time, an efficient and almost the only security against fraud, has for this long time past degenerated into an idle and mischievous ceremony."(p)

It should seem therefore reasonable that one and the same effect should now be given to all classes of instruments; probably the best rule would be that which now prevails with respect to Bills of Exchange; namely, that as a man has signed the instrument, he should be presumed *primâ facie* to have done so for a valid consideration; but that he should not be precluded in any case from disputing this fact: and even though he may have contracted by a deed, or under seal, he should nevertheless be permitted to show that he had not received such consideration as would support his promise.

The Courts of the Company are all Courts of Equity and good conscience; they are not bound by the rigid rules of Law; and may well search the merits of each case that comes before them(q) and decide upon the merits, subject only to general principles, which they must learn.(r)

§ 95. So again in many cases which will be hereafter considered a

---

(p) *Bentham's Works*, vol. 6, page 575.

(q) "It is the duty of this Court" says Lord Cottenham in *Walworth v. Holt* 4 M. and C. p. 635 "to adapt practice and procedure to the existing state of society, and not by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice and to enforce rights for which there is no other remedy. This has always been the principle of this Court, though not at all times sufficiently attended to."

(r) It must not be supposed from the above that Courts of Equity in England will set aside a contract merely from the *inadequacy* of the consideration. It must be such an inadequacy as amounts to a fraudulent and unconscientious advantage. The following passage from Storey's Commentaries on Equity, vol. 1. p. 204 may be usefully quoted.

"Mere inadequacy of price, or any other inequality in the bargain is not, however, to be understood as constituting, *per se*, a ground to avoid a bargain in Equity. For Courts of Equity, as well as Courts of Law, act upon the ground, that every person, who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or otherwise, or profitable, or unprofitable, are considerations, not for Courts of Justice, but for the party himself to deliberate upon."

"Inadequacy of consideration is not, then, of itself, a distinct principle of relief in Equity. The Common Law knows no such principle. The consideration, be it more or less, supports the contract. Common sense knows no such principle. The value of a thing is, what it will produce; and it admits of no precise standard. It must be in its nature fluctuating, and will depend upon ten thousand different circumstances. One man, in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances, which may induce him to part with it at a particular time. If Courts of Equity were to unravel all these transactions, they would throw every thing into confusion, and set afloat the contracts of mankind. Such a consequence would of itself be sufficient to show the inconvenience and impracticability, if not the injustice, of adopting the doctrine, that mere inadequacy of consideration should form a distinct ground for relief."

"Still, however, there may be such an unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition or some undue influence; and in such cases Courts of Equity ought to interfere, upon the satisfactory ground of fraud. But then such unconscionableness or such inadequacy should be made out, as would (to use an expressive phrase) shock the conscience, and amount in itself to conclusive and decisive evidence of fraud. And where there are other ingredients in the case of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud."

party is *estopped* from denying his own admissions and representations: as for instance a man who admits that he is a tenant of A cannot dispute his landlord's title in an action by the latter for rent, or to eject him. So if a man induces a tradesman to supply a woman with goods by a representation that she is his wife, he shall not afterwards be permitted to show that she was not, in a suit brought against him by the tradesman for the price of the goods. This subject will be considered at large when we come to the doctrine of *estoppel*. Here it will suffice to quote the words of Lord Denman in *Pickard v. Sears*.(s)

"The rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

§ 96. As to written instruments the subject is thus exhausted. We come now to the practice of the Law which annexes an artificial effect to facts.

§ 97. This it does by raising upon facts certain artificial *Presumptions;* by drawing from them certain arbitrary inferences, as contradistinguished from those which a judge or jury would naturally draw, were the Law silent on the point. The subject of presumptions will be fully considered hereafter; at present it will suffice to study the language of Bonnier, as translated by Best.(t)

"The determining to what extent a certain known element renders probable the existence of such or such an unknown cause, depending, as it necessarily does, on the light of reason, must in general be left solely to the discrimination of the judge. But in the most important cases the law, desirous of insuring the stability of certain positions, and of cutting short certain controversies, has established PRESUMPTIONS, to which the judge is obliged to conform." And in another place, "It is not always possible for a man to arrive at a perfect knowledge of the truth in each particular case, and yet social necessities do not always allow him to suspend his judgment and refrain. The stability of the status of person and property, in a word, the want of peace and security for a multitude of valuable interests, compel the legislator to hold as true a great number of points which are not demonstrated, but whose existence is established by an induction more or less cogent. Political order, like social order, rests only on legal presumptions.

(s) 6. Ad. and El. p. 474.
(t) See Principles of Evidence, § 42.

The capacity of exercising certain rights, or fulfilling certain functions, can be recognized only through the medium of certain conditions determined *à priori, a special verification for each individual being evidently impracticable.* The more social relations become complicated, the more it becomes necessary to multiply these presumptions. * * * The motives which have induced the legislator to establish such or such a presumption more frequently belong to law than to fact. What he chiefly considers is, not if the known fact combines all the characteristics requisite to render the unknown fact probable, but only if social interest requires that from the proof of one the existence of the other ought to be inferred."

§ 98. Now briefly to glance at the division of these legal presumptions, and to give some instances by way of illustration. This again is ready to our hands in the following section of Mr. Best's work.(v)

"These *legal* presumptions are of two kinds. In most of them the law assumes the existence of something until it is disproved by evidence—called by the civilians *præsumptiones juris,* or *præsumptiones juris tantùm ;* and likewise, by English lawyers, inconclusive or rebuttable presumptions. In others, although these are much fewer in number, the presumption is absolute and conclusive, so that no counter-evidence will be received to displace it. These are called *præsumptiones juris et de jure*—a species of presumption correctly defined, *Dispositio legis aliquid præsumentis, et super præsumpto, tanquam sibi comperto, statuentis.* To this class belong the promise to pay which the law implies from the purchase of goods ; the intent to kill or to do grievous bodily harm implied from the administration of poison, using deadly weapons, &c. Some may be considered as belonging to universal jurisprudence ; the principal of which are the presumption of right derived from the continued and peaceable possession of property, and the presumption upholding the decisions of courts of competent jurisdiction. We have already alluded to the maxim *Interest reipublicæ ut sit finis litium ;* to which must be added, *Vigilantibus et non dormientibus jura subveniunt* and *Ex diuturnitate temporis omnia præsumuntur solemniter esse acta.* Possession is at all times *primâ facie* evidence of property ; but if undisturbed possession for a very long time had not a conclusive effect, the most valuable rights would not only be made the continual subject of dispute, but be liable to be divested or overthrown when the original evidences of the title to them become lost or decayed by time : accordingly, among the various ways in which property may be acquired, we find both writers on natural law and the positive codes of most nations recognizing that of 'prescription,' or uninterrupted user or possession for a period longer or shorter."

(v) See Principles of Evidence, § 43.

And see the observations of Starkie.(w)

"As artificial or legal presumptions are founded partly upon principles of policy and utility, independently of the real existence of the fact inferred, and consequently, as such presumptions must occasionally, at least, be made contrary to the real truth, it follows, that these presumptions cannot, consistently with just principles, be established, unless either the real fact be immaterial, as where the presumption is made merely for the purpose of annexing a legal consequence to the fact on which the presumption is founded; or where the fact to be presumed being material, but its investigation difficult and remote, a general rule of presumption can be established of practical convenience, and consistent with justice, although it may occasionally operate contrary to the truth. In the first place, presumptions are frequently made for the mere purpose of annexing a legal incident to a particular predicament of Act. If the fact *B.* to which a particular legal consequence is annexed, be absolutely or conditionally presumed from the existence of the fact *A.* it is obvious that the effect is to annex to the fact *A.* the legal consequence which belongs to *B.* The making of such presumptions, and thus annexing legal consequences, is an indirect mode of legislation; and in estimating the legal value of such a presumption, it is plain that the intermediate or presumed fact may be left out of the account; the question is, whether a legal consequence be well connected with a particular predicament in fact; in other words whether a rule of law be wisely constituted. Thus, if from the adverse possession of an incorporeal interest in the lands of another, unanswered, a grant is to be presumed, the effect is to annex ownership as an incident to such adverse possession unanswered; for the supposed grant is mere fiction, or legal machinery, and the only question is, whether the legal consequences really incident to a valid grant are well annexed to such a state of facts.—Again, in trover, a conversion of the plaintiff's property is to be inferred by a jury, from the fact of a demand by the owner, and refusal on the part of the defendant who is in possession of it, such refusal being unexplained. Here, the predicament on which the presumption is built renders the fact presumed in reality immaterial, where the defendant wilfully withholds the plaintiff's property; it is of no importance to the real justice of the case, as between the parties, to what use the defendant may have applied the property, whether he has consumed the goods, or allowed them to perish in the course of nature. The effect in such cases is merely to annex to one fact a legal incident annexed by law to another fact, to which the former is in all respects equivalent. Such presumptions are also well founded in principle where the investigation of a fact is difficult and precarious, and where a general rule of practical utility

(w) *Starkie*, p. 743, note *(f)*.

can be established, without occasioning positive injustice, in individual instances. Within this principle, all statutes of limitation, and the presumptions made in analogy to them, are founded. The difficulty of proving a debt constantly increases with lapse of time, and may at last become impossible; whilst, on the other hand, the probability that he who makes no claim of payment or possession has a right to make it, continually diminishes. Convenience, therefore, requires that at some period or other the presumption should be made, either absolutely or otherwise, against the antiquated claim. And as such a rule or presumption must be general in its operation, a precise and definite period must of course be appointed for its operation. The great advantages of this in point of policy and convenience are of the most obvious nature. The operation of such a rule, whether it be absolute, or be but a *primâ facie* presumption, being purely artificial in its nature, may be, it is true, contrary to the fact; but of this, a party who knew the rule, and who suffers therefore merely from his own laches, has no just ground for complaint. On this ground, by the stat. 1, Jac. I. c. 11, s. 2, 19.—Car. II. c. 6, a person who has been abroad for the space of seven years, and has not been heard of within that time, is, at the expiration of it, presumed to be dead; a rule of convenience, on account of the difficulty of proving the death of a person under such circumstances, and attended with no positive injustice in any individual case, the presumption operating only in the absence of proof to the contrary.

"It has been said, that the presumption of the law is better than that of man (Esprit des Loix, l. 29, c. 16). A position much too large, if it be not limited to general rules of the nature above alluded to. For artificial presumptions, although beneficial, as general and practical rules, are usually very uncertain and precarious instruments for the investigation of truth in particular instances; they are, therefore, unfit to be employed where any application of the law, contrary to the real fact, would be attended with positive injustice, as in criminal cases."

The whole subject of Presumptions will be considered at large in the third part of this work; here I would only caution the beginner against the abuse of too hastily raising a presumption, or as it is called in common parlance, of jumping to a conclusion. Not only is rashness in this respect to be avoided, but care must be taken that our presumption when raised is legitimate, and follows necessarily from the premises before us. Otherwise we shall be guilty of twisting and perverting circumstances to our own view, a fault only too likely to happen whenever the mind is pre-occupied or biassed by some preconceived hypothesis of innocence or guilt.

§ 99. Thus we have examined the principles of evidence; and we find that generally speaking there is no difference between the course of investigation allowable in judicial and ordinary matters. That the Law only interferes to vary the ordinary course from causes originating in vexation, expense, or delay: that it operates either by way of exclusion or annexation of particular effects: that its principal exclusive tests are oath and cross-examination; but that, on the ground of public policy, it also excludes testimony in certain other cases, such for instance as secrets of State, confidential communications, &c.; that it annexes effects to instruments and to facts; to the former, according as they are of a public or private character; to the latter, by way of drawing from them certain inferences or presumptions.

§ 100. Our next great division is that of

II.—THE KINDS OF EVIDENCE.

§ 101. We have already had occasion to glance at the various *kinds* of evidence, (See § 33—7, 65) when speaking of the difference between direct and indirect, mediate and immediate, testimony. You will meet with many terms applied to evidence, somewhat confusing at first, because they proceed from different principles of division, and unless this be borne constantly in mind, you will be apt to be puzzled by not getting the branches of the same division properly opposed to each other. Thus you will in the course of your reading meet with such terms as these: original and secondary evidence; primary and derivative; natural and artificial; mediate and immediate; direct and indirect: collateral and circumstantial; conclusive and presumptive;(x) real and personal, and the like. Many of these terms in point of fact being equally applicable to one and the same *kind* of evidence, you will fall into all sorts of cross-divisions, if you do not remember the various principles on which evidence has been divided. Thus, direct evidence may, as you will see, consist as well of real as of personal evidence;

(x) For the sake of clearing away confusion, it may be useful here to explain briefly these terms. The use of them will become apparent as we proceed: and must be learnt by study of the text: the present note merely indicates their application. Direct and indirect have already been explained. Other terms for indirect, are collateral or circumstantial. Conclusive and presumptive evidence are generally used with reference to circumstantial evidence. Direct evidence is divided into immediate and mediate. For the first, primary and original are synonymous. For the latter, derivative, hearsay, and in one sense, secondary. Original and secondary evidence are opposed to one another in another sense; that in which the inferior cannot be received till the absence of the superior quality of testimony is accounted for. Personal and real proceed from a consideration of the source of evidence as it comes from persons or things. Artificial evidence is applied to that effect which the Law annexes to instruments and facts, which is merely conventional—as opposed to all other, which is natural.

thus, all hearsay evidence is necessarily mediate evidence; thus, all circumstantial evidence is in one sense collateral; though all collateral is not circumstantial.

§ 102. To explain this further; Evidence has been divided, as to kind, into real and personal evidence (and it is the division principally followed by Mr. Best in his work on the Principles of Evidence(y)) from a consideration of the source whence the testimony proceeds. Thus, if it is delivered by a person, it is called *Personal*; if it is derived from a thing, it is called *Real*. But if we remember what was said in § 33—7, 65, as to the nature of Direct Evidence, it will be apparent that Real Evidence as well as Personal is often of a direct nature. Thus if the point to be proved is a contract, the contract itself, if it has been reduced to writing, when produced, and proved, is itself *real direct* evidence.

§ 103. The simplest method of explanation which occurs to me, is to bid you always call the point to be proved, the *factum probandum*: and every fact which is produced for the purpose of proving the *factum probandum*, whether by itself simply, or in connection with other facts, a *factum probans*.

§ 104. Now whatever other quality these *facta probantia* may possess, whatever other names we may call them by, this much is certain, that they must be always either *Direct* or *Indirect*. For *Direct* evidence is that which depends directly upon the *senses*, independent of any deduction to be drawn from the *factum probans*; as where a personal witness declares, I *saw* A kill B with a sword: here, if the witness is worthy of full credit, the testimony is conclusive. Its validity rests solely upon its credibility. So if a piece of real evidence be produced, for instance a written contract, the moment the judge is satisfied that it has been executed by the party to be charged by it, its credibility being established, it is *direct* evidence of the *factum probandum*, viz., that such a contract was executed by the party sought to be charged.

§ 105. But suppose, as often happens, there is no, or not sufficient, direct testimony forthcoming to establish the *factum probandum*, the judge will receive indirect evidence, that is to say, evidence which proves or tends to prove the *factum probandum* indirectly, by means of

(y) See *Best*, § 28, 190.

certain inferences or deductions to be drawn from its existence, and its connection with other *facta probantia*. Here the force of the evidence does not rest merely on the credit attached to the *factum probans*, but to the result which by a process of reasoning it indirectly establishes in the mind of the judge: and this is called circumstantial evidence. It is also called collateral evidence, because it is not, as will be shown by example, the very *factum probandum*, as when A says "I saw B kill C," but something collateral to the *factum probandum*, from which the mind of the judge infers the *factum probandum*. It is also called *Presumptive*, because upon certain principles which will be considered hereafter, the mind of the judge raises certain presumptions upon it.

§ 106. Our first great division therefore of the kinds of evidence will be into *Direct* and *Indirect*.

§ 107. Before proceeding further, it may be well in order more vividly to impress the mind of the student, to give one or two illustrations of Indirect evidence, whence he will be able to recognize all others whenever they occur. Suppose, for instance, the *factum probandum* is a murder which A is charged with having committed upon B. It may be that C has actually seen A commit the deed. His testimony to this effect is clearly *direct* evidence. But let us suppose a second case, that there was no person about the spot—no direct testimony in short forthcoming—then, if it were found that there were marks of shoes on the snow about the house, and that those marks exactly corresponded with the shoes worn by the prisoner, these facts would be *indirect* evidence, because their force against the prisoner would not depend solely upon the faith placed in a witness who deposed to the evidence of his senses, but would depend upon a reasoning process carried on in the mind of the judge, whence he would infer or presume from the *collateral circumstances* presented to him, that the prisoner was the person who had on the shoes which made the marks: though it will be seen that this is not a necessary or conclusive presumption, however probable, for it is *possible* that another person may have taken the prisoner's shoes for the express purpose of diverting suspicion from himself: a case which has actually occurred.

§ 108. This instance must suffice. Circumstantial testimony is of course as infinite in its variety as the whole round of human action.

Its quality, and the rules under which it is receivable, will be considered at large hereafter.

§ 109. Bearing in mind this great leading distinction between *Direct* and *Indirect* Evidence, let us now proceed to enquire into the first branch somewhat more closely. As I have above shown, there can be no doubt of the direct quality, when A says, "I *saw* such and such a fact." "I *heard* such and such a statement made by the plaintiff, or the defendant, or the prisoner." But suppose that the witness is not reporting the evidence of his own senses, but that which he has heard from some third party, it is clear that he is still giving *direct* evidence. Because if it were admissible, and credited, its force would depend upon faith, and not upon inference. True it is, that the law of evidence does not, generally speaking, or except in certain cases which will be specified and examined hereafter, admit such testimony. But this is the result of the excluding tests of oath and cross-examination. The witness who on oath and subject to cross-examination reports the evidence of his own senses, gives *immediate* evidence; one permitted to report what some third person has told him, gives *mediate* evidence. He is in truth but a *medium* for communicating to the judge what some other person, not before the Court, has said he saw or heard.(z) He is a mere conduit pipe. Whereas the evidence of the first description is *im*-mediate,(a) that is to say not delivered through any *medium*, but originally. Hence Direct Evidence must be divided into *immediate* and *mediate*.

§ 110. It is superfluous to dwell longer here on the first class of Direct Evidence—*immediate*.

