Such declarations are admissible when the competency of the testator is in issue, not only for the purpose of attacking the will, but also *in support of it.*[3]

1, Williamson v. Nabers, 14 Ga. 286; Waterman v. Whitney, 11 N. Y. 157; 62 Am. Dec. 71; Shailer v. Bumstead, 99 Mass. 112; Boylan v. Meeker, 28 N. J. L. 274; McTaggart v. Thompson, 14 Pa. St. 149; Dennis v. Weeker, 51 Ga. 24; Robinson v. Adams, 62 Me. 369; 16 Am. Rep. 473; Comstock v. Hadlyme, 8 Conn. 254; 20 Am. Dec. 100; Roberts v. Trawick, 17 Ala. 55; 52 Am. Dec. 164 and full note. See also note, 3 Am. Dec. 395–399.

2, Waterman v. Whitney, 11 N. Y. 157; 62 Am. Dec. 71; Shailer v. Bumstead, 99 Mass. 112; Boylan v. Meeker, 28 N. J. L. 274; McTaggart v. Thompson, 14 Pa. St. 149; Dennis v. Weeker, 51 Ga. 24.

3, Doe v. Palmer, 16 Adol. & Ell. N. S. 758; Dennison's Appeal, 29 Conn. 402; Nell v. Potter, 40 Pa. St. 484; Roberts v. Trawick, 17 Ala. 55; 52 Am. Dec. 164.

§ 493. Same — Declarations — How limited.— But declarations of the character treated in the last section are admissible *only for the purpose of proving the condition of the testator.* They afford *no* substantive *proof of fraud, duress or undue influence*, and are admissible for no such purpose. There must be

independent proof and evidence exclusive of such declarations.[1] Of course, if the declarations are made at the time the fraud or undue influence is being effected, they might be admissible on other grounds, that is, as part of the *res gestae*. These declarations may, it is true, so far as they show the mental condition of the testator, constitute a part of the proof of undue influence, but standing alone they furnish no proof of the alleged undue influence. As was said in a New York case:[2] "The difference certainly is very obvious between receiving the declarations of a testator to prove a distinct external fact, such as duress or fraud, for instance, and as evidence merely of the mental condition of the testator. In the former case, it is mere hearsay, and liable to all the objections to which the mere declarations of third persons are subject. While in the latter, it is the most direct and appropriate species of evidence." The same general rule was applied in a Massachusetts case where the delarations were received subsequent to the will, but the proper limitations of the rule were stated, and the authorities reviewed.[3]

1, Jackson v. Kniffen, 2 Johns. 31; 3 Am. Dec. 390 and note; Comstock v. Hadlyme, 8 Conn. 254; 20 Am. Dec. 100; *In re* Hess Will, 48 Minn. 504; 31 Am. St. Rep. 665 and elaborate note on undue influence.

2, Waterman v. Whitney, 11 N. Y. 157, 165; 62 Am. Dec. 71, 76 and note.

3, Shailer v. Bumstead, 99 Mass. 112; Potter v. Baldwin, 133 Mass. 427; Jackson v. Kniffen, 2 Johns. 31; 3 Am. Dec. 390 and note; Reel v. Reel, 1 Hawks (N. C.) 248; 9 Am. Dec. 632; Rambler v. Tryon, 7 Serg. & R. (Pa.) 90; 10 Am. Dec. 444; Davis v. Calvert, 5 Gill & J. (Md.) 269; 25 Am. Dec. 282; Irish v. Smith, 8 Serg. & R. (Pa.) 573; 11 Am. Dec. 648; Comstock v. Hadlyme, 8 Conn. 254; 20 Am. Dec. 100; Nelson v. McGiffert, 3 Barb. Ch. (N. Y.) 158; 49 Am. Dec. 170; Robinson v. Hutchinson, 26 Vt. 38; 60 Am. Dec. 298. See note, 62 Am. Dec. 80. Contra, Roberts v. Trawick, 17 Ala. 55; 52 Am. Dec. 164.

§ 494. Parol proof of declarations as to revocation — Lost wills. — Generally statutes require the *revocation* of a will *to be in writing* with certain formalities, or to be accompanied by some *act amounting to* a virtual *destruction* of the instrument, such as burning or tearing. Hence, the rule has become settled that no declarations of the testator as to the question of revocation are admissible, except such as accompany the act of revocation. If made contemporaneously with such act, they tend to show the *animus revocandi*, and are part of the *res gestae*.[1] Although there has been considerable discussion of the question and some conflict of opinion, the weight of authority seems to be that subsequent declarations of a testator are admissible to prove the existence and contents of a lost will, as well as the fact that it had not been cancelled.[2] But the due and formal execution of the will must first be proved according to the statute, although it may be by a single witness.[3]

1, Waterman v. Whitney, 11 N. Y. 157; 62 Am. Dec. 71; Will of Ladd, 60 Wis. 187; 50 Am. Rep. 355; Doe *ex dem.* Perkes v. Perkes, 3 Barn. & Ald. 489; Doe *ex dem.* Reed v. Harris, 6 Adol. & Ell. 209; Bibb v. Thomas, 2 W. Black. 1044; Dan v. Brown, 4 Cow. 483; 15 Am. Dec. 395; Gay v. Gay, 60 Iowa 415; 46 Am. Rep. 78; Eschbach v. Collins, 61 Md. 478; 48 Am. Rep. 123; Graham v. Burch, 47 Minn. 171; 28 Am. St. Rep. 339 and note; Jackson v. Kniffin, 2 Johns. 31; 3 Am. Dec. 390 and long note. See very elaborate note on revocation of wills, 28 Am. St. Rep. 344–362.

2, Harring v. Allen, 25 Mich. 505; Sugden v. Lord St. Leonards, 1 Prob. Div. 154; 17 Eng. Rep. 453; Weeks v. McBeth, 14 Ala. 474; Patterson v. Hickey, 32 Ga. 156; Foster's Appeal, 87 Pa. St. 67; 30 Am. Rep. 340; Wilbourn v. Shell, 59 Miss. 205; 42 Am. Rep. 363.

3, Matter of Page, 118 Ill. 576; 59 Am. Rep. 395 and note.

§ 495. Parol evidence to explain deeds.— The general rule on this subject respecting deeds was long ago stated by Lord Thurlow as follows: "The rule is perfectly clear that, where a deed is in writing, it will admit of no contract that is not part of the deed; whether it adds to or deducts from the contract, it is impossible to introduce it on parol evidence."[1] It is on this principle that parol evidence will not be received to extend or enlarge the estate granted;[2] or to vary or enlarge covenants of warranty;[3] or to show that an absolute deed was only a conditional one;[4] or to engraft on the deed reservations not expressed therein;[5] or to show that by a conveyance of "a tract of land," only a moiety thereof was intended;[6] or to show that "half a lot" meant less than that

amount;[7] or that part of the land described in a sheriff's deed was intended to be excepted;[8] or otherwise to vary the description, if it is unambiguous;[9] or that the deed was not to be operative, as well as that a reconveyance should be made or a life estate reserved;[10] or an agreement that the consideration should be refunded in case of partial failure of title,[11] or otherwise to change the legal effect.[12] We will now call attention only to some of the exceptions. On the general principles already stated, parol evidence may be received for the purpose of showing that the deed *never had any legal existence*, as that it was invalid on account of *fraud or duress;* or that it was in *violation of the law* of the land, or *contrary to public policy*, or not binding by reason of *coverture, infancy* or *mistake.*[13] Although a deed is presumed to have been executed and delivered on the day of its date, yet, if it has no date or bears an erroneous or impossible date, parol evidence may be given *of the time of its execution and delivery.*[14] So an *erroneous description* of a party to the deed or other person may be corrected by extrinsic evidence which discloses the person intended.[15] Accordingly a mistake in the christian name[16] or surname[17] of the grantor or grantee may be explained. Where there are two or more persons of the name given in the deed, it may be shown by parol who was intended;[18] and where the

christian name of the grantee is left blank, parol evidence may be received to show who was intended.[19] So, where there was an erasure in a deed changing the name of the grantee from Elizabeth to Eliza, parol evidence was received to show that the two names referred to the same person.[20] But it cannot be shown by parol that the person named as grantee was not the one intended.[21] There is an important difference between the description of the grantees in a deed which is inherently uncertain and one which is merely imperfect and capable, on that account, of different applications. Extrinsic evidence is not admissible in the former case to make the conveyance effectual in favor of any particular person, while in the latter case, a resort to extraneous facts and circumstances may become necessary; and it is proper in order to ascertain the individual to whom the description was intended to apply.[22]

1, Elphinstone Deeds 3; Trullinger v. Webb, 3 Ind. 198; Skinner v. Hendrick, 1 Root (Conn.) 253; 1 Am. Dec. 43; Bryan v. Wash, 7 Ill. 557; Timms v. Shannon, 19 Md. 296; 81 Am. Dec. 632; Dodge v. Nichols, 5 Allen 548; Stine v. Sherk, 1 Watts & S. (Pa.) 195; Vermont Ry. Co. v. Hills, 23 Vt. 681; Marshal v. Dean, 4 J. J. Marsh. (Ky.) 583; Kimball v. Morrell, 4 Me. 368; Snyder v. Snyder, 6 Binn. (Pa.) 483; 6 Am. Dec. 493; Jackson v. Sternberg, 20 Johns. 49; Tobin v. Gregg, 34 Pa. St. 446; Kelley v. Saltmarsh, 146 Mass. 582; Lowdermilk v. Bowstick, 98 N. C. 299; Kirch v. Davies, 55 Wis. 287; Palmer v. Culbertson, 143 N. Y. 213.

2, Lothrop v. Foster, 51 Me. 367; Miller v. Washburn, 117 Mass. 371.

3, Raymond v. Raymond, 10 Cush. 134; Johnson v. Walter, 60 Iowa 315; MacLeod v. Skiles, 81 Mo. 595; Bever v. North, 107 Ind. 544; Cartier v. Douville, 98 Mich. 22.

4, Haworth v. Norris, 28 Fla. 763.

5, Austin v. Sawyer, 9 Cow. 39; McIlvaine v. Harris, 20 Mo. 457; 64 Am. Dec. 196; Smith v. Porter, 39 Ill. 28.

6, Child v. Wells, 13 Pick. 121.

7, Butler v. Gale, 27 Vt. 739.

8, Todd v. Philhower, 24 N. J. L. 796.

9, Madden v. Tucker, 46 Me. 367; Clark v. Baird, 9 N. Y. 183; Bratton v. Clawson, 3 Strob. (S. C.) 127; Rowland v. McCown, 20 Ore. 538.

10, Hutchins v. Hutchins, 98 N. Y. 56.

11, Putnam v. Russell, 86 Mich. 389.

12, Holley v. Younge, 27 Ala. 203.

13, *Ex parte* Morgan, 2 Ch. Div. 84; Collins v. Blantern, 2 Wils. 341; Elphinstone Deeds 5.

14, Styles v. Wardle, 4 Barn. & C. 908; Miller v. Hampton, 37 Ala. 342; McComb v. Gilkey, 29 Miss. 146; Draper v. Snow, 20 N. Y. 331; 75 Am. Dec. 408; Elphinstone Deeds 6, 125. But see, Hill v. Freeman, 73 Ala. 200; 49 Am. Rep. 48 and note.

15, Morgan v. Bonlat, 9 La. An. 29; Cleveland v. Burnham, 64 Wis. 347; Elphinstone Deeds 126–7.

16, Henderson v. Hackney, 16 Ga. 520; Peabody v. Brown, 10 Gray 45.

17, Scanlan v. Wright, 13 Pick. 523; 25 Am. Dec. 344.

18, Avery v. Stites, Wright (Ohio) 56; Coit v. Starkweather, 8 Conn. 289.

19, DeAyray's Case, 11 Coke Rep. 21 a; Leach v. Dodson, 64 Tex. 185.

20, Hanrick v. Patrick, 119 U. S. 156.

21, Whitmore v. Learned, 70 Me. 276.
22, Morse v. Carpenter, 19 Vt. 613.

§ 496. Evidence to explain latent ambiguities in deeds.— It is frequently necessary in the construction of deeds to apply the rules already given as to latent ambiguities in order *to identify the land* intended to be conveyed. Thus, where, although the description in a conveyance is sufficiently definite, it appears from extrinsic evidence that the words used are equally applicable to two different pieces of land, a latent ambiguity arises; and it may be shown by parol what land it was intended to convey.[1] In a Wisconsin case it was contended that a tax deed was void for uncertainty because the land was described as the "north twenty feet" of a lot, where the northerly line of the lot deflected twenty-five degrees from a due east and west course. But the court held it proper to prove by parol the general understanding among real estate dealers and conveyancers in that city as to the meaning of the term "north twenty feet," when used and applied to lots in that plat.[2] In a Massachusetts case the boundary called for in the plaintiff's deed was the "Shirley line," while in the deed upon which the defendant relied, it was the "Lunenburg line." These words were equally satisfied by the line which was in law the boundary between the two towns

or by a line which was universally considered to be such boundary at the time of the making of the deeds. It was held admissible to explain by parol evidence the latent ambiguity thus disclosed.[3] *In the absence of any latent ambiguity*, it would be a clear violation of the rules of evidence to receive parol proof to show that the grantor intended to convey a different tract from that described in the deed,[4] for example, that, when the whole is described, only a moiety was intended.[5] But if the lands are vaguely described, such evidence may be received *not to contradict the deed, but to identify the land;*[6] for example, to show that certain lands are well known in the community by the description given in the deed;[7] and to identify land thus indefinitely described, evidence has in some cases been received of *the acts of the parties* as tending *to show their understanding* and construction of the deed.[8] But private *declarations of the grantor* as to boundary lines are *not admissible to control the language of the deed.*[9] Where the description of the land only contained the survey numbers of section, town and range omitting the state, county and basis meridian, parol evidence was admitted to show that, when the conveyance was made, the grantor owned and resided upon lands in a given county in Alabama known by the same numbers as those in the conveyance.[10]

1, Hardy v. Mathews, 38 Mo. 121; Wharton v. Eborn, 82 N. C. 344; Stone v. Clark, 1 Met. 378; 35 Am. Dec. 370; Hall v. Davis, 36 N. H. 569; Miles v. Barrows, 122 Mass. 579; Lanman v. Crooker, 97 Ind. 163; 49 Am. Rep. 437; Swayne v. Vance, 28 Ark. 282; Elofrson v. Lindsay, 90 Wis. 203. For an exhaustive discussion of the authorities on parol explanation of ambiguities in deeds, see Browne Parol Ev. beginning p. 305. See also note, 12 Eng. Rep. 241–250; 40 Am. Dec. 109–111.

2, Jenkins v. Sharpf, 27 Wis. 477.

3, Putnam v. Bond, 100 Mass. 58; 1 Am. Rep. 82. See also, Chambers v. Ringstaff, 69 Ala. 140.

4, Norwood v. Byrd, 1 Rich. L. (S. C.) 135; 42 Am. Dec. 406; Emerick v. Kohler, 29 Barb. (N. Y.) 165; Reed v. Shenck, 2 Dev. (N. C.) 415; Massingill v. Boyles, 4 Humph. (Tenn.) 205; Pride v. Lunt, 19 Me. 115; Waugh v. Waugh, 28 N. Y. 94; Vosburgh v. Teator, 32 N. Y. 561; Ritchie v. Pease, 114 Ill. 353; Bratton v. Clawson, 3 Strob. (S. C.) 127.

5, Child v. Wells, 13 Pick. 121.

6, Pettit v. Shepard, 32 N. Y. 97; Halladay v. Hess, 147 Ill. 588; Ropley v. Klugh, 40 S. C. 134.

7, Shewalter v. Pirner, 55 Mo. 218; Woods v. Sawin, 4 Gray 322.

8, Moran v. Lezotte, 54 Mich. 83; Truett v. Adams, 66 Cal. 218; Lovejoy v. Lovett, 124 Mass. 270; Clark v. Wethey, 19 Wend. 320; Fletcher v. Phelps, 28 Vt. 258.

9, Gainey v. Hays, 63 N. C. 497; Clark v. Wethey, 19 Wend. 320.

10, Chambers v. Ringstaff, 69 Ala. 140.

§ 497. Parol evidence inadmissible to prove reservation. — No reservation can be engrafted upon a deed by parol in respect to fixtures which have become part of the realty, or in respect to the natural products of the

soil, such as growing trees. This would not only be in violation of the common law rules of evidence, but of the Statute of Frauds.[1] There is, however, a decided conflict in the decisions as to whether parol proof may be given of a prior or of a contemporaneous agreement by parol for the reservation of growing crops by the grantor, when there is no exception in the deed. It has been held in numerous cases that the admission of such proof is a clear violation of the rule under consideration;[2] and on the same principle, it has been held that such evidence cannot be given of a parol contemporaneous agreement that the grantor may hold possession until the maturity of another crop,[3] or that possession may be retained until a part of the purchase price has been paid.[4] So it has been held that no such proof can be given of the reservation of rent.[5] On the other hand the doctrine is declared in other cases that by parol agreement, prior to or contemporaneous with the deed, the grantor may sever and reserve the growing crops, although the deed contains no exception.[6] So it has been held admissible to prove an agreement by parol that the grantor might remain in possession for a time without the payment of rent;[7] that the purchaser should be entitled to the crop, such agreement not being inconsistent with the language of the deed,[8] and that a distinct agreement prior to the deed had been

made whereby the grantor should have the right to sell the manure on the land sold.[9] Decisions of this character rest on the general exception, already stated, that the general rule under discussion does not apply to agreements which are entirely distinct from, and which are *collateral to the written instrument.*[10]

1, Backenstoss v. Stahler's Adm., 33 Pa. St. 251; 75 Am. Dec. 592; Bank v. Crary, 1 Barb. 542; Slocum v. Seymour, 36 N. J. L. 138; 13 Am. Rep. 432; Sterling v. Baldwin, 42 Vt. 306; Jones v. Timmons, 21 Ohio St. 596; Detroit Ry. Co. v. Forbes, 30 Mich. 166; *In re* Perkins' Estate, 65 Vt. 313. On this general subject see extended note, 12 Eng. Rep. 241–250.

2, Austin v. Sawyer, 9 Cow. 39; Gibbons v. Dillingham, 10 Ark. 9; 50 Am. Dec. 233; Smith v. Price, 39 Ill. 28; 89 Am. Dec. 284; McIlvaine v. Harris, 20 Mo. 457; 64 Am. Dec. 196; Wintermute v. Light, 46 Barb. 278. Contra, Backenstoss v. Stahler's Adm., 33 Pa. St. 251; 75 Am. Dec. 592; Flynt v. Conrad, Phill. (N. C.) 190; 93 Am. Dec. 588; Merrill v. Blodgett, 34 Vt. 480; Harvey v. Million, 67 Ind. 90; Vanderkerr v. Thompson, 19 Mich. 82.

3, Melton v. Watkins, 24 Ala. 433; 60 Am. Dec. 481. But see, Hamilton v. Clark, (Tex. Civ. App.) 26 S. W. Rep. 515; Willis v. Hulbert, 117 Mass. 151.

4, Gilbert v. Buckeley, 5 Conn. 262; 13 Am. Dec. 57.

5, Winn v. Murehead, 52 Iowa 64.

6, See cases cited under note 2 *supra.*

7, Hersey v. Verrill, 39 Me. 271.

8, Robinson v. Pitzer, 3 W. Va. 335.

9, Strong v. Doyle, 110 Mass. 92.

10, See sec. 444 *supra.*

§498. Parol evidence as to warranties.— The question has often arisen whether

a *warranty*, prior to or contemporaneous with the deed, can be proved by parol. Where the instrument purports to contain the covenants of the grantor with respect to the property, to admit such evidence would seem a clear violation of the familiar rule that written contracts are not to be changed by parol testimony.[1] For example, where a deed contains a covenant of warranty against "all persons claiming under the grantor," parol evidence is not admissible to prove a general warranty against a title from other sources.[2] So where the grantor covenants against incumbrances generally, parol evidence is not admissible to show, in the absence of fraud or mistake, that certain known encumbrances were excluded;[3] and where a deed is absolute in form, verbal warranties in the nature of conditions made prior to the execution of the deed are not admissible.[4] Where a deed contains an express warranty against all claims except certain taxes, parol evidence is inadmissible to show that the warrantor agreed to pay such taxes. Under such circumstances a party can not accept a deed with such a covenant, and escape its form and effect by verbal protestations and stipulations to the contrary. By acceptance of the deed, the parol agreement is waived.[5]

1, Cabot v. Christie, 42 Vt. 121; 1 Am. Rep. 313. On this general subject see note, 5 Am. St. Rep. 199–201.

2, Raymond v. Raymond, 10 Cush. 134.

3, Long v. Moler, 5 Ohio St. 271; Hunt v. Amidon, 4 Hill 345; 40 Am. Dec. 283; Johnson v. Walter, 60 Iowa 315; Bever v. North, 107 Ind 544.

4, Marshall Co. v. Iowa Synod, 28 Iowa 360; Bryan v. Swain, 56 Cal. 616.

5, MacLeod v. Skiles, 81 Mo. 595; 51 Am. Rep. 254; Gilbert v. Stockman, 76 Wis. 62; 20 Am. St. Rep. 23.

§ 499. Same, continued.— On the same general principle, it has been held in an action for breach of covenant against incumbrances in a deed of land that parol evidence is not admissible for the purpose of proving that, prior to the execution of the deed, an oral agreement was made that the grantee would assume a liability growing out of an assessment upon the land for improvements, when such agreement is inconsistent with what was written.[1] But the courts receive evidence of such agreements *when they are not inconsistent with the deed* itself, and when they will serve to explain it, especially when they are an inducement to the making of the contract. For example, parol evidence has been received of an agreement by a vendor of land to pay for filling the same,[2] or for building a sewer,[3] as well as of an agreement to grade a street which was made an inducement to the grantee to buy a lot bounded by it.[4] Although the familiar rule that parol evidence cannot be received to vary or contradict instruments in writing is generally recognized as applicable to deeds,

there is a *class of decisions* in which evidence of prior and contemporaneous agreements has been received, and in which it has even been *held competent to prove warranties by parol.* Thus, in a Wisconsin case the action arose on a note for a portion of the purchase price; it was held competent for the grantee to prove by parol a warranty on the part of the grantor that the lands were good meadow lands, and also a breach of such warranty. While the general rule of evidence is recognized by the court, the distinction is made that contracts in respect to the sale and conveyance of land do not come within such general rule, as the deed is merely adapted to transfer the title, and generally contains only the ordinary convenants of title; and that *covenants as to quality* constitute a collateral or *independent agreement.*[5] On the same theory in an action by grantors to restrain the grantee from using the property for the sale of intoxicating liquors, evidence was held admissible to prove a parol agreement that part of the consideration for the grant was that the property should not be used for such purposes.[6] Where a deed of land which included a store building provided with shelving contained this clause, "this grant includes all the shelving in the building," it was held competent to receive the proof of the sale of personal property at the same time in order to show that it did not

pass by the terms of the deed.[7] So parol evidence of an agreement not to carry on the same business within a given area has been held admissible.[8]

1, Flynn v. Bourneof, 143 Mass. 277; 58 Am. Rep. 135.

2, McCormick v. Cheevers, 124 Mass. 262. See also, Page v. Monks, 5 Gray 492.

3, Carr v. Dooley, 119 Mass. 294.

4, Durkin v. Cobleigh, 156 Mass. 108, and cases there cited. See also note, 32 Am. St. Rep. 441.

5, Green v. Batson, 71 Wis. 54; 5 Am. St. Rep. 194 and full note; Miller v. Richthorn, 31 Pa. St. 260; Carr v. Dooley, 119 Mass. 294; McCormick v. Cheevers, 124 Mass. 262; Ludeke v. Sutherland, 87 Ill. 481; 29 Am. Rep. 66; Buzzell v. Willard, 44 Vt. 44; Ingersoll v. Truebody, 40 Cal. 603; Kingsbury v. Moses, 45 N. H. 223. But see, Dutton v. Gerrish, 9 Cush. 89; 55 Am. Dec. 45; Martin v. Hamlin, 18 Mich. 354; 100 Am. Dec. 181.

6, Hall v. Soloman, 61 Conn. 476.

7, Bretto v. Levine, 50 Minn. 168.

8, Pierce v. Woodward, 6 Pick. 206.

§ 500. As to deficiency of land in deeds.— The question has frequently arisen whether parol evidence can be received in an action for damages or for money had and received to show that the number of acres designated in the deed in question is incorrect. In the absence of fraud, it has generally been held that, in a court of law, when the deed states by way of description the number of acres in the whole tract, parol evidence cannot be received to show that the land was

sold at a given price per acre, and that there is a deficiency in the amount of land;[1] nor can a verbal warranty, prior to the conveyance, be proved.[2] But in a court of equity parol evidence may be received to correct a mistake as to the quantity of land named in the deed.[3]

1, Carter v. Beck, 40 Ala. 599; Howes v. Barker, 3 Johns. 506; 3 Am. Dec. 526; Kerr v. Calvit, 1 Miss. 115; 12 Am. Dec. 537; Cameron v. Irwin, 5 Hill 272; Nixon v. Porter, 38 Miss. 401; Faure v. Martin, 7 N. Y. 210; Clarke v. Lancastur, 36 Md. 196; 11 Am. Rep. 486. But see, White v. Miller, 22 Vt. 380; Ludeke v. Sutherland, 87 Ill. 481; 29 Am. Rep. 66.

2, Cook v. Combs, 39 N. H. 592; 75 Am. Dec. 241; Cabot v. Christie, 42 Vt. 121; 1 Am. Rep. 313; Wadhams v. Swan, 109 Ill. 46.

3, Paine v. Upton, 87 N. Y. 327; 41 Am. Rep. 371; Hill v. Buckley, 17 Ves. Jr. 394; Darling v. Osborne, 51 Vt. 148.

§ 501. Parol proof as to acknowledgments. — Although the acknowledgment of deeds before an officer is, under statutes, generally an act necessary to entitle the deed to record, the fact of such acknowledgment is not in all cases established beyond dispute by the certificate of an officer. It is true, however, that the making of the *official certificate* is generally regarded as *a judicial act;* that the certificate itself is the best evidence of the facts stated therein, and that the law imposes upon the officer the duty of ascertaining the truth of the matters stated by him.[1] But *as between the parties* to the con-

veyance, it is well settled that the acknowledgment may be impeached by parol proof that the same was never actually made, or that it was obtained by *fraud, duress or collusion* of which the grantee had knowledge.[3] The certificate of acknowledgment is *prima facie* evidence of the facts stated therein;[3] and the proof should be clear and conclusive to overcome the presumption of regularity.[4] There are strong and manifest reasons for the rule which has come to prevail that acknowledgments cannot be thus impeached as against *those who purchased subsequently* and in good faith, *without notice* of any irregularity or fraud. Purchasers in a majority of cases are compelled to rely upon the public records in their examination of titles; and there could be no reliance upon such records or upon titles, if the claims of *bona fide* purchasers might be defeated by parol evidence that parties had not in fact acknowledged deeds signed by them and recorded in compliance with every formality of law. The decisions uniformly establish the rule that, in cases where the certificate is regular in form, and the grantor knew that he was in the presence of a competent officer who was making an attempt to take the acknowledgment, it cannot be impeached as against an innocent purchaser on account of any error or omission in its taking.[5] On the other hand, when the *acknowledgment* is materially *defective* on its

face, as where something required by the statute is omitted, such defect cannot be helped out by parol evidence.[6] So where the record is *irregular* because the person taking the acknowledgment gives himself no official character in his certificate or subscription, parol evidence cannot be given to show that the person was in fact duly qualified to take the acknowledgment.[7] But in aid of such acknowledgment, the court may examine and take into consideration *matters stated in the deed* itself or in any part of it.[8]

1, Heeter v. Glasgow, 79 Pa. St. 79; 21 Am. Rep. 46; Lickmon v. Harding, 65 Ill. 505; Cover v. Manaway, 115 Pa. St. 338; 2 Am. St. Rep. 552. On the subject of this section see note, 1 Am. Dec. 81. Further as to acknowledgments, see sec. 532 *infra*.

2, Hecter v. Glasgow, 79 Pa. St. 79; 21 Am. Rep. 46; Miller v. Wentworth, 82 Pa. St. 280; Pickens v. Knisely, 29 W. Va. 1; 6 Am. St. Rep. 622 and note; Jamison v. Jamison, 3 Whart. (Pa.) 457; 31 Am. Dec. 536; Barnet v. Barnet, 15 Serg. & R. (Pa.) 72; 16 Am. Dec. 516; Schrader v. Decker, 9 Pa. St. 14; 49 Am. Dec. 538; Barrett v. Davis, 104 Mo. 549; Smith v. Ward, 2 Root (Conn.) 378; 1 Am. Dec. 80 and note; Stauch v. Hathaway, 101 Ill. 11; 40 Am. Rep. 193; Jordan v. Corey, 2 Ind. 385; 52 Am. Dec. 516 and note.

3, Borland v. Walrath, 33 Iowa 130; Hortienne v. Schnoor, 33 Mich. 274; Lickmon v. Harding, 65 Ill. 505; Van Orman v. McGregor, 23 Iowa 300.

4, Van Orman v. McGregor, 23 Iowa 300; Banning v. Banning, 80 Cal. 271; 13 Am. St. Rep. 156.

5, Williams v. Baker, 71 Pa. St. 476; Ridgely v. Howard, 3 Har. & McH. (Md.) 321; Pickens v. Knisely, 29 W. Va. 1; 6 Am. St. Rep. 622 and note; Kerr v. Russell, 69 Ill.

666; 18 Am. Rep. 634; Kocourek v. Marak, 54 Tex. 201; 38 Am. Rep. 623; White v. Graves, 107 Mass. 325; 9 Am. Rep. 38.

6, Watson v. Bailey, 1 Binn. (Pa.) 470; 2 Am. Dec. 462; Barnet v. Barnet, 15 Serg. & R. (Pa.) 72; 16 Am. Dec. 516; Ennor v. Thompson, 46 Ill. 214; Harty v. Ladd, 3 Ore. 353; Merritt v. Yates, 71 Ill. 636; 22 Am. Rep. 128; Cox v. Holcomb, 87 Ala. 589; 13 Am. St. Rep. 79; Jourdan v. Jourdan, 9 Serg. & R. (Pa.) 268; 11 Am. Dec. 724; Barnet v. Shakleford, 6 J. J. Marsh. (Ky.) 532; 22 Am. Dec. 100. See note, 52 Am. Dec. 520.

7, Johnston v. Haines, 2 Ohio 55.

8, Carpenter v. Dexter, 8 Wall. 513. See sec. 532 *infra*.

§502. Parol evidence to explain receipts.— It has been long well settled that a written receipt for the payment of money is not conclusive, and that it is open to explanation by parol.[1] Receipts are usually general in their expressions, and many matters not considered at the time might be controlled by such general expressions contrary to right and to the intention of the parties, hence such instruments are generally treated as *admissions open to explanation, and not as conclusive.* Thus, a tax receipt is not conclusive evidence upon the question for whom taxes are paid,[2] nor that the description of land therein is correct.[3] So a receipt for "currency" may be shown to have been for money,[4] and a receipt of payment for a bill of goods may be shown to have been given for a note of a third person.[5] So it may be shown that the receipt was given on condi-

tion that it should not be binding until a certain act should be performed,[6] and that a recital in partnership articles of the amount contributed by a partner is incorrect.[7] A certificate of deposit issued by a bank is in the nature of a receipt, and may be explained;[8] and the same is true of bankers' pass books.[9] So it may be shown that a receipt purporting to be for money was in fact given for securities.[10] So terms not expressed in the receipt may be supplied; and receipts given on settlements and on accounts are governed by the same rule.[11] Receipts which are executed in the form of releases under seal purporting to be in full of all demands may be explained by proof of fraud or mistake.[12] But *where the receipt purports to be a full settlement* or compromise of a claim, the courts have frequently refused to admit parol proof of the omission of other terms or conditions.[13]

1, Rambert v. Cohen, 4 Esp. 214; Skaife v. Jackson, 3 Barn. & C. 421; Wallace v. Kelsall, 7 M. & W. 273; Oakley v. State, 40 Ala. 392; Hawley v. Bader, 15 Cal. 44; Calhoun v. Richardson, 30 Conn. 210; Dunnagan v. Dunnagan, 38 Ga. 554; Carr v. Minor, 42 Ill. 179; Henry v. Henry, 11 Ind. 236; 71 Am. Dec. 354; Thompson v. Maxwell, 74 Iowa 415; Knox v. Barbee, 3 Bibb (Ky.) 526; Dund v. Pipes, 20 La. An. 276; Grant v. Frost, 80 Me. 202; Cramer v. Shriner, 18 Md. 140; Stackpole v. Arnold, 11 Mass. 27; 6 Am. Dec. 150; Brooks v. White, 2 Met. 283; 37 Am. Dec. 95; Hart v. Gould, 62 Mich. 262; Elsbarg v. Myrman, 41 Minn. 541; Shotwell v. Hamblin, 23Miss. 156; 55 Am. Dec. 83; McFadden v. Missouri Pac. Ry. Co., 92 Mo. 343; 1 Am. St. Rep. 721; Edgerly v. Emerson, 23 N. H. 555; 55 Am. Dec. 207; Swain v. Frazier, 35 N. J. Eq. 326; Johnson v. Weed, 9

Johns. 310; 6 Am. Dec. 279; Harper v. Dail, 92 N. C. 394; Shoemaker v. Stiles, 102 Pa. St. 549; Bulwinkle v. Cramer, 27 S. C. 376; 13 Am. St. Rep. 645; Tuley v. Barton, 79 Va. 387; McLane v. Johnson, 59 Vt. 237; Hill v. Durand, 58 Wis. 160; Lady Franklin, 8 Wall. 325; Erickson v. Brookings Co., 3 S. Dak. 434; Morse v. Rice, 36 Neb. 212; Fire Ins. Co. v. Wickham, 141 U. S. 564; Bank of British America v. Cooper, 137 U. S. 473. As to the general subject of receipts see also note, 11 Am. St. Rep. 393.

2, Rand v. Scofield, 43 Ill. 167; Elston v. Kennicott, 46 Ill. 187.

3, Paris v. Lewis, 85 Ill. 597.

4, Reading v. Traver, 83 Ill. 372.

5, Johnson v. Weed, 9 Johns. 310; 6 Am. Dec. 279.

6, House v. Low, 2 Johns. 378.

7, Lowe v. Thompson, 86 Ind. 503.

8, Hotchkiss v. Mosher, 48 N. Y. 478.

9, Commercial Bank v. Rhind, 3 Macq. 643.

10, Trisler v. Williamson, 4 Har. & McH. (Md.) 219; 1 Am. Dec. 396.

11, Tuley v. Barton, 79 Va. 387; Keen v. Beckman, 66 Iowa 672.

12, Jones v. Ward, 10 Yerg. (Tenn.) 160; Schultz v. Chicago Ry. Co., 44 Wis. 638; Butler v. Regents, 32 Wis. 124; Kentucky Cement Co. v. Cleveland, 4 Ind. App. 171; Fire Ins. Co. v. Wickham, 141 U. S. 564.

13, State v. Messick, 1 Houst. (Del.) 347; Coon v. Knap, 8 N. Y. 402; 59 Am. Dec. 502; Squires v. Amherst 145 Mass. 192; Goodwin v. Goodwin, 59 N. H. 548; Stapleton v. King, 33 Iowa 28; 11 Am. Rep. 109; White v. Richmond Ry. Co., 110 N. C. 456.

§ 503. Effect of receipts when not explained.— A written receipt is evidence of a high character. Although it is not conclu-

sive, it is *prima facie* evidence of the truth of the recitals which it contains. It is evidence of so satisfactory a character as *not to be overcome, except by clear and convincing testimony;* and the burden of proof as a matter of course rests upon the one attacking it.[1] But such circumstances of fraud or mistake or suspicion as would lead a court of equity to set aside a contract may be shown, either in an equitable or legal proceeding, to vary or impugn the receipt.[2] Although an instrument is in form a receipt, if it is in fact a *complete contract*, it is governed by the same rules in this respect as are other contracts, and cannot be varied by parol.[3] But if the instrument is of a *dual character*, being both a receipt and a contract, the part which is a receipt may be explained;[4] and, if a contract is incorporated in a receipt, or a receipt in a contract, the receipt may be varied, although the contract may not.[5] Thus, an instrument in the form of a receipt for goods specifying kinds, numbers, prices and total value, which is in the handwriting of the receiver and on which the other party indorses the money paid, is a contract of sale, and cannot be varied by parol.[6] "But when the receipt contains no general or vague expressions, but all is definitely descriptive of what is intended to be effected by it, such a receipt, like other writings in general, must not be assailed with parol testimony, unless on the ground of

fraud;"[7] and a receipt "in full of all demands" includes judgments; and parol proof to show the contrary is not admissible.[8] Obviously if the *contents* of a receipt are to be proved, the receipt is the best evidence.[9] Although the rule that receipts may be modified and explained by parol is one of very wide application, yet there are circumstances under which one giving a receipt may be estopped from offering proof of this character. Thus, it has frequently been held that a *receiptor* cannot relieve himself from liability by showing that *attached property* which was receipted for by him was not subject to attachment or not the property of the defendant,[10] although there has been much discussion and considerable conflict of opinion on this subject.[11]

1, Harden v. Gordon, 2 Mason (U. S.) 560; Winchester v. Grosvenor, 44 Ill. 425.

2, Fuller v. Crittenden, 9 Conn. 401; 23 Am. Dec. 364; Sessions v. Gilbert, Brayt. (Vt.) 75; Jones v. Ward, 10 Yerg. (Tenn.) 160.

3, Henry v. Henry, 11 Ind. 236; 71 Am. Dec. 354; Squires v. Amherst, 145 Mass. 192; James v. Bligh, 11 Allen 4; Sencerbox v. McGrade, 6 Minn. 484, 496; Coon v. Knap, 8 N. Y. 402; 59 Am. Dec. 502; Brown v. Brooks, 7 Jones (N. C.) 93; Stone v. Vance, 6 Ohio 246; Harrison v. Juneau Bank, 17 Wis. 340; Carpenter v. Jamison, 75 Mo. 285; Goodwin v. Goodwin, 59 N. H. 548; Thompson v. Williams, 30 Kan. 114.

4, Prairie School v. Haseleu, 3 N. Dak. 328; Burke v. Ray, 40 Minn. 34.

5, Alcorn v. Morgan, 77 Ind. 184; Smith v. Holland, 61 N. Y. 635; Tuley v. Barton, 79 Va. 387.

6, Schultz v. Coon, 51 Wis. 416; 37 Am. Rep. 839.

7, Raymond v. Roberts, 2 Aikens (Vt.) 204; 16 Am. Dec. 698.

8, Henry v. Henry, 11 Ind. 236; 71 Am. Dec. 354.

9, Humphries v. McCraw, 5 Ark 61; Zube v. Weber, 67 Mich. 52.

10, Cornell v. Dakin, 38 N. Y. 253; People v. Reeder, 25 N. Y. 302; Burrall v. Acker, 23 Wend. 606; 35 Am. Dec. 582; Dezell v. Odell, 3 Hill 215; 38 Am. Dec. 628. See note, 25 Am. Dec. 426–9.

11, Penobscot Boom Co. v. Wilkins, 27 Me. 345; Learned v. Bryant, 13 Mass. 224; Fisher v. Bartlett, 8 Greenl. (Me.) 122; 22 Am. Dec. 225; Johns v. Church, 12 Pick. 557; 23 Am. Dec. 651; Barron v. Cobleigh, 11 N. H. 557; 35 Am. Dec. 505; Parks v. Sheldon, 36 Conn. 466; 4 Am. Rep. 95; Bursley v. Hamilton, 15 Pick. 40; 25 Am. Dec. 423 and note; Freem. Exns. sec. 265.

§ 504. Warehouse receipts. — Receipts given by warehousemen are an exception to the general rule respecting the modification of receipts by parol. By statutes these receipts are generally made negotiable; and when the rights of third persons who have relied upon the receipt are involved, warehousemen are held to be estopped from denying the representations made on their receipts.[1] But bills of lading have not the full character of negotiable paper,[2] nor does the receipt warrant the goods in all respects to be what the document represents.[3] There is a long line of authorities in England and in the federal courts holding that, even as against a *bona fide* consignee or indorsee for

value, the carrier is not estopped by the statements of the bill of lading from showing that no goods were in fact received for transportation.[4] The principle of estoppel does not extend so far as to preclude the warehouseman from showing in all cases that the goods do not correspond with the description in the receipt. This is especially true if the warehouseman has had no opportunity for an inspection of the goods.[5]

1, McNeil v. Hill, 1 Woolw. (U. S.) 96; Griswold v. Haven, 25 N. Y. 595; 82 Am Dec. 380; Adams v. Gorham, 6 Cal. 68; Goodwin v. Scannell, 6 Cal. 541. See note, 100 Am. Dec. 243; 19 L. R. A. 302.

2, Shaw v. Railroad Co., 101 U. S. 557.

3, Shaw v. Railroad Co., 101 U. S. 557.

4, Grant v. Norway, 10 C. B. 665; Coleman v. Riches, 16 C. B. 104; Hubbersty v. Ward, 8 Exch. 330; Brown v. Coal Co., 10 C. P. 562; Meyer v. Dresser, 16 C. B. N. S. 646; The Schooner Freeman, 18 How. 182; The Lady Franklin, 8 Wall. 325; Pollard v. Vinton, 105 U. S. 7; St. Louis Ry. Co. v. Knight, 122 U. S. 79; Friedlander v. Railway Co., 130 U. S. 416. But see, Armour v. Michigan Cent. Ry. Co., 65 N. Y. 111; 22 Am. Rep. 603.

5, Hale v. Milwaukee Dock Co., 23 Wis. 276; 99 Am. Dec. 169; 29 Wis. 482.

§ 505. Parol evidence as to bills and notes.— The same reasons which require that other written contracts should not be contradicted by parol evidence apply to contracts in the form of negotiable paper. "Negotiable notes are written instruments, and as such they can not be contradicted nor can their terms

be varied by parol evidence; and that proposition is universally true where the promissory note is in the hands of an innocent holder."[1] There is the additional consideration that the usefulness of commercial paper would be greatly impaired if secret reservations and agreements could be freely engrafted upon bills and notes by parol testimony. For example, when the time of payment is stated in the instrument, a prior or contemporaneous agreement can not be shown fixing a different time or extending the time,[2] or showing that payment should not be demanded on maturity,[3] or until after the death of the maker,[4] or so long as the interest should be paid.[5] Nor is parol evidence competent to establish an agreement that the note should be paid in installments;[6] or that the payee should forclose a collateral mortgage, and not hold the maker;[7] or that it should not be paid until after the sale of the maker's property,[8] or until after a certain dividend should be paid,[9] a draft received,[10] or certain profits realized.[11] But if no time of payment is fixed by the note, the maker may, as between the parties, show a parol contemporaneous agreement that it should be paid only on the happening of a contingency.[12] On the same principle, it is inadmissible to prove an agreement by parol that the instrument should be paid in some other manner than that stated therein. For example, it can not be shown

that a note, payable in "lawful money," is to be paid in silver;[13] or that a note, payable in "dollars," is to be paid in commonwealth paper or in other money, not recognized by federal law,[14] or in bank or individual notes,[15] or in merchandise or other articles, or, indeed, in any mode different from that stated.[16] But an ambiguity as to the kind of funds intended may be explained, as the meaning of "Canada money."[17] Nor can it be shown by such evidence that there was an agreement that the payment should be made out of a particular fund;[18] nor that no money should be paid except from the proceeds of certain sales;[19] nor that an account against the payee should be deducted from the amount stated,[20] nor that the amount due and the rate of interest were other than that expressed.[21]

1, Brown v. Spofford, 95 U. S. 474, 480. See also notes, 45 Am. Dec. 242; 42 Am. Dec. 86; 18 L. R. A. 36; 1 L. R. A. 816; 6 L. R. A. 33. See also extended note, 20 L. R. A. 705–713.

2, Litchfield v. Falconer, 2 Ala. 280; Brown v. Wiley, 20 How. 442; Joyner v. Turner, 19 Ark. 690; Borden v. Peay, 20 Ark. 293; Eaton v. Emerson, 14 Me. 335; Inge v. Hanee, 29 Mo. 399; Campbell v. Upshaw, 7 Humpf. (Tenn.) 185; 46 Am. Dec. 75; Doss v. Peterson, 82 Ala. 253; McClanaghan v. Hines, 2 Strob. (S. C.) 162; DeLong v. Lee, 73 Iowa 53; Thompson v. Ketcham, 8 Johns. 190; 5 Am. Dec. 332; Stucksleger v. Smith, 27 Iowa 286; Doss v. Peterson, 82 Ala. 253.

3, Hoare v. Graham, 3 Camp. 57; Bond v. Morely, 26 Mo. 253; Cairo Ry. Co. v. Parker, 84 Ill. 613; Lakeside Land Co. v. Droomgole, 89 Ala. 505.

4, Graves v. Clark, 6 Blackf. (Ind.) 183; Woodbridge v. Spooner, 3 Barn. & Ald. 233.

5, Trustees v. Stetson, 5 Pick. 506.

6, Barton v. Wilkins, 1 Mo. 74; Eaton v. Emerson, 14 Me. 335; Doss v. Peterson, 82 Ala. 256.

7, Gillman v. Henry, 53 Wis. 465; Stewart v. Alberquerque Nat. Bank, (Ariz.) 30 Pac. Rep. 303.

8, Free v. Hawkins, 8 Taunt. 92.

9, Rawson v. Walker, 1 Stark. 361.

10, Kincaid v. Higgins, 1 Bibb (Ky.) 396.

11, Campbell v. Upshaw, 7 Humph. (Tenn.) 185; 46 Am. Dec. 75; McClanaghan v. Hines, 2 Strob. (S. C.) 122; Litchfield v. Falconer, 2 Ala. 280; DeLong v. Lee, 73 Iowa 53.

12, Horner v. Horner, 145 Pa. St. 258. See also sec. 507 *infra*.

13, Alsop v. Goodwin, 1 Root (Conn.) 196.

14, Williams v. Beazley, 3 J. J. Marsh. (Ky.) 577; Baugh v. Ramsey, 4 T. B. Mon. (Ky.) 155; Thorington v. Smith, 8 Wall. 12; Noe v. Hodges, 3 Humph. (Tenn.) 162; Stewart v. Salamon, 94 U. S. 434; Hair v. La Brouse, 10 Ala. 548.

15, Noe v. Hodges, 3 Humph. (Tenn.) 162; Pack v. Thomas, 21 Miss. 11; 51 Am. Dec. 135; Baugh v. Ramsey, 4 T. B. Mon. (Ky.) 155; Langenberger v. Kraeger, 48 Cal. 147; 17 Am. Rep. 418; Clark v. Hard, 49 Ala. 86.

16, Gilman v. Moore, 14 Vt. 457; Billings v. Billings, 10 Cush. 178; Fields v. Stimson, 1 Coldw. (Tenn.) 40; Racine Bank v. Keep, 13 Wis. 209; Pack v. Thomas, 21 Miss. 11; 51 Am. Dec. 135; Watson v. Hurt, 6 Gratt. (Va.) 633. See also cases last cited. But see, Lang v. Johnson, 24 N. H. 302; Clarke v. Tappen, 32 Conn. 56; Van Valkenburgh v. Stupplebeen, 49 Barb. 99.

17, Thompson v. Sloan, 23 Wend. 71; 35 Am. Dec. 546.

18, Campbell v. Hodgson, Gow. 74; Rawson v. Walker, 1 Stark. 361; Brown v. Spofford, 95 U. S. 482; Adams v.

Wilson, 12 Met. 138; Currier v. Hale, 8 Allen 47; Smith v. Kemp, 92 Mich. 357.

19, DeLong v. Lee, 73 Iowa 53.

20, Eaves v. Henderson, 17 Wend. 190; St. Louis Perpetual Ins. Co. v. Homer, 9 Met. 39.

21, Catlin v. Harris, 7 Wash. 542.

§ 506. Same — As to amount — Payment on contingency. — On the same principle, when the instrument contains an absolute promise to pay a certain sum, it is inadmissible to show by parol that the whole amount is not to be paid, and that in a certain event an indorsement is to be made upon it;[1] or that the value of certain articles should be credited, when ascertained;[2] or, in an action on a note, that the maker may return property for which the note is given, provided the same does not prove satisfactory,[3] or that, if any mistake should be found in a settlement for which a note is given, the mistake should be corrected.[4] It is the general rule in this respect that it cannot be shown by parol, in the absence of fraud or mistake, that an amount different from that stated was agreed upon.[5] In actions on negotiable paper which is absolute on its face, parol evidence is inadmissible to prove an agreement that payment should depend upon some *contingency or condition.*[6] For example, a condition that the payee should furnish certain goods to the maker;[7] or that it was only given as a matter

of form;[8] or that a note should be paid out of commissions to be earned by the maker as agent of the payee;[9] or that an acceptance was on the verbal condition of the completion of certain work by the drawer;[10] or that the bill should not be presented until after a certain other draft was provided for,[11] or on other conditions;[12] or that the note was intended as a receipt only;[13] or that the instrument was not intended as a note, but only as a memorandum, not to be enforced;[14] or that a guaranty was on a condition which has not been performed;[15] or that a note should not be negotiated,[16] or that an acceptance of a draft was on the condition that the acceptor should not be called on to pay according to its tenor.[17] Nor is it admissible, in an *action against a surety*, to prove by parol an agreement that the payee should sue the note when it should become due, and that the surety signed only on that condition; nor in such case does it vary the rule when the proposed evidence is that of the admissions of the plaintiff. Such testimony would establish nothing more than a verbal agreement, made concurrently with the written contract, engrafting upon it a new stipulation materially changing the nature of the promise.[18] The general rule might be illustrated by a great number of cases of similar character. There are, it is true, exceptional cases which, under peculiar circumstances, seem to vary from the general rule.[19]

But the importance of adhering to the general rule with reasonable strictness in respect to commercial paper is everywhere recognized. "It is a firmly settled principle that parol evidence of an oral agreement, alleged to have been made at the time of the drawing, making or indorsing of a bill or note, cannot be permitted to vary, qualify or contradict, to add to or subtract from the absolute terms of the written contract." [20]

1, Allen v. Young, 62 Ga. 617; Barton v. Wilkins, 1 Mo. 74; Blakemore v. Wood, 3 Sneed (Tenn.) 470; Sturdivant v. Hull, 59 Me. 172; Roache v. Roanoke Seminary, 56 Ind. 198; Ziegler v. McFarland, 147 Pa. St. 607.

2, Featherston v. Wilson, 4 Ark. 154; St. Louis Ins. Co. v. Homer, 9 Met. 39.

3, Isaacs v. Elkins, 11 Vt. 679; Allen v. Furbish, 4 Gray 504; 64 Am. Dec. 87; Henderson v. Thompson, 52 Ga. 149.

4, Clute v. Frasier, 58 Iowa 268.

5, Downs v. Webster, Brayt. (Vt.) 79; Gazaway v. Moore, Harp. (S. C.) 401.

6, See cases cited below.

7, Holzworth v. Koch, 26 Ohio St. 33.

8, Wright v. Remington, 41 N. J. L. 48; 32 Am. Rep. 180.

9, Van Vechten v. Smith, 59 Iowa 173.

10, Heaverin v. Donnell, 15 Miss. 244; 45 Am. Dec. 302.

11, Brown v. Wiley, 20 How. 442.

12, Myer v. Beardsley, 30 N. J. L. 236.

13, City Bank v. Adams, 45 Me. 455; Dickson v. Harris, 60 Iowa 727; Billings v. Billings, 10 Cush. 178. Contra, Beals v. Beals, 20 Ind. 163.

14, Burnes v. Scott, 117 U. S. 582.

15, Wright v. Morse, 9 Gray 337; 69 Am. Dec. 291.

16, Knox v. Clifford, 38 Wis. 651; 20 Am. Rep. 28; McSherry v. Brooks, 46 Md. 103; Waddle v. Owen, 43 Neb. 489.

17, Davis v. Randall, 115 Mass. 547; 15 Am. Rep. 146; Robinson v. Kanawha Valley Bank, 44 Ohio St. 441; 58 Am. Rep. 829; Heaverin v. Donnell, 15 Miss. 244; 45 Am. Dec. 302. See note, 1 Am. St. Rep. 134-138.

18, Hanchet v. Birge, 12 Met. 545; Altman v. Anton, (Iowa) 60 N. W. Rep. 191.

19, Murchie v. Cook, 1 Ala. 41, it can be explained by parol why a note is given; Rawlings v. Fisher, 24 Ind. 52, parol evidence is admissible to show the relation of parties; Barlow v. Fleming, 6 Ala. 146, verbal contract explained by parol; Sweet v. Stevens, 7 R. I. 375, parol evidence admissible to show that a note was inchoate, and was delivered in escrow to a third person.

20, Specht v. Howard, 16 Wall. 564, 566.

§ 507. Qualifications of the general rule as applied to negotiable paper.— The exceptions to the general rule which exclude parol evidence to explain written instruments apply in respect to negotiable paper, as well as to other contracts. We have seen in a former section that wide range is given to the proof when the issue of *fraud* is raised.[1] On the same principle, *illegality*,[2] *alteration*[3] and *want of consideration*[4] may be shown. As between the original parties, the *conditional delivery* of a note may be shown,[5] as that it was delivered in escrow.[6] So it may be shown, as between the original parties, that the note had been *discharged* by the performance of an oral agree-

ment,[7] or that the delivery was conditioned upon a certain event.[8] So it may be proved by parol that a *mistake* has been made in the writing as to dates.[9] This would be very clear in an equitable proceeding; and in some cases, the correction of such mistakes by parol has been allowed in legal proceedings.[10] Under rules already stated, if there is a *latent ambiguity*, and if the instrument is obscurely written or erased in part,[11] or if the language admits of several meanings,[12] or if it is made somewhat uncertain in meaning by the omission of words,[13] or if the contract is made with reference to a usage,[14] the uncertainty may be explained by parol. It is also admissible to show by parol the capacity and true *relations of the parties*,[15] such as that a signer of a note is a surety, and that this was known to the plaintiff;[16] or that the plaintiff and defendant sustain toward each other the relation of surety and co-surety.[17] But the apparent relation of the parties cannot be changed to the injury of *innocent third persons*.[18] When no *place of payment* is named in the note, a parol agreement as to the place intended may be shown;[19] and when it is doubtful on the face of the paper whether principal or agent is liable, the intention may be shown by parol.[20] So, in case of *ambiguity*, the parties may be identified by parol proof.[21] Nor is it any violation of the rule to show by extrinsic evidence an entirely distinct and

collateral contract;[22] or to show whether the instrument was given in satisfaction of a former note, or as security therefor;[23] or that the note has been *discharged* by the performance of an agreement.[24]

1, See secs. 440, 447 *supra.*

2, Newson v. Thighen, 30 Miss. 414; Buck v. First National Bank, 27 Mich. 293; 15 Am. Rep. 189; Woods v. Armstrong, 54 Ala. 150; 25 Am. Rep. 671; Henderson v. Palmer, 71 Ill. 579; 22 Am. Rep. 117; Donley v. Tindall, 32 Tex. 43; 5 Am. Rep. 234; Moffitt v. Bulson, 96 Cal. 106; 31 Am. St. Rep. 192; Wolf v. Troxell's Estate, 94 Mich. 573.

3, Buck v. Appleton, 14 Me. 284; Brown v. Straw, 6 Neb. 536; 29 Am. Rep. 369; McCaulay v. Gordon, 64 Ga. 221; 37 Am. Rep. 68; First Nat. Bank v. Fricke, 75 Mo. 178; 42 Am. Rep. 397; Nicholson v. Combs, 90 Ind. 515; 46 Am. Rep. 229.

4, Solly v. Hinde, 2 Cromp. & M. 516; Rawson v. Walker, 1 Stark. 361; Stackpole v. Arnold, 11 Mass. 27; 6 Am. Dec. 150; Dexter v. Clemans, 17 Pick. 175; Barker v. Prentiss, 6 Mass. 430; Folsom v. Mussey, 8 Greenl. (Me.) 400; 23 Am. Dec. 522; West v. Kelley, 19 Ala. 353; 54 Am. Dec. 192; Lewis v. Gray, 1 Mass. 297; 2 Am. Dec. 21; First Nat. Bank v. Nugen, 99 Ind. 160; Maltz v. Fletcher, 52 Mich. 484.

5, Sweet v. Stevens, 7 R. I. 375; Bernhardt v. Brunner, 4 Bosw. (N. Y.) 528; Benton v. Martin, 52 N. Y. 574.

6, Couch v. Meeker, 2 Conn. 302; Taylor v. Thomas, 13 Kan. 217; Alexander v. Wilkes, 11 Lea (Tenn.) 221.

7, Buchanon v. Adams, 49 N. J. L. 636; 60 Am. Rep. 666; Howard v. Stratton, 64 Cal. 487; Crossman v. Fuller, 17 Pick. 171.

8, Couch v. Meeker, 2 Conn. 302; Benton v. Martin, 52 N. Y. 570; McFarland v. Sikes, 54 Conn. 250; 1 Am. St. Rep. 111; Davis v. Davis, 97 Mich. 419.

9, Drake v. Rogers, 32 Me. 524; Barlow v. Buckingham, 68 Iowa 169; Bayley v. Taber, 5 Mass. 286; 4 Am. Dec. 57;

Towne v. Rice, 122 Mass. 71; Biggs v. Piper, 86 Tenn. 589; Smith v. Mussetter, 58 Minn. 159.

10, Barlow v. Buckingham, 68 Iowa 169; Paysant v. Ware, 1 Ala. 160.

11, Paine v. Ringold, 43 Mich. 341.

12, 2 Pars. Bills & N. 517.

13, Lockhard v. Avery, 8 Ala. 502; Agawam Bank v. Strever, 18 N. Y. 502.

14, Renner v. Bank of Columbia, 9 Wheat. 581.

15, Heckscher v. Binney, 3 Wood. & M. (U. S.) 333; Lacy v. Lofton, 23 Ind. 324. See article, 11 Alb. L. Jour. 74.

16, Pollard v. Stanton, 5 Ala. 451; Bank of St. Mary's v. Mumford, 6 Ga. 44; Ward v. Stout, 32 Ill. 399; Bank v. Kent, 4 N. H. 221; Adams v. Flanagan, 36 Vt. 400; Riley v. Gregg, 16 Wis. 666; Irvine v. Adams, 48 Wis. 468; 33 Am. Rep. 817; Hubbard v. Gurney, 64 N. Y. 457; Vestal v. Knight, 54 Ark. 97. But in case of a bond, a principal cannot show that one signing as surety really signed as principal, Coots v. Farnsworth, 61 Mich. 497.

17, Hunt v. Chambliss, 15 Miss. 532; Sweet v. McAllister, 4 Allen 353; Horne v. Bodwell, 5 Gray 457; Bright v. Carpenter, 9 Ohio 139; 34 Am. Dec. 432; Williams v. McAtee, 86 Va. 681. For the rule as between co-indorsers, see McPherson v. Weston, 85 Cal. 90. See note, 17 Am. Dec. 416.

18, Stephens v. Monongahela Bank, 88 Pa. St. 157; 32 Am. Rep. 438; Jordan v. Jordan, 10 Lea (Tenn.) 124; 43 Am. Rep. 294; Martin v. Cole, 104 U. S. 30.

19, Brent v. Bank, 1 Peters 89; McKee v. Boswell, 33 Mo. 567.

20, Dow v. Moore, 47 N. H. 419; Johnson v. Smith, 21 Conn. 627; Early v. Wilkinson, 9 Gratt. (Va.) 68; Schmittler v. Simon, 114 N. Y. 176; 11 Am. St. Rep. 621; Musser v. Johnson, 42 Mo. 74; 97 Am. Dec. 316; Bean v. Pioneer Mining Company, 66 Cal. 451; 56 Am. Rep. 106; Hardy v.

Pilcher, 57 Miss. 18; 34 Am. Rep. 432; Laflin v. Sinsheimer, 48 Md. 411; 30 Am. Rep. 472; Browne Parol Ev. sec. 63. Contra, Robinson v. Bank, 44 Ohio St. 441; 58 Am. Rep. 829.

21, Cork v. Bacon, 45 Wis. 192; Kinney v. Flynn, 2 R. I. 319; Jenkins v. Bass, 88 Ky. 397; 21 Am. St. Rep. 344; McCullough v. Wainwright, 14 Pa. St. 171; Jackson v. Sill, 11 Johns. (N. Y.) 201; 6 Am. Dec. 363.

22, Brent v. Bank, 1 Peters 89; Brook v. Latimer, 44 Kan. 431; 21 Am. St. Rep. 292; Phillips v. Preston, 5 How. 278.

23, Hale v. Rice, 124 Mass. 292; First Nat. Bank v. Nugen, 99 Ind. 160; Farnham v. Ingham, 5 Vt. 514.

24, Buchanon v. Adams, 49 N. J. L. 636; 60 Am. Rep. 666.

§ 508. Endorsements on negotiable paper. — In some cases a distinction has been made in respect to blank indorsements on negotiable paper; and parol evidence has been received to show a contemporaneous verbal agreement that the endorsee should not have recourse on the endorser, and that the instrument was delivered on that condition.[1] Parol evidence has been received in such cases, not as a variation of the agreement, but to prevent the party from making use of the blank indorsement, contrary to the trust and virtually in fraud of the indorser's rights.[2] Other decisions to the same effect have been based on the ground that the contract of indorsement is one implied by law from the blank indorsement, and hence is not subject to the rule which excludes parol evidence to

vary written instruments, but that the parties may prove an agreement that the blank indorsement should only have the effect to transfer the title.[3] But by the clear *weight of authority*, *this distinction*, thus proposed between blank indorsements and those written out in full, is held *untenable.*[4] The better view is that when the legal effect of a contract is clear and definite, as in the case of a blank indorsement, the intention of the parties is, in a legal sense, as well understood as if they had expressed in words what the law implies, and that the contract can no more be varied by parol in the one case than in the other.[5] There has been no conflict of opinion in those cases where the rights of *bona fide* holders are concerned. In such cases, the admission of such testimony would be a palpable violation of legal rules.[6]

1, Hill v. Ely, 5 Serg. & R. (Pa.) 363; 9 Am. Dec. 376 and full note; Castrique v. Battigieg, 10 Moore P. C. 94; Smith v. Morrell, 54 Me. 49; Susquehana Bank v. Evans, 4 Wash. C. C. 480; Ross v. Espy, 66 Pa. St. 481; 5 Am. Rep. 394; Taylor v. French, 2 Lea (Tenn.) 257; 31 Am. Rep. 609; Truman v. Bishop, 83 Iowa 697. See cases cited in Browne Parol Ev. sec. 84. Also notes, 42 Am. Dec. 378; 9 Am. Dec. 381; 39 Am. Rep. 116–123; 13 L. R. A. 52; 18 L. R. A. 33.

2, Hill v. Ely, 5 Serg. & R. (Pa.) 363; 9 Am. Dec. 376 and note.

3, Ross v. Espy, 66 Pa. St. 481; 5 Am. Rep. 394; Susquehana Bank v. Evans, 4 Wash. C. C. 480; Barclay v. Weaver, 19 Pa. St. 396; 57 Am. Dec. 661; Patterson v. Todd, 18 Pa. St. 426; 57 Am. Dec. 622. See note, 9 Am. Dec. 381–385.

4, Free v. Hawkins, 8 Taunt. 92; Hoare v. Graham, 3 Camp. 57; Martin v. Cole, 104 U. S. 30; Charles v. Denis, 42 Wis. 56; 24 Am. Rep. 383; Lee v. Pile, 37 Ind. 107; Fassin v. Hubbard, 55 N. Y. 465; Chaddock v. Vanness, 35 N. J. L. 517; 10 Am. Rep. 256; Dale v. Gear, 38 Conn. 15; 9 Am. Rep. 353; Prescott Bank. v. Caverly, 7 Gray 217; 66 Am. Dec. 473; Howe v. Merrill, 5 Cush. 80; Woodward v. Foster, 18 Gratt. (Va.) 205; Sanborn v. Southard, 25 Me. 409; 43 Am. Dec. 288 and note; Stack v. Beach, 74 Ind. 571; 39 Am. Rep. 113. See cases last cited.

5, Charles v. Denis, 42 Wis. 56; 24 Am. Rep. 383; Stack v. Beach, 74 Ind. 571; 39 Am. Rep. 113; and cases last cited.

6, Dale v. Gear, 38 Conn. 15; 9 Am. Rep. 353.

§ 509. Same — Qualifications. — In the cases already cited, the question has arisen between the indorser and the indorsee, where the endorser was a party to the note, as a payee. It has been held in numerous cases that a different rule obtains where the note is *non-negotiable*, or where it is *made by one not a party* to the note, and prior to an endorsement by the payee.[1] So it may be shown by parol that a principal made the blank endorsement *to an agent for a particular purpose;*[2] or that the endorsement was *for collection* merely,[3] or that the relation was that of *principal and surety*, and that the endorsement was made for the accommodation of the immediate indorsee.[4] It has become the well settled rule that a contemporaneous parol agreement may be shown between indorser and indorsee to the effect that *no demand or notice of non-payment* need be given, and that, without such demand and no-

tice, the indorser shall be absolutely bound for payment.[5] In many of the cases this rule is based upon the ground that the condition of demand and notice is not a part of the contract, but only a step in the legal remedy which may be waived at any time.[6]

1, Dale v. Gear, 38 Conn. 15; 9 Am. Rep. 353; Stack v. Beach, 74 Ind. 571; 39 Am. Rep. 113; Houck v. Graham, 106 Ind. 195; 55 Am. Rep. 727; Deering v. Creighton, 19 Ore. 118; 20 Am. St. Rep. 800; Owings v. Baker, 54 Md. 82; 39 Am. Rep. 353; Kealing v. Van Sickle, 74 Ind. 529; 39 Am. Rep. 101; Burton v. Hansford, 10 W. Va. 470; 27 Am. Rep. 571 and note.

2, Dale v. Gear, 38 Conn. 15; 9 Am. Rep. 353; Chaddock v. Vanness, 35 N. J. L. 517; 10 Am. Rep. 256.

3, Ricketts v. Pendleton, 14 Md. 320; McWhirt v. Mekee, 6 Kan. 412; Wallis v. Littell, 11 C. B. N. S. 369; Bell v. Lord Ingestre, 12 Q. B. 317; Stack v. Beach, 74 Ind. 571; 39 Am. Rep. 113; Hudson v. Wolcott, 39 Ohio St. 618.

