been a case precisely in point of a false confession made under a mistake of fact.

Again, supposing a man to mistake a corpse for a robber, and to belabor it under that impression. On finding the body lifeless, he would probably imagine himself the cause of death: and the story of the little Hunch-back in the Arabian Nights will recur to memory. There, several successive parties thought themselves the Dwarf's murderer.

§ 254. Where a man makes a false confession under an hallucination, there is not any mistaken apprehension of facts, correctly speaking, but the belief in a fact which has no existence.

§ 255. *Mistake of Law.*—This occurs where a man is conscious of *moral* guilt, but does not know that *legally* he is not guilty. For instance, a man breaks into a dwelling house at half-past seven p. m., and steals therefrom. He is tried for *burglary*, and may confess the crime. He is not aware that breaking after 9 o'clock at night is a legal incident necessary to burglary.(o)

Take another instance; a man steals a purse in a crowd: he confesses to the crime of *robbery;* he has really been legally guilty of simple theft, or larceny from the person; *violence* is legally necessary to constitute the crime of *robbery*.

§ 256. We come now to false confessions not of mistake, or in other words, intentional. Here the wide field of *motive* must be searched.

§ 257. The most frequent is the inducement to escape vexation; and this includes all those false confessions which are extorted from a prisoner by bodily or mental torture. Best gives a striking instance of this in the case of the two Boorns.(p)

"A striking instance of this is afforded by the case of the two Boorns, who were convicted in the Supreme Court of Vermont, in Bennington county, in September term, 1819, of the murder of Russell Colvin, May 10, 1812. It appeared that Colvin, who was the brother-in-law of the prisoners, was a person of a weak and not perfectly sound mind; that he was considered burdensome to the family of the prisoners, who were obliged to support him; that on the day of his disappearance, being in a distant field, where the prisoners were at work, a violent quarrel broke out between them; and that one

(o) See Sec. XI. Act XXXI. of 1838.
(p) See § 541, note (z).

of them struck him a severe blow on the back of the head with a club, which felled him to the ground. Some suspicions arose at that time that he was murdered; which were increased by the finding of his hat in the same field a few months afterwards. These suspicions in process of time subsided; but, in 1819, one of the neighbours having repeatedly dreamed of the murder, with great minuteness of circumstance, both in regard to his death and the concealment of his remains, the prisoners were vehemently accused, and generally believed guilty of the murder. Upon strict search, the pocket-knife of Colvin, and a button of his clothes, were found in an old open cellar in the same field, and in a hollow stump not many rods from it were discovered two nails and a number of bones, believed to be those of a man. Upon this evidence, together with their deliberate confession of the fact of the murder and concealment of the body in those places, they were convicted and sentenced to die. On the same day they applied to the legislature for a commutation of the sentence of death to that of perpetual imprisonment; which, as to one of them only, was granted. The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home, in time to prevent the execution. He had fled for fear that they would kill him. The bones were those of some animal. They had been advised by some mis-judging friends, that, as they would certainly be convicted, upon the circumstances proved, their only chance for life was by commutation of punishment, and that this depended on their making a penitential confession, and thereupon obtaining a recommendation to mercy."

§ 258. Analogous to this, or the converse of it, is the case, not of unfrequent occurrence in this country, in which a European soldier falsely accuses himself of a crime in order to be sentenced to transportation. In general the soldier commits some crime in fact for this purpose; and I have heard that in former years, it was not unusual for a lot of soldiers up-country to toss up who should kill a Native, in order that the whole party might go down to Madras in the capacity of witnesses or accused. In one case the whole party was tried and convicted as principals: which stopped this particular practice. But the motive here is the hope to escape the drudgery of service: or to better the condition. Of two evils choose the less says the proverb: and transportation used to hold out temptations sufficient to corrupt military virtue in the minds of the uneducated. To the same source may be traced the strange fact that in China persons may be found for money willing to substitute themselves for those condemned to death. The motive may be an honorable one.

Death may appear to the individual a less evil than the penury of his family.

§ 259. A second motive, is a desire to stifle enquiry, which may be illustrated by the case of a man falsely accused of a comparatively trifling crime, hoping by a confession to throw off suspicion as to some crime of greater magnitude which he has really committed.(q)

§ 260. A third motive is *tædium vitæ*, weariness of life. Ulpian, one of the Roman lawyers, furnishes a case in point: in which a slave confessed himself guilty of a murder which he had never committed, in order to prevent his again falling under the dominion of a cruel master. The most remarkable case is perhaps that of Hubert given in the continuation of Lord Clarendon's life.(r)

"A Frenchman named Hubert was convicted, and executed, on a most circumstantial confession of his having occasioned the great fire of London in 1666; "although," adds the historian, "neither the judges nor any present at the trial did believe him guilty, but that he was a poor distracted wretch weary of life, and chose to part with it in that way."

§ 261. A fourth motive, originating in the relation of the sexes, is thus described by Bentham, to whom we are originally indebted for the whole of this lucid disquisition.(s)

"In the relation between the sexes," says Bentham, when treating of the subject of false confessions, "may be found the source of the most natural exemplifications of this as of so many other eccentric flights. The female unmarried—punishment as for seduction hazarded, the imputation invited and submitted to, for the purpose of keeping off rivals, and reconciling parents to the alliance. The female married—the like imputation, even though unmerited, invited, with a view to marriage, through divorce."

§ 262. A fifth motive is Vanity. Best(t) takes the following extract from Bentham.

"'Vanity,' observes the jurist above quoted, 'without the aid of any other motive, has been known (the force of the moral sanction being in these cases divided against itself) to afford an interest strong enough to engage a man to sink himself in the good opinion of one part of mankind, under the notion of raising himself in that of another. False confessions, from the same

(q) *Best* § 546.
(r) Do. § 547, note (*d*).
(s) Do. § 548.
(t) Do. § 549.

motive, are equally within the rage of possibility, in regard to all acts regarded in opposite points of view by persons of different descriptions. I insulted such or such a man: I wrote such or such a party pamphlet, regarded by the ruling party as a libel, by mine as a meritorious exertion in the cause of truth: I wrote such or such a religious tract, defending opinions regarded as heretical by the Established Church, regarded as orthodox by my sect,"

§ 263. A sixth motive is the desire to benefit others.

"A singular instance of this is said to have taken place at Nuremberg, in 1787, where two women in great distress, in order to obtain for the children of one of them the provision secured to orphans by the law of that country, falsely charged themselves with a capital crime. They were convicted; and one was executed, but the other died on the scaffold through excitement and grief at witnessing the death of her friend. Case of *Maria Schoning* and *Anna Harlin*, Causes Célèbres *Etrangères*, vol. 1, p. 200, Paris, 1827. A case is also mentioned where, after a serious robbery had been committed, a man drew suspicion of it on himself, and when examined before a magistrate dropped hints amounting to a constructive admission of his guilt; in order that his brothers, who were the real criminals, might have time to escape; and afterwards on his trial, the previous object having been attained, proved himself innocent by a complete *alibi*." (v)

§ 264. A seventh motive is the desire to injure others: this is sought to be effected by accusing them as participators in the crime; and cases are not unfrequent in which parties, in their hatred or revenge, have forged evidence against the objects of their passions, even at the expense of their own persons, by self-inflicted wounds or even suicide. (w) We shall not therefore be surprised at finding this motive sufficient to induce a false confession where the punishment may be remote, or slight, or uncertain, or temporary.

§ 265. False confessions are not confined to cases in which there has really been a crime committed. Frequently such confessions have been made, under hallucination, of events which reason tells us are impossible. Such are the extraordinary confessions of witchcraft with which the judicial records of the 17th century abound. Doubtless the great majority of these were wrung out by torture; but some appear to have been freely communicated. The cases are collected by

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(v) *Best*, § 551, note (o).
(w) Do. § 552, also § 200.

Best, § 553, notes (r) (s) (t) and in Appendix No. 3, two remarkable instances are given.(x)

§ 266. In this country, as might be expected, such confessions are by no means uncommon. Mr. Arbuthnot in his Select Cases furnishes us with the following judicial instances :(y)

" The prisoners in this case, charged with having by means of sorcery committed a rape upon the prosecutor's wife, who was then in the tenth month of her pregnancy, beat or otherwise ill-treated her, and with having taken the child out of her womb and introduced into it in lieu thereof the skin of a calf and an earthen pot, and thereby caused her death, were acquitted by the Court of Circuit, notwithstanding that they had confessed before the Police the commission of the acts charged against them, on the ground that the earthen pot referred to was of a size that rendered it impossible to credit its introduction during life ; and in this verdict the Court of Foujdaree Udalut concurred."

And again :—

" The 7th prisoner in this case was convicted by the Circuit Judge of the murder of his father upon his own voluntary confession before the Criminal Court, but was acquitted by the Court of Foujdaree Udalut ; that Court considering the evidence insufficient to prove that the prisoner's father was dead, and attributing the statement made by the 7th prisoner to insanity."(z)

§ 267. The occurrence of such cases among ourselves in the present day renders it desirable to place before you the whole of Best, § 553.

" The anomaly of false confession is not confined to cases where there might have been a criminal or *corpus delicti*. Instances are to be found in the judicial histories of most countries where persons, with the certainty of incurring capital punishment, have acknowledged crimes now generally recognized as impossible. We allude chiefly to the prosecutions for witchcraft and visible communion with evil spirits, which in former ages, and especially in the seventeenth century, disgraced the tribunals of these realms. Some of them present the extraordinary spectacle of individuals, not only freely (so far as the absence of physical torture constitutes freedom) confessing themselves guilty of these imaginary offences, with the minutest details of time and place, but even charging themselves with having, through the demoniacal aid thus avowed, committed repeated acts of murder and other heinous crimes. The cases in Scotland are even more monstrous than

(x) The history of these horrible oppressions seems to be much the same in all the kingdoms of Europe. See *Wright's* " *Narratives of Sorcery and Magic.*" See also the evidence of Harrison in Dove's case ; and a curious account of belief in witchcraft sent by a Magistrate to the *Times*.

(y) See the case of Parayan Chatapan and others, p. 20.

(z) See the case of Pujari Chinna Nayakan and others, p. 58.

those in England, but there is strong reason to believe that in most of them the confessions were obtained by torture; and the following sensible solution of the pyschological phenomenon which they all present is given by an eminent writer on the criminal law of the former country :—' All these circumstances duly considered; the present misery; the long confinement; the small hope of acquittal; the risk of a new charge and prosecution; and the certain loss of all comfort and condition in society; there is not so much reason to wonder at the numerous convictions of witchcraft on the confessions of party. Add to these motives, though of themselves sufficient, the influence of another, as powerful perhaps as any of them,—the unsound and crazy state of imagination in many of those unhappy victims themselves. In those times, when every person, even the most intelligent, was thoroughly persuaded of the truth of witchcraft, and of the possibility of acquiring supernatural powers, it is nowise unlikely that individuals would sometimes be found, who, either seeking to indulge malice, or stimulated by curiosity and an irregular imagination, did actually court and solicit a communication with evil spirits, by the means which in those days were reputed to be effectual for such a purpose. And it is possible, that among these there might be some, who, in the course of a long and constant employment in such a wild pursuit, came at last to be far enough disordered, to mistake their own dreams and ravings, or hysteric affections, for the actual interviews and impressions of Satan,' "

§ 268. This disquisition should teach us how very cautious it is necessary to be in weighing testimony, which, to the untrained or superficial, might, and often does seem, conclusive; it exposes the fallacy of the maxim, as an unqualified guide, *optimum habemus testem confitentem reum.*

§ 269. But there are certain other sources of error, to which more or less in common with all oral testimony, confessions are liable; and as it is all important to guard you against a hasty yeilding to this species of evidence, so frequently tendered in the Courts of this country, I propose to consider them briefly here.

§ 270. 1st.—*Mendacity :* as where a witness reports a confession never in fact made at all: or where, though there is not a total fabrication, there is an intentional misrepresentation of what has actually been confessed. Thus, with regard to confessions made before the Mofussil Police, the Peons are generally very desirous to secure the signature of the party to his confession made before them: but there may be cases in which the entire document is a fabrication, and the signature of the party is the only thing extorted. In the Torture

Report we meet the reason assigned by a Civilian for believing confessions made before the Police, that it is just as easy for the Police to fabricate the entire confession, as to obtain a confession by improper means.

§ 271. 2nd.—*Misreporting:* which arises where there is no wilfully mendacious false coloring, but when what has really been said has been mistaken.

So in Coleman's case given in *Willes*, p. 67.

"Upon the trial of Richard Coleman at Kingston spring assizes, 1748-49, for the murder of a woman, who had been brutally assaulted by three men, and died from the injuries she received, it appeared that one of the offenders, at the time of the commission of the outrage, called another of them by the name of Coleman, from which circumstance suspicion attached to the prisoner. A person deposed that he met the prisoner at a public-house, and asked him if he knew the woman who had been so cruelly treated, and that he answered 'Yes, what of that?' The witness said that he then asked him if he was not one of the parties concerned in that affair; to which he answered, according to one account, 'Yes I was, and what then?' or, as another account states, 'If I was, what then?' It appeared that the prisoner was intoxicated, and that the questions were put with the view of ensnaring him; but, doubtless much influenced by this imprudent and blamable language, the jury convicted him, and he was executed. The real offenders were discovered about two years afterwards, and two of them were executed for this very offence, and fully admitted their guilt; the third having been admitted to give evidence for the Crown, and the innocence of Coleman was rendered indubitable."

So in a case reported by Bentham in his Rationale of Judicial Evidence,(a) we are furnished with an instance in which a man fell a victim to an expression of his own not aptly representing what he intended to say.

"In the history of French jurisprudence, a case, it is said, may be found in which inaccuracy of expression cost a man his life. A witness, having been examined in the presence of the defendant, and having been asked whether he was the person by whom the act was done, which he had seen done, answered in the negative. Blessed be God, exclaims the defendant, Here is a man—*qui ne m'a pas reconnu*—who has not recognized me. What he should have said—what he would have said, had he given a just expression to what he meant, was—Here is a man *qui a reconnu que ce n'etoit pas moi*—who has recognized, declared, that it was not I."

(a) Vol. I, p. 172, note.

The case of *R. v. Simons*,(b) shows how necessary caution is in these cases.

"The prisoner was indicted for the *then* capital offence of having set fire to a barn; and a witness was called to prove that, as the prisoner was leaving the magistrate's room after his committal, he was overheard to say to his wife, 'Keep yourself to yourself, and don't marry again.' To confirm this another witness was called, who had also overheard the words, and stated them to be, 'Keep yourself to yourself, and keep your own counsel:' on which Alderson B. remarked, 'One of these expressions is widely different from the other. It shows how little reliance ought to be placed on such evidence.' The prisoner was acquitted."

§ 272. 3rd.—*Incompleteness*: which occurs when the witness has correctly enough apprehended what the party confessing really said, but through defective memory, or other cause, fails to report the whole of it, or accurately to report it.

Thus, it is not an uncommon occurrence in this country, for a person to take away property, under a claim of right, as a member of an undivided family. Here the party may have openly enough admitted the fact of taking, but coupled with it the assertion of his right. Now, if he were tried for theft, and a witness were to depose to the fact that the prisoner had admitted the taking, forgetting to add that he had done so under a claim of right, this would be an instance of an *incomplete* report of a confession.

§ 273. Confessions may of course be made by a party by his acts as completely as by his words: as for instance, firstly, by his silence when accused of the crime, which we shall term *non-responsion*; or secondly, by *evasive-responsion*; or thirdly, by *false-responsion*.

§ 274. With regard to the first, it is said indeed that silence gives or implies consent: but you must be very cautious how you draw an inference from a party's silence. It may be the result of a prudent caution entirely compatible with innocence. Prisoners, when asked by a Magistrate before committal, if they wish to make any statement, reply that they will reserve their defence for the trial; and generally this would be the advice given them when they act under professional counsel. Silence may also be the result of fear, or of confusion, as well as of guilt.

(b) 6 *C. and P.* 540.

§ 275. The inference which arises from *evasive-responsion* is stronger: that which arises from *false-responsion* is stronger still; and evidence of this is constantly given at criminal trials, as when it appears that a party found in possession of stolen property, gives, in the first instance, an untrue account of the way in which it came into his possession.

§ 276. We must now consider what safeguards the Legislature has provided for securing purity and trustworthiness in the matter of confessions.

§ 277. According to the English Law, a confession, though uncorroborated, is sufficient to warrant conviction: but in Mofussil practice, corroboration is invariably required. See C. O. F. A. 27th Dec. 1815, 18th June 1817, and 9th Feby. 1855.(c)

The New York Criminal Code, § 449, provides as follows:—

"A confession of a defendant, whether in the course of judicial proceedings or to a private person, cannot be given in evidence against him, when made under the influence of fear produced by threats; nor is it sufficient to warrant his conviction, without additional proof that the offence charged has been committed."

The Scotch Law is as follows:—(d)

"The declaration of a prisoner, how clear and explicit soever in admitting his guilt, is not *per se* sufficient to warrant his conviction, if not supported by some evidence not merely as to the *corpus delicti*, but his participation in the offence.

"It is impossible to dispute, that the declaration of a prisoner admitting his guilt, is one of the strongest circumstances which can possibly be imagined, to warrant the conclusion that a jury should convict him of the offence; and it is accordingly always considered as a most decided circumstance against him. It is not, however, *per se* sufficient to warrant his conviction, and so the Courts uniformly lay down the law to the jury, when such a case comes before them. Nor is it sufficient for the prosecutor to say, that the *corpus delicti* is proved by evidence, and that the prisoner in his declaration has confessed the crime; he must go a step farther, and support that confession by some circumstance of evidence connecting him with the criminal proceedings. So it was held by the Court in just such a case, where the three prisoners were charged, two with theft, and one with reset. The *corpus delicti*

(c) See also C. O. F. A. 27th May 1806, 29th April 1822, 27th April 1837, and 12th June 1852.