§ 111. The second class *mediate*, or as it is more popularly termed *Hearsay*, is generally not receivable,(b) being excluded on the grounds

---

(z) See § 65.

(a) *Immediate* is derived from *in* for *non*, and *medium*.

(b) In determining whether a piece of evidence tendered is hearsay or not, it is a good criterion to consider whether it is offered subject to an oath and to cross-examination. Suppose the evidence tendered is the deposition of a deceased witness in a former suit. Then the one test of oath is present; but if the testimony formerly delivered was in a suit not between the same parties, it is clear *the present parties or at least one of them* had not the opportunity of cross-examination, and the evidence is hearsay as against them. Practice alone gives facility in detecting grounds for objection. *Multa multo exercitamentis facilius quam regulis percipies.* The shape in which Hearsay is offered is often very subtile, and by no means in the vulgar form of a witness relating something he has heard from a third person not before the Court: when the absence of both tests—oath and cross-examination—is at once apparent. Yet it is of grave importance to the Pleader to take objection at the moment, for if Hearsay gets unobjected to on the judge's note, he has a right to deal with it as he thinks fit.

already considered under the first head of our subject. It becomes necessary now to consider in detail those exceptive cases in which Hearsay is receivable.

§ 112. Although the test of *Hearsay* is its not having been submitted to oath and cross-examination, yet a little reflection will show us that there are certain cases in which evidence so delivered is in its nature *original*; where for instance it could not have been delivered subject to the ordinary tests. Suppose that the subject of enquiry is whether A wrote or received a particular letter, as frequently is the case in bankruptcy or insolvent cases, here the letter itself is the best, if not the only evidence of *that* fact; although the facts stated in the letter could not be proved by the production of the letter, but if they were the subject-matter of enquiry, the writer of the letter must himself be called and state them on oath.

So in *Cotton v. James*,(c) it was held that "letters, bearing postmarks before the act of bankruptcy, and found in the alleged bankrupt's possession after it, containing statements of matters material to the act of bankruptcy, are admissible without calling the writer, as evidence against the alleged bankrupt, *to show that he received intimation of these facts, though not to prove their truth.*"

§ 113. Thus, in the great case of *Wright v. Doe dem Tatham*,(d) where the question was whether testator was of a sound mind at the time of his death, certain letters from his relations to him were tendered in evidence, to prove that they corresponded with him on the footing of his sanity. It was held that there was no proof that these letters had come home to the knowledge of the testator: and they were rejected, though the judges were divided as to the proof of the letters having reached the testator, and their admissibility on *that* ground. Here you will observe that assuming these letters had never reached the testator, they were offered to establish the sanity of the testator, by the dealings or opinions of third parties. For *this* purpose the parties themselves should have been called, and sworn to the *facts* on which they had dealt with the testator as a sane man: and to prove this by their letters not upon oath, was of course to resort to mere hearsay. In short it was an attempt to prove the state of the testator's mind

(c) 1 *M.* and *M.* 273.
(d) 7 *A.* and *E.* 313.

not by *his* acts, but by the opinion, not upon oath, of third parties. Thus in the case under consideration Tindal, C. J., says,(e)

"The question to be determined by the jury was, whether or not the testator *John Marsden* was and had been, from the time he attained his full age, 1779, and down to and at the time of his making his will and codicil, in the years 1822 and 1825 respectively, a person of sane mind and memory, and capable of making a will. And, in order to determine that question, I conceive all that was said, written, or done by the testator himself at any time during such period was the most direct and the best evidence to ascertain the state of his understanding; and that the next in degree, because intimately connected with it, would be all that was said to him, written to him, and done to him during the same period, by his friends and others who had access to him; provided always, that what was so said, written, or done to him by others, is shown to have come home to his actual knowledge;(f) but I consider this condition to be indispensable as to the admissibility of this second class of evidence; for, as to what was said by others but not heard by the party whose understanding is the subject-matter of enquiry, or written by others but which never reached him, or done by others but never known by him to have been done, it appears to me that such speaking, or such writing, or such acting, can amount to no more than an expression of the opinion of the speaker, or the writer, or the actor, and that such opinion, not having been given upon oath, and not being subject to cross-examination as to the grounds upon which it was originally formed or continued, cannot, upon that account, be deemed admissible in evidence. I cannot therefore accede to the position which has been contended for by the learned counsel on the part of the plaintiff in error, that mere treatment of the party by others without or beyond the reach of the knowledge of the party himself, or, as it was sometimes expressed, conduct of others *towards* him, although not amounting to conduct *to* himself, can form a legitimate or admissible species of evidence. Evidence of that description may have been held admissible in questions relating to the *status* of mind or competency of a testator before ecclesiastical tribunals; those courts may, perhaps, and not improperly, have allowed evidence of the manner in which a person has been treated by his friends and others, without enquiring whether those modes of treatment came home to the understanding of the testator. But in an ecclesiastical court the same persons are judges both of the law and the fact; and their experience and sagacity may be sufficient to prevent any injurious consequences from a class of evidence which approaches so closely to, if it is not in fact, mere opinion of the witness, by giving such testimony no more weight

(e) 7 *Adolphus and Ellis's* Reports, p. 400.

(f) Other letters, so proved, were admitted in this case.

than it really deserves. But our rules of evidence are calculated for trials before popular tribunals; and one of the first objects of the law of evidence in those courts is to exclude the admission of any evidence which may by possibility mislead the understanding of the jury.

"I therefore consider such treatment only of a person by his friends or others to be admissible in evidence upon a question concerning his competency as appears to have come home to his understanding, and upon which he has been shown in some degree to have acted; for, after all, it is not the treatment itself which is of any value, but the mode in which the party conducts himself when such treatment takes place. It is not what the third person does, or says, or writes, which furnishes of itself any indication of the state of mind of the party respecting whom the inquiry is made, but what such party himself does, or says, or writes, or how he conducts, or bears himself on the occasion; for even his refusal to act, or his silence, may, in some instances and on some occasions, furnish evidence as strong upon the state of his mind, and speak as loudly and intelligibly, as any act or answer however direct."

§ 114. In like manner *public* reputation or opinion *can* only be proved by Hearsay; but here Hearsay is in its nature *original* evidence. In *Gurr v. Rattan*,(g) Gibbs, C. J., says, "what is reputed ownership? it is made up of the opinions of a man's neighbours: it is a number of voices concurring upon one or other of two facts." Every man who swears to *public* opinion, must necessarily therefore be giving hearsay evidence as to all that of which his evidence is composed *except his own opinion*. He *can* only have learnt the opinion of others from them, and to refuse on this ground to receive evidence of public opinion, or general reputation in these cases, would exclude the *only* possible evidence of its existence.

§ 115. So where the question is the impression produced upon an aggregate of minds, it would be impossible to call the owner of each individual mind into the witness box, and the existence of any general impression or public opinion can only be established by this evidence not upon oath, so far as the witness speaks of impressions on the minds of others than himself; and the evidence is in fact in its nature original.

§ 116. Thus in the celebrated case of *Du Bost v. Beresford*(h) which was an action for destroying a picture, the impression produced

(g) Holt's, N. P. C. 327.
(h) 2 Cam. 512.

upon the mind by the picture was allowed to be proved on the defence, by witnesses who swore to the exclamations and declarations of other spectators of the picture in their presence, such spectators not being themselves put into the witness box. In that case the Plaintiff, a painter, had painted the Defendant and his wife. The former was extremely plain, the latter very handsome. Some misunderstanding having arisen, the Defendant refused to receive the picture; whereupon the Plaintiff exhibited it in public with the title of "Beauty and the Beast." The Defendant cut the picture to pieces, and therefore the action was brought to recover damages. The defence was that the picture was a Libel, calculated to bring the Defendant into public ridicule, and that he was therefore justified in destroying it. To prove this, witnesses were called, who swore to the impression produced by the picture on their own minds, viz. that it was intended to be a representation of the Defendant and his wife, and *to the statements of recognition by other spectators.* The evidence was received.

§ 117. So when it is material to enquire into the demeanor, mental feelings, and the like, of an individual, the expressions used by that individual are in their nature original evidence. They are the very matter enquired after; only by the expression can the feeling reveal itself. On this ground, in actions for criminal conversation, where it is material to prove the terms on which the husband and wife lived previous to the intimacy with the Defendant, letters and expressions of the wife (not a party to the suit) and of the husband (giving evidence in his own favor) are receivable. But of course not if they are shown to be collusive.

§ 118. So the expressions of a person are receivable to show the state of his bodily health, pain, sensations. Thus the statements to his surgeon by a party assaulted, are receivable to show how he has suffered.

§ 119. Thus also where it is material to enquire whether any complaint has been made; as in rape cases, where the fact that the prosecutrix did not conceal the alleged violation, but communicated it to her mother or friends without delay, is often of the highest importance, the *fact* of complaint *can* only be thus proved. And for this purpose the enquiry is usually made. But beyond the question, did the prosecutrix make a complaint of personal violence against any body? questions cannot be asked to prove thus the *particulars* of the crime. The prosecutrix must herself prove the particulars on oath.

So in *R. v. Clarke*,(i) it was held that

"The fact of her making complaint of the outrage, and the state in which she was at the time of making the complaint are evidence, although the particulars of her statement are not evidence to prove the truth of her statement."

§ 120. So declarations, where they form part of the *res gestæ*, are admissible. Phillipps(k) puts this so clearly that I shall use his language.

"Verbal and written declarations are often said to be admissible, as constituting a part of the *res gestæ*. As such they are most properly admissible when they accompany some act, the nature, object, or motives of which are the subject of enquiry. In such cases, words are receivable as original evidence, on the ground that what is said at the time affords legitimate, if not the best, means of ascertaining the character of such equivocal acts, as admit of explanation from those indications of the mind which language affords. For where words or writings accompany an act, or where they indicate the state of a person's feelings or bodily sufferings, they derive their credit from the surrounding circumstances, and not from the bare expressions of the declarant. And the language of persons at the time of their doing a particular act, in the same manner as their demeanour or gesture, is more likely to be a true disclosure of what was really passing in their minds, than their subsequent statements as to their intentions, even if such statements would not be excluded on other grounds."

§ 121. The most striking illustrations of this principle are to be found in those cases in which the sayings, acts, &c., of conspirators have been admitted against *other* parties accused of participating in the conspiracy.

"It is an established rule" writes Phillipps,(l)

"That where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party; it follows, therefore, that any writings or verbal expressions, being acts in themselves, or accompanying and explaining other acts, and so being part of the *res gestæ*, and which are brought home to one conspirator, are evidence against the other conspirators, provided it sufficiently appear that they were used in the furtherance of a common design."

(i) 2 *Starkie* C. 242.
(k) See vol. 1, p. 152.
(l) *Ibid*, p. 157.

§ 122. *Hardy's case*[m] is the leading case on this point: where letters written by co-conspirators in furtherance of their common object, and writings distributed by them, were received in evidence against the accused. So also in *Lord George Gordon's case*[n] the inscriptions on banners carried by the mob were properly received in evidence against illiterate prisoners who could not read: not, you will observe, to prove the fact of their complicity in a conspiracy: but that complicity having been in the first instance established by proving the acts of the prisoners, to show what was the common object of the rioters.

§ 123. The case of Hardy above referred to affords also a valuable illustration of the Law that hearsay statements, &c. will not be receivable if not actually part of the *res gestæ*.

On this point Phillipps[o] writes lucidly as follows:—

"But where words or writings are not acts in themselves, nor part of the *res gestæ*, but a mere relation or narrative of some part of the transaction, or as to the share which other persons have had in the execution of a common design, the evidence is not within the principle above mentioned; it altogether depends on the credit of the narrator, who is not before the Court, and therefore it cannot be received.

"Thus on the trial of Hardy for high treason, a question arose as to the admissibility of a letter written by Thelwall, and sent to a third person not connected with the conspiracy, containing seditious songs, which the letter stated to have been composed and sung at the anniversary meeting of the London Corresponding Society, of which society the prisoner and the writer of the letter were proved to be members. The argument in favor of the admission of the evidence was, that the letter was an act done in furtherance of the conspiracy; that the letter contained language of incitement, not merely a narrative or confession by a stranger, and that in such case *scribere est agere*. The objection was, that the letter contained merely a relation by the writer, that certain songs had been sung, which could not be evidence against the prisoner. The majority of the Court decided against the admissibility of the letter. Eyre, C. J., Macdonald, C. B., and Hotham, B. were of opinion, that the letter could not be received. Buller, J. (with whom Grose, J. agreed in thinking it admissible) said, the letter ought to be received in evidence, for the purpose of showing what was the nature and extent of the conspiracy; that in *Damaree's* and *Purchase's cases*, evidence was received of what some of the parties had done, when the prisoner was not

(m) 24 *Howell's St. Tr.* 704.
(n) 21 *Howell's St. Tr.* 542.
(o) vol. 1, p. 160.

there; that, on the trial of Lord Southampton, something said by Lord Essex, previous to the prisoner's being there, was admitted as evidence: and that, in *Lord George Gordon's case*, evidence of what different persons of the mob had said, though he was not there, had been admitted. But Eyre, C. J., and the other judges, considered the letter, not as an act done in prosecution of the plot, but as a mere narrative of what had passed. 'Correspondence,' said the Chief Justice, 'very often makes a part of the transaction, and in that case the correspondence of one who is a party in a conspiracy would undoubtedly be evidence, that is, a correspondence in furtherance of the plot; but a correspondence of a private nature, a mere relation of what had been done, appears a different thing.' And with respect to the cases alluded to by Buller, J., the Chief Justice observed, 'In the cases of *Damaree* and *Lord George Gordon*, the cry of the mob at the time made a part of the fact, part of the transaction, and therefore such evidence might properly be received.'

"It is in consequence of the distinction between writings or declarations which are a part of the transaction, and such as are in the nature of subsequent statements, but not part of the *res gestæ*, that the admissibility of writings often depends on the time when they are proved to have been in the possession of co-conspirators; whether it was before or after the time of the prisoner's apprehension. Thus on the trial of Watson, some papers, containing a variety of plans and lists of names, which had been found in the house of a co-conspirator, and which had a reference to the design of the conspiracy, and in furtherance of the alleged plot, were held to be admissible evidence against the prisoner. All the judges were of opinion that these papers ought to be received; inasmuch as there was in the case strong presumptive evidence that they were in the house of the co-conspirator *before* the prisoner's apprehension: for the room in which the papers were found had been locked up by one of the conspirators. And the judges distinguished the point in this case from a point cited from *Hardy's case*, where the papers were found, *after* the prisoner's apprehension, in the possession of persons who, possibly, might not have obtained the papers till afterwards."

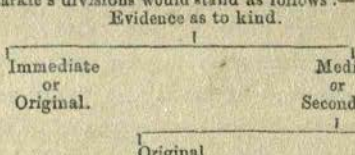
§ 124. Bearing in mind these particular cases in which evidence, though not delivered on oath or subject to cross-examination, is in the nature of original evidence, let us return to a consideration of Hearsay commonly so called.(p)

(p) Starkie is I think somewhat puzzling to the student in this part of his subject, for in page 53 he makes a distinction between *mediate original*, and mediate *secondary* evidence. The general idea of original and secondary evidence makes them correspond respectively with *Immediate* and *Hearsay*; and to introduce the same division into *one* branch (mediate or Hearsay) is confusing. I have therefore abandoned our author here; but must

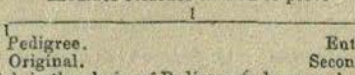
§ 125. It is never receivable if better evidence is procurable and kept back, for otherwise the fundamental rule which requires that the *best* evidence which each case admits of shall be produced, would be violated. But there are certain subjects which cannot possibly from their very nature admit of the production of *immediate* evidence, because they are not the subjects of the senses at all; such as relationship, character, custom, prescription and the like. In some of these instances, it is true that immediate evidence possibly might be producible, but very rarely. Character is clearly matter of opinion, and not of the senses: Relationship might occasionally be proved by the immediate testimony of a midwife, or a surgeon, or a mother, but generally speaking, relationship is not provable by immediate testimony. So of pedigree: suppose the link to be proved existed 100

---

endeavour to make his meaning clear in a note for the benefit of those students who are perusing his work. Starkie's divisions would stand as follows:—



Mediate evidence says Starkie (p. 53) of general reputation, pedigree, admissions, declarations accompanying an act, is in its nature *original*: all other mediate testimony is *secondary*. Now by this he means simply that as to the first class, there really is nothing behind, which could be of a better quality, or which could possibly be resorted to; whereas with respect to the second class, it pre-supposes the existence of better evidence, the absence of which must be accounted, for before any recourse can be had to the secondary evidence. Let us try this by two examples. Suppose mediate evidence were offered to prove a matter of pedigree, suppose also mediate evidence were offered to prove a fact by means of an entry made in a deceased person's book according to the ordinary custom of his trade. Then these two heads of evidence according to Starkie would stand thus—



Now suppose that the link in the chain of Pedigree to be proved, were 100 years back, it is clear that there is nothing better than the hearsay of the old deceased persons which the witness reports. There is nothing to fall back upon, nothing behind this; nothing in short to be accounted for before such evidence was admissible, and so far it is in the nature of original evidence.

But take the other case: when an entry is produced, and is proved to have been made by a deceased person in the ordinary course of his business, it is receivable in evidence. But if the person who made the entry had been alive, his own testimony would have been better than his entry. He might it is true have refreshed his memory by a reference to his book, but the book itself would not have been independent evidence. He would have deposed on oath and subject to cross-examination—whereas, after his death, his entry is not subject to any such tests of its truth. In this case therefore, as there might be better testimony than the secondary or hearsay evidence of the entry, it becomes necessary to satisfy the Court that no such better evidence exists: in other words that the party making the entry is dead, and the source of *original* evidence being thus exhausted, the secondary evidence of the entry itself becomes receivable: thus illustrating the rule that secondary evidence is never admissible so long as original evidence of the same fact is procurable. This is all that Starkie means by his division or sub-division of *mediate* testimony into original and secondary. I have adopted with Phillipps the simpler course of considering in what cases hearsay, or mediate evidence is receivable.

years back. The witnesses almost to a certainty would be all dead, and in all these cases, *cessante ratione cessat lex*, hearsay evidence is receivable.