4, Dale v. Gear, 38 Conn. 15; 9 Am. Rep. 353; Smith v. Carter, 25 Wis. 283; Chaddock v. Vanness, 35 N. J. L. 520; Lewis v. Dunlap, 72 Mo. 178; Breneman v. Furniss, 90 Pa St. 186; 35 Am. Rep. 651; Hamburger v. Miller, 48 Md. 325; Martin v. Marshall, 60 Vt. 321.

5, Barclay v. Weaver, 19 Pa. St. 396; 57 Am. Dec. 661 and full note; Sanborn v. Southard, 25 Me. 409; 43 Am. Dec. 288; Hibbard v. Russell, 16 N. H. 410; 41 Am. Dec. 733; Fuller v. McDonald, 8 Greenl. (Me.) 213; 23 Am. Dec 499; Hazard, v. White, 26 Ark. 155; Schmied v. Frank, 86 Ind. 250; Cheshire v. Taylor, 29 Iowa 492; Wall v. Bry, 1 La. An. 312; Central Bank v. Davis, 19 Pick. 373; Sheldon v. Horton, 43 N. Y. 93; 3 Am. Rep. 669; Dye v. Scott, 35 Ohio St. 194; 35 Am. Rep. 604; Taylor v. French, 2 Lea (Tenn.) 257; 31 Am. Rep. 609; Worden v. Mitchell, 7 Wis. 161. Contra, Rodney v. Wilson, 67 Mo. 123; 29 Am. Rep. 499; Beeler v. Frost, 70 Mo. 185; Doolittle v. Ferry, 20 Kan. 230; 27 Am. Rep. 166.

6, Barclay v. Weaver, 19 Pa. St. 396; 57 Am. Dec. 661; Struthers v. Blake, 30 Pa. St. 139; Sherer v. Easton Bank, 33 Pa. St. 142; Pollard v. Bowen, 57 Ind. 239; Airey v. Pearson, 37 Mo. 428; Worden v. Mitchell, 7 Wis. 161.

§ 510. Bills of lading — Contractual stipulations — Receipts. — We have already seen that, where an instrument in writing partakes both of the qualities of a contract and of a receipt, it is open to explanation or contradiction by parol as to those particulars which constitute a receipt, but that parol evidence is inadmissible to contradict those particulars which import a contract.[1] Perhaps there is no class of writings which afford so frequent illustration of this principle as bills of lading. From the nature of such instruments, they must contain recitals as to the receipt of goods, such as those of the time, quantity, quality and condition of the goods, as well as certain other statements which are rather in the nature of agreements than recitals. While the *recitals* of the character named are generally *open to explanation* and contradiction,[2] yet the agreements or promises are not.[3] For example, the carrier may show, in an action between himself and the one claiming to have shipped the goods, that no goods were received.[4] This may even be shown as against a *bona fide holder* of the bill of lading, as it is held that the common carrier is not estopped to deny such a statement which the agent could have

no authority to make,[5] although the authorities are not entirely agreed upon this proposition, and the *contrary rule* has been vigorously asserted in several cases.[6] It has been frequently held that the common carrier may contradict statements in bills of lading as to the *condition* in which the goods are received,[7] as that, owing to some latent defect, they were not in good order, although the bill of lading so imported. But of course the *burden of proof* of this fact in such case is upon the common carrier.[8] On the same principle the recitals in the bill of lading as to *quantity* are not conclusive, unless it contains some guaranty or warranty on that subject, constituting a contract.[9] As illustrations of the rule that stipulations in bills of lading, which constitute a contract, cannot be varied by parol, it has been held that *prior parol negotiations* respecting the terms of the contract cannot be given in evidence.[10] So evidence is inadmissible to show an agreement to deliver the goods at a different place, or to a different person from the one stated,[11] or an agreement to forward them at a different time,[12] or to carry the goods in a different mode, or on a different part of the vessel from that implied in the contract.[13] Although, as a general rule, where a bill of lading is delivered to the shipper before shipment, he is bound by its contents so far as they constitute a contract,[14] yet *if there is no bill of*

lading, or if the bill is not delivered until after shipment,[15] or if it is delivered to a person not authorized to receive it,[16] the parol agreement may be shown.

1, See sec. 503 *supra*. On the general subject of this section, see extended note, 38 Am. Dec. 409–426.

2, Bates v. Todd, 1 Moody & Rob. 106; Berkley v. Watling, 7 Adol. & Ell. 29; 34 E. C. L. 22; Maryland Ins. Co. v. Ruder, 6 Cranch 38; The Lady Franklin, 8 Wall. 325; O'Brien v. Gilchrist, 34 Me. 554; 56 Am. Dec. 676; Richards v. Doe, 100 Mass. 524; Baltimore St. Co. v. Browne, 54 Pa. St. 77; Chapin v. Chicago Ry. Co., 79 Iowa 582; Atwell v. Miller, 11 Md. 348; 69 Am. Dec. 206; Witzler v. Collins, 70 Me. 290; 35 Am. Rep. 327; Black v. Wilmington & W. Ry. Co., 92 N. C. 42; 53 Am. Rep. 450.

3, The Delaware, 14 Wall. 579 and cases cited; Cincinnati Ry. Co. v. Pontius, 19 Ohio St. 221; 2 Am. Rep. 391; and cases above cited.

4, Berkley v. Watling, 7 Adol. & Ell. 29; Schooner Freeman, 18 How. 182; Fellows v. Steamer Powell, 16 La. An. 316; 79 Am. Dec. 581; Baltimore Ry. Co. v. Wilkins, 44 Md. 11; 22 Am. Rep. 26; Sears v. Wingate, 3 Allen 103; Louisiana Nat. Bank v. Laveille, 52 Mo. 380; The Lady Franklin, 8 Wall. 325; Black v. Wilmington & W. Ry. Co., 92 N. C. 42; 53 Am. Rep. 450; Pollard v. Vinton, 105 U. S. 7; National Bank v. Chicago Ry. Co., 44 Minn. 224; 20 Am. St. Rep. 566. See note, 38 Am. Dec. 410–426.

5, Pollard v. Vinton, 105 U. S. 7; Sutton v. Kettell, Sprague (U. S.) 309; The Loon, 7 Blatchf. (U. S.) 244; Friedlander v. Texas Ry. Co., 130 U. S. 416; Robinson v. Memphis Ry. Co., 9 Fed. Rep. 129; Black v. Wilmington Ry. Co., 92 N. C. 42; 53 Am. Rep. 450 and note; Baltimore Ry. Co. v. Wilkins, 44 Md. 11; 22 Am. Rep. 26; Grant v. Norway, 10 C. B. 665; National Bank v. Chicago Ry. Co., 44 Minn. 224; 20 Am. St. Rep. 566; Sears v. Wingate, 3 Allen 103. See elaborate note, 38 Am. Dec. 404.

6, Sioux City Ry. Co. v. First Nat. Bank, 10 Neb. 556; 35 Am. Rep. 488; Armour v. Michigan Cent. Ry. Co., 65 N. Y. 111; 22 Am. Rep. 603; Savings Bank v. Atchison, T. & S. F. Ry. Co., 20 Kan. 519; Bank of Batavia v. New York Ry. Co., 106 N. Y. 195; 60 Am. Rep. 440; Brooke v. New York Ry. Co., 108 Pa. St. 529. Cases are collected in Browne Parol Ev. sec. 107. See article, 23 Am. Law Rev. 672.

7, Barrett v. Rogers, 7 Mass. 297; 5 Am. Dec. 45; Choate v. Crowninshield, 3 Cliff. (U. S.) 184; The Oriflamme, 1 Sawy. (U. S.) 176; The Adriatic, 16 Blatchf. (U. S.) 424; Illinois Cent. Ry. Co. v. Cobb, 72 Ill. 148; Witzler v. Collins, 70 Me. 290; 35 Am. Rep. 327; Mitchell v. United States Ex. Co., 46 Iowa 214; Steamboat v. Webb, 9 Mo. 192; Richards v. Doe, 100 Mass. 524; Ellis v. Willard, 9 N. Y. 529. See note, 38 Am. Dec. 404.

8, Nelson v. Woodruff, 1 Black 156; The Oriflamme, 1 Sawy. (U. S.) 176; Nelson v. Stephenson, 5 Duer (N. Y.) 538; Barrett v. Rogers, 7 Mass. 297; 5 Am. Dec. 45; Clark v. Barnwell, 12 How. 272; Tarbox v. Eastern Steam boat Co., 50 Me. 339; Richards v. Doe, 100 Mass. 524; Price v. Powell, 3 N. Y. 322.

9, Bates v. Todd, 1 Moody & Rob. 106; The J. W. Brown, 1 Biss. (U. S.) 76; Wallace v. Long, 8 Bradw. (Ill.) 504; Steamboat Wis. v. Young, 3 G. Greene (Iowa) 268; Sears v. Wingate, 3 Allen 103; Hall v. Mayo, 7 Allen 454; O'Brien v. Gilchrist, 34 Me. 554; 56 Am. Dec. 676; Meyer v. Peck, 28 N. Y. 590; Abbe v. Eaton, 51 N. Y. 410; Chapin v. Chicago, M. & St. P. Ry. Co., 79 Iowa 582.

10, Southern Ex. Co. v. Dickson, 94 U. S. 549; Collender v. Dinsmore, 55 N. Y. 200; 14 Am. Rep. 224; Long v. New York C. Ry. Co., 50 N. Y. 76; Belger v. Dinsmore, 51 N. Y. 166; 10 Am. Rep. 575; Shaw v. Gardner, 12 Gray 488.

11, Wolf v. Myers, 3 Sandf. (N. Y.) 7. But see, Baltimore Ry. Co. v. Brown, 54 Pa. St. 77; Malpas v. London Ry. Co., 1. C. P. 336.

12, Indianapolis Ry. Co. v. Remmy, 13 Ind. 518.

13, Barber v. Brace, 3 Conn. 9; 8 Am. Dec. 149; The Wellington, 1 Biss. (U. S.) 279; The Delaware, 14 Wall. 579; Creery v. Holly, 14 Wend. 26.

14, Long v. New York C. Ry. Co., 50 N. Y. 76; Germania Ins. Co. v. Memphis & C. Ry. Co., 72 N. Y. 90; 28 Am. Rep. 113.

15, Bostwick v. Baltimore & O. Ry. Co., 45 N. Y. 712.

16, Mobile Ry. Co. v. Jurey, 111 U. S. 584.

§ 511. Parol evidence as to mortgages.— One important qualification of the general rule excluding parol evidence to vary written instruments has already been discussed in its bearing on mortgages. We have seen that instruments purporting to be deeds may be shown to be mortgages. But the converse of this is not true. An instrument in form a *mortgage cannot be shown by parol to be a deed.*[1] On the principle already discussed, parol evidence is admissible to connect a deed and a defeasance, though in separate instruments, and to show that they were intended as a mortgage;[2] or to show that a bill of sale, absolute in form, is a chattel mortgage;[3] or to show an agreement that the mortgagor of chattels might remain in possession.[4] It is also admissible *to identify* by parol a note secured by mortgage, although the description of the same in the mortgage may be inaccurate as to date or in other respects.[5] This is on the familiar principle that parol evidence may be received *to ap-*

ply an instrument to its proper subject matter.[6] So parol evidence is admissible to show the true character of a mortgage, and also *for what purpose it was given;* although it be for a definite sum and secures the payment of notes for definite amounts, it may be shown that the mortgage was simply one of indemnity.[7] It need hardly be stated that the general rules already given allow parol evidence to show the *true consideration*,[8] and to *explain ambiguities.*[9] But in general, parol evidence cannot be received in the absence of fraud or mistake to *contradict or vary* the mortgage. For example, such evidence is not admissible to show other conditions than those expressed;[10] or that the mortgage was taken subject to a lease;[11] or that timber should be removed from the premises before foreclosure;[12] or an agreement between mortgagor and mortgagee that two mortgages of the same date, executed to secure notes falling due at different times, should be equal liens;[13] or that the mortgage should constitute a mere pledge;[14] or that a discharge was intended as an assignment,[15] or to show a contemporaneous agreement that the mortgagor of chattels may sell or exchange the property.[16]

1, McClintock v. McClintock, 3 Brews. (Pa.) 76; Wharf v. Howell, 5 Binn. (Pa.) 499; Reitenbaugh v. Ludwick, 31 Pa. St. 131. See also cases cited under sec. 451 *et seq. supra*, where this general rule is discussed and its application shown in the cases of the various kinds of written instruments.

2, Gay v. Hamilton, 33 Cal. 686; Preschbaker v. Feaman, 32 Ill. 475; Tillson v. Moulton, 23 Ill. 648; Kelly v. Thompson, 7 Watts (Pa.) 401.

3, Parks v. Hall, 2 Pick. 206; Coe v. Cassidy, 72 N. Y. 133; Laeber v. Langhor, 45 Md. 477; Stokes v. Hollis, 43 Ga. 262; Parish v. Gates, 29 Ala. 254; Watson v. James, 15 La. An. 386; National Ins. Co. v. Webster, 83 Ill. 470; Love v. Blair, 72 Ind. 281.

4, Pierce v. Stevens, 30 Me. 184.

5, Clark v. Houghton, 12 Gray 38; Johns v. Church, 12 Pick. 557; 23 Am. Dec. 651; Hall v. Tufts, 18 Pick. 455; Pierce v. Parker, 4 Met. 84.

6, Jones v. Guaranty Co., 101 U. S. 622; Aull v. Lee, 61 Mo. 160; Duval v. McLoskey, 1 Ala. 708; Bell v. Fleming, 12 N. J. Eq. 13; Jackson v. Bowen, 7 Cow. 13; Johnes v. Church, 12 Pick. 557; 23 Am. Dec. 651; Goddard v. Sawyer, 9 Allen 78; Ellis v. Kenyon, 25 Ind. 134; Partridge v. Swazey, 46 Me. 414; Bourne v. Littlefield, 29 Me. 302.

7, Jones v. Guaranty Co., 101 U. S. 622; Price v. Gover, 40 Md. 102; Mayer v. Grottendick, 68 Ind. 1; Cutler v. Steele, 93 Mich. 204; Kimball v. Meyer, 21 Mich. 276; 4 Am. Rep. 487.

8, Abbott v. Marshall, 48 Me. 44; Clark v. Houghton, 12 Gray 38; Foster v. Reynolds, 38 Mo. 553; Benicia Works v. Estes, (Cal.) 32 Pac. Rep. 938. So it may be shown that a mortgage, absolute on its face, contemplated future advances. Moses v. Hatfield, 27 S. C. 324; Simons v. First National Bank, 93 N. Y. 269; Ferris v. Hard, 135 N. Y. 354. See secs. 475 *et seq. supra.*

9, Hancock v. Watson, 18 Cal. 137; Heaston v. Squires, 9 Ind. 27; Galen v. Brown, 22 N. Y. 37; Merrill v. Cooper, 36 Vt. 314; First Nat. Bank v. North, 2 S. Dak. 480.

10, Adair v. Adair, 5 Mich. 204; 71 Am. Dec. 779; Hunt v. Bloomer, 5 Duer (N. Y.) 202; Townsand v. Empire Stone Co., 6 Duer (N. Y.) 208; Kracke v. Hameyer, (Iowa) 58 N. W. Rep. 1056.

11, Sinclair v. Jackson, 8 Cow. 543.
12, Berthold v. Fox, 13 Minn. 501; 97 Am. Dec. 243.
13, Isett v. Lucas, 17 Iowa 503.
14, Whitney v. Lowell, 33 Me. 318.
15, Wade v. Howard, 6 Pick. 492.
16, Clark v. Houghton, 12 Gray 38.

CHAPTER 16.

DOCUMENTARY EVIDENCE.

§ 512. Documentary evidence—Definitions, etc.— Sir James Stephen defines a document as "any substance having any mat-

ter expressed or described upon it by marks capable of being read."[1] Documents or writings are divisible into two classes, namely, *public* and *private*. "The former consists of the acts of public functionaries in the executive, legislative and judicial departments of government, including under this general head the transactions which official persons are required to enter in books or registers in the course of their public duties, and which occur within the circle of their own personal knowledge and observation. To the same head may be referred the consideration of documentary evidence of the acts of state, the laws and judgments of courts of foreign governments. Public writings are susceptible of another division, they being either (1) judicial, or (2) not judicial; and with respect to the means and mode of proving them, they may be classed into (1) those which are of record, and (2) those which are not of record."[2]

1, Steph. Ev. art. 1.

2, Greenl. Ev. sec. 470.

§ 513. Proof of statutes of the state.— We have already discussed the subject of judicial notice of public statutes; and it has been seen that, although the public statutes of a state prove themselves within the state, *private statutes must be proved.*[1] Public statutes are read to the court, but not as evi

dence. The judges are presumed to know the law, but the statutes are read to refresh their memory.[2] But private statutes, if relied upon, must be offered in evidence, and appear in the record or bill of exceptions;[3] and unless they so appear, the appellate court will ignore such statutes, when produced.[4] At common law private statutes and resolutions of legislative bodies were proved by *sworn or exemplified copies* authenticated by the great seal.[5] Generally statutes are enacted providing that *volumes containing the statutes* of the state, whether public or private, which are published by the state authority, are sufficient evidence of such statutes.[6] Such statutes greatly facilitate the proof of private statutes, as they dispense with the necessity of copies authenticated by officers of state, but they do not dispense with proof of the statute.[7] In some states, however, the courts are required to notice judicially private as well as public statutes;[8] and in some it has been held, in the absence of statutes on the subject, that an edition of the laws of the state published under the authority of the legislature is evidence both of public and private laws.[9] The *revised statutes of the United States*, printed under the direction of the Secretary of State at the government printing office, and embracing the statutes of the United States, general and permanent in their nature which were in force on Decem-

ber 1, 1873, as revised and consolidated, and including also the amendatory acts passed by congress between that date and the year 1878 are legal evidence in all the courts of the United States and of the several states and territories of the laws therein contained, but do not preclude reference to, or control, in case of any discrepancy, the effect of any original act as passed by congress since December 1, 1873; and copies of the acts of congress, printed as aforesaid at the close of each session of congress, are legal evidence in such courts of the laws and treaties therein contained.[10]

1, Leland v. Wilkinson, 6 Peters 317; Ellis v. Eastman, 32 Cal. 447; Pearl v. Allen, 2 Tyler (Vt.) 315. See also secs. 113 *et seq. supra.* As to proof of statutes and laws, see note, 11 Am. Dec. 780.

2, Lincoln v. Battelle, 6 Wend. 475.

3, Pearl v. Allen, 2 Tyler (Vt.) 315; Osborn v. Blackburn, 78 Wis. 209; Hanley v. Donoghue, 116 U. S. 1.

4, Eastman v. Crosby, 8 Allen 206; Haines v. Hanrahan, 105 Mass. 480.

5, Rex v. Forsyth, Russ. & R. 275; 1 Greenl. Ev. sec. 480.

6, See statutes of the forum.

7, Walker v. Armstrong, 2 Kan. 198.

8, Junction Railroad Co. v. Bank of Ashland, 12 Wall. 226; Halbert v. Skyles, 1 A. K. Marsh. (Ky.) 368; Farmers' Bank v. Jarvis, 1 Mon. (Ky.) 4.

9, Biddis v. James, 6 Binn. (Pa.) 321; 6 Am. Dec. 456; Gray v. Monongahela Nav. Co., 2 Watts & S. (Pa.) 156; 37 Am. Dec. 500.

10, U. S. Rev. Stat. 1878, Appendix pp. 1091–1092.

§ 514. Proof of foreign laws.— It is settled beyond doubt that the laws of a foreign country do not prove themselves in our courts, but that they must be proved as facts.[1] The common or *unwritten law of a foreign country* may be proved by the testimony of lawyers or jurists of that country whose studies have afforded opportunities of knowledge of the subject. In other words, it is a proper subject for proof by the testimony of *expert witnesses.*[2] It does not necessarily follow that testimony of this character can be given only by jurists or professional lawyers. The unwritten law of a foreign country may also be proved by those who have held such official position or had such business experience that they may be fairly deemed qualified to speak upon the subject.[3] Thus, one who had long acted as magistrate in Canada was allowed to testify as to the mode of executing notarial instruments in that country.[4] So in England, it was held competent for a Roman catholic bishop who had resided in Rome and who had studied the church law and the Roman law to testify concerning the marriage laws of Rome,[5] and for one who had been a stock broker in Brussels to testify concerning the law of negotiable paper in that city.[6] But it has been held in several cases that one who has merely studied the laws of a foreign country is not competent to give expert testimony on that

subject.[7] The obvious objection to parol evidence of foreign statutes is that it is not the best evidence. On this ground it has generally been held that the *written foreign law* should be proved *by a copy* of the law, properly authenticated.[8] But if there is no proof that the foreign law is statutory, it may be proved by parol;[9] and the party offering such proof is not bound to show that there is no written law on the subject.[10]

1, Ennis v. Smith, 14 How. 400; Church v. Hubbart, 2 Cranch 187; Owen v. Boyle, 15 Me. 147; 32 Am. Dec. 143; Bowditch, v. Soltyk, 99 Mass. 136. See full notes, 11 Am. Dec. 779; 20 Am. Law Reg. (N. S.) 377.

2, Kenny v. Clarkson, 1 Johns. (N. Y.) 385; 3 Am. Dec 336; Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 506; Ennis v. Smith, 14 How. 400; Sussex Peerage Case, 11 Clark & F 134; State v. Moy Looke, 7 Ore. 55. See sec. 370 *supra;* also valuable discussion in 25 L. R. A. 449-468; note, 66 Am. Dec. 233.

3, *In re* Dost Aly Khan, 6 Prob. Div. 6; Pickard v. Bailey, 26 N. H. 152; Dauphin v. United States, 6 Ct. of Cl. 221.

4, Pickard v. Bailey, 26 N. H. 152.

5, Sussex Peerage Case, 11 Clark & F. 134.

6, VanderDonckt v. Thellusson, 8 C. B. 812.

7, Bristow v. Sequeville, 9 Exch. 275; *In re* Bouelli, 1 Prob. Div. 69.

8, Ennis v. Smith, 14 How. 400; Robinson v. Clifford, 2 Wash. C. C. 1; United States v. Ortega, 4 Wash. C. C. 531; Watson v. Walker, 23 N. H. 471; Kenny v. Clarkson, 1 Johns. 385; 3 Am. Dec. 336; Packard v. Hill, 2 Wend. 411; Chanoine v. Fowler, 3 Wend. 173; Lincoln v. Battelle, 6 Wend. 475; Church v. Hubbart, 2 Cranch 187; Talbot v. Seeman, 1 Cranch 1.

9, Dougherty v. Snyder, 15 Serg. & R. (Pa.) 84; 16 Am. Dec. 520; Livingston v. Maryland Ins. Co., 6 Cranch 274.

10, Newsom v. Adams, 2 La. 153; 22 Am. Dec. 126.

§ 515. Same, continued. — In a leading case on this subject in the supreme court of the United States, it was held that foreign statutes "may be verified by an oath, or by an exemplification of a copy under the great seal of the state, or by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by the certificate of an officer, properly authorized by law to give the copy, which certificate must be duly proved."[1] But such modes of proof are *not exclusive* of others, especially of codes of laws and accepted histories of the law of a country.[2] Accordingly it has frequently been held admissible to receive as evidence *volumes of foreign statutes*, when authenticated by the oath of a competent person, or by some other method equivalent to the sanction of an oath.[3] Thus, the printed statutes of Ireland, with the affidavit of an Irish barrister that he had received them from the public printer, and that they were commonly received as evidence in that country, were held admissible.[4] So it has been held in this country that a volume purporting to be the civil code of France, sent by that government to the supreme court of the United States in the course of national exchanges of laws, and so received by our government, was sufficiently authenticated.[5] In

Maine a printed volume of the laws of a foreign province, proved by witnesses to have received the sanction of the executive and judicial officers of that province, was received in evidence;[6] and where ordinances of France on a subject of common concern to all nations were promulgated by the president of the United States, no further authentication was held necessary.[7] But a volume purporting to contain the laws of a foreign country, with no authenticating evidence, except that it was purchased in that country, is not admissible.[8] The same is true of a non-official volume, although proved to be conformable to the official edition;[9] and the mere certificate of a consul was held not to be a sufficient authentication of a foreign statute.[10] Although the rule formerly prevailed in England that foreign written laws must be proved by copies, properly authenticated, the later cases seem to have held otherwise.[11] In his work on evidence Mr. Taylor says that the old doctrine is exploded, and that "whenever foreign written law is to be proved, that proof cannot be taken from the book of the law, but must be derived from some skillful witness who describes the law." But he further says: "the witness may refresh and confirm his recollection of the law, or assist his own knowledge by referring to text-books, decisions, statutes, codes or other legal documents or authorities."[12] A distinguished

federal judge held in an admiralty case that the written laws of England might be proved by printed copies of the statutes, and that the court could determine from an inspection of the volume, as well as from an expert, whether it was genuine. He expressed the view that, as to the English statutes, the same liberal rule should be adopted as that which in some courts prevails relative to the admission of statutes of sister states, but that the old and more rigid rule might properly be continued as to those foreign countries where an entirely different system of law prevails.[13]

1, Ennis v. Smith, 14 How. 400.

2, Ennis v. Smith, 14 How. 400.

3, Jones v. Maffit, 5 Serg. & R. (Pa.) 523; Watson v. Walker, 23 N. H. 471.

4, Jones v. Maffit. 5 Serg. & R. (Pa.) 523.

5, Ennis v. Smith, 14 How. 400.

6, Owen v. Boyle, 15 Me. 147; 32 Am. Dec. 143.

7, Talbot v. Seaman, 1 Cranch 1.

8, Packard v. Hill, 2 Wend. 411; Hill v. Packard, 5 Wend. 376.

9, Chanoine v. Fowler, 3 Wend. 173.

10, Church v. Hubbart, 2 Cranch 187, 236.

11, Sussex Peerage Case, 11 Clark & F. 85; Barron de Bode's Case, 8 Q. B. 208; Lord Nelson v. Lord Bridgport, 8 Beav. 527; Cocks v. Purday, 2 Car. & K. 269; Bremer v. Freeman, 10 Moody P. C. 306.

12, Tayl. Ev. sec. 1423.

13, The Pewashick, 2 Low. (U. S.) 142. See also, Wilcocks v. Phillips, 1 Wall. Jr. (U. S.) 47.

§ 516. Proof of the laws of sister states — Statutes.— We have already seen that the courts of one state within the United States do not take judicial notice of the laws of another state.[1] Where a statute of a sister state is to be proved, the *proof should conform to the provisions of the act of congress* providing for the authentication of the statutes of the several states *or the laws of the state* in which the cause is tried.[2] Under the constitutional provision requiring that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and authorizing congress to prescribe the manner in which such acts and records shall be proved,[3] a law was long since enacted providing that the acts of the legislature of any state or territory or of any country, subject to the jurisdiction of the United States, shall be authenticated by having the *seal of such state, territory or country* affixed thereto.[4] It will be observed that this statute prescribes *no other authentication* or formality than that the seal of the state be affixed to the copy of the act to be proved. The seal itself is supposed to import absolute verity. The annexation 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.[5] Another clause of the statute above quoted makes its provisions

applicable to the United States courts, as well as the state courts.[6] It has been held in some states that this mode of authentication is the only one that may be used.[7] But although the seal of the state may afford the highest evidence of the authenticity of the statute of another state, yet such authentication is not generally deemed the best evidence in such a sense as to exclude other modes of proof; and, indeed, it is believed that the more *common mode is to introduce books* proved to be printed under the authority of the state. It has been held in many of the states that the volumes of statutes of another state, purporting to be printed by authority, are admissible as evidence without other authentication.[8] While in other states it has been held that such volumes are not admissible without extrinsic evidence of their authenticity.[9] In numerous states this subject is regulated by statute.

1, See secs. 119 *et seq. supra.*

2, United States v. Amedy, 11 Wheat. 392; Ashley v. Root, 4 Allen 504; State v. Carr, 5 N. H. 367; Warner v. Com., 2 Va. Cas. 95.

3, U. S. Const. art. 4 sec. 1.

4, U. S. Rev. Stat. sec. 905.

5, United States v. Amedy, 11 Wheat. 392; United States v. Johns, 4 Dall. 416; Henthorn v. Doe, 1 Blackf. (Ind.) 157; State v. Carr, 5 N. H. 367; Warner v. Com., 2 Va. Cas. 95.

6, U. S. Rev. Stat. sec. 905; Mills v. Duryee, 7 Cranch 481; Galpin v. Page, 3 Sawy. (U. S.) 93.

7, State v. Twitty, 2 Hawks (N. C.) 441; 11 Am. Dec. 779 and note; Craig v. Brown, 1 Peters C. C. 352; Canal Co. v. Railroad Co., 4 Gill & J. (Md.) 1.

8, Barkman v. Hopkins, 11 Ark. 157; Comparet v. Jernegan, 5 Blackf. (Ind.) 375; Crake v. Crake, 18 Ind. 156; Thomas v. Davis, 7 B. Mon. (Ky.) 227; Merrifield v. Robbins, 8 Gray 150; Stewart v. Swanzy, 25 Miss. 502; Bright v. White, 8 Mo. 421; Mullen v. Morris, 2 Pa. St. 85; Allen v. Watson, 2 Hill (S. C.) 319; Ellis v. Wiley, 17 Tex. 134; State v. Abbey, 29 Vt. 60; 67 Am. Dec. 754; Simms v. Southern Ex. Co., 38 Ga. 129; People v. Calder, 30 Mich. 85; Clanton v. Barnes, 50 Ala. 260; Young v. Bank of Alexandria, 4 Cranch 384.

9, Bailey v. McDowell, 2 Har. (Del.) 34; Stanford v. Pruet, 27 Ga. 243; 73 Am. Dec. 734; Lord v. Staples, 23 N. H. 448; Van Buskirk v. Mulock, 18 N. J. L. 184; State v. Twitty, 2 Hawks (N. C.) 441; 11 Am. Dec. 779; Packard v. Hill, 2 Wend. 411; Duncan v. Duboys, 3 Johns. Cas. (N. Y.) 125.

§ 517. Same, continued.—It is clear that *mere unofficial volumes*, purporting to contain the statutes or digests of the statutes of other states, are not admissible.[1] But a volume of laws which has printed upon its title page the words "by authority" meets the requirements of this rule of law.[2] Statutes have quite generally been enacted in the different states controlling this subject. Their general purport is such as to remove doubt on the subject by providing that printed statutes of other states the admissible, when they purport to be printed by public authority, or when they are proved to be generally admitted as presumptive evidence in the courts of the state where they are in force.[3] In a Virginia case, it was

held that, when a section of a statute of Maryland was authenticated by the seal of that state it was admissible, and that the other sections of the statute need not be offered in evidence;[4] and where the existence of a statute is proved, such statute is *presumed to continue* in force until the contrary is shown.[5] In the absence of any statute upon the subject, the careful practitioner will either produce an exemplified copy of the statute or a volume purporting to contain the statutes of the state in question and to be printed by authority, as well as the evidence of some person having knowledge of the subject, to the effect that the volume is official, or that it is generally received in evidence in the courts of the state whose laws are to be proved. A statute may also be proved like other records by a *sworn copy*.[6]

1, Yarbrough v. Arnold, 20 Ark. 592; Dixon v. Thatcher, 14 Ark. 141; Kinney v. Hosea, 3 Har. (Del.) 77; Canfield v. Squire, 2 Root (Conn.) 300; 1 Am. Dec. 71.

2, Merrifield v. Robbins, 8 Gray 150; Vaughn v. Griffeth, 16 Ind. 353; Crake v. Crake, 18 Ind. 156; Cutler v. Wright, 22 N. Y. 472.

3, Latterett v. Cook, 1 Iowa 1; Cummings v. Brown, 31 Mo. 309; Glenn v. Hunt, 120 Mo. 330; Wilt v. Cutler, 38 Mich. 189; Pacific Pneumatic Gas Co. v. Wheelock, 80 N. Y. 278; Harryman v. Roberts, 52 Md. 64; Eagan v. Connelly, 107 Ill. 458; Meracle v. Down, 64 Wis. 323; Merrifield v. Robbins, 8 Gray 150; Bride v. Clark, 161 Mass. 130; Cutler v. Wright, 22 N. Y. 472; Cochran v. Ward, 5 Ind. App. 89; State v. Check, 13 Ired. (N. C.) 114; Falls v. United States Building Co., 97 Ala. 417; Rice v. Rankans,

101 Mich. 378; Regero v. Zippel, 33 Fla. 625. See the statutes of the jurisdiction.

4, Hunter v. Fulcher, 5 Rand. (Va.) 126; 16 Am. Dec. 738.

5, State v. Patterson, 2 Ired. (N. C.) 346; 38 Am. Dec. 699.

6, Ennis v. Smith, 14 How. 400.

§ 518. Same — Proof of the unwritten law. — The common or *unwritten law of a sister state* may be proved by the testimony of witnesses having knowledge of the subject, that is, by *expert testimony.*[1] Thus, the testimony of attorneys skilled in the law of the respective states has been received to show that certain acts would constitute valid service of process in another state,[2] the practice of justice courts,[3] the sufficiency of the execution of a deed[4] and that a certain note was negotiable in another state.[5] In some of the cases just cited, the rule seems to have been so extended as to allow the opinions of experts, not only as to the common law of the state in question, but also as to the *construction of statutes.*[6] But the general rule is that the statute law of a sister state, like that of a foreign country, must be proved by a copy authenticated in some of the ways already stated.[7] In a few instances, it has been held that the common law of a sister state may be proved by the printed *reports of decisions* of that state;[8] and in some of the states, statutes have been enacted making such reports admissible.[9] Although *recitals in private stat-*

utes may be evidence of the matters recited, as between the person in whose behalf it is enacted and the state, yet they are not evidence against strangers to the act,[10] not even where the act, though private in its nature, contains a clause declaring it to be a public act.[11]

1, Territt v. Woodruff, 19 Vt. 182; M'Rae v. Mattoon, 13 Pick. 53; Barkman v. Hopkins, 11 Ark. 157; Crafts v. Clark, 38 Iowa 237; Walker v. Forbes, 31 Ala. 9; Hooper v. Moore, 5 Jones (N. C.) 130; State v. Behrman, 114 N. C. 797.

2, Mowry v. Chase, 100 Mass. 79.

3, Dyer v. Smith, 12 Conn. 384.

4, Wilson v. Carson, 12 Md. 54.

5, Tyler v. Trabue, 8 B. Mon. (Ky.) 306.

6, Dyer v. Smith, 12 Conn. 384; Greasons v. Davis, 9 Iowa 219; Walker v. Forbes, 31 Ala. 9; Danforth v. Reynolds, 1 Vt. 259; Barkman v. Hopkins, 11 Ark. 157.

7, See sec. 516 *supra*.

8, Cragin v. Lamkin, 7 Allen 395; Marguerite v. Chouteau, 3 Mo. 540; Raynham v. Canton, 3 Pick. 293; M'Rae v. Mattoon, 13 Pick. 53; Dougherty v. Snyder, 15 Serg. & R. (Pa.) 84; Latimer v. Eglin, 4 Desaus. Eq. (S. C.) 26; Brush v. Scribner, 11 Conn. 388; 29 Am. Dec. 303; Chicago Ry. Co. v. Tuite, 44 Ill. App. 535, but not of a dissenting opinion.

9, Lockwood v. Crawford, 18 Conn. 361; Penobscot & K. Ry. Co. v. Bartlett, 12 Gray 244; 71 Am. Dec. 753.

10, Elmondorff v. Carmichael, 3 Litt. (Ky.) 472; 14 Am. Dec. 86; Parmelee v. Thompson, 7 Hill 77.

11, Brett v. Beales, 1 Moody & M. 416.

§ 519. Proof of acts of state—Proclamations—Legislative journals.—" Acts of

state may be proved by production of the original printed document from a press authorized by the government. Proclamations and other acts and orders of the executive of the like character may be proved by production of the government gazette in which they were authorized to be printed. Printed copies of public documents transmitted to congress by the president of the United States, and printed by the printer to congress are evidence of those documents."[1] Thus, it was held that a volume of public documents printed by authority of the senate of the United States, containing letters to and from various officers of state, communicated by the president of the United States to the senate, was as competent evidence as the original documents themselves.[2] The federal statutes provide that "extracts from the journals of the senate or of the house of representatives, and of the executive journal of the senate, when the injunction of secrecy is removed, certified by the secretary of the senate or by the clerk of the house of representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have, if produced and authenticated in court."[3] So when public statutes or legislative resolutions contain recitals of public events, as that a state of war exists or of other events peculiarly within the knowledge of the gov-

ernment, they are deemed competent evidence of the facts so recited.[4]

1, Greenl. Ev. sec. 479, and cases cited. See notes, 58 Am. Dec. 574; 51 Am. Dec. 616; also article, 13 Cent. L. Jour. 181.

2, Whiton v. Albany Ins. Co., 109 Mass. 24.

3, U. S. Rev. Stat. sec. 895.

4, Rex v. Deberenger, 3 Maule & S. 67; Thelluson v. Cosling, 4 Esp. 266.

§ 520. Official registers—Books of public officers.—When persons in public office are required by statute or by the nature of their office to write down particular transactions occurring in the course of their public duties and under their personal observation, such records are generally admissible in evidence. When such entries are made by authorized public agents in the course of public duty, and relate to matters in which the whole public may be interested, these are deemed sufficient sanctions to dispense with the necessity of an oath and cross-examination.[1] The rule is thus stated by Mr. Stephen: "An entry in any record, official book or register kept in any state, or at sea, or in any foreign country, stating, for the purpose of being referred to by the public, a fact in issue or relevant, or deemed to be relevant thereto, and made in proper time by any person in the discharge of any duty imposed upon him by the law of the place in which such record, book or register is kept, is itself deemed to

be a relevant fact."[2] Such entries are generally made by those who can have no motive to suppress the truth or to fabricate testimony. Moreover, in many cases they are made in the discharge of duty, pursuant to an oath of office.[3] In his work on evidence Mr. Taylor mentions a large number of books of this character which the law recognizes as official registers: for example, among others, parish registers, registers of births, marriages and deaths, made pursuant to the registration acts, land tax assessments, bishops' registers, books kept at public prisons, official log-books, books kept by the coast guard showing the state of wind and weather, registers of parliamentary votes, custom-house revenue books and books of other public offices.[4] Many others are mentioned but these sufficiently illustrate the class of books usually referred to. In this country the same rule has been recognized in many instances. For example, in the admission of registries of deeds and mortgages,[5] the books of accounts and of grants in the office of an alcalde,[6] the records of miners' claims,[7] the records of registered letters received at a post-office,[8] the registration of vessels in the custom-house,[9] the records of city ordinances,[10] of the attendance of pupils at school,[11] the registry of births, deaths and marriages kept by a religious society,[12] or by a town clerk,[13] the records of baptism,[14] the records of a city

or village,[15] of a school district,[16] of town officers showing accounts and expenses,[17] of town meetings,[18] of acts of boards of supervisors,[19] of county commissioners[20] and of town officers,[21] maps, plat-books and field-books of surveyors, prepared and deposited according to statute in a public office,[22] dockets of the clerk of a court showing the issuing and return of writs, after proof has been made of the loss of the writ in question,[23] the record of weather kept by a person employed in the signal service of the United States[24] and records of the state house of correction.[25]

1, Greenl. Ev. sec. 483.

2, Steph. Ev. art. 34.

3, Greenl. secs. 483–4.

4, Tayl. Ev. sec. 1595; Doe v. Barnes, 1 Moody & Rob. 386, marriage register; Doe v. Seaton, 2 Adol. & Ell. 178, land tax assessments; Arnold v. Bishops, 5 Bing. 316, bishop's register; Salte v. Thomas, 3 Bos. & P. 188, prison books; D'Israeli v. Jowett, 1 Esp. 427, log-books; Catherina Maria, L. R. 1 Adm. & Ecc. 53, coast guard books; Reed v. Lamb, 29 L. J. (Exch.) 452, parliamentary register; Johnson v. Ward, 6 Esp. 487, custom books. See statute 6 & 7, Will. IV ch. 86.

5, Conway v. Case, 22 Ill. 127; Dixon v. Doe, 5 Blackf. (Ind.) 106; Booge v. Parsons, 2 Vt. 456; 21 Am. Dec. 557.

6, Downer v. Smith, 24 Cal. 114.

7, Pralus v. Pacific Co., 35 Cal. 30; Attwood v. Fricot, 17 Cal. 37; 76 Am. Dec. 567.

8, Gurney v. Howe, 9 Gray 404; 69 Am. Dec. 299.

9, United States v. Johns, 4 Dall. (Pa.) 416; Catlett v. Pacific Ins. Co., 1 Wend. 561.

10, Com. v. Chase, 6 Cush. 248.

11, Thurston v. Luce, 61 Mich. 292, 486.

12, Stoever v. Whitman, 6 Binn. (Pa.) 416; Jacobi v. Order of Germania, 26 N. Y. S. 318; Hyam v. Edwards, 1 Dall. (Pa.) 2.

13, Sumner v. Sebec, 3 Me. 223; Jacocks v. Gilliam, 3 Murph. (N. C.) 47.

14, Durfee v. Abbott, 61 Mich. 471.

15, Barker v. Fogg, 34 Me. 392.

16, Sanborn v. School Dist., 12 Minn. 17; Thurstin v. Luce, 61 Mich. 292.

17, Thornton v. Campton, 18 N. H. 20.

18, Isbell v. New York Ry. Co., 25 Conn. 556; Bishop v. Cone, 3 N. H. 513; Grafton v. Reed, 34 W. Va. 172.

19, People v. Bircham, 12 Cal. 50; Blackman v. Dunkirk, 19 Wis. 183.

20, Cuttle v. Brockway, 24 Pa. St. 145; Johnson v. Wakulla Co., 28 Fla. 720.

21, Jay v. Carthage, 48 Me. 353; Chatham v. Young, 113 N. C. 161.

22, People v. Denison, 17 Wend. 313; Miller v. Indianapolis, 123 Ind. 196; Com. v. King, 150 Mass. 221; Polhill v. Brown, 84 Ga. 338.

23, Bronning v. Flanagin, 22 N. J. L. 567.

24, Evanston, v. Gunn, 99 U. S. 660; Chicago Ry. Co. v. Trayes, 17 Ill. App. 136; Knot v. Raleigh Ry. Co., 98 N. C. 73; 2 Am. St. Rep. 321; Moore v. Gaus Manfg. Co., 113 Mo. 98; DeArmond v. Neasmith, 32 Mich. 231. See also, Hart v. Walker, 100 Mich. 406, where private weather records were admitted.

25, People v. Kemp, 76 Mich. 410.

§ 521. Proofs of facts contained in official registers. — The contents of books of the character described in the last section

are proven by the production of the books or documents themselves, and by proof that they come from the proper custody;[1] and in some cases, sworn[2] or certified[3] copies of such books have been received, where the books themselves could not readily be obtained. Although such records are admissible, they do not in general import absolute verity, but are treated as *prima facie* evidence of the facts entered and of the documents recorded.[4] But they afford no evidence of facts which *they do not properly contain*, or of any fact which can only be inferred from the record by argument. Thus, army registers published by the secretary of war afford no evidence from which the pay of army officers can be inferred, although, if properly authenticated, they may afford evidence as to the names, dates of commissions and similar facts.[5] And an entry in a registry of baptism is not evidence of the date of birth,[6] though it may be received on this issue in connection with other facts.[7] But a baptismal registry describing the person as illegitimate was received as giving some evidence of this fact.[8] "It is deemed essential to the official character of these books that the entries in them be made *promptly*, or at least without such long delay as to impair their credibility, and that they be made by the person whose duty it was to make them, and in the mode required by law, if any has been prescribed."[9] Where thus

made, they may be introduced in favor of the officer making them, as presumptive evidence of the performance of the acts registered.[10] Although most of the records known as official registers, within the meaning of the rule under discussion, are *required to be kept by statute*, yet this is *not in all cases a pre-requisite* to the admission of the record as evidence.[11]

1, Atkins v. Hatton, 2 Anstr. 387; Armstrong v. Hewett, 4 Price 216; Pulley v. Hilton, 12 Price 625; Swinnerton v. Stafford, 3 Taunt. 91.

2, Jackson v. King, 5 Cow. 237; 15 Am. Dec. 468; Jackson v. Boneham, 15 Johns. (N. Y.) 226.

3, Lewis v. Marshall, 5 Peters 470; Jay v. Carthage, 48 Me. 353; Miller v. City of Indianapolis, 123 Ind. 196.

4, Westerhaven v. Clive, 5 Ohio 136; Chapman v. Herrold, 58 Pa. St. 106; Gurney v. Howe, 9 Gray 404; 69 Am. Dec. 299.

5, Wetmore v. United States, 10 Peters 647.

6, Wihen v. Law, 3 Stark. 63; Duins v. Donovan, 3 Hagg. Ecc. 301; Burghart v. Augenstein, 6 Car. & P. 690; R. v. N. Petherton, 5 Barn. & C. 508; R. v. Clapham, 4 Car. & P. 29; Lavin v. Mutual Aid Society, 74 Wis. 349; Durfee v. Abbott, 61 Mich. 471; Mutual Benefit Co. v. Tisdale, 91 U. S. 238; McGuirk v. Mutual Benefit Co., 20 N. Y. S. 908; Houlton v. Manteuffel, 51 Minn. 185. The same rule was adopted in Hegler v. Faulkner, 153 U. S. 109.

7, Whitcher v. McLaughlin, 115 Mass. 167.

8, Cope v. Cope, 1 Moody & Rob. 269.

9, 1 Greenl. Ev. sec. 485; Doe v. Bray, 8 Barn. & C. 813; Walker v. Wingfield, 18 Ves. 443

10, Bissell v. Hamblin, 6 Duer. (N. Y.) 512.

11, Evanston v. Gunn, 99 U. S. 660; Bell v. Kendrick, 25 Fla. 778; Miller v. City of Indianapolis, 123 Ind. 196; Whart. Ev. sec. 639.

§ 522. Registers of marriage, birth and death.—In most countries where the civil law prevails, registers of marriages, births and deaths, kept by the clergy, are received as primary evidence of such facts.[1] But in England at common law, such registries were not admissible. It was there insisted that before such registries were admissible, it must be shown that they were required by law as kept for the public benefit. "So the records of baptisms and marriages formerly performed at the Fleet and Kings Bench Prisons, at May Fair, at the Mint in Southwark and in certain other places are inadmissible on the ground that they were not compiled under public authority. So a marriage register kept by a clergyman in Ireland, prior to the 31st of March, 1845, when the Irish Marriage Act came into operation, has, for a similar reason, been rejected. So a Jewish register of circumcision, kept at the great synagogue in London, has been rejected, though it was proved that the entries in it were in the handwriting of the deceased Chief Rabbi, whose duty it was to perform the rites of circumcision, and to make corresponding entries in the book. So the birth, marriage or burial register of a Wesleyan or other dissenting chapel will be rejected, unless it has been deposited in the office of the Registrar-General, and entered in his list pur-

suant to the provisions of the act of 3 and 4 Vict. c. 92."[2]

1, Whart. Ev. sec. 649.

2, Tayl. Ev. sec. 1592.

§ 523. **Same, continued.**—In the United States, somewhat *greater latitude* seems to have been allowed; and it has frequently been held that such entries are admissible, if made in the course of official duty, although not required to be made by law.[1] Thus, it was held that, independently of any statute, a baptismal register of a church in which the entries are made in the ordinary course of a clergyman's business is admissible to prove the fact and date of baptism, but not the legitimacy of the child,[2] nor the date of birth.[3] But in other cases, it has been held that such entries, where they are not by law required to be made, are not admissible, unless the person who made them is deceased, in which case they are admissible upon the ground that they are entrics of deceased persons made in the exercise of their calling contemporaneously with the event.[4] Statutes will be found in most of the states which require public officers to keep records of marriages, births and deaths. In such cases, on principles already stated, the records should be received as evidence. Indeed, in some instances the statutes require the records to be received as presumptive evidence of the marriage,

birth or death so recorded.[5] But even where the statute makes the record presumptive evidence, it is no more than presumptive evidence, and does not supersede the testimony of those having knowledge of the facts.[6]

1, Evanston v. Gunn, 99 U. S. 660; Blackburn v. Crawfords, 3 Wall. 175; Lewis v. Marshall, 5 Peters 470; Jackson v. King, 5 Cow. 237; 15 Am. Dec. 468; Kyburg v. Perkins, 6 Cal. 674; Durfee v. Abbott, 61 Mich. 471; Hunt v. Order of Friends, 64 Mich. 671; 8 Am. St. Rep. 855.

2, Blackburn v. Crawfords, 3 Wall. 175.

3, Houlton v. Manteuffel, 51 Minn. 185; Berry v. Hull, (N. M.) 30 Pac. Rep. 936.

4, Kennedy v. Doyle, 10 Allen 161; Chambers v. Chambers, 32 N. Y. S. 875.

5, See the statutes of the jurisdiction.

6, Herman v. State, 73 Wis. 248; 9 Am. St. Rep. 789.

§ 524. Ship registers.— Statutes have been enacted by congress regulating the registry of vessels, for the purpose of showing the character of the vessel, and to entitle her to the advantages secured by law to the vessels of our country.[1] The registries are made and kept by sworn public officers in the usual course of business, and hence are entitled to confidence as official registers. They may be used as evidence of ownership of the vessel against the persons who have procured the registry to be made,[2] and as tending to prove the warranty of American property in the policy;[3] in such cases, it is *prima facie* evidence, but not conclusive.[4] The ownership of the

vessel depends upon other proof; and is not conclusively settled by the registry, since our laws recognize the possibility that the register exists in the name of one, while the property is really in another person.[5] Thus, in an indictment for piracy, the national character of a merchant vessel of the United States may be proved without the certificate of registry or other documentary evidence.[6] In an action to recover a premium of insurance on the ground that the plaintiff had no interest in the vessel at the time of insurance, the register, which was in the name of other persons, was held not even *prima facie* evidence to prove that the plaintiff was not the owner.[7] So the fact that the register remains in the name of A. does not necessarily make him liable for repairs made after a sale by him.[8]

1, U. S. Rev. Stat. secs. 4131 *et seq.* See also, Sharp v. United Ins. Co., 14 Johns. 201.

2, Ligon v. Orleans Nav. Co., 7 Mart. N. S. (La.) 682.

3, Catlett v. Pacific Ins. Co., 1 Wend. 561.

4, Colson v. Bonzy, 6 Me. 474.

5, Sharp v. United Ins. Co., 14 Johns. 201; Leonard v. Huntington, 15 Johns. 298.

6, United States v. Furlong, 5 Wheat. 184.

7, Sharp v. United Ins. Co., 14 Johns. 201.

8, Leonard v. Huntington, 15 Johns. 298. But see, Star v. Knox, 2 Conn. 215.

§ 525. Log-books as evidence. — Under acts of congress providing that masters of vessels shall have official log-books, and make certain entries therein, such books are frequently received in evidence to establish such facts as are contemplated by the act.[1] But they are evidence of no other facts.[2] Such an entry in the log-book is indispensable evidence of the fact of desertion, when a forfeiture of wages is insisted upon.[3] "The log-book, in general, ought not to be admitted to establish any facts, save such as are contemplated by the act of congress. It is in no sense, *per se* evidence, except in certain cases provided for by statute. It does not import legal verity; and in every other case is mere hearsay, not under oath. It may be used against persons, to whom it should be brought home as having a concern in writing or directing what should be contained therein, to contradict their statements or their defense. But it cannot be received as evidence for such persons or others, except by force of a statute rendering it so."[4] The log-book must be identified before it can be introduced in evidence.[5] It will then be presumed that the entries were made in due time as provided by the statute.

1, U. S. Rev. Stat. sec. 4290.

2, Jones v. Brig Phœnix, 1 Peters Adm. (U. S.) 201.

3, The Mary, 1 Peters Adm. (U. S.) 139; Phoebe v. Dig-

num, 1 Wash. C. C. 48; Douglass v. Eyre, 1 Gilp.(U. S.) 147.

4, United States v. Gibert, 2 Sum. 77.

5, United States v. Mitchell, 2 Wash. C. C. 478.

§ 526. Records of municipal corporations. — The same reasons which authorize the admission of entries in official registers apply in favor of the introduction of the records of public and municipal corporations. The acts of such corporations and of their officers concern the rights of the public; and the presumption exists that the records of such acts are authentic. It has often been decided that the books of such corporations, when properly identified, should be received to prove their acts.[1] The records of public or municipal corporations are properly received in evidence, not only when they constitute *admissions* on the part of the corporation as evidence generally of those transactions which the law requires such corporations to record, but they are received on the same grounds on which other records are admissible.[2] Thus, they are admissible to show taxes assessed against individuals,[3] to prove acts of trustees appointed by the statute,[4] the records of cities,[5] and also to prove appointment of town officers.[6] Hence where the records are of a public character and have been kept by the proper officers, they may be received, not only against the corporation and in litigation

between third parties, but *in behalf of the corporation* itself, or its agents.[7] The original minutes of a municipal corporation are competent evidence of the acts of the corporation without further proof of their verity.[8] The minutes of a regular meeting of a city council, written down by the clerk and approved by the council, are evidence of the proceedings, although not recorded in a book, in the absence of any law requiring it;[9] and when the minutes of a meeting state that a certain ordinance was passed by the council, it is to be presumed that it passed in the mode required by the charter.[10] But when the statute prescribes certain formalities, it must be proved that these have been complied with in the passage of the ordinance, if such issue is raised.[11] But such entries are not admissible, if of a mere private nature, although contained in public records.[12]

1, R. v. Mothersell, 1 Str. 93; Ronkendorff v. Taylor, 4 Peters 349; Owings v. Speed, 5 Wheat. 420; Denning v. Roome, 6 Wend. 651; Whitehouse v. Bickford, 29 N. H. 471; People v. Murray, 57 Mich. 396; O'Mally v. McGinn, 53 Wis. 353; City of Greeley v. Hammon, 17 Col. 30. See note, 13 Am. St. Rep. 550.

2, See sec. 269 *supra* as to admissions by public corporations.

3, Ronkendorff v. Taylor, 4 Peters 349; Com. v. Heffron, 102 Mass. 148; Whitney v. Port Huron, 88 Mich. 268.

4, Owings v. Speed, 5 Wheat. 420.

5, Rust v. Boston Mill Corp., 6 Pick. 158.

6, Bishop v. Cone, 3 N. H. 513.

7, R v. Mothersell, 1 Str. 93; Thetford's Case, 12 Vin. Abr. 90; School Dist. v. Blakeslee, 13 Conn. 227; Denning v. Roome, 6 Wend. 651; Troy v. Railroad Co., 11 Kan. 519; 13 Kan. 70.

8, People v. Zeyst, 23 N. Y. 140; Com. v. Chase, 6 Cush. 248; Denning v. Roome, 6 Wend. 651.

9, O'Mally v. McGinn, 53 Wis. 353.

10, O'Mally v. McGinn, 53 Wis. 353; State v. King, 37 Iowa 469.

11, Larkin v. Burlington, C. R. & N. Ry. Co., 85 Iowa 492.

12, Marriage v. Lawrence, 3 Barn. & Ald. 142.

§ 527. Same — How authenticated and proved.— Such records should be authenticated by the proper officers, having their custody, and when so authenticated, the originals are competent evidence.[1] Like other public records, they may be proved, not only by the use of originals, but by the use of sworn or certified *copies;* such copies are only *prima facie* evidence, which may be controlled by proof of their inaccuracy or forgery.[2] Statutes very generally exist allowing such proof to be made by the use of certified copies. When an error has been made by the clerk in preparing municipal records, he may *amend the record* to conform to the fact while he remains in office.[3] Such amendments cannot, however, be allowed after the term of office has expired.[4]

1, O'Mally v. McGinn, 53 Wis. 353; Com. v. Hayden, 163 Mass. 453, authentication by a deputy; Lindsay v. Chi-

cago, 115 Ill. 120; Cleveland, C. C. & St. L. Ry. Co. v. Tart, 64 Fed. Rep. 823. See also, Denning v. Roome, 6 Wend. 651.

2, Com. v. Chase, 6 Cush. 248. See sec. 534 *infra*.

3, Welles v. Battelle, 11 Mass. 477; President of St. Charles v. O'Malley, 18 Ill. 407; Mott v. Reynolds, 27 Vt. 206; Boston Turnpike Co. v. Pomfret, 20 Conn. 590.

4, Hartwell v. Littleton, 13 Pick. 229; School Dist. v. Atherton, 12 Met. 105.

§ 528. Records of private corporations — For what purposes admitted.— The records of private corporations cannot be deemed public records; and therefore quite different rules govern their reception as evidence. By the common law rules, a private corporation has no more right than an individual to make book entries evidence in its own behalf. In England numerous statutes have been enacted making the books of such corporations *prima facie* evidence in their own behalf, as to certain facts recorded therein;[1] and in the United States, it is held that the books and minutes of a corporation, if there is nothing to show irregularity in the proceedings, are competent evidence to show that the acts necessary to the legal incorporation and organization have been performed.[2] The cases just cited show that for this purpose the books may be received in evidence, *even in behalf of the corporation.* Accordingly it has been held that, in actions by the corporation for subscriptions to the

corporate stock, the subscription books and orders for payment are proper evidence to *establish liability*,[3] and also in actions for calls, to establish the amount of the installment, and the fact of the calls.[4] So the minutes have been used as *prima facie* evidence that a quorum was present at a given meeting.[5] The ordinary *presumption as to regularity* of proceedings applies to the transactions at corporate meetings; and when the records show the transaction of business at such meetings, it will be presumed that it was performed in the manner required by law, in the absence of evidence to the contrary.[6]

1, 25 and 26 Vict. ch. 89 § 67; 33 and 34 Vict. ch. 75 § 30; 8 and 9 Vict. ch. 16 § 28. Tayl. Ev. sec. 1781. See note, 13 Am. St. Rep. 550. See article, 34 Cent. L. Jour. 468.

2, Trumbull v. Payson, 95 U. S. 421; Grant v. Henry Clay Coal Co., 80 Pa. St. 208; Penobscot Ry. Co. v. Dunn, 39 Me. 587; Ryder v. Alton Ry. Co., 13 Ill. 516; Duke v. Cahawba Nav. Co., 10 Ala. 82; 44 Am. Dec. 472; Hall v. Carey, 5 Ga. 239; Wood v. Jefferson Bank, 9 Cow. 194; Morawetz Priv. Corp. sec. 75; Angell & Ames Corp. sec. 513.

3, Peake v. Wabash Ry. Co., 18 Ill. 88; Trumbull v. Payson, 95 U. S. 421; Rockwell Co. v. Van Ness, 2 Cranch. C. C. 449; Mudgett v. Horrell, 33 Cal. 25; Coffin v. Collins, 17 Me. 440; Hammond v. Staus, 53 Md. 1; Pittsburg Ry. Co. v. Applegate, 21 W. Va. 172. See next section.

4, Bavington v. Pittsburg Ry. Co., 34 Pa. St. 358; White Mts. Ry. Co. v. Eastman, 34 N. H. 124.

5, Com. v. Woelper, 3 Serg. & R. (Pa.) 29; 8 Am. Dec. 628.

6, See sec. 49 *supra*. Thomp. Corp. Ch. 30.

§ 529. Same—In actions on stock subscriptions and other actions.—In an action where the books of a corporation were used to prove that the defendant was a stockholder, the supreme court of the United States held that where the name of an individual appears on the stock book of a corporation, as a stockholder, the *prima facie presumption* is that he is the owner of the stock, in a case where there is nothing to rebut that presumption; and in an action against him as a stockholder, the burden of proving that he is not a stockholder, or of rebutting that presumption is cast upon the defendant.[1] Referring to the rule that, in cases of this character, books of the company are admissible in its own behalf, Mr. Morawetz, said: "While the rule stated in the preceding section appears to be well established by authority, it is difficult to support it by any principle of the common law. The stock-books of a corporation are undoubtedly evidence against it, as admissions; but they cannot be admitted on this ground for the company, against a person who denies that he is a shareholder."[2] Although the books of a corporation may be received to prove the acceptance of its charter, its organization, the election of officers, the holding of meetings, the adoption of resolutions and other similar corporate acts, yet it is the general rule that they are not admissible in evidence

in matters of a private nature in support of the claims of the corporation *against strangers;*[3] nor even *against a member* who claims adversely, and not under the corporation.[4] They are not admissible as evidence of *an agreement* alleged to have been made *by stockholders*, as individuals, and not intended to bind the corporation.[5] It has frequently been declared that the books cannot in general be adduced by the corporation in support of its own claims *against a stranger*,[6] or to affect strangers in any way.[7] But there are numerous cases in which the books of private corporations have been received in their behalf as against strangers. These cases are for the most part those in which it has been necessary to prove some act of the corporation, a record of which is required to be kept, either by statute or by the rules of the company. Examples of such records are the minutes of the corporate meetings, at which acts have been performed which are relevant to the issue, the stock books in which subscriptions to stock have been received and those records which are necessarily made in the organization of the corporation.[8] "Whenever the action of a deliberative body — whether that of a corporation at large, its board or a committee — is competent to be proved, either in favor of or against the corporation, its officers, members or strangers, the contemporaneous corporate record of their action is

competent, though not always alone sufficient.[9] Thus, the act of organizing may be proved in favor of the corporation or creditors, and against members[10] and strangers[11] by the books; and in an action between strangers, one claiming a professional degree may prove it by the books of the college that granted it;[12] and one claiming as assignee of a corporation may prove the assignment by the corporate books.[13] So where it is competent, in an action against a corporation for negligence, for it to prove its own precautions taken by the appointment of a committee, etc., the books are competent for this purpose.[14] It is very commonly the case that the act of a private corporation is not competent, unless shown to have been communicated to the other party; and in such case, the books are competent to show the act, provided other evidence of communication is given to connect. The first question therefore to be determined is whether the corporate act is competent under the issue, and between the particular parties; if so, the minutes may be resorted to as evidence of it."[15]

1, Turnbull v. Payson, 95 U. S. 421.

2, Morawetz Priv. Corp. sec. 76; Wheeler v. Walker, 45 N. H. 355; Chase v. Sycamore Ry. Co., 38 Ill. 215. For full discussion see, Thomp. Corp. ch. 30 art. 3.

3, Attorney Gen. v. Warwick, 4 Russ. 222; Wheeler v. Walker, 45 N. H. 355; Chase v. Sycamore Ry. Co., 38 Ill. 215; Union Bank v. Call, 5 Fla. 409; Hare v. Waring, 3

M. & W. 362; Cook Stock & Stockhold. sec. 714; Thomp. Corp. ch. 30 art. 3.

4, Wheeler v. Walker, 45 N. H. 355.

5, Black v. Shreve, 13 N. J. Eq. 455; Thomp. Corp. sec. 1931.

6, Com. v. Woelper, 3 Serg & R. (Pa.) 29; 8 Am. Dec. 628; Greenl Ev. sec. 493.

7, Whart Ev. sec. 662.

8, Wood v. Jefferson Bank, 9 Cow. 194; Morawetz Priv. Corp. sec. 75, and cases cited.

9, Bank of U. S. v. Dandridge, 12 Wheat. 64; Grant v. Henry Clay Co., 80 Pa. St. 208; Schell v. Second Nat. Bank, 14 Minn. 43; Rayburn v. Elrod, 43 Ala. 700; Smith v. Natchez Co., 2 Miss. 479.

10, Ryder v. Alton Ry. Co., 13 Ill. 516: Penobscot Ry. Co. v. Dunn, 39 Me. 587; Highland T. Co. v. McKean, 10 Johns. 154; 6 Am. Dec. 324; Coffin v. Coffin, 17 Me. 440.

11, Duke v. Cahawba Nav. Co., 10 Ala. 82; 44 Am. Dec. 472.

12, Moises v. Thornton, 8 T. R. 303.

13, Edgerly v. Emerson, 23 N. H. 555; 55 Am. Dec. 207.

14, Weightman v. Washington, 1 Black. 39.

15, Abbott Trial Ev. p. 46. See full note as to parol evidence of unrecorded acts of corporations, 74 Am. Dec. 310–312.

§ 530. Same — As admissions — As account books. — It is very clear that corporate books and records may be introduced against the corporation as *admissions*. In like manner they may constitute admissions *on the part of the members* of the corporation, when the circumstances are such that the members can be deemed conversant with their contents. Thus, the books of a bank showing its ac-

count with the president, who had access to such books, may be admitted in an action against him by a receiver of the bank to show the state of accounts with the bank,[1] or to show, in such action, the proceedings of a directors' meeting.[2] Although in general the books of a corporation are not competent evidence to affect strangers, they are *admissible as between the members* on proof of knowledge on their part of such entries.[3] But there is *no rule of law which charges a stockholder* or even a director of a corporation *with actual knowledge* of its business transactions merely because he is such stockholder or director. Hence the books of account of a corporation are not sufficient alone to establish an account or claim against such persons in an action brought in behalf of a corporation, and a *shareholder* is *not chargeable with constructive notice* of resolutions adopted by the board of directors or by provisions in the by-laws regulating the mode in which its business shall be transacted with its customers.[4] Although the books and records of a corporation are *prima facie* evidence against it as admissions, they are *not conclusive*, unless they are the records of its proceedings duly made by the recording officer, or unless some person who has had proper access to them or knowledge of them has become aware of their contents, and has acted upon the faith that they were the records of its proceedings. A cor-

poration is not bound, as to third persons, by interpolations fraudulently inserted in its records, where such third persons have not acted on, or seen or known of the existence of the matters so interpolated and appearing to be recorded. It is not estopped or bound by such fraudulent addition, unless it is shown to have been negligent in omitting to make due correction of the records, and that some innocent third person has been misled thereby.[5] The books of corporations may be received in evidence for the purpose of *showing the state of accounts* or a course of dealing, where under similar circumstances the books of individuals would be admitted.[6] Thus, entries in the books of banks showing receipts and payment of money in the regular course of business, as well as the state of a depositor's account have been held admissible.[7] Like other records, the records of a private corporation should be authenticated as the corporation books, kept as such; and the proof should show that the entries have been made by the proper officer, or some other person in his necessary absence.[8]

1, Olney v. Chadsey, 7 R. I. 224. See secs. 270, 272, *supra*.

2, Olney v. Chadsey, 7 R. I. 224.

3, Chase v. Sycamore Ry. Co., 38 Ill. 215; Union Bank v. Call, 5 Fla. 409; Cook Stock & Stockhold. sec. 727; Angell & Ames Corp. sec. 684.