(d) See *Alison's Prac.* Cr. L. of Scot. p. 578.

was distinctly proved by two witnesses against all the panels, and against two the evidence of their accession was deemed quite satisfactory, both by the Court and jury. But, to implicate the third in these proceedings, there was nothing but his own declaration, in which he fully admitted his guilt, and gave a clear and circumstantial detail of its commission. The Court, in these circumstances, held the evidence insufficient to connect him with the proved delinquence, and he was, with their approbation, acquitted by the jury. The case is different with a confession made by pleading guilty before the jury; for the law holds, that what a man admits in the hour of trial, before the jury who are to pronounce him innocent or guilty, is entitled to much more consideration than what is previously declared to, however distinctly, before a magistrate."

And we find that by the Scotch Law a confession is sometimes received *cum nota* as it is styled.(e)

"It is competent to prove confessions made under any circumstances by a panel, even when in jail, or to fellow-prisoners, provided that in such a situation no improper means have been used to elicit or obtain it; but if they are made under promises even by one not authorized to make them, they can be received *cum nota* only."

§ 278. The precautions required by the English Law to be taken by Magistrates will be found in 11 and 12, Vic. c. 42, s. 18, which enacts:

"That after the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the Justice of the Peace or one of the Justices by or before whom such examination shall have been so completed as aforesaid shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words or words to the like effect:—'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence against you upon your trial;' and whatever the prisoner shall then say in answer thereto shall be taken down in writing, and read over to him, and shall be signed by the said Justice or Justices and kept with the depositions of the witnesses and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the Justice or Justices purporting to sign the same did not in fact sign the same: provided always

(e) *Ibid*, page 535.

that the said Justice or Justices before such accused person shall make any statement shall state to him and give him clearly to understand that he has nothing to hope from any promise of favor and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, and that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat."

§ 279. This is but an enforcement of the fundamental rule that all confessions to be receivable must be voluntary. A few instances will be useful.

1. A Surgeon called into a prisoner on a charge of murder said to him, "You are under suspicion of this crime, and you had better confess all you know." The prisoner made a statement, which was held to be inadmissible.(*f*)

2. When a constable said to the prisoner, "It is no use for you to deny it, for there are the man and boy who saw you do it," the prisoner's statement was held inadmissible.(*g*)

3. When the prosecutor said to the prisoner he only wanted his money, and if the prisoner gave him that, he might go to the devil, if he liked; the prisoner pulled some money out of his pocket, gave it, and said it was all he had left out of it, this evidence was rejected.(*h*)

4. When a mistress said to her servant, "Pray, my girl, if you are guilty, do confess; it will perhaps save your neck; you will have to go to prison:" she made a statement which was rejected.(*i*)

§ 280. But the promise or threat must have reference to the prisoner's chances of escape from the consequences of the charge.

When a constable said to a prisoner, "If you will tell where the property is, you shall see your wife;" his confession was received.(*k*)

§ 281. The promise or threat must have relation to some *temporal* advantage or evil.

(*f*) *Kingstone's Case*, 4 *Carr.* and *P.* 387.
(*g*) *Mills' Case*, 6 *C.* and *P.* 146.
(*h*) *Jones' Case*, *Ress.* and *Reg.* 152.
(*i*) *Upchurch's Case*, *R.* and *M. C. C. R.* 465.
(*k*) *Lloyd's Case*, 6 *C.* and *P.* 393.

1. A girl was charged with setting fire to an out-house, her mistress pressed her to confess: telling her that if she would repent and confess, God would forgive her, but she concealed from her, that she herself would not forgive her, the confession was received.(l)

2. So a confession made under advice of a clergyman, where the promise or threat related to punishment in a future world, would be receivable.

3. So when a constable said to a boy, "Kneel down by my side, and tell me the truth:" the boy knelt down, and the man continued, "I am going to ask you a serious question, and I hope you will tell me the truth in the presence of the Almighty." The boy made a confession, which was received, though the judge highly disapproved the manner in which it had been obtained. (m)

§ 282. Although a threat or promise has been used, a *subsequent* confession will not be excluded, if it can be proved that at the time of making the confession, the influence of the threat or promise had ceased.

A girl charged with poisoning was told by her mistress, that if she did not tell all about it *that night*, the constable would be sent for next morning to take her to the magistrate. The prisoner made a statement. The next morning a constable was sent for who took her into custody, and on the way to the magistrate, without any inducement from the constable, she confessed to him. Bosanquet, J. said "I think this statement receivable. The inducement was that if she confessed *that night*, the constable would not be sent for and she would not be taken before the magistrate. Now she must have known, when she made this statement, that the constable was taking her to the Magistrate. The inducement therefore was at an end."(n)

§ 283. When the inducement has proceeded from a third party having no authority to hold out hope, it has long been a disputed point whether the confession was receivable or not. Samuel Taylor's case (o) has at length settled that it is.

(l) *Nute's Case*, 2 *Russ. C.* and *M.* 832.
(m) *Wild's Case*, 1 *Mood. C. C.* 452.
(n) *Richard's Case*, 5 *C.* and *P.* 318.
(o) 8 *C.* and *P.* 733.

§ 284. The following are considered persons having authority :—

Magistrates.
Sheriffs.
Constables.
Masters and Mistresses.

§ 285. A confession obtained by artifice or deception is receivable. Thus when a turnkey was asked by a prisoner if he would put a letter in the post for him, and the turnkey having replied in the affirmative, received a letter containing a confession from the prisoner, which was retained by the jailor, it was received.(p)

So when a person took an oath that what the prisoner revealed to him should go no further, the confession was held receivable.(q)

§ 286. It has been a question of dispute whether the answer which a party has made to questions put to him in a cause, tending to criminate him, may be used against him upon a subsequent criminal trial. Hitherto, as we shall see hereafter, a witness has been exempted from answering such questions, although if he chose to waive his privilege, he must have taken the consequences. But now by Act II. of 1855, Sec. XXXII. a party is bound to answer criminating questions, but the answers elicited shall not be used as evidence against him.(r)

§ 287. *Facts* discovered in consequence of confessions improperly elicited, are admissible. For instance if stolen articles are found in consequence of a confession, the fact that such articles were found is receivable, even though the confession itself should be rejected as having been improperly elicited. The leading case upon this is Warwickshall's case.(s) There the Court said :

"A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and there-

(p) *Derrington's Case*, 2 *C.* and *P.* 418.

(q) *Shaw's Case*, 6 *C.* and *P.* 372. *Thomas' Case*, 7 *C.* and *P.* 345.

(r) In this respect the Indian Legislature has gone beyond the Law as it at present obtains in England, where a witness is still not bound to answer self-criminative questions. In principle the Indian provision is right, since it is desirable that the judge on a trial should have before him the character of a witness on whose testimony he is to decide; and it may be thought that the protection thrown around the witness so compelled to answer, is quite sufficient. But in a small society like that which is found in most Indian towns, it would be almost impossible practically to exclude from the judge or jury the knowledge that the prisoner had made such former self-criminative admission; and the very knowledge could scarcely but produce an effect injurious to him on their minds.

(s) 5 *Leach's Cr. C.* p. 263.

fore it is admitted as proof of the crime to which it refers ; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it ; and therefore it is rejected. This principle respecting confessions has no application whatever as to the admission or rejection of *facts*, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source ; for a *fact*, if it exist at all, must exist invariably in the same manner, whether the confession from which it is derived be *in other respects* true or false. Facts thus obtained, however, must be fully and satisfactorily proved without calling in the aid of any part of the confession from which they may have been derived ; and the impossibility of admitting any part of the confession as a proof of the fact clearly shows that the fact may be admitted on other evidence ; for as no part of an improper confession can be heard, it can never be legally known whether the fact was derived through the means of such confession or not ; and the consequences to public justice would be dangerous indeed ; for if men were enabled to regain stolen property, and the evidence of attendant facts were to be suppressed, because they had regained it by means of an improper confession, it would be holding out an opportunity to compound felonies. The rules of evidence which respect the admission of facts, and those which prevail with respect to the rejection of parol declarations or confessions, are distinct and independent of each other. It is true that many able judges have conceived, that it would be an exceeding hard case that a man whose life is at stake, having been lulled into a notion of security by promises of favor, and in consequence of those promises has been induced to make a confession by the means of which the property is found, should afterwards find that the confession with regard to the property found is to operate against him. But this subject has more than once undergone the solemn consideration of the twelve judges ; and a majority of them were clearly of opinion, that although confessions improperly obtained cannot be received in evidence, any facts done afterwards might be given in evidence, notwithstanding they were done in consequence of such confession."

§ 288. A confession is only evidence against the party making it ; not against those who are charged in common with him.

On a joint trial of a principal and receiver, the confession of the latter cannot criminate the former, against whom the substantive charge must nevertheless be proved ; and in a case before the Supreme Court where two women were so charged, the receiver confessed the crime. The jury however acquitted the principal, and Sir E. Gambier directed the receiver to be released, for it was impossible to

convict her, even on her own confession, of receiving stolen goods from the principal, who the jury had declared did not steal them.

§ 289. The whole confession must be taken together, just as in the case of an admission. The judge may of course attach different degrees of weight to different parts of it.

§ 290. When a confession has been reduced to writing the writing must be produced. To introduce it as evidence, inducement to confess must be negatived and it is then read. It frequently happens that a prisoner in his confession has criminated others who are at the bar with him. In this case a difficulty arises as to the method of reading the confession. On some Circuits in England the practice is to omit the names of others whenever they are mentioned, so tender is the law of implicating one prisoner by the confession of another: and Mr. Justice Burton has directed me as Clerk of the Crown so to read a confession. It made nonsense of nearly the whole, and the practice of other Circuits is that usually followed, where the whole is read, and the jury cautioned not to regard the statement as it effects any body but the author of it.

"Where the confession of a prisoner" writes Russell,(t)

"mentions the name of another prisoner tried at the same time, it seems, according to the later cases, that the whole of the confession, whether by parol, or in writing, must be given in evidence. The judge will, however, in such cases, direct the jury that the confession is only to be taken as evidence against the prisoner who made it. On the Oxford Circuit it was the constant practice a few years ago to omit the name of any prisoner that was mentioned in the confession of another prisoner. But it has been held in many cases that on circuit and elsewhere, that the proper course is to state or read all the names mentioned by the prisoner in his confession. A very learned judge has, however, expressed on several occasions a strong opinion that such a course is unfair.(v)

(t) 2 *Russell on Crimes, p.* 857.

(v) In *Rex v. Daniel and Garland*, Monmouth Spr. Ass. 1831, MS. C. S. G. Bosanquet, J., said, "The ground I go upon is, that I do not think I am authorized to direct the officer to read one word instead of another. I cannot tell the officer to read what is not written." In *Rex v. Giles and Betts*, Worcester Spr. Ass. 1830, MS. C. S. G., where there was a parol confession, Littledale, J., said, "he was satisfied the proper way was to state the names uttered by the prisoner, as to state 'another person' instead of the name used was not to state the truth, which a witness was sworn to do." In *Rex v. Harding, Bailey, and Shumer*, Gloucester Spr. Ass. 1830, MS. C. S. G., where there was a written confession, Littledale, J., said "Suppose two men are indicted, one as principal, and the other as accessory, and the principal is named in the indictment, and the accessory makes a confession admitting himself to be accessory to the principal, how is it to be known that he is accessory to such principal, if the name of the principal is not to be read? I have considered this case very much indeed, and I am most clearly of opinion that it is to be read as the prisoner made it, because otherwise the evidence is not read as it was given by the prisoner. I have no doubt upon it, and will not therefore reserve the point." *Rex v. Walkley*, 6 C. & P. 175, Gurney, B.

§ 291. A maxim of Law says *Nemo audiendus est allegans suam turpitudinem.* No one alleging his own baseness is to be heard. But the reception of a confession does not militate against this rule, for it is restricted to cases in which the party seeks to take advantage of his own turpitude, not where he tells it in his own despite.(w)

§ 292. Having exhausted our observations on direct testimony, we now come to the other great branch of this division, *Indirect or Circumstantial Evidence.* To this we shall recur again more at large when we reach the subject of Presumptions.

Indirect or Circumstantial Evidence.

§ 293. We have had occasion to touch on this before, but the following passage from Starkie, p. 80, is perhaps the most concise and simple account which can be given of the principle on which its force depends.

"Where the connection between facts is so constant and uniform, that from the existence of the one, that of the other may be immediately inferred, either with certainty, or with a greater or less degree of probability, the inference is properly termed a presumption, in contradistinction to a conclusion derived from circumstances by the united aid of experience and reason."

We may also consult with advantage the same author, page 77.

"In general, all the affairs and transactions of mankind are as much connected together in one uniform and consistent whole, without chasm or interruption and with as much mutual dependence on each other, as the phænomena of nature are; they are governed by general laws; all the links stand in the mutual relations of cause and effect; there is no incident or result which exists independently of a number of other circumstances concurring and tending to its existence, and these in their turn are equally dependent upon and connected with a multitude of others. For the truth of this position the common experience of every man may be appealed to; he may be asked, whether he knows of any circumstance or event which has not followed as the natural consequence of a number of others tending to produce

(w) An amusing instance of this sometimes occurs, when a party who has masked his property in order to defraud his creditor by means of the Insolvent Court, afterwards finds the trustee to whom he conveyed his property, turn round upon him and refuse to restore it. I have seen a Bill in Equity filed on this account: but it was successfully demurred to, on the ground that Equity would give no relief to one who did not come into Court with clean hands; and as the Plaintiff was forced to admit his own fraudulent object in creating the trust; *nemo. allegans*, &c. applied. It may be said that the Defendant was as bad as the Plaintiff—*Arcades ambo*—blackguards both. But here another maxim comes in. *In pari delicto, melior est conditio possidentis.* Where both parties are equally in fault, the position of the Defendant is the better; in other words, as a Plaintiff must recover on the strength of his own case, the Law refuses to interfere. Lest the student should feel that there is an injustice somewhere here which he can't quite understand, I would add that the defrauded creditors could successfully set aside the Trust, as created in fraud of them, and take away the property from both Plaintiff and Defendant.

it, and which has not in its turn tended to the existence of a train of dependent circumstances. Events the most unexpected and unforeseen are so considered merely from ignorance of the causes which were secretly at work to produce them ; could the mechanical and moral causes which gave rise to them have been seen and understood, the consequences themselves would not have created surprise.

"It is from attentive observation and experience of the mutual connection between different facts and circumstances, that the force of such presumptions is derived : for where it is known from experience that a number of facts and circumstances are necessarily, or are uniformly or usually connected with the fact in question, and such facts and circumstances are known to exist, a presumption that the fact is true arises, which is stronger or weaker as experience and observation show that its connection with the ascertained facts is constant, or is more or less frequent.

"The presumptions or inferences above alluded to are chiefly those which are deducible by virtue of mere antecedent experience of the ordinary connection between the known and the presumed facts ; but circumstantial or presumptive evidence in general embraces a far wider scope, and includes all evidence which is of an indirect nature, whether the presumption or inference be drawn by virtue of previous experience of the connection between the known and the inferred facts, or be a conclusion of reason from the circumstances of the particular case, or be the result of reason aided by experience."

§ 294. The necessity for resorting to circumstantial evidence is two-fold.

First—In the absence of direct evidence.

Secondly—To check direct evidence.

§ 295. It is a common fallacy to assert that circumstantial evidence is of an inferior and less safe quality than direct. This, you will observe, is one of the most frequent topics of a prisoner's counsel's address to a jury : who will be conjured not to convict upon circumstantial evidence : and it too often happens in Mofussil practice, that a conclusive preponderance is given to direct testimony deposing to a particular fact, when the circumstantial or presumptive evidence is conclusive against it. Thus I have seen several cases where payment of rent has been relied on, to take a case out of the Regulations of Limitation : where three or four witnesses have sworn positively that they saw the Defendant upon a given day pay the Plaintiff rent in money or kind ; and the judge has felt himself bound by this direct evidence, notwithstanding the whole of the circumstantial evidence,

—such for instance as the Defendant dealing with the property as his own, in the presence of the Plaintiff; deeds executed respecting it by the Defendant, to which the Plaintiff had actually affixed his signature as a witness; and the like—ought to have been conclusive against the truth of the direct evidence. Of course, if direct evidence is credible, it is superior to any other class, and more satisfactory to the Judge's mind. But it is always to be borne in mind how very easy it is to fabricate it: how simple a matter it is for a witness to swear falsely, "I saw such an act. I heard such a statement:" whereas, a connected and consistent chain of circumstantial evidence can with difficulty be forged; and the concurrence of many minute facts is often of far more cogency than the oral testimony of a host of personal witnesses.

§ 296. On the other hand it is sometimes urged that "circumstances cannot lie." But this is at least an equal fallacy: for every day's experience proves that circumstances do lie most cruelly. The innocent man often succumbs to the most unfounded suspicions from circumstances which *appear* to tell strongly against him: the true bearing of which he has neither the opportunity, nor often the means, to explain: the injured is too frequently compelled to leave the vindication of his conduct to the solution of time, and rest meanwhile upon the support of an upright conscience. How many times too has an innocent man been pronounced, upon the strength of circumstances, guilty, and punished, sometimes with death, sometimes with worse than death; as in the instance of the unfortunate Mr. Barber, who passed some years since through this town, but as he assured me on a task which he should only lay down with his life, the vindications of his innocence from the guilt which a verdict had affixed on him: a task, which, after years of struggling perseverance, he at last happily accomplished.