§ 126. The following observations sum up the whole matter.(q)

"The chief merit of the English law of evidence, a merit which in some measure atones for that predilection for absurdity which seems to have animated some of its earliest sages, and not quite to have abandoned their posterity, consists in the general exclusion of hearsay evidence; that one man shall not be affected by what another says of him, which he has no opportunity to examine or contradict, is a dictate of natural justice; and however it may be argued that such evidence ought to be admitted, and left to find its own level, yet so long as juries are entrusted with the decision of facts, and those juries in the greater number of instances are taken from a portion of the community peculiarly susceptible of prejudices, any substantive alteration of this rule would lead to the most pernicious consequences. *Vanæ voces populi non sunt audiendæ, nec enim vocibus eorum credi oportet, quando aut noxium crimine absolvi aut innocentem condemnari desiderant.*

"Perhaps the most remarkable exception to this important doctrine is, that by which the English law, dispensing with its formal rules in favor of higher principles, allows hearsay evidence to be given when it tends to explain an act done, and forms part of a particular transaction: nothing can be more sound than the reasoning on which this exception is admitted; an action may bear a totally different interpretation, according to the words by which it is accompanied—nay, in many cases, an action would be altogether unmeaning were it not for words which individuate it, and impart to it a peculiar and distinctive signification; the same cause, therefore, on account of which evidence of the act is given, obliges evidence of the expression with which it is accompanied to be received. Thus, where a question arises as to the validity of an insurance, impeached on the ground of fraud committed by the party for whose benefit it was made, evidence of declarations made by the party whose life was insured is admissible. So where a tradesman leaves his house, evidence may be given of his declarations as to the motives of his absence; so his declarations as to the state of his affairs are evidence, and the answers may be read to letters written by him and requesting assistance. Another exception is, where hearsay is admitted to prove a public right; in such cases that the fact of tradition exists among those who have the means of knowledge, and an interest in perpetuating that knowledge, is a circumstance entitled to great consideration; it is a moral fact, not obvious to the senses. No other evidence can be given, that

(q) *Law Mag.*, N. S. vol. I, p. 34.

such rights exist, but the prevalence of such traditions among the people. Such a persuasion is the very fact sought to be established; if it can be traced to the period when those rights were exercised, if it be constant and general, if no specific date can be assigned to its origin, hearsay is thus stripped of its most dangerous qualities; it ceases to be the loose random declarations of an individual, and assumes a character of constancy and truth in proportion to its extent and accuracy."

§ 127. Mediate or Hearsay evidence is receivable

1st. In matters of public and general interest.
2nd. In questions of ancient possession.
3rd. In matters of pedigree.
4th. In cases of dying declarations.
5th. In cases of declarations made against the interest of the person making them.
6th. In the case of entries made in the ordinary course of business.
7th. Admissions by a party to the suit, his partner, or agent.
8th. Confessions by prisoners.

§ 128. It may be stated generally that except in the abovementioned cases hearsay evidence is *not* receivable.

§ 129. It is receivable

1*st*. *In matters of public and general interest.*

§ 130. The reasons for the reception of hearsay evidence in these cases is thus explained by Taylor.(r)

"And *first*, as to matters of *public and general interest*. The admissibility of hearsay evidence in this class of cases appears to rest mainly on the following grounds :—that the origin of the rights claimed is usually of so ancient a date, and the rights themselves are of so undefined and general a character, that direct proof of their existence and nature can seldom be obtained, and ought not to be required; that in matters, in which the community are interested, all persons must be deemed conversant; that as common rights are naturally talked of in public, and as the nature of such rights excludes the probability of individual bias, what is dropped in conversation respecting them may be presumed to be true; that the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements proved were false; that reputation can hardly exist without the concurrence of many parties unconnected with each other, who are all

(r) § 416.

alike interested in investigating the subject; that such concurrence furnishes strong presumptive evidence of truth; and that it is this prevailing current of assertion that is resorted to as evidence, for it is to this that every member of the community is supposed to be privy, and to contribute his share."

§ 131. It is necessary to bear in mind the distinction between the terms "public" and "general." Public is used of that which is common to all: as a highway. General of that which concerns many indeed, but not the entire body of the public: as a right of common, in which only the inhabitants of one or more parishes participate. In respect to the former class evidence of reputation from *any one* is receivable; in respect to the latter, evidence of those actually unconnected with the particular locality would not be admissible.

§ 132. Phillipps I think discusses this matter in the most simply intelligible form. He divides it into three heads.

1st. Examples of matters of public and general interest.
2nd. The form under which hearsay is usually presented.
3rd. The qualifications under which it is receivable.

1*st. Examples.*

§ 133. A boundary between villages; the limits of a village or town: a right to collect tolls: a right to trade to the exclusion of others: a right to pasturage of waste lands; liability to repair roads, or plant trees; rights to water-courses, tanks, ghauts for washing; rights of common and the like, will be found the most ordinary in Mofussil practice. It may be useful also to consult Taylor(s) to see in what instances hearsay has been respectively received or excluded in matters of this description.

"It may be here expedient to enumerate a few of the principal questions, which have been deemed to involve matters of public or general interest, and to contrast these with some others, which the Courts have considered to be of too private a nature, to allow of their being illustrated by evidence of reputation. Thus, on the one hand, *hearsay has been admitted*, where the question related to a right of common, a parochial or other distinct modus, a manorial custom, a custom of mining in a particular district, a custom of a corporation to exclude foreigners from trading within a town, the limits of a town, the boundary between counties, parishes, hamlets, or manors, or between *old* and *new* land in a manor, a claim of tolls on a public road, the

(s) § 420, 421.

fact whether a road was public or private, a prescriptive liability to repair sea-walls, or bridges, a claim of high way, a right of ferry, the fact whether land on a river was a public landing-place or not, the jurisdiction of a court, and the fact whether it was a court of record or not, the existence of a manor, a prescriptive right of toll on all malt brought by the west country barges to London, a right, by immemorial custom, claimed by the deputy day meters of London, to measure, shovel, unload, and deliver all oysters brought by boat for sale within the limits of the port of London, a claim by the lord of a manor to all coals lying under a certain district of the manor, a custom of electing churchwardens by a select committee, and a prescriptive right to free warren as appurtenant to an entire manor.

"On the other hand, evidence of *reputation has been rejected*, where the question was, what usage had obtained in electing a schoolmaster to a grammar school, whether the sheriff of the county of Chester, or the corporation of the city of Chester, were bound to execute criminals, whether the lord of a manor had a prescriptive right to all wrecks within his manorial boundaries, whether the plaintiff was exclusive owner of the soil, or had a right of common only, whether the land in dispute had been purchased by a former occupier, or was part of an entailed estate of which he had been tenant for life, what patron formerly had the right of presentation to a living, whether a *farm* modus existed, and what was its nature, whether a party had a private right of way over a particular field, whether the tenants of a particular copyhold estate had the right of cutting and selling wood, and what were the boundaries between two private estates. Where, however, it was shown by direct testimony, the admission of which was unopposed, that the boundaries of the farm in question were identical with those of a hamlet, evidence of reputation as to the hamlet boundaries was let in for the purpose of proving those of the farm; for though it was objected that evidence should not be thus indirectly admitted in a dispute between private individuals, the Court overruled the objection, Mr. Justice Coleridge observing, that 'he never heard that a fact was not to be proved in the same manner when subsidiary, as when it was the very matter in issue.'"

§ 134. It was long doubtful whether such evidence is receivable to prove a *private* prescriptive right. In the case of *Morewood v. Wood*(t) where the question was as to a prescriptive right annexed to a particular estate of digging stones on a waste, the judges were equally divided. It is difficult to see how the public were concerned in this.(v)

(t) 14 East, 327, n.

(v) "How is it possible" asks Lord Kenyon "for strangers to know anything of what concerns only private titles." *Morewood v. Wood.*

And I remember once at Salem hearing a case in which the Plaintiff set up a prescriptive right in himself to shave all the inhabitants of his village. The "village barber" is a well known character in India; he may have perhaps Meerassee rights or a salary for his service: but his claim was rejected, properly I conceive, as being a mere private right, attempted to be proved, if I remember aright, by hearsay, and also inasmuch as it was in restraint of trade and against personal freedom of choice.

The forcible words of *Lord Campbell* in the late case of *Reg. v. The Inhabitants of Bedfordshire*(w) are in point. There, a witness who as well as his father and grandfather had been employed in doing repairs to the county part of the bridge was asked "have you heard them say who was liable to repair the three northern arches?" The question was objected to, but permitted. Lord Campbell in delivering judgment said:

"The law of England lays down the rule, that on the trial of issues of fact before a jury, hearsay evidence is to be excluded, as the jury might often be misled by it; but makes exceptions where a relaxation of the rule tends to the due investigation of truth and the attainment of justice. One of these exceptions is, where the question relates to matters of public or general interest. The term 'interest' here does not mean that which is interesting, from gratifying curiosity, or a love of information or amusement, but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected. The admissibility of the declarations of deceased persons in such cases is sanctioned because their rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time; because direct proof of their existence, therefore, ought not to be required; because, in local matters in which the community are interested, all persons living in the neighbourhood are likely to be conversant; because common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interests would lead to contradiction from others if the statements were false; and thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subject. But the relaxation has not been, and ought not to be, extended to questions relating to matters of mere private interest; for respecting these direct proof may be given, and no trustworthy reputation is likely to arise. We must remark, however, that although a private in-

(w) 14, *Jurist*, p. 208, and see *Doe d. Disbury v. Thomas*, 14 *East* 323, s. c. 2 *Sm. L. C.* p. 397, (4th Ed.) where the same law is laid down.

terest should be involved with a matter of public interest, the reputation respecting rights and liabilities affecting classes of the community cannot be excluded, or this relaxation of the rule against the admission of hearsay evidence would often be found unavailing."

And in the *Earl of Dunraven v. Llewellyn*(x) Parke, B. says:

"We are, therefore, of opinion, that this case is precisely in the same situation as if evidence had been offered that there were many persons, tenants of the manor, who had separate prescriptive rights over the lord's wastes; and reputation is not admissible in the case of such separate rights, each being private and depending on each separate prescription, unless the proposition can be supported, that because there are *many* such rights, the rights have a public character, and the evidence, therefore, becomes admissible. We think this position cannot be maintained. It is impossible to say, in such a case, where the dividing point is—what is the number of rights which is to cause their natures to be changed, and to give them a public character.

"But, it is said, there are cases which have decided, that where there are numerous private prescriptive rights, reputation is admissible, and the case of *Weeks v. Sparke* (1 Man. & S. 679) is relied upon as establishing that proposition. The reasons given by the different judges in that case would certainly not be satisfactory at this day, some putting it on the ground of the custom of the circuits, some upon the ground that where there was proof of the enjoyment of the right, reputation was admissible; both these reasons are now held to be insufficient."

§ 135. Such evidence is as much receivable *against* as in favor of a public right. In *Reg. v. The Inhabitants of Bedfordshire*, Coleridge, J. said, "evidence of reputation being admissible to establish a public right, I did not see how I could exclude it when offered to show that the public had not that right."

2nd. Of the forms in which Hearsay is usually presented in matters of public and general interest.

§ 136. Old documents, leases, maps and the like; and in this country, copper grants or sasanums of pagodas, are as receivable as the oral declarations of deceased individuals;(y) verdicts and judgments in suits

---

(x) 14, *Jurist*, p. 1089.

(y) It is a custom in "perambulations" as they are called sometimes to flog a charity boy at the boundary of the parish. This certainly is a pretty certain way of impressing the fact upon one of the senses. I have seen parochial school boys in Lincoln's Inn arrayed in their blue coats, yellow breeches, and caps, beating particular stones with long white willow wands, in their "perambulations" of the Parish bounds.

wherein the same right was in dispute, though not between the same parties.

It is to be remembered that in their early history juries were summoned *de vicineto*, from the neighbourhood, and therefore their verdicts would carry with them somewhat of the authority of general reputation.

§ 137. But a judgment must have been delivered by a Court of competent jurisdiction, and secondly it must be a final, and not a mere interlocutory judgment.

3rd. Of the qualifications under which Hearsay is receivable in matters of public and general interest.

§ 138. The first is that to which we have before alluded when distinguishing between the meaning of *public* and *general* rights.(z)

And on this point we may further quote the remarks of Parke, B. in *Crease v. Barrett.*(a)

"That hearsay evidence on some such subjects cannot be received, unless with the qualification that it comes from persons who have a special interest to enquire, is clear. Thus, in cases of pedigree, it must be derived from relatives by blood, or from the husband, with respect to his wife's relationship: it is not admissible, if it proceeds from servants or friends. *Johnson v. Lawson.* And in this description of hearsay evidence the line is clearly defined. So in cases of rights or customs, which are not, properly speaking, public, but of a general nature, and concern a multitude of persons, as questions with respect to boundaries and customs of particular districts, though the rule is not so clearly laid down, it seems that hearsay evidence is not admissible, unless it is derived from persons conversant with the neighbourhood, *per* Lord Ellenborough, in *Weeks v. Sparke.* Therefore, in *Rogers v. Wood*, a document purporting to be a decree of certain persons, the Lord High Treasurer, Chancellor of the Exchequer, and under Treasurer, Chief Baron, and Attorney and Solicitor General, who had no authority as a Court, was held to be inadmissible evidence on the ground of

(z) And it may not be out of place to mention that the doctrines of the Civil Law are the same as our own as to the reception of hearsay in matters of reputation. *Menochius de præsumptionibus* lays down the general law thus "*Testis debet attestari de his vel quæ vidit vel quæ sensu corporis certa esse percepit alias dolus præsumitur nec ignorantiæ vel erroris excusatio prodest.* And *Mascardus de Probationibus* agrees to this. But he also notes the exception '*Testis de auditu non probat nisi in antiquis.*' '*Et in universum id in præsentia scias, quod ubi verus hominis actus est probandus, probatio per auditum non sufficiat. Limita non procedree in antiqua et* in his *quæ hominum memoriam excedunt, quia talia auditu probari possunt*" which perhaps would be more accurately stated, '*quia talia non nisi auditu probari possunt.*'

(a) 1 *Cr. M. and R.* 928.

reputation, on the question, whether the city of *Chester*, before it was made a county of itself, formed a part of the county palatine, because those personages had from their situations no peculiar knowledge of the fact. On the other hand, actual inhabitancy in the place, the boundaries of which are in dispute, is unnecessary; and in *The Duke of Newcastle v. The Hundred of Broxtowe*, justices of the peace at the sessions of the county, within which the district was alleged to be, were held to have sufficient connexion with the subject in dispute, to make the statements in their orders admissible. Where the right is really public—a claim of highway, for instance —in which all the King's subjects are interested, it seems difficult to say that there ought to be any such limitation; and we are not aware that there is any case in which it has been laid down that such exists. In a matter in which *all* are concerned, reputation from any one appears to be receivable; but of course it would be almost worthless unless it came from persons who were shown to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. In the case of public rights, in the strict sense, the want of proof of the persons from whom the hearsay evidence is derived, being connected with the subject in question, appears to affect the value, and not the admissibility of the evidence. In the present case the alleged custom does not seem to be one in which all the King's subjects have an interest, but only such as may choose to become adventurers in mines. Therefore hearsay from any persons wholly unconnected with the place in which the mines are found, would not only be of no value, but probably altogether inadmissible. But those under whose estates the minerals lie, with respect to which the custom exists, and who are more likely than others living at a distance to become adventurers, and, consequently, subject to its operation, are in our opinion sufficiently connected with the subject to make these declarations evidence; more especially as the very form in which they are given, shows that they were consulted as persons having competent knowledge upon the matters enquired into."

§ 139. It was formerly held upon the authority of *Weeks v. Sparke*, a leading case upon this subject, but now much shaken by subsequent decisions, that hearsay evidence on this subject was not receivable unless it proceeded from persons who had competent knowledge on the subject; and also that acts of enjoyment must be proved before such evidence was receivable. As to the first of these qualifications, the remarks in *Crease v. Barrett* already quoted(a) show that this distinction cannot be drawn where the question is one of a strictly *public*

(b) § 138.

nature. And in the *Earl of Dunraven v. Llewellyn*,(c) where the question was one merely of a *general* nature, (the dispute arising between the lord of a manor and the owner of a freehold estate within the manor) Parke, B. said :

"In the course of the argument we intimated our opinion that the want of evidence of acts of enjoyment of the rights did not affect the admissibility of the evidence, but only its value when admitted. We also stated that no objection could be made to the evidence on the ground that it proceeded from persons who had not competent knowledge upon the subject, or from persons who were themselves interested in the question."

This passage vouches also the second point, that of acts of ownership on which *Parke*, B. in *Crease v. Barrett*,(d) says :

"An observation was made in the course of the argument that all evidence of reputation was inadmissible, unless it was confirmed by proof of facts. We think that such proof is not an essential condition of its reception, but is only material as it affects its value when received ; and indeed if such proof were required, there is amply sufficient in the present case."

Hence it may be gathered that in the present day objections of this nature affect the weight and not the admissibility of the testimony. Evidence of the description at present under consideration is always to be received with caution. Eminent judges have differed as to the weight to be attached to it ; but it is perhaps safest to say that no general rule can be laid down, but that the weight of the evidence must depend upon the particular circumstances of each case. "Where the matters are *public*" as Lord Ellenborough says(e) "all are interested and must be presumed conversant with them," where the matter is of general interest, the opportunities of the declarants to obtain knowledge must vary perpetually.

§ 140. Another qualification is that the declaration must have been made "*ante litem motam*" i. e, before the dispute itself was afoot. For this affords one of the best safeguards for its veracity. If such declarations, made *after* the point was in dispute, were admitted, it is manifest that we should offer a premium to their fabrication.

Taylor writes as follows :(f)

"Now the ground on which the declarations of deceased persons are ad-

(c) See § 134.
(d) § 138.
(e) *Weeks v. Sparke*, 1 *M and S.* 686.
(f) § 432.

mitted at all, is, that they are the natural effusions of a party who is presumed to know the truth, and to speak upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth. But no man is presumed to be thus indifferent in regard to matters in actual controversy; for when the contest has begun, people generally take part on the one side or the other; their minds are in a ferment; and, if they are disposed to speak the truth, facts are seen by them through a false medium. To avoid, therefore, the mischiefs which would otherwise result, all *exparte* declarations, even those upon oath, are rejected, if they can be referred to a date subsequent to the beginning of the controversy."