4, Rudd v. Robinson, 126 N. Y. 113; Pearsall v. Western Union Tel. Co., 124 N. Y. 256; Wheeler v. Walker, 45

N. H. 355; Hager v. Cleveland, 36 Md. 477; Thomp. Corp. sec. 1932.

5, Holden v. Hoyt, 134 Mass. 184.

6, St. Louis Gas Co. v. St. Louis, 86 Mo. 495; Cormac v. Western Bronze Co., 77 Iowa 32; Ganther v. Jenks, 76 Mich. 510, to show payment of money in behalf of the corporation.

7, Thornton v. Campton, 18 N. H. 20; Wheeler v. Walker, 45 N. H. 355; Union Bank v. Knapp, 3 Pick. 96; 15 Am. Dec. 181; Jordan v. Osgood, 109 Mass. 457; 12 Am. Rep. 731; Culver v. Marks, 122 Ind. 554; Goff v. Stoughton Bank, 84 Wis. 369. In dealings with depositors the pass books may be introduced in evidence, First Nat. Bank v. Williams, 4 Ind. App. 501; Kux v. Central Savings Bank, 93 Mich. 511. But the bank cannot introduce its ledger in its own behalf, First Nat. Bank v. Williams, 4 Ind. App. 501.

8, Highland Co. v. McKean, 10 Johns. 154; 6 Am. Dec. 324.

§ 531. Recording acts — Conveyances — Documents recorded when admissible. From an early period in the history of this country statutes have existed in the several states providing for the recording of conveyances of land which had been duly proved or acknowledged; and providing also that such records or copies, duly authenticated, should be as effectual evidence, as if the original had been produced in court.[1] But where there is no such statute, neither the record nor copies thereof are competent evidence. *Such records unlike judicial records and official registers* are mere copies, and open to the objection that they are not the best

evidence. In such cases, the original should be produced, if within the power of the one claiming under it; in other words, the copy cannot be used without laying the usual foundation for the introduction of secondary evidence.[2] Obviously the record or copy is not evidence to prove the original, unless the record is in *compliance with the statute.* Thus, where the statute makes the acknowledgment of the instrument,[3] or its proof by subscribing witnessess[4] a requisite to be complied with before recording, and these conditions are wholly omitted, or not substantially complied with, the record is not evidence. The same is true if the acknowledgment is taken after the time allowed by law,[5] or before an officer having no authority,[6] or if no official seal is affixed, when this is required by the statute,[7] or if the record is not recorded in the county or the office required by law,[8] or if the instrument recorded is not of the class included in the registry laws.[9] Where the acknowledgment is not according to law, the record is inadmissible, nor can it be remedied by proof of a custom of the recorder's office to record deeds without recording the certificate.[10]

1, Van Cortlandt v. Tozer, 17 Wend. 338; Conley v. State, 85 Ga. 348.

2, Brooks v. Marbury, 11 Wheat. 78; Den v. Gustin, 12 N. J. L. 42; Kucker v. McNeely, 5 Blackf. (Ind.) 123; Peck v. Clark, 18 Tex. 239. But see Reinboth v. Zesbe

Run Co., 29 Pa. St. 139; Cranfurd v. State, 6 Harr. & J. (Md.) 231.

3, Johnston v. Haines, 2 Ohio 55; Hall v. Gittings, 2 Harr & J. (Md.) 380; Hayden v. Westcott, 11 Conn. 129; Jackson v. Gould, 7 Wend. 364; Krueger v. Walker, 80 Iowa 733. See sec. 550 *infra*.

4, Pidge v. Tyler, 4 Mass. 541; Maxwell v. Light, 1 Call. (Va.) 117.

5, Hog v. Perry, 1 Litt. (Ky.) 171; Womack v. Hughes, Litt. Sel. Cas. (Ky.) 292; Cunningham v. Buckingham, 1 Ohio 264; Shields v. Buchanan, 2 Yeates (Pa.) 219.

6, Heister v. Fortner, 2 Binn. (Pa.) 40; 4 Am. Dec. 417; Johnston v. Haines, 2 Ohio 55; Conelly v. Bowie, 6 Harr. & J. (Md.) 141.

7, Miller v. Henshaw, 4 Dana (Ky.) 325.

8, Jackson v. Rice, 3 Wend. 180; 20 Am. Dec. 683.

9, Miller v. Holt, 1 Tenn. 111; Cheney v. Watkins, 1 Harr. & J. (Md.) 527; 2 Am. Dec. 530; Dick v. Balch, 8 Peters 30.

10, Velott v. Lewis, 102 Pa. St. 326.

§ 532. Same—Requisites—Certificates of acknowledgment—Defects in.—Under registry laws of the character now under discussion, the acknowledgment should purport on its face to be taken *before an officer having authority* to take the same.[1] Such statement in the certificate of acknowledgment is *prima facie* evidence that he is such an officer.[2] Although the statutes relating to the recording of instruments must be substantially complied with before the record or copy can be admitted as evidence, yet certificates of acknowledgment are to be *liberally construed*, and sustained if possible by fair legal intend-

ment. This is especially true as to forms of acknowledgments which have been long in use, and on which the validity of titles depends.[3] In some cases, words omitted from the acknowledgment by mistake, have been supplied by reference to the body of the deed;[4] and in other cases, where the officer's title was not written out in full, but only indicated by abbreviation, the acknowledgment has been held good;[5] and in other cases, parol evidence has been received to supply the defect, when there was no designation of the official title.[6] Where a discrepancy exists between the date of the deed and the date of the certificate of acknowledgment, the latter date must prevail; and a copy of the record of such deed can not be objected to on account of such discrepancy.[7] Under the registry system the due acknowledgment and record of the deed raises a *presumption that the deed was duly executed*, and that the grantor had sufficient seisin to enable him to convey.[8] But the acknowledgment or other proof of a deed, entitling it to registry is an *ex parte* act, and only *prima facie* proof of the execution or of the seisin of the parties, and is liable to be rebutted.[9] Thus, it may be shown that an acknowledgment was taken by an officer while out of his jurisdiction,[10] or that the person who made the acknowledgment was *non compos*.[11]

1, Downing v. Gallagher, 2 Serg. & R. (Pa.) 455; Shield v. Buchanan, 2 Yeates. (Pa.) 219.

2, Rhoades v. Selin, 4 Wash. C. C. 715; Willink v. Miles, 1 Peters C. C. 429; Johnston v. Haines, 2 Ohio 55.

3, Hayden v. Wescott, 11 Conn. 129; Jackson v. Gumaer, 2 Cow. 552; M'Keen v. Delancy, 5 Cranch 22. See sec. 550 *infra*.

4, Fuhrman v. London, 13 Serg. & R. (Pa.) 386; 15 Am. Dec. 608; Luffborough v. Parker, 12 Serg. & R. (Pa.) 48. As to parol proof of acknowledgments, see sec. 501 *supra*.

5, Duval v. Covenhoven, 4 Wend. 561.

6, Rhoades v. Selin, 4 Wash. C. C. 715.

7, Buck v. Gage, 27 Neb. 306; Moody v. Hamilton, 22 Fla. 298.

8, Ward v. Fuller, 15 Pick. 185; Samuels v. Barrowscale, 104 Mass. 207; Clark v. Troy, 20 Cal. 219; Knight v. Lawrence, 19 Col. 425; Chamberlain v. Showalter, 5 Tex. Civ. App. 226.

9, Ward v. Fuller, 15 Pick. 185; Jackson v. Schoonmaker, 4 Johns. 161.

10, Jackson v. Calden, 4 Cow. 266; Jackson v. Humphrey, 1 Johns. 498.

11, Jackson v. Schoonmaker, 4 Johns. 161.

§ 533. Defective records — Evidence for some purposes. — Although an instrument imperfectly acknowledged, or one which is not required by law to be recorded, derives no efficacy from being placed on record, and although the record of such an instrument is not admissible *as a record*, yet it may be received as a *sworn copy* constituting secondary evidence, when verified by the testimony of a witness knowing the facts.[1] So *certified or exemplified* copies of a record which cannot be found may be used, if the record has been com-

pared with the original.[2] Such records or copies, though not admissible as records, have been frequently used to prove the originals in connection with other facts and circumstances, generally in those cases where the records were of long standing and other proof was not obtainable, or where they were corroborated by possession of the property in question.[3] The mode of authenticating records of deeds and other instruments from other states is discussed elsewhere.[4]

1, Winn v. Patterson, 9 Peters 663.

2, Jackson v. Rice, 3 Wend. 180; 20 Am. Dec. 683.

3, Webster v. Harris, 16 Ohio 490.

4, See secs. 552 *et seq. infra.*

§ 534. Public documents — Provable by copies — Corporate records.— It is a rule of wide application that those documents which are public in their nature, whether judicial or non-judicial, which the public has the right to inspect, and which could not, without inconvenience to the public interests, be removed from their place of custody, may be proved by copies, exemplified or otherwise duly authenticated.[1] It has also been held a test that such copies are not admissible where the law does not require or authorize the recording of the original.[2] Among documents which have been held public and provable by copies are deeds and similar instruments recorded in the registry authorized by statute,[3] patents for lands

issued by the United States,[4] records in the office of the collector of internal revenue,[5] affidavits as to pre-emption rights, on file in the office of the register of the land office,[6] letters of the commissioner of public lands affecting titles,[7] other records, required by law to be filed in the general land office,[8] as well as those required to be filed in the state land offices,[9] grants from a state recorded in the office of the secretary of state,[10] pardons by the executive,[11] books of the state treasurer to show payment of the state tax,[12] contracts for public works on file with the state auditor,[13] manifests and other records required to be kept at the custom house[14] and registries of marriages, births and deaths.[15] Corporate books and records may be proven by copies, where the records are of the character above stated, that is, public entries in *public records*. Thus, copies have been received of the records of warrants for calling town meetings,[16] of records of the acts of towns and town officers[17] and of the by-laws of cities and towns.[18] But in the absence of statutory regulations, there is no principle on which copies of records of private corporations are admissible, unless by reason of some act of the party they may be regarded as admissions.[19]

1, Gresley Ev. 410.

2, Fitler v. Shotwell, 7 Watts & S. (Pa.) 14.

3, Dick v. Balch, 8 Peters 30; Morton v. Webster, 2 Allen 352; VanCortlandt v. Tozer, 17 Wend. 338; Curry v. Raymond, 28 Pa. St. 144.

4, Lane v. Bommelmann, 17 Ill. 95; Barton v. Murrain, 27 Mo. 235; 72 Am. Dec. 259.

5, State v. Loughlin, (N. H.) 20 At. Rep. 981.

6, Smith v. Mosier, 5 Blackf. (Ind.) 51.

7, Davis v. Freeland, 32 Miss. 645; Darcy v. McCarthy, 35 Kan. 722.

8, Culver v. Uthe, 133 U. S. 655; Lee v. Getly, 26 Ill. 76; Harris v. Doe, 4 Blackf. (Ind.) 369; Hardin v. Ho-yo-po-nubby, 27 Miss. 567; Liddon v. Hodnett, 22 Fla. 442.

9, Franklin v. Woodland, 14 La. An. 188; Finley v. Woodruff, 8 Ark. 328, by statute; Wray v. Ho-ya-po-nubby, 18 Miss. 452; Grant v. Levan, 4 Pa. St. 393; Mason v. McLaughlin, 16 Tex. 24; Van Sickle v. Cutlett, 75 Tex. 404.

10, Linning v. Crawford, 2 Bailey (S. C.) 296.

11, Cox v. Cox, 26 Pa. St. 375; 67 Am. Dec. 432.

12, Hodgdon v. Wright, 36 Me. 326.

13, McCoy v. Lightner, 2 Watts (Pa.) 347.

14, United States v. Johns, 4 Dall. (Pa.) 412; White v. Kearney, 2 La. An. 639; Sampson v. Noble, 14 La. An. 347.

15, Lewis v. Marshall, 5 Peters 470; Jackson v. King, 5 Cow. 237; 15 Am. Dec. 468; Jackson v. Boneham, 15 Johns. 226; Hyam v. Edwards, 1 Dall. (Pa.) 2.

16, State v. Bailey, 21 Me. 62.

17, Jay v. Carthage, 48 Me. 353; Willey v. Portsmouth, 35 N. H. 303.

18, Com. v. Chase, 6 Cush. 248. But see, Lumbard v. Aldrich, 8 N. H. 31; 28 Am. Dec. 381; Moor v. Newfield, 4 Me. 44.

19, Atlantic Ins. Co. v. Sanders, 36 N. H. 252.

§ 535. Copies of records — Different classes. — It is often necessary to prove original records by copies. Such copies are classified as follows: *Exemplifications*, or copies verified by the great seal or the seal of the court;[1] *examined or sworn copies*, or those copies "proved by oral evidence to have been examined with the original and to correspond therewith. The examination may be made either by one person reading both the original and the copy, or by two persons, one reading the original and the other the copy.[2] It is not necessary that each should alternately read both."[3] *Office copies* are those made by officers entrusted with the originals and authorized by law to prepare copies.[4] *Certified copies* are those signed and certified as true by the officers to whose custody the original is intrusted.[5] Exemplifications are proved by their own production, since the courts take judicial notice of the seal.[6] "They are deemed of higher credit than examined copies, being presumed to have undergone a more critical examination."[7]

1, Gilbert Ev. 19.

2, Steph. Ev. art. 75; Greenl. Ev. sec. 508.

3, Steph. Ev. art. 75; Krise v. Neason, 66 Pa. St. 253; Kellogg v. Kellogg, 6 Barb. (N. Y.) 116.

4, Greenl. Ev. sec. 507; Best Ev. sec. 486. Sec. 639 *infra*.

5, Best Ev. sec. 486.

6, See sec. 111 *supra*.

7, Tayl. Ev. sec. 1537.

§ 536. Examined and certified copies as evidence. — Mr. Stephen lays down the rule that "the contents of any public document whatever may in all cases be proved by an *examined copy.*"[1] This is the mode most commonly adopted in England. But, although such copies are used in the United States, the usual method of proof, when copies are used, is by exemplified or *certified* copies. If an examined copy is used, it should be an accurate and complete copy; and it is not admissible if abbreviations are used in the copy for words written out at length in the original.[2] *Office copies* are seldom used in this country, and have been for the most part superceded by exemplified and certified copies. The copies now most frequently used in the United States are *certified copies.* In most of the states there are statutes providing for the introduction of certified copies of judicial and non-judicial records.[3] Where copies of this class are offered, it is clear that the *mode of authentication* provided by the statute *must be substantially followed*, or the copy is inadmissible;[4] for such certificates are evidence, only so far as they are made so by statute.[5] Thus, where a statute provided, as the mode of certifying, that "such copy shall be certified by the officer, in whose custody the same is required by law to be, to have been compared by him with the original, and to be a correct transcript therefrom," it was held that a

single certificate of the officer annexed to several deeds was insufficient, and that each document should be authenticated.[6] So a copy verified by comparison with a certified copy has been held inadmissible.[7]

1, Steph. Ev. art. 75.

2, R. v. Christian, Car. & M. 388.

3, See statutes of the jurisdiction. In the absence of statute it may be presumed that clerks of courts of record have authority to furnish certified copies, Gunn v. Peakes, 36 Minn. 177.

4, Greene v. Durtee, 6 Cush. 362.

5, Smith v. United States, 5 Peters 292; Smith v. Brannan, 13 Cal. 107; Brown v. Cady, 11 Mich. 535; Maxwell v. Light, 1 Call (Va.) 117; Byers v. Wallace, 87 Tex. 503; Dixon v. Thatcher, 14 Ark. 14; Billingsley v. Hiles, (S. Dak.) 61 N. W. Rep. 687.

6, Newell v. Smith, 38 Wis. 39.

7, Lasater v. Van Hook, 77 Tex. 650.

§ 537. Effect of copies as evidence — Cannot exclude originals — By whom certified.—Although examined or exemplified copies or, under some statutes, certified copies of certain records are competent evidence, this mode of proof is not exclusive. In other words, in such cases *either the original or the authenticated copy* may be used. Although the courts may not compel the production of public records as evidence, such records, when produced, are at least of as high a nature as copies. No authentication can make the copy of higher dignity than the

original.[1] Thus, under circumstances when copies might have been used, the original letters of administration and letters testamentary,[2] records of suits,[3] writs and executions,[4] orders of court[5] and of courts martial,[6] as well as an insolvent's discharge[7] have been received as evidence; and many similar illustrations might be given. Nor do statutes enabling parties to use copies interfere with or exclude the common law rules which allow the execution and contents of documents to be shown by other kinds of *secondary evidence.*[8] The certificate of a copy from an official record must be *by the officer having the record in charge* and authorized to certify. A copy certified by a stranger, or by an officer, wholly unauthorized, cannot be received.[9] To certify copies is, however, within the ordinary powers of a duly appointed *deputy* of the officer named by law to keep the charge of a record; and a copy certified by a deputy acting for his principal is good.[10] On principles already stated, a certifying officer has no authority to state facts explanatory of or *collateral* to the record certified by him, or mere conclusions, not required to be certified,[11] or facts as to which his statements are *hearsay.*[12] When copies of records are admissible in evidence, the handwriting of the recording or attesting officer is *prima facie* presumed to be genuine.[13] The seal on the original instrument need not be reproduced The let

ters "ss." or other indication that there is a seal are sufficient.[14]

1, Goodwyn v. Goodwyn, 25 Ga. 203; Vose v. Manley, 19 Me. 331; Day v. Moore, 13 Gray 522; Sheehan v. Davis, 17 Ohio St. 571; Miller v. Hale, 26 Pa. St. 432; Brush v. Taggart, 7 Johns. (N. Y.) 19; Otto v. Trump, 115 Pa. St. 425; State v. Voight, 90 N. C. 471.

2, Green v. Durfee, 6 Cush. 362.

3, Lawson v. Orear, 4 Ala. 156.

4, Day v. Moore, 13 Gray 522.

5, Sheehan v. Davis, 17 Ohio St. 571.

6, Brooks v. Daniels, 22 Pick. 498.

7, Green v. Durfee, 6 Cush. 362.

8, United States v. Laub, 12 Peters 1; Loftin v. Nalty, 24 Tex. 565; Green v. Durfee, 6 Cush. 362.

9, Woods v. Banks, 14 N. H. 101; State v. Cake, 24 N. J. L. 516; Devling v. Williamson, 9 Watts (Pa.) 311.

10, Hague v. Porter, 45 Ill. 318; Greason v. Davis, 9 Iowa 219; Triplett v. Gill, 7 J. J. Marsh. (Ky.) 438.

11, Brown v. Galloway, Peters C. C. 291; Stewart v. Allison, 6 Serg. & R. (Pa.) 324; 9 Am. Dec. 433; Martin v. Anderson, 21 Ga. 301; Littleton v. Christy, 11 Mo. 390; Lavin v. Mutual Aid Society, 74 Wis. 349; Lamar v. Pearre, 90 Ga. 377; Fisher v. Ullman, 3 Tex. Civ. App. 322.

12, Garwood v. Dennis, 4 Binn. (Pa.) 314.

13, Com. v. Chase, 6 Cush. 248.

14, Holbrook v. Nichol, 36 Ill. 161; State v. Bailey, 7 Iowa 390; Hedden v. Overton, 4 Bibb (Ky.) 406.

§ 538. Proof of execution of documents.— The general rule in respect to the proof of private writings is that, before they are admissible in evidence, their execution

must be proved.[1] If the instrument is *not attested by a subscribing witness*, its execution is sufficiently proven to warrant its introduction by proof of the signature. It is then presumed that the date is correct and the document genuine,[2] although the other party is not concluded thereby.[3] Where there is *prima facie* proof of execution, the document must go to the jury, for the court will not allow the other party to introduce counter evidence before the instrument is read, and then exclude it from the jury.[4] Where a deed or other instrument is introduced only to prove some *collateral fact*, slight proof of execution is sufficient;[5] and in such cases the subscribing witness need not be called; the proof may be made by means of any other competent testimony.[6] If the instrument purports to be executed by an agent or attorney in fact, and the execution is denied, the authority must be proved.[7] Although instruments cannot be read without some proof of authenticity, such proof may consist of facts and circumstances from which the jury may infer the execution;[8] in other words, the execution may be proved by circumstantial evidence,[9] or by admissions;[10] and the document may furnish internal evidence of the source from which it was derived.[11] It is a general rule that the execution of the instrument by all the parties thereto, should be proved, but there are instances in which it has been held sufficient to

prove the execution *by those sought to be charged.*[12]

1, Linn v. Ross, 16 N. J. L. 55; Francis v. Hazlerig, 1 A. K. Marsh. (Ky.) 93; Dunlap v. Glidden, 31 Me. 510; Williams v. Keyser, 11 Fla. 234; 89 Am. Dec. 243; Stamper v. Griffin, 20 Ga. 312; 65 Am. Dec. 628; Equitable Endowment Ass'n v. Fisher, 71 Md. 430; Baker v. Massengale, 83 Ga. 137; Robertson v. Du Bose 76 Tex. 1. In some states, however, such preliminary proof of execution is not required unless the execution is denied, Mobile & M. Ry. Co. v. Gilmer, 85 Ala. 422; Belton v. Smith, 45 Ind. 291.

2, Pullen v. Hutchinson, 25 Me. 249; Glenn v. Grover, 3 Md. 212; Savery v. Browning, 18 Iowa 246.

3, Pressly v. Hunter, 1 Spear (S. C.) 133.

4, Flournoy v. Warden, 17 Mo. 435.

5, Means v. Means, 7 Rich. L. (S. C.) 533.

6, Kitchen v. Smith, 101 Pa. St. 452.

7, Elliott v. Pearce, 20 Ark. 508; James v. Gordan, 1 Wash. 333; Carnall v. Duval, 22 Ark. 136; Hughes v. Holliday, 3 G. Greene (Iowa) 30; Yarborough v. Beard, 1 Tayl. (N. C.) 25; Darst v. Doom, 38 Ill. App. 397.

8, Siegfried v. Levan, 6 Serg. & R. (Pa.) 308; 9 Am. Dec. 427; Stahl v. Berger, 10 Serg. & R. (Pa.) 170; 13 Am. Dec. 666; Piggott v. Halloway, 1 Binn. (Pa.) 442; Dodge v. Bank of Kentucky, 2 A. K. Marsh. (Ky.) 616; Curtis v. Hall, 4 N. J. L. 148.

9, See cases last cited.

10, Wright v. Wood, 23 Pa. St. 120; Powell v. Adams, 9 Mo. 758.

11, Singleton v. Bremar, 1 Harp. (S. C.) 210.

12, Conrad v. Atlantic Ins. Co., 1 Peters 386; Kingwood v. Bethlehem, 13 N. J. L. 221; St. John v. Kidd, 26 Cal. 263.

§ 539. Proof of attested documents—Attesting witnesses to be called.— It is

an ancient rule of the law that, where an instrument is attested, the attesting or subscribing witness should be produced at the trial to prove the execution.[1] Among the reasons that have been given as the foundation of this rule are that the subscribing witnesses have been agreed upon by the parties as the persons first to be called upon for proof of the execution of the instrument;[2] that such witnesses are presumed to have better knowledge as to the facts than other persons,[3] and that some fact may be known to the subscribing witness, not within the knowledge or recollection of the party.[4] In England the rule has been so changed as to apply only to those documents *required by law to be attested;* and unless the document comes within this description, although it is in fact attested, it may be proved as if unattested.[5] In this country similar statutes have been enacted in some states.[6] "*An attesting or subscribing witness* is one who was present when the instrument was executed, and who, at that time, at the request and with the assent of the party, subscribed his name to it as a witness of the execution. If his name is signed, not by himself, but by the party, it is no attestation. Neither is it such if, though present at the execution, he did not subscribe the instrument at that time, but did it afterwards, and without request, or by the fraudulent procurement of the other party.

But it is not necessary that he should have actually seen the party sign, or have been present at the very moment of signing; for if he is called in immediately afterwards, and the party acknowledges his signature to the witness, and requests him to attest it, this will be deemed part of the transaction, and therefore a sufficient attestation."[7]

1, McPherson v. Rathbone, 11 Wend. 96; Willoughby v. Carlton, 9 Johns. 136; Jackson v. Gager, 5 Cow. 383; Jackson v. Waldron, 13 Wend. 178; Whitaker v. Salisbury, 15 Pick. 534; Petit v. McAdam, 2 Serg. & R. (Pa.) 420; Clarke v. Courtney, 5 Peters 319; Brock v. Saxton, 5 Ark. 708; Stevens v. Irwin, 12 Cal. 306; Mallet v. Mallet, 1 Root (Conn.) 501; Handy v. State, 7 Harr. & J. (Md.) 42; Glasgow v. Ridgeley, 11 Mo. 34; Foye v. Leighton, 24 N. H. 29; Colies v. Vannote, 16 N. J. L. 324; Hudson v. Puett, 86 Ga. 341; International & G. N. Ry. Co. v. McRae, 82 Tex. 614; Richmond & D. Ry. Co. v. Jones, 92 Ala. 218; Coody v. Gress Lumber Co., 82 Ga. 793; Greenl. Ev. sec. 569.

2, Henry v. Bishop, 2 Wend. 576; Clark v. Saunderson, 3 Binn. (Pa.) 194; 5 Am. Dec. 368; McMurtry v. Frank, 4 Mon. (Ky.) 39; Handy v. State, 7 Harr. & J. (Md.) 49; Kinney v. Flynn, 2 R. I. 319; Jones v. Phelps, 5 Mich. 218; Hollenback v. Fleming, 6 Hill 303; Melcher v. Flanders, 40 N. H. 139; Davis v. Alston, 61 Ga. 225; Barry v. Ryan, 4 Gray 523; Chaplain v. Briscoe, 19 Miss. 372.

3, McMurtry v. Frank, 4 Mon. (Ky.) 39; Handy v. State, 7 Harr. & J. (Md.) 48; McPherson v. Rathbone, 11 Wend. 96; Whittmore v. Brooks, 1 Me. 57; Cook v. Woodrow, 5 Cranch 13.

4, Call v. Dunning, 4 East 53; Manners v. Postan, 4 Esp. 239.

5, 17 & 18 Vict. ch. 125 sec. 26; 28 & 29 Vict. ch. 18 secs. 1, 7; Steph. Ev. arts. 66, 69.

6, Laws 1883 N. Y. ch. 195; Pub. Stat. R. I. ch. 215 sec. 41.

7, Greenl. Ev. sec. 569 a; Hollenback v. Fleming, 6 Hill 303; Cussons v. Skinner, 11 M. & W. 168.

§ 540. Same—Application of the rule. The rule at common law, as stated in the last section, is of very wide application and relates not only to deeds and similar instruments of a formal character, but generally to written instruments having subscribing witnesses, such as notices to quit,[1] releases,[2] contracts, sealed or unsealed,[3] receipts[4] and leases.[5] This rule is not dispensed with by the fact that the party has *admitted the execution* of the instrument in question.[6] Parties may, however, expressly *waive such proof* by express admissions in the pleadings,[7] or by failing in the answer to deny the allegations as to execution.[8] The rule applies even where the document has been burned,[9] or cancelled,[10] or lost,[11] if the witnesses are known; and although the subscribing witness is blind,[12] or the person who executed the document is prepared to testify to his own execution of it.[13]

1, Doe v. Durnford, 2 Maule & S. 62.

2, Citizens Bank v. Nantucket Steamboat Co., 2 Story 16; Barry v. Ryan, 4 Gray 523.

3, Bennet v. Robinson, 3 Stew. & P. (Ala.) 227; Henry v. Bishop, 2 Wend. 575; Trammell v. Roberts, 1 McMull. (S. C.) 305; King v. Smith, 21 Barb. (N. Y.) 158.

4, McMahan v. McGrady, 5 Serg. & R. (Pa.) 314.

5, Barry v. Ryan, 4 Gray 523.

6, Smith v. Carolin, 1 Cranch C. C. 99; Turner v. Green, 2 Cranch C. C. 202; Fox v. Reil, 3 Johns. 477; Shaver v.

Ehle, 16 Johns. 201; Zerby v. Wilson, 3 Ohio 42; 17 Am. Dec. 577; Kinney v. Flynn, 2 R. I. 319. But see, Blake v. Sawin, 10 Allen 340.

7, Thorpe v. Keokuk Coal Co., 48 N. Y. 254; Smith v. Gale, 144 U. S. 509.

8, Robert v. Good, 36 N. Y. 408.

9, Gillies v. Smither, 2 Stark. 528.

10, Breton v. Cope, Peake 43.

11, Hewitt v. Morris, 5 & Sp. (N. Y.) 18; Kelsey v. Hammer, 18 Conn. 311; Porter v. Wilson, 13 Pa. St. 641.

12, Cronk v. Frith, 9 Car. & P. 197.

13, R. v. Harringworth, 4 Maule & S. 350.

§ 541. Exceptions to the general rule—Absence or disability of witnesses.— Although the rule under discussion was declared by Lord Ellenborough to be "as fixed, formal and universal as any that can be stated in a court of justice,"[1] yet it has several important *qualifications or exceptions*. The rule does not apply if the subscribing witness is dead,[2] or can not be found,[3] or is without the jurisdiction of the court,[4] or is insane,[5] or incompetent[6] or otherwise incapable of being produced as a witness.[7] Nor does it apply if the instrument is lost, and the name of the subscribing witness is unknown,[8] or if the witness is unable to remember the fact or denies that he was present.[9] Although it has been held in many cases that secondary evidence is admissible where the subscribing witness is proved to reside beyond the jurisdiction of the court,[10] yet the mere temporary absence

of the witness beyond the jurisdiction of the court,[11] or his absence in a distant part of the state are not sufficient.[12] The absence of the witness is sufficiently accounted for, if, after diligent inquiry, he can not be found.[13] But in such case inquiry should be made in due season[14] and in good faith at the place of residence of the witness, if known, and of the persons most likely to know of his whereabouts.[15] The answers to such inquiries are treated as part of the *res gestae*, and may be given in evidence.[16]

1, R. v. Harrington, 4 Maule & S. 352.

2, Adam v. Kerr, 1 Bos. & P. 360; Mott v. Doughty, 1 Johns. Cas. (N. Y.) 230; Mardis v. Shackleford, 4 Ala. 493; Waldo v. Russell, 5 Mo. 387; McGowan v. Laughlan, 12 La. An. 242; Howard v. Snelling, 32 Ga. 195; Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 429; 19 Am. Dec. 139; Armstrong v. Den, 15 N. J. L. 186.

3, Falmouth v. Roberts, 9 M. & W. 469; Parker v. Hoskins, 2 Taunt. 223; Burt v. Walker, 4 Barn. & Ald. 697; Clarke v. Courtney, 5 Peters 319; Spring v. Insurance Co., 8 Wheat. 269; Henry v. Bishop, 2 Wend. 575; Jackson v. Chamberlain, 8 Wend. 620; Clark v. Sanderson, 3 Binn. (Pa.) 192; 5 Am. Dec. 368; Gallagher v. London Assurance Corps., 149 Pa. St. 25.

4, Prince v. Blackburn, 2 East 250; Glubb v. Edwards, 2 Moody v. Rob. 300; Beattie v. Hilliard, 55 N. H. 428; Valentine v. Piper, 22 Pick. 85; 33 Am. Dec. 715 and note; Den v. Van Houten, 10 N. J. L. 270; Dorsey v. Smith, 7 Harr. & J. (Md.) 345; Richards v. Skiff, 8 Ohio St. 586; Ballinger v. Davis, 29 Iowa 512; Selby v. Clark, 4 Hawks (N. C.) 265; Foote v. Cobb, 18 Ala. 585; Clardy v. Richardson, 24 Mo. 295; Teal v. Sevier, 26 Tex. 516; Tatum v. Mohr, 21 Ark. 349; Mariner v. Saunders, 10 Ill. 113; Gould v. Kelley, 16 N. H. 551; McMinn v. Whelan, 27 Cal. 300;

Gordon v. Miller, 1 Ind. 531; Troedor v. Hyams, 153 Mass. 536.

5, Bennett v. Taylor, 9 Ves. 381; Currie v. Child, 3 Camp. 283; Neely v. Neely, 17 Pa. St. 227.

6, Goss v. Tracy, 1 P. Wms. 289; Haynes v. Rutter, 24 Pick. 242; Packard v. Dunsmore, 11 Cush. 283; Hamilton v. Marsden, 6 Binn. (Pa.) 45; Keefer v. Zimmerman, 22 Md. 274; Robertson v. Allen, 16 Ala. 106; Tinnin v. Price, 31 Miss. 422,

7, Clarke v. Courtney, 5 Peters 343; Steph. Ev. art. 66.

8, Hewitt v. Morris, 5 Jones & Sp. (N. Y.) 18; Kelsey v. Hammer, 18 Conn. 311; Porter v. Wilson, 13 Pa. St. 641.

9, Dewey v. Dewey, 1 Met. 349; Whitaker v. Salisbury, 15 Pick. 534; Wynn v. Small, 102 N. C. 133.

10, See cases cited under note 4 *supra*.

11, Mills v. Twist, 8 Johns. 121.

12, McCord v. Johnson, 4 Bibb (Ky.) 531; Tams v. Hitner, 9 Pa. St. 441; Jackson v. Root, 18 Johns. 60.

13, Clark v. Sanderson, 3 Binn. (Pa.) 192; 5 Am. Dec. 368; Jackson v. Cody, 9 Cow. 140; Whittemore v. Brooks, 1 Me. 57; Jackson v. Chamberlain, 8 Wend. 620.

14, Mills v. Twist, 8 Johns. 121.

15, Jackson v. Waldron, 13 Wend. 199; Clark v. Sanderson, 3 Binn. (Pa.) 192; 5 Am. Dec. 368; Greenl. Ev. sec. 574.

16, Greenl. Ev. sec. 574.

§ 542. Diligence necessary, if witness is absent.— What is due diligence must, of course, depend somewhat upon the circumstances of each case. The proof should show satisfactorily that a reasonable, *honest and diligent inquiry* has been made. After such proof is given, the decision of the question depends to a considerable extent upon the

sound *discretion of the court.*[1] Parties will be required to use a less degree of effort to produce the subscribing witness, if the proof shows that the witness is seeking to avoid appearing.[2] If it is shown that there is *collusion* between the witness and the adverse party, or that such party has prevented the attendance of the witness, the rule will not be enforced;[3] nor is the rule enforced where the one party relies upon the document which is *wrongfully withheld by the other.*[4] If the absent witness is out of the state, it is not necessary to take his *deposition*, for parties are not bound to send original documents out of the state to be proved by the subscribing witnesses.[5] If the document was executed outside the state, the presumption is that the subscribing witnesses are non-residents, and the rule does not apply;[6] and in such cases it is sufficient to prove the handwriting of the party to the instrument.[7] "An instrument, purporting to be attested by a subscribing witness, may be proved as if there were no subscribing witnesses, where the name of a fictitious person is inserted as the name of the attesting witness, or where the person who has put his name as attesting witness did so without the knowledge or consent of the parties, or where the attesting witness, on being called, denies having any knowledge of the execution.

1, Jackson v. Burton, 11 Johns. 65; Jackson v. Waldron, 13 Wend. 199; Pelletreau v. Jackson, 11 Wend. 110;

Troeder v. Hyams, 153 Mass. 536. Cases illustrating what is due diligence, Cunliffe v. Sefton, 2 East 183; Crosby v. Percy, 1 Taunt. 364; Dudley v. Sumner, 5 Mass. 444; Morgan v. Morgan, 9 Bing. 359; Evans v. Curtis, 2 Car. & P. 296; Spring v. South Carolina Ins. Co., 8 Wheat. 268; Holman v. Bank of Norfolk, 12 Ala. 369, witness never heard of in locality; Nicks v. Rector, 4 Ark. 251, four years absence, unheard of.

2, Wardell v. Fermor, 2 Camp. 282.

3, Mills v. Twist, 8 Johns. 121.

4, Davis v. Spooner, 3 Pick. 284.

5, Clark v. Houghton, 12 Gray 38; Clark v. Boyd, 2 Ohio 56.

6, McMinn v. O'Connor, 27 Cal. 238; Sherman v. Champlain Co., 31 Vt. 162; Valentine v. Piper, 22 Pick. 85; 33 Am. Dec. 715 and note.

7, McMinn v. Whelan, 27 Cal. 300; Valentine v. Piper, 22 Pick 85; 33 Am. Dec. 715, witness to a deed executed in foreign country.

8, 2 Phill. Ev. 214; Jackson v. Waldron, 13 Wend. 183; Pelletreau v. Jackson, 11 Wend. 123; Clark v. Sanderson, 3 Binn. (Pa) 192; 5 Am. Dec. 368; Handy v. State, 7 Harr. & J. (Md.) 42; Whittemore v. Books, 1 Me. 57; Halloway v. Lawrence, 1 Hawks (N. C.) 49; Gilliam v. Perkinson, 4 Rand. (Va.) 525; Farnsworth v. Briggs, 6 N. H. 561; Bennet v. Robinson, 3 Stew. & P. (Ala.) 229. See sec. 548 *infra*.

§ 543. Exception where adverse party claims under the document.—Another exception to the general rule is that, where the adverse party claims a beneficial interest under the document in the same cause, and produces it pursuant to a notice, he practically admits the execution of the instrument, and cannot insist upon proof thereof,[1] as, for example, where both parties claim the same

interest under the same deed.[2] The mere fact that the document comes from the possession of the adverse party, under notice to produce, is not enough to dispense with the rule. It is essential that the one producing the paper should claim a beneficial interest under it.[3] Nor can a party take advantage of this exception for the purpose of introducing irrelevant testimony;[4] and, if a party admits on cross-examination that a document under which he claims title is in his possession, the instrument may be ordered to be produced, and put in evidence without calling the attesting witnesses.[5]

1, Pearce v. Hooper, 3 Taunt. 60; Carr v. Burdis, 1 Cromp., M. & R. 782; Bradshaw v. Bennett, 1 Moody & Rob. 143; Rearden v. Minter, 5 Man. & G. 205; Jackson v. Kingsley, 17 Johns. 158; McGregor v. Wait, 10 Gray 72; 69 Am. Dec. 305; Herring v. Rogers, 30 Ga. 615; Rhodes v. Selin, 4 Wash. C. C. 715.

2, Greenl. Ev. sec. 571; Roe v. Wilkins, 4 Adol. & Ell. 86; Knight v. Martin, 1 Gow. 26.

3, Doe v. Cleveland, 9 Barn. & C. 864.

4, McGee v. Guthrie, 32 Ga. 307.

5, McGregor v. Wait, 10 Gray 72; 69 Am. Dec. 305.

§ 544. Exception — Ancient documents.— Another exception to the general rule requiring the proof of execution of attested instruments by the subscribing witness is that ancient documents, or those thirty years old or more, prove themselves.[1] The obvious difficulty of producing witnesses

after so long a period rendered it necessary to fix some limit in cases of this character; and although the exception has often been said to be based upon the presumption of the death of the subscribing witnesses,[2] there are cases in which, after thirty years have elapsed, it has been held unnecessary to call the subscribing witnesses, although they were proved to be living,[3] or even in court.[4] This exception to the general rule would therefore seem to be based on grounds of *public expediency* or necessity, rather than on the presumption that the witnesses are dead.[5] But it is an important qualification of the rule that ancient documents prove themselves, that they must on their face be *free from suspicion*, come from the *proper custody* and be accompanied by some *corroborating evidence*. If there are erasures or interlineations, or other facts giving rise to suspicion, the ancient document should be proved, like other documents, by the subscribing witnesses, or by proof of their handwriting.[6] In England, it seems to be sufficient if the document is ancient, comes from proper custody and is otherwise free from suspicion.[7] But in this country, the clear weight of authority sustains the proposition that there must be some corroborating evidence beyond the mere production of the instrument from the proper custody.[8] This principle is recognized in most of the cases cited to other propositions in the next section.

1, Doe v. Davies, 10 Q. B. 314; Green v. Chelsea, 24 Pick. 71; Jackson v. Christman, 4 Wend. 277; Clark v. Owens, 18 N. Y. 434; R. v. Farrington, 2 T. R. 466; Doe v. Wolley, 8 Barn. & C. 22; Chelsea Waterworks v. Cowp, 1 Esp. 275; R. v. Buckby, 7 East 45; Winn v. Patterson, 9 Peters 674; Aldrich v. Griffith, 66 Vt. 390; Baldwin v. Goodfrank, (Tex.) 31 S. W. Rep. 1064; Davidson v. Morrison, 86 Ky. 397; 9 Am. St. Rep. 295; Woods v. Montvallo Co., 84 Ala. 560; 5 Am. St. Rep. 393. When the corroborating evidence is strong the rule has been applied to instruments twenty-five years old, Blackburn v. Norman, (Tex. Civ. App.) 30 S. W. Rep. 718.

2, 1 Greenl. Ev. sec. 570; 1 Selw. N. P. 540 note.

3, Marsh v. Collnet, 2 Esp. 665; Doe v. Burdett, 4 Adol. & Ell. 1; Doe v. Wolley, 8 Barn. & C. 22; Doe v Deakin, 3 Car. & P. 402; Jackson v. Christman, 4 Wend 277. But see, Tolman v. Emerson, 4 Pick. 160.

4, Marsh v. Collnett, 2 Esp. 666.

5, See cases above cited.

6, 1 Stark. Ev. (6th Am. ed.) 330.

7, Tayl. Ev. sec. 871; Steph. Ev. art. 88.

8, Homer v. Cilley, 14 N. H. 85; Bank of Middlebury v. Rutland, 33 Vt. 414; Dishazer v. Maitland, 12 Leigh (Va.) 524; Jackson v. Luquere, 5 Cow. 221; Willson v. Betts, 4 Den. 203; Clark v. Owens, 18 N. Y. 434; Wilson v. Simpson, 80 Tex. 279.

§ 545. Same—Office bonds, etc.—*Possession of the property claimed* to have been conveyed by the instrument is the most usual evidence offered to confirm the instrument in case of the conveyance of property.[1] It has been intimated in some cases that proof of such possession is indispensable.[2] But the clear weight of authority sustains the view that *other corroborative circumstances* may be

sufficient to establish the authenticity of the document, though circumstantial in their character.[3] In such cases the courts are less strict in admitting proofs of the handwriting of witnesses, than in respect to instruments of recent date.[4] It is not necessary to prove a corresponding possession of every portion of the premises claimed to be conveyed. A *possession of a part* under the deed affords evidence of its authenticity of as high a character as though that possession extended to the whole.[5] It has generally been held that where possession is the only corroborating fact supporting the ancient deed, such possession must be shown for the *period of thirty years.*[6] But Mr. Wharton holds that "proof of contemporaneous possession is unnecessary, though without such proof the deeds may be entitled to little or no weight."[7] The presumptions in favor of an ancient deed are greatly weakened, if not rebutted, by proof that the grantor, soon after its date, conveyed the premises to another person.[8] Another exception has been recognized in the case of *office bonds.* Like those of executors, guardians and similar persons, such bonds are generally deposited in a public office. They are for the benefit of various persons who may be interested, and are not generally delivered until they have the approval of some public officer. These facts have been deemed a sufficient guaranty of the authenticity of

bonds of this character to dispense with the evidence of the subscribing witness.[9] It has also been held that where an instrument in writing is *collaterally or incidentally introduced* in proceedings between persons, not parties to it, or when it is not offered as part of a chain of title, it is not necessary to call the subscribing witnesses.[10]

1, Roberts v. Stanton, 2 Munf. (Va.) 129; 5 Am. Dec. 463; Carroll v. Norwood, 1 Harr. & J. (Md.) 167; Middleton v. Mass., 2 Nott & McC. (S. C.) 55; Waldron v. Tuttle, 4 N. H. 371; McGennis v. Allison, 10 Serg. & R. (Pa.) 197; Tolman v. Emerson, 4 Pick. 162; Bell v. McCawley, 29 Ga. 355; Taylor v. Cox, 2 B. Mon. (Ky.) 429; Stockbridge v. West Stockbridge, 14 Mass. 257; Hewlett v. Cock, 7 Wend. 371; Havens v. Sea Shore Land Co., 47 N. J. Eq. 365.

2, Jackson v. Blanshan, 3 Johns. 292; 3 Am. Dec. 485; Jackson v. Laroway, 3 Johns. Cas. (N. Y.) 283, dissenting opinion of Kent Ch.

3, Barr v. Gratz, 4 Wheat. 213; Clark v. Owens, 18 N. Y. 434; Whitman v. Heneberry, 73 Ill. 109; Burgin v. Chenault, 9 B. Mon. (Ky.) 285; Caruthers v. Eldridge, 12 Gratt. (Va.) 670.

4, Coulson v. Walton, 9 Peters 62; Edmonston v. Hughes, 1 Cheves (S. C.) 81; Stump v. Hughes, 5 Hayw. (Tenn.) 93.

5, Jackson v. Davis, 5 Cow. 123; 15 Am. Dec. 451; Jackson v. Luquere, 5 Cow. 221; Townsend v. Downer, 32 Vt. 183. So the payment of taxes is *prima facie* evidence of possession, Williams v. Hillegas, 5 Pa. St. 492.

6, Jackson v. Luquere, 5 Cow. 221; Jackson v. Blanshan, 3 Johns. 292; 3 Am. Dec. 485. But see, Wagner v. Aiton, 1 Rice (S. C.) 100.

7, Whart. Ev. sec. 733.

8, Willson v. Betts, 4 Den. 203.

9, Greenl. Ev. sec. 573.

10, Kitchin v. Smith, 101 Pa. St. 452; Ayers v. Hewett, 19 Me. 281; Curtis v. Belknap, 21 Vt. 433; Com. v. Castles, 9 Gray 121; 69 Am. Dec. 278; Greenl. Ev. sec. 573 b; Whart. Ev. sec. 724. Contra, Jackson v. Christman, 4 Wend. 277.

§ 546. Best evidence after non-production of subscribing witnesses.— If there are several subscribing witnesses, it is sufficient to produce one who has the requisite knowledge.[1] If there are several witnesses, the absence or non-production of all of them must be accounted for before secondary evidence of handwriting can be received.[2] As to what constitutes the best evidence after the non-production of subscribing witnesses has been accounted for, there has been considerable conflict of opinion. One of the views entertained may be thus expressed in the language of Judge Story: Where the subscribing witness "is dead or cannot be found, or is without the jurisdiction, or is otherwise incapable of being produced, the *next best secondary evidence* is the *proof of his handwriting;* and that, when proved, affords *prima facie* evidence of a due execution of the instrument, for it is presumed that he would not subscribe his name to a false attestation. If upon due search and inquiry, no one can be found who can prove his handwriting, there is no doubt that resort may then be had to proof of the *handwriting of the party* who executed the instrument; indeed, such proof

may always be produced as corroborative evidence of its due and valid execution, though it is not, except under the limitations above suggested, primary evidence."[3] Another eminent judge thus expressed the same view: "In proving deeds, the proper course is first to call the subscribing witness; if he cannot be had, you may then prove his handwriting as the next best evidence. When it appears that that cannot be done, and not before, proof may be given of the handwriting of the grantor."[4]

1, Andrew v. Motley, 12 C. B. N. S. 526; Adam v. Kerr, 1 Bos. & P. 360; Belbin v. Skeats, 1 Swab. & T. 148; Jackson v. Sheldon, 22 Me. 569; Melcher v. Fland ers, 40 N H. 139; Burke v. Miller, 7 Cush. 547; McAdams v. Stilwell, 13 Pa. St. 90; Burnett v. Thompson, 13 Ired. (N. C.) 379; Jackson v. Gager, 5 Cow. 383; Gelott v. Goodspeed, 8 Cush. 411.

2, Jackson v. Gager, 5 Cow. 383; Davison v. Bloomer, 1 Dall. (Pa.) 123; Jackson v. Cody, 9 Cow. 140; Jackson v. Root, 18 Johns. 60; Hautz v. Rough, 2 Serg. & R. (Pa.) 349; Whittemore v. Brooks, 1 Me. 57; Shepherd v. Goss, 1 Tenn. 487; McPherson v. Rathbone, 11 Wend. 96; Jackson v. Waldron, 13 Wend. 178.

3, Clarke v. Courtney, 5 Peters 344.

4, Willson v. Betts, 4 Den. 203; Raines v. Phillips, 1 Leigh (Va.) 483; Whittemore v. Brooks, 1 Me. 60; Halloway v. Laurence, 1 Hawks (N. C.) 49; Homer v. Wallis, 11 Mass. 309; 6 Am. Dec. 169; Wilson v. Royston, 2 Ark. 315; Farnesworth v. Briggs, 6 N. H. 561; Pelletreau v. Jackson, 11 Wend. 110; Jones v. Roberts, 65 Me. 273; Yocum v. Barnes, 8 B. Mon. (Ky.) 496.

§ 547. Same, continued.—Mr. Stephen thus states the English rule: "If it be shown

that no attesting witness is alive or can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."[1] But the rule prevails in some jurisdictions in the United States that the *secondary evidence* may consist of proof of the *handwriting of the party;* and that such evidence is of as high order as that of the handwriting of the witness.[2] In one of the cases last cited, the court expressed the view that evidence of the handwriting of the party is the more satisfactory.[3] But in most jurisdictions, it is conceded that evidence of the handwriting of the witness is sufficient;[4] and that where there were several witnesses, proof of the handwriting of one is sufficient.[5] If there are any *suspicious circumstances* attending the instrument, it may be necessary to take the precaution to rebut them by proving in addition the *identity of the person* executing the instrument or his handwriting.[6] But ordinarily the identity of the maker will be assumed from the identity of name.[7] Proof of the handwriting of the party in addition to that of the witness is, of course, admissible in corroboration, and this is necessary, if the handwriting of the witness is not fully proved, or where he has signed by the use of a mark.[8] In New York, where it is held that the handwriting of the absent witness must

be shown in preference to that of the party, if possible, it was held that "the same diligence should be exacted in endeavouring to prove the handwriting, that is required in the endeavour to find and procure the personal attendance of the witness, at least, before the third degree of evidence is admitted, to-wit: the handwriting of the party."[9]

1, Steph. Ev. art. 66.

2, Cox v. Davis, 17 Ala. 714; 52 Am. Dec. 199; Landers v. Bolton, 26 Cal. 393; Leonard v. Neale, 1 Cranch C. C. 493; Clark v. Sanderson, 3 Binn. (Pa.) 192; 5 Am. Dec. 368; McPherson v. Rathbone, 11 Wend. 96; Homer v. Wallis, 11 Mass. 309; 6 Am. Dec. 169; Valentine v. Piper, 22 Pick. 85; 33 Am. Dec. 715.

3, Valentine v. Piper, 22 Pick. 85; 33 Am. Dec. 715.

4, See cases already cited.

5, Stebbins v. Duncan, 108 U. S. 32; Gelott v. Goodspeed, 8 Cush. 409.

6, Brown v. Kimball, 25 Wend. 259 and cases cited.

7, Atchinson v. McCullock, 5 Watts (Pa.) 13; Jackson v. Goes, 13 Johns. 518; 7 Am. Dec. 399; Jackson v. Cody, 9 Cow. 140; Jackson v. King, 5 Cow. 237; 15 Am. Dec. 468. See sec. 99 *supra*.

8, Nelins, v. Brickell, 1 Hayw. (N. C.) 19; Gilliam v. Perkinson, 4 Rand. (Va.) 325.

9, Pelletreau v. Jackson, 11 Wend. 110; McPherson v. Rathbone, 11 Wend 96.

§548. Same—Absence of witnesses, etc.—When the proper foundation has been laid, by proof that the subscribing witness cannot be produced or his handwriting shown, the execution of the instrument may be

proved, not only by evidence of the handwriting of the maker, but by evidence of his express *admissions*,[1] or of his acknowledgment, acquiescence or other *recognition of the validity* of the instrument.[2] The proof of the *handwritng of a subscribing witness* is in general *prima facie* evidence of the execution of the instrument by the apparent maker, as it is presumed that the witness would not have attested the instrument, but for its due execution.[3] The same is true when evidence is admissible as to the handwriting of the maker.[4] Delivery may also be presumed when proof is made of the signature of the subscribing witness.[5] But the presumption arising from proof of the handwriting of the witness or of the party is *not conclusive;*[6] it may be rebutted by the uncontradicted testimony of the witness.[7] If the *subscribing witness fails to establish the execution*, as where he does not remember the act, or denies the attestation, the party calling him to prove the instrument is, by a positive rule of the law, not concluded by his testimony. He may establish the fact by other testimony.[8] In other words, the execution of the instrument, even though it be a will, may be established by competent evidence against the positive testimony of the subscribing witnesses.[9]

1, Pelletreau v. Jackson, 11 Wend. 110; Conrad v. Farrow, 5 Watts (Pa.) 536; Halloway v. Laurence, 1 Hawks (N. C.) 49.

2, Hill v. Scales, 7 Yerg. (Tenn.) 410.

3, Sigfried v. Levan, 6 Serg. & R. (Pa.) 308; 9 Am. Dec. 427; Pelletreau v. Jackson, 11 Wend. 110; Ingram v. Hall, 1 Hayw. (N. C.) 193; Jackson v. Waldron, 13 Wend. 178; Carroll v. Norwood, 1 Harr. & J. (Md.) 167; Ross v. Gould, 5 Me. 204; Farnsworth v. Briggs, 6 N. H. 561; Clarke v. Courtney, 5 Peters 319; Winn v. Patterson, 9 Peters 674.

4, Sigfried v. Levan, 6 Serg. & R. (Pa.) 308; 9 Am. Dec. 427.

5, Burling v. Paterson, 9 Car. & P. 570.

6, Sommerville v. Sullivant, 1 Call (Va.) 560.

7, Booker v. Bowles, 2 Blackf. (Ind.) 90.

8, Talbot v. Hodson, 7 Taunt. 251; Whitaker v. Salisbury, 15 Pick. 534; Sigfried v. Levan, 6 Serg. & R. (Pa.) 308; 9 Am. Dec. 427; Hamsher v. Kline, 57 Pa. St. 397; Harrington v. Gable, 81 Pa. St. 406; Matter of Cottrell, 95 N. Y. 329; Patterson v. Tucker, 9 N. J. L. 322; 17 Am. Dec. 472; Thomas v. LeBaron, 8 Met. 355; Tompson v. Fisher, 123 Mass. 559; Frost v. Deering, 21 Me. 156; Steph. Ev. art. 68.

9, Matter of Cottrell, 95 N. Y. 329.

§ 549. Same — Mode of proving execution by subscribing witnesses. — The party seeking to prove the instrument may cross-examine the subscribing witness,[1] or corroborate or add to his testimony by other evidence.[2] But he *cannot impeach* the general reputation of such witness for truth and veracity.[3] Nor can he impeach a deceased subscribing witness by proving his declarations denying his signature,[4] although it has been held in a few cases that, on cross-examination, he may prove previous statements of the subscribing witness contradicting his

testimony.[5] It is *not necessary*, in order to prove the execution, *that the subscribing witness should remember* the transactions involved in the execution of the instrument. Documents have often been submitted to the jury, as sufficiently proved, where the witness has recognized his signature, and from that fact stated his belief that the document was executed in his presence, without having any positive recollection as to the execution.[6] *Nor need the witness be present* at the moment of the execution. "If he is called in by the parties immediately afterwards, and told that it is their deed or agreement, and requested to subscribe his name as a witness, that will be enough. The execution by the parties, and the subscribing by the witness are then considered as parts of the same transaction."[7]

1, Bowman v. Bowman, 2 Moody & Rob. 501.

2, Whitaker v. Salisbury, 15 Pick. 534.

3, Whitaker v. Salisbury, 15 Pick. 534; Brown v. Bellows, 4 Pick. 194. See secs. 857 *et seq. infra.*

4, Stobart v. Dryden, 1 M. & W. 615.

5, Brown v. Bellows, 4 Pick. 194; Cowden v. Reynolds, 12 Serg. & R. (Pa.) 281; Sigfried v. Levan, 6 Serg. & R. (Pa.) 308; 9 Am. Dec. 427.

6, Maugham v. Hubbard, 1 Man. & R. 7; Russell v. Coffin, 8 Pick. 143; Merrill v. Ithca Ry. Co., 16 Wend. 598; 30 Am. Dec. 130; Brown v. Anderson, 1 Mon. (Ky.) 198.

7, Hollenback v. Fleming, 6 Hill 303, 305.

§ 550. Statutes affecting proof of documents — Recording acts, etc.—Although

considerable space has been necessarily given to the discussion of the common law rules for the proof of attested documents, it should be observed that various statutes have been enacted in the several states which greatly modify the old rules in certain classes of cases. It is, of course, beyond the scope of this work to enter into any general discussion of these statutes, or to do more than point out in the most general way their effect upon the common law rules. Among the most important of the statutes referred to are those which provide for the *acknowledgment* or proof of *conveyances* and other instruments before public officers in such manner as to entitle them to be recorded under the registry laws; and that, when so acknowledged, they shall be received in evidence without further proof of execution, subject to rebuttal by competent testimony. Generally when these statutes make the instrument *prima facie evidence of its execution* by reason of such acknowledgment, they also give like effect to the record and to certified copies of such record.[1] Where such statutes exist, the document, which has been proved or acknowledged pursuant to the statute, is admitted without calling the attesting witnesses or giving any proof of signature or other execution.[2] Of course the instrument must be *acknowledged* in substantial *compliance with the statute.*[3] For example, if the statute requires

the certificate to state that the party is known to the officer, this is essential.[4] So if the statute requires two witnesses as a condition of recording, and the instrument has only one, the execution must be proved.[5] But instruments so acknowledged may be admitted in evidence, although there are *errors* which appear from the face of the instrument to be the *result of inadvertence* or clerical mistake, for example, in respect to such matters as dates or names.[6] They are not excluded, although the acknowledgment has been made since the bringing of the suit.[7] In some states, statutes have been enacted authorizing the acknowledgment of *other instruments* than those affecting real property; and making such acknowledgment *prima facie* evidence of execution, although promissory notes, bills of exchange and wills are generally excepted.[8] Other statutes relating to the proof of documents are those which provide that either party may exhibit to the other, before the trial, any material document, and *request an admission of its genuineness;* and that on default of such admission, and on due proof at the trial, the one declining to make the admission be required to pay the expense of such proof. There is another class of statutes materially modifying the common law rule with respect to *proof of signatures.* These statutes generally provide that written instruments, purporting to have been signed

by a person, shall be proof of such signatures until the person by whom they purport to have been so signed shall specifically deny the signature by oath or affidavit, or by a pleading, duly verified. It has been held that the provisions of these statutes apply to instruments signed by strangers, as well as to those signed by parties to the action.[9] Under such a statute, it has been held that the affidavit denying the signature may, in the discretion of the court, be filed at the trial.[10]

1, See sec. 531 *supra*. See statutes of the jurisdiction.

2, Doe v. Johnson, 3 Ill. 522; Morris v. Wadsworth, 17 Wend. 103; Thurman v. Cameron, 24 Wend. 87; Keichline v. Keichline, 54 Pa. St. 75; Eaton v. Campbell, 7 Pick. 10; Hinchliff v. Hinman, 18 Wis. 130; Gragg v. Learned, 109 Mass. 167; Clark v. Troy, 20 Cal. 219; Simpson v. Mundee, 3 Kan. 181; Smith v. Gale, 144 U. S. 509, acknowledged out of the state.

3, Lowry v. Harris, 12 Minn. 255; Winlock v. Hardy, 4 Litt. (Ky.) 272; Aubuchon v. Murphy, 22 Mo. 115; Andrews v. Marshall, 26 Tex. 212; Wood v. Weiant, 1 N. Y. 77. See sec. 531 *supra*.

4, Morgan v. Curtenius, 4 McLean (U. S.) 366; Job v. Tebbetts, 9 Ill. 143; Bone v. Greenlee, 1 Coldw. (Tenn.) 29.

5, Eastland v. Jordan, 3 Bibb (Ky.) 186.

6, Carpenter v. Dexter, 8 Wall. 513; Fisher v. Butcher, 19 Ohio 406; 53 Am. Dec. 436; Page v. Arnim, 29 Tex. 53; Jordan v. Mead, 12 Ala. 247; Emanuel v. Gates, 53 Fed. Rep. 772; Smith v. Gale, 144 U. S. 509.

7, Lanning v. Dolph, 4 Wash. C. C. 624; Shelden v. Strykes, 42 Barb. (N. Y.) 284.

8, As to the provisions of the various statutes on this subject, the statutes of the jurisdiction should be consulted.

9, Parroski v. Goldberg, 80 Wis. 339.

10, Parroski v. Goldberg, 80 Wis. 339; Wallis v. White, 58 Wis. 26.

§ 551. Non-judicial records — Proof of — Federal statutes. — It is impracticable in this work to discuss the various statutes existing in the different states relating to the authentication of non-judicial records. There are, however, certain federal statutes, operative in all jurisdictions, to which attention should be called. One of these statutes is as follows: "All records and exemplifications of books which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish or district in which such office may be kept, or of the governor or secretary of state, the chancellor or keeper of the great seal of the state or territory or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the

said court who shall certify under his hand and the seal of his office that the said presiding justice is duly commissioned and qualified, or, if given by such governor, secretary, chancellor or keeper of the great seal, it shall be under the great seal of the state, territory, or country aforesaid in which it is made; and the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the state, territory or country, as aforesaid, from which they are taken."[1] This mode of authentication has been held applicable to marriage certificates,[2] deeds,[3] pardons,[4] surveys[5] and to other documents, when they do not form part of the records of courts, such as wills,[6] patents[7] and guardians' bonds.[8] In case they do form part of judicial records, they should be authenticated as stated in sections 641 *et seq. infra* or according to local statutes. The records *must be relevant* to the issue,[9] and the authentication must be *as required by the statute*, and be correct in form.[10] It has been held in some cases that the copy of the record is not admissible in such cases, unless there is also *proof of the effect* of such copy under the laws of the state where recorded.[11]

1. Rev. Stat. U. S. sec. 906; Desty Fed. Proc. sec. 906.

2. King v. Dale, 2 Ill. 513.

3. Drummond v. Magruder, 9 Cranch 122; Johnson v.

Fowler, 4 Bibb (Ky.) 521; Pennel v. Weyant, 2 Har. (Del.) 501; Warren v. Wade, 7 Jones (N. C.) 494; Petermans v. Laws, 6 Leigh (Va.) 523; Kidd v. Manley, 28 Miss. 156; Brown v. Edson, 23 Vt. 435; King v. Mims, 7 Dana (Ky.) 267. But see, State v. Engle, 21 N. J. L. 347.

4, United States v. Wilson, Bald. (U. S.) 78.

5, Smith v. Redden, 5 Har. (Del.) 321.

6, Ewing v. Savory, 4 Bibb (Ky.) 424.

7, Henthorn v. Shepherd, 1 Blackf. (Ind.) 157.

8, Carlisle v. Tuttle, 30 Ala. 613.

9, Ordway v. Conroe, 4 Wis. 45.

10, Drummond v. Magruder 9 Cranch 122; Pennel v. Weyant, 2 Har. (Del.) 501; Mott v. Ramsay, 92 N. C. 152.

11, Dickson v. Grisson, 4 La. An. 538; Kidd v. Manley, 28 Miss. 156; Stevens v. Bomar, 9 Humph. (Tenn.) 546; Dunlap v. Dougherty, 20 Ill. 397; Powell v. Knox, 16 Ala. 364.

§ 552. Same — Department records — Federal statutes. — There are numerous other federal statutes which provide for the admission of copies of records of the governmental departments and bureaus. The scope of this work will only admit a reference to these statutes, and a brief statement of their general purport. It is provided that "copies of any books, records, papers or documents in any of the executive departments, authenticated under the seals of such departments respectively, shall be admitted in evidence equally with the originals thereof."[1] So it is provided that copies of records and papers in the office of the *solicitor of the treasury*[2] and of the *comptroller of the currency*,[3] including

his certificate of the *organization of national banks*,[4] when certified and authenticated by the seal of the respective offices, shall be evidence equally with the originals. In an action brought for the delinquincy of any person accountable for public money, a transcript from the *books or proceedings of the treasury department*, certified by the register and authenticated under the seal of the department, or, if the suit involves the accounts of the *war or navy departments*, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the treasury department, afford evidence on which the court may grant judgment. So *copies of bonds, contracts* or other papers relating to or connected with the settlement of any account between the United States and an individual, when certified by the register or the auditor and authenticated under the seal of such department, may be annexed to such transcript and have equal effect with the original papers, except that, if the action is upon a bond or other sealed instrument, and the plea is *non est factum*, the court may require the production of the original.[5] By statute such transcripts are sufficient evidence to show a balance against the defendant in an indictment for embezzlement of public moneys,[6] and of false swearing to affidavits made by officers which are required,

to be returned to the department of the interior.[7] In like manner copies of *records* of the *post-office department*, such as quarterly returns of post-masters, papers pertaining to their accounts in the auditor's office and statements of their accounts, when certified to by the proper officer under the seal of his office, are admissible in the courts of the United States in all civil and criminal prosecutions.[8] So certified copies of records, books and papers belonging to the *general land office*[9] or to the *patent* office[10] are evidence in all cases wherein the original would be evidence. So copies of official papers or official entries in the records of the offices of *consuls, vice-consuls or commercial agents* of the United States, certified under their hand and seal, are also admitted in evidence in the courts of the United States.[11]

1, Rev. Stat. U. S. sec. 882.
2, Rev. Stat. U. S. sec. 883.
3, Rev. Stat. U. S. sec. 884.
4, Rev. Stat. U. S. sec. 885.
5, Rev. Stat. U. S. sec. 886.
6, Rev. Stat. U. S. sec. 887.
7, Rev. Stat. U. S. sec. 888.
8, Rev. Stat. U. S. sec. 889.
9, Rev. Stat. U. S. sec. 891.
10, Rev. Stat. U. S. sec. 892.
11, Rev. Stat. U. S. sec. 896.