§ 297. The truth is that either kind of Evidence has its peculiar excellencies and defects: nor can I better close these remarks than by calling your attention to the admirable comparison instituted between them by Mr. Best.

In § 288 he writes as follows:—

"Direct and presumptive evidence (using the words in their technical sense) being, as has been shown, distinct modes of proof, have each their peculiar advantages and characteristic dangers. Abstractedly speaking,

presumptive is inferior to direct evidence, seeing that it is in truth only a substitute for it, and an indirect mode of proving that which otherwise might not be provable at all. Hence a given portion of credible direct evidence must ever be superior to an equal portion of equally credible presumptive evidence *of the same fact.* But in practice it is, from the nature of things, impossible, except in a few rare and peculiar cases, to obtain more than a very limited portion of direct evidence to any fact, especially any fact of a criminal kind; and with the probative force of such a limited portion of direct evidence, that of a chain of evidentiary facts forming a body of presumptive proof, may well bear comparison. When proof is direct, as, for instance, consisting of the positive testimony of one or two witnesses, the matters proved are more proximate to the issue, or, to speak correctly, are identical with the physical facts of it and thus leave but two chances of error, namely, those which may arise from mistake or mendacity on the part of the witnesses; while in all cases of mere presumptive evidence, however long and apparently complete the chain, there is a third,—namely, that the inference from the facts proved ever so clearly may be fallacious. Besides, there is an anxiety felt for the detection of crimes, particularly such as are either very heinous or peculiar in their circumstances, which often leads witnesses to mistake or exaggerate facts, and tribunals to draw rash inferences; and there is also natural to the human mind a tendency to suppose greater order and conformity in things than really exist, and likewise a sort of pride or vanity in drawing conclusions from an isolated number of facts, which is apt to deceive the judgment. Accordingly, the true meaning of the expressions in our books, that all presumptive evidence of felony should be warily pressed, admitted cautiously, &c., is, not that it is incapable of producing a degree of assurance equal to that derivable from direct testimony, but that in its application tribunals should be upon their guard against the peculiar dangers just described. Such are its disadvantages. But then, on the other hand, a chain of presumptive evidence has some decided advantages over the direct testimony of a limited number of witnesses, which are thus clearly stated by an able modern writer. '1. By including in its composition a portion of circumstantial evidence, the aggregate mass on either side is, if mendacious, the more exposed to be disproved. Every false allegation being liable to be disproved by any such notoriously true fact as it is incompatible with; the greater the number of such distinct false facts, the more the aggregate mass of them is exposed to be disproved: for it is the property of a mass of circumstantial evidence, in proportion to the extent of it, to bring a more and more extensive assemblage of facts under the cognizance of the judge. 2. Of that additional mass of facts, thus apt to be brought upon the carpet by circumstantial evidence, parts more or less considerable in number will have been brought forward by so many differ-

ent deposing witnesses. But, the greater the number of deposing witnesses the more seldom will it happen that any such concert, and that a successful one, has been produced, as is necessary to give effect to a plan of mendacious testimony, in the execution of which, in the character of deposing witnesses, individuals are concerned. 3. When, for giving effect to a plan of mendacious deception, direct testimony is of itself, and without any aid from circumstantial evidence, regarded as sufficient; the principal contriver sees before him a comparatively extensive circle, within which he may expect to find a mendacious witness, or an assortment of mendacious witnessses sufficient to his purpose. But where, to the success of the plan, the fabrication or destruction of an article of circumstantial evidence is necessary, the extent of his field of choice may in this way find itself obstructed by obstacles not to be surmounted.' Lest too much reliance should be placed on this, it is important to observe that circumstantial evidence does not always contain either numerous circumstances or circumstances attested by numerous witnesses, and also, that the more trifling any circumstance is in itself the greater is the probability of its being inaccurately observed and erroneously remembered. But after every deduction made, it is impossible to deny that a conlusion deduced from a process of well conducted reasoning on evidence purely presumptive may be quite as convincing, and in some cases far more convincing, than one arising from direct testimony."

And to the remarks of Starkie, p. 67.

"The necessity for resorting to indirect or circumstantial evidence is manifest. It very frequently happens that no direct and positive testimony can be procured; and often, where it can be had, it is necessary to try its accuracy and weight by comparing it with the surrounding circumstances.

"The want of written documents, the treachery and fallaciousness of the human memory, the great temptations which perpetually occur to exclude the truth by the suppression of evidence, or the fabrication of false testimony, render it necessary to call in aid every means of ascertaining the truth upon which the law can safely rely.

"Where direct evidence of the fact in dispute is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be. It is possible that some circumstances may be misrepresented, or acted with a view to deceive; but the whole context of circumstances cannot be fabricated; the false invention must have its boundaries, where it may be compared with the truth: and therefore, the more extensive the view of the jury is of all the minute circumstances of the transaction, the more likely will they be to arrive at a true conclusion. Truth is necessarily consistent with itself; in other words, all facts which really did happen, did actually consist and agree with each other. If then

the circumstances of the case, as detailed in evidence, are incongruous and inconsistent, that inconsistency must have arisen either from mistake, from wilful misrepresentation, or from the correct representation of facts prepared and acted with a view to deceive. From whatever source the inconsistency may arise, it is easy to see that the greater the number of circumstances which are exhibited to the jury, the more likely will it be that the truth will prevail: since the stronger and more numerous will be the circumstances on the side of truth. It will be supported by facts, the effect of which no human sagacity could have foreseen, and which are therefore beyond the reach of suspicion: whilst, on the other hand, fraudulent evidence must necessarily either be confined to a few facts, or be open to detection, by affording many opportunities of comparing it with that which is known to be true. Fabricated facts must, in their very nature, be such as are likely to become material. Hence it has frequently been said, that a well supported and consistent body of circumstantial evidence is sometimes stronger than even direct evidence of a fact; that is, the degree of uncertainty which arises from a doubt as to the credibility of direct witnesses, may exceed that which arises upon the question whether a proper inference has been made from facts well ascertained. A witness may have been suborned to give a false account of a transaction to which he alone was privy, and the whole rests upon the degree of credit to be attached to the veracity of the individual; but where a great number of independent facts conspire to the same conclusion, and are supported by many unconnected witnesses, the degree of credibility to be attached to the evidence increases in a very high proportion, arising from the improbability that all those witnesses should be mistaken or perjured, and that all the circumstances should have happened contrary to the usual and ordinary course of human affairs. The consideration, however, of the credit due to circumstantial evidence, belongs to another place; at present, the subject is mentioned merely with a view to illustrate the necessity of opening to a jury the most ample view of all the facts which belong to the disputed transactions; leaving the consideration of the importance due to such evidence to be examined hereafter."

And again, p. 874.

"As it is universally admitted that circumstantial evidence is in its own nature sufficient to warrant conviction, even in criminal cases, and as the test of sufficiency is the understanding and conscience of a jury, it would be superfluous and nugatory to enter into a discussion of the comparative force and excellence of these different modes of proof, where they do not conflict with each other. In the abstract, and in the absence of all conflict and opposition between them, the two modes of evidence do not in strictness

admit of comparison; for the force and efficacy of each may, according to circumstances, be carried to an indefinite and unlimited extent, and be productive of the highest degree of probability, amounting to the highest degree of moral certainty. With regard to the comparative force and efficacy of these modes of proof, it is clear that circumstantial evidence ought not to be relied on where positive proof can be had, and that so far the former is merely of a secondary nature. Hence it seems to be clear that no conviction in a criminal case ought ever to be founded on circumstantial evidence, where the prosecutor might have adduced direct evidence; and in civil cases the resorting to such a practice would, in a doubtful case, be a circumstance pregnant with the strongest suspicion.

"The characteristic excellence of direct and positive evidence consists in the consideration, that it is more immediate and more proximate to the fact; and if no doubt or suspicion arise as to the credibility of the witnesses, there can be none as to the fact to which they testify; the only question is as to their credit. On the other hand, the virtue of circumstantial evidence is its freedom from suspicion, on account of the exceeding difficulty of simulating a number of independent circumstances, naturally connected and tending to the same conclusion. In theory, therefore, circumstantial evidence is stronger than positive and direct evidence, wherever the aggregate of doubt, arising, first, upon the question, whether the facts upon which the inference is founded are sufficiently established; and, secondly, upon the question, whether, assuming the facts to be fully established, the conclusion is correctly drawn from them, is less than the doubt, whether, in the case of direct and positive evidence, the witnesses are entirely trustworthy. Where no doubt exists in either case, comparison is useless; but it is very possible, where there is room for suspecting the honesty or accuracy of direct witnesses, that the force of their evidence may fall far short of that which is frequently supplied by mere circumstantial evidence; and whenever a doubt arises as to the credibility of direct witnesses, it is an important consideration in favor of circumstantial evidence, that in its own nature it is much less liable to the practice of fraud and imposition than direct evidence is; for it is much easier to suborn a limited number of witnesses to swear directly to the fact, than to procure a greater number to depose falsely to circumstances, or to prepare and counterfeit such circumstances as will without detection yield a false result. The increasing the number of false witnesses increases the probability of detection in a very high proportion; for it multiplies the number of points upon which their statements may be compared with each other, and also the number of points where their testimony comes in contact with the truth; and therefore multiplies the danger of inconsistency and variance in the same proportion.

"So, on the other hand, it is exceedingly difficult by artful practice to

create circumstances which shall wear the appearance of truth, and tend effectually to a false conclusion. The number of such circumstances must of necessity be limited in their nature ; they must be such as are capable of fabrication by an interested party, and such that their materiality might be foreseen. Hence all suspicion of fraud may be excluded by the very number of concurring circumstances, when they are derived from various but independent sources, or by the nature of the circumstances themselves, when either it was not in the power of the adverse party to fabricate them, or their materiality could not possibly have been foreseen, and consequently where no temptation to fabricate them could have existed."

§ 298. It is a general rule that circumstantial evidence shall never be resorted to, when direct evidence of the same fact is procurable and kept back. For instance, suppose there was an eye witness of a murder, whose evidence was forthcoming ; it would not be open to the Prosecution to keep back that witness, and to endeavour to establish the guilt of the accused by a chain of circumstantial evidence.

A good example occurs to me. I was some time since consulted on the case of two officers of H. M.'s 84th, who were brought to a Court Martial, charged with having ridden furiously through the streets of the Trichinopoly Fort, and caused the death of an old woman by riding over her. There were two witnesses before the Court of Inquiry who deposed that they saw the accident occur. Yet the Prosecution did not call either of them on the Court Martial, but relied on a mass of circumstantial evidence to establish the case against the prisoners. The Court accepted this, although the objection was taken, and conviction and sentence followed.(x) This is contrary to the first principle of the Law of Evidence, which requires that the best evidence procurable shall be produced. And wherever such evidence is kept back, the strongest presumption arises, that it is withheld for some very sufficient reason, and that it could not conveniently be permitted to see the light.

§ 299. A second rule is, that the proof of the circumstances themselves must be direct. That is, the circumstances cannot be proved by hearsay. Thus, if the circumstance offered in evidence is the cor-

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(x) Of course I cannot tell what reasons weighed with the Prosecution in pursuing this course ; but it is a remarkable fact that the evidence of the two alleged eye-witnesses before the Court of Inquiry exhibited the most startling discrepancies to each other : and that whereas it was beyond all question that the two officers were in plain clothes, one of the eye-witnesses stated that the individual who knocked down the deceased had on a red shell jacket

respondence of the prisoner's shoes with certain marks in mud or snow, the party who has made the comparison and measurement must himself be called; not a third party, who *heard* from the measurer, of the correspondence. A third rule is that circumstantial evidence to amount to proof, must exclude every hypothesis except that of the guilt or liability of the accused. If its effect is consistent with any other hypothesis, a doubt is introduced, and the accused should have the benefit of it.(y)

§ 300. Limits to the admission of indirect evidence.(z) *Res inter alios acta*—the declarations and acts of mere strangers are excluded: and this on the principles of reason which exclude this description of testimony when the evidence is direct.

§ 301. The cogent reasoning of Starkie, page 81, as to the exclusion of *declarations* of strangers is as follows:—

"In the first place, the mere declarations of strangers are inadmissible, except in the instances already considered, where, on particular grounds, and under special and peculiar sanctions, they are admissible as direct evidence of a fact. Declarations so circumstanced may be used either for the purpose of directly establishing the principal fact in dispute, or for the purpose of proving the existence of collateral facts from which the principal fact may be inferred; but other declarations, which are of too vague and suspicious an origin to be received as evidence of the facts declared, must also, on the same principle, be rejected as indirect evidence. If such declarations as to the principal fact be inadmissible, they must also be at least equally inadmissible to establish any collateral fact, by the aid of which the principal fact may be indirectly inferred. It would be inconsistent to reject them when offered as direct testimony, but to receive them as collateral evidence, the more especially as even immediate testimony is in one sense but presumptive evidence of the truth; for it is on the presumption of human veracity, confirmed by the usual legal tests, that credit is usually given to human testimony.

"If, for example, the question were whether A. had waylaid and wounded B, if the declaration of a third person, not examined on the trial, that he saw the very fact, could not be received in evidence, neither, on any consistent principle, could his declaration that he saw A. near the place, armed with a weapon, be received in order to establish that fact as one of several

(y) See *Arbuthnot's Select Cases*, Preface p. XXX, Rule 3.

(z) *Tutius semper est errare acquietando quam in puniendo, ex parte misericordiæ quam ex parte justitiæ.* Lord Hale, 290.

constituting a body of circumstantial evidence. For circumstantial proof rests wholly on the effect of established facts, and cannot, therefore, be properly founded wholly or in part on mere declarations, which are of no intrinsic weight to prove any facts."

§ 302. The reason for excluding the *acts* of strangers is as good as that for excluding their declarations. Starkie, p. 82, writes as follows :—

"Neither, in general, ought any inference or presumption to the prejudice of a party to be drawn from the mere acts or conduct of a stranger; for such acts and conduct are but in the nature of declarations or admissions, frequently not so strong; and such declarations are inadmissible, for the reasons already stated. An admission by a stranger cannot be received as evidence against any party; for it may have been made, not because the fact admitted was true, but from motives and under circumstances entirely collateral, or even collusively, and for the very purpose of being offered in evidence. On a principle of good faith and mutual convenience, a man's own acts are binding upon himself, and his acts, conduct and declarations are evidence against him; but it would not only be highly inconvenient, but also manifestly unjust, that a man should be bound by the acts of mere unauthorized strangers. But if a party ought not to be bound by the acts of strangers, neither ought their acts or conduct to be used as evidence against him for the purpose of concluding him; for this would be equally objectionable in principle, and more dangerous in effect, than the other. It is true, that, in the course of the affairs of life a man may frequently place reliance on inferences from the conduct of others. If, for instance, A. and B. were each of them insurers against the same risk, A. to a large, and B. to a small amount, it is very possible that, on a claim made against each for a loss, which was admitted and paid by A. to the extent of his liability, B., trusting to the knowledge and prudence of A., might reasonably infer that the loss insured against had occurred, and that he also was bound to pay his proportion. It is plain, however, that such an inference would rest on the special and peculiar circumstances of the case; and that, so far from warranting the general admission of such evidence by inference on a legal trial to ascertain the fact, it would supply no general rule, but must be regarded as an exception, even in the ordinary course of business.

"In addition to this, it is obvious that whilst an individual might with discretion rely on the conduct of others, where, under the peculiar circumstances, there was no reason for suspicion (in which case a principle of self-interest would usually secure the exercise of a sound discretion), such inferences could not be safely left to a jury, who could not possibly be put in

possession of all the collateral reasons by which an individual might properly be influenced in trusting to such evidence, and, which is more material, could not act on those collateral circumstances of suspicion which would have induced an individual to withhold his confidence.

" An act done by another, from which any inference is to be drawn as to his knowledge of any bygone fact, is an acted declaration of the fact, and is not in general evidence of the fact, because there is no sufficient test for presuming either that he knew the fact, or that, knowing the fact, his conduct was so governed by that knowledge as to afford evidence of the fact which ought to be relied on. A man may frequently act upon very uncertain evidence of a fact ; he may have been deceived by others ; and even where he has certain knowledge, his conduct may frequently be governed by motives independent of the truth, or even in opposition to it.

" Where a party professes to act on his knowledge of the truth of a particular fact, so that his so acting is accompanied by, or is equivalent to a direct or express declaration of the truth of that fact, the question of admissibility falls under principles already considered. A test is necessary to show, first, that he had competent knowledge of the fact; secondly, that he faithfully communicated what he knew.

" The rule, therefore, in the absence of special tests of truth, operates to the exclusion of all the acts or declarations or conduct of others, as evidence to bind a party, either directly or by inference; and, in general, no declaration, or written entry, or even affidavit made by a stranger, is evidence against any man. Neither can any one be affected, still less concluded, by any evidence, decree, or judgment, to which he was not actually or in consideration of law privy.

" As this is a rule which rests on the clearest principles of reason and natural justice, it has ever been regarded as sacred and inviolable."

§ 303. Having considered what is excluded, let us now see what is admitted.

§ 304. The principle does not exclude a declaration accompanying an act, whenever evidence of the act itself is admissible.

" The objection," writes Starkie, p. 87,

" does not extend to a class of declarations already described as declarations accompanying an act ; for these, when the nature and quality of the act are in question, are either to be regarded as part of the act itself, or as the best and most proximate evidence of the nature and quality of the act : their connection with the act either sanctions them as direct evidence, or constitutes them indirect evidence, from which the real motive of the actor may be duly estimated.

"Hence it is that declarations, made by a trader at the time of his departure from his residence or place of business, are evidence of the intention with which he went. His real intention, in such a case, cannot be inferred otherwise than from external appearances, from his acts; and his declarations are collateral indications of the nature of his acts and his intention in doing them."

But he continues, page 88.