§ 141. "*Lis mota*" is a term taken from the Roman Law according to which it referred to the institution of the suit: we with more reason seem to refer it back to the commencement of the dispute.(g)

§ 142. Whatever may be the precise limits of the rule of *lis mota*, the following propositions seem clear. In the language of Taylor:(h)

"First, that declarations will not be rejected, in consequence of their having been made *with the express view of preventing disputes*; secondly, that they are admissible, if no dispute has arisen, though made in *direct support of the title* of the declarant; and, thirdly, that the mere fact of the declarant having stood, or having believed that he stood, in *pari jure* with the party relying on the declaration, will not render his statement inadmissible. In support of the first proposition, the *Berkeley Peerage* case may be referred to, where the judges unanimously held, in conformity with an earlier opinion expressed by Lord Mansfield, that an entry made by a father in any book, for the express purpose of establishing the legitimacy of his son and the time of his birth, in case the same should be called in question, will be receivable in evidence notwithstanding the professed view with which it was made. This doctrine has since been sanctioned by Lords Brougham and Cottenham in England, and by Sir Edward Sugden in Ireland, and may now be considered as established law in both countries. The latest decision in support of the second proposition is *Doe v. Davies*, where the Court observed, that although a feeling of interest will often cast suspicion on declarations, it has never been held to render them inadmissible. The third proposition is equally clear law; for although there is a peerage case which appears, at first sight, to throw some doubt upon the subject; yet it is highly probable that the pedigree was there rejected, not as having been made by a party while standing in the same situation as the claimant, but

(g) I say *seem* to refer it; for the point is not yet settled. See the state of the authorities in *Taylor* § 433, (and the cases in the note *a*.) and the sections to the end of the chapter 433—8.

(h) § 434.

as having been concocted by such person in direct contemplation of himself laying claim to the dignity."

The dispute must have related to the subject-matter in issue; this was ruled in *Freeman v. Phillipps*, 4 M. and S. 497, where *Bayley*, J. said :(*i*)

"The distinction had been correctly taken, that where the *lis mota* was on the very point, the declarations of persons would not be evidence; because you cannot be sure, that in admitting the depositions of witnesses, selected and brought forward on a particular side of the question, who embark, to a certain degree, with the feelings and prejudices belonging to that particular side, you are drawing evidence from perfectly unpolluted sources. But 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."

It appears still unsettled, whether such testimony is receivable where the declarant did not in fact know of the existence of any dispute at the time of making his declaration. In this uncertainty we may perhaps safely adopt the remarks of Taylor :(*k*)

"In this conflict of judicial opinions it is difficult to ascertain the precise rule; but perhaps we shall not be far wrong in suggesting that neither of the learned judges has laid down the law with strict accuracy, and that declarations, though made *post litem motam*, will be admissible, if the party offering them in evidence can show, by any proof satisfactory to the judge, that the declarant was *in all probability* ignorant of the existence of the controversy."

§ 143. The last qualification is that the evidence must be confined to general facts: evidence of particular acts cannot be given. For instance suppose the dispute were about a right of way from one village to another. A witness might say that he had heard old deceased persons say that the way had always been used as a public path: but he would not be allowed to say that A. B., deceased, had told him that he had individually used the way: for *non constat* but that he was a trespasser.

So in *Crease v. Barrett*(*l*) it was contended that the tenth answer was nothing more than a statement of a particular fact, and therefore not within the rule as to reputation, and it was held that the evidence ought not to have been received, on that ground.

(*i*) *Taylor*, § 435.
(*k*) § 438.
(*l*) See ante § 138.

II. *Ancient Possessions.*

§ 144. The distinction between this and the first head of this division, is, that as to that, the question arises upon matters of *general* interest: we are now speaking of the ancient possessions of *individuals*. A deed or other document in writing thirty years old proves itself notwithstanding there are attesting witnesses to it; for looking at the age at which men ordinarily engage in such transactions of life as are likely to cause them to become witnesses to deeds, the general presumption is that they will not have survived that period thirty years. This is an arbitrary rule, and exceptions must be of daily occurence: but the line must be drawn somewhere, and a mass of inconvenience would arise, if after such a lapse of time, it was always requisite to call the attesting witnesses, or account for their absence, or prove their death.(m) *A fortiori* must this principle apply to *ancient* documents.

§ 145. Ancient documents are receivable when they form a part of the transactions, and are not a mere narrative of facts—that is, they must form links of the chain of evidence.

§ 146. It must also be shown that modern ownership has been exercised by virtue of those ancient documents.

§ 147. So an old map, annexed to a deed, is receivable; but the qualification with which such evidence is receivable is that just above stated, viz., that it must be confirmed by proof of some act done under the authority or license of the deed or other instrument, as for instance repairs done to the house to which the title deed refers: payment of rent on the land and the like: in short, possession proved of the property to which the ancient document relates, either by the party producing it, or those through whom he claims: and any act of ownership, that is, an act which exhibits the power of the party to exercise a control or disposition over the property, is sufficient for this purpose.

§ 148. Lastly, a most important necessity is that the document must come from the proper custody, of which hereafter.

(m) These observations are made subject of course to the operation of Act II. of 1855, Sec. XXXVII.

III. *Pedigree.*

§ 149. I cannot more lucidly explain the principle upon which Hearsay is admited in cases of Pedigree than in the words of Phillipps,(n) who writes as follows :—

"Hearsay statements of deceased persons are allowed to be received in matters of pedigree, subject however to various qualifications. This exception appears to be founded on the considerations, that the facts which are the subject of enquiry are frequently of an ancient date, and that the knowledge of them is usually confined to few individuals. By limiting the exception to the statements of deceased persons, a resort to this kind of evidence is precluded, where the hearsay tendered indicates the existence of more satisfactory proof, and it is only admitted on failure of the ordinary channels of information. According to the qualifications under which evidence of pedigree is received, provision is made that the statement should be derived from a person likely to be well informed upon the subject on which he was speaking, and free from any apparent motive for perverting the facts.

"The exception in question is framed upon general principles adapted to circumstances of frequent occurrence. It may happen that these principles will fail of application in many instances to which the exception might seem to extend. The exception is not confined to ancient facts, but extends also to matters of pedigree which have recently transpired; and the hearsay of deceased witnesses is admitted as to facts which have occurred in the presence of living witnesses.

"It would be impossible to prove descents according to the strict rules for establishing contracts, or for regulating rights of property, which require the proof of facts from witnesses who had personal knowledge of them. On enquiring into the truth of facts which happened a long time ago, the Courts have varied from the strict rule of evidence applicable to facts of the same description happening in modern times, on account of the difficulty or impossibility (by lapse of time) of proving those facts in the ordinary way by living witnesses. On this ground hearsay and reputation (which latter is no other than the hearsay of those who may be supposed to be acquainted with the fact handed down from one to another) have been admitted as evidence in particular cases."

§ 150. It is to be remarked however that if the hearsay shows that there is more satisfactory proof forthcoming, it should be brought forward.

(n) Vol. 1, p. 197.

§ 151. *Pedigree* may be considered under the following heads.

1st. What are matters of pedigree.

2nd. The different forms in which hearsay evidence presents itself in questions of pedigree.

3rd. The qualifications under which evidence is receivable in questions of pedigree.

§ 152. It will be observed that this division closely follows that which we have adopted when considering the admission of hearsay in matters of public and general interest.

1*st. What are matters of Pedigree.*

§ 153. Such matters as relate to general evidence of descent or relationship. *Descent* means lineal descent. *Relationship* is used of collateral relations, and sometimes of relationship by marriage, which is more accurately termed *Affinity*.

§ 154. Evidence of particular facts is necessarily receivable, for that which is proposed is to prove the particular fact: as for instance a particular birth, marriage, or death. So also to prove the fact of relationship, and of the time when a birth took place, either absolutely or relatively. Absolutely, as that A B was born on such and such a date; relatively, as that A B was born before or after C D.

§ 155. Also as to place. It has been laid down that hearsay evidence is not receivable as to place. Thus Phillipps writes:(o)

"It has been held that the declarations of a deceased parent, though they are good proof of the *time* of a child's birth, are not admissible as evidence of the *place* of the birth. 'The point in dispute,' said Lord Ellenborough, C. J., in a case where the admissibility of such evidence was discussed, 'turns on a single fact involving no question but of locality, and therefore not falling within the principle of, or governed by the rules applicable to, cases of pedigree.' In this case the declaration of a deceased father as to the birthplace of his illegitimate child was rejected. And this distinction between the time and place of birth, as matters of pedigree, has been recognized in a recent case.

"It may indeed be observed, that the fact where a child was born is seldom provable except by the evidence of relations, and that they are quite

(o) See Vol. I. p. 201.

as likely to remember accurately the *place* as the *time* of the birth, if not more so. But the reason of the distinction appears to be that pointed out by Lord Ellenborough, C. J., namely, that the place of birth is not a question of pedigree, or at least not necessarily so, whereas the time of birth is so, as showing the age of a party."

§ 156. The leading case on this point is *Rex v. Erith*(p) (recognized in *R. v. Rishworth*(q)) where it is thus laid down.

"This was a case in which the question was, whether the hearsay declarations of the father of a bastard child, as to the place of his, the bastard's, birth, were competent evidence of that fact? The only doubt which has been introduced into this case has arisen from improperly considering it as a question of *pedigree*. The controversy was not, as in a case of pedigree, from what parents the child has derived its birth; but in what *place* an undisputed birth, derived from known and acknowledged parents, has happened. The point thus stated turns on a single fact, involving no question but of locality; and therefore not falling within the principle of, or governed by the rules applicable to, cases of pedigree; and is to be proved, therefore, as other facts generally are proved, according to the ordinary course of the common law; that is, by evidence to which the objection of *hearsay* does not apply."

I must confess however that to my mind the distinction seems very fine-drawn, and scarcely sustainable on satisfactory grounds.

Though the law is still unaltered, the observations of *Knight Bruce*, V. C. in the case of *Shields v. Boucher*(r) are so forcible, that I think if ever the point should come directly before the Court for decision, hearsay evidence *as to place* will be held equally receivable with evidence *as to time* of birth. The observations are somewhat lengthy but too valuable to be abridged.

"The questions, however, which in the present instance it was not permitted to the plaintiffs' counsel to put, may be thought not of necessity liable to the same objection, if any, as a direct question whether a deceased person has been heard to say where another person was born.

"In the instance before the Court, the questions disallowed were (I repeat these:)—'Have you heard her (meaning Mrs. Allen) say where her family came

---

(p) 8 *East*, 541.
(q) 2 *Q. B. R.* 476.
(r) 1 *De Gex and Sm.* p. 52.

from ?' 'Have you heard her (meaning Mrs. Allen) say where she came from ?' and after a witness had stated his father to have said that that father's brother, who was Mrs. Allen's husband, had married Miss Hollins 'did he say where ?'

"Are these questions within the reason or principle upon which proof, by hearsay, of single acts or particular facts, is excluded, so far as it is excluded, in a case of pedigree ? According to my understanding of that reason or principle, so far as I have been able to collect it, I am disposed to say rather that neither of the three questions is within it, than that they are all within it. They seem to me to relate rather generally to the history of a life, or a family, than particularly to a single transaction, or the doing of a single thing, and, perhaps, rather to the description or identification, or (if I may use the phrase) individuation of a family or person under discussion, than to a history of a family or of a life.

"But if not impeachable for the reason or upon the principle to which I have just referred, the question still may be without the principle or beyond the reasons upon which hearsay evidence is admitted at all on points of pedigree. Are they so ? I confess myself not persuaded that they are. I own myself not convinced that the reasons and grounds (so far as I can collect and understand them) upon which births and times of births, marriages, deaths, legitimacy, illegitimacy, consanguinity generally, and particular degrees of consanguinity and of affinity, are allowed to be proved by hearsay (from proper quarters) in a controversy merely genealogical, are not as applicable to interrogatories like those that have been rejected in a case like the present, as to an interrogatory whether a man's grandfather was said to be related to some other man, or in what year, on what day, or at what time, or of what parents a man was said to have been born ; whether a man's mother was said to be illegitimate ; whether she was said to have been married, or to have brought a child into the world before or after a marriage, or what her name was said to have been ; or (to resort for an instance to one of the questions allowed to be put and answered on the trial in this case) whether it had been said 'what her father was.' Who generally is more likely to know whence a man or a family came than the man or the family ? Does the emigrant, living or dying, forget his native soil ? Is a woman less likely to state her country than her age with accuracy ? In those persons, also, who care for the history of lineage, whom genealogy interests, local attachment, local predilections, and local memory, are, for the most part, lively and strong ; nor are there, perhaps, any recollections or traditions of the old more readily communicated, or more acceptable to an auditory of descendants, than the original seat of the family, its former residences and possessions, its migrations, its local and other distinctions

of the past, its advancement or its decay. If such topics are not strictly genealogical, they are at least intimately connected with genealogy. Their exclusion, surely, from those traditions to which the law, for the very purpose of preserving the memory and proof of common ancestry and connected lineage between families, allows the force of evidence, must, as it seems to me, at least tend strongly to deprive of the law's protection cases in great number and variety needing most peculiarly its aid, and in the most striking manner within its reason. Nor do I refer merely to such instances as those of branches from English families planted in distant colonies; for, in the same country, the severance and estrangement that arise between wealth and poverty, industry and idleness, prosperity and misfortune, illustration and obscurity, vanity and humility, are often more effectual and complete than could be the distance between Northumberland and Australia.

"It can scarcely, I suppose, be contended, that whenever, in a statement by a deceased person of a relationship between that person and another individual, or a particular family, the residence or country of the individual or family is mentioned, the statement must, for so much, be rejected or disregarded. There might then be no identification. The statement might then be without meaning or unintelligible, or without applicability. Let us suppose a declaration (from a proper quarter) to be given in evidence in these words:—'My father was not the person that you imagine. He was John Smith of the Hill—not John Smith of the Dale;' or thus, 'As my father's mother came from Suffolk, she could not be the person to whom you refer;' or thus, 'My sister married a man of the same name, it is true, but he was born and bred in a parish in Berkshire, as he has often told me, and he died there.' What is the objectionable part, or the part that is to go for nothing, of either of these statements? In the present instance, the sole dispute in effect was, of what John Hollins was Mrs. Allen the daughter; it being proved or conceded that she was the daughter of some John Hollins, and that the intestate had a paternal uncle called John Hollins. The theory of the defendant, if Mrs. Allen was the daughter of some John Hollins, must be, that there were at least two men, each called John Hollins. And whether the plaintiffs' case is true or untrue, there may have been two or more persons of that name. Supposing that there were two or more men of that name, would a declaration by Mrs. Allen, specifying her father and distinguishing him from the other or each of the others so called, by stating his country or residence, or that of his family, be so far rejected? And if the answer to a question allowed to be put at the trial which I have already noticed, had been, 'She told me that her father was rather more than a farmer, that he was a country gentleman,' would it have been treated as nothing? Or had the answer been, 'She told me that her father

was a Staffordshire yeoman,' would the word, 'Staffordshire' have been rejected or substantially disregarded? If Mrs. Allen had had a Bible containing entries of births and marriages in her family, which would have been evidence, and it had been tendered at the trial and found to contain a description of her father as 'John Hollins, of Kinver,' would it have been right to tell the jury to pay no attention to the two last words? As a man or a family may be identified, may be distinguished and discriminated from other men or other families by a name, why not by an occupation? and why not by a residence.

"To say nothing of the time when surnames were not general in England, there are now-a-days in this country many men, especially those having servants, that are in habit of daily intercourse with persons whose surnames, if any, they do not know, and, as I have heard, men who, if they have surnames, are not themselves aware of them. Nor are some illustrious painters the only persons whom many know by nicknames and by nicknames only. Of surnames, some are exceedingly common, not in Wales merely, but in England too. In particular districts of England, particular surnames frequently abound. In many parts of Wales, not only is the number of surnames very limited, but within the last half century, the surname of a family was liable to change, and often did change at every generation; nor is the custom, I believe, wholly extinct. Often, in cases such as those to which I have been referring, hearsay of relationship, without local addition or local designation, may, I repeat, and as is obvious, be absolutely worthless. What precise notion of individuality can 'John Jones' in Wales, or 'John Brown' in England, afford?

"But whatever I may correctly or erroneously think as to reason or principle, I ought certainly not, upon my own notions, to act against any authority long followed, against a series of authorities, or a course of decisions, or perhaps even against a single decision of a certain class and kind. The books, however (and I have not looked into them carelessly on this subject), do not appear to me to show, nor am I persuaded, that there is any authority long followed, or a series of authorities, that there has been a course of decisions or any decision of a nature to bind the Court—of which it must be in contravention to say, that either of the disallowed questions under consideration might properly have been allowed to be put and answered; the matter in issue having been such as it was.

"I repeat that the case of *Rex v. Erith* appears to me substantially distinguishable from the present. Lord Ellenborough there says—'The only doubt which has been introduced into this case has arisen from improperly considering it as a question of *pedigree*, &c.' That case involved no

question of relationship ; this involves singly and merely a question of relationship.

If the place of birth in *Rex v. Erith* had been a genealogical fact, as it was not,—had been material, namely, for any genealogical purpose, which it was not, Lord Ellenborough and the Court of King's Bench might possibly have dealt with the evidence differently. Here the disallowed interrogatories applied not necessarily (as I observed before, and as is obvious) to a place of birth; they applied merely to the country or district or place from whence the declarant or her family had come, or of which Mrs. Allen, before her marriage, had been ; nor am I satisfied (I say again that interrogatories such as those ought to be considered as in all respects on the same footing with a mere interrogatory what had been said to be the place of a birth. And here I may refer to a case mentioned in Mr. Hubback's learned and useful publication at p. 468, as to matter not noticed in Mr. Simons's report of the same cause—I mean *Hood v. Lady Beauchamp*, in which I was, as I believe, one of the counsel. That is an authority bearing, as it seems to me, against the rejection of the evidence rejected here; and I may say the same of the case before Mr. Baron Rolfe at Liverpool.