§ 553. Proof of records of public departments — Copies — Certificates.— Some of the statutes referred to in the last section have long been on the statute books; and have been frequently applied in the federal courts in actions against officers and sureties on their bonds, and in other similar actions. It is a familiar rule that the *copy must be authenticated* in the mode provided by the statute; and the statute must, in this respect, be *strictly pursued.*[1] It has been held a sufficient authentication of copies of records from the executive departments, where the certificate was signed by the head of the department, as by the secretary of the treasury [2] or of state,[3] and authenticated by the seal of the department; thus, a copy of a collector's bond, so authenticated, is admissible,[4] but not if the execution of the bond is denied on oath.[5] If the document is in the immediate possession of a subordinate officer, it is sufficient, if he makes the certificate, and his official character is certified to by the head of the department under its seal.[6] But where the transcript is offered under section eight hundred and eighty-six of the revised statutes, referred to in the last section, the certificate should be by the auditor and authenticated by the seal of the department, both having been held necessary.[7] Under the respective statutes referred to in the last section, copies of papers and records have been received as evi-

dence of the fact that officials were indebted to the government,[8] and also of the official character of an accredited minister and of the date of his recognition,[9] or that an officer or other person received the money charged to him on the accounts certified.[10] In like manner certified copies of a vessel's register,[11] of official bonds,[12] of accounts and returns rendered by officers,[13] of certificates of organization of national banks,[14] copies of patents,[15] plats and descriptions in the general land office[16] and the certificates of receivers[17] have been received in evidence. The certificate of a consul, under his seal of office, is admissible as evidence that a master of a vessel refused to receive a destitute seaman in a foreign port, when the essential facts are stated;[18] that ship's papers were lodged with him,[19] and that a seaman was discharged in a foreign port with his own consent.[20]

1, Smith v. United States, 5 Peters 292; Block v. United States, 7 Ct. of Cl. 406; Desty Fed. Proc. sec. 406 and note. See also, West Jersey Traction Co. v. Board of Public Works, (N. J. L.) 30 At. Rep. 581.

2, United States v. Hunt, 105 U. S. 183; Chadwick v. United States, 3 Fed. Rep. 750; White v. St. Guirons, Minor (Ala.) 331; 12 Am. Dec. 56.

3, United States v. Berner, Bald. (U. S.) 234; United States v. Liddle, 2 Wash. C. C. 205; Ballew v. United States, 160 U. S. 187, by commissioner of pensions.

4, Chadwick v. United States, 3 Fed. Rep. 750.

5, United States v. Humason, 8 Fed. Rep. 71.

6, Thompson v. Smith, 2 Bond (U. S.) 320; Stephens v. Westwood, 25 Ala. 716.

7, Smith v. United States, 5 Peters 292.

8, United States v. Hunt, 105 U. S. 183.

9, United States v. Benner, Bald. 234; United States v. Liddle, 2 Wash. C. C. 205.

10, Bruce v. United States, 17 How. 437; United States v. Lee, 2 Cranch C. C. 462.

11, Carlett v. Pacific Ins. Co., 1 Paine (U. S.) 594.

12, Chadwick v. United States, 3 Fed. Rep. 750; United States v. Lent, 1 Paine (U. S.) 417.

13, United States v. Gaussen, 19 Wall. 198; United States v. Vanzandt, 2 Cranch C. C. 338.

14, Rev. Stat. U. S. sec. 885; First Nat. Bank v. Kidd, 20 Minn. 234; Washington Nat. Bank v. Lee, 112 Mass. 521.

15, Hines v. Greenlee, 3 Ala. 73; Stevenson v. Wait, 8 Blackf. (Ind.) 508; Lane v. Bommelman, 17 Ill. 95; Lacey v. Davis, 4 Mich. 140; 66 Am. Dec. 524; Barton v. Murrain, 27 Mo. 235; 72 Am. Dec. 259; Avery v. Adams, 69 Mo. 603.

16, Lee v. Getty, 26 Ill. 76; Davis v. Freeland, 32 Miss. 645; LeBleu v. North Am. Land Co., 46 La. An. 1465.

17, McDonald v. Edmunds, 44 Cal. 328.

18, Mathews v. Offley, 3 Sum. (U. S.) 115; Desty Fed. Proc. sec. 416.

19, United States v. Mitchell, 2 Wash. C. C. 478.

20, Lamb v. Baird, Abb. Adm. (U. S.) 367.

§ 554. Same—Effect of these statutes. It will be observed that, by provisions of some of the statutes referred to in a former section, the copies of statements of account appearing upon the books of the departments, properly certified and authenticated, are admissible in evidence, and that they afford

sufficient basis for the entry of judgment.[1] Such transcripts are admissible, not only against the *principals*, but also *against their sureties;*[2] and it is no objection to their introduction as evidence that the party against whom they are offered had no notice of the adjustment of the accounts.[3] But although such transcripts are admissible as evidence, they are only *prima facie* evidence of the facts recited; and it is open to *proof that they are erroneous.*[4] Accounts which do not arise in the ordinary course of business in the departments are not proven by transcripts. Under these statutes, statements can only establish items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books.[5] Items which become known to the department only through hearsay do not become evidence under these statutes.[6] The words "papers and documents" relate to such as are made in the discharge of official duty, which it is the duty of the officers to file.[7] They are *not evidence of unofficial acts*, for example, the certificate of a consul as to the foreign laws,[8] or as to the arrival of a vessel,[9] and the facts as to the imprisonment of a seaman.[10] The statement of the account *should contain the items* of the account, the debits and credits as acted upon by the accounting officers, and not a statement of the balance in gross.[11] But it has been held

in several cases that statements of accounts with postmasters are competent, although not containing the credits allowed; that it is sufficient in such cases, if the balances on the quarterly returns are stated.[12]

1, Rev. Stat. U. S. secs. 886–889. See sec. 552 *supra*.

2, United States v. Gaussen, 19 Wall. 198; United States v. Vanzandt, 2 Cranch C. C. 338.

3, Watkins v. United States, 9 Wall. 759.

4, United States v. Irving, 1 How. 250; United States v. Gaussen, 19 Wall. 198; Soule v. United States, 100 U. S. 8; United States v. Hunt, 105 U. S. 187; United States v. Ralston, 17 Fed. Rep. 895.

5, Rev. Stat. U. S. sec. 886; United States v. Buford, 3 Peters 12; United States v. Jones, 8 Peters 385.

6, United States v. Forsythe, 6 McLean (U. S.) 584.

7, Rev. Stat. U. S. sec. 882; Block v. United States, 7 Ct. of Cl. 406.

8, Church v. Hubbart, 2 Cranch 187.

9, Levy v. Burley, 2 Sum. (U. S.) 355.

10, The Cariolanus, Crabbe (U. S.) 239.

11, United States v. Jones, 8 Peters 375; United States v. Kuhn, 4 Cranch C. C. 401; United States v. Edwards, 1 McLean (U. S.) 467.

12, United States v. Harrill, 1 McAll. (U. S.) 243; United States v. Hodge, 13 How. 478; Lawrence v. United States, 2 McLean (U. S.) 581.

§ 555. Same — Certificates. — It is not a necessary incident to the admissibility of transcripts that all of every account should be contained in the extracts; if not garbled or mutilated, they may be received, provided

they contain the items of credit and debit relating to the subject matter, and are not confined to the results or balances.[1] So a transcript of documents in the patent office may be received, though it is not a transcript of all the proceedings, or of anything in the nature of a record, but only of certain documents in that office relevant to the issue.[2] Although copies, properly certified and authenticated, may be used as evidence, instead of the originals, yet officials can not certify as a fact that certain acts were performed at a given time, for example, that a patent was issued.[3] Nor is the certificate of an officer any evidence that no document or record of a given character exists in his office, or that it can not be found after diligent search. Such a fact must be proven by the deposition or testimony of the proper officers taken in open court.[4] When certificates are admissible under the statutes referred to, they are *prima facie* evidence of the genuineness of the originals.[5]

1, United States v. Gaussen, 19 Wall. 198.

2, Toohey v. Harding, 1 Fed. Rep. 174.

3, Davis v. Gray, 17 Ohio St. 331.

4, Stoner v. Ellis, 6 Ind. 152; Bullock v. Wallingford, 55 N. H. 619.

5, Lee v. Blandy, 1 Bond (U. S.) 361.

§ 556. Mere certificates not evidence.— Under the familiar rule that it is the prov-

vince of the court to determine the effect of written instruments, and that the best evidence must be produced, it is clear that the certifying officer should attach his certificate to the copy of the instrument to be proven. Both under the federal statutes, we have discussed, and under the statutes of the states, it is the rule that the *mere certificate of the clerk* or other custodian of a paper, *as to its contents or legal effect*, or that the paper attached is an abstract or summary of the original, is no evidence whatever. Such certificates are pure hearsay.[1] Clerks and other recording officers may make and verify copies of their records; and in doing so, they act under the obligation of their oath of office. Their certificate may be evidence of the correctness of such copies, but it is *no part of their duty to certify to other facts*, than that the copy is correct.[2] The courts will not assume that the conclusions drawn by such officers from the inspection of the records are correct.[3] Thus, the certificate of a justice as to what was claimed on a trial before him is no evidence;[4] nor is the certificate of the clerk of a court as to the events of a trial,[5] or the loss of a paper[6] admissible; nor is it competent to introduce the certificate of the chairman of county commissioners to prove that work on a highway has been accepted;[7] nor a surveyor's return on a warrant for the collection of highway taxes;[8] nor the certifi-

cate of the secretary of state that a certificate of a certain character has not been filed in his office,[9] nor that a certain grant has not been recorded in his office;[10] nor the certificate of the commissioner of patents that a patent of the kind designated has been issued;[11] nor is the certificate of the register that certain lands have been listed to a state;[12] nor is the certificate of a judge of probate admissible to show who are the heirs of a deceased person,[13] or that a person is public administrator[14] or other facts known to him by inspection of his office records;[15] nor is the certificate of a register of deeds that there is no plat on record of a certain kind admissible.[16] So the certificate of the register of the land office that a map is a correct representation of part of a township is not sufficient; there should be a copy of the original certified to be correct.[17] Many other illustrations might be given of the general rule that the certificate of a public officer and for stronger reasons, that of a private individual, is not competent evidence of facts in issue. Unless the certificate accompanies a copy of the record, it has no probative force. If it is necessary to prove *facts collateral* to the record, or that no document of a public character exists or is on file, or similar facts, the proper mode is not by statements in official certificates, but by the *testimony of the officer.*[18]

1, Griffiths v. Tunckhouser, Peters C. C. 418; Maguire v. Sayward, 22 Me. 230; Cox v. Cox, 26 Pa. St. 375; 67 Am. Dec. 432; Drake v. Merrill, 2 Jones (N. C.) 368; Foute v. McDonald, 27 Miss. 610; Tessman v. Supreme Commandery, (Mich.) 61 N. W. Rep. 261. See also, Wickersham v. Johnson, 104 Cal. 407.

2, Oakes v. Hill, 14 Pick. 442.

3, Hanson v. South Scituate, 115 Mass. 336.

4, Wolfe v. Washburn, 6 Cow. 262.

5, Barry v. Rhea, 1 Overt. (Tenn.) 345; Wilcox v. Ray, 1 Hayw. (N. C.) 410.

6, Robinson v. Clifford, 2 Wash. C. C. 1; Wilcox v. Ray, 1 Hayw. (N. C.) 410. Contra, Ruggles v. Alexander, 2 Rawle (Pa.) 232.

7, Reed v. Scituate, 7 Allen 141.

8, Davis v. Clements, 2 N. H. 390.

9, Cross v. Pinckneyville Mill Co., 17 Ill. 54.

10, Ayres v. Stewart, 1 Overt. (Tenn.) 220.

11, Stoner v. Ellis, 6 Ind. 152; Reed v. Chicago, M. & St. P. Ry. Co., 71 Wis. 399.

12, Murphy v. Sumner, 74 Cal. 316.

13, Greenwood v. Spiller, 3 Ill. 502.

14, Littleton v. Christy, 11 Mo. 390.

15, Armstrong v. Boylan, 4 N. J. L. 76.

16, Bemis v. Becker, 1 Kan. 226.

17, Doe v. King, 4 Miss. 125.

18, Bullock v. Wallingford, 55 N. H. 619; Stoner v. Ellis, 6 Ind. 152.

§557. Exceptions to the rule that mere certificates are not evidence.—Although the rule is very general that official certificates are not evidence, except as authen-

tication of accompanying copies, yet occasionally cases are to be found in which such certificates have been received. Thus, the certificates of foreign dignitaries have been received as evidence in a few cases where the certificate related to, or was part of an official act, or where it was probable that the official would not give a deposition.[1] By a familiar rule of the law merchant, the *certificate of a notary public* that he made due demand and presentment of a foreign negotiable bill, and of its dishonor is proof of such demand and refusal to pay or accept.[2] "On the other hand, the *protest of inland bills*, however common, is not necessary by the law merchant; and, when made, is extra-official; and therefore a certificate or record of it is not evidence, either of presentment, demand or dishonor, or of notice to any party."[3] *Statutes* have, however, frequently been enacted in this country making such certificates evidence in the case of the protest of inland bills and promissory notes.[4] In such cases, the statute must be strictly complied with before the certificate will be admitted;[5] neither is the notary thereby authorized to act beyond his territorial limits.[6] The certificate of protest is only evidence of such facts as it properly states. It is *not evidence of collateral facts*,[7] for example, as to the statements or conduct of the parties.[8] The presumption is that acts alleged to be done

were regularly performed in all cases.[9] This mode of proof is exclusive as to foreign bills of exchange,[10] but the statutes relating to the protest of inland bills of exchange *do not exclude other modes of proof*,[11] such as the admission of the party,[12] or the oral testimony of the notary.[13] But in general the certificates of notaries, unless relating to bills of exchange or protests of ships, are, like other official certificates, not evidence of any controverted fact.[14] Other illustrations of cases in which certificates have been received as evidence might be added to those already cited in this section, but such cases either depend upon statutes, or relate to certificates which have been issued as part of the act to be proven, and which were made contemporaneously therewith, such as receipts of public officers for money,[15] the certificate of a marine inspector,[16] the certificates of officers in service of process[17] or on sale of property on legal process.[18] Cases of this character do not at all modify the general rule that mere certificates are not evidence. On a principle elsewhere discussed, the entries or certificates of persons, since deceased, made in the regular course of business may be admissible.[19]

1, United States v. Acosta, 1 How. 24; Bingham v. Cabot, 3 Dall. 19; United States v. Mitchell, 3 Wash. C. C. 95. But see, Wood v. Pleasants, 3 Wash. C. C. 201.

2, 2 Dan. Neg. Inst. sec. 959; 2 Pars. Notes & B. 498.

3, 2 Pars. Notes & B. 498; Young v. Bryan, 6 Wheat. 146; Union Bank v. Hyde, 6 Wheat. 572; Nicholls v. Webb, 8 Wheat. 326; Bank of United States v. Leathers, 10 B. Mon. (Ky.) 64; Bond v. Bragg, 17 Ill. 69; Carter v. Burley, 9 N. H. 558; Sumner v. Bowen, 2 Wis. 524.

4, Dan. Neg. Inst. sec. 926. See the statutes of the jurisdiction.

5, Rogers v. Jackson, 19 Wend. 383.

6, Dutchess Co. Bank v. Ibbotson, 5 Den. 110; Kirkland v. Wanzer, 2 Duer (N. Y.) 278; Dan. Neg. Inst. sec. 959.

7, Bradshaw v. Hedge, 10 Iowa 402; Sprague v. Tyson, 44 Ala. 338; Turner v. Rogers, 8 Ind. 139; Sullivan v. Deadman, 19 Ark. 484; Stiles v. Inman, 55 Miss. 469.

8, Dan. Neg. Inst. sec. 966.

9, Bank of United States v. Smith, 11 Wheat. 171; Pattie v. McCrillis, 53 Me. 410; Simpson v. White, 40 N. H. 540; Union Bank v. Middlebrook, 33 Conn. 95; Bank of Commonwealth v. Mudgett, 44 N. Y. 514; Coleman v. Smith, 26 Pa. St. 255; Stainback v. Bank, 11 Gratt. (Va.) 260; Elliott v. White, 6 Jones (N. C.) 98; Whaley v. Houston, 12 La. An. 585; Wamsley v. Rivers, 34 Iowa 466; McFarland v. Pico, 8 Cal. 626.

10, Union Bank v. Hyde, 6 Wheat. 572; Carter v. Union Bank, 7 Humph. (Tenn.) 548.

11, Bailey v. Dozier, 6 How. 23; Wanzer v. Tupper, 8 How. 234.

12, Derickson v. Whitney, 6 Gray 248; Long v. Crawford, 18 Md. 220.

13, Terbell v. Jones, 15 Wis. 253.

14, Talcott v. Delaware Ins. Co., 2 Wash. C. C. 449; Moore v. Worthington, 2 Duv. (Ky.) 307.

15, Newport v. Cooper, 10 La. 155; Goddard v. Glodinger, 5 Watts (Pa.) 209; Fager v. Campbell, 5 Watts (Pa.) 287; Lewisburg v. Augusta, 2 Watts & S. (Pa.) 65; Johnson v. Thompson, 4 Bibb (Ky.) 294.

16, Perkins v. Augusta Ins. Co., 10 Gray 310.

17, Knowlton v. Ray, 4 Wis. 288.

18, Knowlton v. Ray, 4 Wis. 288.

19, See sec. 323 *supra*.

§ 558. Proof of handwriting—Writer need not be called. — When it is necessary to prove handwriting, probably no mode would ordinarily seem so satisfactory to the jury as to call the alleged writer himself as a witness; this has sometimes been called the strongest proof of such a fact.[1] But while this may be generally true, it is not necessarily so in all cases. It might frequently happen that an ignorant person could form a less accurate judgment as to his own handwriting after a considerable lapse of time, than could be formed by a third person acquainted with his handwriting and accustomed to pass judgment upon such questions. It is well settled, therefore, that *the alleged writer need not be called* as a witness in the first instance. His testimony is not the *best evidence* within the meaning of the rule that the best evidence must be produced. "There is not such a distinction between one man's knowledge of his own handwriting, and the knowledge of another on the same subject as constitutes the former evidence of a superior degree to the latter."[2] The same rule prevails in both *civil and criminal cases*.[3] The general rule which admits proof of the handwriting of a party by others who are

acquainted with such writing rests on the ground that in every person's handwriting there is a peculiar prevailing character which distinguishes it from the handwriting of every other person.[4]

1, Eagleton v. Kingston, 8 Ves. 474; Brewster v. Countryman, 12 Wend. 449; Whart. Ev. sec. 705.

2, Stark. Ev. 339 (6th. Am. ed.); R. v. Benson, 2 Camp. 508; Arnsworth v. Greenlee, 1 Hawks (N. C.) 190. See also, Williams v. Deen, 5 Tex. Civ. App. 575.

3, De la Motte, 21 How. St. Tr. 810; Hammond's Case, 2 Greenl. (Me.) 33; 11 Am. Dec. 39.

4, Strong v. Brewer, 17 Ala. 706.

§ 559. One who has seen another write is competent to testify as to his handwriting.— A witness is deemed competent to testify to the handwriting of another, if *he has seen that person write.*[1] This rule is recognized in all the cases that will be cited on the subject. Discussion and differences of opinion have arisen, not as to the general rule just stated, but with respect to the degree of weight to be given to testimony of this character. This kind of testimony may be so weak as to be unsafe to act upon, or so strong as, in the mind of every reasonable man, to produce conviction. But whatever degree of weight his testimony may deserve, which is a question exclusively for the jury, it is an established rule that, if one has seen the person write, he will be competent to speak as to such handwriting; and

this is true, although the impression on the mind of the witness may be faint and inaccurate.[1] Thus, the testimony has been admitted, although the witness has not seen the person write for many years before the trial,[2] and although he has only seen the person write on a single occasion,[3] and even though he only saw the person write his name,[4] or even his surname,[5] or although he never saw the person write before the date of the disputed paper;[6] and it is not necessary that the witness should be an expert.[7] These are matters affecting, not the admissibility, but the *weight* of such testimony;[8] and it is within the discretion of the court to determine them in the first instance.[9] The same is true when the witness is unable to read and write, but testifies to handwriting with which he says he is familiar,[10] or when a witness testifies that he is familiar with the mark of another, used as a signature.[11] One may be competent to testify as to the signature of another, if acquanted with it, although he is not acquainted with his general handwriting.[12] So he may testify as to the signature of a firm, although he is not acquainted with the handwriting of either member of the firm.[13] It has also been held that a witness is competent to testify as to the handwriting of another, although he has not actually seen him write, if the witness *has seen writing which such person has acknowledged or admitted* to

be his.[14] Such acknowledgment may not only be in express terms, as where a person has formally acknowledged the signature or other writing to have been executed by him,[15] but may be inferred as will be seen from other facts and circumstances or from the course of business.[16] But when a witness has testified that he has neither seen a certain person write, nor any writing which he knew to be the writing of the person, his opinion as to the genuineness of such writing is not admissible.[17]

1, Hopper v. Ashley, 15 Ala. 463; Hammond's Case, 2 Greenl. (Me.) 31; 11 Am. Dec. 39 and note; Stoddard v. Hill, 38 S. C. 385; Riggs v. Powell, 142 Ill. 453; State v. Farrington, 90 Iowa 673. As to proof of handwriting by witnesses, see article, 16 Am. L. Rev. 569.

2, Horne Tooke's Case, 25 How. St. Tr. 71, nineteen years; Warren v. Anderson, 8 Scott 384, ten years; Smith v. Walton, 8 Gill (Md.) 18, six years; Edelen v. Gough, 8 Gill (Md.) 87, three years; Com. v. Nefus, 135 Mass. 533; Wilson v. Van Leer, 127 Pa. St. 371; 14 Am. St. Rep. 854 and note.

3, Hammond v. Varian, 54 N. Y. 398; Com. v. Nefus, 135 Mass. 533; McNair v. Com., 26 Pa. St. 388; Rediout v. Newton, 17 N. H. 71; Pepper v. Barnett, 22 Gratt. (Va.) 405; Horne Tooke's Case, 25 How. St. Tr. 71; Willman v. Worrall, 8 Car. & P. 380. See also, Egan v. Murray, 80 Iowa 180.

4, Willman v. Worrall, 8 Car. & P. 380; Warren v. Anderson, 8 Scott 384; Rediout v. Newton, 17 N. H. 71.

5, Smith v. Walton, 8 Gill (Md.) 18.

6, Keith v. Lothrop, 10 Cush. 453.

7, Moon v. Crowder, 72 Ala. 79; Williams v. Deen, 5 Tex. Civ. App. 575.

8, Hammond v. Varian, 54 N. Y. 398; Com. v. Nefus, 135 Mass. 533; McNair v. Com., 26 Pa. St. 388; Miles v. Loomis, 75 N. Y. 288; 31 Am. Rep. 470.

9, Wilson v. Van Leer, 127 Pa. St. 371; 14 Am. St. Rep. 854.

10, Foye v. Patch, 132 Mass. 105.

11, Strong v. Brewer, 17 Ala. 706; Fogg v. Dennis, 3 Humph. (Tenn.) 47; Jackson v. Van Dusen, 5 Johns. 144; 4 Am. Dec. 330; Thompson v. Davitte, 59 Ga. 472; Pearcy v. Dicker, 13 Jur. 937; George v. Surrey, Moody & M. 516. Contra, Shinkle v. Crock, 17 Pa. St. 159.

12, McConkey v. Gaylord, 1 Jones (N. C.) 94.

13, Gordon v. Price, 10 Ired. (N. C.) 385.

14, Hammond v. Varian, 54 N. Y. 398; Cabarga v. Seezer, 17 Pa. St. 514; Berg v. Peterson, 49 Minn. 420; Pierce v. De Long, 45 Ill. App. 462.

15, Cabarga v. Seezer, 17 Pa. St. 514.

16, Riggs v. Powell, 142 Ill. 453; Tucker v. Kellogg, 8 Utah 11.

17, Spotteswood v. Weir, 80 Cal. 448; Gibson v. Trowbridge F. Co., 96 Ala. 357; Arthur v. Arthur, 38 Kan. 691; Talbott v. Hedge, 5 Ind. App. 555.

§560. Knowledge of handwriting may be gained by correspondence.— One is deemed competent to testify to the handwriting of another person when he has received letters or documents purporting to be written by that person in answer to those written by himself, or under his authority, and addressed to that person. In such case there is a presumption that the letter or document is genuine.[1] It has sometimes been held that the receipt of letters, purporting to come from

another, which have been acted upon as such will render the testimony of the person so receiving them competent to prove the handwriting.[2] But the decisions generally establish the proposition that the rule is not changed by the mere fact that the one receiving the letters has acted upon them, although such acts may be part of a chain of evidence from which the acknowledgment or approval of the supposed author may be inferred. In order to bind the alleged writer he must have recognized or ratified such instrument or letter.[3] But it is well settled that the mere receipt of letters or papers, standing alone, is not evidence that they were written by the person whose name they bear.[4]

1, Chaffee v. Taylor, 3 Allen 598; Clark v. Freeman, 25 Pa. St. 133; Cunningham v. Hudson Riv. Bank, 21 Wend. 557; Campbell v. Woodstock Iron Co., 83 Ala. 351; Violet v. Rose, 39 Neb. 660; Southern Exp. Co. v. Thornton, 41 Miss. 216; Pearson v. McDaniel, 62 Ga. 100; Atlantic Ins. Co. v. Manning, 3 Col. 224; Steph. Ev. art. 51. See sec. 46 *supra*. But this is sometimes held to be insufficient authentication, McKeone v. Barnes, 108 Mass. 344.

2, Tharpe v. Gisburne, 2 Car. & P. 21.

3, Doe v. Suckermore, 5 Adol. & Ell. 703; Cunningham v. Hudson Riv. Bank, 21 Wend. 557; Nunes v. Perry, 113 Mass. 274. See sec. 599 *infra*.

4, White S. M. Co. v. Gordon, 124 Ind. 495.

§ 561. Such knowledge may be gained in the course of business. — A person is deemed to be acquainted with the handwriting of another when, in the ordinary course of

business, documents purporting to be written by that person have been habitually submitted to him.[1] Among the illustrations of this rule are those where an agent or clerk takes the letters of his principal to the post;[2] where *public officers* have seen many official documents of importance filed in their office which purported to bear the signature of another officer,[3] or where the writing or signature of the person whose handwriting is in question has come before such officer in other ways.[4] The rule is the same where one has received and paid notes bearing the name of the party whose handwriting is in question;[5] where the officers of a bank, who are called on to testify, have been in the habit of paying checks of a customer,[6] or have seen his signature to papers known to have been signed by him,[7] or where the witness has in the course of business seen orders,[8] receipts or other papers[9] which the party, whose handwriting is in question has acknowledged by payment or other mode of approval. It has sometimes been held that in order to prove the signatures of *bank officers* on *bank bills* to be genuine, or forged, the officers themselves should be called, or at least other witnesses who have seen such officers write or have received letters from them in correspondence.[10] But the weight of authority holds that, since the bills are known to the public, persons who have been in the habit

of receiving such bills and who are skilled in the detection of counterfeits may testify in such cases.[11]

1, Doe v. Suckermore, 5 Adol. & Ell. 703; Titford v. Knott, 2 Johns. Cas. (N. Y.) 211; Com. v. Smith, 6 Serg. & R. (Pa.) 568; Com. v. Webster, 5 Cush. 295; 52 Am. Dec. 711 and note; Jones v. Huggins, 1 Dev. (N. C.) 223; 17 Am. Dec. 567 and note.

2, Doe v. Suckermore, 5 Adol. & Ell. 703.

3, Rogers v. Ritter, 12 Wall. 317; Yates v. Yates, 76 N. C. 142; Goddard v. Gloninger, 5 Watts (Pa.) 209; Amherst Bank v. Root, 2 Met. 522.

4, Sill v. Reese, 47 Cal. 343.

5, Johnson v. Daverne, 19 Johns. 134; 10 Am. Dec. 198; Hess v. State, 5 Ohio 5; 22 Am. Dec. 767 and note.

6, State v. Candler, 3 Hawks (N. C.) 393; Hess v. State, 5 Ohio 5; 22 Am. Dec. 767; Allen v. State, 3 Humph. (Tenn.) 367; Johnson v. State, 35 Ala. 370.

7, Ennor v. Hodson, 28 Ill. App. 445.

8, Cody v. Conly, 27 Gratt. (Va.) 313.

9, Armstrong v. Fargo, 8 Hun (N. Y.) 175; Hess v. State, 5 Ohio 5; 22 Am. Dec. 767 and note.

10, State v. Allen, 1 Hawks (N. C.) 6; 9 Am. Dec. 616.

11, Com. v. Carey, 2 Pick. 47; State v. Lawrence, Brayt. (Vt.) 78; State v. Anderson, 2 Bailey (S. C.) 565; State v. Carr, 5 N. H. 369.

§562. Value of the testimony—How affected by the means of knowledge.—When a witness states that he is acquainted with the handwriting in question, but is not asked his means of knowledge, his testimony is *prima facie* competent. But his means of knowledge or the fact that he has not suffi-

cient data for knowledge may be drawn out by the adverse party; and if it appear to the court that he is not sufficiently acquainted with the writing, the testimony will not be admitted.[1] "Knowledge of handwriting, *acquired for the purpose of testifying*, will qualify only where it is clear that there was no motive either in the writer or the witness to manufacture testimony."[2] The value to be given to the opinion of a witness as to the authorship of handwriting is to be determined by the opportunity and circumstances under which he has acquired his knowledge. If he is an illiterate man, or one whose business seldom brings him into contact with writing, his opinion is entitled to much less weight than if he were an educated man accustomed to correspondence, and to seeing people write.[3] If a witness has become familiar with the handwriting of a person, he may testify as to the genuineness of the alleged handwriting of that person, although it appears to be *simulated and disguised.*[4] It will be seen from the cases already cited that the witness must be familiar with the handwriting concerning which he testifies. When he shows such an acquaintance, he may give his opinion or belief; and it is *not necessary that he should know* or be certain that the specimen is the handwriting of the person who, it is claimed, wrote it.[5] But the witness should be able to state that he *has an opinion.*[6]

1, Goodhue v. Bartlett, 5 McLean (U. S.) 186; Henderson v. Bank of Montgomery, 11 Ala. 855; Smith v. Walton, 8 Gill (Md.) 77; Whittier v. Gould, 8 Watts (Pa.) 485; Arthur v. Arthur, 38 Kan. 691; Talbott v. Hedge, 5 Ind. App. 555. But see, Carrier v. Hampton, 11 Ired. (N. C.) 307.

2, Lawson Exp. Ev. rule 54; Reese v. Reese, 90 Pa. St. 89; 35 Am. Rep. 634 and note; Sanderson v. Osgood, 52 Vt. 309; Reid v. State, 20 Ga. 681; Trustees v. Misenheimer, 78 Ill. 22; Keith v. Lathrop, 10 Cush. 453; Stranger v. Searle, 1 Esp. 15; R. v. Crouch, 4 Cox Cr. C. 163; Greaves v. Hunter, 2 Car. & P. 477; Territory v. O'Hare, 1 N. Dak. 30.

3, United States v. Gleason, 37 Fed. Rep. 331.

4, Com. v. Webster, 5 Cush. 301; 32 Am. Dec. 711.

5, Garrels v. Alexander, 4 Esp. 37; Eagleton v. Kingston, 8 Ves. 474; Talbott v. Hedge, 5 Ind. App. 555; Beverly v. Williams, 4 Dev. & B. (N. C.) 236; Magee v. Osborn, 32 N. Y. 669; Bell v. Brewster, 44 Ohio St. 690; Taylor v. Sutherland, 24 Pa. St. 333; Salmon v. Feinour, 6 Gill & J. (Md.) 60; Wiggin v. Plumer, 31 N. H. 251; State v. Minton, 116 Mo. 605; Salazar v. Taylor, 18 Col. 538; Egan v. Murray, 80 Iowa 180. In Holmes v. Goldsmith, 147 U. S. 150, the witness was allowed to state that he would act on the signature in question.

6, Wiggin v. Plumer, 31 N. H. 251; Burnham v. Ayer, 36 N. H. 182; Fash v. Blake, 38 Ill. 363; People v. Spooner, 1 Den. 343; 43 Am. Dec. 672 and note; Succession of Morvant, 45 La. An. 207. Only an expert, however, can state an opinion derived from comparison, Spottiswood v. Weir, 80 Cal. 448.

§ 563. Use of writing written at the trial for comparison. — The use of handwriting for the purpose of comparison at the trial is, by the great weight of authority, confined to that written before the trial. Most of the courts hold that a person is not

entitled to offer a specimen of his handwriting written during the trial. This rule is based on the ground that the party might be influenced by the interests, then at stake, to disguise his handwriting, if, by so doing, he could promote his cause.[1] But if the writing is done at the request of the adverse party on cross-examination, such writing is admissible.[2] So it was held error not to allow an expert on cross-examination to show before the jury the effect that the use of a blotter has on the color of ink.[3] In England, there is a statute by which a person whose handwriting is in dispute may be called upon by the court to write his name in the presence of the jury.[4] In this country, there is high authority for the rule that, in the absence of a statute, the court may, in the exercise of a sound discretion, require a party in a civil action to write his signature in the presence of the jury as a basis of comparison.[5]

1, King v. Donahue, 110 Mass. 155; 14 Am. Rep. 589; Com. v. Allen, 128 Mass. 46; 35 Am. Rep. 356; Gudzom v. Tyler, 64 Cal. 334.

2, Bronner v. Loomis, 14 Hun (N. Y.) 341; Bridgman v. Corey's Estate, 62 Vt. 1; Huff v. Nims, 11 Neb. 363; Chandler v. LeBarron, 45 Me. 534.

3, Farmers' Bank v. Young, 36 Iowa 451.

4, Cobet v. Kilminister, 4 Fost. & F. 490; Reg. v. Taylor, 6 Cox Cr. C. 58.

5, Smith v. King, 62 Conn. 515; Williams v. Riches, 77 Wis. 569; King v. Donahue, 110 Mass. 155; 14 Am.

Rep. 589; Hickory v. United States, 151 U. S. 303. But see, First Nat. Bank v. Robert, 41 Mich. 709. See sec. 406 *supra*.

§ 564. Comparison of handwriting — English rule.— It has been the subject of much discussion in the courts whether handwriting can be proved in court by a direct comparison of hands, that is, by a collation of the two papers in juxtaposition for the purpose of ascertaining by inspection whether they were written by the same person. Cases have arisen many times in England in which it was contended, and in some of which it was held, that handwriting might be proved by the immediate comparison by a witness of the paper in dispute with some other specimen proved to have been written by the supposed writer of the first. But the *English rule* finally became settled that such comparison could not be made.[1] The grounds on which this rule rest are thus stated by Mr. Best: "First, that the writings offered for the purpose of comparison with the document in question might be spurious, and consequently that, before any comparison between them and it could be instituted, a collateral issue must be tried to determine their genuineness. Nor is this all,— if it were competent to prove the genuineness of the main document by comparison with others, it must be equally so to prove that of the latter by comparison with fresh ones; and so the inquiry might go

on *ad infinitum*, to the great distraction of the attention of the jury and delay in the administration of justice.[2] Secondly, that the specimens might not be fairly selected.[3] Thirdly, that the persons composing the jury might be unable to read, and consequently be unable to institute such comparison."[4] Although the rule as above stated has become well settled after long discussion in the courts of England and has become known as the English rule, yet *a statute* was finally enacted to the effect that "comparison of a disputed handwriting with any writing, proved to the satisfaction of the judge to be genuine, is 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."[5]

1, Doe v. Suckermore, 5 Adol. & Ell. 703; Hickory v. United States, 151 U. S. 303.

2, Doe v. Suckermore, 5 Adol. & Ell. 706.

3, Burr v. Harper, Holt N. P. 420.

4, Best Ev. sec. 238; Eagleton v. Kingston, 8 Ves. 475; Peck v. Callaghan, 95 N. Y. 75.

5, Steph. Ev. art. 52; 17 & 18 Vict. ch. 125 sec. 27; 28 Vict. ch. 18 sec. 8.

§ 565. Same — Conflicting views in the United States. — In the United States, this has long been a mooted question; and it will be seen from the cases cited below that

the rule is still unsettled in many of the states, for the courts of some of the states have decided one way under one set of facts, and another under different circumstances. The classification of states given below serves to show the tendency of the decisions in each state, but does not divide the states by any hard and fast line. The federal courts[1] and the courts of the greater number of the states have adopted the old English rule stated in the last section, although in some of the states where this rule came to prevail, statutes have been adopted similar to the English statute. Among the states in which the courts have adopted the old English rule may be mentioned the following: Alabama,[2] Arkansas,[3] California,[4] Colorado,[5] Illinois,[6] Kentucky,[7] Maryland,[8] Michigan,[9] Missouri,[10] New York,[11] North Carolina,[12] North Dakota,[13] Rhode Island,[14] Tennessee,[15] Texas,[16] Virginia,[17] West Virginia[18] and Wisconsin.[19] In other states, however, the English rule was never followed; and the reasons which led to its adoption in England were held no longer applicable. Thus, the comparison of documents, proved to be correct, with the handwriting in dispute has been allowed in the following states: Connecticut,[20] Georgia,[21] Indiana,[22] Iowa,[23] Kansas,[24] Maine,[25] Massachusetts,[26] Minnesota,[27] Mississippi,[28] New Hampshire,[29] Nebraska.[30] Ohio,[31] South Carolina,[32] Pennsylvania,[33] Vermont[34] and Utah.[35]

In this country the tendency of legislation has been toward the adoption of the more liberal rule; and in several states statutes somewhat similar to the English statutes have been adopted.[36] These statutes have, in many cases, changed the common law rule indicated by the cases already cited.

1, Hickory v. United States, 151 U. S. 303; Strother v. Lucas, 6 Peters 763; Moore v. United States, 91 U. S. 270; Williams v. Conger, 125 U. S. 397. As to the general subject of the comparison of handwriting, see articles, 2 Mich. L. Jour. 16; 20 Weekl. L. Bul. 350; 10 Cent. L. Jour. 121, 141; 17 Am. L. Rev. 21.

2, Moon v. Crowder, 72 Ala. 79; Snyder v. Burks, 84 Ala. 53.

3, Miller v. Jones, 32 Ark. 338.

4, Cal. Code sec. 1944, notes. Comparison made by expert, Marshall v. Hancock, 80 Cal. 82.

5, Wilber, v. Eicholtz, 5 Col. 240.

6, Putnam v. Wadley, 40 Ill. 346; Gitchell v. Ryan, 24 Ill. App. 372. Contra, Northfield Ins. Co. v. Sweet, 46 Ill. App. 598; Frank v. Taubman, 31 Ill. App. 592.

7, Hawkins v. Grimes, 13 B. Mon. (Ky.) 260. See also, Fee v. Taylor, 83 Ky. 259.

8, Herrick v. Swomley, 56 Md. 439. The fact that there is a genuine and a disputed signature on same page does not render proper a comparison of them by the jury, Williams v. Drexel, 14 Md. 566.

9, Foster's Will, 34 Mich. 21; People v. Parker, 67 Mich. 222. But see, Dritz v. Fourth Nat. Bank, 69 Mich. 287.

10, Rose v. First Nat. Bank, 91 Mo. 399; 60 Am. Rep. 258.

11, People v. Spooner, 1 Den. 343; 43 Am. Dec. 672; Miles v. Loomis, 75 N. Y. 288; 31 Am. Rep. 470; Peck. v. Callaghan, 95 N. Y. 73.

12, Fuller v. Fox, 101 N. C. 119; 9 Am. St. Rep. 27; Pope v. Askew, 1 Ired. (N. C.) 16; 35 Am. Dec. 729. But see, State v. DeGraff, 113 N. C. 688.

13, Territory v. O'Hare, 1 N. Dak. 30.

14, Kinney v. Flynn, 2 R. I. 319.

15, Clark v. Rhodes, 2 Heisk. (Tenn.) 206; Wright v. Hussey, 3 Baxt. (Tenn.) 42. But see, Powers v. McKenzie, 90 Tenn. 167.

16, Hanley v. Gandy, 28 Tex. 211; 91 Am. Dec. 315. But see, Cannon v. Sweet, (Tex. Civ. App.) 28 S. W. Rep. 718.

17, Burress' Case, 27 Gratt. (Va.) 934. But see, Hanriot v. Sherwood, 82 Va. 1.

18, Clay v. Alderson, 10 W. Va. 49.

19, Hazleton v. Union Bank, 32 Wis. 47.

20, Tyler v. Todd, 36 Conn. 218.

21, Wimbish v. State, 89 Ga. 294.

22, Swales v. Grubbs, 126 Ind. 106.

23, Riordan v. Guggerty, 74 Iowa 688.

24, State v. Zimmerman, 47 Kan. 242.

25, State v. Thompson, 80 Me. 194; 6 Am. St. Rep. 172.

26, Homer v. Wallis, 11 Mass. 309; 6 Am. Dec. 169 and note; Costello v. Crowell, 139 Mass. 588.

27, Morrison v. Porter, 35 Minn. 425; 59 Am. Rep. 331.

28, Wilson v. Beauchamp, 50 Miss. 24.

29, State v. Hastings, 53 N. H. 452.

30, Grand Island Banking Co. v. Shoemaker, 31 Neb. 124.

31, Koons v. State, 36 Ohio St. 195.

32, Weaver v. Whildon, 33 S. C. 190.

33, *In re* Rockey's Estate, 155 Pa. St. 453.

34, State v. Hopkins, 50 Vt. 316.

35, Tucker v. Kellogg, 8 Utah 11.

36, Cal. Code sec. 1944; Marshall v. Hancock, 80 Cal. 82; Ga. Code sec. 3840; Iowa Code sec. 3655; Hammond v. Wolf, 78 Iowa 227; Neb. Code sec. 344; Stat. of N. Y. ch. 36 Laws of 1880; Mutual Life Ins. Co. v. Suiter, 131 N. Y. 557; Wis. R. S. sec. 4189a; Andrews v. Haydens, 88 Ky. 455. The practitioner should refer to the statutes of the jurisdiction in each case.

§ 566. Comparison of simulated signatures — Proof of identity. — On the issue as to the genuineness of a signature, it is not competent, on cross-examination, to submit to the witness *simulated* signatures and to require his opinion as to their genuineness.[1] In South Carolina, the rule was adopted that comparison of handwriting might be competent when the evidence is conflicting; and it was held that in such a case the witnesses making the comparison need not be experts.[2] Under the statute of New York authorizing the comparison of a disputed writing with any writing proved, to the satisfaction of the court, to be genuine, it was held inadmissible to offer in evidence writings other than those of the person whose signature was in question, and that specimens of the *handwriting of a person, who*, it was claimed, *had forged the signature*, should be excluded.[3] It is the general rule that a signature, made for the occasion *post litem motam*, and *merely for use at the trial*, ought not to be taken as a standard. It is only when the paper is written, not by design, but unconstrainedly and in the natural manner,

so as to bear the impress of the general character of the party's writing, as the involuntary and unconscious result of constitution, habit or other permanent cause, and therefore of itself permanent, that it furnishes, if otherwise admissible, any satisfactory test of genuineness.[4] It often happens, however, that signatures made on the trial are, by consent of parties, allowed to be compared by the jury. A *comparison of* hands has frequently been resorted to *for the purpose of proving the identity* of a person. This was illustrated in a celebrated murder case, where such evidence was introduced for the purpose of showing that certain anonymous letters, written in a disguised hand, addressed to the city marshal between the date of the disappearance of the deceased and the arrest of the defendant, containing suggestions designed to mislead the officers of the law, had been written by the defendant,—the object being to incriminate the accused by identifying him with the person who wrote the anonymous letters.[5] Evidence of this character was received in the celebrated Tichborne case; and such evidence has been received for the purpose of identifying parties in various other actions, such as those for sending threatening letters, for arson, and in suits for libel and the like.

1, Rose v. First Nat. Bank, 91 Mo. 399; 60 Am. Rep. 258 and note; Massey v. Farmer's Bank, 104 Ill. 327.

2, Benedict v. Flanigan, 18 S. C. 506; 44 Am. Rep. 583.

3, Peck v. Callaghan, 95 N. Y. 73; Bruyn v. Russell, 52 Hun (N. Y.) 17.

4, King v. Donahue, 110 Mass. 155; Chandler v. Le Barron, 45 Me. 534; Hickory v. United States, 151 U. S. 303; Doe v. Suckermore, 5 Adol. & Ell. 703.

5, Com. v. Webster, 5 Cush. 295; 52 Am. Dec. 711.

§ 567. Exceptions — Allowing comparison of hands. — Before the English statute was adopted, two exceptions to the general rule excluding a comparison of hands to prove handwriting were well established. One of these exceptions relating to *ancient documents* has been thus stated: "When a document is of such a date that it cannot reasonably be expected to find living persons acquainted with the handwriting of the supposed writer, either by having seen him write or by having held correspondence with him, the law, acting on the maxim, *lex non cogit impossibilia*, allows other ancient documents, which are proved to have been treated and regularly preserved as authentic, to be compared with the disputed one."[1] The other exception is that, when *different instruments are properly in evidence* in the case for other purposes, the handwriting of such instruments may be compared by the jury, and the genuineness or simulation of the handwriting in question be inferred from such comparison.[2] These exceptions are still recognized and well established in those jurisdictions where the common law, or so-called English rule, pre-

vails. Concerning this subject Mr. Justice Bradley used the following language: "But the general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally well settled as the rule itself. One of these exceptions is that, if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper may be compared with it by the jury."[3]

1, Best Ev. sec. 240; Doe v. Suckermore, 5 Adol. & Ell. 703; Strother v. Lucas, 6 Peters 763; Sweigart v. Richards, 8 Pa. St. 436; Jackson v. Brooks, 8 Wend. 426; Wilson v. Betts, 4 Den. 201; Turnipseed v. Hawkins, 1 McCord (S. C.) 272; West v. State, 22 N. J. L. 212; Clark v. Wyatt, 15 Ind. 271; 77 Am. Dec. 90. See note, 6 Am. Dec. 171.

2, Moore v. United States, 91 U. S. 270; Van Wyck v. McIntosh, 14 N. Y. 439; Rogers v. Tyley, 144 Ill. 652; Swales v. Grubbs, 126 Ind. 106; Stokes v. United States, 157 U. S. 187.

3, Moore v. United States, 91 U. S. 274; Hickory v. United States, 151 U. S. 303; Van Wyck v. McIntosh, 14 N. Y. 442; Randolph v. Laughlin, 48 N. Y. 459; Brobston v. Cahill, 64 Ill. 354; State v. Fritz, 23 La. An. 55; Hanley v. Gandy, 28 Tex. 213; 91 Am. Dec. 315; Johnston Co. v. Miller, 72 Mich. 265; 16 Am. St. Rep. 536; Swales v. Grubbs, 126 Ind. 106; State v. DeGraff, 113 N. C. 688; Green v. Terwilleger, 56 Fed. Rep. 384; State v. Farrington, 90 Iowa 673.

§ 568. Writings used for comparison must be shown to be genuine.—In those states in which the common law rule has not been followed, or in which statutes authorize

the comparison with other writings, proved or admitted to be genuine, it is, of course, not necessary that the writing used as a standard should be in evidence or relevant for any other purpose.[1] Where writings, otherwise irrelevant, are allowed to be used for the purpose of comparison, such writings should clearly be *proved to be the genuine handwriting* of the party sought to be charged.[2] Any other rule would lead to many collateral issues; and thus be clearly open to the most serious objection which has been urged against the comparison of handwriting. It has been held that a paper, proposed to be used as a standard, cannot be proved to be original and genuine merely by the opinion of a witness that it is so, when such opinion is derived solely from his general knowledge of the handwriting of the person whose handwriting it purports to be.[3] The production of a written instrument by a party is not such an admission that the body of the instrument or the signature is in his handwriting, that the writing can be used for the purpose of comparison.[4] Nor for this purpose is the possession of a diary proof that the owner is the writer of its contents;[5] nor does the certificate of acknowledgment of a deed prove the signature so that it is competent for this purpose;[6] nor is a letter admissible for this purpose, when the only proof of its genuineness

is the fact that it has been received, purporting to be a reply to another letter.[7]

1, See cases cited in sec. 565 *supra*.

2, Holmberg v. Johnson, 45 Kan. 197; Gaunt v. Harkness, 53 Kan. 405; State v. Minton, 116 Mo. 605; Hanriot v. Sherwood, 82 Va. 1; Walker v. Steele, 121 Ind. 436; Spottiswood v. Weir, 80 Cal. 448; Com. v. Coe, 115 Mass. 481; Martin v. Maguire, 7 Gray 177; Com. v. Eastman, 1 Cush. 189; 48 Am. Dec. 596.

3, Eborn v. Zimpelman, 47 Tex. 503; 26 Am. Rep. 315; Com. v. Eastman, 1 Cush. 189; 48 Am. Dec. 596; Jester v. Steiner, 86 Tex. 415; Sankey v. Cook, 82 Iowa 125. But a more liberal rule has been adopted in New York and Ohio, McKay v. Lasher, 121 N. Y. 477; Bell v. Brewster, 44 Ohio St. 690.

4, Com. v. Coe, 115 Mass. 481; Martin v. Maguire, 7 Gray 177. In Michigan such writing was received where a witness admitted its genuineness on cross-examination, Dietz v. Fourth Nat. Bank, 69 Mich. 287. But see, Doud v. Ried, 53 Mo. App. 553.

5, Van Sickle v. People, 29 Mich. 61.

6, Hyde v. Woodfolk, 1 Iowa 162.

7, Desbrow v. Farrow, 3 Rich. L. (S. C.) 382; White S. M. Co. v. Gordon, 124 Ind. 495; 19 Am. St. Rep. 109.

§ 569. Same, continued. — It has been held that copies of letters in letter-books are not admissible as competent standards for such comparison; in such case, only the original writing is admissible.[1] So photographic or enlarged copies of writings have been excluded.[2] But in other cases, after preliminary proofs as to the accuracy of such copies, they have been allowed as proper standards of comparison;[3] and the jury

may use a magnifying glass in comparing handwriting.[4] Generally where such writings are admitted for the purpose of comparison, they must be *proved to the satisfaction of the judge* as a *preliminary question;*[5] and his decision on such preliminary question is *conclusive*, unless it appears to have been based on some erroneous view of law, or was clearly not justified by the state of the evidence at that time. But it is the rule in New Hampshire that the writing introduced as a standard of comparison "is to be received; and then the jury are to be instructed that they are first to find, upon all the evidence bearing upon that point, the fact whether the writing introduced for the purpose of comparison, or sought to be used for that purpose is genuine. If they find that it is not so, then they are to lay this writing and all the evidence based upon it entirely out of the case; but if they find it genuine, they are to receive the writing and all the evidence founded upon it; and may then institute comparisons themselves between the paper thus used and the one in dispute, and settle the final and main question whether the signature in dispute is or is not genuine."[7]

1, Com. v. Eastman, 1 Cush. 189; 48 Am. Dec. 596; Cohen v. Teller, 93 Pa. St. 123; Spottiswood v. Weir, 66 Cal. 525.

2, Taylor's Will Case, 10 Abb. Pr. N. S. (N. Y.) 300; Crane v. Dexter, 5 Wash. 479; White S. M. Co. v. Gordon, 124 Ind. 495; 19 Am. St. Rep. 109.

3, Marcy v. Barnes, 16 Gray 162; 77 Am. Dec. 405; Hynes v. McDermott, 82 N. Y. 41; 37 Am. Rep. 538; Busard v. McAnulty, 77 Tex. 438; Roswell v. Fuller's Estate, 59 Vt. 688. See sec. 597 *infra*.

4, White S. M. Co. v. Gordon, 124 Ind. 495; 19 Am. St. Rep. 109; Kannon v. Galloway, 2 Baxt. (Tenn.) 231. See note by M. D. Elwell in 29 Am. L. Reg. 553, as to the use of the microscope and camera in the detection of forgery.

5, Com v. Coe, 115 Mass. 504; Rowell v. Fuller, 59 Vt. 688; State v. Thompson, 80 Me. 194; 6 Am. St. Rep. 172; Walker v. Steele, 121 Ind. 436; Sankey v. Cook, 82 Iowa 125; McKay v. Lasher, 121 N. Y. 477; Powers v. McKenzie, 90 Tenn. 167.

6, State v. Thompson, 80 Me. 194; 6 Am. St. Rep. 174; Rowell v. Fuller, 59 Vt. 688; Com. v. Coe, 115 Mass. 504.

7, State v. Hastings, 53 N. H. 461; State v. Thompson, 80 Me. 194; 6 Am. St. Rep. 174; Trevis v. Brown, 43 Pa. St. 17. Contra, Fuller v. Fox, 101 N. C. 119; 9 Am. St. Rep. 27.

§ 570. Proof of handwriting — Expert evidence. — It is often necessary to make use of the testimony of experts in the proof of handwriting. This rule has been illustrated in a great variety of cases. Thus, such witnesses have been allowed to give their opinion as to whether certain words on a paper were written before or after the paper was folded;[1] whether a certain writing was thirty years old or more, or whether it had been recently written;[2] whether the whole of an instrument was written by the same hand, with the same pen and ink and at the same time;[3] whether certain words were written over others;[4] whether words have been added since the execution of the paper;[5]

whether anonymous letters written in a disguised hand and calculated to divert suspicion from the defendant are in his handwriting;[6] whether a word or writing has been altered;[7] whether an old deed originally had a seal;[8] what differences exist between the disputed parts and other parts of the instrument, and whether erasures and insertions have been made;[9] whether two writings were written by the same hand, and which of two writings exhibits the greater ease and facility of writing;[10] whether a certain writing could be that of a very old man,[11] and whether writings were written by a feigned or a natural hand.[12] But it is not competent, for the purpose of proving the genuineness of a signature against a party to be charged thereby, to show by such testimony that the signature is not in a simulated handwriting;[13] and it has been held that it is not competent for experts to testify whether, in their opinion, accounts purporting to extend through a period of time were all written at the same time.[14] *When comparison of handwriting* is allowed, the testimony of experts is, of course, admissible; and they may express their opinions after making such comparison.[15] But the courts have often spoken of evidence derived from the comparison of handwriting as *weak and unsatisfactory.*[16] On the *cross-examination* of experts on the subject of handwriting very considerable

latitude should be allowed. Thus, any writings or parts of writings may be exhibited to them for their opinion as to the identity of the handwriting with that in question. It was even held in a Georgia case that neither the expert nor the opposite counsel is entitled to know what writings will be used for this purpose, or whether they are genuine.[17]

1, Bacon v. Williams, 13 Gray 525. As to expert testimony in general, see secs. 361, 394 *supra*.

2, Eisfield v. Dill, 71 Iowa 442.

3, Fulton v. Hood, 34 Pa. St. 365; 75 Am. Dec. 664; Reese v. Reese, 90 Pa. St. 91; 35 Am. Rep. 634; Quinsigamond Bank v. Hobbs, 11 Gray 250; Cooper v. Bockett, 4 Moore P. C. 433. See article, 3 Ch. L. Jour. 1.

4, Dubois v. Baker, 30 N. Y. 355.

5, Moye v. Herndon, 30 Miss. 118. But see, Jewett v. Draper, 6 Allen, 434.

6, Com. v. Webster, 5 Cush. 295; 52 Am. Dec. 711 and note.

7, Vinton v. Peck, 14 Mich. 287; Ballentine v. White, 77 Pa. St. 20; Edelin v. Saunders, 8 Md. 118.

8, Follett v. Rose, 3 McLean (U. S.) 332.

9, Hawkins v. Grimes, 13 B. Mon. (Ky.) 258. But see, Swan v. O'Fallon, 7 Mo. 251.

10, Demerritt v. Randall, 116 Mass. 331.

11, Lansing v. Russell, 3 Barb. Ch. (N. Y.) 325.

12, King v. Cator, 4 Esp. 117; Doe v. Suckermore, 5 Adol. & Ell. 703.

13, Kowing v. Manley, 49 N. Y. 192; 10 Am. Rep. 346.

14, Phoenix Ins. Co. v. Philip, 13 Wend. 81; Ellingwood v. Bragg, 52 N. H. 488.

15, State v. Shinborn, 46 N. H. 497; 88 Am. Dec. 224; State v. Ward, 39 Vt. 225; Com. v. Williams, 105 Mass. 62; Lyon v. Lyman, 9 Conn. 55; Finch v. Gridley, 25 Wend. 469; Himrod v. Gilman, 147 Ill. 293; Hanriot v. Sherwood, 82 Va. 1; Johnston Co. v. Miller, 72 Mich. 265; 16 Am. St. Rep. 536; State v. Thompson, 80 Me. 194; 6 Am. St. Rep. 172; Bennett v. Mathewes, 5 S. C. 478; State v. Harris, 5 Ired. (N. C.) 287. Contra, Herrick v. Swomley, 56 Md. 439; Huston v. Schindler, 46 Ind. 40; Moye v. Herndon, 30 Miss. 118; Hanley v. Gandy, 28 Tex. 213; 91 Am. Dec. 315; Territory v. O'Hare, 1 N. Dak. 30; Fee v. Taylor, 83 Ky. 259; Snyder v. Burks, 84 Ala. 53.

16, Turner v. Hand, 3 Wall. Jr. 115; Foster's Will, 34 Mich. 21; Whitaker v. Parker, 42 Iowa 585. See note, 66 Am. Dec. 240; see secs. 392, 393 *supra*.

17, Travelers Ins. Co. v. Sheppard, 85 Ga. 751; Johnston Harvester Co. v. Miller, 72 Mich. 265. But see, Gaunt v. Harkness, 53 Kan. 405; 42 Am. St. Rep. 297 and note. See sec. 391 *supra*.

§ 571. What persons are competent as experts as to handwriting.— In order that a witness should be competent as an expert in respect to handwriting, it is not necessary that he should belong to any particular calling or profession. Bank officers or clerks,[1] merchants,[2] writing engravers,[3] lawyers,[4] conveyancers,[5] teachers,[6] book-keepers[7] and officials in public offices[8] have been allowed to give opinions with respect to handwriting. It is only necessary that the business opportunities and intelligence of the witness should be such as to enable him to have reasonable skill in judging of handwriting.[9] While it is not necessary that the witness should have made the comparison of

handwriting a specialty, it should appear that he has been engaged in some business which calls for frequent comparisons, and that he has in fact been in the habit for a length of time of making such comparisons.[10]

1, Stone v. Hubbard, 7 Cush. 595; Speiden v. State, 3 Tex. App. 159; Pate v. People, 8 Ill. 644.

2, Hyde v. Woolfolk, 1 Iowa 159; Edmondston v. Henry, 45 Mo. App. 346.

3, R. v. Williams, 8 Car. & P. 434.

4, Hyde v. Woolfolk, 1 Iowa 159; State v. Phair, 48 Vt. 366.

5, Vinton v. Peck, 14 Mich. 287.

6, Bacon v. Williams, 13 Gray 525.

7, State v. Ward, 39 Vt. 225; State v. De Graff, 113 N. C. 688.

8, Yates v. Yates, 76 N. C. 142; State v. Phair, 48 Vt. 366; State v. De Graff, 113 N. C. 688.

9, Cases just cited above; also note, 66 Am. Dec. 241. The mere fact that one is skilled in the use of a microscope does not make him competent to testify as to handwriting as an expert, Stevenson v. Gunning's Estate, 64 Vt. 601.

10, Ort v. Fowler, 31 Kan. 478. But see, Sweetzer v. Lowell, 33 Me. 450. In some cases a somewhat stricter rule has been enforced than in the cases already cited, Heacock v. State, 13 Tex. App. 97; State v. Tompkins, 71 Mo. 616.

§ 572. Effect of alteration of instruments — What constitutes alteration. — The strictness of the ancient rule as to the alteration of documents is well illustrated in an early case, known as Henry Pigot's case,[1] in which it was declared that a *deed* becomes

void, when the obligor or a stranger alters it in any material point, without the privity of the obligee, be it by interlineation, addition, erasing or by the drawing of a pen through the midst of any material word. It was also declared that "if the obligee himself alters the deed by any of said ways, although it is in words not material, yet the deed is void." Afterward the same rigid doctrine was applied in the case of other contracts.[2] But it has been wholly repudiated, both in England and in this country, and has been declared repugnant to justice and common sense.[3] While the *present rule* of law is much *more liberal* on this subject, it is still the rule "that any change in the terms of a written contract which varies its original legal effect and operation, whether in respect to the obligation it imports, or to its force as a matter of evidence, when made by any party to the contract, is an alteration thereof, unless all the parties to the contract gave their express or implied consent to such change. And the effect of such alteration is to nullify and destroy the altered instrument as a legal obligation, whether made with fraudulent intent or not."[4] In other words, the later cases make a distinction, not recognized by the earlier ones, between the *alteration and the spoliation* of written instruments, that is, between a change made by a party or privy, and that made by a stranger; and it is now

the rule that parties are not to be deprived of the benefit of their contracts through the wrongful act of a stranger.[5] If it appears that the alteration has been made since the instrument came into the hands of the plaintiff, he may show that it was not his act or the act of any agent; and may recover, if the jury believe that the alteration was made by a stranger, and that it was therefore a spoliation.[6]

1, Pigot's Case, 11 Coke Rep. 27.

2, Master v. Miller, 4 T. R. 320; 1 Smith L. C. 857 (star paging) and valuable note; Powell v. Divett, 15 East 29; Davidson v. Cooper, 11 M. & W. 778; 13 M. & W. 343.

3, Aldons v. Cornwall, L. R. 3 Q. B. 573; United States v. Spalding, 2 Mason (U. S.) 478; Bigelow v. Stilphen, 35 Vt. 521; Bellows v. Weeks, 41 Vt. 590; Ames v. Brown, 22 Minn. 257. As to this general subject see notes, 10 Am. Dec. 267–273; 1 Smith L. C. 1304–1316; 37 Am. Rep. 260; 4 Am. St. Rep. 25; 25 Am. Rep. 481–484; 17 Am. Rep. 97–106.

4, Daniel Neg. Inst. sec. 1373; Mersman v. Werges, 112 U. S. 139; Wood v. Steele, 6 Wall. 80; Kilkelly v. Martin, 34 Wis. 525; Greenfield Bank v. Stowell, 123 Mass. 196; 25 Am. Rep. 67; Eckert v. Louis, 84 Ind. 99; Adair v. England, 58 Iowa 314.

5, Clopton v. Elkin, 49 Miss. 95; Fuller v. Green, 64 Wis. 159; Bigelow v. Stilphen, 35 Vt. 521; Piersol v. Grimes, 30 Ind. 129; 95 Am. Dec. 673; Bellows v. Weeks, 41 Vt. 590; Fisher v. King, 153 Pa. St. 3; Ames v. Brown, 22 Minn. 257; Rees v. Overbaugh, 6 Cow. 746; Gleason v. Hamilton, 138 N. Y. 353 and cases cited; Lubbering v. Kolbrecher, 22 Mo. 596; Lee v. Alexander, 9 B. Mon. (Ky.) 25; 48 Am. Dec. 412; Nichols v. Johnson, 10 Conn. 192; Boyd v. McConnell, 10 Humph. (Tenn.) 68; Hunt v. Gray, 35 N. J. L. 227; 10 Am. Rep. 232; Ford v. Ford, 17 Pick. 418.

6, Drum v. Drum, 133 Mass. 566; Murray v. Peterson, 6 Wash. 418; Cheek v. Nall, 112 N. C. 370; White Sewing Mach. Co. v. Dakin, 86 Mich. 581. See note, 36 Am. St. Rep. 128.

§ 573. Same rule although change is to the disadvantage of the wrongdoer. When a material alteration is made, the contract is vitiated, even though the change might operate to the *disadvantage of the wrongdoer* or to the benefit of the other party. The party objecting to such an alteration can well say that the contract sued on is a contract which he never made, and that the one which was executed has been cancelled by the change. The *identity* of the contract is *destroyed;* and the mutilated paper affords no evidence of the contract.[1] As *illustrations* of this rule, a change in the date of payment of a note, although the payment is delayed, vitiates the note;[2] and the addition of a new surety vitiates the note as to a surety who has already signed.[3] The same is true of a change diminishing the amount of interest to be paid.[4]

1, Wo dworth v. Bank of America, 19 Johns. 391; 10 Am. Dec. 239 and elaborate note; Angle v. Northwestern M. L. Ins. Co., 92 U. S. 330; Greenfield Bank v. Stowell, 123 Mass. 196; 25 Am. Rep. 67; Draper v. Wood, 112 Mass. 315; 17 Am. Rep. 92; Brown v. Straw, 6 Neb. 536; 29 Am. Rep. 369; Benedict v. Cowden, 49 N. Y. 396; 10 Am. Rep. 382; Miller v. Finley, 26 Mich. 249; 12 Am. Rep. 306; Warrington v. Early, 2 Ell. & B. 763; Fordyce v. Kosminski, 49 Ark. 40; 4 Am. St. Rep. 18; National Ulster Co. Bank v. Madden, 114 N. Y. 280; 11 Am. St. Rep. 633; Burrows v.

Klunk, 70 Md. 451; 14 Am. St. Rep. 371; Hartley v. Carboy, 150 Pa. St. 23. See note, 71 Am. Dec. 369.

2, Brown v. Straw, 6 Neb. 537; 29 Am. Rep. 369.

3, Woodworth v. Bank of America, 19 Johns. 391; 10 Am. Dec. 239 and note; Browning v. Gosnell, (Iowa) 59 N. W. R. 340; Barnes v. VanKeuren, 31 Neb. 165; Little Rock Trust Co. v. Martin, 57 Ark. 277.

4, Coburn v. Webb, 56 Ind. 96; 26 Am. Rep. 15; Palmer v. Poor, 121 Ind. 135; Sanders v. Bagwell, 37 S. C. 145; First Nat. Bank v. Hall, 83 Iowa 645.

§ 574. Immaterial alterations — Conflicting views. — It does not necessarily follow that all alterations made by a party or privy after delivery vitiate the contract. In a great variety of cases where such alterations have been made, the instrument has been admitted as evidence of the rights of the parties. But in such cases, they have been alterations of so little importance as to be *wholly immaterial*, or they have been made *to correct obvious and clerical errors*, and for the purpose of making the contract conform to the actual agreement. It was so held where the words "on demand" were added to a note expressing no time of payment, as the legal effect of the note was not changed;[1] as well as where the rate of interest, which had actually been agreed upon, was inserted in a note;[2] where the words "in gold" were inserted in a promissory note;[3] where an immaterial date was added,[4] and where the date or the name of a payee was

changed so as to conform to the intent and agreement of the parties.[5] Other examples are the retracing of a name,[6] the insertion of a dollar mark before numbers,[7] the adding of the name of a witness, omitted in a note,[8] as well as that of making the marginal figures and the written amount correspond by changing the figures.[9] *Alterations in deeds* are governed by the same rule where neither the rights, interests, duties nor obligations of either of the parties are in any manner affected or changed.[10] There are two distinct lines of decisions as to whether an alteration, which would otherwise be immaterial, made by the party interested, with a *fraudulent intent* and with a view to gain some improper advantage, will prevent the use of the instrument as evidence. The older decisions hold that, if the alteration be *fraudulently* made, it makes little difference whether it be in a material or immaterial part, for, in either case, the person has transgressed the rule for the prevention of fraud, and having fraudulently destroyed the identity of the instrument, he must accept all the consequences.[11] This view is thus expressed by Lord Kenyon: "No man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected."[12] But the later and, in the opinion of the author, the better rule is that as such an alteration is wholly immaterial and

in no way changes the liability of the parties, it is also immaterial with what intent such alteration was in fact made. Many of the cases often cited to support the other doctrine are *obiter*, being in reference to changes which were in fact material, whereby the document had lost its identity; but these reasons will not apply when such alterations are wholly immaterial. According to this view, an immaterial alteration is not made material simply by a fraudulent intent, and, if such intent was not effectuated into a material change, the intent alone does not make it material. The motive for the act cannot be inquired into, unless the act itself affect materially the rights of the parties.[13] And, although an alteration by the party, if unexplained, may authorize the inference of a fraudulent intent, such inference may be rebutted.[14]

1, Aldons v. Cornwall, L. R. 3 Q. B. 573. See notes, 36 Am. St. Rep. 128; 17 Am. Rep. 101.