"It is, however, to be particularly observed, that in these cases, when declarations or entries are admitted in evidence as part of the *res gestæ* or transaction, they are admitted, either because they constitute the very fact which is the subject of enquiry, or because they elucidate the facts with which they are connected having been made without premeditation or artifice, and without a view to the consequences; and as such they are the best evidence—it may be, better than even the subsequent testimony of the party who made them—to prove the object for which they are admitted in evidence; for the party who made the declaration, if he were competent as a witness, would frequently be under temptation to give a false colouring to the circumstance when its tendency was known; besides, as in this case the effect of the evidence is independent of the credit due to the party himself, it could be of no use to confirm his credit by examination upon oath, and his declaration as a mere fact is as capable of being proved by another witness as any other fact is."

§ 305. It does not exclude the real or natural facts connected with the main transactions. Starkie explains this lucidly as follows, page 90.

"The principle does not extend to the exclusion of any of what may be termed real or natural facts and circumstances in any way connected with the transactions, and from which any inference as to the truth of the disputed fact can reasonably be made. Thus, upon the trial of a prisoner on a charge of homicide or burglary, all circumstances connected with the state of the body found, or house pillaged, the tracing by stains, marks or impressions, the finding of instruments of violence, or property, either on the spot or elsewhere, in short, all visible *vestigia*, as part of the transaction, are admitted in evidence, for the purpose of connecting the prisoner with the act.

"Such facts and circumstances have not improperly been termed inanimate witnesses. It may be asked, whether the same principle which excludes all inferences from the acts, conduct and declarations of others, ought not also to exclude such real circumstances; for an artful person may not only deceive by speaking and writing, but may also create false and deceptive appearances, calculated to induce others to draw false conclusions from them; he

may act as well as speak a lie, and may deceive by false facts as well as false expressions. Real facts, that is, such as are the object of actual observation, in contradistinction to mere recitals of facts, are in themselves always true, whilst a mere recital or statement may be wholly false; and although collateral circumstances, when considered without careful comparison, may, either in consequence of contrivance and design, or even from accident, present appearances which tend to false conclusions, that tendency is always subject to be corrected by a multitude of other facts which are genuine.

"The whole context of facts must be consistent with truth; to speak more properly, they constitute the truth; if all were known, nothing would be left for inquiry; the greater the number known, the more probable will it be that an artificial or spurious fact, from inconsistency with the rest, will be detected, and the truth manifested. This is the more evident, when it is considered that the practice of creating false appearances must always be difficult, limited in its extent, and constantly subject to detection and exposure from a comparison of the deceptive fact with such as are undoubtedly genuine.

"By way of illustration, the following instance may be selected: A person having been robbed and murdered, the body is so placed by the offender, with a discharged pistol beside it, as naturally to induce the inference that the deceased had fallen by his own hand: but on close examination, it is discovered that the ball extracted from the body, and which occasioned death, is too large to have been discharged from that pistol, an inconsistency which immediately detects the imposture, and refutes the false inference to which *some* of the circumstances apparently tend.

"The general admission, therefore of evidence of the actual visible state of things, in the absence of any special reason for suspecting fraud, is quite consistent with the exclusion of statements or declarations, as contradistinguished from real facts; such statements may be altogether fictitious; they are easily invented, and would therefore be the more dangerous, because if they were to be admitted to any credit, they would usually be conclusive. At all events, there is a strong practical necessity for resorting, especially in criminal proceedings, to the aid of circumstantial evidence; the consequence would be infinitely mischievous if such evidence were to be excluded; and the real practical results from any suggestions as to the probability of fraud and deception being practised through the medium of such evidence, is that it ought in all cases to be received and acted on in the highest degree of caution and circumspection."

§ 306. We come now to the third great branch of our subject.

PART III.

The Instruments of Evidence.

§ 307. We have reached the dryest, because the most technical part of our subject ; but the rules and illustrations about to be considered are equally necessary with all others for the practitioner, and it may offer some inducement to proceed, to learn that our course will ultimately lead us into a region which has not inaptly been called the Romance of the Law of Evidence.

§ 308. A glance at the Chart will show that I have divided this subject into two great branches : the first embraces a consideration of the principles which in practice regulate the method for placing the instruments of evidence before the Court : the second leads us to enquire how these instruments are to be used for the purposes of proof.

Practice regulating Instruments of Evidence.

§ 309. We may conveniently divide the Instruments of evidence into *Oral* and *Written*. The former are *witnesses*, who give their evidence *vivâ voce* ; the latter *documents*.

§ 310. And here it will be well to remember, first, that the only natural limit to the introduction of evidence ought to arise from a consideration of the expense, delay, or inconvenience of its production (See § 26) and secondly, that the fundamental principle of the Law of Evidence is that *the best evidence which each case admits of, shall be invariably produced*. The following rules are framed for these objects ; and will all be found more or less to be illustrative of them :—

§ 311. We shall consider oral evidence under six different heads.

1st. The mode of procuring the attendance of witnesses.

2nd. How the law provides for enforcing the production of a document in the possession of a witness.

3rd. What protection the law affords a witness in the discharge of his duty.

4th. What preliminary objections can be raised to the examination of a witness.

5th. What rules the law prescribes for the examination of a witness.

6th. How the testimony of a witness may be rebutted or confirmed.

1st. *The Mode of Procuring the Attendance of a Witness.*

§ 312. The process for enforcing the attendance of a witness(a) in civil suits, when such witness is within the jurisdiction of the Court, will be found in Reg. III. of 1802, Sec. VII. para 1, Reg. VI. of 1816, Sec. XXVIII. and Reg. IV. of 1802, Sec. XX. The penalty for recusancy is in the discretion of the judge by fine not exceeding 500 rupees.

§ 313. Act X. of 1855, Secs. II., III., IV., V., VI. and VIII., lays down the Law regarding the attendance of witnesses in Mofussil Courts.

§ 314. The attendance of the adverse party is enforced under Sec. II.

§ 315. Sec. XVI. provides that no appeal shall lie against any order or decision of a judge with respect to his summoning or examining a party.

§ 316. In England, the expenses of a witness must be tendered in the first instance, or he need not attend. By Sec. VII. of Reg. III. of 1802, the expenses need not be tendered in the first instance, but the judge can order the party summoning to pay the witness a reasonable sum. If the expenses ordered be not paid, the party at whose requisition he has been called, loses the benefit of the evidence, and the judge after decree passed, is to confine such party until he discharges the sum awarded to the witness. In England a witness not attending is liable to a suit for damages at the instance of the party summoning him, if any loss has thereby been sustained.(b)

§ 317. Act X. of 1855, Section X. introduces this practice of the English Courts into the Mofussil.

(a) See Dawes' Procedure "Evidence" Sec. 122—134. The process for securing attendance of witnesses in Bengal is provided by Act XIX. of 1853. It were to be wished that the provisions of that Act were extended to this Presidency, unless indeed the proposed new Civil and Criminal Procedure Codes should become Law, in which case the reader will have to note up the alterations thereby effected in this portion of the Law of Evidence. This provision consists of little more than pointing out the various authorities on the attendance, &c. of witnesses. As the books referred to are in the hands of all practitioners, it has not been thought necessary to swell the text with giving the passages in full; the more especially as the introduction of the new Procedure Codes will render much of the existing law obsolete.

(b) See *Morley's Digest, Tit. Ev.* case 102.

"Case 102.—A Musulman refusing to be sworn to prove the execution of a note, alleging that he was a *Munshi*, and could not take an oath, but, in fact, because he wished to defeat the action, was severely reprimanded by the Court. The Court, in addition, told him it was fortunate for him that the plaintiff had established his demand without his assistance; for had he failed for want of it, it would have been the duty of the Court to have considered what ought to have been done. *Bantleman v. Aujoo Lubby Maistry.* 5th Feb. 1807. 1 Str. 225.

By the English Law, as it prevails in Courts in England and the Supreme Courts in India, where a person, required as a witness, is in custody, the method of obtaining his presence as a witness is by application to have him brought up by a writ of *Habeas Corpus ad testificandum*. As an instance, you may remember that some of the admirers of Buonaparte, in order to prevent his going to St. Helena, applied for a writ of *Habeas Corpus* to bring him up as a witness. The writ was granted, but the Captain of the Man-of-War, being aware of what was in the wind, got underway before the writ could be served.

§ 318. In Criminal Cases, Reg. VII. of 1802, Sec. XVII. shows what course is to be pursued if a witness cannot be found: but there appears no provisions for procuring his attendance if he can be found.(c) Regulation I. of 1824, extends to Criminal Courts and Magistrates the provisions of Sec. VII. Reg. III. of 1802. Reg. X. of 1816—constituting Criminal Courts in Zillahs—Sec. XIII, XIV—provides for attendance of *prisoners'* witnesses. Reg. II. of 1822, Sec. II. Cl. 3,(d) gives Judges certain discretionary powers.

§ 319. The following C. O. of Fouj. Ad. on the subject of attendance of witnesses should be consulted.

12th February of 1836.
14th November of 1836.

§ 320. Act XIX. of 1847, Art. 99, provides for the attendance of witnesses before Courts Martial.

§ 321. Act XI. of 1841, Sec. V., VI. provides for attendance of witnesses before Military Courts of Request.

§ 322. Reg. VII. of 1832, Sec. VIII.—XI. provides the same in respect of Military Bazar Stations.

§ 323. Reg. VI. of 1816, Sec. XXVIII.—XXXIV. provides for attendance of witnesses before District Moonsiffs, see Cl. 5.

§ 324. Act XII. of 1854, provides for attendance of witnesses in Criminal Suits before District Moonsiffs.

(c) This Regulation only applies to Circuit Courts which were abolished by Act VII. of 1843, and their power transferred to the Sessions Courts by Sec. XXVI. of that Act, and by order of Council 28th July 1843.

(d) Modified by Sec. XXX. of Act VII. of 1843.

§ 325. Reg. IV. of 1816, Sec. XV. XVI. provides for attendance of witnesses before Village Moonsiffs.

§ 326. Reg. V. of 1816, Sec. IV. Cl. 7—12, provides for attendance before Punchayets.

§ 327. All the above references apply to witnesses within the jurisdiction of the Court issuing the process.

§ 328. We proceed to the case of witnesses residing beyond the jurisdiction.

In such a case Reg. III. of 1802, Sec. VII. empowers the Judge of the Court before which the suit is pending, to issue a letter to the Judge of the Zillah in which the witness resides, to examine him on oath *vivâ voce*, or by interrogatories; or if his presence is necessary at the Court before which the suit is pending, it may be ordered.

§ 329. Act VII. of 1841, Sec. II. provides that a Commission may be issued for the examination of witnesses in open Court, and for production of papers if necessary. Sec. III. makes disobedience a contempt of Court. Sec. V. is extended by Sec. XIII. Act X. of 1855 to *parties*. Sec. VI. of this Act provides that commissions to be executed within the limits of the Supreme Court shall be directed to a Court of Requests.(e)

§ 330. The attendance of witnesses residing in Foreign European, or Native States, is procured by a summons addressed to the Resident.(f)

§ 331. Commissions to examine witnesses in Ceylon must be sent to that Government addressed to the Secretary to Government.(g)

§ 332. When Native females are of such rank that they cannot appear in Court, Reg. III. of 1802, Sec. VII. provides for their being examined on written interrogatories, by a Commission of three creditable women, on oath.

But Act X. of 1855, Sec. XV. contains new provisions for the examination of Native females of rank in Civil cases.

Reg. VII. of 1802, Sec. XIII. contains the same exceptions regarding the examination of women of rank in Criminal cases.

(e) See *Morley's Digest, O. S. Tit. Ev.* Case 54.
"*Case* 54.—If a commission to take an answer be made returnable on a day certain, the Court has no power to enlarge the time. *Chisholm v. Gibson and others.* 14th March 1843. 1 Fulton, 146."

(f) *C. O. F. A.* 23*d October* 1816.

(g) See *Baynes' Civil L.* p. 180, and *C. O. S. A.* 18th May 1827.

The C. O. S. A. of 12th July 1830 A. relates to the examination of Native women of the Nair caste.

§ 333. But disgrace arising from attending a Court as a witness is no ground of exemption.

§ 334. By Act II. of 1855, Sec. XXV. any person, actually present in Court, may be compelled to give evidence, or produce documents, just as though he had been summoned.

§ 335. The attendance of the opposite *party* is enforceable under Act X. of 1855, Sec. II. VI. which provide for the method by which, and the cases in which, *parties* are to be summoned: and the penalty for disobedience; Act II. of 1855, Sec. VII. provides for the case of a party voluntarily tendering himself as a witness, and see Sec. XII. Act X. of 1855 and R. P. S. A. Cl. 39.

II. *How production of Documents in the possession of Party or Witness may be enforced.*

§ 336. By Act VI. of 1854, Sec. XVII. (extended to all sides of the Supreme Court by Act II. of 1855, Sec. LIV.) the production of documents can be compelled in the Supreme Court.

§ 337. Regulation III. of 1802, Sec. VII. has been held by the Sudder Adawlut to empower Courts to enforce production of documents. See *C. O. S. A.* 17th June 1824. Act VII. of 1841, Sec. III. empowers the Courts in this respect; and by Act II. of 1855, Sec. XXIII. every witness, summoned to produce a document, must bring it into Court, though there be a valid objection to its production. By Section XXVI. his personal attendance is dispensed with.

§ 338. We must now consider what are valid objections to the production of documents.

§ 339. The validity of the objection must be determined by the Court. See Sec. XXIII., Act II. of 1855.

§ 340. By Act X. of 1855, Sec. IX. a witness, *not being a party*, is not bound to produce his own title deeds, unless he shall have agreed to do so in writing.

§ 341. By Act II. of 1855, Sec. XXII. a *party* is not bound to produce a document irrelevant to the suit, or his confidential communi-

cation with his professional adviser, unless he offer himself as a witness.(h)

§ 342. By Sec. XIX. a *party* may be compelled to give evidence and produce documents in the same way as if he was not a party.

§ 343. By Sec. XXIV. a pleader is not to divulge his client's secrets, (and of course under this, not to produce his documents.) But the privilege is that of the client, not of the pleader, and if therefore the client consents to waive it, or if he offers himself as a witness, (in which case he must make the fullest disclosure) he loses the protection, and his pleader may be compelled to divulge or produce.

§ 344. Professional confidence extends to interpreters. In the case of *Du Barré v. Livette*,(i) it is said :

"An interpreter who is present at conversations between a foreigner and his attorney, is bound to the same secrecy as the attorney himself, and ought not to divulge the facts confided to him, *after* the cause, for the purpose of which the confidence was placed, is at an end."

§ 345. Taylor's Law of Evidence, § 668, states that protection as between clients and pleader extends to all organs of communication.

§ 346. The rule as to professional confidence does not extend to a medical adviser. The New York Civil Code, § 1710, Cl. 4 provides that :

"A licensed physician or surgeon cannot, without the consent of his patient be examined, in civil action, as to information which was necessary to enable him to prescribe or act for the patient."

§ 347. Neither does it extend to Clergymen :(k) though it may be well doubted whether an alteration in the Law in this respect is not desirable. Taylor, § 665, writes as follows :—

"The propriety of extending the privilege to communications made to clergymen in reference to criminal conduct, has been strongly urged, on the ground that evildoers should be enabled with safety to disburthen their guilty consciences, and by spiritual instructions and discipline to seek pardon

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(h) *The New York Civil Code* § 1711, is to this effect.
"If a person offer himself as a witness, that is to be deemed a consent to the examination : also, if a wife, husband, attorney, clergyman, physician or surgeon, on the same subject, within the meaning of the first four subdivisions of the last section."

(i) *Peake's Reports*, p. 77.

(k) *R. v. Griffin*, 6 *Cox. Cr. C.* 219. A. D. 1853. Alderson B. when evidence of conversation between prisoner and her spiritual adviser were offered, said : "I do not lay this down as an absolute rule, but I think such evidence ought not to be given :" whereupon Counsel withdrew it.

and relief. The law of Papal Rome has adopted this principle in its fullest extent, not only, as already intimated, excepting such confessions from the general rules of evidence, but punishing the priest who reveals them. It has even gone further; for Mascardus, after observing that, in general, persons coming to the knowledge of facts under an oath of secrecy are compellable as witnesses to disclose them, states that confessions to a priest are not within the operation of the rule, since they are made not so much to the priest as to the Deity whom he represents; and he thence draws the jesuitical conclusion that the priest, when appearing as a witness in his private character, may lawfully swear that he knows nothing of the subject. *Hoc tamen restringe, non posse procedere in sacerdote producto in testem contra reum criminis, quando in confessione sacramentali fuit aliquid sibi dictum, quia potest dicere, se nihil scire ex eo; quod illud quod scit, scit ut Deus, et ut Deus non producitur in testem, sed ut homo, et tanquam homo ignorat illud super quo producitur.* In Scotland, where a prisoner in custody and preparing for his trial has confessed his crimes to a clergyman, in order to obtain spiritual advice and comfort, such confession is privileged; but this privilege is not carried so far as to include communications made confidentially to clergymen in the ordinary course of their duty. Though the law of England encourages the penitent to confess his sins 'for the unburthening of his conscience, and to receive spiritual consolation and ease of mind,' yet the minister, to whom the confession is made, is merely excused from presenting the offender to the civil magistrate, and enjoined not to reveal the matter confessed, 'under pain of irregularity.' In all other respects he is left to the full operation of the rules of the common law, which recognize no distinction between clergymen and laymen, but provide that all confessions and other matters, not confided to legal counsel, must be disclosed when required for the purpose of justice. Neither penitential confessions made to the minister or to members of the party's own church, nor even secrets confined to a Roman Catholic priest in the course of confession, are regarded as privileged communications."