"I had, while at the bar, always thought, too, that when wills and sepulchral inscriptions were received upon questions of pedigree, they were not in practice rejected or slighted, so far as they attributed (when they did attribute) particular countries of origin, or particular residences, to persons mentioned in them, but were legitimately capable of being in that respect important evidence. It is not my impression that the residences stated in the inscription which was the subject of contention in *Slaney v. Wade* were thought matters unfit to receive judicial attention. And, in *Davies v. Lowndes* one of the cases mentioned by Mr. Serjt. Talfourd (a cause tried at bar), there appears reason to think that the judges and counsel concurred in treating one or both of the residences mentioned in the alleged will of James Lloyd as a material portion of the evidence, if the instrument was his will. To render it, however, proper for me to decide, against the opinion of the learned judge who tried this issue, that the questions which he overruled ought to have been allowed to be put and answered, I ought, at least, to have in my own mind a clear opinion amounting to absolute conviction, that, according to law, they ought to have been allowed to be put and answered. Now, though I cannot represent myself as satisfied that they ought not to have been so, it would be too much to say, that I have a clear opinion upon the point amounting to absolute conviction. If (as I do not say) I ever had such a conviction, my high estimation of Sir Thomas Wilde's great knowledge and great experience would have caused me to hesitate."

2nd. The forms in which Hearsay is generally offered in questions of Pedigree.

§ 157. The following are receivable: oral evidence: entries in family Bibles: inscriptions on tombstones(s) and coffin plates: genealogical trees hung up in family mansions: engravings on mourning rings, &c.

§ 158. Peculiar weight is attached to entries in family Bibles, not on account of the character of the book, but on account of the custom prevailing among Christians of making entries there.

§ 159. Entries in almanacs have been received: in prayer books: in Roman Catholic Missals. Even family documents, and family correspondence; *i. e.* letters from one member of a family to another; recitals in family deeds, marriage settlements, description in wills, armorial bearings.

§ 160. To show how far the law has gone in admitting evidence in these cases, I may refer to a case in which a slip of parchment, found in a shoemaker's shop, was once produced and offered in evidence. On one side was written, Mr. A.'s measure—on the other, two lines purporting to be part of a family deed. The judge refused to admit the evidence; but a new trial was granted on account of its improper rejection.

§ 161. The above is the result of the adjudged cases on this subject. It would overburthen the text were I to refer to all the cases seriatim. It may however be useful to refer to Phillipps, as to the credit to be attached to monumental inscriptions.(t)

"The credit due to monumental inscriptions must necessarily depend much upon the circumstances, whether they are contemporaneous with the events to which they relate, and whether they are set up in the view or with the knowledge of surviving relatives. It is to be observed that this species of evidence often trenches upon the rule which rejects secondary evidence; inasmuch as the author of the evidence may be alive. In *Monkton v. The Attorney General*, Lord Brougham, C. considered such inscriptions to stand on the same footing as rings, pedigrees hung up, and family Bibles, and as admissible on account of their publicity, without connecting them with the

(s) One of the most interesting points in Mr. Warren's Tale of Ten Thousand a year turns upon the evidence of a tombstone.

(t) Vol. I. p. 212.

family. Such inscriptions however may always be impeached, and their evidence seems peculiarly open to attack, not only on account of the great facility of forgery, but also because the preparation of them is often committed to undertakers, executors, or other persons not members of the family, or because perhaps the inscription has been delayed, till a period when the facts are but imperfectly remembered. In the claim of Katherine Bokeman to the barony of Berners, an inscription upon the tombstone of a person who was one of the links in the pedigree was given in evidence; but it appeared from the entry of her burial in the parish register, and from her will, that there was a mistake of a year on the tombstone as to the time of her death; and the mistake is said to have arisen from a delay in laying down the stone."

3rd. As to the qualifications under which Hearsay Evidence is receivable in matters of Pedigree.

§ 162. It is of course necessary that the original author of the statement should have had the means of knowledge; *i. e.* he must be a competent witness, supposing he could have been produced. But where shall we draw the line? The law has been unsettled on that point till lately. It has now however been settled. Formerly there was no limitation. The reputation of the neighbourhood or of the County was sufficient. Declarations of servants, physicians, intimate friends, have been received; but the general rule was at last laid down that evidence of this description should be confined to relatives or members of the family. The leading case on this subject is *Johnson v. Lawson.*(v) The author of the statement might however be an illegitimate member of the family.

§ 163. But now by Act II. of 1855, Sec. XLVII. evidence of persons who though not related by blood or marriage to the family, were intimately acquainted with its members and state, shall be admissible in evidence after the death of the declarant, in the same manner and to the same extent as those of the deceased members of the family.

§ 164. The next qualification is that the declaration must have been made *ante litem motam* as to which observe what has been said in § 140, 141. The observations of Lord Brougham in *Att. Genl. v. Monckton,*(w) a pedigree case, should here be studied.

"One restriction, however, clearly must be imposed; the declarations

(v) 2 *Bing. Rep.* 86.
(w) 2 *Russ. and My.* 147.

must be *ante litem motam*. If there be *lis mota*, or any thing which has precisely the same effect upon a person's mind with *litis contestatio*, that person's declaration ceases to be admissible in evidence. It is no longer what Lord Eldon calls a natural effusion of the mind. It is subject to a strong suspicion that the party was in the act of making evidence for himself. If he be in such circumstances, that what he says is said, not because it is true, not because he believes it, but because he feels it to be profitable, or that it may hereafter become evidence for him, or for those in whom he takes an interest after his death, it is excluded, both upon principle and upon the authority of the cases, and among others of *Whitelocke v. Baker*. There is a still more distinct authority in the *Berkeley Peerage case*, where Mr. Justice Lawrence adopts almost the very language of Lord Eldon in *Whitelocke v. Baker*, and where, proceedings in equity having been instituted to perpetuate testimony, evidence of declarations was rejected upon the ground of *litis contestatio*."

To this it may be added that caution is always necessary in receiving hearsay evidence of pedigree. The remarks of Sir J. Romilly, M. R. in the late case of *Crouch v. Hooper*(*x*) are so instructive that they should be studied.

"It is a trite but just remark, that if one link in a pedigree be assumed any two persons may be proved to be related; and it is the usual observation in these cases, that the difficulty consists in properly weighing and considering the evidence relating to some one link, which connects the line of the claimant with that of the intestate.

"It is a rule of evidence, in pedigree cases, that declarations *post litem motam* are not receivable in evidence. All this is evidence of declarations made before any question arose as to the succession to this property, but there is no trace that they were remembered or acted upon until after the contest had arisen. And though no complaint can justly be urged against persons for not giving the evidence before the occasion requires it, yet it must always be borne in mind, in judging of evidence of this description, how extremely prone persons are to believe what they wish. And where persons are once persuaded of the truth of such a fact, as that a particular person was the uncle of their father, it is every day's experience, that their imagination is apt to supply the evidence of that which they believe to be true. It is a matter of frequent observation, that persons dwelling for a long time on facts, which they believe must have occurred, and trying to remember whether they did so or not, come at last to persuade themselves that they do actually recollect the occurrence of circumstances which, at

(*x*) 16 *Beav.* 181.

first, they only begin by believing must have happened. What was originally the result of imagination becomes in time the result of recollection, and the judging of which and drawing just inferences from which is rendered much more difficult, by the circumstance, that, in many cases, persons do really, by attentive and careful recollection, recall the memory of facts which had faded away, and were not, when first questioned, present to the mind of the witness. Thus it is, that a clue given or a note made at the time frequently recalls facts which had passed from the memory of the witness. I look, therefore, with great care and considerable jealousy on the evidence of witnesses of this description, even when I believe them to be sincere, and to be unable to derive any advantage from their testimony. Once impress the witnesses with the belief that Charles Crouch the father of the intestate, was the brother of their grandfather, and the further steps follow rapidly enough. In the course of a few years, by constant talk and discussion of the matter, and by endeavouring to remember past conversations, without imputing anything like wilful and corrupt perjury to witnesses of this description, I believe, that in 1847 they may conscientiously bring themselves to believe, that they remembered conversations and declarations which they had wholly forgotten in 1830, and that they may in truth *bonâ fide* believe, that they have heard and remember conversations and observations which in truth never existed, but are the mere offspring of their imagination. It is also always necessary to remember, that in these cases, from the nature of the evidence given, it is not subject to any worldly sanction, it being obviously impossible, that any witness should be convicted of perjury for speaking of what he remembers to have been said in a conversation with a deceased person."

IV. *Dying Declarations.*

§ 165. Where a man is *in extremis : i. e.* dying, the awful position in which he is placed is held by the law to be a sufficient guarantee for his veracity; and therefore the tests of oath and cross-examination are dispensed with under such circumstances. The maxim of the law is *nemo moriturus præsumitur mentiri*(y) : a man will not meet his Maker with a lie in his mouth.

(y) *See Howell's St. Trials*, p. 18.

Also Morley's Digest, N. S. Tit. Criminal Law.

"*Case* 124.—The dying declaration of a person, if duly attested, is admissible as evidence, although not taken in the presence of the prisoner. *Case of Wittoo Wulud Bappoo*, 13th April 1841. S. F. A. Rep. 141.—Marriott, Bell, Giberne, & Greenhill.

"*Case* 128.—The deposition of a murdered man, taken by a competent authority shortly before death, and proved by two or more witnesses, is admissible evidence, even if taken in the absence of the accused." *Case of Ambia Bin Kan Matra.* 22d April 1844. S. F. A. Rep. 193.—Bell, Hutt, & Brown.

§ 166. The dying declaration is receivable,(z) even though it was not made in the presence of the accused. Indeed it must frequently happen that death ensues before any individual is apprehended or even suspected; and the rule is relaxed from the necessity of the case.

§ 167. Many nice distinctions have become obsolete by the passing of Act II. of 1855, Sec. XXIX. Formerly it was necessary that the declarant should have the sense of death immediately impending over him, and that his mind should have excluded all hope or thought of recovery. This led to many decisions which we may pass over in silence: for as the law now stands, it is provided that,

"Where dying declarations are evidence, they shall be received, if it be proved that the deceased was at the time of making the declaration and then thought himself to be in danger of impending death, *though he entertained at the time of making it, hope of recovery.*"(a)

§ 168. It is absolutely necessary for the protection of society, that dying declarations should be received,(b) for otherwise a premium would be held out for the commission of crime. It is the nature of crimes of violence that they should be committed with the greatest possible secrecy: and thus it must sometimes occur that the only testimony, often the only direct testimony against an accused, is to be found in the dying declaration of his victim. But at the same time we must receive this evidence with a certain degree of caution. It may be seldom that a dying declaration is made *wilfully* false, but there are many circumstances in the situation of the wounded man which may introduce elements of fallaciousness into his statement. Thus the effects of the wound itself may dim his memory, or weaken, or confuse his intellectual powers. The very suddenness of the attack may have rendered him mistaken in his identification of his assailant; the darkness, the disguise, may tend to the same result: although where the mental powers are not affected by the wound or its consequences, it may be very true that the circumstances of the attack, however sudden have made an indelible impression on the sufferer: and a just Providence has perhaps determined that this should be so, as one of the most mysterious instruments for the discovery of crime. Thus in the late shocking case of Marley the ticket of leave man, his victim Reddy

(z) C. O. F. U. 26th Nov. 1832, contains the old law on this subject.

(a) Act II. of 1855, Sec. XXIX. This conforms to the Law of Scotland. See *Alison's Pr. Cr. L.* 510—512—604—7.

(b) See *Best*, § 487.

recognized him the moment he was confronted, and with a shudder exclaimed, "That is the man." The human mind is so constituted as to be inclined to attach a very high degree of importance to dying declarations;(c) and it is necessary that the judge who has to decide, should have present to his mind the arguments against their weight as well as in their favor.(d) The weight to be attached must vary with the circumstances of each particular case.

§ 169. The following remarks are here necessary :—

1st. Dying declarations are only receivable in criminal cases,(e)

2nd. The charge must be one of homicide.

3rd. The only points they are receivable to prove are the cause and circumstances of death. Thus the circumstances of robbery attended by death could not be thus proved.

(c) So *Shakespeare : Ric.* II. *Act* II. *sc.* 1.

> 'Oh, but they say the tongues of dying men
> Enforce attention like deep harmony.'

And see *King John*, Act V. sc. 4. and also Act V. sc. 7.

(d) See *Roscoe's Criminal Evidence*, p. 35, where it is thus laid down.

"With respect to the effect of dying declarations, it is to be observed, that although there may have been an utter abandonment of all hope of recovery, it will often happen that the particulars of the violence, to which the deceased has spoken, were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences, also, of the violence may occasion an injury to the mind, and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Such evidence therefore is liable to be very incomplete. He may naturally, also, be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill-will. But it cannot be concealed, animosity and resentment are not unlikely to be felt in such a situation. The passion of anger once excited may not have been entirely extinguished, even when all hope of life is lost. See *Crockett's case*, 5 *C.* & P. 544, *ante*, *p.* 32, where the declaration was, 'that damned man has poisoned me.' Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state; especially when it is considered that they cannot be subjected to the power of cross-examination; a power quite as necessary for securing the truth as the religious obligation of an oath can be. The security also, which courts of justice have in ordinary cases, for enforcing truth, by the terror of punishment and the penalties of perjury cannot exist in this case. The remark before made, on verbal statements which have been heard and reported by witnesses, applies equally to dying declarations, namely, that they are liable to be misunderstood and misreported, from inattention, from misunderstanding, or from infirmity of memory. In one of the latest cases upon the subject, this species of proof is spoken of as an anomaly, and contrary to all the general rules of evidence, yet as having, where it is received, the greatest weight with juries. *Per Coleridge, J., Spilsbury's case*, 7 *C.* & P. 196; 1 *Phill. Ev.* 305, 8*th ed.*, 293, 9*th ed.* 'When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations, as to the cause of his death are considered equal to an oath, but they are, nevertheless, open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost, by the absence of the opportunity of more full investigation by the means of cross-examination.' *Per Alderson, B., Ashton's case*, 2 *Lewin, C. C.* 147."

(e) *In Stobart v. Dryden* 1 *Mees.* and *Wels.* 615, the dying statement of an attesting witness to an instrument was rejected; and in *Rex v. Mead* 2 *B.* & *C.* 607 it was held that "dying declarations are admissible only when the death is the subject of the charge, and the circumstances of the death the subject of the declarations."

4th. It matters not in what form the dying declaration is taken.

5th. The interval between the time of the declaration and death is immaterial.(*f*)

6th. The statement of a dying man in favor of a prisoner is as receivable as one against him.

7th. Dying declarations are as open to be contradicted by proof as any other evidence.

V. *Declarations against the interest of the person making them.*

§ 170. The admission or declaration of a *party* to a suit is of course always evidence against him. But we are not now considering that description of evidence. The title refers to the evidence of persons not *parties* to the suit, but who would, if they could be produced before the Court, be competent witnesses for or against the respective parties to the suit.

§ 171. The principle upon which such evidence is admitted, is, that the very fact that the declaration offered is against the interest of the person who made it, affords a sufficient guarantee for its veracity, without the test of oath or cross-examination; for general experience proves that persons are very careful not to make such statements unless they are true.

§ 172. The form in which such declarations are ordinarily offered is that of *written* entries: but evidence of oral statements of this quality appears to be also receivable.(*g*) The inaccuracy with which oral statements are repeated or reported, of course makes this latter class less satisfactory, but that is an objection to its credibility not to its reception.

§ 173. The leading case on this subject is that of *Higham v. Ridg-*

(*f*) On the propositions in heads 4 and 5, I would observe that it is always advisable that the declaration should on its face show that it is a dying declaration; for otherwise the party who took it must be called to supply the defect, as was done in the case of *Q. v. Narrainamah and Govindó* at the 3rd Sessions of the Madras Supreme Court for 1853, when the magistrate was sworn for this purpose. And secondly that it is obviously expedient, whenever circumstances admit of it, that the dying person should be examined as an ordinary witness, on oath, in the presence of the accused.

(*g*) I am not aware of any *express* decision of this point. But in the *Sussex Peerage case*, 11 Cl. and Fin. 103, oral declarations and written entries against interest were offered without any distinction being taken to them on that ground; and in *Stapylton v. Clough*, 18 Jur. p. 60, Lord Campbell expressly refers to and approves what he is reported to have said in the *Sussex Peerage case*, though it is to be remarked that in the case of *Stapylton v. Clough* the entries and oral declarations were made in the ordinary course of business, and not as against the interest of the maker; and in *Edie v. Kingsford*, 14 C. B. 759, it seems to have been taken for granted that oral declarations against interest would be equally receivable with written entries.

way.(h) This case has been selected by the late Mr. Smith in his celebrated Book of leading cases, vol. 1, p. 183, where the whole law upon this subject, together with the cases, will be found admirably collated in his note.

§ 174. Until lately such evidence was not receivable, unless the person making the entry was dead: but now by Act II. of 1855, Sec. XXXIX. it is receivable also, if he is incapable of giving evidence by reason of his subsequent loss of understanding, or is, at the time of trial or hearing, *bonâ fide* and permanently beyond the reach of the process of the Court, or cannot after diligent search be found.

§ 175. It is essential that the author of the statement or entry must have had the means of knowing that his statement was true.

§ 176. The interest must be of a pecuniary or proprietary character.(i)

§ 177. The ordinary cases in which evidence of this sort is tendered, are those in which persons have charged themselves with the receipt of money, such for instance as the entries of stewards, tax gatherers, bailiffs, managers of estates, and the like.

§ 178. Books of this character are entitled to more consideration than purely private books, inasmuch as they are usually subject to inspection by the employer of the maker of the entry.(k) But entries made in a private book for the convenience of the individual are also receivable. Thus, for instance, if I write in my memorandum, or pocket, or account book, that I have received 100 Rupees from A. B, such entry will be evidence, in event of my death, lunacy, absence, &c. for whether it be a memorandum of a sum paid me, or of money lent, or entrusted to be kept or laid out, it is clearly an entry against my own

---

(h) 10 *East's Rep. p.* 109.