2, First Nat. Bank v. Carson, 60 Mich. 432; Rainbolt v. Eddy, 34 Iowa 440; 11 Am. Rep. 152. Contra, Wyerhauser v. Dun, 100 N. Y. 150.

3, Bridges v. Winters, 42 Miss. 135; 97 Am. Dec. 443; 2 Am. Rep. 598. But see, Bogarth v. Breedlove, 39 Tex. 561, where it is held that it avoids the note as to sureties.

4, Inglish v. Breneman, 5 Ark. 377; 41 Am. Dec. 96.

5, Duker v. Franz, 7 Bush (Ky.) 273; 3 Am. Rep. 314; Jessup v. Dennison, 2 Disn. (Ohio) 150; Dirby v. Thrall, 44 Vt. 413; 8 Am. Rep. 389; Cole v. Hills, 44 N. H. 227; Ames v. Colburn, 11 Gray 390; 71 Am. Dec. 723; King v.

Rea, 13 Col. 69; Westmoreland v. Westmoreland, 92 Ga. 233.

6, Dunn v. Clements, 7 Jones (N. C.) 58; Reed v. Roark, 14 Tex. 329; 65 Am. Dec. 127.

7, Houghton v. Francis, 29 Ill. 244.

8, Fuller v. Green, 64 Wis. 159.

9, Smith v. Smith, 1 R. I. 398; 53 Am. Dec. 652.

10, Smith v. Crooker, 5 Mass. 538; Dexby v. Thrall, 44 Vt. 413; 8 Am. Rep. 389; Reilly v. First Nat. Bank, 148 Ill. 349; Gordon v. Third Nat. Bank, 144 U. S. 97 and note. Same rule as to contracts, Consaul v Sheldon, 35 Neb. 247; Cline v. Goodale, 23 Orc. 406. See note, 1 Smith L. C. 1304–1316.

11, First Nat. Bank v. Fricke, 75 Mo. 178; 42 Am. Rep. 397; Turner v. Billagram, 2 Cal. 523; Den v. Wright, 2 Halst. (N. J.) 175; 11 Am. Dec. 596; Hunt v. Gray, 35 N. J. 227, 10 Am. Rep. 232; Greenl. Ev. sec. 568. But see, Williams v. Jenson, 75 Mo. 681.

12, Cited in Hunt v. Gray, 35 N. J. 227; 10 Am. Rep. 232.

13, Fuller v. Green, 64 Wis. 159; 54 Am. Rep. 600; Thornton v. Appleton, 29 Me. 298; Miller v. Gilleland, 19 Pa St. 119; Robinson v. Phoenix Ins. Co., 25 Iowa 430; Moye v. Herndon, 30 Miss. 120.

14, Shroeder v. Webster, 88 Iowa 627; Booth v. Powers, 56 N. Y. 22. Contra, Moon v. Hutchinson, 69 Mo. 429.

§ 575. Test of the materiality of the alteration.—It will be observed that the cases in which it has been held that alterations are not fatal to the contract are all those in which the alteration was of such a character as not to change the legal effect or operation of the contract. But within the meaning of the rule under discussion, very slight changes

in the instrument may be material, and prevent its use as evidence, or as the foundation of any claim. The rule rests not only upon the principle that the altered contract is not the one agreed upon, but also upon the ground that a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state. The public interest demands that the integrity of legal instruments should be preserved; and the party who may suffer by reason of his own alteration of such an instrument has no right to complain.[1] The following is the *test* given by Mr. Stephen *for determining whether the change is material:* "An alteration is said to be material when, if it had been made with the consent of the party charged, it would have affected his interest or varied his obligations in any way whatever."[2] Among *illustrations of alterations* in contracts, which have been held *material*, are alterations in the date,[3] in the place of payment by erasing or inserting the place of payment,[4] or by erasing the place and inserting another,[5] by writing "waive notice and protest" over an indorsement in blank,[6] by inserting a place of payment, when none is mentioned,[7] by changing the name,[8] by adding or erasing "junior" in the signature,[9] by changing the nature of the note, as to its being joint or joint and several,[10] by striking off or adding signatures,[11] by changing the consideration,[12] or amount to be paid,[13] by

changing the amount or mode of paying interest,[14] by adding or inserting any special stipulations,[15] by making a change in the description of property,[16] by changing a non-negotiable to a negotiable instrument,[17] by the erasure of the name of a surety from a bond,[18] by cutting off[19] or adding the name of a witness,[20] although it has been held otherwise where the name has been accidentally omitted.[21] Any alteration as to the time of payment,[22] or as to the mode or article in which payment is to be made has the same effect.[23] Whether an alteration is material is a *question for the court.*[24]

1, Davidson v. Cooper, 11 M. & W. 795; 13 M. & W. 343. On the subject of materiality of alterations, see notes, 17 Am. Rep. 101; 4 Am. St. Rep. 25 and notes cited under sec. 572 *supra.*

2, Steph. Ev. art. 89.

3, Wood v. Steele, 6 Wall. 80; Miller v. Gilleland, 19 Pa. St. 119; Lisle v. Rogers, 18 B. Mon. (Ky.) 528; Taylor v. Taylor, 12 Lea (Tenn.) 714; Outhwaite v. Luntley, 4 Camp. 179; Bathe v. Taylor, 15 East 412. See notes, 17 Am. Rep. 101; 10 Am. Dec. 268; 71 Am. Dec. 724; also note 22 to this section.

4, Winter v. Pool, 100 Ala. 503; Baugh v. Anderson, 91 Ga. 831; Woodnorth v. Bank, 19 Johns. 391; 10 Am. Dec. 239 and full note.

5, Tidmarsh v. Grover, 1 Maule & S. 735; Bank of O. Valley v. Lockwood, 13 W. Va. 392; 31 Am. Rep. 758.

6, Davis v. Eppler, 38 Kan. 629.

7, Nazro v. Fuller, 24 Wend. 374; Townsend v. Star Wagon Co., 10 Neb. 615; 35 Am. Rep. 493; Whitesides v. Northern Bank, 10 Bush (Ky.) 501; 19 Am. Rep. 74.

8, M'Ara v. Watson, 2 S. (Scotch, June, 1823) 366; Home v. Purvis, 14 S. (Scotch, June, 1836) 898; Hollis v. Harris, 96 Ala. 288.

9, Broughton v. Fuller, 9 Vt. 373.

10, Perring v. Hone, 4 Bing. 28; 12 Moore 135; 2 Car. & P. 401; Heath v. Blake, 28 S. C. 406; Humphreys v. Guillow, 13 N. H. 385; 38 Am. Dec. 499; Hemmenway v. Stone, 7 Mass. 58; 5 Am. Dec. 27; Eckert v. Louis, 84 Ind. 99.

11, Hamilton v. Hooper, 46 Iowa 515; 26 Am. Rep. 161; Wallace v. Jewell, 21 Ohio St. 163; 8 Am. Rep. 48; Lunt v. Silver, 5 Mo. App. 186; Houck v. Graham, 106 Ind. 195; 55 Am. Rep. 727; Sullivan v. Rudisill, 63 Iowa 158; Monson v. Drakeley, 40 Conn. 552; 16 Am. Rep. 74; Gardner v. Welsh, 5 El. & B. 82; Smith v. United States, 2 Wall. 219; Mason v. Bradley, 11 M. & W. 590.

12, Knill v. Williams, 10 East 431; Low v. Argrove, 30 Ga. 129.

13, Brown v. Jones, 3 Port. (Ala.) 420; Waterman v. Vose, 43 Me. 504; Schwarz v. Oppold, 74 N. Y. 307; Jones v. Bangs, 40 Ohio St. 139; 48 Am. Rep. 664; Neff v. Horner, 63 Pa. St. 327; 3 Am. Rep. 555; Green v. Snead, 101 Ala. 205.

14, Schnewind v. Hacket, 54 Ind. 248; Gwin v. Anderson, 91 Ga. 831; Harsh v. Klepper, 28 Ohio St. 200; Hoopes v. Collingwood, 10 Col. 107; Heath v. Blake, 28 S. C. 406; Woodworth v. Anderson, 63 Iowa 503; Davis v. Henry, 13 Neb. 497. See note, 48 Am. Rep. 667.

15, American Pub. Co. v. Fisher, 10 Utah 147; McIntyre v. Velte, 153 Pa. St. 350; Flanigan v. Phelps, 42 Minn. 186.

16, Marcy v. Dunlap, 5 Lans. (N. Y.) 365; Sherwood v. Merritt, 83 Wis. 233; Hollingsworth v. Holbrook, 80 Iowa 151.

17, Croswell v. Labree, 81 Me. 44; 10 Am. St. Rep. 238; Johnson v. United States Bank, 2 B. Mon. (Ky.) 310; Pepoon v. Stagg, 1 Nott & McC. (S. C.) 102; Brown v. Straw, 6 Neb. 536; 29 Am. Rep. 369; McAuley v. Gordon, 64 Ga. 221; Union Nat. Bank v. Roberts, 45 Wis. 373;

Needles v. Shaffer, 60 Iowa 65; Walton Plow Co. v. Campbell, 35 Neb. 173.

18, Smith v. United States, 2 Wall. 219.

19, Sharpe v. Bagwell, 1 Dev. Eq. (N. C.) 115.

20, Brackett v. Mountfort, 11 Me. 115; Homer v. Wallis, 11 Mass. 309; 6 Am. Dec. 169.

21, Smith v. Dunham, 8 Pick. 246.

22, Wyman v. Yeomans, 84 Ill. 403; Long v. Moore, 3 Esp. 155 and note; Alderson v. Langdale, 3 Barn. & Adol. 660. See also cases cited in note 3 *supra*.

23, Stevens v. Graham, 7 Serg. & R. (Pa.) 505; Martendale v. Follett, 1 N. H. 95; Schwalm v. McIntyre, 17 Wis. 232; Angle v. Northwestern Ins. Co., 92 U. S. 330.

24, Belfast Bank v. Harriman, 68 Me. 522; Keen v. Monroe, 75 Va. 424; Pritchard v. Smith, 77 Ga. 463.

§ 576. Implied consent to alteration—Blanks. — Many of the cases already cited afford illustration of the rule that material alterations in negotiable paper avoid the contract, even in the hands of a *bona fide* holder.[1] But if the *maker leave room for alterations* to be made *or blanks to be filled* in such manner as to excite no suspicion, he may be liable to a *bona fide* holder, if such changes are made when there are no marks on the instrument giving notice of the alterations.[2] If the alteration is made *before delivery or with the consent* of all the parties, of course the validity of the instrument as a contract or as a means of evidence is not affected.[3] Such consent is often implied where an instrument is signed and delivered,

and blank places are left unfilled. It has often been held in such cases that the holder has the implied authority to fill the blanks in conformity to the general character of the paper.[4] This has been illustrated in cases respecting deeds,[5] powers of attorney to transfer stock,[6] promissory notes,[7] appeal bonds,[8] bail bonds,[9] blank indorsements on promissory notes[10] and co-obligors in blank writs and similar papers issued from the courts.[11]

1, Benedict v. Cowden, 49 N. Y. 396; 10 Am. Rep. 382; Angle v. Northwestern Mut. L. Ins. Co., 92 U. S. 330.

2, Bank of Pittsburg v. Neal, 22 How. 96; Goodman v. Simonds, 20 How. 343; Angle v. Northwestern M. Life Ins. Co., 92 U. S. 330; Garrard v. Lewis, 10 Q. B. Div. 30; Abbott v. Rose, 62 Me. 194; 16 Am. Rep. 427; Benedict v. Cowden, 49 N. Y. 396; 10 Am. Rep. 382; Garrard v. Hadden, 67 Pa. St. 82; 5 Am. Rep. 412; Blakey v. Johnson, 13 Bush (Ky.) 197; 26 Am. Rep. 254; Canon v. Grigsby, 116 Ill. 151; 56 Am. Rep. 769; 2 Dan. Neg. Inst. 415. Contra, Homes v. Trumper, 22 Mich. 427; 7 Am. Rep. 661; Worrall v. Gheen, 39 Pa. St. 388; Greenfield Bank v. Stowell, 123 Mass. 196; 25 Am. Rep. 67; Goodman v. Eastman, 4 N. H. 455; Knoxville Bank v. Clarke, 51 Iowa 264. See notes, 10 Am. Dec. 267–273; 4 Am. St. Rep. 25.

3, Ravisies v. Alston, 5 Ala. 297; Stewart v. Preston, 1 Fla. 10; 44 Am. Dec. 621; Wickes v. Caulk, 5 Harr. & J. (Md.) 36; Boston v. Benson, 12 Cush. 61; Camden Bank v. Hall, 14 N. J. L. 583; Lewis v. Payn, 8 Cow. 71; 18 Am. Dec. 427; Bell v. Boyd, 76 Tex. 133; Janney v. Goehringer, 52 Minn. 428.

4, Bank of Commonwealth v. McChord, 4 Dana (Ky.) 119; 29 Am. Dec. 398; Spitler v. James, 32 Ind. 202; 2 Am. Rep. 334; Redlich v. Doll, 54 N. Y. 234; 13 Am. Rep. 573; Gillaspie v. Kelley, 41 Ind. 158; 13 Am. Rep. 318; Garrard v. Hadden, 67 Pa. St. 82; 5 Am. Rep. 412; McCrath v. Glark, 56 N. Y. 34; 15 Am. Rep. 372; Rainbolt v.

Eddy, 34 Iowa 440; 11 Am. Rep. 152; Van Duzer v. Howe, 21 N. Y. 531; Yocum v. Smith, 63 Ill. 321; 14 Am. Rep. 120; Geddes v. Blackmore, 132 Ind. 551. See long notes, 10 Am. Dec. 271; 13 Am. Dec. 669; 17 Am. Rep. 97.

5, Eagleton v. Gutteridge, 11 M. & W. 465; West v. Steward, 14 M. & W. 47; Vose v. Dolan, 108 Mass. 155; 11 Am. Rep. 331; Devin v. Himer, 29 Iowa 297; Clark v. Allen, 34 Iowa 190; Schintz v. McManamy, 33 Wis. 299; Murray v. Klinzing, 64 Conn. 78.

6, Commercial Bank v. Kortright, 22 Wend. 348; 34 Am. Dec. 317.

7, Angle v. Northwestern M. L. Ins. Co., 92 U. S. 330; Redlich v. Doll, 54 N. Y. 234; 13 Am. Rep. 573; Wilson v. Henderson, 17 Miss. 375; 48 Am. Dec. 716; Michigan Bank v. Eldred, 9 Wall. 544.

8, *Ex parte* Decker, 6 Cow. 59; *Ex parte* Kerwin, 8 Cow 118.

9, Hale v. Russ, 1 Me. 334; Gordon v. Jeffery, 2 Leigh (Va.) 410. But see, Gilbert v. Anthony, 1 Yerg. (Tenn.) 69; 24 Am. Dec. 439.

10, Edwards v. Scull, 11 Ark. 325; Dunham v. Clogg, 30 Md. 284; Spitler v. James, 32 Ind. 202; 2 Am. Rep. 334.

11, 1 Whart. Ev. sec. 632.

§ 577. Unauthorized filling of blanks—Deeds.— But the depositary of a written instrument containing blanks has no *implied authority* to make a new instrument by erasing what is written or printed, nor by filling the blanks with stipulations repugnant to the plainly expressed intention of the same, as shown by its written or printed terms;[1] and although the name of a grantee in a *deed* may be inserted after execution, pursuant to parol authority, there is no implied authority to

insert the name of a person other than the one designated.[2] But the authority to insert a name after the delivery of the deed,[3] or to fill up the blanks of a deed which has nothing but the signature and seals attached[4] will not be implied. An *alteration in a deed* of conveyance after delivery does not operate to reconvey the title to the original grantor. The title remains in the grantee, and he may bring ejectment upon it. The title passed by the deed has performed its office, and its continued existence or integrity is not essential to the title, although a fraudulent and material change may disable the holder from bringing an action upon its covenants;[5] and there is doubt whether such a deed can be used as any evidence of title.[6]

1, Angle v. Northwestern M. L. Ins. Co., 92 U. S. 330; McCoy v. Lockwood, 71 Ind. 319.

2, Schintz v. McManamy, 33 Wis. 299.

3, Allen v. Withrow, 110 U. S. 119.

4, Burns v. Lynde, 6 Allen 305; Gilbert v. Anthony, 1 Yerg. (Tenn.) 69; 24 Am. Dec. 439.

5, Woods v. Hilderbrand, 46 Mo. 284; 2 Am. Rep. 513; Lewis v. Payn, 8 Cow. 71; 18 Am. Dec. 427; Jackson v. Gould, 7 Wend. 364; Herrick v. Malin, 22 Wend. 388; Alexander v. Hickox, 34 Mo. 496; 86 Am. Dec. 118; Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119; 47 Am. Dec. 299.

6, Woods v. Hilderbrand, 46 Mo. 284; 2 Am. Rep. 513; Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119; 47 Am. Dec. 299. See sec. 420 *supra*.

§ 578. Presumption in case of alteration — English rule. — When alterations appear in written instruments offered as evidence, what presumptions arise, and on whom rests the burden of proof? These are questions which have given rise to elaborate discussion in England, and as to which great diversity of opinion exists in this country. Mr. Stephen thus states the rule as now established in England: "Alterations and interlineations appearing on the face of a *deed* are, in the absence of all evidence relating to them, presumed to have been made before the deed was completed. Alterations and interlineations appearing on the face of a *will* are, in the absence of all evidence relating to them, presumed to have been made after the execution of the will. There is no presumption as to the time when alterations and interlineations appearing on the face of *writings, not under seal*, were made, except that it is presumed that they were so made that the making would not constitute an offense."[1] As will be seen when the different views are stated, it would be in vain to attempt to reconcile the decisions upon this subject in the United States. It will be found, however, that the distinction which exists in England with respect to deeds and other instruments is not generally made in this country. The mere fact that there is an interlineation or alteration would not seem to call for any ex-

planation, provided the appearance of the writing and ink is such as to indicate that the whole was written at *the same time and by the same person.* In such cases, it is clear that the usual *presumption* in favor of *innocence* and against wrong doing will obtain; and the burden will rest upon the person asserting that a wrongful alteration has been made.[2] So the alteration may be sufficiently explained, if properly noted in the attestation clause.[3] The difficulty arises when it is evident from the difference in handwriting or ink, or from other indications that an alteration has been made; and in those other cases where it may seem doubtful whether the interlineation or change was made in the same ink and handwriting.

1, Steph. Ev. art. 89.

2, Yakima Bank v. Knipe, 6 Wash. 348; Wolferman v. Bell, 6 Wash. 84; 36 Am. St. Rep. 126 and note; Des Moines Bank v. Harding, 86 Iowa 153; Houston v. Jordan, 82 Tex. 352; McLain v. Bedgood, 89 Ga. 793; Shroeder v. Webster, 88 Iowa 627; Conger v. Crabtree, 88 Iowa 536; Zimmerman v. Camp, 155 Pa. St. 152.

3, Smith v. United States, 2 Wall. 232.

§ 579. Same — Conflicting views in the United States. — In some states where the rule prevailing in England as to deeds is adopted, it is held, if nothing is shown to the contrary, that the alteration of a written instrument should be presumed to have been made before or at the time of its execution;

and it has been argued that this rule is better adapted to this country where so many contracts are drawn by the parties without great care in regard to interlineations and alterations.[1] In accordance with this view the supreme court of Minnesota in a recent case have thus stated the rule as held by them: "We are therefore of opinion that the correct rule is that the burden is upon the maker to show that the alteration was made after delivery, or perhaps, to state the proposition with more precision, the proof or admission of a signature of a party to an instrument is *prima facie* evidence that the instrument written over it is his act; and this *prima facie* evidence will stand as binding proof, unless the maker can rebut it by showing by evidence that the alteration was made after delivery; and that the question when, by whom and with what intent the alteration was made is one of fact to be submitted to the jury upon the whole evidence, intrinsic and extrinsic."[2] In other states, it is held that a material alteration will be presumed to have been made after the execution of the contract, and the burden rests upon the person offering the paper to explain the alteration.[3] While in still other states, it is held that there is no presumption of law either that the alterations and interlineations apparent on the face of the instrument were made prior to its execution or subsequently.

It is there held that the question is to be settled by the jury upon all the evidence in the case offered by the parties, including, of course, the character of the alterations and the appearance of the instrument alleged to have been altered.[4] It is apparent that there is great confusion of the authorities upon this subject. But whatever conflict of opinion there may be as to the legal presumptions to be raised, there seems to be quite general concurrence in the view that when *suspicious circumstances*, tending to discredit the document, appear either upon its face or from extrinsic facts, the burden of removing such suspicion is upon the party seeking to use the instrument.[5]

1, Little v. Herndon, 10 Wall. 26; Sirrine v. Briggs, 31 Mich. 443; Stover v. Ellis, 6 Ind 152; Des Moines Nat. Bank v. Harding, 86 Iowa 153; Rainbolt v. Eddy, 34 Iowa 440; 11 Am. Rep. 152; Wolferman v. Bell, 6 Wash. 84; 36 Am. St. Rep. 126 and note; Stillwell v. Patton, 108 Mo. 352; North River Co. v. Shrewsbury, 22 N. J. L. 424; 53 Am. Dec. 258; Beaman v. Russell, 20 Vt. 205; 49 Am. Dec. 775; Wicker v. Pope, 12 Rich. L. (S. C.) 387; 75 Am. Dec. 732; Franklin v. Baker, 48 Ohio St. 296; 29 Am. St. Rep. 547 and note; Kendrick v. Latham, 25 Fla. 819; Sharpe v. Orme, 61 Ala. 263; Hagan v. Merchants Co., 81 Iowa 321. See article, 23 Am. L. Rev. 859.

2, Wilson v. Hayes, 40 Minn. 531; 12 Am. St. Rep. 754. But if it is shown that an alteration has been made, it will be presumed to be fraudulent, Warder v. Willyard, 46 Minn. 531.

3, Cole v. Hills, 44 N. H. 227; Provost v. Gratts, Peters C. C. 369; United States v. Linn, 1 How. 104; Morris v. Vanderen, 1 Dall. (Pa.) 67; Jackson v. Osborn, 2 Wend.

555; 20 Am. Dec. 649; Herrick v. Malin, 22 Wend. 388; Hills v. Barnes, 11 N. H. 395; Barrington v. Bank of Wash., 14 Serg. & R. (Pa.) 405; McMicken v. Beauchamp, 2 La. 290; Von Eherenkrook v. Webber, 100 Mich. 314; Hodnett v. Pace, 84 Va. 873. See note, 1 Smith L. C. 1314. In California, by the provisions of the code an alteration after execution must be explained by the party producing the instrument, Code, sec. 1982; Galland v. Jackman, 26 Cal. 85. The rule is less rigid, however, when words in a printed form are erased, Corcoran v. Doll, 32 Cal. 88.

4, Ely v. Ely, 6 Gray 439; Newman v. Wallace, 121 Mass. 323; Huston v. Plato, 3 Col. 402; Robinson v. Myers, 67 Pa. St. 9; Milliken v. Marlin, 66 Ill. 13.

5, Henman v. Dickinson, 5 Bing. 183; Knight v. Clements, 8 Adol. & Ell. 215; Newcomb v. Presbrey, 8 Met. 406; Dodge v. Haskell, 69 Me. 429; Huntington v. Finch, 3 Ohio St. 445; Jordan v. Stewart, 23 Pa. St. 244; Courcamp v. Weber, 39 Neb. 533; United States v. Linn, 1 How. 111; Smith v. United States, 2 Wall. 219. But see, Wilson v. Hayes, 40 Minn. 531; 12 Am. St. Rep. 754.

§ 580. Question of alteration is for the jury.— There is also general concurrence in the view that the question whether an alteration has been made is a matter to be *determined by the jury.* Where the instrument is submitted to them, either with or without explanation, the appearance of the document, the possible motive for or against the alteration, the advantage or disadvantage to the party claiming under the instrument which would be likely to follow from an alteration, are all circumstances from which the jury may determine the fact of alteration, as well as the time and the intent.[1] While there are numerous cases in which it has been held

that instruments in which the alteration was manifest from their face, as from difference in ink or handwriting, might be submitted to the jury without any explanation,[2] yet it is clearly the safer and better practice for the person relying on such an instrument to give evidence *explaining the same*, if possible; and in many cases this has been held indispensable.[3] When the maker testifies that an alteration has been made, it is clearly a question for the jury.[4] When an alteration, after execution, is shown, it is incumbent on the person claiming under the instrument to prove consent.[5] It has been held that there is no burden on the party producing *ancient documents* which have been exposed to the inspection of numerous persons who have thus had opportunity to make additions or annotations, provided such documents come from the proper repositories.[6]

1, Bailey v. Taylor, 11 Conn. 531; 29 Am. Dec. 321; Heffelfinger v. Shute, 16 Serg. & R. (Pa.) 44; Commissioners v. Hanion, 1 Nott & McC. (S. C.) 554; Ault v. Fleming, 7 Iowa 143; Commercial Bank v. Lum, 8 Miss. 414; Maybee v. Sniffin, 2 E. D. Smith (N. Y.) 1; Schwartz v. Herrenkind, 26 Ill. 208; Stockton v. Graves, 10 Ind. 294; Reinhart v. Miller, 22 Ga. 402; 68 Am. Dec. 506; Dodge v. Haskell, 69 Me. 429; Cole v. Hills, 44 N. H. 227; Beaman v. Russell, 20 Vt. 205; 49 Am. Dec. 775; Mathews v. Coalter, 9 Mo. 696; Martin v. Klein, 157 Pa. St. 473; Pearson v. Hardin, 95 Mich. 360; Courcamp v. Weber, 39 Neb. 533.

2, Cole v. Hills, 44 N. H. 227; Wicker v. Pope, 12 Rich. (S. C.) 387; 75 Am. Dec. 732; Stayner v. Joyce, 120 Ind. 99; Hunt v. Gray, 35 N. J. 227; 10 Am. Rep. 232.

3, Wilde v. Armsby, 6 Cush. 314; Davis v. Jenny, 1 Met. 223; Commercial Bank v. Lum, 8 Miss. 414; Warren v. Layton, 3 Har. (Del.) 404; Stoner v. Ellis, 6 Ind. 159; Fontaine v. Gunther, 31 Ala. 258; Jackson v. Osborn, 2 Wend. 555; 20 Am. Dec. 649; Clark v. Eckstein, 22 Pa. St. 507; 62 Am. Dec. 307; Page v. Danaher, 43 Wis. 221.

4, Von Eherenkrook v. Webber, 100 Mich. 314. See also, Martin v. Kline, 157 Pa. St. 473.

5, Emerson v. Opp, 9 Ind. App. 581; Shroeder v. Webster, 88 Iowa 627. See also, Gleason v. Hamilton, 138 N. Y. 353 and cases there cited.

6, Evans v. Rees, 10 Adol. & Ell. 151; Little v. Herndon, 10 Wall. 26; Stevens v. Martin, 18 Pa. St. 101; Walls v. McGee, 4 Har. (Del.) 108.

§ 581. Fraudulent intent — Alteration of negotiable paper. — In most cases it is immaterial whether the alteration is made fraudulently or without actual fraudulent intent. If the alteration is material, the instrument is invalidated; and a material alteration, after delivery, if unexplained, is presumptively fraudulent.[1] We have seen, however, according to one line of decisions that, if even an immaterial alteration is made with a fraudulent purpose, the result is the same.[2] In another case fraudulent intent may materially affect the rights of the parties. Thus, although no action can be maintained upon the contract materially altered, yet an *action may in some cases be brought upon the original debt* or consideration for which such contract was given, provided it is shown that the alteration was made by mistake and without fraudulent intent.[3] But in some courts this

has been limited to those cases where the original indebtedness could be regarded as independent of the altered contract, and not discharged by or merged in it.[4] It is the object of the general rule under discussion to prevent the perpetration of fraud; and it is obvious that, if the guilty party may, when defeated on his contract, recover on the original debt, the salutary purpose of the rule would be defeated. A party should not be permitted to take the chances of gain by the commission of a fraud, without running the risk of loss in case of detection.[5] As respects the burden of proof, a somewhat *stricter rule* prevails in the case of *negotiable instruments*, than in the case of other instruments. Although there is the same conflict of opinion on this subject, which has already been pointed out in respect to other instruments, yet the tendency is to require the holder of negotiable paper to explain alterations and erasures appearing on its face. It is urged that as notes and bills are intended for negotiation, and as payees do not receive them when clogged with impediments to their circulation, there is a presumption that such an instrument is fair and untarnished, until such presumption is repelled, and that the very fact that the holder received negotiable paper is presumptive evidence that it was unaltered at the time.[6]

1, Russell v. Reed, 36 Minn. 376; Pew v. Laughlin, 3 Fed. Rep. 39; Osgood v. Stevenson, 143 Mass. 399; State v. Craig, 58 Iowa 238.

2, See sec. 574 *supra*.

3, Matteson v. Ellsworth, 33 Wis. 488; 14 Am. Rep. 766; Hunt v. Gray, 35 N. J. 227; 10 Am. Rep. 232; Clough v. Seay, 49 Iowa 111; Clute v. Small, 17 Wend. 238; Booth v. Powers, 56 N. Y. 22; Eckert v. Pickle, 59 Iowa 545; State Sav. Bank v. Shaffer, 9 Neb. 1; 31 Am. Rep. 395; Merrick v. Boury, 4 Ohio St. 60; Courcamp v. Weber, 39 Neb. 533.

4, Booth v. Powers, 56 N. Y. 22. See also, Wheelock v. Freeman, 13 Pick. 165; 23 Am. Dec. 674 and note.

5, Warder Co. v. Willyard, 46 Minn. 531.

6, Simpson v. Stackhouse, 9 Barr (Pa.) 186; 49 Am. Dec. 554; Henman v. Dickenson, 5 Bing. 183; Hill v. Barnes, 11 N. H. 395; Humphreys v. Guillow, 13 N. H. 385; 38 Am. Dec. 499; Dan. Neg. Inst. sec. 1417.

CHAPTER 17.

DOCUMENTARY EVIDENCE — continued.

§ 582. Books of account as evidence.

The discussion in another portion of this work shows that it has long been the settled common law rule that entries made in the regular

course of business in shop books by the clerk or agent of a person are, with proper restrictions, admissible in evidence after the death of such clerk on proof of his handwriting.[1] It has also been shown that the American cases extended this principle so as to include entries made by such hired clerk or agent when authenticated by his oath, although he is not able to remember the fact so recorded, in other words, the entries may be admissible during the life of the one who made them.[2] Such entries are admitted, not on the principle that they were declarations against interest, or the declarations of persons since deceased, but on the ground that they were a part of the acts they purported to record, in other words, part of the *res gestae;* and it was but another step to admit entries in books made in the regular course of business which were kept by the party himself. Accordingly it has long been the practice in most of the states to admit as evidence entries made by the parties themselves, as well as those made by clerks, to prove the sale, delivery and price of goods and the performance of work and labor. The change of the old rule, prohibiting parties from testifying in their own behalf, operated to give much more latitude to testimony of this character. In many of the states statutes have been enacted which furnish rules for the admission of entries in books of account made in the regular course

of business. It will, of course, be impossible to state in detail the statutes in the several states, or the decisions in which such statutes have been construed.

1, As to the general subject of this and the succeeding sections, see notes, 15 Am. Dec. 191–198; 30 Am. Dec. 142; also extended discussion of the authorities in 1 Smith L. C. 567–614. See sec. 323 *supra*.

2, See secs. 324 *et seq. supra*.

§ 583. Same—Statutes—Of what transactions books are evidence.—But there are certain rules which, although by no means of universal application, will be found to prevail quite generally. Although there is considerable diversity in the statutes of the several states, yet they contain such points of similarity that the decisions in one state are frequently useful in construing the statutes of another; and it will be found that in some of the states where no statute exists, and in which the practice has grown up as a part of the common law, the rules adopted by the courts are quite similar to the regulations prescribed in the statutes of other states.[1] It will, of course, be borne in mind that the general view of the subject here taken is liable to be controlled by the statutes or decisions of the jurisdiction. Generally these entries relate to *articles sold* or to *services rendered* in the regular course of business, without reference to their value or the number of items.[2] In

some states books are not admissible to prove *cash items*, such as the loan of money. Goods are generally sold in the regular course of business and under circumstances of some publicity. Services are generally performed under such circumstances that third persons may have some knowledge of the subject. But the payment of money occurs as frequently in private as in public, and it has been deemed unsafe, as a rule, to allow mere book entries as evidence of such transactions.[3] In some states entries in account books are not evidence of items of money exceeding certain specified amounts.[4] Although the loan or payment of money is not ordinarily such a subject of charge in book accounts as to be proved thereby, yet it has been held that books of account may be books of evidence to prove the payment of money, when it appears that the party offering the books is engaged in a business that justifies the charges, such as *banking* or *receiving money on deposit* and paying it out for others.[5] It has also been held that, although entries may not be competent to prove the facts recorded, they may be used as *memoranda* for *refreshing the memory of the witness.*[6] Such a special course of dealing may exist between parties as to render entries admissible which would otherwise be incompetent, in other words, the usage and conduct of the parties may have been such as to create an implied con-

tract that their dealings may be proven in such mode.[7] In some cases, the practice has been so far extended as to receive in evidence memoranda which contain other items than charges for goods sold or services rendered, when such entries are shown to have been correctly made and in the regular course of business.[8]

1, Schettler v. Jones, 20 Wis. 412.

2, Leach v. Sheppard, 5 Vt. 363. A note or collection register kept by a banker is not a book of account, Laboree v. Klosterman, 33 Neb. 150.

3, Inslee v. Prall, 23 N. J. L. 457; Townsend v. Townsend, 5 Har. (Del.) 125; Case v. Potter, 8 Johns. 211; Smith v. Renz, 131 N. Y. 169. But see, Clark v. Savage, 20 Conn. 258.

4, Kelton v. Hill, 58 Me. 114; Winner v. Bauman, 28 Wis. 563; Union Bank v. Knapp, 3 Pick. 109; 15 Am. Dec. 181; Basset v. Spofford, 11 N. H. 167. See the statutes of the jurisdiction.

5, Veiths v. Hagge, 8 Iowa 163; Lyman v. Bechtel, 55 Iowa 437; Culver v. Marks, 122 Ind. 554; Lehman v. Rothbarth, 111 Ill. 185. They may afford some evidence of non-payment, when properly kept, if no credit appears, Union School Co. v. Mason, 3 S. Dak. 147.

6, Winner v. Bauman, 28 Wis. 563; Schettler v. Jones, 20 Wis. 412; Cobb v. Wells, 124 N. Y. 77; Lester v. Thompson, 91 Mich. 245. In Missouri books can only be used to refresh the memory, Robertson v. Reed, 38 Mo. App. 32.

7, Case v. Berry, 3 Vt. 332; Monroe v. Snow, 131 Ill. 126; Beach v. Mills, 5 Conn. 493; Snodgrass v. Coldwell, 90 Ala. 319; Swing v. Sparks, 7 N. J. L. 59; Goff v. Stoughton Bank, 84 Wis. 369; Spear v. Peck, 15 Vt. 556.

8, Mayor of New York v. Second Ave. Ry. Co., 102 N. Y. 572; Cobb v. Wells, 124 N. Y. 77; West v. Van Tuyl, 119 N. Y. 620; Blumhardt v. Rohr, 70 Md. 328; Goff v. Stoughton Bank, 84 Wis. 369.

§ 584. Books should be those of original entry.— There is general concurrence in the rule that the books offered should be books of *original entry*. Thus, if the entries are made in a day book or journal, and transferred thence to a ledger, the entries in the ledger are not competent.[1] But it is no objection to the book, if otherwise regular, that the entries which they contain were *first made temporarily* for convenience upon a slate,[2] or on slips of paper or other memoranda,[3] or even on a blotter, and the *same day transferred* to the journal or other book of original entry.[4] The same is true, if they were temporarily made in some other manner, for example, on notched sticks, shingles or boards,[5] and afterwards regularly transferred to the book. It has been held that, where the party had but little business and did not make the transfer until the slate was full, although it was a period of from two to four weeks, the book was still admissible.[6] But under other circumstances such a delay might be held unwarrantable. In Pennsylvania, it has been intimated that the entries should be transcribed not later than the next day after that on which they were first made.[7] But other decisions in that state seem to adopt a more liberal rule.[8] In this particular, every case must be made to depend very much upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode

of conducting it and the time and manner of making entries. Upon questions of this sort, much must be left to the discretion of the judge who presides at the trial, because, having the books before him, and understanding all the circumstances of the case, he is best able to decide upon all questions involving the fairness and regularity of the entries sought to be proved.[9] The transfer must be shown to have been made within a reasonable time under all the circumstances, so that it may appear to have taken place while the memory of the facts was recent, or the source from which the knowledge of the matter was acquired was unimpaired.[10]

1, Woodbury v. Woodbury, 50 Vt. 152; Wall v. Dovey, 60 Pa. St. 212; Stetson v. Wolcott, 15 Gray 545; *In re* Huston's Estate, 167 Pa. St. 217; Kerns v. Dean, 77 Cal. 555. See also, Woolsey v. Bohn, 41 Minn. 235. See note, 15 Am. Dec. 196. But see note 1 of the next section.

2, Hall v. Glidden, 39 Me. 445; Faxon v. Hollis, 13 Mass. 427; Barker v. Haskell, 9 Cush. 218; McGoldrick v. Traphagen, 88 N. Y. 334; Landis v. Turner, 14 Cal. 573; Nichols v. Vinson, 9 Houst. (Del.) 274.

3, Paine v. Sherwood, 21 Minn. 225; Davison v. Powell, 16 How. Pr. (N. Y.) 467; Taylor v. Davis, 82 Wis. 455; Robinson v. Mulder, 81 Mich. 75; Way v. Cross, (Iowa) 63 N. W. Rep. 691.

4, Montague v. Dougan, 68 Mich. 98.

5, Davison v. Powell, 16 How. Pr. (N. Y.) 467; Rowland v. Burton, 2 Har. (Del.) 288; Paine v. Sherwood, 21 Minn. 225; Smith v. Sanford, 12 Pick. 139; 22 Am. Dec. 415.

6, Hall v. Glidden, 39 Me. 445.

7, Forsythe v. Norcross, 5 Watts (Pa.) 432; 30 Am. Dec. 334.

8, Jones v. Long, 3 Watts (Pa.) 325; Yeardsley's Appeal, 48 Pa. St. 531; Hartley v. Brooks, 6 Whart. (Pa.) 189. See 1 Smith L. C. (8th ed.) 599.

9, Barker v. Haskell, 9 Cush. 221.

10, Redlich v. Bauerlee, 98 Ill. 134; 38 Am. Rep. 87.

§ 585. Form of books of account.— No particular form of books of accounts is generally prescribed, although books are far more satisfactory when kept in the form of daily entries of debits and credits in a day book or journal. They may be kept in the form of a ledger, if this is the general mode in which the party keeps his books, provided the entries are original entries.[1] The entries may be made in pencil,[2] or in the form of a time book, and be used as proof, not only of the labor of the plaintiff, but of his apprentice as well.[3] Although regularly prices ought to be specified, yet the book is not necessarily inadmissible, even if measure, weight, price and quantity are not given in connection with the items charged,[4] though, of course, the book in such case furnishes no evidence as to matters omitted.[5] But the book should be such a *regular* and *usual account book* as explains itself and as appears on its face to create a liability in an account with the party against whom it is offered, and not to be a mere memorandum for some other purpose.[6] Hence, mere loose sheets of paper are not admissible;[7] and a single entry does

not constitute an account book.[8] Charges may be so isolated and separated from others as to indicate that they were not made in the regular course of business, in which case, they should be rejected.[9] When books are proved to be the "only books" of the party, they are books of original entry.[10] So where the entries were by stipulation transferred to a new set of books, made by experts for the purpose of making the entries intelligible, it was held that the new set of books, prepared in this way, were properly admitted in evidence.[11] The statutes do not generally prescribe the form in which bboks should be kept, nor the degree of definiteness to be observed in making entries. They have been so framed as to have a very general application. The account books of an illiterate laborer, as well as those of a tradesman or a banker are admissible in evidence, if within the statutory conditions, the purposes of which are to secure authenticity and credibility in respect to the evidence, rather than to prescribe the form of it.[12]

1, Faxon v. Hollis, 13 Mass. 427; Gibson v. Bailey, 13 Met. 537; Wells v. Hatch, 43 N. H. 246; Cogswell v. Dollivar, 2 Mass. 217; 3 Am. Dec. 45; Gifford v. Thomas' Estate, 62 Vt. 34.

2, Gibson v. Bailey, 13 Met. 537.

3, Mathes v. Robinson, 8 Met. 269; 41 Am. Dec. 505.

4, Pratt v. White, 132 Mass. 477.

5, Hagaman v. Case, 4 N. J. L. 370.

6, Wilson v. Goodin, Wright (Ohio) 219, check-book; Cooper v. Morrell, 4 Yeates (Pa.) 341; Thompson v. McKilvey, 13 Serg. & R. (Pa.) 126, scraps of paper; Van Every v. Fitzgerald, 21 Neb. 36; 59 Am. Rep. 835; Pollard v. Turner, 22 Neb. 366.

7, Richardson v. Emery, 23 N. H. 220; Jones v. Jones, 21 N. H. 219; Thompson v. McKilvey, 13 Serg. & R. (Pa.) 126; Hough v. Doyle, 4 Rawle (Pa.) 291.

8, Kibbe v. Bancroft, 77 Ill. 18; Fitzgerald v. McCarty, 55 Iowa 702.

9, Prince v. Smith, 4 Mass. 455; Lynch v. McHugo, 1 Bay (S. C.) 33; Swing v. Sparks, 7 N. J. L. 59.

10, Patrick v. Jack, 82 Ill. 81.

11, Roberts v. Eldred, 73 Cal. 394.

12, Woolsey v. Bohn, 41 Minn. 235.

§ 586. Books are to be those used in the course of business. — From what has already been stated, it may be implied that books are not admissible, unless they are those used in the regular course of business, and kept by the party as books of account.[1] Such entries are by no means confined to mercantile transactions, but may relate to the accounts of persons, generally made in the regular course of business, where goods, services or materials are furnished. Thus, books have been used to prove the accounts of carpenters and other mechanics and laborers,[2] ferrymen,[3] manufacturers,[4] millers,[5] publishers,[6] physicians and those in other professions.[7] It makes little difference in what capacity the services are rendered, provided they are in the regular course of business,[8]

and that they have been performed.[9] But such entries have frequently been rejected when they consisted of *charges in gross* for continued services, such as a charge for three months' labor, made in one term,[10] a charge, for the erection of a building,[11] a charge "four months' work, $300,"[12] a charge for labor extending through the period of a year, made in a single item, entered when the work was done.[13] But in a charge for work and labor continuing from day to day for several days, it is not necessary to set down a charge for each day itself. This is a matter which must rest very largely in the discretion of the judge according to the nature of the subject and its susceptibility of being precisely charged.[14] So charges have been rejected when the articles sold or furnished were *outside* the line of *the party's general business*, for example, a charge for a sale of a horse by a dry goods merchant.[15] In Massachusetts, it has been held that an item, "seven gold American lever watches," was not a proper subject of book charge;[16] and in South Carolina, a single item for furnishing labor and material amounting to six hundred and thirty-six dollars was held inadmissible.[17] But it may be suggested that, in respect to charges of this character, much would depend upon the nature and amount of business carried on by the party, in other

words, whether the transaction should appear to be in the regular course of his business.

1, Costelo v. Crowell, 139 Mass. 588; Walter v. Bollman, 8 Watts (Pa.) 544; Curren v. Crawford, 4 Serg. & R. (Pa.) 3; Stuckslager v. Neel, 123 Pa. St. 53.

2, Slade v. Teasdale, 2 Bay (S. C.) 172.

3, Frazier v. Drayton, 2 Nott & McC. (S. C.) 471.

4, Cobb v. Wells, 124 N. Y. 77.

5, Gordon v. Arnold, 1 McCord (S. C.) 517.

6, Ward v. Powell, 3 Har. (Del.) 379.

7, Lynch v. Hugo, 1 Bay (S. C.) 33; Thayer v. Deen, 2 Hill (S. C.) 677; Murphy v. Gates, 81 Wis. 370.

8, Howell v. Barden, 3 Dev. (N. C.) 449; Bell v. McLeran, 3 Vt. 185; Minor v. Irving, 1 Kirby (Conn.) 158.

9, Howell v. Barden, 3 Dev. (N. C.) 449.

10, Henshaw v. Davis, 5 Cush. 145. As to books of corporations, see sec. 530 *supra*.

11, Sloan v. Grimshaw, 4 Houst. (Del.) 326.

12, Karr v. Stivers, 34 Iowa 123.

13, Earle v. Sawyer, 6 Cush. 142.

14, Cummings v. Nichols, 13 N. H. 420; 38 Am. Dec. 501; Bay v. Cook, 22 N. J. L. 343.

15, Shoemaker v. Kellogg, 11 Pa. St. 310.

16, Bustin v. Rogers, 11 Cush. 346.

17, White v. St. Phillips Church, 2 McMull. (S. C.) 306; 39 Am. Dec. 125.

§ 587. Time of making the entries.— It is another requisite that the entry should be made at or *about the time of the transactions*. The entries should not be a recital of past transactions, but an account of transactions

as they occur. It is very clear that there is no principle on which shop books should be received as evidence, where the entries are not made at or about the time of the transaction. If not so made, the entries are no part of the register. They are mere independent declarations of the party in his own favor.[1] In some of the states, *the statutes* prescribe that the entries shall be contemporaneous with the transaction. But it is believed that the same rule generally prevails in the states where no such statute exists.[2] A reasonable construction will be given to the requirement; and it is not indispensable that the entries should be made immediately or upon the same day.[3] The learned American editors of Smith's Leading Cases quote and approve the rule as declared by the courts of Pennsylvania: "The law fixes no *precise instant when the entries should be made.* It is not to be a register of past transactions, but of transactions as they occur."[4] It is evident that much must depend upon the nature of the transactions and the general mode of carrying on the business. Although the entries are *not strictly contemporaneous*, the circumstances and nature of the business may be such as to satisfy the court that the delay was not unreasonable or inconsistent with the due course of business. The authorities already cited as to the transfer of temporary entries seem to sanction this princi-

ple.[5] The precise day of the month need not be affixed to the charge in all cases. The book has been admitted where no day of the month was specified, when it was regular in other respects.[6] It has been held that a book should not be rejected for the reason that it had no date, as the date of the account might be proved by other evidence.[7]

1, Bentley v. Ward, 116 Mass. 333; Griesheimer v. Tanenbaum, 124 N. Y. 650. See cases cited below.

2, Rev. Stat. Wis. sec. 4186; Iowa Stat. sec. 3658; Minn. Stat. 1878, p. 803.

3, Morris v. Briggs, 3 Cush. 342.

4, 1 Smith L. C. (8th ed.) 598; Jones v. Long, 3 Watts (Pa.) 325; National Ulster Co. Bank v. Madden, 114 N. Y. 280.

5, See sec. 584 *supra*.

6, Cummings v. Nichols, 13 N. H. 420; 38 Am. Dec. 501.

7, Doster v. Brown, 25 Ga. 24; 71 Am. Dec. 153.

§ 588. **Suppletory oath.**—In most jurisdictions it is necessary that testimony should be given *authenticating* the book of account and showing it to be the book of original entries kept for that purpose; also that the entries were true and correct, and contemporaneous with the transactions. It is obvious that the statutes on this subject must be complied with in order to render the book admissible.[1] This testimony should be given by the party, if the entries are in his handwrit-

ing,[2] or by a clerk, if the entries are in his handwriting, unless he is dead or out of the state, in which case, the books are admissible upon proof of the handwriting.[3] In some states statutes dispense with the calling of the party or the clerk who made the entries, if sufficient reason is shown therefor.[4] If the *party is deceased*, his handwriting may be shown and the books verified by the oath of his administrator or executor, showing that the books have come into his possession in such capacity and his belief that the entries are correct, and that they were made contemporaneously with the transactions.[5] When a *wife* keeps her husband's accounts, she may testify to that fact, and also that they were made under his direction; and the husband may testify that the charges are just and true.[6] When the entries are made by two *partners*, one should not be allowed to testify to entries made by the other, unless he knows that the sales were actually made.[7] Where temporary entries are made by one person who delivers the goods and transferred by another, both should be witnesses to render the book admissible.[8] The person making the entries should have *personal knowledge* of the facts recorded, or his testimony should be supported by that of some person who has such knowledge.[9] Thus, where a book contained entries of goods sold which were copied every Saturday night from the deliv-

ery book of the drayman, it was held inadmissible, without the testimony of the drayman or some other evidence showing that at the time the charges were made some articles were delivered by the plaintiff to the defendant.[10] If the witness who verifies the book can swear positively that the entries were made according to the truth, and that the fact stated actually existed, that is sufficient, although he has *no present recollection* about such facts.[11] In a few states the *suppletory oath* of the party or clerk may be *dispensed with*, if a sufficient reason is shown why such verification is not made.[12] Where the statute permits a party to testify to the correctness of his own book, such *statute enlarges*, but does not repeal the *common law rule* making such books admissible when their correctness is testified to by the clerk who kept them.[13]

1, Security Co. v. Graybeal, 85 Iowa 543; Watrous v. Cunningham, 71 Cal. 30. See cases cited below.

2, Van Swearingen v. Harris, 1 Watts & S. (Pa.) 356; Alter v. Berghaus, 8 Watts (Pa.) 77; Hoover v. Gehr, 62 Pa. St. 136; Foster v. Sinkler, 1 Bay (S. C.) 40; Hooper v. Taylor, 39 Me. 224; Marsh v. Case, 30 Wis. 531; Merrill v. Ithaca & O. Ry. Co., 16 Wend. 586; 30 Am. Dec. 130; McDonald v. Carnes, 90 Ala. 147; Ford v. Cunningham, 87 Cal. 209. It is not necessary to call other persons who have settled accounts by the books, Seventh Day Ass'n v. Fisher, 95 Mich. 274.

3, Sterrett v. Bull, 1 Binn. (Pa.) 234; Merrill v. Ithaca & O. Ry. Co., 16 Wend. 586; 30 Am. Dec. 130; Holland v. Commercial Bank, 22 Neb. 571; Cobb v. Wells, 124 N. Y. 77.

4, Volker v. First National Bank, 26 Neb. 602.

5, McLellan v. Crofton, 6 Me. 307; Prince v. Smith, 4 Mass. 455; Bentley v. Hollenbeck, Wright (Ohio) 168. See also, Dicken v. Winters, (Pa.) 32 At. Rep. 289.

6, Littlefield v. Rice, 10 Met. 287.

7, Horton v. Miller, 84 Ala. 537. But see, Webb v. Michener, 32 Minn. 48.

8, Kent v. Garvin, 1 Gray 148; Smith v. Sanford, 12 Pick. 139; 22 Am. Dec. 415; Barker v. Haskell, 9 Cush. 218; Harwood v. Mulry, 8 Gray 250; State v. Shinborn, 46 N. H. 497; 88 Am. Dec. 224.

9, Hart v. Kendall, 82 Ala. 144.

10, Kent v. Garvin, 1 Gray 148. See also, Price v. Earl of Torrington, Salk 285; 1 Smith L. C. 344 and extended note.

11, Briggs v. Rafferty, 14 Gray 525; Curran v. Witter, 68 Wis. 16; 60 Am. Rep. 827; Merrill v. Ithaca & O. Ry. Co., 16 Wend. 586; 30 Am. Dec. 130; State v. Shinborn, 46 N. H. 497; 88 Am. Dec. 224.

12, Iowa Code sec. 3658; Minn. Gen. Stat. 1878 ch. 73 sec. 78.

13, House v. Beak, 141 Ill. 290.

§ 589. Account books not evidence of collateral facts.— The proper use of book accounts is to show contemporaneous charges for goods or materials furnished or services rendered in a course of dealing between the parties, and also to serve as evidence of such facts, and of the promise implied by law to pay therefor. "If offered to prove any *collateral matter*, as that a third party assumes to pay; or that a certain person was a partner in a house charged, or to prove any

agency, and show that goods were delivered or received to sell on commission, or to prove a delivery of goods in performance of a special contract, for any such purpose, books are not a competent evidence."[1] Thus, the plaintiff's account book is not competent to prove a promise of payment by the defendant;[2] nor are such books admissible in actions between *strangers to the transaction*;[3] nor is the defendant's book of credits, containing a statement of the number of days the plaintiff worked for him, evidence that the plaintiff did not work for him certain days;[4] nor is a book evidence that the other party did not purchase goods, not credited;[5] nor that a sale was conditional;[6] nor that goods were left to be sold on commission;[7] nor that credit was given solely to a third person;[8] nor is a book evidence that there is an agreement to answer for the debt of another.[9] In an action for the price of goods sold, where the only issue was whether the delivery of the goods to a third person was on the credit of the defendant, it was held error for the judge to instruct the jury that the entry in the book might be regarded as a memorandum made at the time by the plaintiff, and, as such, entitled to some weight in confirmation of the recollection and evidence of the plaintiff.[10] The book to be admissible must be a *record of things actually done*, and not of orders, executory contracts and things to be done subsequently to the entry.[11]

1, 1 Smith L. C. (8th ed.) 595; Juniata Bank v. Brown, 5 Serg. & R. (Pa.) 226; Eshleman v. Hamish, 76 Pa. St. 97; Lyman v. Bechtel, 55 Iowa 437.

2, Somers v. Wright, 114 Mass. 171.

3, Minton v. Underwood Lumber Co., 79 Wis. 646; Martin Brown Co. v. Perrill, 77 Tex. 199.

4, Morse v. Potter, 4 Mass. 292.

5, Winner v. Bauman, 28 Wis. 563.

6, Rogers v. Severson, 2 Gill (Md.) 385.

7, Kerr v. Love, 1 Wash. C. C. 172; Brisch v. Hoff, 1 Yeates (Pa.) 198; Richards v. Burroughs, 62 Mich. 117.

8, Peck v. Kellar, 76 N. Y. 604; Field v. Thompson, 119 Mass. 151; Walker v. Richards, 41 N. H. 388; Kaiser v. Alexander, 144 Mass. 71. The entries of an attorney admitted to show for whom the service was rendered, Murphy v. Gates, 81 Wis. 370.

9, Tarrand v. Gage, 3 Vt. 326.

10, Field v. Thompson, 119 Mass. 151.

11, Hart v. Livingston, 29 Iowa 217; Whisler v. Drake, 35 Iowa 103.

§ 590. Degree of credit to be given to books of account.— The courts have frequently expressed the opinion that evidence of this character is quite unsatisfactory, and that it should be subjected to close *scrutiny*. It has been said that the practice of admitting such evidence had its origin in a kind of "moral necessity," and that "such is the general course of business that no proof could be furnished of the frequent small transactions between men without resorting to the entries which they themselves have made in this form of accounts."[1] It is doubtless in view

of considerations of this kind, as well as of the opportunity afforded to interested and unscrupulous parties to manufacture testimony in their own behalf, that the courts have sometimes refused to receive book entries in evidence, so long as more satisfactory evidence could be produced.[2] But it will be seen from the cases already cited that this evidence is generally treated as *original* and *not secondary evidence;* and when the statutory requirements as to verification are complied with, it is admissible. Although other evidence might be produced of a more convincing character, its *weight is for the jury.*[3] In New York and Michigan, where the use of account books as evidence was not the result of statutory regulations, but of usage sanctioned by the courts, the rule was declared that such evidence could not be received, unless the party had no clerk. This was on the theory that in such case only did it appear that there was no better evidence.[4] In these states it is also necessary to prove, before books of account are admissible, that some of the articles charged have been delivered, and that the books are the account books of the party. It should also be proved by those who have dealt with the party that he keeps fair and honest accounts.[5] In most states by force of statutes or decisions of the courts, books of account, when kept in compliance with the rules above given, and prop-

erly verified, are *prima facie evidence* of the facts therein stated.

1, Larue v. Rowland, 7 Barb. (N. Y.) 107; Mathes v. Robinson, 8 Met. 269; 41 Am. Dec. 505; Weamer v. Juart, 29 Pa. St. 257; 72 Am. Dec. 627; Pratt v. White, 132 Mass. 477.

2, Eastman v. Moulton, 3 N. H. 156; Thomas v. Dyott, 1 Nott. & McC. (S. C.) 186; Slade v. Nelson, 20 Ga. 365; Bracken v. Dillon, 64 Ga. 243; 37 Am. Rep. 70.

3, Lewis v. Meginniss, 30 Fla. 419. See also cases already cited.

4, Vosburgh v. Thayer, 12 Johns. 461; Sickles v. Mather, 20 Wend. 72; 32 Am. Dec. 521; McGoldrick v. Traphagen, 88 N. Y. 334; Jackson v. Evans, 8 Mich. 476.

5, Vosburgh v. Thayer, 12 Johns. 461; Jackson v. Evans, 8 Mich. 476.

§ 591. Defects in books as affecting admissibility.—The question of *admissibility* or competency is *for the determination of the court*, upon the preliminary proof required by the statute or other law of the forum, while the *degree of credit* to be given is *for the jury*.[1] If the book is not found to be a book of original entries, or if for other reasons it fails to conform to the rules regulating its admission, the court will reject the evidence as incompetent. But if this is left in doubt, the book may be submitted to the jury with the instruction that it should be disregarded, if they find against it.[2] Book entries are not necessarily excluded because there may be *alterations or erasures*[3] or *mistakes*, such as those in the name of the party.[4] These

are matters which may be explained to the satisfaction of the court. But if the entries show that they were all made at the same time, though relating to separate transactions,[5] or if by reason of alterations or erasures or other cause they have a suspicious and *fraudulent appearance*, and are not explained, they should be rejected,[6] although in some cases, it has been held that books of this character should be submitted to the jury under proper instructions.[7] The book may be admitted as to entries which are proved to be original, although other entries in the same book are not original,[8] unless the two classes of entries cannot be distinguished.[9]

1, Cogswell v. Dolliver, 2 Mass. 217; 3 Am. Dec. 45; Moody v. Roberts, 41 Miss. 74; Eyre v. Cook, 9 Iowa 185; Maverick v. Maury, 79 Tex. 435.

2, Curren v. Crawford, 4 Serg. & R. (Pa.) 5; Churchman v. Smith, 6 Whart. (Pa.) 146; 36 Am. Dec. 211.

3, Churchman v. Smith, 6 Whart. (Pa.) 146; 36 Am. Dec. 211; Kline v. Gundrum, 11 Pa. St. 249.

4, Schettler v. Jones, 20 Wis. 412.

5, Davis v. Sanford, 9 Allen 216.

6, Lovelock v. Gregg, 14 Col. 53; Churchman v. Smith, 6 Whart. (Pa.) 146; 36 Am. Dec. 211; Cogswell v. Dolliver, 2 Mass. 217; 3 Am. Dec. 45; Cole v. Anderson, 8 N. J. L. 68; Thomas v. Dyott, 1 Nott & McC. (S. C.) 186; Caldwell v. McDermit, 17 Cal. 464; Cheever v. Brown, 30 Ga. 904; Davis v. Sandford, 9 Allen 216.

7, Gossewitch v. Zibley, 5 Har. (Del.) 124; Sargeant v. Pettibone, 1 Aiken (Vt.) 355. While a fair book may

strongly corroborat the testimony of a party, an unfair one may discredit his testimony, Walron v. Evans, 1 Dak 11.

8, Ives v. Miles, 5 Watts (Pa.) 323; Wollenweber v. Ketterlinus, 17 Pa. St. 389.

9, Vance v. Feariss, 1 Yeates (Pa.) 321; Kessler v. McConachy, 1 Rawle (Pa.) 435; Venning v. Hacker, 2 Hill (S. C.) 584.

§ 592. Impeachment of books of account — They must be produced in court.—It has sometimes been held that, where the statute provides that account books, properly verified, are *prima facie* evidence of their contents, evidence cannot be received to impeach the general reputation of the party verifying them. This is on the theory that such testimony lessens the credibility which the statute gives to the books.[1] But in Pennsylvania, it has been held that such testimony is admissible; that evidence may be received to the effect that the books of the party are notoriously unworthy of confidence, and that for the purpose of showing this fact *particular acts of irregularity* in keeping them may be shown.[2] The books must be *produced in court*, ready for the inspection of the adverse party in open court, so that their credibility may be tested by their appearance or by the cross-examination of the party.[3] When the book of original entries contains marks showing that items have been transferred to the ledger, the *ledger* must be *produced*, so that the other party may have the

advantage of any items entered therein to his credit.[4] There is no necessity for the production of books of account, if the party can furnish *any other competent evidence*,[5] although under some circumstances the non-production of such evidence might lead to an unfavorable presumption.[6]

1, Winne v. Nickerson, 1 Wis. 1; Nickerson v. Morin, 3 Wis. 243.

2, Crouse v. Miller, 10 Serg. & R. (Pa.) 155; Barber v. Bull, 7 Watts & S. (Pa.) 391.

3, Furman v. Peay, 2 Bailey (S. C.) 394; Nicholson v. Withers, 2 McCord (S. C.) 428; 13 Am. Dec. 739.

4, Prince v. Swett, 2 Mass. 569; Rev. Stat. Wis., sec. 4188.

5, Cambioso v. Maffett, 2 Wash. C. C. 98; Nicholson v. Withers, 2 McCord. (S. C.) 428; 13 Am. Dec. 739; Levenworth v. Phelps, Kirby (Conn.) 71; Palmer v. Green, 6 Conn. 14; Whiting v. Corwin, 5 Vt. 451.

6, Palmer v. Green, 6 Conn. 14.

§ 593. Scientific books.—According to the clear weight of authority scientific books and treatises can not be received as evidence of the matters or opinions which they contain.[1] Among other objections which have led the courts to reject books of this character as evidence is the fact that opinions on many of the questions of philosophy and science are so constantly undergoing change that it would be impossible to know whether the author still entertains the same views. Another objection is that testimony of this character would be hearsay. Perhaps the

most serious objection is that such testimony would be without the sanction of an oath, and that the adverse party would thus be deprived of the right of cross-examining the author as to the ground of his opinion.[2]

1, R. v. Taylor, 13 Cox Cr. C. 77; Collier v. Simpson, 5 Car. & P. 73; Stilling v. Thorp, 54 Wis. 528; 41 Am. Rep. 60; State v. O'Brien, 7 R. I. 336; Bloomington v. Shrock, 110 Ill. 219; 51 Am. Rep. 679; Epps v. State, 102 Ind. 539; Ware v. Ware, 8 Me. 42; People v. Hall, 48 Mich. 482; 42 Am. Rep. 477; Tucker v. Donald, 60 Miss. 460; 45 Am. Rep. 416; Com. v. Brown, 121 Mass. 69; Ashworth v. Kittridge, 12 Cush. 193; 59 Am. Dec. 178; Kreuziger v. Chicago & N.-W. Ry. Co., 73 Wis. 158; Huffman v. Click, 77 N. C. 55; Gallagher v. Market St. Ry. Co., 67 Cal. 359; 56 Am. Rep. 713; Davis v. State, 38 Md. 15; People v. Goldenson, 76 Cal. 328. See note, 59 Am. Dec. 180–187; 38 Am. Rep. 578; 41 Am. Rep. 61; also article, 5 Cent. L. Jour. 439.

2, Ashworth v. Kittridge, 12 Cush. 193; 59 Am. Dec. 178 and note; Fowler v. Lewis, 25 Tex. 387; Mutual Ins. Co. v. Bratt, 55 Md. 200.

§ 594. Same — Illustrations of the rule. — As illustrations of the general rule, it has been held that medical works are not admissible as evidence on questions of insanity,[1] malpractice[2] or homicide,[3] or for the purpose of determining whether certain stains are blood stains,[4] or in relation to the diseases of horses.[5] On the same principle cyclopedias,[6] engravings in medical works,[7] books known as bank note detectors[8] and books on agriculture[9] have been held inadmissible. The reasons on which testimony of

this character is excluded have far less weight where the inquiry relates to the *exact sciences;* and in numerous instances the rule has been relaxed in such cases. To this class belong tables of logarithms, of weights and measures and of interest. The rule is the same as to annuity tables;[10] the Carlisle and Northampton tables, properly authenticated, are often received as evidence of the probable duration of human life.[11] But they are not necessarily binding upon the court, especially if their adoption would work manifest injustice;[12] and in an action for personal injury, where the person injured is living, they are not competent.[13] On the same principle almanacs have been admitted to prove at what hour the sun or moon rose at a given time.[14] Although, since this is a fact of which the court will take judicial notice, the evidence may be unnecessary,[15] or it may be deemed as used for the purpose of refreshing the memory of the court and jury.[16]

1, Com. v. Wilson, 1 Gray 338.

2, Collier v. Simpson, 5 Car. & P. 73.

3, Boyle v. State, 57 Wis. 472; 46 Am. Rep. 41.

4, Com. v. Sturtivant, 117 Mass. 130; 19 Am. Rep. 401.

5, Washburn v. Cuddily, 8 Gray 430; Fowler v. Lewis, 25 Tex. 387.

6, Whitton v. Albany Ins. Co., 109 Mass. 24.

7, Ordway v. Haynes, 50 N. H. 159.

8, Payson v. Everett, 12 Minn. 217.

9, Darby v. Ousely, 1 Hurl. & N. 12.

10, Vicksburg Ry. Co. v. Putnam, 118 U. S. 545; McKeigue v. Janesville, 68 Wis. 50.

11, Schell v. Plumb, 55 N. Y. 592; People v. Security Ins. Co., 78 N. Y. 114; 34 Am. Rep. 522; Central Ry. Co. v. Richards, 62 Ga. 306; Gorman v. Minneaopolis & St. L. Ry. Co., 78 Iowa 509; Worden v. Humeston & S. Ry. Co., 76 Iowa 310; City of Lincoln v. Smith, 28 Neb. 762.