The leading case upon the law on this point as it now stands is *Rex. v. Gilham.*(l)

"A confession made in consequence of persuasion by a clergyman, not with any view of temporal benefit, is admissible."

In *Broad v. Pitt,*(m) Best, C. J. said he would not compel a Clergyman to divulge, but would not object to receive communications made to him in his professional capacity.

(l) 1 *Moody's Cr. C.* p. 186.
(m) 5 *Carr. and P.* 519.

By the Scotch law such communications are protected. By the New York Civil Code, § 1710, Cl. 3, it is provided that:

"A clergyman, or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline, enjoined by the church to which he belongs."

§ 348. As regards an ordinary agent, his communications with his principal must be disclosed. So in the proceedings under the Mandamus in *Douglas'* case held in the Supreme Court, his agents were compelled to produce their books and show the state of his account, with a view to ascertain whether he had received sums largely in excess of his pay.

§ 349. The communications between a client and his professional adviser, in order to be privileged, must have been made in a professional capacity, or with a view to advice: but it is not necessary that any secret should have been communicated at the time of the advice sought. Secrets which come to the knowledge of the Pleader subsequently, in consequence of his being retained or consulted, equally fall within the rule: nor does the protection terminate with the termination of the particular litigation which has elicited the communication. The seal of the law once set upon a privileged communication rests upon it for ever, unless it be removed by the waiver of the party.(n)

§ 350. There are a few other heads of a similar character to those already given concerning professional confidence, which it may be most convenient to dispose of here.(o)

§ 351. *Judges* are not compellable to testify as to matters in which they have been judicially engaged.

§ 352. A case of *Arbitration* is governed by the same policy. *Arbitrators* cannot be compelled to disclose the grounds of their award, unless under very cogent circumstances, such as an allegation of fraud; and this may be taken as another illustration of the maxim. "*Interest reipublicæ ut sit finis litium.*" On this subject, Taylor, § 682, writes:—

"*Judges*, *arbitrators* and *counsel* may be mentioned as forming a *second*

(n) In connection with this *Taylor*, § 660—3 may be advantageously consulted, and see ante § 70—1.

(o) Although the principal topic immediately under consideration is that of Production of Documents, it is convenient to exhaust the subject of privileged communications, when it is once entered upon.

class of persons, who, from motives of public policy, are not compelled to testify as to certain matters, in which they have been judicially or professionally engaged; though, like ordinary persons, they may be called upon to speak to any foreign and collateral matters, which happened in their presence, while the trial was pending, or after it was ended. In regard to judges of courts of record, it is considered dangerous, or at least highly inconvenient, to compel them to state what occurred before them in court; and on this ground the grand jury have been advised not to examine the chairman of the Quarter Sessions, as to what a person testified in a trial in that court. The case of arbitrators is governed by the same general policy; and neither the courts of law nor of equity will disturb decisions deliberately made by arbitrators, by requiring them to disclose the grounds of their award, unless under very cogent circumstances, such as upon an allegation of fraud; for *Interest reipublicæ ut sit finis litium.* If an award be made in favor of a defendant, upon the examination of the parties, or the inspection of their books, which would not have been legal evidence had the cause been tried, the arbitrator, in an action for a malicious arrest, brought by the defendant against the former plaintiff, will not be *permitted* to depose as to what transpired before him, though, in ordinary cases, where he has proceeded according to strict rules of law, he may, by his own consent, be examined respecting the facts proved, or the matters claimed, at the reference. On the same ground, it has been held that a barrister cannot be forced to prove what was stated by him on a motion before the court; and the like privilege has been strenuously claimed, though not expressly recognised, where a counsel was called upon as a witness to disclose a confidential negotiation into which, on behalf of his client, he had entered with a third party, though the client himself waived all objection to the course of examination proposed."

§ 353. Grand jurors are within the rule. They are sworn "to keep secret their fellows' counsel and their own." See Taylor, § 686.

§ 354. So also are petty jurors. On this point, Taylor, § 687, writes as follows:

"On similar grounds of public policy, and for the protection of parties against fraud, the law excludes the testimony of *traverse* or *petty jurors*, when offered to prove *mistake* or *misbehaviour* in the jury in regard to the verdict. Thus, where a motion was made to amend the postea by increasing the damages, the Court refused to admit an affidavit sworn by all the jurymen, in which they stated their intention to have been to give the plaintiff such increased sum. So, also, on several occasions, affidavits that verdicts have been decided by lot have been rejected on motions for new trials, whether such affidavits were sworn by individual jurymen, or by strangers,

stating the subsequent admissions of jurors to themselves, or even that a declaration had been made by one juror in the hearing of his fellows in open Court after the verdict had been pronounced. In all cases of this kind, the Court must obtain their knowledge of the misconduct complained of, either from the officer who had charge of the jury, or from some other person who actually witnessed the transaction."

§ 355. Allied to this, is the objection that the communication relates to secrets of State. See ante § 70 note. The various cases falling under this description are thus enumerated by Taylor, § 689.

"On similar grounds, the official transactions between the *heads of the departments of Government and their subordinate officers*, are, in general, treated as *secrets of State*. Thus, communications between a colonial governor and his attorney-general, on the condition of the colony or the conduct of its officers; or between such governor and a military officer under his authority; the report of a military commission of inquiry, made to the commander-in-chief; and the correspondence between an agent of the government and a Secretary of State; or between the Directors of the East India Company and the Board of Control; or between an officer of the Customs and the Board of Commissioners,—are confidential and privileged matters, which the interests of the State will not permit to be revealed. The President of the United States, and the Governors of the several States, are not bound to produce papers or disclose information communicated to them, where, in their own judgment, the disclosure would on public considerations be inexpedient. And where the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same thing in effect, namely, receiving secondary evidence of their contents. It has, however, been held, that, in an action of trespass brought against the governor of a colony, a military officer under his control might be asked in general terms, whether he did not act by the direction of the defendant, though the written instructions could not be given in evidence. But communications, though made to official persons, are not privileged, where they are not made in the discharge of any public duty; such, for example, as a letter by a private individual to the chief secretary of the postmaster-general, complaining of the conduct of the guard of the mail towards a passenger."

§ 356. Letters addressed to Government officially are not producible without the consent of Government. See *Hayes v. Graham* East's notes of cases, case 74 decided 29th Jan. 1818, (p) and this objec-

(p) Sir Hyde East's notes of cases, and also Sir Erskine Perry's are collected in the 2nd Vol. of Morley's Digest. Sir E. Perry has also published his Notes in a separate form.

tion may be taken on behalf of Government by a Collector. See C. O. S. A. 17th June 1824.

§ 357. The neglect of a witness to produce a document will not be sufficient ground for admitting secondary evidence of its contents; but where a document has been transferred to the adverse party with the fraudulent intention of preventing its production, secondary evidence of its contents is admissible. If this rule were otherwise, a party might in many cases be able to deprive his adversary of important evidence by collusion with his adversary's witnesses; on the other hand too, if the secondary evidence were admissible merely on the ground that a document was not forthcoming, no fraud being shown, it might lead to very inconvenient latitude in the reception of inferior evidence; as when a party prevented his own witness from producing a document; and therefore, on the score of general convenience, the law determines that as the least of two evils, the party requiring the evidence, shall under such circumstance lose the benefit of it, rather than open the door to the chance of fraud.

§ 358. Notice or Summons to produce a document must be given a reasonable time before the trial. The Court will decide what is a reasonable time, which will vary with the particular circumstances of each case; according to the distance at which the witness resides, the necessity for search, and the like.

§ 359. The Notice or Summons should specify the document required with as much particularity as lies in the party's power.

III. *Protection of Witnesses, &c.*

§ 360. It may be shortly stated that witnesses are protected from arrest "*eundo, morando, et redeundo,*" *i. e.* on their way to the Court, at Court, and on their way back,(q) Taylor, § 936, may be usefully consulted here.

"In order to encourage witnesses to come forward voluntarily, they, as well as parties, barristers, attorneys, and, in short, all persons who have that relation to a suit which calls for their attendance, are *protected from arrest*, while going to the place of trial, while attending there for the purpose of the cause, and while returning home; *eundo, morando, et redeundo.* The service of a subpœna or other process is not necessary in order to afford

(q) See the case of in *R. v Douglas.* 3. *Q. B. R.* 837, where the arguments are worth perusal. That was a case of arrest after leaving Court.

the witness this protection, provided he has consented to come without such service and actually does attend in good faith ; and, therefore, the privilege extends to a witness coming from abroad without a subpœna. In determining what constitutes a reasonable time for going, staying, and returning, the Courts are disposed to be liberal ; and provided it substantially appears that there has been no improper loitering or deviation from the way, they will not strictly enquire whether the witness or other privileged party, went as quickly as possible and by the nearest route. Thus the rule of protection has been held to apply, where a witness, two hours after he had left the court, was arrested about a mile off in the direct road to his house ; where a defendant, who had attended his cause in the morning, went to a tavern near the court in the afternoon, to dine with his attorney and witnesses ; where a party had been staying for some days at a coffee-house near the court, waiting for the trial of his cause, which was a remnant, but was not in the list of causes for the day on which the arrest happened ; where a party attending an arbitration was arrested during an adjournment of the reference from one period to another of the same day ; where a witness, in a cause tried on Friday afternoon, was arrested in the assize town on Saturday evening, as she was entering a stage coach which was to convey her home ; where a plaintiff, on leaving court, called at his office for refreshment, and then on his way home went to his tailor's, in whose shop he was arrested ; and even where a witness from abroad, on finding that the trial was postponed till the next sittings, determined to wait till it came on, and was arrested on the eighth day after his arrival."

§ 361. An amusing instance occurred in the Supreme Court during the first Sessions of the year 1852.

Gholam Moortooza Khan had been indicted and found guilty of concealing a watch at the time of his passing through the Insolvent Court. He was brought up to receive sentence. He had at that moment many writs out against him ; now the law gives protection to a witness compelled to give evidence, not to a prisoner called up to receive sentence. When Gholam Moortooza Khan had paid the fine to which he was sentenced, and had left the Court, he was arrested at the suit of one of his creditors, but he seems to have been well advised ; for he instantly produced a summons from the Small Cause Court to attend there as a witness : and as he was then on his way there, he was protected, *eundo*—and also while there, *morando*—and on his return home, *redeundo*—although I saw two bailiffs up behind his carriage to take the chance of his making any detour.

§ 362. This protection extends only to civil suits. A witness

may be arrested at any time on a charge of crime. Home itself affords no protection in such a case. The insolvent, as we frequently see, sits safe behind his "railings," and no bailiff can break through their feeble frame; but the Police officer would not respect the strongest door, where it opposed his entrance to arrest a person on a charge of crime.

§ 363. Bail may arrest the party for whom he is security at any time; for this is said not to be a taking, but a re-taking.

IV. *Preliminary objections to the examination of a witness.*

§ 364. Objections on the score of want of understanding, or want of belief, have already been considered. See ante (§ 28—30.) Since the alteration of the law as to objections on the score of interest the only grounds of exclusion left are infamy, &c.

In addition to what was before said on the subject of disqualification from insanity, we may here add the following remarks. In the case of *Reg. v. Hill*(r) the evidence of a witness, who believed he was possessed by 20,000 spirits, was received, on his appearing to understand the nature of an oath, and on the belief of the medical witness that he was capable of giving an account of the transactions that happened before his eyes. This decision, which seems sound in principle, has modified the old law, if indeed the case itself should be upheld. There is a case however, *Waring v. Waring*,(s) not mentioned in the argument of *Reg. v. Hill*, which seems directly opposed to it. There Lord Brougham in delivering the judgment of the Court said:

"The disease affecting them (the mental faculties) may have been more or less general; it may have extended over a greater or a less portion of the understanding; or rather, we ought to say, that it may have affected more, or it may have effected fewer, of the mental faculties: for we must always keep in view that which the inaccuracy of ordinary language inclines us to forget, that the mind is one and indivisible; that when we speak of its different powers or faculties, as memory, imagination, consciousness, we speak metaphorically, likening the mind to the body, as if it had members or compartments; whereas, in all accuracy of speech, we mean to speak of the mind acting variously—that is, remembering, fancying, reflecting—the same mind in all these operations being the agent. We therefore cannot, in any

(r) 15 *Jur.* p. 470.
(s) 6 *Moore's P. C. C.*, p. 341.

correctness of language, speak of general or partial insanity; but we may most accurately speak of the mind exerting itself in consciousness without cloud or imperfection, but being morbid when it fancies, and so its owner may have a diseased imagination; or the imagination may not be diseased, and yet the memory may be impaired, and its owner be said to have lost his memory. In these cases we do not mean that the mind has one faculty, as consciousness, sound; while another, as memory or imagination, is diseased; but that the mind is sound when reflecting on its own operations, and diseased when exercising the combination termed 'imagining,' or casting the retrospect, called 'recollecting.'"

And again, in another part of the judgement:—

"Nothing is more certain than the existence of mental disease of this description—nay, by far the greater number of morbid cases belonging to this class. They have acquired a name—the disease called familiarly, as well as by physicians, 'monomania,' on the supposition of its being confined, which it rarely is, to a single faculty or exercise of the mind. A person shall be of sound mind, to all appearance, upon all subjects save one or two, and on these he shall be subject to illusions, mistaking for realities the suggestions of his imagination. The disease here is said to be in the imagination—that is, the patient's mind is morbid or unsound when it imagines; healthy and sound when it remembers. Nay, he may be of unsound mind when his imagination is employed on some subjects, in making some combinations, and sound when making others, or making one single kind of combination. Thus he may not believe all his fancies to be realities, but only some or one: of such a person we usually predicate that he is of unsound mind only upon certain points. I have qualified the proposition thus on purpose, because if the being, or essence, which we term the mind, is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is quite erroneous to suppose such a mind really sound on other subjects. It is only sound in appearance; for if the subject of the delusion be presented to it, the unsoundness, which is manifested, by believing in the suggestions of fancy as if they were realities, would break out; consequently it is as absurd to speak of this as a really sound mind—a mind sound when the subject of the delusion is not presented—as it would be to say that a person had not the gout, because, his attention being diverted from the pain by some more powerful sensation by which the person was affected, he, for the moment, was unconscious of his visitation.

"It follows from hence, that no confidence can be placed in the acts or in any act of a diseased mind, however apparently rational that act may appear to be, or in reality be. The act in question may be exactly such as a person without mental infirmity might well do. But there is this differ-

ence between the two cases—the person uniformly and always of sound mind could not, at the moment of the act done, be the prey of morbid delusion, whatever subject was presented to his mind; whereas the person called partially insane—that is to say, sometimes appearing to be of sound, sometimes of unsound mind—would inevitably show his subjection to the disease the instant its topic was suggested. Therefore we can with perfect confidence rely on the act done by the former, because we are sure that no lurking insanity —no particular, or partial, or occasional delusion—does mingle itself with the person's act, and materially affect it. But we never can rely on the act, however rational in appearance, done by the latter, because we have no security that the lurking delusion—the real unsoundness—does not mingle itself with or occasion the act. We are wrong in speaking of partial unsoundness; we are less incorrect in speaking of occasional unsoundness. We should say that the unsoundness always exists, but it requires a reference to the peculiar topic, else it lurks, and appears not. But the malady is there; and as the mind is one and the same, it is really diseased while apparently sound; and really its acts, whatever appearance they may put on, are only the acts of a morbid or unsound mind."

On the subject of excluding testimony, we may consult the New York Civil Code, § 1708, note.

"The fundamental difference between this system of evidence and that in common use, consists in this, that the former goes upon the principle of admission, the latter upon the system of exclusion. Admission is the rule here; exclusion is the rule of the common law. Let in all the light possible, we ask. Not so the common law; exclude the light, it says, lest perchance it deceive you; unmindful, as it appears to us, that poor light is better than none. There are many occasions, when you cannot have the pure light of heaven; it sometimes comes through a stained medium; but you should not therefore prefer total darkness.

"The code of 1848 abolished incompetency from mere interest, but left *parties* still incompetent, as witnesses in their own favor. In this completed code, we are for abolishing the remaining portion of the rule of exclusion, and for declaring parties competent as well as others. This has been already done in Connecticut, by a section of the Revised Statutes of 1849, as follows:

"'No person shall be disqualified as a witness in any suit or proceeding at law or in equity, by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credit.'" (*Revised Statutes of Connecticut*, 1849, *page* 86, *sec.* 141.)

§ 365. The proper time for taking the objection (if it were known to the party objecting) is before the witness is sworn; but at any time

during the examination at which the incompetency becomes apparent, the objection will prevail, and the evidence already taken will be struck out. In *Jacobs v. Layborn*(t) this is laid down as follows by Lord Abinger.