(i) By Lord Campbell *Sussex Peerage case*, 11 *Cl. and Fin.*

(k) So in *Ellis v. Cowne*, 2 *Car. and K.* p. 719 when a book was kept privately by the defendant, and was made up from certain slips of paper on which the daily transactions of his business were entered, and there was no proof that these were copied accurately, it was held that the book was not admissible as evidence for the defendant. Byles, Serjeant, objected that as no one was in the habit of seeing the book but the defendant, it would be allowing him to make his own evidence. Miller contra: It was the policy of the law to favor the admission of books of accounts as evidence. *Wilde*, C. J. "The Courts it is true are inclined to extend the effect of tradesmen's books, and hence books kept openly in a shop, and to which the shopmen have access, and in which entries are *originally* made, or even into which items are copied from other books, have been admitted as evidence although they were written by parties to the action." But the book was refused because it was "written by the defendant himself and kept privately in his own possession."

In this case it is to be observed not only that the book wanted that publicity which is requisite as a guarantee for the correctness of such documents, but it was a copy, not proved to be a true copy.

interest, inasmuch as I either discharge my debtor, or charge myself with liability to a creditor.

§ 179. Such entries are only receivable when they are material to the merits of the case. Otherwise their reception would militate against the rule which excludes purely collateral matter.

§ 180. They are not receivable where better evidence is to be had to prove the same fact. As for instance where the maker of the entry is himself forthcoming personally.

§ 181. An entry charging the maker with the receipt of money is receivable, although on the other side he has made an entry *discharging* himself. Thus for instance, in the ordinary form of a debtor and creditor account, only the creditor side would be admissible. It is clear that the side on which a man admits himself a debtor is against his own interest: that in which he discharges himself is not only not against his interest, but positively directly in his own interest.(*l*)

§ 182. Entries against interest need not be contemporaneous: *i. e.* they need not have been made at the date of the transaction to which they refer. A man is as little likely to make an entry against his own interest a year after the event as at the moment of its occurrence. The accuracy of the entry does not therefore depend upon the memory, as in the class of entries to be next considered, those made in the ordinary course of business, where their fidelity very materially depends upon their having been made about the time to which they refer. Put the case of a clerk in Arbuthnot's House, who perhaps books up 100 items daily, what reliance could be placed on the accuracy of his relation of the fact to which any one of these items referred, if the entry were made a year, or even a month, after its occurrence?

§ 183. But such entries are, except in the case of merchants' books, seldom more dry statements of sums received, and more ordinarily they refer to place, purpose, surrounding circumstances; and a question

(*l*) In *Doe d Kinglake v. Beviss*, 7 C. B. p. 507, Coleman, J. said "This matter was considered in *Knight v. the Marquis of Waterford* where Alderson, B. observes with respect to *Bullen v. Mitchell*, that the decision was right without taking into consideration all the reasons given for it. In that case the learned Baron expressly decided that the charging part of the account might be read but not the discharging part, and I think the decision was right." And V. Williams, J. said "As to the rejection of the evidence I am of opinion that the ruling in *Knight v. the Marquis of Waterford* ought to govern this case. It seems to me that the doctrine laid down by the Court of Exchequer in *Davies v. Humphreys* upon the authority of *Higham v. Ridgway* and *Doe v. Robson*, that 'the entry of a payment against the interest of the party making it is to have the effect of proving the truth of other statements contained in the same entry and connected with it,' has gone quite far enough. I for one do not feel inclined to carry it farther."

arises whether, when this is the case, the entry is receivable to prove every fact to which it relates, or only that which is clearly against the maker's interest. For instance it is against my interest to admit that I received £10 from A B; but how does the entry that I received it at such and such a place affect my liability?

§ 184. Now the general rule is that these entries are receivable for the purpose of proving the circumstances of which they speak, as well as the single dry fact of payment or receipt, provided of course that the other circumstances are material to the merits of the enquiry, and not merely collateral.(m)

In *Higham v. Ridgway* the books of a deceased accoucheur were offered to prove the birth of a child *on a particular day*. In his ledger was entered the amount of fee for attendance, and it was marked *paid*. This last circumstance made the entry against his interest; it was therefore receivable, and it was held good evidence to prove the *date* of the child's birth.

§ 185. So a steward's book would prove the description of land held by a certain tenant and the amount he had to pay for rent, if all these circumstances are coupled in the entry with the amount of money admitted to have been received.

§ 186. Such entries are not the less receivable, because the same fact may be proved by evidence of another description. For instance, in *Higham v. Ridgway*, the evidence of the entry of the accoucheur would not have been rejected, because the evidence of a midwife who was present at the delivery might have been forthcoming: though this may seem at first sight to militate against the rule that the best evidence shall alone be received. The entry of the accoucheur would not have been receivable if he himself had been forthcoming, because then his testimony on oath would have been superior to his entry which was not on oath: but as we shall see here after, when we come to consider the rule that the best evidence must always be given, the rule applies to the *quality*, and not the *quantity*, of evidence; and that a fact may often be proved by independent testimony, notwithstanding there may be two distinct ways of proving it. Thus

(m) This distinction is explained in the notes to *Higham v. Ridgway*: but the author does not approve of the distinction. "The reason" says Mr. Smith "for this distinction does not seem very obvious; the principle upon which the two classes of entries are admitted is the same, namely, the improbability of their falsehood; but there seems no more reason for admitting the entry as evidence of facts as to which that improbability does not exist in the one case than in the other."

the mere fact that there has been a *written* receipt given for money, will not preclude the proof of payment by oral witnesses who *saw* the payment; but this will become clearer hereafter.(n) Thus in the case of *Middleton v. Melton*,(o) a private book, kept by a deceased collector of taxes, containing entries by him, acknowledging the receipt of sums in his character of collector, was also held to be admissible evidence in an action against his surety, although the parties who had paid him were alive and might have been called. So the verbal admissions of a party to the suit are evidence against him: even though his statement refers to the contents of a written instrument.

§ 187. The entries must be proved to be in the handwriting of the party purporting to have made them, before they can be received. Where the entry is thirty years old, it proves itself.

§ 188. Cases may be conceived in which a party may have made a fictitious entry charging himself *apparently* against his own interest. The instance brought forward by Best in § 483 is such.

"Cases may be put where his doing so would be an advantage to him. E. g. the accounts of the receiver or steward of an estate have through neglect or worse, got into a state of derangement, which it is desirable to conceal from his employer, and one very obvious way of setting the balance straight is by falsely charging himself with having received money from a particular person."

§ 189. A case of frequent occurrence in this country is that of a party charging himself with receipt of interest by way of endorsement on a stale bond, in order to take it out of the Regulation of Limitations.(p) This entry is however only apparently against the interest of the party making it; since it enables him to bring his suit. In these cases satisfactory evidence ought to be given, that the entry was made *before* the presumption of satisfaction had arisen; and in accordance with this view, the language of Lord Ellenborough in *Rose v. Bryant*,(q) may be cited.

"I think you must prove that these endorsements were on the bond at, or recently after, the times when they bear date, before you are entitled to

---

(n) *See Taylor*, § 305—6.
(o) 10 *B. and C.* p. 317.
(p) *Reg. II.* of 1802, Sec. XVIII.
(q) 2 *Cam.* p. 321.

read them. Although it may seem at first sight against the interest of the obligee to admit part payment, he may thereby in many cases set up the bond for the residue of the sum secured. If such endorsements were receivable whensoever they may have been written, this would be allowing the obligee to manufacture evidence for himself to contradict the fact of payment. I have been at a loss to see the principle on which these receipts, in the handwriting of the creditor, have sometimes been admitted as evidence against the debtor; and I am of opinion they cannot be properly admitted, unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest."(r)

§ 190. The case of *Searle v. Lord Barrington*,(s) is also to be consulted. It will be found stated in *Starkie*, p. 478, note *b*.

"The bond was dated June 24, 1697; the endorsement of interest on the bond, under the hand of the *obligee*, was dated 1707, being three years before the death of the obligor; and the cause was first tried Trin. 1724. Pratt, C. J., was of opinion that this endorsement was not evidence; but the three other Judges were of opinion that it ought to have been left to the jury, for they might have reason to believe that it was done with the privity of the obligor; because it was the constant practice for the obligee to endorse the payment of interest, and that for the sake of the obligor, who is safer by such an endorsement than by taking a loose receipt. Upon a second trial, Lord Raymond, C. J., admitted the evidence, and a bill of exceptions was tendered, and after judgment in the King's Bench for the plaintiff, a writ of error was brought in the Exchequer Chamber; and upon argument, five of the Judges were of opinion to affirm, and two to reverse, the judgment was afterwards affirmed in the House of Lords."(t)

Starkie's remarks, p. 478, may be usefully consulted, he writes:—

"If this case is to be taken as an authority for the general position, that an endorsement of the receipt of interest on a bond bearing date within the space of twenty years from the date of the bond, shall in itself, and without any proof that it was actually made within that space of time, or with the privity of the obligor, be evidence to rebut the presumption of payment, it seems to be difficult to support it upon principle; for it amounts to this, that in this particular case the party shall have an opportunity of making evidence in his own closet, in order to rebut a presumption which would otherwise arise against him. If this be so, the case must be regarded as anomalous, and as an exception to the plain fundamental rule, that a man shall not be permitted to make evidence for himself. If, on the other

(r) *See also Taylor*, § 483—8.

(s) 2 *Strange*, p. 826.

(t) In the report of the case before the House of Lords, 3 *Brown P. C.* p. 593, it appears that there *was* extrinsic evidence of the date of the entry.

hand, this further limitation is to be applied to the reception of such evidence, that reasonable proof shall be adduced to show that the endorsement existed before the presumption of satisfaction had arisen, the doctrine seems to be more consonant with the principle above stated; a presumption arises that the obligee would not falsely and wantonly make an endorsement prejudicial to his own interest at the time from which he could derive no benefit. It seems to be clear, at all events, that such evidence would be inadmissible, if the endorsement appeared to have been made after the presumption had arisen.(v)

VI. *Entries made in the course of business.*

§ 191. The leading case on this topic is *Price v. Lord Torrington*,(w) selected by Mr. Smith in his Leading Cases, vol. 1, p. 139.

§ 192. The ground for admitting such evidence is the warrant of experience that it is usually free from suspicion of carelessness or fraud. Of course it is always open to show that there are errors or fraud, but if there be no reason for imputing one or the other, the entries are trustworthy.

"It is observable," writes Starkie,(x) that the great object of the rule is to guard not against *fraud*, but negligence and carelessness: the slightest suspicion of fraud would be sufficient at once to exclude such evidence; and the imposing of the limitation, that the entry, to be admissible, should be apparently against the interest of the party making it, would afford no security against fraud; the forger of a false entry would take care to obviate any objection of this description, by admitting payment or some other fact apparently against the interest of the supposed author of the document. The consideration that the entry is against the interest of the party is therefore principally material, as it affords reason for supposing that a person would not be likely to commit any error or mistake which might afterwards turn to his prejudice. When, however, it is considered that in many instances such entries remain in the private custody of the parties who make them, it is not probable that the consideration that the document might be published by accident or mistake, and might, in some possible state of circumstances, be turned to the prejudice of the party, would cause him to exercise a degree of exactness and caution, so

(v) It is a frequent custom in this country for a bond to provide that no payment of interest or principal shall be of effect unless endorsed on the back of the instrument. This is a useful precaution; but it still leaves room for false entries by the obligee, in event of the Regulation of Limitations having run, since it is the obligee generally who endorses payments as admissions against himself; it might be useful to provide that every payment should at the time of its being endorsed by the obligee be also initialed by the obligor.

(w) 1 *Salk.* p. 285.

(x) *Page* 465.

far beyond that which he would have used in the common course of professional or official duty, or ordinary habits of business, as to supply a sound and useful test, operating to the admission of the former, the rejection of the latter. In the absence of all suspicion of any motive to the contrary, it is fairly presumable that all entries made in the ordinary routine of business are truly made. The same motive which induced a party to use the pains and trouble of making an entry at all, would usually induce him to make a true entry; a false one would be of no value, and the making it would frequently be more troublesome than to make a true one; it would require the additional trouble of invention; and although the sparing of trouble might, in many instances, induce a party to state particulars without sufficient accuracy, it would seldom cause him to invent and state a transaction which never happened."(y)

§ 193. The entry, when made in the course of business should be contemporaneous, or nearly so with the fact it chronicles. In the case of *Price v. Lord Torrington*, the entry was made on the evening of the day on which the beer was delivered, and signed by the drayman. The necessity of the entry being what is called contemporaneous, we have already dwelt on,(z) and it is clear that if a man makes his entries after some distance of time from the principal fact, his memory is more likely to err as his recollection grows fainter and fainter.

§ 194. By Act II. of 1855, Sec. XXXIX. before referred to, this description of evidence is now receivable in the same cases as entries against interest, even when the maker is not dead. By Act II. of 1855, Sec. XL. such entries, so far as they relate to the limited purposes of identifying any "bank notes or other securities for the payment of money, or other property, and the payer in, or receiver of them" are receivable, even though the maker of the entry *is* capable of being produced as a witness.

§ 195. It is necessary that the party making the entry should have

(y) See the grounds stated at large. *Poole v. Dicas*, 1 Bing, N. C. 653. *Taylor* § 489, writes thus:

"The considerations which have induced the Courts to recognize this exception appear to be principally these;—that, in the absence of all suspicion of sinister motives, a fair presumption arises, that entries made in the ordinary routine of business are correct, since, the process of invention implying trouble, it is easier to state what is true than what is false; that such entries usually form a link in a chain of circumstances, which mutually corroborate each other: that false entries would be likely to bring clerks into disgrace with their employers; that as most entries made in the course of business are subject to the inspection of several persons, an error would be exposed to speedy discovery; and that, as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favor of such entries may often prove convenient, if not necessary, for the due investigation of truth."

(z) *See ante* § 182.

had a *personal* knowledge of the fact to which it relates. Thus in *Price v. Lord Torrington*, the drayman, *who delivered the beer*, signed the entry.(a) But supposing you were to go into a shop and purchase an article on credit *from the tender*, who merely reported the fact of your purchase to a clerk in another room, who entered the sale; such an entry would not be receivable, because the *clerk* would have had no personal knowledge of the sale, but merely have made an entry of something told him by a third party (the tender), which so far as he (the clerk) knew, might be true or not true. So again; if a rough draft were made at the time of sale by a clerk whose duty it was to watch the sale and make the entry then and there, and such rough drafts were afterwards written up fair into a ledger, by *another clerk*, the ledger entry, on the same principle, would not be receivable.(b) We shall see hereafter, that such entry would not be receivable except under particular circumstances on another principle, viz., that it was a copy. But supposing those particular circumstances to exist in a particular case, and in the absence of better evidence, the ledger entry were admissible *as a copy*, the first named objection, viz. that it was made by a person who knew nothing of the fact, would be fatal to its admission.

§ 196. Illustrative of the above paragraph we may cite the case of *Brain v. Preece*.(c) There, coals were delivered by a coalman whose duty it was to report deliveries to a foreman. It so happened that neither the coalman nor the foreman could write. The latter therefore dictated his entries to a clerk. When the case came on for trial both coalman and foreman were dead. It was held that the entry was not receivable.

§ 197. So in *Davis v. Lloyd*.(d) Jewish children are circumcised on the eighth day. An entry by the Rabbi of the Synagogue, whose duty it was to make such entry, was held not receivable, to prove the age of the child, because that was not a fact within his own personal knowledge. The child *might* have been seven or nine days old when brought to him for circumcision. These cases must suffice to explain

(a) It is not necessary that the declaration made in the course of duty should be in a written form. See the *Sussex Peerage case*: and per Lord Campbell. *Stapylton v. Clough*, 2 *E. and B.* 933. S. C. 18 *Jur.* 60. See *ante* § 172, note (*g*).

(b) See *ante* § 178, note (*k*).

(c) 11 *M. and W.* p. 773.

(d) 1 *C. and K.* 275.

how necessary it is that the party should have a knowledge of the fact which he purports to record.

§ 198. Entries in the course of business are not receivable to prove any collateral fact: and herein they differ from entries against interest. In *Chambers v. Bernasconi*,(e) Lord Denman delivering the unanimous opinion of the Court of Exchequer Chambers, observes:

"Whatever effect may be due to an entry made in the course of office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances."

§ 199. Taylor(f) thus sums up the cirumstances which are necessary to admit of the reception of this kind of evidence:

"From the cases cited above it may be collected, that, in order to bring a declaration within the present exception, proof must be given that it was made contemporaneously with the fact which it narrates, and in the usual routine of business, by a person whose duty it was to make the whole of it, who was himself personally acquainted with the fact, who had no interest in stating an untruth, and who is since dead; and, provided all the terms of this proposition be satisfied, it seems to be immaterial, excepting so far as regards the *weight* of the evidence, that more satisfactory evidence might have been produced, that the declaration is uncorroborated by other circumstances, or that it consists of a mere verbal statement, which has never been reduced to writing. In support of this last point *no direct decision can be cited*,(g) since all the cases on the subject relate to written entries; but, as we have before suggested, the law appears to recognize no valid distinction between written and verbal statements; and in the *Sussex Peerage case*, Lord Campbell, no mean authority, expressly stated, that 'where a declaration *by word of mouth*, or by writing, is made in the course of business of the individual making it, then it may be received in evidence, though it is not against his interest.'"

§ 200. It may be well to remark here, that in the practice of the Mofussil Courts, the entries made by a party himself in his own books have been held sufficient to prove his case.(h) This was certainly not in accordance with the English law, though it is admitted by the Roman law, the French, and the Scotch; and when the books are regularly kept, and the entries evidently contemporaneous, it would

(e) 1 *C. M. and R.*. 368.

(f) § 497.

(g) But see *ante* § 172, note (g).

(h) See Sudder Reports, vol. 1, p. 42. No 91 of 1849, and vol. 3. p. 191, No. 19 of 1851.

seem that the objection should with reason go to the *credibility* rather than the *reception* of the evidence. When accounts are kept on loose cadjans, forgery, by way of interpolation or extraction, is of course easy; much credit might not be attached perhaps to the memoranda of a wandering hawker: no exception might possibly be taken to the books of the Madras Bank. So I have always understood that the Guzzeratti Soucars place the most unlimited confidence in one another's books, and I remember a case in which one Soucar offered to be bound, if the claim made against him could be found in the claimant's books. Any conceivable degree of credit may be given in each particular case to the books offered, according to the whole of the circumstances which surround them: and perhaps as a concession to this principle, Act II. of 1855, Sec. XLIII. has provided that "books proved to have been regularly kept in the course of business, or in any public office, shall be admissible as *corroborative*, but not as *independent* proof of the facts stated therein."