12, Shippens Appeal, 2 Weekly N. Cas. Pa. 468.

13, Nelson v. Chicago, R. I. & P. Ry. Co., 38 Iowa 564; Chicago, B. & Q. Ry. Co. v. Johnson, 36 Ill. App. 564.

14, State v. Morris, 47 Conn. 179; Munshower v. State, 55 Md. 11; 39 Am. Rep. 414; Mobile Ry. Co. v. Ladd, 92 Ala. 287; Wilson v. Van Leer, 127 Pa. St. 371; 14 Am. St. Rep. 854.

15, De Armand v. Neasmith, 32 Mich. 231.

16, State v. Morris, 47 Conn. 179.

§ 595. Use of scientific books in the examination of experts.—It is generally conceded, however, that where experts are examined as to questions of science, they may give their opinions and the ground and reason therefor, although they state that such opinions are in some degree founded upon treatises on the subject.[1] But it has been held inadmissible for such a witness to read to the jury from books, although he concurs in the views expressed,[2] or even to state the contents of such books,[3] though he may refer to them to refresh his memory.[4] But when an expert has given an opinion and cited a treatise as his authority, the book cited may be offered in evidenee by the adverse party as

impeaching testimony.[5] But unless the book is referred to on cross-examination, it cannot be used for this purpose.[6] It would be a mere evasion of the general rule under discussion, if counsel were allowed on cross-examination to read to the witness portions of such works, and to ask if he concurred in or differed from the opinions there expressed, hence this is not allowed.[7] In a few states, statutes have been enacted extending the common law rule on this subject.[8] But in a California case where it was claimed that, under the statute making historical works and books of science and art *prima facie* evidence of facts of general notoriety and interest, a certain medical work should be received, the court held that the statutes did not apply to works of this character, but to those within the range of exact sciences.[9]

1, Collier v. Simpson, 5 Car. & P. 73; Carter v. State, 2 Ind. 617; State v. Baldwin, 36 Kan. 1; State v. Ward, 53 N. H. 484; Beck's Med. Jur. 918, 919. As to cross-examination of experts, see sec. 391 *supra*.

2, Com. v. Sturtivant, 117 Mass. 122; 19 Am. Rep. 401.

3, Boyle v. State, 57 Wis. 472; 46 Am. Rep. 41.

4, Sussex Peerage Case, 11 Clark & F. 114; People v. Wheeler, 60 Cal. 581; 44 Am. Rep. 790.

5, Pinney v. Cahill, 48 Mich. 584; Ripon v. Bittel, 30 Wis. 614; Connecticut Ins. Co. v. Ellis, 89 Ill. 516; People v. Goldenson, 76 Cal. 328; Hess v. Lowery, 122 Ind. 225. But see, Davis v. State, 38 Md. 15; State v. O'Brien, 7 R. I. 336.

6, Knoll v. State, 55 Wis. 249; 42 Am. Rep. 704.

7, Marshall v. Brown, 50 Mich. 148; People v. Millard, 53 Mich. 63; Bloomington v. Shrock, 110 Ill. 219; 51 Am. Rep. 678; State v. Winter, 72 Iowa 627.

8, Cal. Code sec. 1936; Iowa Code sec. 3653; Stoudenmeier v. Williamson, 29 Ala. 558; Bowman v. Woods, 1 G. Greene (Iowa) 441; Quackenbush v. Chicago Ry. Co., 73 Iowa 458.

9, Gallagher v. Market St. Ry. Co., 67 Cal. 13; 56 Am. Rep. 713.

§ 596. Reading from scientific books in argument to the jury.— Although it is the general rule that books of the character under discussion cannot be read in evidence, it is a practice in some states, and one sustained by very respectable authority, to allow attorneys during their argument to the jury to read from books which have been proved to be standard works upon the subject.[1] When books of science or general literature are thus used during the argument of counsel, they are merely adopted as the argument of counsel. They are used by way of illustration, and cannot be used for the purpose of proving facts.[2] It is a qualification of the rule in those jurisdictions where the practice is allowed, that the court may determine in its discretion whether the matter proposed to be read by way of argument is pertinent to the subject under discussion.[3] It is undoubtedly a very serious objection to this practice that, by it, the same result is accomplished indirectly as if the book were read to the jury as substantive evidence.[4]

On this ground the practice is not allowed in England,[5] nor in some of the states in this country. While it may be fairly claimed that it is doubtful on which side the weight of authority is to be found, the better reasoning condemns the practice. In his valuable work on expert testimony, Mr. Rogers argues that some of the cases usually cited in favor of the practice do not justify the claim made for them; and he well says: "The same objections which have been deemed sufficient to exclude scientific treatises as evidence would seem to be equally potent against the right of counsel to read extracts therefrom as a part of their argument to the jury. It is difficult to see how any just distinction can be made between the two cases, and how any such right can be recognized by any court which maintains the inadmissibility of the treatise in evidence."[6] In a few jurisdictions the rule prevailed that the opinions of standard writers, as stated in their printed works, may be read to the jury as evidence, when the opinions of expert witnesses on the subject would be competent. It was argued that, since expert witnesses may found their opinions upon works of this character, it is quite as safe a practice to admit the opinions at first hand. But this rule is now generally rejected.[7]

1, R. v. Courvosier, 9 Car. & P. 362; Cary v. Silcox, 6 Ind. 39; Harvey v. State, 40 Ind. 516; State v. Hoyt, 46

Conn. 330; Legg v. Drake, 1 Ohio St. 287; Union Central L. Ins. Co. v. Cheever, 36 Ohio St. 201; 38 Am. Rep. 573; Merkle v. State, 37 Ala. 139; Cavanah v. State, 56 Miss. 300. For numerous illustrations, see Lawson Ex. Ev. 179. See also articles, 24 Alb. L. Jour. 266, 284, 357.

2, Darby v. Ouseley, 1 Hurl. & N. 12; R. v. Courvosier, 9 Car. & P. 362; Cary v. Silcox, 6 Ind. 39; Union Central L. Ins. Co. v. Cheever, 36 Ohio St. 201; 38 Am. Rep. 573; Boyle v. State, 57 Wis. 472; 46 Am. Rep. 41; Wilson v. Van Leer, 127 Pa. St. 371; 14 Am. St. Rep. 854, almanac used.

3, Union Central L. Ins. Co. v. Cheever, 36 Ohio St. 201; 38 Am. Rep. 573; Legg v. Drake, 1 Ohio St. 287.

4, Boyle v. State, 57 Wis. 472; 46 Am. Rep. 41.

5, R. v. Crouch, 1 Cox Cr. C. 94.

6, Rogers Exp. Ev. sec. 179; R. v. Taylor, 13 Cox Cr. C. 77; People v. Wheeler, 60 Cal. 581; 44 Am. Rep. 70; Fraser v. Jemmison, 42 Mich. 206; Huffman v. Click, 77 N. C. 54; Boyle v. State, 57 Wis. 472; 46 Am. Rep. 41; Washburn v. Cuddihy, 8 Gray 430; Ashworth v. Kittridge, 12 Cush. 193; 59 Am. Dec. 178 and valuable note.

7, Crawford v. Williams, 48 Iowa 247; Stoudenmeier v. Williamson, 29 Ala. 558; State v. Winter, 72 Iowa 627; Merkle v. State, 63 Ala. 30; People v. Wheeler, 60 Cal. 581; 44 Am. Rep. 70, with an extended discussion of the cases relating to this subject.

§597. Admissibility of photographs.—It is a constant practice to receive as evidence pictures and drawings of objects which cannot be brought into court, after these have been proved to be accurate representations of the subject.[1] In like manner photographs are often admitted, when the proper preliminary proof as to their exactness and accuracy is offered.[2] Thus, for the same rea-

son that a portrait might be admitted, they have been admitted on the question of identity of persons,[3] and to show the appearance of an individual at different times,[4] or of a limb or other portion of the body.[5] Photographs are also admissible to show the appearance of a street in an action for damages in consequence of a change in the grade of the street,[6] as well as in other actions for damages against municipal corporations,[7] or railway companies.[8] But photographs of persons or places, taken so long after the time in question as to give opportunity for a change in the appearance of the person or place, will not be received in evidence.[9] It has been held that photographs may be introduced to show the appearance of any place which might be properly viewed by the jury, where such a view by the jury is impossible or impracticable.[10] Photographic copies have been received of the public documents on file at the governmental departments at Washington which public policy requires should not be removed.[11] On the same principle, the courts, both of this country and of England, have received photographic copies of instruments in the custody of other courts which could not be obtained for use at the trial.[12] As has already been stated, the authorities are in conflict on the question whether photographic copies may be used as a basis for the comparison of handwriting.[13] The cases al-

ready cited agree as to the rule that, where a photograph or other similar mode of representation is used as evidence, there should be *proof of its accuracy* given by the photographer or by some other person acquainted with the fact. This is *a preliminary question* to be determined by the court;[14] and the decision of the court is not subject to review by a higher tribunal.[15] Photographs of documents are obviously secondary evidence, and should not be admitted when the original can be produced.[16]

1, Marcy v. Barnes, 16 Gray 161; 77 Am. Dec. 405; Hollenbeck v. Rowley, 8 Allen 473; Ruloff v. People, 45 N. Y. 213; Udderzook v. Com., 76 Pa. St. 340; Church v. Milwaukee, 31 Wis. 512; Wood v. Willard, 36 Vt. 82; 84 Am. Dec. 659; Blair v. Pelham, 118 Mass. 420; Shook v. Pate, 50 Ala. 91; Ayers v. Harris, 77 Tex. 108. See note, 24 Am. St. Rep. 755.

2, Archer v. New York, N. H. & H. Ry. Co., 106 N. Y. 591; McLean v. Scripps, 52 Mich. 214; Albertie v. New York, L. E. & W. Ry. Co., 118 N. Y. 77; Blair v. Inhabitant of Pelham, 118 Mass. 420; Cooper v. St. Paul City Ry. Co., 54 Minn. 379. The cases cited below in this section sustain this proposition. On the general subject of photographs as evidence, see articles, "Photographs as Instruments of Evidence," 31 Cent. L. Jour. 414; "Photographs as Evidence," 2 Minn. L. Jour. 91; also an article on the same subject by George Lawler, 41 Cent. L. Jour. 92; also 20 Alb. L. Jour. 4. See also an interesting discussion of the subject by Irving Browne in 5 Green Bag 15, 60.

3, Ruloff v. People, 45 N. Y. 213; People v. Smith, 121 N. Y. 578; Beavers v. State, 58 Ind. 530; State v. Holden, 42 Minn. 350; Udderzook v. Com., 76 Pa. St. 340, photographs admitted to identify a mangled corpse. See also cases in next note.

4, Cowley v. People, 83 N. Y. 464; 38 Am. Rep. 464; Com. v. Morgan, 159 Mass. 375; State v. Elwood, 17 R. I. 763; Com. v. Conners, 156 Pa. St. 147. Photographs may be admitted to show the appearance of plaintiff after assault, Reddin v. Gates, 52 Iowa 210; Franklin v. State, 69 Ga. 42. They are also admissible to show the appearance of a deceased person in cases of homicide, Walsh v. People, 88 N. Y. 458; Udderzook v. Com., 76 Pa. St. 340; Luke v. Calhoun County, 52 Ala. 18. See also cases cited in last note.

5, Albertie v. New York, L. E. & W. Ry. Co., 118 N. Y. 77; Cooper v. St. Paul City Ry. Co, 54 Minn. 379.

6, Church v. Milwaukee, 31 Wis. 512.

7, Blair v. Pelham, 118 Mass. 421; German Theol. School v. Dubuque, 64 Iowa 736.

8, Dyson v. New York & N. E. Ry. Co., 57 Conn. 9; 14 Am. St. Rep. 82; Archer v. New York, N. H. & H. Ry. Co., 106 N. Y. 589; Missouri, K. & T. Ry. Co. v. Moore, (Tex. App.) 15 S. W. Rep. 714; Kansas City Ry. Co. v. Smith, 90 Ala. 25; Locke v. S. C. & P. Ry. Co., 46 Iowa 109; Cleveland Ry. Co. v. Monaghan, 140 Ill. 474; Turner v. Boston & M. Ry. Co., 158 Mass. 261.

9, Leidlein v. Meyer, 95 Mich. 586; Gilbert v. West End St. Ry. Co., 160 Mass. 403.

10, Omaha S. Ry. Co. v. Beeson, 36 Neb. 361. See also, People v. Buddensieck, 103 N. Y. 487.

11, Leathers v. Salvor Wrecking Co., 2 Wood (U. S.) 680. See also, Luco v. United States, 23 How. 541.

12, Daley v. McGuire, 6 Blatchf. (U. S.) 137; *In re* Stephens, L. R. 9 C. P. 187.

13, See secs. 568 *et seq. supra.* In Luco v. United States, 23 How. 541, photographic copies of signatures were used for comparison. The same rule has been sanctioned in Massachusetts, Marcy v. Barnes, 16 Gray 161. See also, Eborn v. Zimpelman, 47 Tex. 503; 26 Am. Rep. 315 and note discussing the subject.

14, Com. v. Coe, 115 Mass. 481; Walker v. Curtis, 116 Mass. 98; Blair v. Inhabitants of Pelham, 118 Mass. 420; Roosevelt v. New York El. Ry. Co., 21 N. Y. S. 205.

15, Blair v. Inhabitants of Pelham, 118 Mass. 420; Will of Foster, 34 Mich. 21; Com. v. Morgan, 159 Mass. 375.

16, Duffin v. People, 107 Ill. 115; Eborn v. Zimpelman, 47 Tex. 503; 26 Am. Rep. 315 and note; McLean v. Scripps, 52 Mich. 214.

§ 598. Newspapers — When admissible.—It is hardly necessary to cite authorities to the proposition that, as a general rule, newspapers are not admissible as evidence of the facts stated therein. But when proof is made that one has usually read a newspaper, and that it has probably been brought to his attention, it may be offered in evidence for the purpose of showing that such person had *notice* of its contents;[1] and when it is shown that a person is *the author* of, or otherwise responsible for statements or advertisements, they *may, of course, be used against him.*[2] Such advertisements have been received to establish the public character of a hotel at a given time,[3] the advertised time for the arrival of trains or coaches,[4] and the dissolution of a partnership.[5] The courts have in various cases received those *market reports* in newspapers on which the commercial world rely as evidence of the state of the market. In discussing this subject an eminent judge used the following language: "As a matter of fact, such reports, which are

based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or inquiries; and courts would justly be the subject of ridicule, if they should deliberately shut their eyes to the source of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character."[6] Witnesses have been allowed to testify to the market value at a particular date, even though their knowledge was chiefly derived from daily price current lists.[7] But in a New York case, such testimony was held incompetent without some evidence authenticating the report, or showing the mode in which the list was made up.[8] At common law *gazettes printed under the authority of government* are admissible as evidence of public royal proclamations, addresses and acts of state. But in such cases, they are evidence only of matters of public interest, and not of matters merely affecting private rights.[9] Of course, the newspaper itself is the best evidence of an article published in it.[10]

1, Com. v. Robinson, 1 Gray 555; Man v. Russell, 11 Ill. 586; Somerville v. Hunt, 3 Har. & McH. (Md.) 113. See also, Kellogg v. French, 15 Gray 354. See note, 90 Am. Dec. 258.

2, Sweet v. Avaunt, 2 Bay (S. C.) 492; Berry v. Mathewes, 7 Ga. 457; Dennis v. Van Voy, 28 N. J. L. 158; 31 N. J. L. 38.

3, Stringer v. Davis, 35 Cal. 25.

4, Com. v. Robinson, 1 Gray 555.

5, Roberts v. Spencer, 123 Mass. 397; Hart v. Alexander, 7 Car. & P. 746. See also, Pitcher v. Burrows, 17 Pick. 361; Vernon v. Manhatten Co., 22 Wend. 183.

6, Sisson v. Cleveland & T. Ry. Co., 14 Mich. 489; 90 Am. Dec. 253 and note; Cliquot's Champagne, 3 Wall. 114; Lush v. Druse, 4 Wend. 314; Peter v. Thickstun, 51 Mich. 589.

7, Whitney v. Thatcher, 117 Mass. 523; Cliquot's Champagne, 3 Wall. 114. See also, Chaffee v. United States, 18 Wall. 541.

8, Whelan v. Lynch, 60 N. Y. 474; 19 Am. Rep. 202.

9, Rex v. Holt, 5 T. R. 436; Attorney General v. Theakstone, 8 Price 89; Lurton v. Gilliam, 2 Ill. 577; 33 Am. Dec. 430; Brundred v. Del Hoyo, 20 N. J. L. 328.

10, Bond v. Central Bank of Georgia, 2 Ga. 92.

§ 599. Proof and effect of letters.— Before letters are received in evidence there must be, as in the case of other documents, some proof of their genuineness. This is not proved by the mere fact that the letter is received by mail, when the signature is not proved.[1] It is a familiar practice to receive letters in evidence as part of the *res gestae*, as in the case of a letter enclosing a note sent from one bank to another,[2] or to show for what purpose the note was sent,[3] even though the writer of the letter might be examined on oath.[4] When letters properly form a part of the *res gestae*, they are received although they contain declarations in the party's favor.[5] Obviously statements in the form of letters

are not more entitled to be received in evidence than mere verbal statements, and, unless they are competent as part of the *res gestae*, or as admissions, or under some other general rule of evidence, they should be rejected. Thus, a letter from the witness to a third party simply appended to a deposition in which there is no averment of the truth of its contents is inadmissible,[6] nor is a letter admissible for the party in whose favor it is sought to be introduced, except as a notice or demand, or as part of the *res gestae*.[7] Nor are the letters of an agent to his principal admissible against a third person.[8] In a celebrated trial, known as the "Anarchist Case," it was held that an unanswered letter found in the possession of a defendant may be received in evidence as in the nature of an admission, if from its terms it may be gathered that he invited it, or if evidence is adduced that he acted on it.[9] It is only the application of a familiar rule that proof of letters, when admissible, must be *by the best evidence*, that is, *the originals*, and that, before secondary evidence can be received, there must be proof of the loss of the original.[10] In order to present *secondary evidence* of the contents of a letter in the possession of the other party, notice to produce must have been given.[11] *Letter-press copies* are not originals, and cannot be admitted without the preliminary proof.[12] But after such proof of the loss of

the original, a sworn copy of a letter-press copy has been held competent secondary evidence without producing the letter-press copy.[13]

1, Sweeney v. Ten Mile Oil Co., 130 Pa. St. 193. As to presumption where a letter is received as an answer, see secs. 46, 560 *supra*.

2, Bank of Munroe v. Culver, 2 Hill 531.

3, Breese v. Hurley, 1 Stark. 23.

4, Roach v. Learned, 37 Me. 110.

5, Beaver v. Taylor, 1 Wall. 637.

6, Dwyer v. Dunbar, 5 Wall. 318. See also, Winslow v. Newlan, 45 Ill. 145.

7, Richards v. Frankum, 9 Car. & P. 221. As to admission of decoy letters, see McCarney v. People, 83 N. Y. 408.

8, United States v. Barker, 4 Wash. C. C. 464.

9, Spies v. People, 122 Ill. 1.

10, Watson v. Roode, 30 Neb. 264; Huff v. Hall, 56 Mich. 456; Stevens v. Miles, 142 Mass. 571. As to presumption of receipt of letters, see sec. 200 *supra*.

11, Chicago v. Greer, 9 Wall. 726. See secs. 218, *et seq. supra*.

12, Foot v. Bentley, 44 N. Y. 166; Marsh v. Hand, 35 Md. 123; Delaney v. Errickson, 10 Neb. 492; Sturge v. Buchanan, 10 Adol. & Ell. 598.

13, Goodrich v. Weston, 102 Mass. 362; 3 Am. Rep. 469. As to degrees of secondary evidence, see sec. 229 *supra*.

§ 600. Admissibility of facts in histories. — Historical facts of general and public notoriety may, indeed, be proved by reputation; and that reputation may be established by historical works of known

character and accuracy. But evidence of this sort is confined in a great measure to ancient facts which do not presuppose better evidence in existence; and where, from the nature of the transactions, or the remoteness of the period, or the public or general reception of the facts, a just foundation is laid for general confidence.[1] Such testimony is competent only when the facts necessary to be established are properly matters of history. In such cases, it is competent because of the difficulty or impossibility of establishing the facts by other testimony. Hence, *facts* which have *recently transpired* and are within the knowledge of persons living cannot be proved in this way;[2] and the work of a living author who is within the reach of the process of the court would not be admissible. In the latter case, the witness may be called and examined as to the sources of his information.[3] According to this view, statements in histories as to *mere private rights* are not admissible. The facts should be of a general and public nature;[4] nor are *mere local histories* admissible, for example, histories of counties.[5] On the same principle, college catalogues, court guides, directories and other non-official publications of a similar nature have been held inadmissible;[6] and the same is true of army registers[7] and the gazetteer of the United States,[8] when not authenticated by the proper officials. Although matters of general history

may be received without that *full proof* which is necessary for the establishment of a private fact,[9] yet a jury should not be left to their own knowledge or information upon such subjects. Some proof should be furnished.[10]

1, Morris v. Harmer, 7 Peters 555; McKinnon v. Bliss, 21 N. Y. 206; State v. Wagner, 61 Me. 178.

2, Morris v. Edwards, 1 Ohio 209.

3, Morris v. Harmer, 7 Peters 555.

4, Neale v. Fry, 1 Salk. 281; Steph. Ev. art. 35.

5, McKinnon v. Bliss, 21 N. Y. 206; Evans v. Getting, 6 Car. & P. 586; Roe v. Strong, 107 N. Y. 350.

6, State v. Daniells, 44 N. H. 383; Tayl. Ev. sec. 1785.

7, Wetmore v. United States, 10 Peters 647.

8, Spalding v. Hedges, 2 Pa. St. 240.

9, Mima Queen v. Hepburn, 7 Cranch 290.

10, Gregory v. Baugh, 4 Rand. (Va.) 611.

§ 601. Effect of judgments — General rule. — It is clearly beyond the scope of this work to enter into an elaborate discussion as to the admissibility or binding effect of judgments, when offered in evidence. The most that can be attempted is to state the general rules governing the subject with their limitations. The rule is one generally recognized among civilized nations that, when a matter has been adjudicated and finally determined by a competent tribunal, *the determination is conclusive* as between the parties and their privies. *Interest reipublicæ ut sit finis litium.*[1] This rule holds even though the amount of

the judgment was so small as to prevent a review,[2] or although it was rendered on evidence improperly introduced,[3] or although it was rendered after the defendant's death,[4] or was palpably erroneous.[5] The same is true where the bill in the former suit was defective,[6] or where damages, not allowed by law, were recovered in the former action.[7] If the court has jurisdiction of the subject matter and the parties, its decision stands as a finality between them and their privies, until set aside by a rehearing on appeal or in some other mode recognized by the law.[8] Whether the judgment is in fact right or erroneous, just or unjust, it *cannot be collaterally attacked.*[9] The rule is by no means limited to courts of record or those of general jurisdiction. The same principle obtains whether the judgment is that of a justice of the peace, acting within his jurisdiction, or that of a court of general jurisdiction.[10] It is not necessary to cite the numberless cases which support the rule that judgments are evidence between parties and privies in subsequent actions. The principle is tacitly recognized in most of the cases which will be referred to while discussing the limitations of the rule.

1, Locke v. Norborne, 3 Mod. 141; Outram v. Morewood, 3 East 353; Rex v. Mayor of York, 5 T. R. 66; Croudson v. Leonard, 4 Cranch 436; North-Western Bank v. Hays, 37 W. Va. 475; Archbishop v. Shipman, 69 Cal. 586; Strayer v. Johnson, 110 Pa. St. 21; Woods v. Montevallo Co., 84 Ala. 560; 5 Am. St. Rep. 393; Maloney v.

Dewey, 127 Ill. 395; 11 Am. St. Rep. 131, Gardner v. Buckbee, 3 Cow. 120; 15 Am. Dec. 256; Peay v. Duncan, 20 Ark. 85; Lore v. Truman, 10 Ohio St. 45; Wales v. Lyon, 2 Mich. 276; Newton v. Marshall, 62 Wis. 8; Castle v. Noyes, 14 N. Y; 329; Finney v. Boyd, 26 Wis. 366; Sanford v. Oberlin College, 50 Kan. 342; Lazarus v. Phelps, 156 U. S. 202. For a general discussion of the effect of judgments as evidence, see notes, 23 Am. St. Rep. 103; 82 Am. Dec. 411; 96 Am. Dec. 775-788; 14 Am. St. Rep. 250; 15 Am. St. Rep. 142; 41 Am. Dec. 681; 7 L. R. A. 577-582.

2, Johnson Co. v. Wharton, 152 U. S. 252.

3, Parker v. Albee, 86 Iowa 46.

4, New Orleans v. Gaines' Adm., 138 U. S. 595.

5, Wolverton v. Baker, 86 Cal. 591.

6, Griswold v. Hazard, 141 U. S. 260.

7, Baker v. Flint & P. M. Ry. Co., 91 Mich. 298.

8, Wall v. Wall, 28 Miss. 409; Parrish v. Ferris, 2 Black 606; Foster v. Wells, 4 Tex. 101; Swiggart v. Harber, 5 Ill. 364; 39 Am. Dec. 418; La Grange v. Ward, 11 Ohio 257; Peay v. Duncan, 20 Ark. 85; Housemire v. Moulton, 15 Ind. 367; Hart v. Jewett, 11 Iowa 276; Wallace v. Usher, 4 Bibb (Ky.) 508; Lefebore v. DeMontilly, 1 La. An 42; Vandyke v. Bastedo, 15 N. J. L. 224; Page v. Esty, 54 Me. 319; Wingate v. Haywood, 40 N. H. 437; Hibshman v. Dulleban, 4 Watts (Pa.) 183; Kelley v. Nize, 3 Sneed (Tenn.) 59; Dick v. Webster, 6 Wis. 481.

9, Elliott v. Piersol, 1 Peters 340; Mills v. Duryee, 7 Cranch 484; Holmes v. Remson, 20 Johns. 268; 11 Am. Dec. 269; Latham v. Edgerton, 9 Cow. 227; Loring v. Mansfield, 17 Mass. 394; Hollister v. Abbott, 31 N. H. 442; 64 Am. Dec. 342; Homer v. Fish, 1 Pick. 439; 11 Am. Dec. 218; Baker v. Flint & P. M. Ry. Co., 91 Mich. 298.

10, Sheets v. Hawk, 14 Serg. & R. (Pa.) 173; 16 Am. Dec. 486; Adams v. Pearson, 7 Pick. 341; 19 Am. Dec. 290; Hopkins v. Lee, 6 Wheat. 109, 114.

§ 602. As to what persons judgments are conclusive. — In discussing the conclu-

siveness of judgments upon parties and privies, Mr. Greenleaf lays down the rule that "parties, in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses and to appeal from the decision."[1] Hence a judgment may be evidence against and conclusive upon the rights of one who was not a nominal party in the former proceeding, if he is the person who controlled and directed the action,[2] but the mere fact that one has contributed to a defense does not make the judgment conclusive upon him.[3] But generally one who defends or prosecutes by employing counsel, paying costs and doing those things that are generally done by a party will be bound by the judgment, though not a party.[4] Nor is it necessary that there be absolute *identity as to the parties* in the two actions, for although there were different parties in the two suits, this has frequently been held immaterial as between those who were parties to both suits.[5] In order that the judgment should be a bar on the ground that the parties are the same, it is necessary that the persons should sue or be sued in the *same capacity*, for example, if the same person sue in his own right and afterwards as administrator, the former judgment is not a bar.[6]

1, 1 Greenl. Ev. sec. 535. See note, 2 Am. St. Rep. 877.

2, Aslin v. Parkin, 2 Burr. 668; Hitchin v. Campbell, 2 W. Black. 827; Outram v. Morewood, 3 East 346; Castle v. Noyes, 14 N. Y. 329; Cecil v. Cecil, 19 Md. 72; 81 Am. Dec. 626; Peterson v. Lothrop, 34 Pa. St. 223; French v. Neal, 24 Pick. 61; Adams v. Barnes, 17 Mass. 365; Case v. Reeve, 14 Johns. 82; Calhoun's Lessee v. Dunning, 4 Dall. (Pa.) 120; Wood v. Ensel, 63 Mo. 193; Stokes v. Morrow, 54 Ga. 597.

3, Goodnow v. Litchfield, 63 Iowa 275; Schroeder v. Lahrman, 26 Minn. 87.

4, McNamee v. Moreland, 26 Iowa 96; Stoddard v. Thompson, 31 Iowa 80; Wood v. Ensel, 63 Mo. 193.

5, Davenport v. Burnett, 51 Ind. 329; Larum v. Wilmer, 35 Iowa 244; Tauziede v. Jumel, 133 N. Y. 614; State v. Krug, 94 Ind. 366; French v. Neal, 24 Pick. 55; Lawrence v. Hunt, 10 Wend. 80; 25 Am. Dec. 539; Dows v. McMichael, 6 Paige (N. Y.) 139; Thompson v. Roberts, 24 How. 233; Girardin v. Dean, 49 Tex. 243. Contra, Davis v. Hunt, 2 Bailey (S. C.) 412; Nave v. Adams, 107 Mo. 414.

6, Leggott v. Great Northern Ry. Co., 1 Q. B. Div. 599; Karr v. Parks, 44 Cal. 46; Collins v. Hydron, 135 N. Y. 320; Brooking v. Dearmond, 27 Ga. 58; Lander v. Arno, 65 Me. 26; Downing v. Diaz, 80 Tex. 436; Landon v. Townshend, 129 N. Y. 166, a foreclosure against a person as assignee in bankruptcy does not bar his individual right.

§ 603. Effect of judgments on persons in privity with each other.— The term privity denotes mutual or successive relationship to the same rights of property.[1] Privies are generally classified as *privies in law*, such as tenant by curtesy, tenant in dower, executor or administrator; *privies in blood* such as heirs and co-parceners; *privies in estate*, such as those where there is a mutual or successive relationship to rights of property, not occasioned by descent nor by act

of law.[2] Common illustrations of the binding effect of judgments by reason of the privity of the parties are: That a judgment, binding upon the testator or intestate in his life, is also binding on his executor or administrator,[3] or upon his heirs at law,[4] his legatee, devisee, tenant in dower or by curtesy.[5] Purchasers of property concerning which litigation is pending are privies and are bound by the result, although not made parties.[6] The same principle applies, of course, to subsequent incumbrancers, lessees,[7] assignees[8] and grantees,[9] provided their succession to the rights of the property affected occurred previously to the institution of the suit.[10]

1, Greenl. Ev. sec. 189.

2, 2 Coke Litt. 352 b; Freem. Judg. sec. 162.

3, Torrey v. Pond, 102 Mass. 355.

4, Locke v. Norborne, 3 Mod. 141; Ross v. Banta, (Ind.) 34 N. E. Rep. 865.

5, Locke v. Norborne, 3 Mod. 141; Outram v. Morewood, 3 East 353.

6, Inloe v. Harvey, 11 Md. 519; Shotwell v. Lawson, 30 Miss. 27; 64 Am. Dec. 145; Haynes v. Calderwood, 23 Cal. 409; Loomis v. Riley, 24 Ill. 307; Green v. White, 7 Blackf. (Ind.) 242; McGregor v. McGregor, 21 Iowa 441; Wickliffe, v. Bascom, 7 B. Mon. (Ky.) 681; Thurston v. Spratt, 52 Me. 202; Steele v. Taylor, 1 Minn. 274; Com. v. Dieffenbach, 3 Grant (Pa.) 368; Thompson v. McCormick, 136 Ill. 135.

7, Com. v. Dieffenbach, 3 Grant (Pa.) 368; National Bank v. Sprague, 21 N. J. Eq. 530; Miller v. White, 80 Ill. 580.

8, Smith v. Kernochen, 7 How. 198.

9, Foster v. Earl of Derby, 1 Adol. & Ell. 787.

10, Samson v. Ohleyer, 22 Cal. 200; *Ex parte* Reynolds, 1 Caines (N. Y.) 500; Georges v. Hufschmidt, 44 Mo. 179; Garrison v. Savignac, 25 Mo. 47; 69 Am. Dec. 448.

§ 604. Same, continued.—There is no such privity of estate between the real and personal representatives of a deceased person, hence judgments against *administrators or executors* are not conclusive against *heirs or devisees.*[1] Although in jurisdictions where the administrator or executor fully represents the heirs, as well as the creditors and next of kin, a different rule would prevail.[2] The executor or administrator is not concluded by a judgment against the heirs in an action which has been brought by such heirs in disregard of the rights of the creditors;[3] nor is the executor or administrator bound by proceedings against a distributee.[4] There is no such relation between a *corporation* and its *stockholders* that the latter can bind the corporation by an action brought in their own names;[5] but, if an action is brought by a next friend in behalf of an infant, the judgment may be proved as a bar to any future action by the infant on the same cause.[6] As a rule *agents* and *principals* have no mutual or successive relationship to rights of property, and are not in privity with each other.[7] But if the principal knows of a pending suit in which his agent is a party, in respect to property in his hands as such agent, and if he

controls the litigation, he will be bound by the judgment.[8] So in trespass against the principal, the latter may give, as evidence in his favor, a former judgment rendered on the merits of the case in favor of his servant, where in both cases the same facts are relied on as constituting the trespass which was alleged to have been by the command of the principal.[9] Although the *tenant* is in privity with the *landlord*, and is bound by a recovery against him, the landlord is not affected by the proceedings against the tenant,[10] unless he assumes control of the prosecution or defense, in which case he is bound.[11]

1, McCoy v. Nichols, 5 Miss. 31; Vernon v. Valk, 2 Hill Ch. (S. C.) 257; Collinson v. Owens, 6 Gill & J. (Md.) 4; Robertson v. Wright, 17 Gratt. (Va.) 534; Early v. Garland, 13 Gratt. (Va.) 1; Dorr v. Stockdale, 19 Iowa 269.

2, Shannon v. Taylor, 16 Tex. 413; Castellow v. Guilmartin, 54 Ga. 299.

3, Dorr v. Stockdale, 19 Iowa 269.

4, Johnson v. Longmore, 39 Ala. 143.

5, Trustees v. Meetze, 4 Rich. L. (S. C.) 50.

6, Morgan v. Thorne, 7 M. & W. 400.

7, Pico v. Webster, 12 Cal. 140; Lawrence v. Ware, 37 Ala. 553; Freem. Judg. sec. 164.

8, Warfield v. Davis, 14 B. Mon. (Ky.) 41.

9, Emery v. Fowler, 39 Me. 331; 63 Am. Dec. 627.

10, Wenman v. MacKenzie, 5 El. & B. 447; Chant v. Reynolds, 49 Cal. 213; Bartlett v. Boston Gas Co., 122 Mass. 209.

11, Valentine v. Mahoney, 37 Cal. 389; Chirac v. Rei-

necker, 2 Peters 617. But see, Samuel v. Dinkins, 12 Rich. L. (S. C.) 172.

§ 605. Admissibility of judgments as against strangers.— In a celebrated case it was declared to be the generally accepted rule that "a transaction between two parties in judicial proceedings ought not to be binding upon a third. For it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment, he might think erroneous; and, therefore, the depositions of witnesses in another cause in proof of a fact, the verdict of the jury finding the fact and the judgment of the courts upon facts found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers."[1] But it is an exception, generally recognized, that verdicts and judgments on questions of a *public nature*, where evidence of a *general reputation* would be received, may be admitted as evidence, although the parties are not the same or in privity with each other. But in such cases the judgment is not conclusive against strangers to the record, although admissible.[2] Thus, such judgments have been received in a second action, although the parties were different, in cases affecting customs,[3] boundaries between parishes and counties,[4] liabilities to repair roads,[5] to prove the existence of a highway where the party claims by pre-

scription,[6] to show the dedication of a public square or park,[7] to determine questions relating to tolls,[8] pedigrees,[9] and other questions of public and general interest.[10] Another exception to the rule that statements in judgments are not relevant, except between parties and privies, has been recognized in *actions in rem.* This is illustrated in actions for the condemnation of ships as prizes;[11] and in other actions where a judgment is rendered as to the *status* of some particular subject matter by a tribunal of competent jurisdiction, as in attachment proceedings against a non-resident,[12] or where the issue relates to such questions as marriage and divorce,[13] settlements of paupers,[14] grants of probate[15] and administration.[16] As illustrations of the general rule that judgments are not admissible except between parties or privies to the action, it has been held that, in an action for slander against a husband, a judgment in a former action between the plaintiff and the *husband and wife* for the same slanderous words could not be received.[17] So in an action by a town against a husband for support furnished the wife, a judgment in divorce is not admissible on the issue whether she was justified in leaving him.[18]

1, Duchess of Kingston's Case, 20 How. St. Tr. 538; 2 Phill. Ev. 4.

2, Reed v. Jackson, 1 East 357; Pile v. McBratney, 15 Ill. 314; Patterson v. Gaines, 6 How. 599; 2 Tayl. Ev. sec. 1683.

3, Reed v. Jackson, 1 East 357; Berry v. Banner, Peake 156.

4, Brisco v. Lomax, 8 Adlo. & Ell. 198; Evans v. Rees, 10 Adol. & Ell. 151.

5, R. v. St. Pancras, Peake 220; R. v. Haughton, 1 El. & B. 501.

6, Fowler v. Savage, 3 Conn. 90.

7, Elson v. Comstock, 150 Ill. 303; People v. Halladay, 102 Cal. 661.

8, City of London v. Clerke, Carth. 181.

9, Vaughan v. Phebe, 1 Mart. & Y. (Tenn.) 1; 17 Am. Dec. 770.

10, Mulholland v. Killen, I. R. 9 Eq. 471.

11, Gelston v. Hoyt, 13 Johns. 561; 3 Wheat. 246; Risley v. Phœnix Bank, 83 N. Y. 318, 332; 38 Am. Rep. 421; Steph. Ev. art. 42.

12, Pennoyer v. Neff, 95 U. S. 714; McKinney v. Collins, 88 N. Y. 216.

13, People v. Baker, 76 N. Y. 78; 32 Am. Rep. 274.

14, Dorset v. Manchester, 3 Vt. 370; Gibson v. Nicholson, 2 Serg. & R. (Pa.) 422.

15, Noel v. Wells, 1 Lev. 235; Allen v. Dundas, 3 T. R. 125.

16, Bouchier v. Taylor, 4 Brown P. C. 708; Prosser v. Wagner, 1 C. B. N. S. 289.

17, Magauran v. Patterson, 6 Serg. & R. (Pa.) 278; Killingsworth v. Bradford, 2 Overt. (Tenn.) 204; Chapman v. Chapman, 1 Munf. (Va.) 398.

18, Inhabitants of Sturbridge v. Franklin, 160 Mass. 149.

§ 606. Judgments in civil cases no bar in criminal cases. — Although the same fact may be involved in two cases, one

civil and the other criminal, the *parties are necessarily different*, for one action is prosecuted by an individual, the other by the state; and the judgment in one case is not generally admissible in the other to establish the facts on which it was rendered.[1] Thus, in an action to recover a reward for the detection and conviction of an offender, the record of his conviction, though admissible to show that fact, does not determine conclusively the question of his guilt.[2] An action for trover for stolen money is not defeated by the fact that the defendant has been acquitted of the theft in a criminal action;[3] and a conviction for forging a bill of exchange is not admissible to prove forgery in an action on the bill.[4] So in a civil action for the killing of a person, the record of the defendant's acquittal is not admissible.[5] Although the clear weight of authority supports the proposition illustrated by the foregoing cases, there are instances in which a different rule has been held.[6] But if a defendant has pleaded guilty in a criminal case, the judgment entered upon such plea may be received as an admission, although it is not conclusive.

1, Smith v. Rummens, 1 Camp. 9; Hathaway v. Barrow, 1 Camp. 151; Jones v. White, 1 Str. 68; Hillyard v. Grantham, cited by Ld. Hardwicke in Brownsword v. Edwards, 2 Ves. Sr. 246; Morch v. Raubitschek, 159 Pa. St. 559; Marceau v. Travelers Ins. Co., 101 Cal. 338; Mead v. Boston, 3 Cush. 404; Betts v. New Hartford, 25 Conn. 180;

Corbley v. Wilson, 71 Ill. 209; 22 Am. Rep. 98; Steel v. Cazeaux, 8 Mart. (La.) 318; 13 Am. Dec. 288; Cluff v. Mutual B. L. Ins. Co., 99 Mass. 317; Cottingham v. Weeks, 54 Ga. 275.

2, Mead v. Boston, 3 Cush. 404.

3, Hutchinson v. Bank of Wheeling, 41 Pa. St. 42; 80 Am. Dec. 596; Beausoliel v. Brown, 15 La. An. 543.

4, Castrique v. Imrie, L. R. 4 H. L. 414.

5, Cottingham v. Weeks, 54 Ga. 275.

6, Moses v. Bradley, 3 Whart. (Pa.) 272; Maybee v. Avery, 18 Johns. 352; Anderson v. Anderson, 4 Me. 100; 16 Am. Dec. 237; Randall v. Randall, 4 Me. 326; R. v. Fontaine Moreau, 11 Q. B. 1033; Bradlev v. Bradley, 11 Me. 367; Green v. Bedell, 48 N. H. 546; Clark v. Irvin, 9 Ohio 131.

§ 607. Judgments admissible against third persons for incidental purposes. Although, where the parties to the suit are not the same or in privity, the record of the former suit cannot be introduced to establish the facts on which it was rendered, yet there are certain incidental purposes for which such records may be introduced.[1] For example, if it becomes material to show that a *judgment has been rendered*, although against one who is a stranger to the pending suit, the record may be offered for that purpose;[2] and it becomes evidence, not only of the rendition of the judgment, but of its *legal effect*.[3] This rule is thus stated by Mr. Stephen: "All judgments, whatever, are conclusive proof, as against all persons, of the existence of that state of things which they actually

effect, when the existence of the state of things so effected is a fact in issue, or is, or is deemed to be relevant to the issue."[4] For such purposes, judgments have been received to show that one person was a *creditor* of another at a given time, though he was a stranger to the suit,[5] or to show the former acquital of the plaintiff in an action for malicious prosecution.[6] The records are admissible to identify a case, if this become material,[7] or if they constitute a part of the *res gestae* out of which the present action has grown.[8] On the same principle, where the plaintiff, but not the defendant, was a party in the former action, the record in the former case was admitted to rebut the presumption that the claim was stale as well as for the purpose of showing the filing of a *lis pendens* in relation to the property in controversy.[9] In *actions by sureties* or guarantors, judgments rendered against them in former actions may be admitted to show their rendition as well as the consequence of the default of the principal and amount of damages, although this is not necessarily conclusive as to the debt or misconduct of the principal.[10] The same rule applies where a judgment has been rendered against a *master* for the negligence of his *servant*, and the master sues the servant for indemnity,[11] as well as where the judgment forms a link in the chain of title, or where the existence or validity of collat-

eral proceedings is in issue.[12] In an action against an *indorser*, a judgment against the maker may be introduced for the purpose of showing diligence.[13] So the record may be introduced where it is a *matter of inducement* or necessarily introductory to other evidence.[14]

1, Freem. Judg. sec. 154; Black Judg. secs. 534, 600.

2, Vogt v. Ticknor, 48 N. H. 242; Spencer v. Dearth, 43 Vt. 98; Goodnow v. Smith, 97 Mass. 69; Kip v. Brigham, 7 Johns. 168; Key v. Dent, 14 Md. 86; Ray v. Clemens, 6 Leigh (Va.) 600; State v. Foster, 3 McCord (S. C.) 442; Fox v. Fox, 4 La. An. 135; Lee v. Lee, 21 Mo. 531; Smith v. Chapin, 31 Conn. 530; Taylor v. Means, 73 Ala. 468; McCamant v. Robbins, 66 Tex. 260; Maple v. Beach, 43 Ind. 51.

3, Stark. Ev. 287. See also cases cited in the last note.

4, Steph. Ev. art. 40; Dorrell v. State, 83 Ind. 357; Chamberlain v. Carlisle, 26 N. H. 540; Wadsworth v. Sharpsteen, 8 N. Y. 388; 59 Am. Dec. 499.

5, Vogt v. Ticknor, 48 N. H. 242; Goodnow v. Smith, 97 Mass. 69; Church v. Chapin, 35 Vt. 223; Inman v. Mead, 97 Mass. 310; Candee v. Lord, 2 N. Y. 269; 51 Am. Dec. 294.

6, Sayles v. Briggs, 4 Met. 421; Burt v. Place, 4 Wend 591.

7, Harris v. Miner, 28 Ill. 135.

8, Wells v. Shipp, 1 Miss. 353.

9, Sowden v. Craig, 26 Iowa 156; 96 Am. Dec. 125.

10, Lewis v. Knox, 2 Bibb (Ky.) 453; Cox v. Thomas, 9 Gratt. (Va.) 323; Copp v. M'Dugall, 9 Mass. 1; Lee v. Clarke, 1 Hill 56; Tyler v. Ulmer, 12 Mass. 163.

11, Green v. New River, 4 T. R. 590.

12, Barr v. Gratz, 4 Wheat. 220; Key v. Dent, 14 Md. 86; King v. Chase, 15 N. H. 9; 41 Am. Dec. 675.

13, Lane v. Clark, 1 Mo. 657.

14, Kip v. Brigham, 6 Johns. 158; 7 Johns. 168; Weld v. Nichols, 17 Pick. 538; Head v. McDonald, 7 T. B. Mon. (Ky.) 203; Foster v. Shaw, 7 Serg. & R. (Pa.) 156; Barr v. Gratz, 4 Wheat. 213; Jackson v. Wood, 3 Wend. 27; Fowler v. Savage, 3 Conn. 90; Farwell v. Hilliard, 3 N. H. 318; Davis v. Loundes, 1 Bing. N. C. 607; Greenl. Ev. sec. 539, and cases there cited.

§ 608. Judgments against principals in actions against their sureties. — There is an irreconcilable conflict in the decisions as to the admissibility and effect of judgments against principals, when offered in actions against their sureties. This conflict is due in part to dissimilarity of statutes affecting the subject in the several states, and in part to the differences in the conditions of the bonds or other obligations which have been the subject of litigation. There are many cases which, although they recognize the general rule that judgments conclude only parties and privies, have held former judgments against a surety admissible in his behalf against the principal on the ground that the language of the contract has been such that the surety has made himself liable for the conduct of his principal and for the results or consequences of a suit between other parties.[1] The strictness of the common law rule on this subject has undoubtedly been much relaxed in holding judgments against the principal *prima facie* evidence against the surety, in the absence of fraud or collusion;[2]

and in some jurisdictions such judgments are held *conclusive.*[3] Where judgment has been recovered against one who, by reason of the facts found in such action, has the right to recover damages against another bound to indemnify him, and who had due and timely notice to appear and defend such action, the judgment may be evidence in an action for such indemnity, although the parties are different.[4] In actions against *sureties on the bonds of executors and administrators*, it is generally conceded that the judgment against the principal is admissible for some purposes.[5] In such cases, the contention is over the question whether the judgment should be *conclusive or only prima facie* evidence. The bonds of executors and administrators generally contain some condition, the legal effect of which is that the principals shall be bound by the orders or decrees of the court, and hence the sureties may be regarded as having contracted to abide the judgment of the court. In such cases, there is general uniformity in the view that the judgment against the principal is not *res inter alios acta*, but is competent evidence against the surety.[6] In the opinion of the author, the weight of authority sustains the view that in such cases the judgment is conclusive against the surety on the principle that he has in effect contracted to be bound thereby.[7] But it must be conceded that in a large number of cases the judgment

has been held to be only *prima facie* evidence against the principal.[8] The same general principles apply when judgments are offered in evidence against sureties of *guardians*, as in the case of executors and administrators.[9] It need hardly be stated that the judgment may be attacked on the ground of *want of jurisdiction;*[10] and it is always competent for the surety to prove that the judgment against the principal was obtained by *fraud or collusion.*[11]

1, Thomas v. Hubbell, 15 N. Y. 405; 69 Am. Dec. 619; Douglass v. Howland, 24 Wend. 35; Lee v. Clark, 1 Hill 56; Duffield v. Scott, 3 T. R. 374; Rapelye v. Prince, 4 Hill 119; 40 Am. Dec. 267; Lartigue v. Baldwin, 5 Mart. O. S. (La.) 193; Firemen's Ins. Co. v. McMillan, 29 Ala. 147; Arrington v. Porter, 47 Ala. 714. See notes, 33 Am. Rep. 802; 83 Am. Dec. 380–390, as to the general subject of this section.

2, Haddock v. Perham, 70 Ga. 572; Curry v. Mack, 90 Ill. 606; Spencer v. Dearth, 43 Vt. 98; City of Lowell v. Parker, 10 Met. 309; McLaughlin v. Bank of the Patomac, 7 How. 220; Drummond v. Prestman, 12 Wheat. 515; Berger v. Williams, 4 McLean (U. S.) 577; Jacobs v. Hill, 2 Leigh (Va.) 393; Jaynes v. Platt, 47 Ohio St. 262; Bone v. Torry, 16 Ark. 83.

3, McLaughlin, v. Bank of the Patomac, 7 How. 220; Pasewalk v. Bollman, 29 Neb. 519.

4, Rochester v. Montgomery, 72 N. Y. 65; Kip v. Brigham, 6 Johns. 158; Portland v. Richardson, 54 Me. 46; 89 Am. Dec. 720; Boston v. Worthington, 10 Gray 496; 71 Am. Dec. 678; Inhabitants v. Holbrook, 9 Allen 17; 85 Am. Dec. 735; Chicago v. Robbins, 2 Black (U. S.) 418.

5, See cases cited below. As to the general subject of this and succeeding sections see notes, 83 Am. Dec. 380–390; 33 Am. Rep. 802.

6, See cases cited below; also note, 32 Am. Dec. 202.

7, Stovall v. Banks, 10 Wall. 583; Martin v. Tally, 72 Ala. 23; Irwin v. Backus, 25 Cal. 214; 85 Am. Dec. 125; Willey v. Paulk, 6 Conn. 74; Salyer v. State, 5 Ind. 202; Ralston v. Wood, 15 Ill. 159; 58 Am. Dec. 604, by statute; Housh v. People, 66 Ill. 178; Hobbs v. Middleton, 1 J. J. Marsh. (Ky.) 176; Heard v. Lodge, 20 Pick. 53; 32 Am. Dec. 197; State v. Holt, 27 Mo. 340; 72 Am. Dec. 273; Taylor v. Hunt, 34 Mo. 205; Baggott v. Boulger, 2 Duer (N. Y.) 160; Casoni v. Jerome, 58 N. Y. 315; Garber v. Com., 7 Pa. St. 265; Boyd v. Caldwell, 4 Rich. L. (S. C.) 117; State v. Pike, 74 N. C. 531, by statute; Tracy v. Goodwin, 5 Allen 409.

8, Bennett v. Graham, 71 Ga. 211; Fontleroy v. Lyle, 5 T. B. Mon. (Ky.) 266; Verret v. Belanger, 6 La. An. 109; Iglehart v. State, 2 Gill & J. (Md.) 235; Lipscomb v. Postell, 38 Miss 476; 77 Am. Dec. 651; Hobson v. Yancey, 2 Gratt. (Va.) 73; Seat v. Cannon, 1 Humph. (Tenn.) 471.

9, Shepard v. Pebbles, 38 Wis. 373; Watts v. Gayle, 20 Ala. 817; Willey v. Paulk, 6 Conn. 74; Love v. Gibson, 3 Fla. 598; McKeller v. Bowell, 4 Hawks (N. C.) 34.

10, Buckner v. Archer, 1 McMull. (S. C.) 85.

11, Annett v. Terry, 35 N. Y. 256; Irwin v. Backus, 25 Cal. 214; 85 Am. Dec. 125. See also cases cited in note 7 *supra*.

§ 609. Same—Other classes of bonds.

The principle already stated applies in respect to other classes of bonds where the language of the contract has been such that the surety has made himself liable for the conduct of his principal, or for the results or consequences of a suit between other parties.[1] Thus, sureties have been held bound by the judgment against the principal in attachment proceedings,[2] on appeal bonds,[3] recognizances or bail bonds,[4] in injunctions proceedings,[5] and in

replevin or on a re-delivery bond.[6] There has been great diversity of opinion on this subject in actions against sureties on *sheriff's and constable's bonds.* In these official bonds the surety does not generally undertake that the principal shall do a specified act in a given way to be ascertained by the court. The bonds are in general terms to the effect that the principal will perform certain official duties; and in such cases, the rule applied to executors and administrators does not necessarily govern. Accordingly it has been decided in numerous cases that a judgment against the principal on the bond of a sheriff or other officer is no evidence against the surety of any fact necessary to be found in the recovery of the judgment, although admissible to show the fact of its rendition.[7] In other cases, the judgment has been held admissible against the surety as *prima facie* evidence of the right of the plaintiff to recover as well as of the amount of such recovery.[8] While in still other cases, it has been held that the judgment against the principal is *conclusive* against the sureties as to the default or misconduct of the principal and the amount of damages.[9] A similar conflict of opinion is found in actions brought by sheriffs against sureties on the *bonds of the sheriff's deputies.* In some cases, the original judgment against the sheriff for misconduct of the deputy has been held *prima facie* evidence of the right

to recover in an action against the sureties,[10] and in others, it is held to be *conclusive*.[11]

1, Thomas v. Hubbell, 15 N. Y. 405; 69 Am. Dec. 619; Douglass v. Howland, 24 Wend. 35; Duffield v. Scott, 3 T. R. 374; Rapleye v. Prince, 4 Hill 119; 40 Am. Dec. 267; Firemen's Ins. Co. v. McMillan, 29 Ala. 147; Arrington v. Porter, 47 Ala. 714; Giltman v. Strong, 64 Pa. St. 242; Pico v. Webster, 14 Cal. 202; 73 Am. Dec. 647.

2, Cutter v. Evans, 115 Mass. 27; Tracy v. Maloney, 105 Mass. 90. See valuable note, 83 Am. Dec. 380–390.

3, Murdock v. Brooks, 38 Cal. 596.

4, Parkhurst v. Sumner, 23 Vt. 538; 56 Am. Dec. 94; Keane v. Fisher, 10 La. An. 261; Way v. Lewis, 115 Mass. 26. But see, Mott v. Hazen, 27 Vt. 208, 213.

5, McBroom v. Sommerville, 2 Stew. (Ala.) 515; Lothrop v. Southworth, 5 Mich. 536; Towle v. Towle, 46 N. H. 431; Methodist Church v. Barker, 18 N. Y. 463.

6, Kennedy v. Brown, 21 Kan. 171.

7, Lucas v. Governor, 6 Ala. 826; Pico v. Webster, 14 Cal. 202; 73 Am. Dec. 647; Carmichael v. Governor, 4 Miss. 236.

8, Stephens v. Shafer, 48 Wis. 54; 33 Am. Rep. 793, note and cases cited; State v. Jennings, 14 Ohio St. 73; Taylor v. Johnson, 17 Ga. 521; Graves v. Bulkley, 25 Kan. 249; 37 Am Rep. 249; Mullen v. Scott, 9 La. An. 173; Munford v. Overseers, 2 Rand. (Va.) 313; Aiken v. Bailey, 9 Yerg. (Tenn.) 111. See note, 41 Am. Dec. 683.

9, Tracey v. Goodwin, 5 Allen 409, bond being joint; State v. Colerick, 3 Ohio 487; McBroom v. Governor, 4 Port. (Ala.) 90; Dane v. Gilmore, 51 Me. 544; Masser v. Strickland, 17 Serg. & R. (Pa.) 354; 17 Am. Dec. 668; Evans v. Com., 8 Watts 398; 34 Am. Dec. 477; McMicken v. Com., 58 Pa. St. 213.

10, Westervelt v. Smith, 2 Duer (N. Y.) 449; Stephens v. Shafer, 48 Wis. 54; 33 Am. Rep. 793 and note.

11, Chamberlain v. Godfrey, 36 Vt. 380; 84 Am. Dec. 690; Crawford v. Turk, 24 Gratt. (Va.) 176.

§ 610. Judgments — When admissible as against third persons who are liable to make indemnity. — It frequently happens, where a judgment is recovered against a defendant, that, by reason of the facts found in that action, he has the right to recover damages against another who is bound to indemnify him by reason of some contract or other relation. In such cases, the judgment recovered in the first action may be given in evidence in the second against the one bound to give indemnity, provided he has been given proper and timely *notice to appear and defend* such action, although the parties are different.[1] Thus, after due notice to defend, a judgment against a town or city for damages caused by a defective highway may be given as evidence against a person or corporation liable over to such town or city.[2] The same rule applies in actions against those who have agreed to indemnify sheriffs or other officers.[3] In order to make the judgment conclusive evidence against the one alleged to be liable for indemnity, the notice to defend should be given in time so that there may be full *opportunity to appear and defend;* and he should be so notified of the controversy that he may know the consequences of his failure to defend.[4] There are, however, a few cases, not in harmony with the last statement, which hold that the party to be affected need not have *express notice*, that it is enough if

he knew of the pendency of the suit, and might have appeared and protected his interests.[5] The weight of authority, however, sustains the view that notice should be given, and that, when properly given, the judgment is *conclusive*,[6] although there is a line of authorities which hold that the relation which exists between a principal and a surety does not render one privy to a suit against the other; that a judgment against the principal is not even *prima facie* evidence in a subsequent action against the surety, and that the surety or indemnitor is not concluded by such judgment, even though due notice to defend has been given.[7] It is the prevailing rule that a *warrantor of the title of land* is bound by a judgment against a warrantee, when proper notice to defend the title has been given, and that he cannot be heard, in the absence of fraud or collusion, to claim that the judgment against the warrantee should not have been rendered. In such case, the judgment in ejectment is conclusive evidence that the warrantee has been evicted by paramount title.[8] But the defendant may show that his covenant was only a special covenant or prove such other defenses, as that the recovery was on a title derived from the warrantee, or on account of some fact occurring after the date of the covenant.[9] The same principle applies in the case of warranty of personal property.[10]

1, Rochester v. Montgomery, 72 N. Y. 65; Kip v. Brigham, 7 Johns. 168; Freem. Judg. sec. 181. On the general subject of this section see note, 83 Am. Dec. 380–390.

2, Chicago v. Robbins, 2 Black 418; Robbins v. Chicago, 4 Wall. 657; Boston v. Worthington, 10 Gray 496; 71 Am. Dec. 678; Milford v. Holbrook, 9 Allen 17; 85 Am. Dec. 735; Portland v. Richardson, 54 Me. 46; 89 Am. Dec. 720.

3, Train v. Gold, 5 Pick. 380; Miller v. Rhoades, 20 Ohio St. 494; Lovejoy v. Murray, 3 Wall. 1.

4, Turpin v. Thomas, 2 Hen. & M. (Va.) 139; 3 Am. Dec. 615; Peabody v. Phelps, 9 Cal. 213; Sampson v. Ohleyer, 22 Cal. 200; Somers v. Schmidt, 24 Wis. 417; 1 Am. Rep. 191; Boyd v. Whitfield, 19 Ark. 447; Davis v. Wilbourne, 1 Hill (S. C.) 27; 26 Am. Dec. 154. Parol notice is sufficient, however, Miner v. Clark, 15 Wend. 425.

5, Chicago v. Robbins, 2 Black 418; Robbins v. Chicago, 4 Wall. 657.

6, Boston v. Worthington, 10 Gray 496; 71 Am. Dec. 678; Milford v. Holbrook, 9 Allen 17; 85 Am. Dec. 735; Portland v. Richardson, 54 Me. 46; 89 Am. Dec. 720; State v. Colerick, 3 Ohio 487; State v. Jennings, 14 Ohio St. 73.

7, Jackson v. Griswold, 4 Hill 522; Pico v. Webster, 14 Cal. 202; 73 Am. Dec. 647.

8, Andrews v. Denison, 16 N. H. 469; 43 Am. Dec. 565; McConnell v. Downs, 48 Ill. 271; Hamilton v. Cutts, 4 Mass. 349; 3 Am. Dec. 222; Chamberlain v. Preble, 11 Allen 370; Cooper v. Watson, 10 Wend. 202; Davis v. Wilbourne, 1 Hill (S. C.) 27; 26 Am. Dec 154; Paul v. Witman, 3 Watts & S. (Pa.) 407; Knapp v. Marlboro, 34 Vt. 235; Daskam v. Ullman, 74 Wis. 474; Marsh v. Smith, 73 Iowa 295. See note, 43 Am. Dec. 569.

9, Chicago Ry. Co. v. Northern Line Packett Co., 70 Ill. 217; Davenport v. Muir, 3 J. J. Marsh. (Ky.) 310; 20 Am. Dec. 143. See article, 23 Cent. L. Jour. 412.

10, Salle v. Light, 4 Ala. 700; 39 Am. Dec. 317; Boyd v. Whitfield, 19 Ark. 447; Thurston v. Spratt, 52 Me. 202; Pickett v. Ford, 5 Miss. 246; Barney v. Dewey, 13 Johns. 224; 7 Am. Dec. 372.

§ 611. Judgment must be final.—It is essential to the conclusive effect of a former judgment that it should be a *final judgment.* Until such judgment, the litigation is not deemed to be at an end, and there cannot be said to be a final adjudication of the point in controversy. Thus, mere verdicts or findings, not resulting in judgment, are not conclusive, for they are still liable to be set aside on motion for new trial.[1] It has been held otherwise, however, as to verdicts before justices of the peace who have no power to grant new trials.[2] Mere interlocutory orders and decrees are also subject to revision and are not conclusive.[3] So where the action is remanded for further proceedings, the judgment cannot be offered as a bar, until there is a final judgment;[4] and it may, of course, be shown by the party against whom the judgment is offered that it has been reversed.[5]

1, Reed v. Proprietors, 8 How. 274; McReady v. Rogers, 1 Neb. 124; 93 Am. Dec. 333; Lord v. Chadbourne, 42 Me. 429; 66 Am. Dec. 290; Allen v. Blunt, 3 Story (U. S.) 746; Estate of Holbert, 57 Cal. 257; Wadsworth v. Connell, 104 Ill. 369; Ridgely v. Spenser, 2 Binn. (Pa.) 70; Child v. Morgan, 51 Minn. 116; Humphreys v. Browne, 19 La. An. 158; Taylor v. Hicks, 36 Pa. St. 392; Dunlap v. Robinson, 12 Ohio St. 530; Pearson v. Post, 2 Dak. 220; Gapen v. Bretternitz, 31 Neb. 302. See also, Wood v. Jackson, 8 Wend. 9; 22 Am. Dec. 603. See extended notes, 37 Am. St. Rep. 29–32; 96 Am. Dec. 775–788; Big. Estop. 48.

2, Aurora v. West, 7 Wall. 82; Sherman v. Dilley, 3 Nev. 21. But see, Doe v. Wright, 10 Adol & Ell. 763, 783; Munroe v. Pilkington, 31 L. J. (Q. B.) 81.

3, Baugh v. Baugh, 4 Bibb (Ky.) 556; Humphreys v. Browne, 19 La. An. 158; Rosenthal v McManus, 93 Cal. 505; Rockwell v. District Court Lake Co., (Col.) 29 Pac. Rep. 454.

4, Aurora City v. West, 7 Wall. 82; Board of Education v. Fowler, 19 Cal. 11.

5, R. v. Drury, 3 Car. & K. 193; Wood v. Jackson, 8 Wend. 9; 22 Am. Dec. 603; Goodrich v. Bodurtha, 6 Gray 323; Fries v. Pennsylvania Ry. Co, 98 Pa. St. 142; Smith v. Frankfield, 77 N. Y. 414; Borden Manfg. Co. v. Barry, 17 Md. 419; Fleming v. Riddick, 5 Gratt. (Va.) 272; 50 Am. Dec. 119; Taylor v. Smith, 4 Ga. 133; Clodfelter v. Hullett, 92 Ind 426; Edgar v. Greer, 10 Iowa 279; Atkinson v. Dixon, 96 Mo. 582. As to effect of appeal, see sec. 613 *infra*.

§ 612. Finality of judgments — Must be on the merits. — It is one of the limitations to the general rule under discussion that the judgment, in order to be conclusive evidence as a bar, *must be upon the merits.*[1] This does not imply that the judgment must be free from error, or that it is necessarily such a judgment as should have been rendered upon the evidence, or on the merits, as used in the popular sense.[2] It does, however, imply that, in order to be conclusive, the judgment should be rendered upon the issues in litigation, and not upon the ground of mere *technical defects*, such as the temporary disability of the plaintiff to sue, or because the action has not accrued, or because of a mere defect in pleadings,[3] or misjoinder or non-joinder of plaintiffs.[4] An eminent author has made the following classification of judgments which are not conclusive in a second

action on this ground: "First, where the plaintiff fails for want of jurisdiction in the court to hear his complaint, or to grant him relief; second, where he has misconceived his action; third, where he has not brought the proper parties before the court; fourth, where the decision was on demurrer, and the complaint in the second suit sets forth the cause of action in proper form; fifth, where the first suit was prematurely brought; sixth, where the matter in the first suit was ruled out as inadmissible under the pleadings."[4]

1, Gray v. Dougherty, 25 Cal. 266; Liddell v. Chidester, 84 Ala. 508; 5 Am. St. Rep. 387; State Bank v. New Orleans Nav. Co., 3 La. An. 294; Schindel v. Suman, 13 Md. 310; Morton v. Sweetser, 12 Allen 134; Gerrish v. Pratt, 6 Minn. 53; Bell v. Hoagland, 15 Mo. 360; Mosby v. Wall, 23 Miss. 81; 55 Am. Dec. 71; Brackett v. Hoitt, 20 N. H. 257; Carmony v. Hoober, 5 Pa. St. 305; Wethered v. Mays, 4 Tex. 387; Webb v. Buckelew, 82 N. Y. 555; Agnew v. McElroy, 10 Smedes & M. (Miss.) 555; 48 Am. Dec. 772; Lorillard v. Clyde, 122 N. Y. 41; 19 Am. St. Rep. 470.

2, Hughes v. United States, 4 Wall. 232; Lore v. Truman, 10 Ohio St. 45; Birch v. Funk, 2 Met. (Ky.) 544; Agnew v. McElroy, 18 Miss. 552; 48 Am. Dec. 772; Brackett v. Hoitt, 20 N. H. 257; Van Vleet v. Olin, 1 Nev. 495; Wilbur v. Gilmore, 21 Pick. 250; Keene v. Clarke, 5 Rob. (N. Y.) 38; Rogers v. Higgins, 57 Ill. 244.