"The plaintiff's counsel have furnished us with a proof of the antiquity, at least, of the practice contended for by them. They have shown that it has been recognised by the high authority of Lord King, assisted by those other learned Judges who sat with him on that occasion, and confirmed afterwards by the opinion of Lord Hardwicke, one of the greatest Judges who ever presided in this country, not only on the law, but on the reason of the law. To this I can add the testimony of my own experience, which has been of more than forty years, that, whenever a witness was discovered to be incompetent, the Judge always struck the evidence which he had given out of his notes. I have known both Lord Ellenborough and Mr. Baron Bayley erase whole pages in this way; and it was not the practice to swear the witness on the *voir dire*, unless specially required by the party against whom he appeared. It is a very singular thing, that I do not recollect a case ever occurring before Lord Kenyon, in whose time I was in the habit of constantly attending the courts, in which a witness was sworn on the *voir dire*: and it very seldom happened in the time of Lord Ellenborough, although of late years the practice seems to have become more frequent. In courts of equity, also, it is every day's practice to object to a witness as incompetent, whenever his incompetency appears; there is no examination on the *voir dire*; and it certainly may be said, that the danger spoken of by the defendant's counsel in this case, of a party withholding his objection till he sees a favourable opportunity for making it, cannot arise in those courts, as the evidence is kept secret, so that the party who would make the objection if he could might not know when to take it. Still the same inconvenience would exist more or less; and it might well be said, that, if a party knew of any objection to the witness, he ought to state it at once. The reason of the practice rests on the ground,—the law will not allow a verdict to stand which has been obtained on the evidence of a person whom the rules of law have declared incompetent to give evidence. Historians and others may receive all kinds of evidence of facts, hearsay as well as any other; but with juries it is otherwise, for the law (whether wisely or not it is unnecessary to discuss) excludes all testimony that it considers dangerous. Suppose, for instance, a verdict obtained on such illegal testimony were questioned by means of a bill of exceptions, would it not be set aside? There is no statute which says that the incompetency of a witness must be

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(t) 11 *Mee. and Wels.* 685.

determined by an examination on the *voir dire*; when a man is examined on the *voir dire*, the examination is only to satisfy the conscience of the Judge, the jury having nothing to do with it. Now a witness may, on his examination on the *voir dire*, appear perfectly competent; and the circumstance showing him not to be so may appear afterwards. Suppose, for instance, a man examined on the *voir dire* were, in answer to questions put to him, to swear distinctly that he had never been convicted of felony or perjury, he is then *primâ facie* competent, and is sworn in chief; but while his examination is being proceeded with, the attorney for the party against whom he appears goes away, and fetches the record of his conviction—is not the opposite counsel to be permitted to question him anew as to that conviction? So, in any other case, I do not see why counsel should be restrained from enquiring at any moment into the witness' competency; and, if they see that he is swearing falsely, excluding his testimony if they can. A counsel who knows of an objection to the competency of a witness may very fairly say, 'I will lie by, and see whether he will speak the truth; if he does not, I will exclude his evidence.' I see no hardship or injustice at all in that course."

§ 366. By the Scotch law the objection must be taken before the witness is sworn. Alison, p. 429, so lays it down.

§ 367. Any number of witnesses may be called to prove the same point: the court is bound to hear them all; and the repetition is no ground of objection. In Morley's Digest, Title Evidence, Case 112, it is expressly so laid down.

"In a suit for possession of a *Zamindari* and other estates, by a party claiming as son and heir of the deceased *Zamindar*, the defendants denied the title of the plaintiff, alleging that he was a spurious and suppositious child, and tendered fifty-eight witnesses to prove that fact. The Zillah Court,(v) having taken the depositions of thirty of these witnesses, refused to permit the remaining twenty-eight to be examined, on the ground that, being to prove the facts deposed to by those already examined, it was unnecessary to take their depositions, and ultimately decided in favor of the plaintiff. The defendants appealed to the Sudder Dewanny Adawlut of Bombay, which refused to examine the witnesses rejected by the Zillah Court, and affirmed the decree of that Court. On appeal to Her Majesty in Council, the Judicial Committee remitted the case back to the Sudder Dewanny Adawlut, being of opinion that the refusal, by that Court, to admit the examination of witnesses tendered, was irregular, and that no decision could be come to upon the merits under such circumstances."

(v) "*Jeswunt Singjee Ubby Singjee v. Jet Singjee Ubby Singjee*, 7th June 1841. 2 *Moore Ind. App.* 424."

There have also been Circular orders on the subject : but the decision of the Supreme Appellate Court is of itself conclusive authority on the point.

V. *Mode of examining witnesses.*

§ 368. In Civil Suits, Act X. of 1855, Sec. XII. directs how all evidence is to be taken. It must be in writing, except in cases tried by District Moonsiffs, where the amount does not exceed 20 rupees, or by Village Moonsiffs.

§ 369. This Section (XII.) alters the procedure in Mofussil Courts, where the practice was to take down evidence by a third party when the judge had not time to undertake the duty himself. See Reg. VII. of 1809, Sec. XXII. which is expressly repealed by Act X. of 1855, Section I; Regulation XII. of 1809, Section VIII. is also repealed by the same Act and Section.

§ 370. The practice of vicarious examination has too largely prevailed in Criminal as well as Civil cases. I have myself seen such an examination going on in the corner of a Magistrate's tent, while the Magistrate was engaged on other duties, although the charge was one of murder. I cannot find however any provision in the Regulations for taking evidence by deputy in criminal cases, analogous to that above quoted for civil suits. Regulation VII. of 1802. Section XVIII. certainly contemplates nothing of the kind; and Reg. X. of 1816, (which makes the judges also criminal judges) expressly provides by Section IX. Clause 1, that the judge himself shall take the deposition. See also Sections XV. XVI. whereby criminal judges are required to take the depositions themselves. Act VII. of 1843, Section XXX. contains a similar provision.

§ 371. We come now to the practice by which the examination of a witness is regulated; and this may be conveniently considered under three heads. The party tendering the witness first examines him and this is called *the examination in chief*. Then the opposite party searches the credit and veracity of the witness : this is called *the cross-examination;* and then the party responding, has the privilege of allowing the witness an opportunity of explaining any thing which may have been elicited from him on cross-examination ; this is called *the re-examination*. We shall consider each of them in its order :— and

1st. *Of the examination in chief.*

§ 372. Leading questions are not to be asked. The ordinary criterion of a leading question is said to be, whether the answer to it would be directly yes or no. But this is scarcely accurate, as there are many questions which obviously could receive no other answer, but which nevertheless could not be objected on that ground.

§ 373. It is proper to lead a witness in all matters which are merely introductory, and the same question may be objectionable or unobjectionable according to circumstances. For instance, in a case of assault, if the defence be an *alibi*, it would be obviously improper to ask a witness in chief point blank, Did you see the defendant at that place? But if it were admitted that the defendant was present, and the defence was that in fact he had taken no part in the alleged assault, in technical terms, that he is *not guilty*, but was there accidentally as a mere passer by, the question might be properly put, both because the matter would be introductory, and for the purpose of identification. In either case the answer would be, yes or no. Lord Ellenborough says in *Nicholls v. Dowding*,(w) that the question would be objectionable, when the answer, if "yes" or "no," would be *conclusive*; that is, going directly to the point in issue.

§ 374. So where the question is simply one of identification, it is every day's practice to point out to the witness in the box the prisoner at the bar, and ask directly, Is that the man? The answer is directly "yes" or "no." But if the witness is suspected, such a question would be improper, and the correct course would be to bid him look around the Court, and say if he saw the man he spoke of.

§ 375. No objection is more frequently taken than this to the leading form of a question, and yet as Lord Ellenborough observes in the case above cited, no objections are usually more frivolous.

The following note(x) from Starkie deserves attention:

"*Nicholls v. Dowding*, 1 Stark. C. 81. In order to prove that Dowding and Kemp were partners, the witness was asked whether Kemp had interfered in the business of Dowding; and upon the objection being taken that this was a leading question, Lord Ellenborough, C. J., held that it was a proper question, and intimated that objections of this nature were frequently

(w) 1 *Starkie's Cases*, p. 81.

(x) Note (o) p. 166.

made without consideration. It is not a very easy thing to lay down any precise general rule as to leading questions: on the one hand, it is clear that the mind of the witness must be brought into contact with the subject of enquiry; and, on the other, that he ought not to be prompted to give a particular answer, or to be asked any question to which the answer 'yes' or 'no' would be conclusive. But how far it may be necessary to particularize, in framing the question, must depend upon the circumstances of each individual case. Upon the trial of De Berenger and others, before Lord Ellenborough, at Guildhall, for a conspiracy, it became necessary for a witness (a postboy who had been employed to drive one of the actors in the fraud) to identify De Berenger with that person: and Lord Ellenborough held that, for this purpose, the counsel for the prosecution might point out De Berenger to the witness, and ask him whether he was the person. The same was done in *Watson's case*, upon a trial at bar; 2 Stark. C. 128. In these cases, the question was as to a mere fact to be determined by *inspection*; and in all such cases, it seems that the mind of the witness may be led directly to the very point, although a more general question might have been proposed, as, whether the witness saw the person whom he had described in court. So where a witness is called to prove the handwriting of another, it is the common practice to show him the document, and to ask, directly, whether that is the handwriting of A. B. But where a witness is examined as to any *conversation*, *admission* or *agreement*, where the particular terms of the admission or contract are important, this objection chiefly becomes material, since there is danger lest the witness should by design or mistake be guilty of some variance, and give a false coloring to the transaction. In such cases there seems to be no objection to directing the mind of the witness fully to the subject, by asking him whether he was present when any conversation took place between the parties, or relating to the particular subject; and when the mind of the witness has been thus directed to the subject-matter, to request him to state what passed. It is obvious that observations like these are intended for the use of mere students; to such it may not be improper to suggest, that when the time and place of the scene of action have once been fixed, it is generally the easiest course to desire the witness to give his own account of the matter, making him omit, as he goes along, an account of what he has heard from others, which he always supposes to be quite as material as that which he himself has seen. If a vulgar, ignorant witness be not allowed to tell his story in his own way, he becomes embarrassed and confused, and mixes up distinct branches of his testimony. He always takes it for granted that the Court and jury know as much of the matter as he does himself, because it has been the common topic of conversation in his own neighbourhood; and therefore his attention cannot easily be drawn so as to answer particular questions, with-

out putting them in the most direct form. It is difficult, therefore, to extract the important parts of his evidence piecemeal; but if his attention be first drawn to the transaction by asking him when and where it happened, and he be told to describe it from the beginning, he will generally proceed in his own way to detail all the facts in the order of time."

§ 376. Any question which suggests or prompts a particular answer, is clearly inadmissible; and is more objectionable than a question directly leading in point of form. I may caution the practitioner against an indulgence in this foolish practice, for it weakens terribly the effect of the evidence so elicited, and is calculated to create the most unfavorable impression on the mind of the judge.

§ 377. A pleader may occasionally lead, or rather cross-examine his own witness, by permission of the Court, where the witness is evidently hostile to him. The modern tendency of practice is however to keep the examination-in-chief to its ordinary bounds, and to take the demeanor, &c. of the witness into consideration when determining on his credibility and weight. Act II. of 1855, Section XXX. has now legalized the practice above alluded to.

§ 378. So when a witness is called for the purpose of contradicting another witness who has sworn to the use of certain expressions and the like, it is usual to ask *directly*, were such and such expressions used? This arises from the necessity of the case; the difficulty of proving a negative is extreme, and the contradicting witness might beat about the bush for an hour, and give no contradiction after all, if he were simply told to state what expressions were used on such and such an occasion. On this subject Starkie has the following observations :—

"The negative, if not allowed to be directly proved, could only be proved indirectly, by calling on the witness to detail the whole of what was said on the particular occasion, if any such were singled out by the evidence, or to detail the whole of several such conversations, where the use of the alleged expressions or words was not limited to any conversation in particular; and, after all, the evidence would not be complete and satisfactory to establish the negative, unless sooner or later the question as to the use of the particular expressions were to be directly put, for till then the evidence would show only that the witness did not remember their use; but the direct negative, after the attention of the witness had been excited by the suggestion of the very expressions, would go much further. It may frequently happen that a witness, unable to detail even the substance of a particular conversation, may yet be able to negative with confidence proposals, offers,

statements, or other matters, sworn to have been made in the course of a conversation. In such cases, therefore, this form of enquiry is absolutely necessary for obtaining complete information on the subject. So where a witness is called to prove affirmatively what a witness on the other side has denied, as, for instance, to prove that on some former occasion that witness gave a different account of the transaction, a difficulty may frequently arise in proving affirmatively that the first witness did make such other statement, without a direct question to that effect.

"But although the practice above stated is, to a certain extent, sanctioned by a principle of convenience, and although, after other attempts have failed, it becomes a matter not of mere convenience but of absolute necessity so to put the question to a witness called to contradict a former one, it is plain that the convenience so attained to is purchased at the expense of some departure from a general principle, and that it would usually be more satisfactory, where that is practicable, that the desired answer should be obtained without a direct suggestion, by which a fraudulent witness might be greatly aided."

§ 379. So again where details are of such length or difficulty that the memory requires assistance, the witness may be led. As for instance, a witness may be asked as to the result of his examination of long accounts or of various old documents. The leading case on this subject is *Rowe v. Brenton.*(y)

"Mr. Illingworth stated that he had examined the assession rolls and ministers' accounts from the time of Edw. III. down to the latest period, and that the rents of assize, rents of conventionary tenants, fines of tin and tolls of tin, the old acknowledgments and new acknowledgments mentioned in the assession rolls and books, agreed with those mentioned in the ministers' accounts in almost every instance with merely trifling deviations."

"Brougham objected to the *result* of the witness' searches being received in evidence. The 'trifling deviations' spoken of show the danger of admitting evidence of this kind."

"Lord Tenterden, C. J.—In evidence of this kind, I cannot agree to give the time which is necessary to compare Latin documents. The time of the Court would be occupied many months, if we were to go through them all in the way proposed. You have a right to cross-examine upon

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(y) *The New York Civil Code*, § 1842, may be consulted:
"A question, which suggests to the witness the answer which the examining party desires, is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the Court, under special circumstances, making it appear that the interests of justice require it."

this as far as you please ; but there is no doubt it is evidence and the usual course."(z)

§ 380. Leading questions are forbidden in criminal trials by Reg· VII. of 1802, Sec. XVIII. Cl. second.

§ 381. Having shown the form in which it is proper to frame questions, let me now see what are the subject and matter upon which a witness in chief may be examined.

§ 382. 1st.—*As to facts:* Every witness is examinable as to all facts within his own knowledge. 2nd, he is examinable as to inferences drawn by him from facts within his own knowledge ; for instance as to his belief in the identity of handwriting, which is framed upon his previous knowledge of the character of the writer's hand : but he cannot be asked as to his inference drawn from what he has simply heard from others. For instance he could not be asked if he believed the prisoner at the bar was the man whom he had heard described by others, or had seen described by the hue and cry, or any other advertisement.

§ 383. There is an exception however to this last rule in regard to belief or *opinion in matters of science,* where the maxim of the law is "*cuilibet in arte suâ credendum est.*" Credit is to be given to a witness skilled in his own profession. For instance it is allowable for a medical man, who has not himself attended the prisoner as a patient, to sit in Court during the trial, and having heard the facts of the prisoner's demeanor, conduct, &c., deposed to by other witnesses, he may be asked what opinion, inference, or belief he draws from such evidence, assuming it to be true, as to the state of the prisoner's mind. This was done in *M'Naghten's* case.(a) There the question submitted to the Judges, was as follows :—(b)

"Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time

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(z) 3 *Manning and Ryland's Rep.* p. 212.

(a) 1 *Carr. and K.* p. 156.

(b) Also reported in 10 *Clarke and Fin.*, p. 200.
This case is referred to in a note (b) *Rex v. Higginson.*

of doing the act that he was acting contrary to law, or whether he was laboring under any and what delusion at the time?"

The reply was as follows, by Maule, J.

"Fifth, whether a question can be asked depends, not merely on the questions of fact raised on the record, but on the course of the cause at the time it is proposed to ask it; and the state of an enquiry as to the guilt of a person charged with a crime, and defended on the ground of insanity, may be such that such a question as either of those suggested is proper to be asked and answered, though the witness has never seen the person before the trial, and though he has been present and heard the witnesses; these circumstances, of his never having seen the person before, and of his having been present at the trial, not being necessarily sufficient, as it seems to me, to exclude the lawfulness of a question which is otherwise lawful, though I will not say that an enquiry might not be in such a state as that these circumstances should have such an effect.

"Supposing there is nothing else in the state of the trial to make the questions suggested proper to be asked and answered, except that the witness had been present and heard the evidence, it is to be considered whether that is enough to sustain the question. In principle it is open to this objection, that, as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and as it does not appear what those conclusions are, it may be that the evidence he gives is on such an assumption of facts as make it irrelevant to the enquiry. But such questions have been very frequently asked, and the evidence to which they are directed has been given, and has never, that I am aware of, been successfully objected to. Evidence, most clearly open to this objection, and on the admission of which the event of a most important trial probably turned, was received in the case of the *Queen v. M'Naghten*, tried at the Central Criminal Court in March last, before the Lord Chief Justice, Mr. Justice Williams, and Mr. Justice Coleridge, in which counsel of the highest eminence were engaged on both sides; and I think the course and practice of receiving such evidence, confirmed by the very high authority of these Judges, who not only received it, but left it, as I understand, to the jury without any remark derogating from its weight, ought to be held to warrant its reception, notwithstanding the objection in principle to which it may be open. In cases even where the course of practice in criminal law has been unfavorable to parties accused, and entirely contrary to the most obvious principles of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of Parliament."

And by Tindal, C. J., thus,

"The question lastly proposed by your lordships is:—'Can a medical man

conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was laboring under any and what delusion at the time ?' In answer thereto, we state to your lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But, where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

Starkie, p. 175, note (*i*) should here be consulted :—

" Thus, in an action for unskilfully navigating a ship, a master of the Trinity House, or other nautical man, cannot be asked whether, having heard the evidence, he considers the ship was improperly navigated, for that would be requiring him to draw a conclusion of fact and then to give an opinion upon it, and would make him a judge not only of the matter of skill and science but also of the truth of the facts in dispute ; but he may be asked what was the duty of a captain under certain specified circumstances ; *Sills v. Brown*, 9 Car. & P. 604 ; or whether, admitting the facts as proved by the plaintiff to be true, he is of opinion that a collision could have been avoided by proper care on the part of defendant's servants ; *Fenwick v. Bell*, 1 Car. & K. 312. And see *Malton v. Nesbit*, 1 Car. & P. 70 ; *Jameson v. Drinkald*, 12 Moore, 148. So where the sanity or insanity of an individual is the point to be decided by the jury, and medical men who previously knew nothing of the prisoner, but have heard the evidence, are called on to give an opinion, the proper course is not to ask them what their opinion is as to the state of mind of the party, for that would necessarily assume and involve the truth of the evidence which it is for the jury, and not the witnesses, to weigh and decide, but they should be asked what is their opinion, assuming the facts stated by the witnesses to be true, as to his state of mind ; *M'Naghten's case*, 10 Cl. & Fin. 200 ; 1 Car. & K. 135. Where, however, the truth of the facts is not disputed, and the question remaining is one almost exclusively of science, it is usual to allow the question to be thus broadly put, though, if objected to, it could not be insisted upon. If doubts exist as to the accuracy of some of the facts, it may perhaps be well in propound-

ing the question to the witnesses to exclude those facts from their consideration; and see *Wheeler v. Alderson*, 3 Hagg. Eccl. R. 574."