VII. *Admissions by a party to the Suit, his Partner or Agent.*

§ 201. The title of this heading is perhaps sufficient to point out the distinction between the present subject for consideration and that of the two last topics: for it is to be remembered that whereas we are now about to discuss the admissions of *parties* to a suit and those in privity with them, we have hitherto been considering the admissions of mere third persons tendered as evidence by or on behalf of the parties to a suit.

§ 202. If the presumption that a man will make an entry or declaration contrary to his own interest is thought sufficient guarantee for the veracity of the entry, &c. in the case of third persons who have no interest in the subject-matter of the suit, how much stronger *a fortiori* is the presumption, when the declaration proceeds from one of the very parties to the suit himself?

§ 203. The first rule is that when an admission is offered in evidence, the *whole of it* must be submitted to the judge.

For instance, suppose that A B the plaintiff wishes to prove that C D the defendant has admitted a particular fact in a letter written by him to the plaintiff. He produces the letter and reads the passage. The defendant has a right to insist upon the whole of the letter being read. So also where a deposition by a witness in a criminal trial is

proposed to be read as evidence against him, to show that he has upon a former occasion given a different account of the same transaction, not only the particular passage should be read, but the whole deposition if the party wishes it. So if the admission be contained in a conversation, the party sought to be charged by it would have a right to insist that not only the particular part of the conversation should be narrated, but that the whole, at least the whole relating to that particular fact, should be given.

§ 204. But although a party has a right to insist upon this course, it does not of course follow that the judge is bound to place an equal degree of reliance on all points of the statement: for otherwise, by making a trifling admission against himself, a party might be enabled to drag in twenty statements in his own favor. Here again comes in the principle, that only what is against a man's interest is evidence, not that which he chooses to assert in his own interest, for there the guarantee for truth is wanting.

§ 205. So again, if a statement refers to another statement, as in the case of a letter referring to a preceding one, an entry referring to a previous entry, the party against whom the letter or entry is offered, has a right to insist that the first should be put in also.(*i*)

§ 206. But though a party has a right to insist that the whole of his declaration shall be received, this will not admit a rambling statement on collateral matters; or other declarations not referred to, or not connected with, the declaration before the Court.

§ 207. For instance; suppose a Plaintiff is compelled to produce an entry in his own books, telling against himself; he has clearly a right to insist upon the whole of the entry being read, but he will not be entitled to introduce other entries in his book, not referred to in such entry itself, and insist upon their being read.

§ 208. The rule is precisely the same with regard to conversations. The leading case is *Prince v. Samo.*(*k*) Lord Denman who tried

(*i*) A party may always give in evidence a letter of the opposite party, which is a *reply* to a letter from himself, without putting in his own letter. Because the opposite party can always put it in if he wishes it; and to insist upon the previous production of such letter from the adversary's hands might tend to serious injustice in those cases in which the adversary refused to produce it, and the party writing had kept no copy, so as to give secondary evidence of its contents. Here, it would be in the power of the adversary to exclude his own statement. *Dagleish v. Dodd*, 5 C. and P. 238. See also *Lord Barrymore v. Taylor*, 1 Esp. p. 326, per *Lord Kenyon*, "Letters of a party are evidence of themselves to prove a promise to pay without producing those to which such letters are answers."

(*k*) 7 *A. and E.* p. 627.

the case, was of opinion that the witness might be asked as to every thing said by the Plaintiff which could in any way qualify the principal statement, but that he had no right to add any independent history of transactions wholly unconnected with it.

Phillipps thus sums up the rule :—

"Where a statement forming part of a conversation is given in evidence, whatever was said by the same person in the same conversation that would in any way qualify or explain that statement is also admissible."

That is to say; a party can only have read all other matters which explain, qualify, or bear upon the statement given in evidence.

§ 209. The unpractised might suppose that where A declared that a given deed contained certain statements, his *verbal* admission would not be evidence, because the *written* matter would be the best evidence. But the rule is that *whatever* a party may choose to say, is evidence against him.

§ 210. The leading case is *Slatterie v. Pooley*(l) in which Parke, B. says as follows :—

"The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true, may reasonably be presumed to be so. The weight and value of such testimony is quite another question. That will vary according to the circumstances, and it may be in some cases quite unsatisfactory to a jury. But it is enough for the present purposes to say, that the evidence is admissible."

§ 211. The following remarks from Taylor(m) are worthy of attentive consideration :—

"It may seem presumption to question the correctness of this reasoning, and of the decisions founded upon it, but we cannot refrain from observing, that, although the admission of a party may fairly be presumed to be true, the parol evidence by which that admission is proved need by no means be so; and, indeed, such testimony is open to precisely the same objection as applies to the ordinary case, where secondary evidence is produced, and the

(l) 6 *M. and W.* p. 669.
(m) § 302.

best evidence is withheld. If the admission were made in court, it might then be allowed to render unnecessary the production of the written instrument to which it refers, because the simple question in such case would be, is the admission true? and the rational presumption is that a man will not tell a falsehood, which is against his own interest; but where a witness is called to say that he has heard the opposite party make a certain statement, with respect to the contents of a written instrument, the further question arises, was this statement really made? and to permit such parol evidence to be equally admissible, as proof of the contents of the instrument, with the production of the instrument itself, is to open a vast field for misapprehension, perjury, and fraud, which would be wholly closed, if the salutary rule of law, requiring that what is in writing should be proved by the writing itself, were here, as in other cases, to prevail. It must be remembered that Lord Tenterden, no mean authority, has emphatically expressed an opinion in support of the view here suggested; while Mr. Baron Parke himself has declared that the parol evidence of admissions may, in some cases, be quite unsatisfactory to a jury, and that too great weight ought never to be attached to such evidence, since it frequently happens that the witness not only has misunderstood what the party has said, but, by unintentionally altering a few of the expressions really used, has given to the statement an effect completely at variance with what was intended."

§ 212. This ruling has however been questioned by C. Baron Pennefather in the Irish case of *Lawless v. Queale*.(n)

"The doctrine laid down in that case" says the C. Baron, referring to *Slatterie v. Pooley*,

"is a most dangerous proposition; by it a man might be deprived of an estate of 10,000*l.* per annum derived from his ancestors through regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear that they heard defendant say he had conveyed away his interest therein by deed, or had mortgaged, or had otherwise incumbered it; and thus, by the facility so given, the widest door would be opened to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty."

§ 213. Phillipps remarks on this Irish case (o) as follows:

"It would seem however, that these observations would apply to the weight due to such testimony rather than to its admissibility. It is to be observed that there is no positive law that excludes parol evidence of the contents of a written instrument, except where a written instrument is required by law.

(n) 8 *Irish Reports*, p. 382.
(o) Vol. 1, p. 323.

Such evidence in other cases is excluded by one of those rules which have been laid down by the Courts as best calculated for ascertaining the truth. The party against whom such evidence is given may object to it, because oral testimony as to a written document is not the best means of ascertaining its contents. A verbal statement of the contents of a writing may not be true. But the party who is entitled to the benefit of the rule may waive it, if he thinks proper,—as for instance, when he believes that the witness will state truly the contents of the document. If the party were, in Court, by himself or his counsel, to make an admission as to the contents of a document, with the contents of which he must necessarily be acquainted, and upon the production of which he might insist, this would amount to a waiver of its production, and his admission would be taken as true. If he made a similar admission out of Court, but for the purposes of the cause, it would operate in a similar manner. Again, if it can be proved by clear and satisfactory testimony that he has made such an admission, though not for the purposes of the cause, although it may not be regarded as a waiver of the production of the document, it is surely receivable, as a declaration made by him against his own interest, and which, as he knows the truth, he must be presumed to have made consistently with the truth. The credit or weight to be given to such testimony must of course depend upon the circumstances of the case. There is, undoubtedly, in the case of verbal declarations, always the *possibility* of fraud or perjury on the part of the witness who repeats the declaration. There is the same possibility in every instance, where a witness speaks to any fact that he professes to have seen. Such testimony is not rejected, but is to be sifted by the best means the adverse party may have in his power. In the case of verbal declarations there is also a possibility—and often a probability—of misapprehension, or of inaccurate recollection on the part of the witness, and the judge will always point out this to the jury."

§ 214. And Best, § 508, writes :

"The authority of *Slatterie v. Pooley* has been recognized and acted on in several subsequent cases, but has been severely attacked in Ireland, and also in this country. In *Lawless v. Queale*, Lord Chief Justice Pennefather, speaking of that case, says, 'The doctrine there laid down is a most dangerous proposition ; by it a man might be deprived of an estate of 10,000*l.* per annum, derived from his ancestors by regular family deeds and conveyances, by producing a witness, or by one or two conspirators who might be got to swear they heard the defendant say he had conveyed away his interest therein by deed, or had mortgaged or otherwise incumbered it ; and thus by the facility so given, the most open door would be given to fraud, and a man might be stripped of his estate through this invitation to fraud and disho-

nesty.' Now we must protest in toto against trying the *inadmissibility* of evidence by such a test as this. The most respectable man in the community may be hanged for murder or arson on the unsupported testimony of a *soi-disant* accomplice, or transported for rape on the unsupported oath of an avowed prostitute; but is this a reason for altering the law with reference to the admissibility of the evidence of accomplices or prostitutes, or does any innocent man ever feel himself in danger from it? The weight of the species of proof under consideration varies *ad infinitum*. Look at the different forms in which it may present itself—plenary confession *in judicio*; non plenary confession *in judicio*; plenary *quasi* judicial confession before a justice of the peace; non plenary *quasi* judicial confession before a justice of the peace; plenary extra judicial confession to several respectable witnesses; plenary extra-judicial confession to one such witness; implied confession to several respectable witnesses; implied confession to one such; supposed plenary confession to several suspected witnesses; supposed plenary confession to one such; implied confession to several suspected witnesses; implied confession to one such: and under the terms 'non-plenary' and 'implied' are included every possible degree of casual observation, or even sign, from which the existence of the principal fact may be collected. The shade between the probative force of any two of these degrees is so slight as to be almost imperceptible, and yet of all forms of evidence the highest is perhaps the most satisfactory, and the lowest the most dangerous. The *value* of self-disserving evidence, like that of every other sort of evidence, is for the jury; its *admissibility* is a question of law—the test of which is to see if the offered evidence is in its nature original and proximate, and it will scarcely be contended that self-disserving statements of all kinds do not fulfil both those conditions. It may, indeed, be objected that they usually come in a parol or verbal shape, and that parol evidence is inferior to written, but that is a maxim which has been much misunderstood. The contents of a document could most unquestionably be proved by a chain of circumstantial evidence composed of *acts*, every link in which might be established by parol or verbal testimony."

The latest case on this subject is *Boulter v. Peplow*(*p*) in which the earlier cases are all cited, and the doctrine upheld. In *Howard v. Smith*(*q*) too it was held that the admissions of the Plaintiff are evidence to show the terms upon which he held the premises, though he held under an agreement in writing which is not produced.

§ 215. Where a party has made an admission or statement on the

(*p*) 14 *Jur.* p. 249.

(*q*) 3 *Scott's N. R.* p. 574.

faith of which another has acted, so as to change his own situation, such admission or statement is conclusive against the party making it: for otherwise a premium for fraud would be held out.

§ 216. The leading case on this subject is that of *Pickard v. Sears*(r) where it is thus laid down.

"The rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

In *Gregg v. Wells*,(s) Lord Denman said:

"*Pickard v. Sears* was in my mind at the time of the trial, and the principle of that case may be stated even more broadly than it is there laid down. A party, who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

In *Freeman v. Cooke*(t) Parke, B. thus explains the word "wilfully" in the leading case.

"By the term '*wilfully*' however in that rule we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly—and if whatever a man's real meaning may be, he so conducts himself, that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect—as for instance a retiring partner omitting to inform the customers of the firm, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons on the faith of their being authorized."(v)

§ 217. The law on this head is well laid down by Taylor, § 605.

"Admissions, which have been *acted upon by others*, are conclusive against

---

(r) 6 *A. and E.* 474. See also *ante* p. 45.

(s) 10 *A.* and *E.* p. 97.

(t) 12 *Jur.* 777.

(v) See the doctrine further sanctioned in *Howard v. Hudson*, 17 *Jur.* 1855, *Att. Genl. v. Stephens*, 19 Jur. 1039.

the party making them, in all cases between him and the person whose conduct he has thus influenced. It is of no importance, whether they were made in express language to the person himself, or may be implied from the open and general conduct of the party; for, in the latter case, the implied declaration will be considered as having been addressed to every one in particular, who may have had occasion to act upon it; and the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on the belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. Indeed, the principle may be laid down still more broadly, as precluding any party, who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, from disputing that fact in an action against the person whom he has himself assisted in deceiving. In such case the party is estopped, on grounds of public policy and good faith, from repudiating his own representations."(*w*)

§ 218. The admission of a person identified in interest with the party to the record is receivable against the latter.

§ 219. But the admission of a *prochain ami* or guardian is not evidence: because they are usually *nominal* parties, and, as it were, officers of the Court for the purpose of representing those unable to sue *sui juris*.

§ 220. Admissions by *privies*, as they are called, are equally receivable with admissions of the parties themselves to whom they are privy.(*x*)

§ 221. Privies are of three classes, because privity may arise from blood, law, or estate. Privies in blood, are heir and ancestor, &c.—privies in estate are donor and donee: lessor and lessee, &c.—privies by estate also are those among whom there is a *jus representandi* as between executors and their testators, administrators and their intestates. Privies in law are those upon whom the law casts a privity, as where land escheats to a third party in failure of heirs.

§ 222. In these cases the declarations of privies are in their respective grades binding upon their representatives. The declaration of an ancestor would be receivable against his heir: that of a testator against an executor: and the like.

(*w*) Consult also *Taylor*, § 606—17, on this important subject.

(*x*) See Act II. of 1855, Sec. XLI. as to effect of a receipt against parties.

§ 223. So a party may be bound by the declaration of his partner or agent(*y*): but the existence of the relation of partnership or that of agency must first be established; and it is essential that the declaration of an agent should be within the scope of his authority. A special agent for a particular purpose or occasion cannot bind his principal as to matters in general, or not arising out of that for which his agency was constituted.

So the declaration of a partner, to be binding on his co-partners, must be one made concerning their joint-business. But the misrepresentation of a fact in such joint-business, made by one partner to a third party will be evidence against the other members of the firm, though not parties to the misrepresentation.

§ 224. Of course if such statement has been made in fraud of the co-partners and in collusion with the opponent, *cessante ratione, cessat lex;* and the evidence will not be receivable.

§ 225. The proof of the partnership or of the agency cannot be established by the mere admission of the alleged partner or agent: it must be established by independent evidence; for otherwise, principals and partners would be at the mercy of any one who chose to assert that the abovementioned relationships existed.(*z*)

(*y*) See Act II. of 1855, Sec. XLII. receipt of agent.

(*z*) The following remarks upon the mode in which agency may be established in proof, taken from Broom's Commentaries, page 537, may here assist the Student.

"The *fact* of agency may be proved by proving an express authority given to the alleged agent; by showing circumstances from which the requisite authority must necessarily or may reasonably be inferred; or by establishing the existence of a particular relation between parties whence an authority to contract will be implied by law: for instance, the relation of partners, by which relation, when complete, one partner becomes at common law the agent of the firm for all purposes necessary for carrying on their particular partnership, whether general or special, or usually belonging to it; or the relation of husband and wife, in which the law, under certain circumstances, considers the husband to make his wife an agent.

"To explain and illustrate these remarks, let us suppose that an action for goods sold and delivered, or for work and labour, is brought by A. against B. The plaintiff, on whom, in such a case, the burthen of proof lies, must, in order to recover against the defendant, show that he (the defendant) contracted expressly or impliedly with the plaintiff; expressly, by making a contract with the plaintiff; impliedly, by giving an order to him under such circumstances as show that it was not to be gratuitously executed; and if the contract was not made by the defendant in person, it must be proved that it was made by an agent of the defendant duly authorized, and that it was made as his contract. Assuming that the contract in the given case was made by a third person, the point for decision will be—whether that third person was an agent for the defendant for the purpose of making it, and *made the contract as such.*

"Now, in accordance with what has been already said, the agency may, under the circumstance supposed, be constituted by an express limited authority to make such a contract, or a larger authority to make all contracts falling within the class or description to which it belongs, or a general authority to make any; or it may be proved by showing that such a relation existed between the parties as by law would create the authority. If proof to such effect be given, and if further it be shown that the agent in making the contract acted on the authority given to him, the principal will be bound by the contract, and the agent's contract will be his contract, *but not otherwise.*

"Agency, then, may be created by the *immediate act* of the principal, that is, by really giving authority to the agent, or representing to him that he is to have it: or by constituting

§ 226. The admissions of a wife will bind her husband only where she had authority from him to make them.

The case of *Meredith v. Footner*,(a) is illustrative of this proposition. There, the wife by authority of her husband carried on the business of a shop. The Court held that her admissions to the landlord of the shop respecting the amount of rent was not evidence. Had the admission related to the receipt of shop goods it would have been otherwise, but the conduct of the business did not constitute her her husband's agent to make admissions of an antecedent contract for the hire of the shop, or to make a new contract for its future occupation.(b)

§ 227. The admissions of Attornies on the record bind their clients in all matters relating to the progress and trial of the cause. But such admissions should be distinct and formal: not those of mere conversation. Thus for the purpose of saving expense, it is a wholesome practice introduced into our English rules of Court,(c) to call upon the Attorney of the opposite party to admit certain scheduled documents "saving all just exceptions." The letters or other writings required, are referred to specifically by date, &c. and if they are admitted, the expense, &c. of *proving* them at the trial is saved; a refusal to admit is at the peril of payment of costs of the witnesses called to prove the documents. At the same time, the saving of all just exceptions reserves all objections to the reception of the testimony which may arise, on other ground than that of want of proof of execution of the documents at the trial: for instance, their irrelevancy; their being between third parties, and the like.