3, Smalley v. Edey, 19 Ill. 207; Kendal v. Talbot, 1 A. K. Marsh. (Ky.) 321; Atkins v. Anderson, 63 Iowa 739; Philpott v. Brown, 16 Neb. 387; Taylor v. Matteson, 86 Wis. 113.

4, McCall v. Jones, 72 Ala. 368; Hughes v. United States, 4 Wall. 237; Miller v. Manice, 6 Hill 114; Hill v. Huckabee, 70 Ala. 183.

5, Freem. Judg. sec. 263; Taylor v. Matteson, 86 Wis. 113; De Graaf v. Wyckoff, 118 N. Y. 1, where matter pleaded as defense was ruled out and hence not adjudicated.

§613. Effect of nonsuit or discontinuance or appeal.—A judgment of nonsuit or discontinuance is not such a judgment on the merits as to constitute a bar. In speaking of such a judgment, the supreme court of the United States used this language: "As nothing positive can be implied from the plaintiff's error as to the subject matter of his suit, he may reassert it by the same remedy in another suit, if it be appropriate to his cause of action, or by any other which is so, if the first was not."[1] But the judgment of nonsuit may involve a decision on the merits, and constitute a bar. It was so held, where the decision settled the question of the validity of the note in suit;[2] and where there is a judgment of dismissal *based on an agreement of the parties*, in the absence of any thing in the agreement or judgment to the contrary, such judgment will constitute a bar.[3] The same is true of judgments on *confession*.[4] It has been held in some states that a dismissal which is not expressly made "without prejudice" is a bar to a subsequent action.[5] In like manner a *demurrer* on the merits to the entire cause of action stated constitutes a bar.[6] "But it is equally well settled that, if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his

declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right, for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action."[7] Where an action is dismissed on the ground of a defective preliminary affidavit or notice,[8] or informal bond,[9] or for failure to make a demand,[10] or want of jurisdiction,[11] or because the debt was not due,[12] or if for other reasons the action is prematurely brought,[13] or where it fails on account of mistake of name,[14] or default[15] or incapacity of plaintiff,[16] the judgment is no bar.[17] Where a *bill in chancery* is dismissed and the decree is in absolute terms, it is presumed to be upon the merits.[18] But if it is evidently on technical grounds, like defect of pleadings, or want of jurisdiction, or want of an adequate remedy at law, the former decree is not conclusive. Of course, this is clearly so when the decree is in terms "without prejudice."[19] It is an open question, whether a mere *appeal from a judgment* prevents its use as evidence to establish the defence *res judicata*. In some of the states it is held that an appeal destroys the effect of the judgment for this purpose,[20] while the contrary view is maintained by equally high authority.[21]

1, Homer v. Brown, 16 How 354, 365; Manhattan Ins. Co. v. Broughton, 109 U. S. 121; Louisville, N. A. & C. Ry. Co. v. Wylie, 1 Ind. App. 136; Taylor v. Barron, 30 N. H. 78; 64 Am. Dec. 281; Dunham v. Carson, 37 S. C. 269; Lord v. Chadbourne, 42 Me. 429; 66 Am. Dec. 290; Smith v. Floyd Co., 85 Ga. 420; Holland v. Hatch, 15 Ohio St. 464; Loeb v. Willis, 100 N. Y. 231; Hayes v. Collins, 114 Mass. 54; Bridge v. Sumner, 1 Pick. 371; Bishop v. McGillis, 82 Wis. 120; People v. Vilas, 36 N. Y. 459; 93 Am. Dec. 520; Bauden v. Roliff, 1 Mart. N. S. (La.) 165; 14 Am. Dec. 181; Holmes v. Chicago & A. Ry. Co., 94 Ill. 439; Mills v. Pelligrew, 45 Kan. 573; Gates v. McLean, 70 Cal. 42. See note, 96 Am. Dec. 778.

2, Brett v. Marston, 45 Me. 401.

3, VanValkenburgh v. Milwaukee, 43 Wis. 574; Merritt v. Campbell, 47 Cal. 542; Bank of Commonwealth v. Hopkins, 2 Dana (Ky.) 395; Jarboe v. Smith, 10 B. Mon. (Ky.) 257; 52 Am. Dec. 541; Phillpotts v. Blasdel, 10 Nev. 19; Hoover v. Mitchell, 25 Gratt. (Va.) 387.

4, Neusbaum v. Keim, 24 N. Y. 325; North v. Mudge, 13 Iowa 496; 81 Am. Dec. 441; Fletcher v. Holmes, 25 Ind. 458; Dunn v. Pipes, 20 La. An. 276.

5, Bradley v. Bradley, 160 Mass. 257; Stults v. Forst, 135 Ind. 297.

6, Gould v. Evansville & C. Ry. Co., 91 U. S. 534; Bissell v. Spring Valley, 124 U. S. 225; St. Johnsbury Ry. Co. v. Hunt, 59 Vt. 294; Bouchaud v. Dias, 3 Den. 238; Gray v. Gray, 34 Ga. 499; Perkins v. Moore, 16 Ala. 17; City Bank v. Walden, 1 La. An. 46; Parker v. Spencer, 61 Tex. 155; McLaughlin v. Doane, 40 Kan. 392; Wilson v. Ray, 24 Ind. 156; Vanlandigham v. Ryan, 17 Ill. 25; Felt v. Turnure, 48 Iowa 397; Terry v. Hammonds, 47 Cal. 32; Connecticut Ins. Co. v. Smith, 117 Mo. 261; Ellis v. Northern Pac. Ry. Co., 80 Wis. 459.

7, Gould v. Evansville & C. Ry. Co., 91 U. S. 534; Wiggins Ferry Co. v. Ohio & M. Ry. Co., 142 U. S. 396 Gilman v. Rives, 10 Peters 298; Aurora v. West, 7 Wall. 90; Doctor v. Furch, 76 Wis. 153; Com. v. Goddard, 13 Ms. 456; Chapin v. Curtis, 23 Conn. 388; Foster v. Com., 8

Watts & S. (Pa.) 77; Griffin v. Seymour, 15 Iowa 30; 83 Am. Dec. 395; Crumpton v. State, 43 Ala. 31; Harding v. State, 22 Ark. 210; Campbell v. Hunt, 104 Ind. 210; Thomas v. Bland, 91 Ky. 1.

8, Stockwell, v. Byrne, 22 Ind. 6; Rose v. Hawley, 141 N. Y. 366.

9, Morton v. Sweetser, 12 Allen 134.

10, Crosby v. Baker, 6 Allen 295.

11, Estill v. Taul, 2 Yerg. (Tenn.) 466; 24 Am. Dec. 498; Weyand v. Atchinson, T. & S. F. Ry. Co., 75 Iowa 573; 9 Am. St. Rep. 505.

12, Estill v. Taul, 2 Yerg. (Tenn.) 466; 24 Am. Dec. 498.

13, New England Bank v. Lewis, 8 Pick. 113; Wood v. Faut, 55 Mich. 185; Rose v. Hawley, 141 N. Y. 366.

14, Wixom v. Stephens, 17 Mich. 518; 97 Am. Dec. 205.

15 Gray v. Dougherty, 25 Cal. 266; Agnew v. McElroy, 18 Miss. 552; 48 Am. Dec. 772; Perry v. Lewis, 49 Miss. 443.

16, Rogers v. Levy, 36 Neb. 601.

17, Hess v. Beekman, 11 Johns. 457; Elwell v. McQueen, 10 Wend. 519; Brintnall v. Foster, 7 Wend. 103; Platt v. Storer, 5 Johns. 346; Felter v. Mulliner, 2 Johns. 181.

18, Durant v. Essex Co., 7 Wall. 107; Foote v. Gibbs, 1 Gray 412; Perine v. Dunn, 4 Johns. Ch. (N. Y.) 142; Neafie v. Neafie, 7 Johns. Ch. (N. Y.) 1; 11 Am. Dec. 380; Bigelow v. Winsor, 1 Gray 301.

19, Taylor v. Barron, 30 N. H. 78; 64 Am. Dec. 281; Kendal v. Talbot, 1 A. K. Marsh. (Ky.) 321; Perry v. Lewis, 49 Miss. 443; Mobile v. Kimball, 102 U. S. 691; Shepherd v. Pepper, 133 U. S. 626; Foote v. Gibbs, 1 Gray 412; Heuse v. Mullen, 22 Wall. 42; Thurston v. Thurston, 99 Mass. 39; Mey v. Gulliman, 105 Ill. 272; Lore v. Truman, 10 Ohio St. 45; Walden v. Bodley, 14 Peters 156; Strang v. Moog, 72 Ala. 460; Hughes v. United States, 4 Wall 232; Durant v. Essex Co., 7 Wall. 107; Ballentine v. Ballentine, (Pa.) 15 At. Rep. 859; Gunn v. Peakes, 36 Minn. 177. See also, Maxwell v. Clarke, 139 Mass. 112. See note, 96 Am. Dec. 778.

20, Texas Ry. Co. v. Jackson, 85 Tex. 605; Murray v. Green, 64 Cal. 363; Naftzger v. Gregg, 99 Cal. 83; 37 Am. St. Rep. 23 and valuable note.

21, Smith v. Schreiner, 86 Wis. 19; Parkhurst v. Burdell, 110 N. Y. 386; Burton v. Burton, 28 Ind. 342; Faber v. Hovey, 117 Mass. 107; Willard v. Ostrander, 51 Kan. 481; Freem. Judg. sec. 328. See note, 37 Am. St. Rep. 29.

§ 614. Conclusive only as to matters in issue.— It is another limitation upon the general doctrine that judgments are conclusive in subsequent actions between the same parties, that the issue in the second action must have been a material and necessary issue in the first action, and determined therein,[1] this limitation rests upon the obvious ground that there should be no estoppel, unless the party has had his day in court as to the question in controversy. The real difficulty has arisen in determining what is the "matter in issue," within the meaning of the rule. Some of the decisions have proceeded on the theory that no matters are to be deemed in issue, except those on which the action proceeds, and which are controverted by the defendant's pleadings. In other words, they hold somewhat strictly to the rule that the *issuable, and not the evidential facts*, are those referred to in the rule. Thus, in the leading case in New Hampshire sustaining this view, it was held that the validity of a mortgage offered as evidence of the plaintiff's title in trover was not in issue, although it was shown by parol that it was the only question

submitted to the jury, and that they found the mortgage fraudulent.[2] Although there is agreement in the view that mere collateral facts, although controverted and used in evidence, are not included within the rule,[3] yet the weight of authority is to the effect that "every point which has been either expressly or by necessary implication in issue, which must necessarily have been decided in order to support the judgment or decree is concluded."[4] "A judgment is conclusive upon every matter actually and necessarily decided in the former suit, though not then directly the point in issue. If the facts involved in the second suit are so cardinal that without them the former decision cannot stand, they must now be taken as conclusively settled."[5] It follows logically that the facts found in a verdict or judgment *must be facts material to the issue.*[6] This remains true, even though the judgment in express terms finds a fact immaterial to the issue;[7] and the same is true as to the special findings of a jury on the trials of issues, when such findings are upon facts not essential to their verdict.[8] But an issue that has once been properly determined cannot be retried in a collateral action between the same parties, even though the evidence upon which the case was decided was sent up with the record.[9]

1, Williams v. Williams, 63 Wis. 71; 53 Am. Rep. 253; Dickinson v. Hayes, 31 Conn. 417; Church v. Chapin, 35

Vt. 223; Crofton v. Board of Education, 26 Ohio St. 571; Woodgate v. Fleet, 44 N. Y. 1; Gray v. Dougherty, 25 Cal. 266; Boutin v. Lindsley, 84 Wis. 644; Watts v. Rice, 75 Ala. 289; Bennett v. Holmes, 1 Dev. & B. (N. C.) 486; Des Moines Bank v. Harding, 86 Iowa 153; Agnew v. McElroy, 18 Miss. 552; 48 Am. Dec. 772; Lentz v. Wallace, 17 Pa. St. 412; 55 Am. Dec. 569; Henry v. Davis, 13 W. Va. 230; Standish v. Parker, 2 Pick. 20; 13 Am. Dec. 393; Widow de St. Romes v. Carondalet Co., 24 La. An. 331; Gilbert v. Thompson, 9 Cush. 348; King v. Chase, 15 N. H. 9; 41 Am. Dec. 675; Forcey's Appeal, 106 Pa. St. 508; Brady v. Pryor, 6 Ga. 691; Land v. Keirn, 52 Miss. 341; Shall v. Briscoe, 18 Ark. 142; Wahle v. Wahle, 71 Ill. 510; Fish v. Leightner, 44 Mo. 268; King v. Townshend, 141 N. Y. 358. See note, 96 Am. Dec. 779.

2, King v. Chase, 15 N. H. 9; 41 Am. Dec. 675, which has been criticised in Big. Estop. 90, who cites, Wood v. Jackson, 8 Wend. 9; 22 Am. Dec. 603. See also, Smith v. McCool, 16 Wall. 560; Jackson v. Lodge, 36 Cal. 37.

3, Manny v. Harris, 2 Johns. (N. Y.) 24; 3 Am. Dec. 386; Coit v. Tracy, 8 Conn. 268; 20 Am. Dec. 110; Wood v. Jackson, 8 Wend. 9; 22 Am. Dec. 603; Beebe v. Bull, 12 Wend. 504; 27 Am. Dec. 150; Garrott v. Johnson, 11 Gill & J. (Md.) 173; 35 Am. Dec. 272; Blackmore v. Gregg, 10 Watts (Pa.) 222; 36 Am. Dec. 171; Naison v. Blaisdell, 12 Vt. 165; 36 Am. Dec. 331; Garwood v. Garwood, 29 Cal. 521; King v. Chase, 15 N. H. 9; 41 Am. Dec. 675 and note; Lea v. Lea, 99 Mass. 493; 96 Am. Dec. 772 and note. See sec. 621 *infra*.

4, Supervisors v. Mineral Point Ry. Co., 24 Wis. 124; Wood v. Jackson, 8 Wend. 9; 22 Am. Dec. 603; Burlen v. Shannon, 99 Mass. 200; 96 Am. Dec. 733; Hunter v. Davis, 19 Ga. 413; Widow de St. Romes v. Carondalet, C. & N. Co., 24 La An. 331; Nesbit v. Riverside District, 144 U. S. 610; Henry v. Davis, 13 W. Va. 230. See note, 96 Am. Dec. 777.

5, Freem. Judg. sec. 256; Reg. v. Hartington, 4 El. & B. 780; Cabat v. Washington, 41 Vt. 168; Gardner v. Buckbee, 3 Cow. 120; 15 Am. Dec. 256; Freeman v. Bass, 34 Ga. 355; 89 Am. Dec. 255; Bouchaud v. Dias, 3 Den. 243; Gates v. Preston, 41 N. Y. 113.

6, Tams v. Lewis, 42 Pa. St. 403; Hibshman v. Dulleban, 4 Watts (Pa.) 183.

7, Hardy v. Mills, 35 Wis. 141; People v. Johnson, 38 N. Y. 63; 97 Am. Dec. 770; Woodgate v. Fleet, 44 N. Y. 13. See note, 96 Am. Dec. 780.

8, Burlen v. Shannon, 99 Mass. 200; 96 Am. Dec. 733 and note; Gilbert v. Thompson, 9 Cush. 348; Hawks v. Truesdale, 99 Mass. 557.

9, Franklin County v. German Savings Bank, 142 U. S. 93.

§ 615. As affected by form of action.— Although it must appear that the issue is the same, before a judgment in one suit can operate as a bar in the second action, it is equally well settled that the *form and object of the two actions need not be the same.*[1] It is sufficient, if the grievance complained of is the same.[2] Thus, when there is a right to one action in tort or on contract, the judgment in one will constitute a bar to the other proceeding.[3] For example, when the judgment is recovered in trover, the plaintiff will be estopped from proving the same facts in another action for money had and received.[4] Judgment for the defendant in trover bars trespass;[5] and judgment in trespass bars trover.[6] So a recovery of damages in trespass on land bars a subsequent action for *mesne* profits;[7] and a judgment in trespass for taking goods bars assumpsit for the value;[8] and where the title is the point in controversy, judgment in ejectment bars an action in trespass.[9] So if

the *claim of the plaintiff* has been *litigated in a former action, as a defence* between the same parties, the former judgment is conclusive. Thus, where want of consideration was proved as a defence to a promissory note given for goods sold, the defendant was thereby held precluded from proving false representations in a subsequent action brought by him;[10] and where one, as defendant, attempts to prove that work sued for is of no value, he cannot, as plaintiff, prove damages for unskillful performance of the work.[11] If a plaintiff fails to show all the damages that he has suffered, he cannot recover for those omitted in a second suit.[12] As respects the rule under consideration, the *courts of law and chancery* stand on the same footing; and where the same issues have been litigated between the same parties or their privies in the one court, they cannot be litigated in the other.[13] Thus, where a surety makes his defence at law, which proves insufficient, he cannot on the same state of facts defend in equity;[14] and where a mortgage is held void in a suit to foreclose, the judgment is a bar in an action of ejectment founded on the same mortgage.[15] But if a party has rights which are *not cognizable in the one court*, but which may be heard in the other, the failure in one forum does not constitute a bar in the other.[16] If, however, the same question may be properly tried in a state or a federal court, the

de termination in one is binding in the other.[17] Owing to the peculiar respect which the early English law paid to the tenure by which real estate was held, the same conclusive effect was not given to judgments in actions for *ejectment* as in other cases.[18] But now in some of the states, there are *statutes* having special regulations as to the granting of new trials in such actions, and, except in this respect, they are governed by the same rules as to the binding effect of judgments as other actions.[19]

1, Moore v. Williams, 132 Ill. 589; Marsh v. Pier, 4 Rawle (Pa.) 273; 26 Am. Dec. 131; White v. Martin, 1 Port. (Ala.) 215; 26 Am. Dec. 365; Owens v. Raleigh, 6 Bush (Ky.) 656; Bell v. McColloch, 31 Ohio St. 397; Sewell v. Scott, 35 La. An. 553; Leib v. Lichtenstein. 121 Ind. 483; Harryman v. Roberts, 52 Md. 64; Hatch v. Coddington, 32 Minn. 92; Edwards v. Baker, 99 N. C. 258; Schrorers v. Fish, 10 Col. 599; Sanderson v. Peabody, 58 N. H. 116; Murphy v. DeFrance, 101 Mo. 151; Eastman v. Cooper, 15 Pick. 285; 26 Am. Dec. 600; Lawrence v. Vernon, 3 Sum. (U. S.) 20; Hitchin v. Campbell, 2 W. Black. 778. 827; Ferrer's Case, 6 Coke 7; Mitchel v. Chisholm, 57 Minn. 148.

2, Perry v. Lewis, 49 Miss. 443; Agnew v. McElroy, 18 Miss. 552; 48 Am. Dec. 772; Goodenow v. Litchfield, 59 Iowa 226; Day v. Vallette, 25 Ind. 42; 87 Am. Dec. 353; McNeely v. Hyde, 46 La. An. 1083; Doty v. Brown, 4 N. Y. 71; 53 Am. Dec. 350; Ahl v. Goodhart, 161 Pa. St. 455; Spear v. Tidball, 40 Neb. 107; Attorney General v. Chicago Ry. Co., 112 Ill. 520. See note, 96 Am. Dec. 787.

3, Smith v. Way, 9 Allen 472.

4, Eastman v. Cooper, 15 Pick. 285; 26 Am. Dec. 600.

5, Hite v. Long, 6 Rand. (Va.) 457; 18 Am. Dec. 719.

6, Boynton v. Willard, 10 Pick. 166.

7, Coleman v. Parish, 1 McCord (S. C.) 264.

8, Rice v. King, 7 Johns. 20.

9, Beebe v. Elliott, 4 Barb. (N. Y.) 457.

10, Burnett v. Smith, 4 Gray 50.

11, Merriam v. Woodcock, 104 Mass. 326.

12, Stevens v. Pierce, 151 Mass. 207.

13, Stickney v. Goudy, 132 Ill. 213; Miles v. Caldwell, 2 Wall. 39; Alley v. Chase, 83 Me. 537; Hopkins v. Lee, 6 Wheat. 109; Wolverton v. Baker, 86 Cal. 591; Fate v. Hunter, 3 Strob. Eq. (S. C.) 136.

14, Dunham v. Donner, 31 Vt. 249.

15, Smith v. Kernochen, 7 How. 198; Adams v. Barnes, 17 Mass. 365; Betts v. Starr, 5 Conn. 550.

16, Dunham v. Donner, 31 Vt. 249; Gray v. Tyler, 40 Wis. 579.

17, Russell v. Lamb, 49 Fed. Rep. 770; Simmons v. Sau, 138 U. S. 439; State v. Trammel, 106 Mo. 510; Colt v. Colt, 48 Fed. Rep. 385.

18, Miles v. Caldwell, 2 Wall. 35.

19, Miles v. Caldwell, 2 Wall. 35; Dawley v. Brown, 79 N. Y. 390; Amestre v. Castro, 49 Cal. 326; Hodges v. Eddy, 53 Vt. 434; Cadwallader v. Harris, 76 Ill. 370; Kinter v. Jinks, 43 Pa. St. 445. See note, 85 Am. Dec. 208.

§ 616. Extrinsic evidence to identify the issue.—It frequently happens that it cannot be determined from the records alone whether the issues in the two actions are the same. It would be repugnant to a familiar rule of evidence to receive parol proof to contradict the record, by allowing evidence that a claim was or was not determined in the former suit, if the record shows the contrary.[1]

Thus, if the complaint in the prior action declares upon special facts as a cause of action, parol proof is inadmissible to show that the subject determined was a different one.[2] But if there is any uncertainty in the record as to whether the precise question was raised and determined in the former controversy, "as for example, if it appear that several distinct matters may have been litigated, upon one or more of which judgment may have been passed, without indicating which of them was thus litigated and upon which the judgment was rendered, the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."[3]

1, Armstrong v. St. Louis, 69 Mo. 309; Gray v. Dougherty, 25 Cal. 266; Trimmer v. Thompson, 19 S. C. 247; Fromlet v. Poor, 3 Ind. App. 425. See note, 96 Am. Dec. 785; also valuable note, 44 Am. St. Rep. 562.

2, Campbell v. Butts, 3 N. Y. 173.

3, Russell v. Place, 94 U. S. 608. Note, 44 Am. St. Rep. 562–572.

§ 617. Same, continued. — Mr. Justice Miller has thus stated the prevailing doctrine: "Whenever the form of the issue in the trial relied on as an estoppel is so vague that it

does not determine what questions of fact were submitted to the jury under it, it is competent to prove by parol testimony what question or questions of fact were before the jury and were necessarily passed on by them."[1] The *opinion of the court* rendering the former judgment printed in the authorized reports of decisions of the state, as well as the statement of the case, may be received in evidence to show the issue determined.[2] But *in no case can proof be admitted* to show what was determined, *unless the fact is such as might have been given in evidence* under the pleadings.[3] When extrinsic evidence is proper to ascertain the issue tried and determined in the former suit, such evidence must be submitted to the jury with proper instructions. And only such *issues* as have been *actually tried and determined*, and on which the judgment was rendered, or such issues as by reasoning are essential to and *necessarily involved* in the former verdict and judgment are to be considered as conclusively determined between the parties.[4] The *testimony of jurors* on the former trial is admissible, where extrinsic evidence of the identity of the cause of action is proper; but their testimony should be confined to the points in controversy on the former trial, the testimony given by the parties and the questions submitted to the jury; and should not be received as to the nature of their secret

deliberations;[5] nor to contradict the record;[6] nor to show what matters were considered by them.[7]

1, Miles v. Caldwell, 2 Wall. 43; Davis v. Brown, 94 U. S. 423; Jepson v. International Alliance, 17 R. I. 471; Cook v. Burnley, 45 Tex. 97; Gray v. Dougherty, 25 Cal. 266; Leopold v. City of Chicago, 150 Ill. 568; Humpfner v. Osborne Co., 2 S. Dak. 310; Post v. Smilie, 48 Vt. 185; Doty v. Brown, 4 N. Y. 71; 53 Am. Dec. 350; Wright v. Salisbury, 46 Mo. 26; Long v. Baugas, 2 Ired. (N. C.) 290; 38 Am. Dec. 694; McFighe v. McSane, 93 Ala. 626; Emery v. Fowler, 39 Me. 326; Munro v. Meech, 94 Mich. 596; 63 Am. Dec. 627; White v. Chase, 128 Mass. 158; Appeal of Buckingham, 60 Conn. 143; Indianapolis Ry. Co. v. Clark, 21 Ind. 150; Reast v. Donald, 84 Tex. 648; Warwick v. Underwood, 3 Head (Tenn.) 238; 75 Am. Dec. 767; Crum v. Boss, 48 Iowa 433; King v. Chase, 15 N. H. 9; Supples v. Cannon, 44 Conn. 424. See note, 96 Am. Dec. 786.

2, Hood v. Hood, 110 Mass. 463. Contra, Appeal of Buckingham, 60 Conn. 143; Robinson v. New York Ry. Co., 18 N. Y. S. 728.

3, Briggs v. Wells, 12 Barb. (N. Y.) 567; Gay v. Wells, 7 Pick. 219.

4, Cromwell v. County of Sac, 94 U. S. 351; Foye v. Patch, 132 Mass. 110. It should appear that the facts alleged to have been determined were necessary to the issue, Irish American Bank v. Ludlum, 56 Minn. 317. See note, 44 Am. St. Rep. 562.

5, Packet Co. v. Sickles, 5 Wall. 580. The testimony of an attorney has also been received as to such facts, Susquehanna Ins. Co. v. Mardorf, 152 Pa. St. 22. See note, 44 Am. St. Rep. 562–572.

6, Stapleton v. King, 40 Iowa 278.

7, Crum v. Boss, 48 Iowa 433.

§618. Proof that issues are the same — Burden.— When it appears that there were

several issues in the former action, it should be shown by extrinsic evidence that the point claimed to have been adjudicated was in fact determined, unless this appears from the record. In such cases a *particular ground of adjudication cannot be inferred.*[1] Thus, where, in an action for divorce for cruelty, there was a denial of the charge, as well as a plea of former judgment of divorce, and the action was dismissed by the court, it was held in a subsequent action that the court could not, without proof, infer on what ground the judgment had proceeded.[2] The same principle was applied by the supreme court of the United States in a patent case where the patent alleged to be infringed contained two distinct claims; it was held that a patent might be valid as to one claim, and invalid as to the other; and the former judgment was held to be no bar as it had not appeared on which claim the recovery was had.[3] So, where *various matters of defense* are set up in the answer, some in abatement, and others in bar, and there is a general judgment of dismissal, the judgment will not be held a bar to future proceedings, unless there is extrinsic evidence to show the ground of the decision.[4] But if in such a case there are *special findings* in favor of the defendant on all the issues, such findings and judgments are conclusive as to each question and on the merits.[5] In those cases where the record gives no in-

timation whether a particular matter has been determined or not, it is clearly incumbent upon the party alleging that a question has been settled by a former adjudication to support his allegation by evidence *aliunde* and by a *preponderance of the proof*.[6] In an action where the effect of a decision upon demurrer was under consideration, it was held that, "where the parties and the cause of action are the same, the *prima facie* presumption is that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue."[7] But if there is any uncertainty in the record, the whole subject is open to litigation, unless the uncertainty is removed by extrinsic evidence showing the precise point involved and determined.[8]

1, Washington, A. & G. Packet Co. v. Sickles, 24 How. 333; 5 Wall. 580; Chase v. Walker, 26 Me. 555.

2 Burlen v. Shannon, 99 Mass. 200; 96 Am. Dec. 733.

3, Russell v. Place, 94 U. S. 606. The same principle was applied in a case relating to municipal bonds, Nesbit v. Riverside District, 144 U. S. 610.

4, Foster v. Busteed, 100 Mass. 409.

5, The 420 Mining Co. v. Bullion Mining Co., 3 Sawy. (U. S.) 634; Sheldon v. Edwards, 35 N. Y. 286. See note, 44 Am. St. Rep. 562–572.

6, Cook v, Burnley, 45 Tex. 97; Agnew v. McElroy, 1 Miss. 552; 48 Am. Dec. 772; King v. Townshend, 14 N. Y. 358; Phillips v. Berick, 16 Johns. 136; Russell v Place, 94 U. S. 606; Dygert v. Dygert, 4 Ind. App. 276; Kleinschmidt v. Binzel, 14 Mont. 31; Freem. Judg. sec. 276. See notes, 96 Am. Dec. 786; 44 Am. St. Rep. 564.

7, Gould v. Evansville & C. Ry. Co., 91 U. S. 533. For full discussion, see note, 44 Am. St. Rep. 566.

8, Russell v. Place, 94 U. S. 606.

§ 619. Effect of judgment where cause of action is different.— There is a material difference between the effect of a judgment as an estoppel against a prosecution of a second action upon the same claim, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, as we have already seen, a judgment on the merits is an absolute bar concluding parties and privies, not only as to the material facts proven, but as to the material facts which might have been proven. But where the second action is founded on a diferent claim, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In such cases, the inquiry must be as to the point or *question actually litigated* in the original action, not what might have been litigated and determined.[1] In a case in the supreme court of the United States in which this subject was fully discussed, the plaintiff had been defeated in a former action on certain municipal bonds, in which action it was determined that the bonds in question were void, as against the county, in the hands of those who were not purchasers be-

fore due for value. In a second action by the same plaintiff on other bonds of the same series, it was held that the former judgment did not preclude the plaintiff from proving that he was, as to the bonds in suit, a *bona fide* holder.[2] But where the actions are upon different notes or causes of action, and the *same points are in issue and determined*, the judgment in the former case is conclusive.[3] The same rule applies in actions of trespass, where the causes of action are different, but the questions of title are the same.[4] So where in an action to recover possession of land, the plaintiff litigates his claim for rents and profits, he is precluded from suing for rent.[5] But the former judgment does not constitute an estoppel as to matters *occurring subsequent* thereto which give the plaintiff a new title or right of action.[6] Thus, a suit for taxes for one year is no bar to a suit for taxes for another year;[7] and a former judgment in an action for nuisance is not conclusive evidence of the plaintiff's rights in a subsequent action for the continuance of the same nuisance.[8]

1, Cromwell v. County of Sac, 94 U. S. 351; Davis v. Brown, 94 U. S. 423; McKissick v. McKissick, 6 Humph. (Tenn.) 75; Vaughn v. Morrison, 55 N. H. 580; Goodenow v. Litchfield, 59 Iowa 226; Foye v. Patch, 132 Mass. 110; Nesbit v. Independent District of Riverside, 144 U. S. 610; Bernard v. Hoboken, 27 N. J. L. 412; Burwell v. Canday, 3 Jones (N. C.) 165; Bridger v. Asheville Ry. Co., 27 S. C. 456; 13 Am. St. Rep. 653; Kilander v. Hoover, 111 Ind. 10; Danziger v. Williams, 91 Pa. St. 234; Furneaux v. First Nat. Bank, 39 Kan. 144. See note, 96 Am. Dec. 784 as to the subject of this section.

2, Cromwell v. County of Sac, 94 U. S. 351.

3, Bouchand v. Dias, 3 Den. 243; French v. Howard, 14 Ind. 455; Williamsburg Sav. Bank v. Town of Solon, 136 N. Y. 465.

4, Shettlesworth v. Hughey, 9 Rich. L. (S. C.) 387.

5, Stewart v. Dent, 24 Mo. 111.

6, Barrows v. Kindred, 4 Wall. 399; Hawley v. Simons, 102 Ill. 115; People's Sav. Bank v. Hodgdon, 64 Cal. 95; McLane v. Bovee, 35 Wis. 27; McKissick v. McKissick, 6 Humph. (Tenn.) 75; Gluckauf v. Reed, 22 Cal. 468; Ramsey Bld. Soc. v. Lawton, 49 Minn. 362; Dwyer v. Goran, 29 Iowa 126; Neafie v. Neafie, 7 Johns. Ch. (N. Y.) 1; 11 Am. Dec. 380; Stone v. St. Louis Stamping Co., 155 Mass. 267; Perkins v. Parker, 10 Allen 22; Morse v. Marshall, 97 Mass. 519; People v. Mercein, 3 Hill 399; 38 Am. Dec. 644; Caperton v. Schmidt, 26 Cal. 479; 85 Am. Dec. 187 and note. See also, State v. Bechdel, 37 Minn. 360; 5 Am. St. Rep. 854.

7, Keokuk & W. Ry. Co. v. Missouri, 152 U. S. 301.

8, Parker v. Standish, 3 Pick. 288; Richardson v. Boston; 19 How. 263; Byrne v. Minneapolis & St. L. Ry. Co., 38 Minn. 212; 8 Am. St. Rep. 668.

§ 620. Effect of judgment — General issue. — There has long been controversy as to the effect which should be given to a former judgment, when it is offered in evidence under *the general issue*, but is not pleaded as an estoppel. In England, although the former judgment may be relevant and as such may be offered in evidence between the same parties or their privies, it is not conclusive, unless pleaded as an estoppel or unless the party giving it in evidence had no opportunity of pleading it as an estoppel.[1]

While there has been much conflict of opinion on this subject in the United States, the weight of authority seems to reject the English view that a former judgment may be properly admitted in evidence, and yet that it is a mere fact or argument which the jury may adopt or disregard, as they choose.[2] The prevailing view in this country is that, if under the pleadings proof of the former judgment is received, it should have effect as a *conclusive determination* of the rights of the parties.[3] This controversy is not likely to be continued in those jurisdictions where the reformed procedure is adopted, and where a former judgment must be *pleaded as new matter* in order to admit proof thereof.

1, Vooght v. Winch, 2 Barn. & Ald. 662; Outram v. Morehead, 3 East 346; Hannaford v. Hunn, 2 Car. & P. 148; Magrath v. Hardy, 4 Bing. N. C. 782; Doe v. Huddart, 2 Cromp., M. & R. 316; Dimes v. Grand Junction Canal Co., 9 Q. B. 469; Clink v. Thurston, 47 Cal. 21; Fanning v. Hibernia Ins. Co., 37 Ohio St. 344.

2, Marsh v. Pier, 4 Rawle (Pa.) 273; 26 Am. Dec. 131; Cist v. Zeigler, 16 Serg. & R. (Pa.) 282; 16 Am. Dec. 573; Betts v. Starr, 5 Conn. 550; 13 Am. Dec. 94.

3, Krekeler v. Ritter, 62 N. Y. 372; Foye v. Patch, 132 Mass. 105; Walker v. Chase, 53 Me. 258; Beall v. Pearre, 12 Md. 550; Larum v. Wilmer, 35 Iowa 244; Finley v. Hanoest, 30 Pa. St. 190.

§ 621. Matters which might have been litigated in a former suit.—It is a rule which, with some limitations, has been often recognized that the courts will not

permit the same parties to open the same subject of litigation in respect to matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they had from negligence, inadvertence or even accident omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court is actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.[1] Thus, if the plaintiff fails to give any evidence of certain items of an account, he will be precluded from proving the same in a subsequent action.[2] It has often been held that a plaintiff *cannot sever a book account*, and bring separate actions for the several portions; in such cases, a judgment for some of the items is a bar to another action for other items.[3] This is upon the theory that, when the dealings are continuous and nothing appears to show that the parties supposed the several items were to constitute separate transactions or causes of actions, the court would presume the claim to be entire and indivisible.[4] The same rule applies if one sues for only part of an indivisible claim[5] or if an action is brought for less than the whole amount due.[6]

So if, in an action on a note and mortgage, judgment is rendered on the note alone, the plaintiff is precluded from claiming any lien in a subsequent action;[7] and if a plaintiff by mistake takes judgment by default for less than his claim, he is barred from suing for the balance.[8] It has even been held that a judgment in favor of a physician for professional services is a bar to a subsequent action by the defendant for malpractice in rendering such services, although the question of malpractice was not raised or litigated in the first action.[9] But this seems to be an application of the principle under discussion which can hardly be sustained.[10] A defendant, when sued, ought *not be compelled to litigate an independent claim* which he may have against the plaintiff, and which he may prefer to have heard in another forum.[11] It was so held even where, in an action for the price of a horse, the defendant set up breach of warranty, but failed to appear at the hearing, and judgment was rendered against him; he was held not precluded from suing on the warranty in another action.[12] It is the general rule that, when a defendant has a *counter-claim*, he is not compelled to plead and prove the same as defendant, but may assert his claim in a separate action.[13] And when one had a counter-claim which could not have been pleaded as a defense in an action on a note, it was held that

he might prove the same in an action on the judgment rendered upon such note.[14] But of course if he does litigate his claim in the same action, he is bound by the result.[15] The same rule applies if the court erroneously excludes evidence,[16] or if new evidence which would change the result has been discovered,[17] for the judgment, unless reversed or vacated, remains a bar. The *rule applies to defendants as well as plaintiffs.* Defendants are presumed to have presented all the evidence and all their grounds of defense, for actions cannot be tried piecemeal.[18] Thus, if the defendant on a promissory note neglects to offer proof of want of consideration or of forgery, the judgment is as conclusive in future proceedings as if the defense had never existed.[19] So in actions affecting the title to land, the defendant must bring forward all the defenses or claims of title on which he intends to rely. He cannot reserve defenses to be tried in another suit;[20] and where a defendant in a suit on one of a series of notes given for the purchase price of property defeats recovery under a plea of failure of consideration, he is precluded from making the same defense in a subsequent action on other notes of the series.[21]

1, Henderson v. Henderson, 3 Hare 115; Farquharson v. Seton, 5 Russ. 45; Partridge v. Usborne, 5 Russ. 195; Chamley v. Lord Dunsany, 2 Schoales & L. 718; Kaehler v. Dobberpuhl, 60 Wis. 256; Pennock v. Kennedy, 153 Pa. St. 579; Danaher v. Prentiss, 22 Wis. 316; Simpson v. Hart, 1

Johns. Ch. 91; Le Guen v. Gouverneur, 1 Johns. 436; 1 Am. Dec. 121; Des Moines & Ft. D. Ry. Co. v. Bullard, 89 Iowa 749; Embury v. Connor, 3 N. Y. 511; 53 Am. Dec. 325; Bates v. Spooner, 45 Ind. 489; Bailey v. Bailey, 115 Ill. 551. See note, 78 Am. Dec. 760. For the rule where the cause of action is different, see sec. 614 *supra*.

2, Guernsey v. Carver, 8 Wend. 492; 24 Am. Dec. 60; Borngesser v. Harrison, 12 Wis. 544; 78 Am. Dec. 757; Bendernagle v. Cocks, 19 Wend. 207; 32 Am. Dec. 448; Avery v. Fitch, 4 Conn. 362; Lucas v. Le Compte, 42 Ill. 303; Memmer v. Carey, 30 Minn. 458; Oliver v. Holt, 11 Ala. 574; 46 Am. Dec. 228; Ingraham v. Hall, 11 Serg. & R. (Pa.) 78. Contra, Badger v. Titcomb, 15 Pick. 409; 26 Am. Dec. 611; Cunnington v. Wareham, 9 Cush. 590.

3, Lucas v. Le Compte, 42 Ill. 303; Pittman v. Chrisman, 59 Miss. 124; Bolen Coal Co. v. Whittaker Co., 52 Kan. 747.

4, Magruder v. Randolph, 77 N. C. 79. A different rule applies where the transactions or sales are separate and independent of each other, American Machine Co. v. Thornton, 28 Minn. 418; Terreri v. Jutte, 159 Pa. St. 244; Secor v. Sturgis, 16 N. Y. 541; Schmidt v. Zahensdorf, 30 Iowa 498.

5, Miller v. Covert, 1 Wend. 487; Smith v. Jones, 15 Johns. 229; Hill v. Joy, 149 Pa. St. 243; Willard v. Sperry, 16 Johns. 121; Bowe v. Minnesota Milk Co., 44 Minn. 460; Baker v. Stinchfield, 57 Me. 363; Beronio v. Southern Pac. Rv. Co., 86 Cal. 415; Burford v. Kersey, 48 Miss. 642; Wickersham v. Whedon, 33 Mo. 561; Bassett v. Connecticut River Co., 150 Mass. 178; Thislor v. Miller, 53 Kan. 515, action against an officer for wrongful seizure of animals; Hodge v. Shaw, 85 Iowa 137, where there is permanent obstruction of a right of way, one suit for trespass bars others; Sullivan v. Baxter, 150 Mass. 261, as to judgment for conversion. But part of a claim may be withdrawn, and as to such part of the judgment it is not *res judicata*, Busch v. Jones, 94 Mich. 223.

6, Bowden v. Horne, 7 Bing. 716; Olmstead v. Bach, 78 Md. 132.

7, Johnson v. Murphy, 17 Tex. 216.

8, Footman v. Stetson, 32 Me. 17; 52 Am. Dec. 634.

9, Gates v. Preston, 41 N. Y. 113; Blair v. Bartlett, 75 N. Y. 150; 31 Am. Rep. 455.

10, Ressequie v. Byers, 52 Wis. 650; 38 Am. Rep. 775; Bodurtha v. Phelon, 13 Gray 413; O'Connor v. Varney, 10 Gray 231; Bascom v. Manning, 52 N. H. 132; Barker v. Cleveland, 19 Mich. 230; Mondel v. Steele, 8 M. & W. 858; Rigge v. Burbridge, 15 M. & W. 598; Davis v. Hedges, L. R. 6 Q. B. 687.

11, Stark v. Starr, 94 U. S. 477; Phillips v. Berick, 16 Johns. 136; 8 Am. Dec. 299; Bendernagle v. Cocks, 19 Wend. 207; 32 Am. Dec. 448; Railroad v. Castello, 50 Ala. 12; Flaherty v. Taylor, 35 Mo. 447; Eastman v. Porter, 14 Wis. 39.

12, Burwell v. Knight, 51 Barb. (N. Y.) 267; Fairfield v. McNamy, 37 Iowa 75; Robbins v. Harrison, 31 Ala. 160.

13, Mondel v. Steele, 8 M. & W. 858; Davis v. Hedges, L. R. 6 Q. B. 687; Bascom v. Manning, 52 N. H. 132; Burnett v. Smith, 4 Gray 50; Gillispie v. Torrence, 25 N. Y. 306, 310; Indiana Ins. Co. v. Stratton, 4 Ind. App. 566; Black v. Miller, 75 Mich. 323; Uppfalt v. Woreman, 30 Neb. 189; Seventh Day Assn. v. Fisher, 95 Mich. 274; Dewsnap v. Davidson, 18 R. I. 98; Riley v. Hale, 158 Mass. 240. See note, 40 Am. Dec. 326.

14, Dudley v. Stiles, 32 Wis. 370.

15, Thompson v. Schuster, 4 Dak. 163; Simes v. Zane, 24 Pa. St. 242; Nave v. Wilson, 33 Ind. 294.

16, Beall v. Pearre, 12 Md. 550; Burnett v. Smith, 4 Gray 50; Grant v. Button, 14 Johns. 377; Smith v. Whiting, 11 Mass. 445.

17, Flint v. Bodge, 10 Allen 128.

18, Pearl v. Wells, 6 Wend. 291; 21 Am. Dec. 328; Kelly v. Donlin, 70 Ill. 378; Howe v. Lewis, 121 Ind. 110; Shaffer v. Scuddy, 14 La. An. 575; Barksdale v. Greene, 29 Ga. 419; Footman v. Stetson, 32 Me. 17; Hackworth v. Zollars, 30 Iowa 433. See also, Green v. Sanborn, 150 Mass. 454.

19, Cromwell v. County of Sac, 94 U. S. 351.

20, Dodd v. Scott, 81 Iowa 319; Dowell v. Applegate, 152 U. S. 327.

21, Hanover v. Kilander, 135 Ind. 600.

§ 622. Same, continued.—There has been some controversy whether this rule applies to the *defense of payment.* Some authorities hold that, if the plaintiff neglects to make proper credits in taking judgment, the defendant is not precluded in another action from proving the facts. But the clear weight of authority is that in such cases the judgment is a bar, and that an action will not lie to recover money paid under such circumstances. "It is clear that, if there be a *bona fide* legal process under which money is recovered, although not actually due, it cannot be recovered back, inasmuch as there must be some end of litigation."[1] A learned author thus states the rule as to the conclusive effect of judgments upon the matters in issue: "A judgment or decree is conclusive upon all causes of action and all matters of defense presented by the pleadings and not withdrawn before or during the trial, except, *first*, where the plaintiff claims on several and distinct causes of action, in which case he may, according to some of the authorities, maintain a second action upon any one of those causes upon which he can show that he offered no evidence at the trial of the former case; *second*, where the defendant pleads a matter as a defense which he might have suc-

cessfully employed as a cause of action against the plaintiff, in which case, it appears that the right to such cause of action is not lost to the defendant, unless he followed up his pleading by offering evidence upon it in the former suit. With the possible exception here stated, a judgment is conclusive upon all the material issues made by the pleadings, and also upon all material allegations of matters of claim or of defense which the party against whom such allegation is made does not choose to controvert."[2] Although the courts very generally recognize the rule stated at the beginning of the last section, with the limitations which have been referred to, and have often stated very broadly the doctrine that the judgment is not only conclusive as to the matters actually contested, but as to those matters which might have been contested,[3] yet it must be borne in mind that the rule refers only to those issues which were within the issues before the court, and so might have been determined.[4]

1, Duke de Cadaval v. Collins, 4 Adol. & Ell. 867; Cromwell v. County of Sac, 94 U. S. 351.

2, Freem. Judg. sec. 272.

3, Hamilton v. Quimby, 46 Ill. 90; Shaffer v. Scuddy, 14 La. An. 575; Fischli v. Fischli, 1 Blackf. (Ind.) 360; Sayre v. Harpold, 33 W. Va. 553; Denver Water Co. v. Middaugh, 12 Col. 434.

4, Fairchild v. Lynch, 99 N. Y. 359; Nesbit v. Independent District, 144 U. S. 610.

§ 623. Judgments in rem as evidence.—As regards the effect of judgments, there is a generally recognized distinction between the class of judgments heretofore discussed, that is, judgments *in personam*, and those which are generally known as judgments *in rem*. Actions of this class are proceedings against property alone, which is treated as responsible for the claims asserted by the libellants or plaintiffs.[1] Among the judgments generally designated as judgments *in rem* are those for the condemnation of property as forfeited,[2] adjudications on the subject of prizes or enforcement of maritime liens,[3] judgments for divorce[4] and grants of probate and administration.[5] Judgments in attachment and garnishment are also sometimes classified as *judgments in rem*.[6] They are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. They differ among other things from actions which are strictly *in rem* in that the interest of the defendant is alone sought to be affected, that citation to him is required and that judgment therein is only conclusive between the parties.[7] It is a rule, peculiar to proceedings strictly *in rem*, that in such proceedings all persons are deemed parties, and those claiming hostile rights are

bound to come in and assert such right, and, if they fail so to do, they are conclusively bound by the judgment. Thus, the sentence of a court of admiralty, having jurisdiction, decreeing a ship to be a lawful prize, is conclusive upon all the world as to the facts found, until reversed, where such facts are plainly stated on the face of the sentence.[8] It has been held, however, that the conclusiveness of the judgment in such cases must be confined to those persons who, from their interest in the subject of the proceeding *in rem*, were entitled to appear in such proceeding, and assert their interest in the thing condemned;[9] nor is such a decree conclusive of any fact, not necessary to be found.[10] It is clear that, if the court has no jurisdiction over the subject matter, its decree has no conclusive effect, even collaterally. Thus, where a court proceeded to seize and confiscate the property of a corporation, under the statute which only authorized the condemnation of the property of natural persons, the decree is not evidence, or of any validity.[11] When no *notice* is given to the parties interested in the *res*, against which proceedings are instituted, the judgment affords no evidence of any personal obligation or liability of such parties, however conclusive it may be as to the title of the property affected. In other words, adjudications which stand merely as proceedings *in rem* cannot, as a general rule,

be made the foundation of ulterior proceedings *in personam*, so as to conclude a party upon the facts involved.[12] It is on this principle that in attachment proceedings, although constructive notice may be given by publication or otherwise, the judgment may be conclusive as to the title of property seized, yet it is not a judgment on which execution can be issued for the money, or on which an action can be based.[13]

1, Freeman v. Alderson, 119 U. S. 185. For various definitions of judgments *in rem*, see note, Duchess of Kingston's case, 2 Smith L. C. 810; Freem. Judg. sec. 606; Black Judg. sec. 792. For numerous illustrations of the subjects discussed in this section, see Brown on Jurisdiction. See also note, 75 Am. Dec. 720.

2, Scott v. Shearman, 2 W. Black. 977; Cooke v. Sholl, 5 T. R. 255.

3, LeCaux v. Eden, 2 Doug. 594; Williams v. Armroyd, 7 Cranch 423; Gelston v. Hoyt, 3 Wheat. 246, 315.

4, R. v. Grundon, 1 Cowp. 315.

5, Allen v. Dundas, 3 T. R. 125; Bogardus v. Clark, 4 Paige (N. Y.) 623; Vanderpoel v. Van Valkenburgh, 6 N. Y. 190.

6, Woodruff v. Taylor, 20 Vt. 65; Cooper v. Reynolds, 10 Wall. 308; Maxwell v. Stewart, 22 Wall. 77; Megee v. Beirne, 39 Pa. St. 50; Moore v. Chicago, R. I. & P. Ry. Co., 43 Iowa 385, garnishment.

7, Freeman v. Alderson, 119 U. S. 185.

8, Gelston v. Hoyt, 13 Johns. 561; 3 Wheat. 246; Risley v. Phenix Bank, 83 N. Y. 318; 38 Am. Rep. 421; Croudson v. Leonard, 4 Cranch 434; The Helena, 4 Rob. Chr. 3; Williams v. Armroyd, 7 Cranch 423, where it was so held in a prize case although avowedly contrary to the law of nations. Steph. Ev. art. 42; 2 Smith L. C. 851.

9, The Mary, 9 Cranch 126.

10, Maley v. Shattuck, 3 Cranch 458.

11, Risley v. Phenix Bank, 83 N. Y. 318; 38 Am. Rep. 421; Thompson v. Whitman, 18 Wall. 457; Cheriot v. Foussat, 3 Binn. (Pa.) 220.

12. Salem v. Eastern Ry. Co., 98 Mass. 448; 96 Am. Dec. 650; Rand v. Hanson, 154 Mass. 87; Pennoyer v. Neff, 95 U. S. 714.

13, Jones v. Spencer, 15 Wis. 583; Greenl. Ev. sec. 542; Drake Attach. sec. 5.

§ 624. Same—Judgment of divorce.—"A sentence of divorce has or may have a dual nature. A judgment of divorce is a decree *in rem*, so far as it fixes the *status* of the parties by dissolving their marital obligation. But so far as it disposes of any other matter than the marriage relation, it is *in personam*."[1] The English courts have held that no foreign court has power, so far as any consequences in England are concerned, to annul a marriage solemnized in England between English subjects.[2] In this country, the chief conflict of opinion has arisen respecting *judgments in sister states*, rendered without personal service. It is generally conceded that, if a party goes to another state *for the mere purpose of obtaining a divorce* and seeks to gain a residence for that purpose, no jurisdiction is gained, and the judgment is not conclusive for any purpose on the other party. Such a judgment is a fraud upon the court.[3] It has been held in some jurisdictions that

a decree of divorce, obtained in another state, in conformity to the laws of that state, without obtaining jurisdiction of the person of the defendant by personal service of process within the jurisdiction of such state, or by appearance, can only fix and determine the *status of the party within its own jurisdiction.*[4] Thus, it was held in New York that a divorce, obtained in another state by publication of summons, had no validity against a defendant actually domiciled in New York, and that it constituted no defense in an action for bigamy.[5]

1, Freem. Judg. sec. 584; Black Judg. sec. 803. See notes, 7 Am. Dec. 206; 21 Am. Dec. 747; 65 Am. Dec. 355–361; 39 Am. St. Rep. 371; 75 Am. Dec. 722.

2, Briggs v. Briggs, 5 Pr. Div. 163; Tovey v. Lindsay, 1 Dow 117. *In re* Wilson's Trusts, 35 L. J. (Ch.) 243; Tayl. Ev. sec. 1726.

3, Hanover v. Turner, 14 Mass. 227; 7 Am. Dec. 203; Chase v. Chase, 6 Gray 157; Sewall v. Sewall, 122 Mass. 156; 23 Am. Rep. 299; Reed v. Reed, 52 Mich. 117; 50 Am. Rep 247; Colburn v. Colburn, 70 Mich. 647; Neff v. Beauchamp, 74 Iowa 92; Flower v. Flower, 42 N. J. Eq. 152; Tipton v. Tipton, 87 Ky. 243; Ditson v. Ditson, 4 R. I. 87; Hood v. State, 56 Ind. 263; 26 Am. Rep. 21.

4, People v. Baker, 76 N. Y. 78; 32 Am. Rep. 274; O'Dea v. O'Dea, 101 N. Y. 23; Jones v. Jones, 108 N. Y. 415; 2 Am. St. Rep. 447; Gregory v. Gregory, 78 Me. 187; 57 Am. Rep. 792; Flower v. Flower, 42 N. J. E. 152; De Meli v. De Meli, 120 N. Y. 485; 17 Am. St. Rep. 652.

5, People v. Baker, 76 N. Y. 78; 32 Am. Rep. 274.

§ 625. Same, continued.— The cases above cited proceed upon the theory that the

marriage relation is not a *res* within the state of the party invoking the jurisdiction of a court to dissolve it so as to authorize the court to bind the absent party by substituted service without the jurisdiction.[1] But the view generally prevails in this country that the courts of the actual domicil of a married person may render a judgment which has the effect of a decree *in rem*, so far as it affects the matrimonial *status*.[2] But it does not necessarily follow that such a decree, based upon constructive notice alone, is conclusive evidence against the right of the defendant to *alimony*, *dower* or other action asserting claim to property.[3] Generally the usual rule as to the conclusiveness of judgments between parties obtains; and the decree is conclusive as to the facts found or necessary to be found at the hearing,[4] for example, as to the cause of divorce,[5] as to the existence of the marriage,[6] the dissolution of the marriage[7] and the right to a divorce upon the facts presented.[8] And although a judgment in an action of divorce is binding upon all persons so far as it determines the *status* of the parties,[9] yet it is *not conclusive on third persons as to other questions*, for example, as to the fact of the marriage[10] or of guilty conduct.[11]

1, Jones v. Jones, 108 N. Y. 415; 2 Am. St. Rep. 447.

2, Hull v. Hull, 2 Strob. Eq. (S. C.) 174; Hubbell v. Hubbell, 3 Wis. 662; 62 Am. Dec. 702; Mansfield v. McIntyre, 10 Ohio 28; Ditson v. Ditson, 4 R. I. 87; Thompson

v. State, 28 Ala. 12; Tolen v. Tolen, 1 Blackf. (Ind.) 407; 21 Am. Dec. 742; Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146; Gould v. Crow, 57 Mo. 200; 2 Bish. Mar., Div. & Sep. secs. 152 *et seq.*; Freem. Judg. sec. 584.

3, Cook v. Cook, 56 Wis. 195; 43 Am. Rep. 706; Wright v. Wright, 24 Mich. 180; Mansfield v. McIntyre, 10 Ohio 28; Webster v. Webster, 54 Iowa 153; Beard v. Beard, 21 Ind. 321; Turner v. Turner, 44 Ala. 437; Gould v. Crow, 57 Mo. 200; Prosser v. Warner, 47 Vt. 667; 19 Am. Rep. 132; Reel v. Elder, 62 Pa. St. 308; Garner v. Garner, 56 Md. 127.

4, Vance v. Vance, 17 Me. 203; Thurston v. Thurston, 99 Mass. 39; Brown v. Brown, 37 N. H. 536; 75 Am. Dec. 154; Prescott v. Fisher, 22 Ill. 390; Lewis v. Lewis, 106 Mass. 309; Bradshaw v. Heath, 13 Wend. 407; Gill v. Read, 5 R. I. 343; 73 Am. Dec. 73; Blain v. Blain, 45 Vt. 538; Amory v. Amory, 26 Wis. 152. See note, 65 Am. Dec. 361.

5, Slade v. Slade, 58 Me. 157.

6, Mayhew v. Mayhew, 3 Maule & S. 266.

7, Hood v. Hood, 11 Allen 196; 87 Am. Dec. 709.

8, Fera v. Fera, 98 Mass. 155; Slade v. Slade, 58 Me. 157; Thurston v. Thurston, 98 Mass. 39.

9, Burlen v. Shannon, 3 Gray 387.

10, Gourand v. Gourand, 3 Redf. (N. Y.) 262; Freem. Judg. secs. 154, 313.

11, Gill v. Reed, 5 R. I. 343; 73 Am. Dec. 73; Needham v. Bremner, 12 Jur. N. S. 434; L. R. 1 C. P. 583.

§ 626. Judgments in probate — Conclusive effect of — Proof of death, etc. — In determining the effect of judgments of probate courts, as conducted in this country, the same general principles which govern in other courts are applicable. Where the decree is

of the nature of a proceeding *in rem*, and relates to those matters of exclusive jurisdiction, as in the *settlement of estates*, the judgment is binding on all the world.[1] Thus, it has been held inadmissible after the probate of a will to show that the testator was mad or that the will was forged, as those are matters which should have been urged in opposition to the grant of probate;[2] nor is it admissible to show that the testator made a subsequent will and appointed another executor;[3] nor that the will was not executed according to the law of the country where the testator was domiciled;[4] nor can it be collaterally impeached on other grounds;[5] nor can it be shown, after letters of administration have been granted, that an administrator had not been legally appointed, and was not a competent person;[6] nor will collateral inquiry be made into the legality of the appointment of a guardian.[7] The letters issued to an executor or administrator prove that the authority incident to the office has devolved upon the person therein named; that he is the executor or administrator, and that the preliminary proceedings have been regularly taken;[8] and in actions respecting the settlement of the estate of the deceased, they are conclusive evidence of the right of the administrator to sue for and receive whatever was due to the deceased,[9] or as to the validity of the claims allowed.[10] But such letters are

not conclusive proof of the death of the alleged decedent, even between parties and privies;[11] nor are they evidence of death in an action brought by a plaintiff individually on an insurance policy on the life of the one claimed to be deceased.[12]

1, Simmons v. Saul, 138 U. S. 439; Caujolle v. Ferrie, 13 Wall. 465; Harris v. Colquit, 44 Ga. 663; Stiles v. Burch, 5 Paige (N. Y.) 132; Womack v. Womack, 23 La. An. 351; Byrne v. Hume, 84 Mich. 185; Rudy v. Ulrich, 69 Pa. St. 177; 8 Am. Rep. 238; Ward v. State, 40 Miss. 108; Judd v. Ross, 146 Ill. 40; Cummings v. Cummings, 123 Mass. 270; Mooney v. Hines, 160 Mass. 469; Simpson v. Norton, 45 Me. 281; State v. McGlynn, 20 Cal. 233; 81 Am. Dec. 118; Gates v. Treat, 17 Conn. 388; Sanborn v. Perry, 86 Wis. 361; Hutton v. Williams, 60 Ala. 107; Johnson v. Beazley, 65 Mo. 250; 27 Am. Rep. 276; Jones v. Chase, 55 N. H. 234; Roderigas v. East River Sav. Inst., 63 N. Y. 460; 20 Am. Rep. 555; Cecil v. Cecil, 19 Md. 79; 81 Am. Dec. 626; Wall v. Wall, 123 Pa. St. 545; 10 Am. St. Rep. 549; Corrigan v. Jones, 14 Col. 311; Lawrence v. Englesby, 24 Vt. 42; Blake v. Butler, 10 R. I. 133; Turner v. Malone, 24 S. C. 398; Kurtz v. St. Paul & D. Ry. Co., (Minn.) 63 N. W. Rep. 1. See notes, 75 Am. Dec. 722; 46 Am. St. Rep. 466; 21 L. R. A. 680–689.

2, Noell v. Wells, 1 Lev. 235; Mutual L. Ins. Co. v. Tisdale, 91 U. S. 238; 2 Smith L. C. 827 (star page). Same as to judgment settling probate of will, Miller v. Foster, 76 Tex. 479.

3, Moore v. Tanner, 5 T. B. Mon. (Ky.) 42; 17 Am. Dec. 35.

4, Whicker v. Hume, 7 H. L. Cas. 124.

5, Vanderpoel v. Van Valkenburgh, 6 N. Y. 190.

6, Lawrence v. Englesby, 24 Vt. 42.

7, Farrar v. Olmsted, 24 Vt. 123.

8, Mutual L. Ins. Co. v. Tisdale, 91 U. S. 238.

9, Mutual L. Ins. Co. v. Tisdale, 91 U. S. 238.

10, Phelen v. Fitzpatrick, 84 Wis. 240; City of La Porte v. Organ, 5 Ind. App. 369.

11, Thompson v. Donaldson, 3 Esp. 63; Moons v. De Bernales, 1 Russ. 301; Cunn n ham v. Smith, 70 Pa. St. 450; Tisdale v. Connecticut M. L. Ins. Co., 26 Iowa 170; 96 Am. Dec. 136; English v. Murray, 13 Tex. 366. See note, 19 Am. Rep. 148. But they are conclusive in a collateral proceeding, French v. Frazier, 7 J. J. Marsh. (Ky.) 425; Lancaster v. Insurance Co., 62 Mo. 121; or where no plea in abatement is filed, Newman v. Jenkins, 10 Pick 515.

12, Mutual L. Ins. Co. v. Tisdale, 91 U. S. 238.

§ 627. Same — Jurisdiction.—As in the case of other judgments, the *jurisdiction of the court is essential to the validity* of the judgments of courts of probate. It is not to be inferred that they are so far conclusive that they cannot be directly attacked. It is a well settled rule that, if the appointment of an administrator or the probate of a will is secured by fraud, mistake or collusion, the facts may be proved in a direct proceeding in the same court to set aside the judgment.[1] It is a general rule that the probate or surrogate courts have no authority to grant administration, except upon the estates of deceased persons, and hence that the *letters are a nullity, if the person is alive.*[2] Under the statutes of New York in a case which has excited much comment, the statutes were construed to extend the jurisdiction so that letters might be issued, not only upon the estates of decedents, but also upon the es-

tates of persons whom the surrogate should determine upon evidence to be dead;[3] and that a payment by a debtor to an administrator, so appointed, was valid, and a bar to an action to compel a second payment, though the supposed decedent was alive and the letters had been revoked.[4] But in a new trial, it was proved that the clerk of surrogate had issued the letters without evidence or authority, and that, since the letters were without jurisdiction and void, they afforded no protection to the debtor for his payment to the person named as administrator.

1, Waters v. Stickney, 12 Allen 1; Gaines v. Chew, 2 How. 651; Gaines v. Hennen, 24 How. 567; Estate of Leavens, 65 Wis. 440.

2, Jochumsen v. Suffolk Bank, 3 Allen 87; Melia v. Simmons, 45 Wis. 334; 30 Am. Rep. 746; Griffith v. Frazier, 8 Cranch 9; Allen v. Dundas 3 T.R. 125.

3, Roderigas v. East River Sav. Inst., 63 N. Y. 460; 20 Am. Rep. 555.

4, See case last cited.

§ 628. Collateral proof to show want of jurisdiction.—We have already called attention to the *presumption in favor of the jurisdiction* of courts.[1] But in this section we will discuss more fully the effect of such presumption in respect to domestic judgments. It is a rule, generally admitted, that nothing is presumed to be out of the jurisdiction of superior courts of general jurisdiction, but that which specially appears to be so.[2] It is

also generally conceded that, if the want of jurisdiction *appear on the face of the proceedings*, expressly or by necessary implication, whether as to the subject matter or as to the parties, the judgment is void and will be so treated even in a collateral proceeding.[2] But in the case of domestic judgments, there has been much discussion and no little confusion in the authorities as to whether any evidence can be received to show want of jurisdiction when no defect appears on the face of the proceedings. But undoubtedly the great weight of authority sustains the proposition that, *in the case of a domestic judgment of a court of general jurisdiction, want of jurisdiction cannot be shown by extrinsic evidence in a collateral proceeding.*[4] This rule proceeds on the theory that the decision of the court, as to the subject of jurisdiction, is binding on the parties and privies on grounds of public policy, and that, if a review of this decision is desired, the rights of the parties may be protected by appeal or writ of error, or by a direct attack in an equitable proceeding.[5]

1, See sec. 26 *supra*. See notes, 15 Am. Dec. 378; 94 Am. Dec. 765–770.

2, See sec. 26 *supra*.

3, McKee v. McKee, 14 Pa. St. 231; Jackson v. Brown, 3 Johns. (N. Y.) 459; Tunis v. Withrow, 10 Iowa 305; 77 Am. Dec. 117; Hess v. Cole, 23 N. J. L. 116; Babbitt v. Doe, 4 Ind. 355; Moore v. Starks, 1 Ohio St. 369; Paine v. Mooreland, 15 Ohio 435; 45 Am. Dec. 585; Ragan's Estate,

7 Watts (Pa.) 438; Eddy v. People, 15 Ill. 386; Abrams v. Jones, 4 Wis. 806; Harris v. Hardeman, 14 How. 334. For a general discussion of the impeachment of judgments for want of jurisdiction, see notes, 11 Am. Rep. 435; 26 Am. Rep. 27; article, 40 Cent. L. Jour. 67.

4, Pease v. Whitten, 31 Me. 117; Succession of Durnford, 1 La. An. 92; Parks v. Moore, 13 Vt. 183; 37 Am. Dec 589; Grier v. McLendon, 7 Ga. 362; Selin v. Snyder, 7 Serg. & R. (Pa.) 171; Barron v. Fart, 18 Ala. 668; Clark v. Sawyer, 48 Cal. 133; Brockerborough v. Melton, 55 Tex. 493; Wenner v. Thornton, 98 Ill. 156; Callen v. Ellison, 13 Ohio St. 446; 82 Am. Dec. 448; Coit v. Haven, 30 Conn. 190; 79 Am. Dec. 244; Cook v. Darling, 18 Pick. 393; Wingate v. Haywood, 40 N. H. 437; Clark v. Bryan, 16 Md. 171; Ferguson v. Crawford, 70 N. Y. 253; 26 Am. Rep. 589; Letney v. Marshall, 79 Tex. 573.

5, Callen v. Ellison, 13 Ohio St. 446; 82 Am. Dec. 448; Coit v. Haven, 30 Conn. 190; 79 Am. Dec. 244; Freem. Judg. sec. 130.