Another leading case upon this point is *R. v. Searle*[c] the placitum of which is as follows :—

"When a prisoner's defence is insanity, a medical man, who has heard the trial, may be asked whether the facts proved show symptoms of insanity."

§ 384. According to the Scotch law[d] a private writing, if tendered in evidence, must be proved either by;

1st. The person who wrote it.
2nd. Those who have seen him writing.
3rd. Those who know his writing.
4th. By engravers.
5th. By comparison.

§ 385. In the English Ecclesiastical Courts proof of handwriting by comparison has always been admitted, *i. e.* the opinion of persons skilled in deciphering handwriting, such as Bank Clerks, &c. The actual undisputed handwriting is shown and the witness asked if another paper is in the same person's handwriting. This was not admissible according to the English Law till lately. Now by Act II. of 1855, Sec. XLVIII. such comparison is legalized. A comparison of handwriting is not permitted by the Mahomedan Law. See Morley's Digest, Tit. Criminal Law, Case 209.

"Comparison of handwriting is not admitted by the Mahomedan law as legal evidence. *Government v. Chukkun Lal.* 26th Aug. 1806. 1 N. A. Rep. 113.—H. Colebrooke & Fombelle."

It has always been the practice in the Mofussil Courts, which is the more extraordinary, seeing that it was not in accordance with the practice of either the English or Mahomedan Law of Evidence.

§ 386. Although Act II. of 1855, has now declared that such proof is admissible, it may be well for the student to see how the law stood before this enactment. The whole subject is so well handled by Taylor, that though the extract is long, we can scarcely spare the author's passage which will be found in § 1349—53.

"In the Ecclesiastical Courts, witnesses skilled in the examination of handwriting and detection of forgeries, have been permitted for centuries

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(c) 1 *Moo. and Rob.* p. 75.
(d) *Alison*, p. 601.

to depose to their opinion, upon direct comparison of the writing in question with other documents, admitted to be in the handwriting of the party, or proved to be so by persons who saw them written; and that, too, though the specimens on which the comparison is founded may be wholly irrelevant to the case. In France the same doctrine prevails, at least to a limited extent; and in America, though some of the States have adopted the English rule, others have altogether rejected it, while a few have received it, subject to considerable modifications. It will be seen, by referring to the last note, that the American decisions do not add much weight to either side of the argument; and they are here noticed, rather as furnishing to the curious reader ample sources for further investigation, than as affording a safe, or indeed an intelligible, guide, on which to rely. Still, if it were possible to extract from those conflicting judgments any rule, which would find support from the majority of them, perhaps it would amount to this; that such papers can be offered in evidence to the jury, only when no collateral issue can be raised concerning them; that is, where the papers are either conceded to be genuine, or are such as the other party is precluded from denying; or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his own testimony.

"In thus discussing at length the general rule of law, which rejects all proof of handwriting by direct comparison, and in venturing to question the validity of the principles on which this rule is founded, it is not intended for a moment to deny the existence of the rule, but simply to advocate, however feebly, the adoption of another system; and, acknowledging the rule to be the law of the land to the fullest extent, it now becomes necessary to advert to *two exceptions*, which have been recognised in courts of justice with more or less distinctness. *First*, where *other documents, admitted to be genuine, have already been produced as evidence in the cause, the jury may compare them with the writing in dispute.* The reason assigned for this exception is, that, as the jury are entitled to look at such writings for one purpose, it is better to permit them, under the advice or direction of the Court, to examine them for all purposes, than to embarrass them with impracticable distinctions, to the peril of the cause. In fact, it is impossible to prevent the comparison, and therefore the exception may be said to rest on necessity. Moreover, this course is supposed to be the less inconvenient, inasmuch as documents, which are put in for other purposes, will generally be free from all suspicion of having been unfairly selected. But this last reason will not be universally applicable, because, if a paper happen to be admissible in its own nature, as bearing in however slight a degree on the cause, the judge cannot reject it, though it be avowedly put in for the sole purpose of enabling the jury to compare it with another document in dispute. Where

the holder of a bill, which has been endorsed to him by the drawer, brings an action against the acceptor, who by his plea denies the endorsement alone, the jury cannot compare the endorsement with the drawing, and thus find a verdict for the plaintiff without the intervention of a witness, though the acceptance admits the drawing to be correct, and this is further confirmed by a subsequent acknowledgment by the defendant.

"*Secondly*, where *documents* are of such *antiquity* that witnesses who have corresponded with the supposed writer, or who have seen him write, cannot be produced, the law will, from necessity, be satisfied with less strict proof than is required in other cases. We have seen that, as a general rule, such documents, when thirty years old, prove themselves; but nevertheless there are occasions, when in order to establish identity, it becomes necessary to prove the handwriting. For instance, if in a pedigree cause, or a peerage claim, a declaration, purporting to have been written by a deceased member of the family, be tendered in evidence, or if it be required to show the identity of the writer of two ancient documents, only one of which is admissible in the cause, the handwriting must be proved in some legal mode, however ancient the papers may be. The question then remains, how is this to be done? Till within a recent date it has been thought that the proof might be established in one or both of two ways;—either by producing other documents, admitted to be genuine, or proved to have been respected, treated, and acted upon as such by the parties interested in them, and then permitting witnesses, whether experts or others, and perhaps even the jury, to compare such documents directly with the paper in dispute; or by calling witnesses, who, from a prior examination of these documents, could, without an actual comparison, pronounce their belief, as to whether or not the instrument in question were written by the same hand. But though, in the case of *Doe v. Suckermore*, the judges of the Court of Queen's Bench, differing as they did with respect to the immediate question before them, appear to have recognised the legality, if not of both these modes of proof, at least of the latter; yet the House of Lords, by a very recent decision, have thrown much doubt on the subject, if they have not expressly overruled the practice that had hitherto prevailed.

"The question arose on the claim of Sir B. W. Bridges to the Barony of Fitzwalter, when it became necessary to show that a family pedigree, produced from the proper custody, and purporting to have been made some ninety years ago by an ancestor of the claimant, was in fact written by him. To establish this fact, an inspector of official correspondence was called, who stated that he had examined the signatures attached to two or three documents, which were admitted to have been executed by the ancestor;—that they were written in a remarkable character; and that his mind was so

impressed with that character, as to enable him, without immediate comparison, to say whether any other document was or was not in the handwriting of the same person. The Attorney-General having objected to the testimony of this witness, on the ground that he had gained his knowledge of the handwriting, *not* from a *course of business*, like a party's solicitor or steward, but from *studying* the signatures for the *express purpose* of speaking to the identity of the writer, the Lord Chancellor and Lord Brougham were clearly of opinion that the testimony was inadmissible, the latter noble lord observing, that the cases of *Doe v. Tarver*, and *Sparrow v. Farrant*, if correctly reported, had gone further than the rule was ever carried; that the Lord Chief Justice entertained the same views on this last subject; and that if, as was doubtless the case, such kind of evidence had been often received, it was only because no objection had been raised. The family solicitor of the claimant was then called, and having stated that he had acquired a knowledge of the ancestor's handwriting, from having had occasion, at different times, to examine, in *the course of his business*, many deeds and other instruments purporting to have been written or signed by him, the lords considered this witness competent to prove the handwriting of the pedigree. The distinction drawn between these two witnesses is obvious. The former had studied the signatures admitted to be genuine, with the avowed purpose of discovering a similitude between them and the writing in dispute, and might well be supposed to bring to the investigation that bias in favor of the party calling him, which is proverbially displayed by scientific witnesses; the latter had acquired his knowledge incidentally, and unintentionally, under no circumstances of prejudice or suspicion, and, what is especially worthy of remark, without reference to any particular object, person, or document.

"Again, in another recent case, where, in order to prove a pedigree, it became necessary to rely upon a marriage certificate, which purported to have been written and signed eighty-five years before the trial, by W. Davies, the then curate of the parish, the Court held that the document was admissible, on proof by the parish clerk, that in the course of his official duty he had acquired a knowledge of the handwriting of Mr. Davies from various signatures in the original register. It was objected that some witness should have been called to speak to the death of the curate, or to have shown when he died, or at least that some search should have been made for persons who might have seen him write, or have been able to prove his signature in the ordinary way; but the objections were overruled as untenable. Coupling these decisions with the case of *Brookbard v. Woodley*, in which Mr. Justice Yates refused to permit the proof of an old paper by comparison, it may perhaps be stated as the better opinion, that, although in proving *ancient* writings, no evidence of an ineffectual search for persons who have

corresponded with the writer need be given, yet, in strict law, the handwriting of such documents must be proved by some witness who has become acquainted with it in the ordinary course of his business, and that it will not be allowable, either to call a scientific witness who has obtained his knowledge by studying other documents in the same handwriting, or to produce such documents to the jury, provided they be not admissible for some other purpose, in order to enable them to form a comparison."

§ 387. A man swearing falsely to *belief* may be indicted for perjury. The leading case on this point is *Pedley's case.*(e)

"A *bankrupt* committed on *mesne process*, on *an extent* from the Crown, and also under the *Commissioners' warrant*, may be discharged *quoad* the commitment by the Commissioners, if they have mistaken *improbable* answers for *unsatisfactory* ones; for if he is perjured, he may be indicted, though he has not sworn *positively*, but only that he *believes*, &c.

§ 388. In France the evidence of skilled witnesses, or as they are called "*Experts*," is carried to a great length. The celebrated case of Le Brun affords an excellent illustration. There "*Experts*" were examined on a variety of points.(f)

§ 389. A witness skilled in foreign law may be asked as to his opinion of the law. By Act II. of 1855, Sec. XII. a provision is made which will go far towards obviating the necessity for recourse to this dilatory and expensive method of ascertaining the state of foreign law.

§ 390. Great caution is necessary in receiving the evidence of professional witnesses. The medical testimony recorded in Palmer's trial for the murder of Cooke will be fresh in the recollection of all. And the following remarks of Best should be borne in mind.(g)

"But the weight due to this, as well as every other kind of evidence, is to be determined by the tribunal, which is to form its own judgment on the matters before it, and is not concluded by that of any witness, however highly qualified or respectable. Nor is this always an easy task; there being no evidence the value of which varies so immensely as that now under

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(e) 1 *Leach's Crown Law*, p. 327.

(f) 3 *Bentham's Rat. of Ev.* p. 60.
The cause is reported 3 *Causes Celebres*, p. 323. There "Experts" were examined from various trades; lockmakers to speak to the state of locks; washerwomen to clothes, &c.; and the unfortunate Le Brun was condemned and executed, though his innocence was fully established subsequently by the confession of the real murderer. We have a striking instance of the evidence of Experts in the very recent case of *Bremer v. Freeman and another*, decided in the Privy Council, on the domicile of Englishmen in France. There a number of "Experts" were examined on both sides to prove what was the law of France.

(g) § 496.

consideration, and respecting which it is so difficult to lay down any rules beforehand. Its most legitimate, valuable, and wonderful application is on charges of poisoning, where poison is extracted from a corpse by means of chemical analysis. 'It is surely,' says Dr. Beck, 'no mean effort of human skill to be brought to a dead body, disinterred perhaps after it has lain for months, or even years in the grave; to examine its morbid condition; to analyze the fluids contained in it (often in the smallest possible quantities); and from a course of deductions founded in the strictest logic, to pronounce an opinion, which combined circumstances, or the confession of the criminal, prove to be correct. It is such duties ably performed, that raise our profession to an exalted rank in the eyes of the world; that cause the vulgar to marvel at the mysterious power by which an atom of arsenic, mingled amidst a mass of confused ingesta, can still be detected. It does more: it impresses on the minds of assassins, who resort to poison, a salutary dread of the great impossibility of escaping discovery.' And it would not be easy to overrate the value of the evidence given in many difficult and delicate enquiries, not only by medical men and physiologists, but by learned and experienced persons in various branches of science, art, and trade. But as it is impossible *á priori* to measure the integrity of any witness, and equally so to determine the amount of skill which a person following a particular science, art, or trade may possess, the tribunal is under the necessity of listening to all such witnesses who present themselves. Now, after making every allowance for the natural bias which witnesses usually feel in favor of causes in which they are embarked, and giving a wide latitude for *bonâ fide* opinions, however unfounded or fantastical, which persons may form on subjects necessarily much depending on conjecture, there can be no doubt that much testimony is daily received in our courts as 'scientific evidence' to which it is almost profanation to apply the term; as being revolting to common sense, and wholly inconsistent with the commonest honesty on the part of those by whom it is given. In truth witnesses of this description are apt to presume largely on the ignorance of their hearers with respect to the subject of examination, and little dread prosecution for perjury—an offence of which it is extremely difficult to convict a person who only swears to his belief, and, when that belief relates to scientific matters, may be pronounced almost impossible. On the other hand, however, mistakes have occasionally arisen from not attaching sufficient weight to scientific testimony. This arises chiefly where the knowledge of the tribunal and society in general are in a high degree in arrear of the scientific knowledge of the witness. One remarkable instance is cited by a modern author on the law of evidence. A civil engineer of high reputation having deposed before a committee that locomotive engines might very possibly be expected to travel on railroads at the rate of ten miles an hour, the interrogating

counsel contemptuously bid him stand down, for he should ask him no more questions, and the weight of his former evidence was much impaired."

§ 391. A witness may be examined, thirdly, as to Hearsay, in those cases which have already been considered of Pedigree, &c. See ante (§ 127—292.)

§ 392. *Refreshing Memory.*(h)—When a witness is asked as to facts of which he has no recollection, or but a faint one, except through the medium of some written memorandum made at or about the time of the event to which it relates, he may look at such memorandum for the purpose of refreshing his memory. Starkie writes as follows, page 177 :—

" Although in general leading questions are not to be put to a witness, yet, where his memory has failed, he may, even during examination, read, or, if necessary, hear the contents of a document read, for the purpose of reviving his former recollection. And if by that means he obtains a recollection of the facts themselves as distinct from the memorandum, his statement is admissible in evidence. A witness is, of course, competent to testify as to his actual present recollection of a fact, although in the interval his memory may have failed, and although such defect, and the means of restoration may be the subject of comment in cases to which any suspicion is attached. The law however goes further, and in some instances permits a witness to give evidence as to a fact, although he has no present recollection of the fact itself. This happens in the first place where the witness having no longer any recollection of the fact itself, is yet enabled to state that at some former time, and whilst he had a perfect recollection of that fact, he committed it to writing. If the witness be correct in that which he positively states from present recollection, viz., that at a prior time he had a perfect recollection, and having that recollection, truly stated it in the document produced, the writing, though its contents are thus but mediately proved, must be true. Such evidence, though its reception be warranted by sound principles, is not in ordinary cases as strong and satisfactory as immediate testimony, for in such cases, the witness professing to have no recollection left as to the facts themselves, there is less opportunity for cross-examination, and fraud is more easily practised.

" There is also a class of cases where the testimony of a witness is admissible to prove a fact, although he has neither any recollection of the fact itself, nor mediate knowledge of the fact, by means of a memorial of the truth of which he has a present recollection. This happens where the memorandum is such as to enable the witness to state with certainty that it would not

(h) These remarks are of course equally applicable to cross and re-examination.

have been made had not the fact in question been true. Here the truth of the evidence does not wholly depend on the contents of the document itself, or on any recollection of the witness of the document itself, or of the circumstances under which it was made, but upon a conviction arising from the knowledge of his own habits and conduct sufficiently strong to make the existence of the document wholly irreconcilable with the non-existence of the fact, and so to convince him of the affirmative.

"Thus, in proving the execution of a deed or other instrument (one of the most ordinary and cogent cases within this class) where a witness called to prove the execution of a deed sees his signature to the attestation, and says he is thereby sure that he saw the party execute the deed, that is a sufficient proof of the execution of the deed, although the witness should add that he has no recollection of the fact of the execution of the deed. The admission of such evidence is not confined to attestations of the execution of written instruments."

§ 393. What Starkie here says may be reduced under three heads.

1st. When the document brings the facts immediately to recollection.

2nd. When the witness has no present recollection of the fact itself brought home to him by the perusal of the document, but he can state that he *did* truly commit the fact to writing.

3rd. When he recollects nothing from the document, but feels satisfied that he would not have written it unless it was true. A common instance of this is afforded by the attesting witness of an old document, from whose memory all recollection of the execution has faded, but who says he is satisfied that he would not have attested it, unless it had been properly executed.