§ 228. Admissions by Counsel stand on much the same footing. But the latitude of Counsel's statements often tends to inaccuracy, and it is not perhaps so safe to look to Counsel's "opening" as

---

that relation to which the law attaches agency. It may also be created by the *representation of the defendant to the plaintiff* that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him agent; and if the plaintiff really makes the contract on the faith of such representation, the defendant is bound, because he is estopped from disputing the truth of it with respect to that contract; and the representation of an authority is, *quoad hoc*, (by virtue of the doctrine of estoppel) precisely the same thing as a real authority given by the defendant to the supposed agent. This representation may be made *directly to the plaintiff*, or made *publicly*, so that it may be inferred to have reached him, and may be made by *words* or conduct."

(a) 11 *M. and W.* 202.

(b) In a late case tried in the Supreme Court, the statements of a Milliner were admitted as against her husband, the defendant in the suit, because she was held to be trading by his authority.

(c) See Supreme Court Rules, 23d Plea, side rule. Some such provision might be advantageously introduced into Mofussil Courts.

to the facts which he proves. In the case of *College v. Horne*,(d) on a second trial, the defendant endeavoured to avoid part of the Plaintiff's demand, by proving an admission made on a former trial by the Plaintiff's Counsel in the presence of the Plaintiff. The Judge rejected this evidence: but on a motion for a new trial, Burroughs, J. said that if the Plaintiff heard his Counsel's statement without objection, he was bound by it. The other Judges expressed no opinion.

In the late case of *Swinfen v. Swinfen*,(e) the Court refused to enquire into the authority of Counsel (Sir. F. Thessiger) to compromise a suit at *nisi prius*.

§ 229. How far a party may be bound by admissions in his pleadings(f) is rather a subject for discussion when we lecture on Pleading: but in this country according to the practice of the Mofussil, this will be for consideration of the Judge who settles the "Points;" and who of course is bound to take care that he does not burthen the record by calling for proof of facts which are really not in dispute between the parties.

§ 230. So a party may be bound by his own conduct during the progress of the cause: the commonest form of this perhaps is that of payment by the defendant of a certain sum into Court, to which extent he thereby admits his liability. Thus, the suppression of documents is an implied admission that their contents are unfavorable to the suppressor.

§ 231. So admissions may arise from the conduct of a party in other particulars—for instance from acquiescence, or even silence: but in these cases the inference of admission is often very slight and scarcely noteworthy.

§ 232. Taylor, § 840, may here be consulted.

"Again, where goods had been sold through a London broker under a written contract, which stipulated that payment should be made by bills, Lord Ellenborough rejected evidence of a custom, that *bills* meant *approved* bills, and that the vendor had the option of rejecting any bill of which he disapproved; and, although the same learned judge, in a subsequent stage of the case admitted evidence of a usage of trade, which reserved to vendors, selling through brokers in the manner above stated, the power of annulling the contract, within a reasonable time after the name of the purchaser had

(d) 3 *Bing.* 119.
(e) 18 *C. B.* 485.
(f) See on this subject *Taylor*, § 584—96.

been communicated to them,—serious doubts may be entertained whether he was right in so doing; and whether the custom, thus allowed to be proved, was so incidental to the contract, as, in the absence of express words to be incorporated in it."

§ 233. And all verbal admissions are to be received with caution. Taylor says, § 622.

"With respect to all *verbal admissions* it may be finally observed, that they ought to be *received with great caution*. The evidence, consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake; for either the party himself may have been misinformed, or he may not have clearly expressed his meaning, or the witness may have misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually said. But where the admission is deliberately made, and precisely identified, the evidence it affords is often of the most satisfactory nature."

§ 234. An admission which is made under constraint, or by mistake, or obtained by misrepresentation, or fraud, is of course not binding on the party who made it, and if this character be proved to attach to it, should not be received.

§ 235. Neither are admissions made during confidential overtures for pacification, arbitration, or settlement of disputes, receivable; in short no admissions which are made with a view to what is called the "purchase of peace;" for a party may often be willing to concede a point on such occasions, even against his own convictions, which he would by no means admit, but for the hope of thus avoiding further controversy.

§ 236. It is however advisable on such occasions that the correspondence should be headed "without prejudice."(g) The leading case on the subject is that of *Paddock v. Forrester*.(h) The dictum there is as follows:

"Where a letter is expressed to be written 'without prejudice,' it cannot be received in evidence either for or against the party sending it; neither can the reply thereto, though not similarly guarded."

(g) A story is told of a lawyer's clerk sued for breach of promise of marriage, who when his love letters were about to be received in evidence against him, objected that they were inadmissible, as they were all signed "Yours very affectionately, without prejudice." In *Hicks v. Thompson*, reported in the *Times*, 19th January 1857, Willes, J. said that this occurred in the case of *Wood v. Hurd*, 2 Bing. N. C. 166; though the point is not there mentioned.

(h) 3 *Scott's New Rep.* p. 734.

VIII. *Confessions.*

§ 237. The term confession is applied to an admission made by a party against his own interest on a *criminal* charge. As the consequences are more serious, so is the reception of confessions in criminal cases still more stringently watched than that of admissions in Civil suits; there is greater danger too by far in the former than in the latter of such admissions not being voluntary. All men are in general anxious to detect and prevent crime. The lower orders of officials in the administration of criminal justice are perhaps but little to be trusted themselves; are open to corrupt influences, and have the desire to raise their own characters, and increase their chances of promotion by the display of their own activity and astuteness. All experience proves how anxious and unscrupulous this class is to obtain confessions from their prisoners, sometimes by actual violence, sometimes by trickery, sometimes by holding out hopes of pardon or benefit: sometimes by the intimidation of threats of punishment. In this country the quality of "confessions" made before the Police is proverbial; and the Indian Law Reform Commissioners propose in their Report to forbid the taking of confessions by the Police in any case whatever, perhaps as the surest and shortest mode of putting an end to the evil.

§ 238. Where the origin of the confession is untainted with suspicion, and it can be safely relied on, it is not possible to obtain more satisfactory testimony: for if the consideration, that even in civil cases the improbability of a man speaking against his own interest is thought to afford sufficient guarantee for his veracity, how much more powerfully does the same guarantee exist in criminal cases, where the consequences to the declarant are so much more serious; affecting, it may be, his very life itself.

§ 239. Hence the maxim *Optimum habemus testem confitentem reum.* The very best of witnesses is an accused person who confesses his guilt. Hence the extreme desire in all ages to obtain from the lips of the accused an admission of his crime.

§ 240. And hence the bare confession of a prisoner is sufficient evidence to warrant his conviction, even though there be no corroborative testimony of his having committed the crime with which he stands accused.(i)

(i) "*Confessus pro judicato est*" says the Roman Law, "*qui quodammodo suâ sententiâ damnatur.*" *Bowyer* 393.

§ 241. But under this maxim lurks the cruellest fallacy: a fallacy which has exhibited itself practically in the form of torture, judicially administered under the sanction of the law itself.

§ 242. Nor is the maxim by any means of universal truth. Even where a confession is voluntary, that is to say, where it has not been wrung out of the prisoner by the instrumentality of his fellowman, how often has experience proved that a party has accused himself through motives of fear, of hope, of vanity, or even under the influence of insanity or hallucination.

§ 243. On these grounds, the law jealously protects prisoners against becoming the victims of their own delusions, or the machinations of others. Hence, no confession is receivable, if its source be not *omni suspicione majus*, above and free from the remotest taint of suspicion. Of course a confession wrung from an individual by bodily pain is utterly worthless. But further, the mind must be in a state of perfect equanimity; it must not have been operated upon by fear, or by hope: and hence *threats* or *promises* held out to the declarant equally exclude the testimony when it is offered against him.

§ 244. At least according to the humane provisions of the Law of England: for on this point the practice is widely different between the English and Continental Courts: there, where the Civil Law(k) is followed, till lately a confession was deemed of so high a character, that proof was not even admitted to contradict it; from this same reason prevailed the old practice of the "*Question*" with all its terrors; and even at the present day obtains the practice of the judge

(k) "*Quæstioni fidem non semper, nec tamen nunquam habendam, constitutionibus declaratur; etenim res est fragilis, et periculosa, et quæ veritatem fallat. Nam plerique patientiâ sive duritiâ tormentorum ita tormenta contemnunt, ut exprimi eis veritas nullo modo possit; alii tanta sunt impatientia, ut quodvis mentiri, quam pati tormenta, velint; ita fit ut etiam vario modo fateantur, et non tantum se, verum etiam alios criminentur.*—*Dig.* xlviii. *tit.* 18. n. i. § 23, from Ulpian *de Officio Proconsulis.*" The reluctance to disclose facts detrimental to a man's self family or friends has induced Governments to have recourse to torture for the purpose of exacting the truth. Though the Civil Law sanctioned it in the case of slaves, *Cicero* has stated plainly the cruel fallacy of the practice. In his oration *pro Sulla* he says:—"*Quæstiones nobis servorum ac tormenta accusator minitatur; in quibus quamquam nihil periculi suspicamur, tamen illa tormenta gubernat dolor, regit quæsitor, flectit libido corrumpit spes, infirmat metus; ut in tot rerum angustiis nihil veritati loci relinquatur.*" We may remember that when St. Paul was about to be scourged by the Roman officer he pleaded his Roman citizenship as a protection, and his plea was allowed. The process of torture is analogous to that of *experiment* in Physics. Both are artificial means of exploring the truth. Hence the term so often recurring in modern works on Chemistry of *interrogating* nature: which corresponds to the *question* in judicial investigations. But here the analogy stops: for scientific experiment brings out true results: torture, where silence is broken, brings out only *something*. *Quintus Curtius* remarks concerning *Philotas* who confessed certain designs against Alexander. "*Philotas, verone an mendacio liberare se a cruciatu voluerit, anceps conjectura est, quoniam et vera confessis, et falsa dicentibus, idem doloris finis ostenditur.*" And see *Beccaria c.* 16, concerning the fallibility of torture as an inducement for eliciting the truth. See 1 *Lewis Pol. Ph.* p. 169.

submitting the accused to searching personal interrogation. In England the maxim *nemo tenetur seipsum prodere* has always obtained, and it is a proud boast that judicial torture has never *legally* obtained in England, however it may in ruder times have been occasionally practised by virtue of some imaginary prerogative of the Crown.

§ 245. The whole of Mr. Best's masterly disquisition on the Law of Confession should be carefully studied. It will be found in § 535—48.

§ 246. Thence I take the following illustrations of the practice of foreign Courts. It is a note of what occurred at the Duke of Praslin's trial at Paris in 1847 for the murder of his wife. The President thus interrogated him.

"'Was she (the deceased) not stretched upon the floor where you had struck her for the last time.' 'Why do you ask me such a question?' Then follow these questions and answers :—'You must have experienced a most distressing moment when you saw, upon entering your chamber, that you were covered with the blood which you had just shed, and which you were obliged to wash off?'—'Those marks of blood have been altogether misinterpreted. I did not wish to appear before my children with the blood of their mother upon me.' 'You are very wretched to have committed this crime?'—(The accused makes no answer, but appears absorbed). 'Have you not received bad advice, which impelled you to this crime?'—'I have received no advice. People do not give advice on such a subject.' 'Are you not devoured with remorse, and would it not be a sort of solace to you to have told the truth?'—'Strength completely fails me to-day.' 'You are constantly talking of your weakness. I have just now asked you to answer me simply yes, or no.'—'If any body would feel my pulse, he might judge of my weakness.' 'Yet you have had just now sufficient strength to answer a great many questions in detail. You have not wanted strength for that?'—(The accused makes no reply). 'Your silence answers for you that you are guilty.'—'You have come here with a conviction that I am guilty, and I cannot change it.' 'You can change it if you give us any reason to believe the contrary; if you will give any explanation of appearances that are inexplicable upon any other supposition than that of your guilt.'—'I do not believe I can change that conviction on your mind.' Why do you believe that you cannot change that conviction?'—(The accused, after a short silence, said that he had not strength to continue). 'When you committed this frightful crime did you think of your children?'—'As to the crime, I have not committed it; as to my children, they are the subject of my constant thoughts.' 'Do you venture to affirm that you have not com-

mitted this crime ?'—(The accused, putting his head between his hands, remained silent for some moments, and then said) 'I cannot answer such a question.' "

§ 247. The remarks of Mr. Best in summing up the arguments for and against the practice of England and the Continental nations are so instructive that they must be given in full.

" In favour of judicial interrogation it is argued, that tribunals are bound to use all available means to get at the truth of the matters in question before them; and as the accused must necessarily best know his own guilt or innocence, he is naturally the fittest person to be interrogated on that subject; and indeed in many cases, often of the most serious nature, it would be impossible, without his own testimony, to prove the crime against the accused. That the rule which excuses a man from criminating himself is a protection to none but the evil-disposed; for not only have innocent persons nothing to dread from interrogation, however severe, but the more closely the interrogation is followed up the more their innocence will become apparent. And, lastly, that, in declining to extract self-disserving statements from the accused himself, while it receives without scruple from the mouths of witnesses similar statements he has made to them, the English law violates its own rule, which requires the best evidence to be given.

" Before considering what may be directly urged on the other side, it is essential to point attention to an important circumstance commonly lost sight of. In the English system, as in every other, the indictment, information, act of accusation, or whatever else it may be called, is a *general* interrogation of the accused to answer the matters charged; and every material piece of evidence adduced against him is a *question* to him, whereby he is required either to prove it false, or explain it consistently with his innocence. Any evidence or explanation he can give is not only receivable, but anxiously looked for by the court and jury; and, in practice, few things tell more strongly against a prisoner than his non-explanation of apparently criminating circumstances. What our law prohibits is the *special* interrogation of the accused—the converting him, whether willing or not, into a witness against himself—assuming his guilt before proof, and subjecting him to an interrogation conducted on that hypothesis. And here a question naturally presents itself—supposing the interrogation of accused persons advisable, by whom is it to be performed? There seem but two alternatives—the accuser and the court. Moreover, if the extraction of truth be the *sole* object in view, why is not the accused to be interrogated on oath like other witnesses? This, however, and the subjecting the accused to the interrogation of the accuser, are rarely, if ever, seriously advocated; so that we may confine our attention to the continental practice, where the interrogation of

the accused is the act of the tribunal, in which case a technical difficulty presents itself at the outset—how is an abuse of power in this respect to be rectified? Improper questions put to a witness by a party or his counsel may be objected to by the other side, and the judge determines whether the objection is well founded. But when the judge is the delinquent who is to call him to order? Decency and the rules of practice alike prohibit counsel from taking exception to questions put by the bench; and, indeed, to do so would be appealing to a man against himself.

"But to test this important question by broader principles. First, then, the functions of tribunals appointed to determine causes are primarily and essentially *judicial*, not *inquisitorial*. The tribunal is to judge and decide; to supply the proofs—the materials for decision—belongs in general to the litigant parties; though the inquisitorial principle is recognized thus far, that the tribunal is allowed to extract facts from the instruments of evidence adduced, and in some cases to compel the production of others which have been withheld. In the next place, the proposition that it is the duty of courts of justice to use all available means to get at the truth of the matters in question before them, must be understood with these limitations; first, that those means be such as are likely to extract the truth in the majority of cases; and, secondly, that they be not such as would give birth to collateral evils, outweighing the benefit of any truth they might extract. Admitting, therefore, that the *special* interrogation of accused persons might in some cases extract truth which otherwise would remain undiscovered (indeed the same may be said of torturing, imprisoning, or any other violent means adopted to compel confession), the law is fully justified in rejecting the use of such an engine, if on the whole prejudicial to the administration of justice. Now, that sort of interrogation, even when conducted with the most honest intention, must, in order to be effective, assume the shape of cross-examination, and consequently involve the judge in an intellectual contest with the accused,—a contest unseemly in itself, dangerous to the impartiality of the judge, and calculated to detract from the moral weight of the condemnation of the accused though ever so guilty. In gladiatorial conflicts of this kind the practised criminal has a much better chance of victory than an innocent person, embarrassed by the novelty and peril of his situation; whose honesty would probably prevent his attempting a suppression of truth, however to his prejudice; and whose inexperience in the ways of crime, were he in a moment of terror to resort to it, would insure his detection and ruin. But where the judge is dishonest or prejudiced the danger increases immeasurably. The screw afforded by judicial interrogation would then supply a ready mode of compelling obnoxious persons, under penalty of condemnation on silence, to disclose their most private affairs; and corrupt governments would be induced, in order to get at the secrets of political enemies, or sweep

them away by penal condemnation, to place unprincipled men on the bench, thus polluting justice at its source. In short, judicial interrogation, however plausible in theory, would be found in practice a *moral torture*; scarcely less dangerous than the physical torture of former times, and, like it, unworthy a place in the jurisprudence of an enlightened country."(*l*)

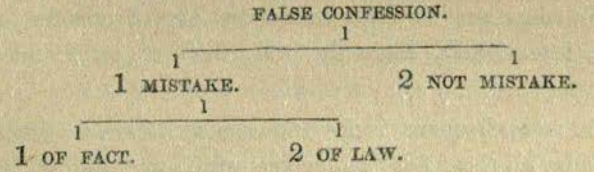
§ 248. These remarks, it is conceived, are conclusive in favor of the English practice.

§ 249. Let us now enquire into the motives which sometimes induce persons to make false confessions against themselves; because an acquaintance with this will put us on our guard against placing too much reliance on this kind of testimony.

§ 250. It is sometimes quite impossible to divine the motive of a human action. For instance in *Harrison's* case.(*m*) There a woman and her two sons were executed for the murder of a man named Harrison, who some time afterwards re-appeared; the conviction rested chiefly upon the confession of one of the accused.

§ 251. But all false confessions must be the result of mistake, or not of mistake; *i. e.* they are intentional or unintentional. And those the result of mistake, are either of mistake as to fact or as to law.

§ 252. Thus the logical division will stand thus:—



§ 253. *Mistake of Fact.*—There is a case in *Beck's Medical Jurisprudence*(*n*) which will explain this. There, a girl died in convulsions while her father was chastising her for theft. He fully believed that she died from the effects of his chastisement. Had he been tried, probably he might have pleaded guilty. But the truth was that the girl took poison after committing theft, and the poison took effect during her beating. This was proved on a *post mortem* examination. Now here, supposing the father to have been tried, no *post mortem* examination having taken place, and he had pleaded guilty, it would have

(*l*) *Best*, § 537—38—39.
(*m*) 1 *Leach's Crown Cases*, p. 264, note.
(*n*) Page 588, 7th Ed.