§ 629. Contrary view — Qualifications of general rule. — There are, however, numerous decisions which are often cited as not being in harmony with this view. Some of these maintain that the jurisdiction of the courts under discussion may be attacked collaterally by extrinsic evidence. A large number of these cases will be found cited in a New York decision in which this question is fully discussed.[1] Although it was there freely admitted that the weight of authority is otherwise, it was held that the recital of jurisdictional facts in the record of the judgment of any court is not conclusive, and may be disproved by extrinsic evidence. This decision is based in part on the fact that, under

the New York code of procedure, equitable defenses are allowable; and it is claimed that there is no reason why the defendant in an action on the judgment should not be allowed to set up, by way of defense, any facts which would be ground for relief in equity. Other cases which hold judgments open to collateral attack for want of jurisdiction will be found cited in the notes.[2] Domestic judgments cannot be questional collaterally, although errors or irregularities may appear on the face of the proceeding, unless the errors are such as to show want of jurisdiction.[3] The rule that, when a court has once acquired jurisdiction, it has a right to decide every question which arises in the case, and that its judgment, however erroneous, cannot be collaterally assailed is subject to *qualifications* in its application. "It is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."[4]

1, Ferguson v. Crawford, 70 N. Y. 253; 26 Am. Rep. 589.

2, Williamson v. Berry, 8 How. 495; Shriver v. Lynn, 2 How. 43; Hickey v. Stewart, 3 How. 750; Enos v. Smith, 15 Miss. 85; Shaefer v. Gates, 2 B. Mon. (Ky.) 453; 38 Am. Dec. 164; Bloom v. Burdick, 1 Hill 130; 37 Am. Dec. 299; Wilcox v. Jackson, 13 Peters 498; Demeritt v. Lyford, 27 N. H. 541; Ferguson v. Crawford, 70 N. Y. 253; 26 Am. Rep. 589; Risley v. Phœnix Bk., 83 N. Y 318; 38 Am. Rep.

421; Galpin v. Page, 18 Wall. 350. As to the rule where the jurisdictional facts do not appear in the record, see sec. 26 *supra*.

3, Faulkner v. Guild, 10 Wis. 561.

4, Windsor v. McVeigh, 93 U. S. 274; United States v. Walker, 109 U. S. 258.

§ 630. Inferior courts—Jurisdiction to appear on record.— While the recital of jurisdictional facts in the proceedings of inferior courts is *prima facie* evidence of such jurisdiction, there is no conclusive presumption of the truth of such recitals, and they may be contradicted by extrinsic evidence.[1] When the powers of such a court "are limited as it regards the cause of action, its locality or amount, the restriction cannot be evaded by a finding or allegation which is contrary to the truth; and if such an averment is made of record, it may be disproved, and the judgment set aside collaterally."[2] It is a familiar rule that the jurisdiction of inferior courts should appear on the face of the proceedings, and it has frequently been held that, if the jurisdiction does not so appear, the judgment is void.[3]

1, Jenks v. Stebbins, 11 Johns. 224; Barber v. Winslow, 12 Wend. 102; Denning v. Corwin, 11 Wend. 647; Borden v. Fitch, 15 Johns. 121; 8 Am. Dec. 225; People v. Cassels, 5 Hill 164; Clark v. Holmes, 1 Doug. (Mich.) 390; Willis v. Sproule, 13 Kan. 257.

2, 1 Smith L. C. (8th ed.) 1120; Harriott v. Van Cott, 5 Hill 285; Bowne v. Mellor, 6 Hill 496.

3, Adams v. Jeffries, 12 Ohio 253; 40 Am. Dec. 477; Bigelow v. Stearns, 19 Johns. 39; 10 Am. Dec. 189; Chase v. Hathaway, 14 Mass. 222; Enos v. Smith, 15 Miss. 85; Clark v. Bryan, 16 Md. 171.

§ 631. Merits of foreign judgments—Not open to inquiry.—That some degree of respect should be paid by the courts of one country to the judgments of the courts of foreign countries is universally conceded. The obligation to give credit to foreign judgments does not depend upon any rule of international law.[1] It has sometimes been said to rest on grounds of international comity. But, according to other authorities, such credit is given on the principle "that the judgment of the court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts of this country are bound to enforce."[2] As will appear, it is conceded on all hands that there are certain reasons on account of which a foreign judgment may be impeached. The question whether such judgments may be impeached upon the merits has given rise to an interesting and long continued controversy. The respective arguments are thus clearly stated by Mr. Smith in his note to the Duchess of Kingston's Case: "Upon one side, it is said that the tribunals of this country are not bound to enforce the judgments of a foreign court; that, when they do so, it

is *de gratia*, and from a wish to extend the limits of justice, *ampliare justitiam*. But that it would be to amplify injustice, not justice, were they to enforce a sentence which ought never to have been pronounced, because against the party with whom right was. On the other side, it is answered with great force that invariable experience shows that facts can never be inquired into so well as on the spot where they arose; laws never administered so satisfactorily as in the tribunals of the country governed by them; that, if our courts were to allow matters judicially decided upon to be again opened at any distance of time or place, the consequences would be, in ninety-nine cases out of a hundred, that they would be deceived by the concoction of testimony, or by the abstraction of it, or by the want of it; and that injustice and mistakes, instead of being amended, would be generated." [3]

1, Wheat. Int. L. sec. 147. See note, 20 L. R. A. 668–682, for a general discussion of foreign judgments. As to the effect of judgments of confederate courts, see note, 89 Am. Dec. 261.

2, Godard v. Gray, L. R. 6 Q. B. 139; Williams v. Jones, 13 M. & W. 633.

3, 2 Smith L. C. 847; Story Conf. L. sec. 607.

§ 632. Same — Conflicting views. — In the earlier English cases, considerable latitude was given in admitting evidence as to the foreign law, and in ascertaining whether

the judgment was warranted by that law; in other words, the foreign judgment was treated as little more than *prima facie* evidence in behalf of the one who offered it.[1] But the more recent decisions have settled the doctrine that foreign judgments, even in actions *in personam*, are *conclusive*, and prevent any re-trial on the merits.[2] The cases last cited also overrule the former doctrine of the English courts that the court would disregard a foreign judgment, if it appeared to have been rendered under a mistake of the English law.[3] Many of the *American cases* have followed the earlier English cases above referred to, and have held that inquiry may be made not only into the question of jurisdiction, but as to the merits of the foreign judgment.[4] There is, however, in the later authorities a decided tendency toward the adoption of the rule which has come to prevail in England. After discussing the subject fully, the court of appeals of New York uses the following language: "We think the rule adopted in England, holding the same doctrine as to foreign judgments, and recognized in this state should be adopted and adhered to here in respect to such foreign judgments; and that the same principles and decisions which we have made as to judgments from the courts of the other states of the union, should be applied to foreign judgments."[5]

1, Phillips v. Hunter, 2 H. Black. 410; Walker v. Witter, Doug. 1; Houlditch v. Donegal, 8 Bligh N. S. 301. See note, 82 Am. Dec. 413.

2, Ferguson v. Mahon, 11 Adol. & Ell. 179; Bank of Australasia v. Nias, 16 Q. B. 717; Henderson v. Henderson, 6 Q. B. 288; Godard v. Gray, L. R. 6 Q. B. 139. As to the distinction between actions *in personam* and *in rem*, see sec. 623 *supra*.

3, Godard v. Gray, L. R. 6 Q. B. 139.

4, Bissell v. Briggs, 9 Mass. 461; 6 Am. Dec. 88; Bartlett v. Knight, 1 Mass. 401; 2 Am. Dec. 36; Buttrick v. Allen, 8 Mass. 273; 5 Am. Dec. 105; Pelton v. Platner, 13 Ohio 209; 42 Am. Dec. 197; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600; 20 Am. Dec. 179; Hohner v. Gratz, 50 Fed. Rep 369; Taylor v. Barron, 30 N. H. 78; 64 Am. Dec. 281; Rankin v. Goddard, 54 Me. 28; 89 Am. Dec. 718. See note, 82 Am. Dec. 413.

5, Lazier v. Westcott, 26 N. Y. 154; 82 Am. Dec. 411 and elaborate note; Brinckley v. Brinckley, 50 N. Y. 202; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126; Low v. Mussy, 41 Vt. 393; Silver Lake Bank v. Harding, 5 Ohio 545; Konitzky v. Meyer, 49 N. Y. 571; Coughran v. Gilman, 81 Iowa 442; Chicago Bridge Co. v. Packing Co., 46 Fed. Rep. 584; Glass v. Blackwell, 48 Ark. 50; Wernse v. McPike, 100 Mo. 476; Memphis Ry. Co. v. Grayson, 88 Ala. 572; Atlanta Co. v. Andrews, 120 N. Y. 58; Hilton v. Guyott, 42 Fed. Rep. 249; Elasser v. Haines, 52 N. J. L. 10; Edwards v. Jones, 113 N. C. 453; Griggs v. Becker, 87 Wis. 313; McMullen v. Richie, 41 Fed. Rep. 502. See discussion of this subject, Black Judg. secs. 828-830.

§ 633. Foreign judgments — May be impeached for fraud or want of jurisdiction. — The general rule as to the conclusiveness of foreign judgments is not affected by the fact that mistake or *irregularity may appear on the face of the proceedings*,[1] although the judgment cannot be held conclu-

sive, if the proceedings are so defective that the point decided does not clearly appear.[2] On a familiar principle, the foreign judgment may always be impeached by extrinsic evidence showing *want of jurisdiction.* If the party was not subject to the authority of the court, or no proper steps were taken to obtain service, there could be no presumption that the merits of his case have once been adjudicated.[3] On the same principle, the judgment does not bind persons who were not residents or present in the country when the suit began,[4] although a voluntary appearance would cure the defect.[5] So the effect of the judgment may be avoided by *proof of fraud* in its procurement.[6] But the usual *presumption as to the regularity* of proceedings, and the jurisdiction of regularly constituted tribunals applies.[7] It is generally held that a foreign judgment, unlike that of a sister state, *does not involve a merger* of the original cause of action.[8] And if the plaintiff chooses to sue upon his original cause of action, instead of resorting to his judgment, it would seem that the defendant would have the right to dispute the cause of action.[9]

1, 2 Smith L. C. 841. See notes, 11 Am. Rep. 435–440; 82 Am. Dec. 412.

2, Obicini v. Bligh, 8 Bing. 335; Callander v. Dittrich, 4 Man. & G. 82; 4 Scott N. R. 682.

3, Ferguson v. Mahon, 11 Adol. & Ell. 179; Reynolds v. Fenton, 3 C. B. 187; Schibsby v. Westenholtz, L. R. 6 Q. B.

155; Bischoff v. Wethered, 9 Wall. 812; McEwan v. Zimmer, 38 Mich. 765; 31 Am. Rep. 332; Putnam v. McDougall, 47 Vt. 478; Wernet's Appeal, 91 Pa. St. 319; Bissell v. Briggs, 9 Mass. 462; 6 Am. Dec. 88; Middlesex Bank v. Butman, 29 Me. 19; Foster v. Glazener, 27 Ala. 391; Corby v. Wright, 4 Mo. App. 443; DeMeli v. DeMeli, 120 N. Y. 485; 17 Am. St. Rep. 652.

4, 2 Smith L. C 847.

5, Brissac v. Rathbone, 6 Hurl. & N. 301.

6, Henderson v. Henderson, 6 Q. B. 288; Reimers v. Druce, 23 Beav. 145; Abouloff v. Oppenheimer, 10 Q. B. Div. 295; Price v. Dewhurst, 8 Sim. 279; Lazier v. Westcott, 26 N. Y. 146; 82 Am. Dec. 404; Rankin v. Goddard, 54 Me. 28; 55 Me. 389; 89 Am. Dec. 718.

7, Henderson v. Henderson, 6 Q. B. 288. See sec. 26 *supra*.

8, Bank of Australasia v. Harding, 9 C. B. 661; Bank of Australasia v. Nias, 16 Q. B. 717; Bank v. Beebe, 53 Vt. 177; New York, L. E. & W. Ry. Co. v. McHenry, 17 Fed. Rep. 414.

9, Smith v. Nicolls, 5 Bing. N. C. 208; Doe v. Huddart, 2 Cromp., M. & R. 316. Still the judgment in such a case would be *prima facie* evidence of the plaintiff's right, Phillips v. Hunter, 2 H. Black. 402; Hall v. Odber, 11 East 118.

§ 634. Judgments of sister states — Want of jurisdiction may be shown.— The nature of the former controversy as to the effect of judgments of sister states and the present prevailing doctrine are thus clearly stated by Clifford J. in a case in the supreme court of the United States: "Cases may be found in which it is held that the judgments of a state court, when introduced as evidence in the tribunals of another state, are to be regarded in all respects as do-

mestic judgments. On the other hand, another class of cases might be cited in which it is held that such judgments in the courts of another state are foreign judgments, and that, as such, the judgment is open to every inquiry to which other foreign judgments may be subjected under the rules of the common law. Neither class of these decisions is quite correct. They are not foreign judgments under the constitution and laws of congress in any proper sense, because they shall have such faith and credit given to them in every other court within the United States as they have by law and usage in the courts of the state from whence they were taken. Nor are they domestic judgments in every sense, because they are not the proper foundation for final process, except in the state where they were rendered. Besides, they are open to inquiry as to the jurisdiction of the court and notice to the defendant. But in all other respects, they have the same faith and credit as domestic judgments."[1] Where the *want of jurisdiction* appears from the record itself, clearly the judgment is inadmissible, and can have no effect.[2] The courts have gone far beyond this, and have held, not only that the jurisdiction of the court of another state may be attacked, when the want of jurisdiction appears upon the face of the proceedings, but also that it may be attacked in other cases, and even that *evidence* may be received *to contradict the record*

as to the jurisdictional facts asserted therein, and also as to such facts, though stated to have been passed upon by the court.[3] Thus, evidence has been received to show that an attorney, who appeared, had no authority to appear;[4] that an allegation in the record that the defendant had been served personally or had appeared was untrue;[5] that the return of service on the summons was untrue,[6] and that a recital as to any other jurisdictional fact is erroneous.[7] So it has been held admissible to prove in an action on a judgment, rendered in another state on confession on power of attorney, that the defendant never executed the power of attorney, nor had any notice of the suit.[8] There have been numerous decisions to the effect that recitals in the judgment of another state as to jurisdictional facts cannot be contradicted,[9] but in view of the general current of authority, as shown by the cases cited, and especially the decisions in the supreme court of the United States, there can be little doubt but that the other rule will prevail.

1, Christmas v. Russell, 5 Wall. 305; D'Arcy v. Ketchum, 11 How. 165; Thompson v. Whitman, 18 Wall. 461; Bissell v. Briggs, 9 Mass. 462; 6 Am. Dec. 88; Atlanta Hill Co. v. Andrews, 120 N. Y. 58; McDermott v. Clary, 107 Mass. 501; Mills v. Duryee, 7 Cranch 481; Kinnier v. Kinnier, 45 N. Y. 541; McCauley v. Hargroves, 48 Ga. 50; 15 Am. Rep. 660; Sweet v. Brackley, 53 Me. 346; Marx v. Fore, 51 Mo. 69; 11 Am. Rep. 432; Coit v. Haven, 30 Conn. 190; 79 Am. Dec. 244; Welch v. Sykes, 3 Gilm. (Ill.) 197; 44 Am. Dec. 689; Wescott v. Brown, 13 Ind. 83; Harshey v. Black-

marr, 20 Iowa 161; 89 Am. Dec. 520; People v. Dawell, 25 Mich. 247; 12 Am. Rep. 260; McLure v. Benceni, 2 Ired. Eq. (N. C.) 513; 40 Am. Dec. 437; Frothingham v. Barnes, 9 R. I. 474; Harrington v. Harrington, 154 Mass. 517; Jones v. Jones, 108 N. Y. 415; 2 Am. St. Rep. 447; Drake v. Granger, 22 Fla. 348; Keilam v. Toms, 38 Wis. 592; Crumlish's Adm. v. Central Imp. Co., 38 W. Va. 390. The courts of the various states are bound by the construction of a state statute given by the highest court of that state, Glos v. Sankey, 148 Ill. 536. As to the general subject, see notes, 26 Am. Rep. 27; 2 Am. Dec. 42.

2, Shumway v. Stillman, 6 Wend. 447; Middlesex Bank v. Butman, 29 Me. 19; Tessier v. Lockwood, 18 Neb. 167; Bissell v. Wheelock, 11 Cush. 277; Renier v. Hurlbut, 81 Wis. 24; Rothrock v. Dwelling-House Ins. Co., 161 Mass. 423.

3, Downer v. Shaw, 22 N. H. 277; Baltzell v. Nosler, 1 Iowa 588; 63 Am. Dec. 466; Gleason v. Dodd, 4 Met. 333; Carleton v. Bickford, 13 Gray 591; 74 Am. Dec. 652; Norwood v. Cobb, 15 Tex. 500; Jardine v. Reichert, 39 N. J. L. 167; Pennywit v. Foote, 27 Ohio St. 600; 22 Am. Rep. 340; Thompson v. Whitman, 18 Wall. 457; Harris v. Hardeman, 14 How. 334; Rape v. Heaton, 9 Wis. 328; 76 Am. Dec. 269.

4, Baltzell v. Nosler, 1 Iowa 588; 63 Am. Dec. 466; Lawrence v. Jarvis, 32 Ill. 304; Price v. Ward, 25 N. J. L. 225; Gilman v. Gilman, 126 Mass. 26; 30 Am. Rep. 646; Ferguson v. Crawford, 70 N. Y. 253; 26 Am. Rep. 589; Koonce v. Butler, 84 N. C. 221; Sherrard v. Nevius, 2 Ind. 241; 52 Am. Dec. 508; Harshey v. Blackmarr, 20 Iowa 161; 89 Am. Dec. 520.

5, Finneran v. Leonard, 7 Allen 54; 83 Am. Dec. 665; McDermott v. Clary, 107 Mass. 501; Easley v. McClinton, 33 Tex. 288; Rape v. Heaton, 9 Wis. 328; 76 Am. Dec. 269; Starbuck v. Murray, 5 Wend. 148; 21 Am. Dec. 172; Hoffman v. Hoffman, 46 N. Y. 30; 7 Am. Rep. 299; Kane v. Cook, 8 Cal. 449; Pollard v. Baldwin, 22 Iowa 328; Marx v. Fore, 51 Mo. 69; 11 Am. Rep. 432; Aldrich v. Kinney, 4 Conn. 380; 10 Am. Dec. 151; Kingsbury v. Yniestra, 59 Ala. 320; People v. Dawell, 25 Mich. 247; 12 Am. Rep. 260;

Bowler v. Huston, 30 Gratt. (Va.) 266; 32 Am. Rep. 673; Brown v. Eaton, 98 Ind. 591; Wood v. Wood, 78 Ky. 624; Thorn v. Salmonson, 37 Kan. 441; Aultman, Miller & Co. v. Mills, 9 Wash. 68.

6, Knowles v. Gas Light Co., 19 Wall. 58; Webster v. Hunter, 50 Iowa 215; Lowe v. Lowe, 40 Iowa 220; Carleton v. Bickford, 13 Gray 591; 74 Am. Dec. 652.

7, Ferguson v. Crawford, 70 N. Y. 253; 26 Am. Rep. 589; Kelley v. Kelley, 161 Mass. 111.

8, Wilson v. Bank of Mt. Pleasant, 6 Leigh (Va.) 570.

9, Zepp v. Hager, 70 Ill. 223; Wetherill v. Stillman, 65 Pa. St. 105; Semple v. Glenn, 91 Ala. 245; Lapham v. Briggs, 27 Vt. 26; Caughran v. Gilman, 72 Iowa 570; Wilson v. Jackson, 10 Mo. 330; Griggs v. Becker, 87 Wis. 313; Hall v. Mackay, 78 Tex. 248.

§ 635. Same.—Regularity presumed —Proof of fraud.— Although the want of jurisdiction may be proved, the usual *presumption as to the jurisdiction* and the regularity of procedings of courts of general jurisdiction exists, until overthrown.[1] Under the constitutional provision, the courts of the state where a judgment is offered have the right to inquire how far the judgment would be conclusive in the state where rendered; and the effect which it has there is precisely the effect which it has in every other state.[2] The presumptions indulged in support of such judgments are, however, limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over those proceedings which are in accordance with the course of the common

law.[3] Although it may be regarded as well settled that the subject of jurisdiction is open to inquiry, it is not so clear to what extent the judgment of a sister state may be attacked for *fraud in its procurement.* On the principle that no defenses are available which might have been proved in the original action, it would seem clear that *fraud in the cause of action* which might have been pleaded as a defense would not be available. It has frequently been declared that *fraud in the procurement of the judgment* cannot be proved as a defense, but that one seeking to avoid the effect of such a judgment must attack it directly, not collaterally, as in the case of a domestic judgment.[4] But in his work on judgments, Mr. Freeman expresses the view that this depends upon the form of practice in the state where the action is brought, and that such decisions as those above cited are inapplicable in those states in which equitable, as well as legal, defenses may be pleaded and proved.[5]

1, Hassell v. Hamilton, 33 Ala. 280; Latterett v. Cook, 1 Iowa 1; 63 Am. Dec. 428; Glos v. Sankey, 148 Ill. 536; Nunn v. Sturges, 22 Ark. 389; Scott v. Coleman, 5 Litt. (Ky.) 349; 15 Am. Dec. 71; Shumway v. Stillman, 4 Cow. 292; 15 Am. Dec. 374; Dodge v. Coffin, 15 Kas. 277; Bailey v. Martin, 119 Ind. 103; Buffum v. Stimson, 5 Allen 591; 81 Am. Dec. 767; Stewart v. Stewart, 27 W. Va. 167; Mink v. Shaffer, 124 Pa. St. 280; Horton v. Critchfield, 18 Ill. 133; 65 Am. Dec. 701; Freem. Judg. sec. 565; Wells Res. Adj. sec. 538. See extended discussion, 1 Smith L. C. 1086–1158. See also secs. 26 *et seq. supra.*

2, Hampton v. McConnell, 3 Wheat. 235; McLaren v. Kahler, 23 La. An. 80; 8 Am. Rep. 592 and note; Sanborn v. Perry, 86 Wis. 361; Simmons v. Clark, 56 Ill. 96; Bauserman v. Blunt, 147 U. S. 647; French v. Pease, 10 Kan. 51; Hanley v. Donoghue, 116 U. S. 1; Renaud v. Abbott, 116 U. S. 277. See sec. 33 *supra*.

3, Galpin v. Paige, 18 Wall. 350; Kelley v. Kelley, 161 Mass. 111, where a court in Massachusetts refused to presume that a court in New York had equitable jurisdiction of a suit to annul a marriage, because of the fact that one of the parties had a husband by a former marriage living at the time.

4, Christmas v. Russell, 5 Wall. 290; Maxwell v. Stewart, 22 Wall. 77; Anderson v. Anderson, 8 Ohio 109; Benton v. Burgot, 10 Serg. & R. (Pa.) 240; Granger v. Clark, 22 Me. 128; Sanford v. Sanford, 28 Conn. 6; McDonald v. Drew, 64 N. H. 547.

5, Freem. Judg. sec. 576. See also, Black. Judg. sec. 918.

§ 636. Domestic judgments not impeachable by parties for fraud.—In the opinion of the author, the weight of authority sustains the proposition that domestic judgments cannot be collaterally attacked by extrinsic evidence of fraud or collusion, when rendered by a court having competent jurisdiction, except by those who are not parties or privies.[1] The *remedy* of parties, *in such cases*, is by writ of error or new trial, or by a motion or proceeding in equity to set aside the judgment.[2] There are doubtless numerous authorities which are not in harmony with the foregoing propositions. Says Mr. Wharton: "Whenever a party seeks to avail himself of a former judgment, fraudulently

entered, the opposite party may show the fraud, and thus avoid the judgment."[3] The learned author cites many cases to maintain this proposition, but some of them are not in point, and others relate to judgments of sister states. Mr. Wharton, however, qualifies his proposition by the statement that "fraud cannot be collaterally set up by a party to a judgment in any case in which he is either directly or constructively, either by action or by want of vigilance, when he was bound to be vigilant, a party to the fraud." And he further says "that, when a party has the opportunity of applying to the court, entering the judgment, to open it, he must do so, and cannot resort to a collateral attack."[4] It should be added that, in those jurisdictions where, by reason of the mode of procedure, *equitable defenses* may be proven *in legal actions*, it may be competent to allege and prove as a defense that the judgment relied upon has been procured by fraud.[5] There is no principle which precludes *strangers to a judgment*, who would otherwise be prejudiced in their rights, from impeaching a judgment collaterally by showing that it was obtained by the fraud of the parties or either of them, or that it was secured for the purpose of defrauding others.[6]

1, Simms v. Slacum, 3 Cranch 300; Smith v. Lewis, 3 Johns. 157; 3 Am. Dec. 469; Granger v Clark, 22 Me. 128; Carpentier v. Oakland, 30 Cal. 439; Smith v. Smith, 22 Iowa

516; Otterson v. Middleton, 102 Pa. St. 78; Davis v. Davis, 61 Me. 395; Krekeler v. Ritter, 62 N. Y. 372; Blanchard v. Webster, 92 N. H. 467; Ross v. Wood, 70 N. Y. 8; Hawley v. Mancius, 7 Johns. Ch. (N. Y.) 174; Christmas v. Russell, 5 Wall. 290; Steph. Ev. art. 46; Freem. Judg. sec. 334.

2, Dugan v. McGann, 60 Ga. 353; Ogden v. Larrabee, 57 Ill. 389; Cowin v. Toole, 31 Iowa 513; Hayden v. Hayden, 46 Cal. 332; Carrington v. Holabird, 17 Conn. 530; Hahn v. Hart, 12 B. Mon. (Ky.) 426; Binsse v. Barker, 13 N. J. L. 263; 23 Am. Dec. 720; Poindexter v. Waddy, 6 Munf. (Va.) 418; 8 Am. Dec. 749; Whittlesey v. Delaney, 73 N. Y. 571; Bresnehan v. Price, 57 Mo. 422; Kemp v. Cook, 18 Md. 130; 79 Am. Dec. 681.

3, Whart. Ev. sec. 797.

4, Whart. Ev. secs. 797, 798.

5, Mandeville v. Reynolds, 68 N. Y. 528.

6, Atkinsons v. Allen, 12 Vt. 619; 36 Am. Dec. 361; Caldwell v. Walters, 18 Pa. St. 79; 55 Am. Dec. 592; De Armond v. Adams, 25 Ind. 455; Faris v. Dunham, 5 T. B. Mon. (Ky.) 397; 17 Am. Dec. 77; Sidensparker v. Sidensparker, 52 Me. 481; 83 Am. Dec. 527; Bridgeport Ins. Co. v. Wilson, 34 N. Y. 281; Second Nat. Bank's Appeal, 85 Pa. St. 528; Murcheson v. White, 54 Tex. 78; Downs v. Fuller, 2 Met. 135; 35 Am. Dec. 393; Smith v. Cuyler, 78 Ga. 654; Shallcross v. Beats, 43 N. J. L. 177.

§ 637. Judgments — How proved — Should be complete.— "Before any document, whether an original or a copy, can be received in evidence of a judicial proceeding, it must, in general, appear that the record or entry of such proceeding has been finally completed."[1] A transcript of minutes extracted from the docket of a court is not admissible to prove a judgment;[2] nor is a memorandum, not a copy, furnished by the

clerk of the court showing the substance of the judgment, competent, although it is the custom of the court to deliver such memoranda as evidence;[3] nor is the mere certificate of the clerk,[4] nor that of an attorney in the case[5] any evidence that a judgment has been rendered; nor can a judgment be proved by the entries of the judge;[6] nor is a judgment proved by the collateral statement of the witnesses of the adverse party.[7] It is not necessary to the admissibility of a judgment that it be contained in the formal judgment roll of the common law. The record may be contained in the judgment book or docket, as provided by the local law or custom;[8] or where a formal record is not required by law to be made up, those entries which are permitted to stand in its place are admissible.[9] Thus, sworn copies of docket entries were held admissible to show the pendency of an action.[10]

1, Tayl. Ev. sec. 1570. As to finality of judgments, see sec. 612 *supra*.

2, Ferguson v. Harwood, 7 Cranch 408; Pepin v. Lachenmeyer, 45 N. Y. 27.

3, Wade v. Odeneal, 3 Dev. (N. C.) 423.

4, Lansing v. Russell, 3 Barb. Ch. (N. Y.) 325.

5, Tuthill v. Davis, 20 Johns. (N. Y.) 285.

6, Miller v. Wolf, 63 Iowa 233; Moore v. Bruner, 31 Ill. App 400.

7, Seaton v. Cordray, 1 Wright (Ohio) 102.

8, Den v. Downam, 13 N. J. L. 135; Penn v. Meeks, 2 N. J. L. 151; Harvey v. Brown, 1 Ohio 268.

9, Philadelphia, W. & B. Ry. Co. v. Howard, 13 How. 307.

10, Philadelphia, W. & B. Ry. Co. v. Howard, 13 How. 307; Read v. Sutton, 2 Cush. 115.

§ 638. **Proof of parts of record — Verdict.** — It is not necessary to the admissibility of the judgment as evidence that all the various proceedings be shown.[1] But if it becomes material to show the *particular issue* on which the judgment was rendered, *the pleadings must be offered;* and if the adverse party can derive benefit by producing the antecedent or subsequent proceedings, he, of course, has the right to do so.[2] When one party introduces and reads from a record that which suits his purpose, the other party may read for his own benefit all that relates to that subject, or require the party introducing the record to do so.[3] A judgment which has been declared utterly invalid is not admissible for any purpose.[4] Although the usual method of proving the proceedings of a court is by the record as completed and extended, it has frequently been held that the minutes or memoranda upon the *docket of the clerk* of the court or the magistrate are competent evidence of an order or proceeding in court, in case the extended record has not been made.[5] The docket is the record, until the record is fully extended; and the same rules of verity apply to it as to the record. Every

statement therein is deemed to have been made by the direction of the court.[6] In like manner, the journals and *minutes* of the courts may be evidence,[7] but not for the purpose of contradicting the record.[8] Although it may sometimes be relevant to show that a *verdict* has been rendered, as an incidental fact or by way of inducement,[9] yet it is the general rule that a verdict without the judgment is inadmissible as evidence of the facts found, and that it constitutes no bar.[10] The verdict may have been set aside; and the court will not presume that a judgment was entered on the verdict.[11] But the general rule does not apply in those courts where the court has no authority to arrest judgment or grant a new trial, as in justice court.[12]

1, Packard v. Hill, 7 Cow. 434; Gardere v. Columbian Ins. Co., 7 Johns. 514; Walker v. Doane, 108 Ill. 236. See also, Thomas v. Stewart, 92 Ind. 246.

2, Rathbone v. Rathbone, 10 Pick. 1; Walker v. Doane, 108 Ill. 236.

3, Tappan v. Beardsley, 10 Wall. 427. *Supra* sec. 168.

4, Agnew v. Adams, 26 S. C. 101; Miller v. Barkeloo, 8 Ark. 318.

5, Townsend v. Way, 5 Allen 426; McGrath v. Seagrave, 2 Allen 443; 79 Am. Dec. 797; Pruden v. Alden, 23 Pick. 184; 34 Am. Dec. 51.

6, Read v. Sutton, 2 Cush. 115; Davis v. Smith, 79 Me. 351.

7, R. v. Browne, 3 Car. & P. 572.

8, Den v. Downam, 13 N. J. L. 135; Mandeville v. Stockett, 28 Miss. 398.

9, Barlow v. Dupuy, 1 Mart. N. S. (La.) 442.

10, Donaldson v. Jude, 2 Bibb (Ky.) 57; Ragan v. Kennedy, 1 Overt. (Tenn.) 91. But see, Felter v. Mulliner, 2 Johns. 181.

11, Ragan v. Kennedy, 1 Overt. (Tenn.) 91.

12, Felter v. Mulliner, 2 Johns. 181.

§ 639. Proof of judgments in courts where rendered.— The judgment itself may be produced for the inspection of the court when such judgment becomes relevant in another action in the same court. Such a judgment requires no authentication when produced by the clerk, as the court takes judicial notice of its own records.[1] At common law, office copies of records in the same cause were also admissible in such cases.[2] In this country, office copies are seldom used; and the mode of proof of judgments in the same court is by the original records, or by an exemplified, certified or examined copy.[3]

1, Peck v. Land, 2 Ga. 15; 46 Am. Dec. 368; Prescott v. Fisher, 22 Ill. 390; Harrison v. Kramer, 3 Iowa 543; Odiorne v. Bacon, 6 Cush. 185; Sutcliffe v. State, 18 Ohio 469; 51 Am. Dec. 459; Ward v. Saunders, 6 Ired. (N. C.) 382; Adams v. State, 11 Ark. 466; Wallis v. Beauchkamp, 15 Tex. 303; Larco v. Casaneuava, 30 Cal. 560.

2, Den v. Fulford, 2 Burr. 1177; Jack v. Kiernan, 2 Jebb & S. 231. As to office copies, see sec. 535 *supra*.

3, See secs. 535, 536 *supra*.

§ 640. Proof of records of courts in the same state.—The records of other courts within the same state are generally proved by

the production of *copies, certified or exemplified* by the clerk of the court having their custody.[1] Statutes are generally enacted prescribing the substance of the certificate in such cases, and providing that the copy, when properly certified with the seal of the court affixed, shall have the same effect as the original.[2] In other states, copies of the records, attested by the clerk, have been received in evidence in other courts by immemorial usage.[3] The *original records* of the proceedings of other courts within the same state are also admissible, when identified by the oath of the proper custodian.[4] The original is, of course, admissible whenever a copy would be competent.[5] It is not sufficient that a witness identifies certain papers as those which were formerly filed by him when he was clerk of the court, nor that another witness testifies that he received the papers from the present clerk of the court;[6] nor is it sufficient for an attorney to produce such records without other authentication.[7] But the court may take judicial notice of the clerk's signature, although from another district.[8] Owing to the inconvenience of the removal of public records, the practice generally prevails of proving such records by copies certified by the clerk of the court or by the judge,[9] or by sworn copies of the same.[10] The certificate should, of course, explicitly state that the document is a true copy of the original,

and, if based upon a statute, should substantially comply therewith. Statutes prescribing the mode of authenticating domestic records or those from sister states vary in form, of course, but they generally provide that the seal of the court shall be annexed to the copy which shall be certified by the clerk or judge to have been carefully compared by him with the original, and to be a true copy thereof.[11]

1, Turnbull v. Payson, 95 U. S. 418.

2, See the statutes of the jurisdiction.

3, Ladd v. Blount, 4 Mass. 402; Com. v. Phillips, 11 Pick. 28; Chamberlin v. Ball, 15 Gray 352.

4, Odiorne v. Bacon, 6 Cush. 185, by statute; Hart v. Stone, 30 Conn. 94; State v. Hunter, 94 N. C. 829; Rogers v. Tillman, 72 Ga. 479; Hardin v. Blackshear, 60 Tex. 132.

5, Gray v. Davis, 27 Conn. 447; Folsom v. Creesey, 73 Me. 270.

6, Lyon v. Bolling, 14 Ala. 753; 48 Am. Dec. 122; Darden v. Neuse & T. Co., 107 N. C. 437.

7, Bigham v. Coleman, 71 Ga. 176.

8, Sherrerd v. Frazer, 6 Minn. 572.

9, Brackett v. Hoitt, 20 N. H. 257.

10, White v. Burnley, 20 How. 235; Harvey v. Cummings, 68 Tex. 599; Karr v. Jackson, 28 Mo. 316.

11, Mass. Pub. Stat. ch. 169 sec. 67; Rev. Stat. Wis. sec. 4140; Rev. Stat. Mich. sec. 7504; Rev. Stat. Iowa sec. 4964. See the statute of jurisdiction. As to authentication of foreign judgments, see secs. 641 *et seq. infra.*

§ 641. Mode of proof of foreign records.— In an early case in the supreme court

of the United States, it was determined that foreign judgments may be authenticated in the following modes: "(1) By an exemplification under the great seal; (2) by a copy proved to be a true copy; (3) by the certificate of an officer authorized by law, which certificate itself must be properly authenticated. These are the usual, and appear to be the most proper, if not the only modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony, inferior in its nature, may be received."[1] It is evident that this includes the common law method of proof by a sworn copy.[2] A judgment rendered at Havana was held admissible on proof that the copy was signed by the clerk of the court, the keeper of its records, whose duty it was to certify them; and on further proof that the court had no seal; that the signature of the clerk validated its proceedings; that the seal annexed was that of the Royal College of Notaries, and that the document was authenticated in the customary way in which records were authenticated to be sent to foreign countries.[3]

1, Church v. Hubbart, 2 Cranch 238. See note, 82 Am. Dec. 411.

2, Lincoln v. Battelle, 6 Wend. 475; Hill v. Packard, 5 Wend. 387; Condit v. Blackwell, 19 N. J. Eq. 193.

3, Packard v. Hill, 7 Cow. 435; Hill v. Packard, 5 Wend. 387.

§642. Same—Mode of authentication.— The authentication is sufficient if application was made to the reputed clerk of the court for a copy, and if the witness assisted the clerk in comparing the copy with the record and in affixing the seal of the court to the copy, and saw the clerk attest the same.[1] So it is sufficient to show by an expert that the record is authenticated in the manner authorized in the country whence it came, the signature of the judge of the court and the seal affixed being proved genuine.[2] Copies of foreign records are not proved by the mere fact that they purport to be under the hands and seals of the officers of such courts. There must, in such cases, be some *extrinsic proof of the genuineness of the signatures and seals.*[3] But the clerk or prothonotary of a court is presumed to possess authority to make and certify copies of the records of the court in a certificate over his official signature, together with the seal of the court. His official signature and the seal are duly authenticated by the affixing of the great seal of the state or government in which the court is found to the certificate of the keeper thereof. The great seal proves itself.[4] It has been held that, if the record is authenticated by the *great seal* of the foreign country, no certificate of any officer of the court is necessary.[5] But the *private seal* of one styling himself "secretary of state" is not

a sufficient authentication.[6] The practitioner will find statutes in some states regulating the mode of authenticating foreign judgments.[7] These in some cases dispense with proof of the genuineness of the signature of the certifying officer and of the seal of the court, making the mode of proof similar to that of judgments of sister states.[8] Other cases illustrating mode of proof of foreign records will be found in the notes.[9]

1, Buttrick v. Allen, 8 Mass. 273; 5 Am. Dec. 105; Pickard v. Bailey, 26 N. H. 152.

2, Owings v. Nicholson, 4 Har. & J. (Md.) 66.

3, Delafield v. Hand, 3 Johns. 310; Griswold v. Pitcairn, 2 Conn. 90; Word v. McKinney, 25 Tex. 258. Evidently parol evidence is insufficient, Tharpe v. Pearce, 89 Ga. 194.

4, Gunn v. Peakes, 36 Minn. 177; Lazier v. Westcott, 26 N. Y. 146; 82 Am. Dec. 404 and note.

5, Watson v. Walker, 23 N. H. 471; Griswold v. Pitcairn, 2 Conn. 91; Thompson v. Stewart, 3 Conn. 171; 8 Am. Dec. 168.

6, Church v. Hubbart, 2 Cranch 187; Vandervoort v. Columbian Ins. Co., 2 Caines (N. Y.) 155.

7, See the statutes of the jurisdiction. As to authentication of records of sister states, see next sections.

8, See the statutes of the jurisdiction.

9, Russel v. Insurance Co., 4 Dall. 421; Yeaton v. Fry, 5 Cranch 335; Stein v. Bowman, 13 Peters 209; Slaughter v. Cunningham, 24 Ala. 260; 60 Am. Dec. 463; Smith v. Redden, 5 Har. (Del.) 321; United States v. Delespine, 12 Peters 654; James v. Kerby, 29 Ga. 684; Atwood v. Buck, 113 Ill. 268; Elmondorff v. Carmichael, 3 Litt. (Ky.) 472; 12 Am. Dec. 86; DeSobry v. DeLaistra, 2 Har. & J. (Md.) 191; 3 Am. Dec. 535; Steward v. Swanzy, 23 Miss. 502; Clarke v. Diggs, 6 Ired. (N. C.) 159; 44 Am. Dec. 73; Stangtien v

State, 17 Ohio St. 453; Spaulding v. Vincent, 24 Vt. 501; Hadfield v. Jamieson, 2 Munf. (Va.) 53; Succession of Lorenz, 41 La. An. 1091; Capling v. Herman, 17 Mich. 524

§ 643. Proof of records of sister states — Federal statutes.— It is clearly beyond the province of this work to discuss or set forth the statutes of the several states respecting the authentication of records. But there is a *federal statute* on the subject which furnishes a rule of universal application in this country which should be carefully examined. The statute provides that the records and judicial proceedings of any state or territory, or of any country subject to the jurisdiction of the United States "shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice or presiding magistrate that the said attestation is in due form.' And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."[1] It is well settled that, while a compliance with this statute is sufficient in any jurisdiction, the statute does not prevent the several states from prescribing other modes of authentication, less formal, or from using the common law modes. *The statute is not ex*

clusive.[2] But while the states may dispense with part of the formalities required by congress, they *cannot compel a more formal or detailed* mode of authentication, *or one inconsistent* with the act.[3] A record is admissible which conforms either to the provisions of the act of congress or of the state where offered.[4] The provisions of the act apply to the proceedings of courts of record, to decrees in chancery,[5] proceedings in probate court,[6] such as those relating to the probate of wills,[7] and to guardians' and administrators' bonds, if part of the record,[8] and to all proceedings in other states which by the laws and usage of that state are entitled to the faith and credit of a judgment.[9] It has been held in some jurisdictions that *proceedings in justice courts* are within the meaning of the act. Such decisions, however, generally related only to those justice courts which, by the laws of their state, were courts of record.[10] But it is the general rule that a judgment of a justice of the peace from a sister state cannot be proved in the mode prescribed by the act. Such judgments must be proved according to the rules of the common law, or as prescribed by the statutes of the several states;[11] and a transcript of a justice's judgment, authenticated by the certificate of a clerk of the county or district court, is not admissible under the statute.[12]

1, Rev. Stat. U. S. sec. 905.

2, Kingman v. Cowles, 103 Mass. 283; English v. Smith, 26 Ind. 445; Railroad Bank v. Evans, 32 Iowa 202; Hackett v. Bonnell, 16 Wis. 471; Parke v. Williams, 7 Cal. 247; Goodwyn v. Goodwyn, 25 Ga. 203; Karr v. Jackson, 28 Mo. 316; Pryor v. Moore, 8 Tex. 250; Kean v. Rice, 12 Serg. & R. (Pa.) 203; Hanrick v. Andrews, 9 Port. (Ala.) 9.

3, Kingman v. Cowles, 103 Mass. 283; McMillan v. Lovejoy, 115 Ill. 498.

4, Ordway v. Conroe, 4 Wis. 45; Pryor v. Moore, 8 Tex. 250.

6, Settle v. Alison, 8 Ga. 201; 52 Am. Dec. 393; Case v. McGee, 8 Md. 9; Houze v. Houze, 16 Tex. 598; Melvin v. Lyons, 18 Miss. 78; Morgan v. Gaines, 3 A. K. Marsh. (Ky.) 613.

5, Barbour v. Watts, 2 A. K. Marsh. (Ky.) 290; Patrick v. Gibbs, 17 Tex. 275.

7, Keith v. Keith, 80 Mo. 125; First Nat. Bank v. Kidd, 20 Minn. 234; Walton v. Hall's Estate, 66 Vt. 455; Long v. Patton, 154 U. S. 573.

8, Carlisle v. Tuttle, 30 Ala. 613; Pickett v. Bates, 3 La. An. 627.

9, Taylor v. Runyan, 9 Iowa 522.

10, Bissell v. Edwards, 5 Day (Conn.) 363; 5 Am. Dec. 166; Belton v. Fisher, 44 Ill. 32; Draggoo v. Graham, 9 Ind. 212; Scott v. Cleveland, 3 T. B. Mon. (Ky.) 62; Brown v. Edson, 23 Vt. 435; Mahurin v. Bickford, 6 N. H. 567; Lawrence v. Gaultney, 1 Cheves (S. C.) 7; Pelton v. Platner, 13 Ohio 209.

11, Kean v. Rice, 12 Serg. & R. (Pa.) 250; Robinson v. Prescott, 4 N. H. 450; Silverlake v. Howling, 5 Ohio 545.

12, McElfatrick v. Taft, 10 Bush (Ky.) 160; Thomas v. Robinson, 3 Wend. 267; Mahurin v. Bickford, 6 N. H. 567.

§644. Proof of judgments in federal courts.— It will be noticed that the language of the act providing for the authentication of judicial proceedings of certain courts does not include the federal courts. It has accordingly been held by the supreme court of the United States, after full discussion, that it is not absolutely necessary that the record of a judgment in the district court of the United States should be authenticated in the mode prescribed by the act of congress referred to, in order to render the same admissible in the courts of the United States; that the district court of the United States, even out of the state composing the district, is to be regarded as a domestic and not a foreign court, and that the records of such court may be proved by the certificate of the clerk under the seal of the court, without the certificate of the judge that the same is in due form.[1] But it has been held that, if the record of a judgment of a state court is offered in the federal court, it must be attested as provided by the statute.[2] The records of the federal courts are admissible in the state courts, if authenticated as provided by the statute.[3] When the record of a judgment of a state court is offered in evidence in the United States circuit court sitting within that state, the certificate of the clerk and seal of the court are sufficient authentication.[4]

1, Turnbull v. Payson, 95 U. S. 424; Adams v. Way, 33 Conn. 419; Mason v. Lawrason, 1 Cranch C. C. 190.

2, United States v. Biebusch, 1 Fed. Rep. 213.

3, Redman v. Gould, 7 Blackf. (Ind.) 361; Tappan v. Norvelle, 3 Sneed (Tenn.) 570; Helm v. Shackleford, 5 J. J. Marsh. (Ky.) 390; United States v. Bank, 11 Rob. (La.) 418.

4, Mewster v. Spalding, 6 McLean (U. S.) 24.

§ 645. Authentication—Attestation by clerk.—There must be compliance with the statute in its various requirements. Thus, the clerk must be the clerk of the court in which the judgment was rendered,[1] or, if the constitution of the court has changed, he must be a successor of that clerk.[2] If the record has been transferred from one court to another, the certificate of the clerk, having custody of the records, as to the fact is sufficient,[3] or such fact may be stated in the certificate of the judge.[4] The certificate of a deputy or substitute is not sufficient,[5] although the judge certifies that the attestation is in due form and according to the laws of the state.[6] But if the record is certified by the clerk through his deputy, this is a compliance with the law.[7] The *certificate* or attestation made by the clerk must be *according to the form used in the state from which the record comes;* and the only evidence of this fact is the certificate of the presiding judge. No form of attestation is prescribed by the act, and whether it is in due form or not can only be shown by the certificate of

the presiding judge.[8] It has been held in several cases that the certificate of the clerk need not state in express terms that the transcript is a copy of the whole proceedings, but where he certifies that the copy is a true one, taken from the record of proceedings of the court, and the certificate of the judge complies with the statute, the document will be presumed to be a true copy.[9] Thus, it has been held sufficient, if the clerk certifies that the transcript is a true transcript of the record, as fully as it now exists in the office;[10] that the copy is exemplified;[11] that the exemplification is a transcript of the proceedings,[12] and that the transcript is a true copy of the whole judgment roll.[13] The judge may certify that he acts as his own clerk, and that the certificate is in due form.[14] In such case, he should certify first as clerk and then as judge, in the same manner as if there were two officers.[15] But the certificate of the judge alone, though under the great seal of the state, is not sufficient.[16]

1, Kirkland v. Smith, 2 Mart. N. S. (La.) 497; Scott v. Blanchard, 8 Mart. N. S. (La.) 303; Moyer v. Lyon, 38 Mo. App. 635.

2, Thomas v. Tanner, 6 T. B. Mon. (Ky.) 52; Capen v. Emery, 5 Met. 436; Manning v. Hogan, 26 Mo. 570.

3, Thomas v. Tanner, 6 T. B. Mon. (Ky.) 52; McRae v. Stokes, 3 Ala. 401; Hatcher v. Rocheleau, 18 N. Y. 86; Darrah v. Watson, 36 Iowa 116; Capen v. Emery, 5 Met. 436; Manning v. Hogan, 26 Mo. 570; Gatling v. Robbins, 8 Ind. 184.

4, Capen v. Emery, 5 Met. 436; Gatlin v. Robbins, 8 Ind. 184.

5, Morris v. Patchin, 24 N. Y. 394; 82 Am. Dec. 311; Lothrop v. Blake, 3 Pa. St. 483; Sampson v. Overton, 4 Bibb (Ky.) 409; Donohoo v. Brannon, 1 Overt. (Tenn.) 327.

6, Morris v. Patchin, 24 N. Y. 394; 82 Am. Dec. 311; Kansas Pac. Ry. Co. v. Cutter, 19 Kan. 83.

7, Greasons v. Davis, 9 Iowa 219.

8, Schoonmaker v. Lloyd, 9 Rich. L. (S. C.) 173; Craig v. Brown, Peters C. C. 352; Ducommun v. Hysinger, 14 Ill. 249; White v. Strother, 11 Ala. 720.

9, Mudd v. Beauchamp, Litt. Sel. Cas. (Ky.) 142; Reber v. Wright, 68 Pa. St. 471; Lee v. Gause, 2 Ired. (N. C.) 440.

10, McCormick v. Deaver, 22 Md. 187.

11, Taylor v. Carpenter, 2 Wood. & M. (U. S.) 1.

12, Lee v. Gause, 2 Ired. (N. C.) 440.

13, Clark v. Depew, 29 Pa. St. 409.

14, Roop v. Clark, 4 G. Greene (Iowa) 294; Pagett v. Curtis, 15 La. An. 451; State v. Hinchman, 27 Pa. St. 479. But see, Sherwood v. Houston, 41 Miss. 59.

15, Catlin v. Underhill, 4 McLean (U. S.) 199; Duvall v. Ellis, 13 Mo. 203; Bissell v. Edwards, 5 Day (Conn.) 363; 5 Am. Dec. 166.

16, Tarlton v. Briscoe, 1 A. K. Marsh. (Ky.) 67.

§ 646. Same—Certificate of the judge. It is clear that, under the act of congress, there should be a certificate of *the judge* of the court in which the judgment was rendered.[1] It is not sufficient that he is merely acting as judge; though, if the judges are appointed from the state at large, the certificate may be

by the one presiding in his place.[2] That the certificate is made by the judge of the court should appear on its face,[3] for example, it should appear affirmatively that the judge is the judge of the county or district where the judgment was rendered.[4] But it is sufficient, if the certificate describes the judge certifying as the judge of the court in question, as it is the presumption that he holds the position which he professes to hold.[5] If there are several judges constituting the court, the certificate should be by the chief justice or presiding judge.[6] If there are several of the same rank, all may unite,[7] although one may certify alone, if he certifies that each judge has equal authority and power to sign certificates of this character.[8] If the certificate is made by one who styles himself the judge, it need not add that there are no others constituting the court.[9] Since the certificate of the judge affords the only evidence that the certificate of the clerk is correct, the judge must certify that the *attestation of the clerk is in due form;*[10] and this certificate of the judge is conclusive on that subject, although the attestation by the clerk may on its face seem to be defective.[11] This certificate of the judge is also sufficient *prima facie* evidence of the jurisdiction of the court.[12] It is no objection to the admission of the copy as evidence that the certificates may contain more than is required, if the essentials of

the act are therein contained.[13] The certificate of the judge need not state that the person certifying the record is the clerk;[14] and the omission of a date in a certificate may be supplied by that in the certificate of the clerk.[15] If there are several certificates by the clerk, the single certificate by the judge referring to the "foregoing attestation," only authenticates the one last preceding; and the other copies are not admissible.[16] It is not necessary under the federal statutes that the official character of the judge, certifying the record, should be evidenced by the certificate of the governor under the great seal of the state; nor that the clerk of the court should certify under his hand and seal of office that the certifying judge is duly commissioned and qualified to act[17]

1, Huff v. Campbell, 1 Stew. (Ala.) 543; Arnold v. Frazier, 5 Strob. (S. C.) 33.

2, Taylor v. Kilgore, 33 Ala. 214.

3, Washabough v. Entriken, 34 Pa. St. 74; Stewart v. Gray, Hempst. (U. S.) 94; Hudson v. Dailey, 13 Ala. 722; Settle v. Alison, 8 Ga. 201; 52 Am. Dec. 393.

4, Phelps v. Tilton, 17 Ind. 423.

5, Gavit v. Snowhill, 26 N. J. L. 76; Hatcher v. Rocheleau, 18 N. Y. 86.

6, Stevenson v. Bannister, 3 Bibb (Ky.) 371; Hudson v. Daily, 13 Ala. 722; Settle v. Alison, 8 Ga. 201; 52 Am. Dec. 393; Lothrop v. Blake, 3 Pa. St. 483.

7, Arnold v. Frazier, 5 Strob. (S. C.) 33.

8, Orman v. Neville, 14 La. An. 392; Huff v. Campbell, 1 Stew. (Ala.) 543; Van Storch v. Griffin, 71 Pa. St. 240.

9, Central Bank v. Veasey, 14 Ark. 671.

10, Rev. Stat. U. S. 905; Trigg v. Conway, Hempst. (U. S.) 538; Shown v. Barr, 11 Ired. (N. C.) 296; Pepin v. Lachenmeyer, 45 N. Y. 27; Burnell v. Weld, 76 N. Y. 103; Brackett v. People, 64 Ill. 170; Washabaugh v. Entriken, 34 Pa. St. 74; Hutchins v. Gerrish, 52 N. H. 205.

11, Ferguson v. Harwood, 7 Cranch 408; Duvall v. Ellis, 13 Mo. 203; Wilburn v. Hall, 16 Mo. 426; Andrews v. Flack, 88 Ala. 294.

12, Thomas v. Tanner, 6 T. B. Mon. (Ky.) 52.

13, Gavit v. Snowhill, 26 N. J. L. 76; Young v. Chandler, 13 B. Mon. (Ky.) 252; Weeks v. Downing, 30 Mich. 4.

14, Ducommun v. Hysinger, 14 Ill. 249; Linch v. McLemore, 15 Ala. 632; Haynes v. Cowen, 15 Kan. 637; Lothrop v. Blake, 3 Pa. St. 483.

15, Lewis v. Sutliff, 2 G. Greene (Iowa) 186.

16, Burnell v. Weld, 76 N. Y. 103.

17, Kinsley v. Rumbough, 96 N. C. 193.

§ 647. Same — Seal. — As will be seen from an examination of the act, the seal must be annexed, if there be one [1] If the court has no seal, that fact should be made to appear in one of the certificates.[2] A certificate by the clerk under his private seal, if he certifies that the court has no seal, is sufficient, as the private seal will be treated as mere surplusage; and it has the same effect as if no seal had been used.[3] No statement is necessary that the seal affixed is the seal of the court, as it is presumed to have been attached by the proper officer.[4] The seal should be affixed to the record with the certificate of the clerk, and not to the certificate of the

judge; and if the seal of the court is annexed only to the certificate of the judge, the record is insufficient.[5] The record has been held admisssible, however, where the clerk certified that he annexed his seal of office, instead of the seal of the court.[6] So it is sufficient, if an impression of the seal is made on the paper, as the use of wax is not essential.[7]

1, Rev. Stat. U. S. sec. 905; McFarlane v. Harrington, 2 Bay (S. C.) 554; Allen v. Thaxter, 1 Blackf. (Ind.) 399.

2, Craig v. Brown, 1 Peters C. C. 352; Kirkland v. Smith, 2 Mart. N. S. (La.) 497.

3, Strode v. Churchill, 2 Litt. (Ky.) 75.

4, Ducommon v. Hysinger, 14 Ill. 249.

5, Rev. Stat. U. S. sec. 905; Kirschner v. State, 9 Wis. 140.

6, McLain v. Winchester, 17 Mo. 49; Clark v. Depew, 25 Pa. St. 509; Coffee v. Neely, 2 Heisk. (Tenn.) 304, by statute.

7, Hunt v. Hunt, 45 N. J. Eq. 360.

§ 648. Returns of officers — Not evidence of collateral facts.— It is often necessary to use as evidence the official returns of officers made in the discharge of their duty. It is their duty under their oath of office to certify certain official facts, like the service of process and similar acts; and such returns are generally received as evidence.[1] It has already been stated that certificates and returns made by officers, where no such certificate or return is required by law, are not competent evidence.[2] They are unofficial state-

ments, and are mere hearsay, like the unsworn declarations of a private individual.[3] On principles already discussed, a certificate or return stating *collateral facts*, facts not required by law to be stated, is not evidence as to such facts. Its effect as evidence must be restricted to those facts concerning which it was the duty of the officer to make return. Thus, the return on an execution that the sheriff has paid to the plaintiff the money collected is not evidence of that fact;[4] nor is it evidence of acts beyond his territorial jurisdiction,[5] or of any facts therein alleged as excuse for failing to return the process or otherwise to do his duty.[6]

1, Cavendish v. Troy, 41 Vt. 99; Allen v. Gray, 11 Conn. 95; Browning v. Hanford, 5 Den. 586; Boynton v. Willard, 10 Pick. 166; Perryman v. State, 8 Mo. 208.

2, See sec. 556 *supra*.

3, Browning v. Hanford, 7 Hill 120; 5 Den. 586.

4, Cator v. Stakes, 1 Maule & S. 599; First v. Miller, 4 Bibb (Ky.) 311. See also, Great West Mining Co. v. Woodmas Mining Co., 12 Col. 46; 13 Am. St. Rep. 204.

5, Arnold v. Tourtellot, 13 Pick. 172.

6, Bruce v. Dyall, 5 T. B. Mon. (Ky.) 125.

§ 649. As between parties, the return cannot be collaterally attacked. — As between the parties or privies to the suit, the general rule is that the return of the officer is conclusive. It is open to *no collateral attack*, but, as between the parties, stands as

a verity, unless vacated or otherwise attacked by a direct proceeding.[1] The same rule applies whether the return is upon intermediate or final process, or upon that by which the action is commenced. The usual remedy for a party, if he would show that the return is false, is by action against the officer for making a false return. This is a *direct attack* upon the return, and the plaintiff is not bound thereby.[2] The rule that the return cannot be attacked collaterally by the parties applies, although proof is offered that the officer has *acted fraudulently.*[3] But in a proceeding to *vacate the judgment* for want of service, evidence may be received contradicting the return.[4] It has been held that an *irregular or illegal return* may be inquired into and impugned, as where the sheriff, in violation of his duty, received a note and returned an execution as satisfied.[5]

1, Smith v. DeKock, 81 Iowa 535; Kirksey v. Bates, 1 Ala. 303; Newton v. State Bank, 14 Ark. 9; 58 Am. Dec. 363; Egery v. Buchanan, 5 Cal. 53; Tillman v. Davis, 28 Ga. 494; 73 Am. Dec. 786; Cully v. Shirk, 131 Ind. 76; Rivard v. Gardner, 39 Ill. 125; Smith v. Hornback, 3 A. K. Marsh. (Ky.) 392; Hotchkiss v. Hunt, 56 Me. 252; Sawyer v. Harmon, 136 Mass. 414; Frasier v. Williams, 15 Minn. 288; Heath v. Missouri Ry. Co., 83 Mo. 617; Bowles v. Bowen, 45 N. H. 124; Rice v. Goff, 58 Pa. St. 116; Cozine v. Walter, 55 N. Y. 304; Phillips v. Elwell, 14 Ohio St. 240; 84 Am. Dec, 373; Flaniken v. Neal, 67 Tex. 629; Wood v. Doane, 20 Vt. 612; Carr v. Commercial Bank, 16 Wis. 50; Brown v. Kennedy, 15 Wall. 597; Freem. Exns. sec. 364. Contra, Sanford v. Nichols, 14 Conn. 324; Grant v. Harris, 16 La. An. 323; Jackson v. Jackson, 13 Ired. (N. C.) 159.

2, Chamberlin v. Brewer, 3 Bush (Ky.) 561; Andrew v. Parker, 6 Blackf. (Ind.) 461; Briggs v. Green, 33 Vt. 565; Campbell v. Webster, 15 Gray 28; Allen v. Martin, 10 Wend. 300; 25 Am. Dec. 564; Phillips v. Elwell, 14 Ohio St. 240; 84 Am. Dec. 373.

3, Egery v. Buchanan, 5 Cal. 53; Higgs v. Huson, 8 Ga. 317; Smith v. Noe, 30 Ind. 117; Angell v. Bowler, 3 R. I. 77; Love v. Smith, 4 Yerg. (Tenn.) 117; Ayres v. Duprey, 27 Tex. 593; 86 Am. Dec. 657.

4, Carr v. Commercial Bank, 16 Wis. 50; Knutson v. Davies, 51 Minn. 363; Crosbey v. Farmer, 39 Minn. 305.

5, Orange Co. Bank v. Wakeman, 1 Cow. 46; Mumford v. Armstrong, 4 Cow. 553; Armstrong v. Garrow, 6 Cow. 465.

§ 650. Same — How far conclusive upon the officer — As to strangers. — In general, the return is *conclusive upon the officer*. He cannot be heard to gainsay the truth of his return made under his oath of office.[1] Thus, the sheriff cannot be heard to prove that the amount of money collected was less than the amount stated in the return, although the act was that of his deputy;[2] nor can he deny that an arrest was made at the time stated in the return;[3] nor can he prove that he did not in fact sell land returned as sold;[4] nor that there were no goods, where he has made return of the levy.[5] But an officer may *explain* a return, if *ambiguous* or indefinite.[6] He may also prove *facts not inconsistent* with his return, as that the plaintiff, being the purchaser at the sale, paid his bid by crediting the amount on the execution.[7] So where an

officer is sued for not making a levy, he may show that the property was not the debtor's, although he has made a return designating the property as belonging to the debtor.[8] Nor is the return of the officer conclusive, as against him, as to those statements which clearly relate to *matters of opinion*, for example, as to value.[9] On the same principle, it was held that an officer was not bound by the statement that a levy was made at a given hour of the day.[10] The general rule is that an officer may use his return in *his own favor*, but in such case, it is only *prima facie* evidence of its truthfulness, and may be shown to be incorrect by any competent testimony.[11] Thus, if the officer brings an action against one who has interfered with the goods after his levy, his return is *prima facie* evidence of the levy.[12] As between *strangers to the suit*, the general rule is that the return of the officer, as to those matters which the law requires him to certify, is *prima facie* evidence, but not conclusive.[13] Generally strangers, who have no right of action against the officer for a false return or no standing in court against a proceeding to amend or set aside the return, may contradict the matters alleged therein.[14] Thus, although the return states that the property levied on by execution is the property of the judgment debtor, a third person who is the real owner is not bound thereby.[15] Other

persons may, however, sustain such *relations of privity* to the parties as to be concluded by the return. This has been most frequently illustrated in actions against sureties or those who have given bail, as such persons may be deemed to be in privity with those as to whose acts they have given indemnity;[16] and such persons may bring their actions for false return.[17] "Returns of officers are usually conclusive as a protection in favor of third persons who are bound to act upon them, and have no other evidence furnished them of their authority."[18]

1, Purrington v. Loring, 7 Mass. 388; Townsend v. Olin, 5 Wend. 207; Denton v. Livingston, 9 Johns. 96; 6 Am. Dec. 264; Harvey v. Foster, 64 Cal. 296; Scott v. Seiler, 5 Watts (Pa.) 235; Walters v. Moore, 90 N. C. 41; Williams v. Cheesebrough, 4 Conn. 356; Cowan v. Wheeler, 31 Me. 439; Martin v. Barney, 20 Ala. 369; Planters Bank v. Walker, 11 Miss. 409; Pratt v. Phillips, 1 Sneed (Tenn.) 543; 60 Am. Dec. 162.

2, Sheldon v. Payne, 7 N. Y. 453; Gardner v. Hosmer, 6 Mass. 325.

3, Shewel v. Fell, 3 Yeates (Pa.) 17.

4, Shewel v. Fell, 3 Yeates (Pa.) 17.

5, Barney v. Weeks, 4 Vt. 146.

6, Atkinson v. Cummins, 9 How. 479; Chamberlain v. Brewer, 3 Bush (Ky.) 561; Susquehannah Boom Co. v. Finney, 58 Pa. St. 200.

7, Evans v. Davis, 3 B. Mon. (Ky.) 344.

8, Fuller v. Holden, 4 Mass. 498; Learned v. Bryant, 13 Mass. 224; Tyler v. Ulmer, 12 Mass. 163; Whiting v. Bradley, 2 N. H. 83.

9, Williams v. Cheesebrough, 4 Conn. 356; Denton v. Livingston, 9 Johns. 96.

10, Williams v. Cheesebrough, 4 Conn. 356.

11, Sanborn v. Baker, 1 Allen 526; Baylor v. Scott, 2 Port. (Ala.) 315; Smith v. Emerson, 43 Pa. St. 456; Barrett v. Copeland, 18 Vt. 67; 44 Am. Dec. 362; Splahn v. Gillespie, 48 Ind. 397.

12, Cornell v. Cook, 7 Cow. 310; Loftin v. Huggins, 2 Dev. (N. C.) 10; Stanton v. Hodges, 6 Vt. 604; Lowry v. Cady, 4 Vt. 504; 24 Am. Dec. 628; Earl v. Camp, 16 Wend. 562.

13, Allen v. Gray, 11 Conn. 95; Bott v. Burnell, 9 Mass. 96; Tullis v. Brawley, 3 Minn. 277; Crow v. Hudson, 21 Ala. 560; Kingsbury v. Buchan, 11 Iowa 387; Tucker v. Bond, 23 Ark. 268; Hathaway v. Goodrich, 5 Vt. 65; Cornell v. Cook, 7 Cow. 310; Browning v. Hanford, 7 Hill 120; Butler v. State, 20 Ind. 169.

14, Bott v. Burnell, 9 Mass. 96; Caldwell v. Harlan, 3 T. B. Mon. (Ky.) 349.

15, Whiting v. Bradley, 2 N. H. 79.

16, Cozine v. Walter, 55 N. Y. 304; Boomer v. Lane, 10 Wend. 525; Bean v. Parker, 17 Mass. 591.

17, Cozine v. Walter, 55 N. Y. 304; Whitaker v. Sumner, 7 Pick. 551; 19 Am. Dec. 298.

18, 2 Cowen & Hill's Notes to Phill. Ev. 797; Thayer v. Stearns, 1 Pick. 109; Saxton v. Nimms, 14 Mass. 320.