§ 394. Generally speaking, an instrument used for the purpose of refreshing memory, ought to be in the handwriting of the person using it, and as nearly as possible contemporaneous with the fact which it records; at the same time, neither of these conditions is absolutely indispensable. A witness may refresh his memory from a document written by another, if at or about the time it was made, he has seen and inspected it, and it does bring the fact to his memory. For instance, a ship's log book is usually written up by the mate; yet the captain would be permitted to refresh his memory by it, if he could swear that he examined it shortly after the time of the

entry, and that it was correct, and that by looking at the entry he remembered that the circumstance it narrated had taken place. So a shopkeeper who has himself sold goods, of which the accounts are kept by one in his employ, if he has inspected the entries within a reasonable time after the entry was made, would be allowed to refresh his memory by the memorandum, notwithstanding it was made by a third person; but it is evident that the weight to be attached to such testimony will vary according to circumstances. A judge will attach much more weight to the evidence of a person speaking from a contemporaneous entry made by his own hand, than to that of one to whose memory the fact was recalled by a memorandum made by a third party, and which perhaps he had not seen for some time after it was made.

§ 395. The law upon this point is now settled by Act II. of 1855, Section XLV.

§ 396. In accordance with the rule which requires the production of the best evidence, the memorandum itself must be produced, not a copy of it, unless indeed the Court is satisfied that the non-production of the original has been sufficiently accounted for. It frequently happens that a witness makes an extract from his books, which would be themselves good sources for refreshing his memory: while the extract as a mere copy of such books is not receivable. See Act II. of 1855, Section XLVI.

§ 397. When a document is put into the hands of a witness for the purpose of refreshing his memory, the opposite pleader has a right to see it, and he may cross-examine the witness upon the whole of it. See Act II. of 1855, Section XLV.

2nd. Cross-Examination.

§ 398. It is impossible more lucidly to explain the use and objects of cross-examination than in the words of Starkie(*) already quoted.(k)

§ 399. Any witness who has once been sworn, may be cross-examined, although no question may have been asked him in chief; unless he has been sworn by mistake, as where there are two witnesses of the same name, and the wrong one answers to his name.

§ 400. Leading questions may be asked on cross-examination:

(*) P. 195. (k) See ante § 61.

but words must not be put into the mouth of a witness, in order that he may echo them back; nor must the pleader, by his form of question, assume, as already proved, any fact which has not been proved, or any statement as made, which has not been made. This is an error of constant occurrence, though nothing can be more unfair.

§ 401. A witness may not be cross-examined as to collateral matters; for they are foreign to the issue. If questions upon collateral facts were permitted to be put for the purpose of laying a foundation to contradict the witness as to the answers he might give, it is clear that one trial might ramify into fifty; a judge might have to try twenty different issues upon matters which would not in the least assist, but on the contrary might embarrass him in deciding the issue really before him. For instance, on an action founded on a contract, a witness should not be examined or cross-examined as to a contract made with third parties. The leading case on this point is *Spenceley v. De Willott.* (*l*)

"The Court were all decidedly of opinion that it was not competent to counsel on cross-examination to question the witness concerning a fact wholly irrelevant to the matter in issue, if answered affirmatively, for the purpose of discrediting him if he answered in the negative by calling other witnesses to disprove what he said. That in this case, whatever contracts the witness might have entered into with other persons for other loans, they could not be evidence of the contract made with the defendant, unless the witness had first said that he made the same contract with the defendant as he had made with those persons; which he had not said."

§ 402. A witness does not come into Court prepared to answer as to all the transactions of his past life; and when a collateral matter has been examined into without objection being made, the evidence must be taken as it stands; it cannot be contradicted; for then the error already tolerated, perhaps through an oversight, would be indefinitely increased, and the trial prolonged upon purely irrelevant matter.

§ 403. But the character of a witness is never irrelevant; since it is of the highest importance in enabling the judge to weigh the value of his testimony. There has been a long struggle on this point, which even yet is not concluded in England, and in this respect the Law of India is in advance.

(*l*) 7 *East*, p. 108.

§ 404. By 14 and 15 Vic. c. 99, s. III. a witness is not bound to answer criminating questions: but by Act II. of 1855, Sec. XXXII. it is provided as follows :—

"A witness shall not be excused from answering any question relevant to the matter in issue in any suit or in any Civil or Criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate such witness, or that it will expose, or tend, directly or indirectly, to expose such witness to a penalty or forfeiture of any kind.

"Provided that no such answer, which a witness shall be compelled to give, shall, except for the purpose of punishing such person for wilfully giving false evidence upon such examination, subject him to any arrest or prosecution, or be used as evidence against such witness in any criminal proceeding."

§ 405. Where such question is answered in the negative, it is not open to contradiction.

§ 406. Whether a degrading question(m) may be asked has been the subject of much controversy: but it should be remembered that as the law formerly stood witnesses who had been convicted of felony were considered infamous, and incapable and unworthy to give evidence: but now that this disability has been removed, it seems only reasonable that they should be bound to answer questions as to their former crimes, notwithstanding the degrading tendency, for otherwise a material circumstance for determining the true value of their evidence will not be brought under the notice of the judge. Accordingly Act II. of 1855, Sec. XXXIII. provides as follows :—

"A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction."

§ 407. Although the law is now thus settled, it may be well to study the following remarks of Phillipps :—(n)

"Thirdly, the last case to be mentioned on this subject is, where a question is asked not relevant to the matters in issue, the answering of which has a direct tendency to degrade the witness' character, though it may not subject him to a criminal prosecution. If a witness, for instance, were to

(m) Observe the difference between criminating and degrading questions. The former are those which threaten to bring the witness subsequently within the danger of the law: the latter may be such as seek to expose his having already suffered the penalty of the law.

(n) Vol. 2 page 493.

be asked, whether he had not suffered some infamous punishment, or if any other question of the same kind were asked, imputing criminality to the witness in some past transaction, and not relevant to the matters in issue, would he be compellable to answer? The enquiry here made, it is to be observed, relates only to such questions as are not relevant to the matters in issue; for if the transaction, to which the witness is interrogated, form any part of the issue, he will be obliged to give evidence, however strongly it may reflect upon his character.

There seems to be no reported case, in which this point has been solemnly determined; and, in the absence of all express authority, opinions have been much divided. The advocates for a compulsory power in cross-examination might argue, that as parties are frequently surprised by the appearance of a witness unknown to them, or, if known, entirely unexpected, without such power they would have no adequate means of ascertaining what credit is due to his testimony; that on the cross-examination of spies, informers, and accomplices, this power is more particularly necessary: and that if a witness may not be questioned as to his character at the moment of trial, the property and even the life of a party must often be endangered. Those, on the other side, who maintain, that a witness is not compellable to answer such questions, may contend to the following effect. They say, the obligation to give evidence arises from the oath, which every witness takes; that by this oath he binds himself only to speak touching the matters in issue; and that such particular facts as these—whether the witness has been in gaol for felony or suffered some infamous punishment, or the like,—cannot form any part of the issue, as appears evident from this consideration, that the party, against whom the witness is called, would not be allowed to prove such particular facts by other witnesses. They may argue, further, that it would be an extreme grievance to a witness, to be compelled to disclose past transactions of his life, which may have been since forgotten, and to expose his character afresh to evil report and obloquy, when perhaps by subsequent conduct he may have recovered the good opinion of the world; that if a witness is privileged from answering a question, though relevant to the matters in issue, because it may tend to subject him to a forfeiture of property, with much more reason ought he to be excused from answering an irrelevant question to the disparagement and forfeiture of his character; that in the case of accomplices, in which this compulsory power of cross-examination is thought to be more particularly necessary, the power may be properly conceded to a certain extent, because accomplices stand in a peculiar situation, being admitted to give evidence only under the implied condition of making a full and true confession of the whole truth; but even accomplices are not to be questioned, in their cross-examination, as to other offences in which they have not been concerned with the prisoner: lastly,

that with respect to witnesses, in general, the best course to be adopted, both in point of convenience and justice, is to allow the question to be asked, at the same time allowing the witness to shelter himself under his privilege of refusing to answer, and, if he refuses, to leave it to the jury to draw their own conclusion as to his motives for such refusal."(o)

§ 408. Under the old law, where such a question was answered in the negative, it was conclusive; but now by Section XXXIII. of Act II. of 1855 above quoted, the conviction may be proved.

§ 409. A witness is bound to answer a question relevant to the matter in issue, notwithstanding it may subject him to a civil suit. This was provided by 46, Geo. 3, c. 37.(p)

§ 410. A witness now cannot object to answer a question because it may expose him to a penalty or forfeiture. This is expressly provided by Section XXXIII. of Act. II. of 1855, above quoted. The declaratory Statute 46, Geo. 3, c. 37, s. II. was in favor of the exemption. Suppose an enam were granted upon a particular condition, the grantee could not refuse to answer a question, although the answer should disclose his non-fulfilment or breach of a condition which would work a forfeiture of his estate.

§ 411. A witness may be cross-examined as to writings for either of two purposes. First, to establish the writing itself; secondly, to test his memory. In either of these aspects it becomes a question whether the witness should have an opportunity of examining the

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(o) The various authorities are then discussed: but it is unnecessary to load the text with them, as the Legislature has now settled the point. Russell on Crimes, vol. 2, p. 927 may also be consulted. And No. 99 of the *Law Magazine*, p. 258, by those anxious to pursue the subject.

(p) This subject was much discussed, and as an instance of the difficulty and slowness with which the present enlightened principles of evidence have made their way, we may consult Phillipps, vol. 2, p. 493, note (1)

"This subject was much discussed, and referred to the judges for their opinion. A bill had been brought into the House of Lords, to indemnify witnesses from criminal prosecutions and from civil process, to which they might be exposed by giving evidence. The indemnity from *criminal* prosecutions was agreed to: but some doubts arising with respect to the indemnification from *civil* process, several questions were referred to the judges with the view of ascertaining whether persons were legally justified in refusing to answer questions, the result of which might subject them to a civil suit, (Vol. 6. Parl. Deb., p. 167.) Three questions were proposed; the object of the first and second was to ascertain, whether a witness could demur to a question, the answering of which might render him liable to an action for debt, or to a suit for the recovery of the profits of public money; the object of the third was to ascertain, whether a witness, who on making a full and fair disclosure was to be excused from certain debts, could, as the law then stood, be objected to on the ground of his being interested. (P. 222.) Mansfield, C. J., who delivered the opinion of the judges, stated, that upon the first two questions they were divided in opinion. (P. 223.) The House of Lords then called upon the judges to deliver their opinions *seriatim* on the proposed questions. (P. 226,227.) The judges accordingly delivered their opinions in order. Four of the judges (Mansfield, C. J., Grose, J., Rooke, J., and Thomson, J.) were of opinion, that a witness was not compellable to answer any question, the answer to which might subject him to a civil action: the other judges, together with the Lord Chancellor, and Lord Eldon, were of a contrary opinion. (P. 234,245.)

writing in the first instance, before his cross-examination begins. I have observed in a multitude of depositions taken in Mofussil Courts, the practice of examining and cross-examining a witness as to the contents of documents, without the document being ever shown to him, or where it is put into his hands only at the close of his examination. This is particularly observable with regard to attesting witnesses: who frequently undergo a long examination and cross-examination as to the fact of attestation and execution of the document, without ever having the paper first put into their hands: that being done at the conclusion of the examination, by the Court, as it were, as a mere formality; and the question asked, Is this the paper of which you have been speaking?

§ 412. With regard to the first purpose: that of establishing the writing itself, the subject has undergone much consideration by the Judges of England. Starkie(q) thus states the whole matter:—

"In the course of the proceedings in the House of Lords in *The Queen's case*, Louisa Dumont, a witness in support of the charge, having been asked, upon cross-examination, whether she did not use certain expressions which the counsel read from a supposed letter from the witness to her sister, it was objected by the Attorney-General that the letter itself ought to be put in before any use could be made of its contents.

"The following questions were in consequence proposed to the judges:—

"First,—Whether in the Courts below, a party, on cross-examination, would be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked that witness whether the witness wrote that letter, and his admitting that he wrote such letter?

"Secondly,—Whether, when a letter is produced in the Courts below, the Court would allow a witness to be asked, upon showing a witness only a part of or one or more lines of such letter, and not the whole of it, whether he wrote such part, or such one or more lines; and in case the witness shall not admit that he did or did not write the same, the witness can be examined to the contents of such letter?

"The first question was answered in the negative for the following reasons:—'The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself and by that alone, if the paper be in existence. The proper course, therefore,

(q) Page 216.

is to ask the witness whether or no that letter is of the handwriting of the witness? If the witness admits that it is of his or her handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence, and when the letter is produced then the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments is, in order that the Court may be possessed of the whole. If the course which is here proposed should be followed, the cross-examining counsel may put the Court in possession only of a part of the contents of the written paper; and thus the Court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part.'

"To the second question the judges returned the following answer:—In answer to the first part, 'Whether when a letter is produced in the Courts below the Court would allow a witness to be asked, upon showing the witness only a part or one or more lines of such letter, and not the whole of it, whether he wrote such part?' the judges are of opinion that that question should be answered by them in the affirmative in that form; but in answer to the latter part, which is this, 'And in case the witness shall not admit that he did or did not write such part, whether he can be examined as to the contents of such letter?' the learned Judges answer in the negative, for the reason already given, namely, that the paper itself is to be produced in order that the whole may be seen, and the one part explained by the other.

"Upon the further question proposed, 'Whether, when a witness is cross-examined, and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the Courts below, whether he did or did not make statements such as the counsel shall, by questions addressed to the witness, enquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are not contained in the letter?' the judges were of opinion, that the counsel cannot, by questions addressed to the witness, enquire whether or no such statements are contained in the letter, but that the letter itself must be read to manifest whether such statements are or are not contained in that letter. They found their opinion upon what, in their opinion, is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by any parol evidence.

"To another question, viz.: 'In what stage of the proceedings, according to the practice of the Courts below, such letter could be required by counsel to be read, or be permitted by the Court below to be read,' the learned judges answered, that according to the ordinary rule of proceedings in the Courts

below, the letter is to be read as the evidence of the cross-examining counsel, as a part of his evidence in his turn, after he shall have opened his case; that that is the ordinary course; but that, if the counsel, who is cross-examining, suggests to the Court that he wishes to have the letter read immediately, in order that he may, after the contents of that letter shall have been made known to the Court, found certain questions upon the contents of that letter, which could not well or effectually be done without reading the letter itself, that becomes an excepted case in the Courts below; and for the convenient administration of justice the letter is permitted to be read at the suggestion of the counsel; but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of having such letter considered as part of his evidence.

"In the course of the same proceeding, the counsel for the Queen, having cross-examined Guiseppe Sacchi, whether he had ever represented to any person after he had left the service of the Princess, that he had taxed himself with ingratitude towards a generous mistress; it was objected, that the witness should be asked whether such representation made by him was an oral or written one, because, if written, the writing itself should be produced before the question could be put. The following question was in consequence proposed to the judges: 'Whether, according to the established practice in the Courts below, counsel, in cross-examining, are entitled, if the counsel on the other side object to it, to ask a witness whether he has made representations of a particular nature, not specifying in his question whether the question refers to representations in writing or in words?'

"The Lord Chief Justice, in delivering the opinions of the judges, observed, that they felt some difficulty in giving a distinct answer to that proposition, as they did not remember an instance of a question having been asked by the cross-examining counsel, precisely in those words, and were not aware of any established practice distinctly referring to such a question. He adverted to the rule of law respecting the examination of a witness as to a contract or agreement, in which case, if the counsel on one side were to put a question generally as to the contract, the ordinary course is for the counsel on the other side to interpose an intermediate question, whether the contract referred to was in writing, and if the contract should appear to have been in writing, then all further enquiry would be stopped, because the writing itself must be produced. With *reference to this established rule*, they considered the question proposed to them, and were of opinion that the witness could not properly be asked on cross-examination, whether he had written such a thing, the proper course being to put the writing into his hands, and ask him whether it be his writing. They held, also, that if the witness were asked whether he had *represented* such a thing, they should direct the counsel to ask whether the representation had been made in wri-

ting or by words; and if in consequence he should ask whether it had been made in writing, the counsel on the other side would object to the question; but if he should ask whether the witness had *said* such a thing, the counsel would undoubtedly have a right to put that question.

"It seems to be perfectly clear, that if it appear from the cross-examination of the witness, or from any antecedent evidence, that the writing in question has been destroyed, the objection founded on the reasons alleged by the learned judges ceases; and as the defendant may at all events, in his turn, adduce secondary evidence of the contents, there is no objection to his proving the contents in the first instance by means of the adversary's witness. Thus it has been held, where depositions have been taken and lost, a witness, after proof of the loss, may be cross-examined from copies. And in order to let in this secondary evidence, the cross-examination party, before or during the cross-examination, may call a person on his *subpœna duces tecum* to produce the writing, or call on the adversary so to do, if he has had notice to produce.

"It is to be observed, that the opinions delivered by the judges upon the preceding questions, were founded, for the most part, on the principle that the best evidence must be adduced which the case admits of, and on the supposition that the object of the cross-examination is to establish in evidence the contents of a written document as material to the cause. Where that is the case the objection is invincible."

And Taylor, § 1056, writes as follows :—

"In conformity with the general rule of law, which requires the contents of every document to be proved by its production, if that course be possible, it was decided, in the Queen's case, after solemn argument, that the cross-examining counsel cannot be allowed, in the statement of a question, to represent the contents of a producible letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect; but that the *proper course is to show the witness the letter*, or some one or more lines of it, and then to ask him whether or not it is in his handwriting. If he admits that it is, the cross-examining counsel may, at his proper season, read that letter as evidence; or the Court will even permit it to be read immediately, if the counsel suggests that he wishes to found certain questions upon it; but, in either case, it must be produced as *his* evidence, and the whole of it must be read. The chief reason assigned by the judges for this rule is, that the adoption of a contrary course would enable the cross-examining counsel to put the Court in possession of only a part of the contents of a paper, though a knowledge of the whole might be essential to a right judgment in the cause. So stringent is the rule, that if a witness, on cross-examination, be asked whether he has ever made *representations* of the particular nature stated to him, the counsel will be required to