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PREFACE.

The aim of the author in the composition of the present work, is to combine an exposition of the principles which constitute the foundation of the Law of Evidence, the subject of the Treatise, with the practical development of the Law; and to render the work useful alike to the Student and the Practitioner.

It addresses itself more particularly to India. But the English Law of Evidence is the basis of that of India;—so that what is explained is in fact the Law of Evidence as administered in the Courts of England; with those occasional modifications which have been introduced by Indian legislation. Some subjects of English law, indeed, are matters of mere local application, and these are omitted accordingly.

The Analysis which precedes the body of the work will be found to exhibit, at a glance, a summary of its entire contents; while this will at the same time prove a useful adjunct to the Index;—for which, indeed, it is in part substitutional.

Considering the number and the ability of the already existing Treatises on the English Law of Evidence, some apology might, at first sight, appear required for the obtrusion of a new work on the subject; and the author is too conscious of the superiority of those works to his own, not to feel, that were this treatise intended only for English readers, he was unduly entering on a field already amply occupied. It appeared to him, however, that while English Treatises were, of course, silent as to the peculiarities of the Indian system, there was much in them of a local character only; which, while it added to the bulk of the volume, added nothing to an elucidation of principle. Indeed, even as regards principle, the extended illustration of this by the varied, and often lengthened statement of cases, which swells the text of most English books on the same subject, however applicable to England, is felt to be somewhat redundant in reference to the simpler requisitions of India; and the elaborate enumeration, found in the foot-notes of English books, of the cases from which the propositions of the text are deduced, while
adding most inconveniently to size, would, in the main, be almost practically useless in India. At all events it would be so beyond the limits of the three Presidency Towns; in which alone, it is believed, the very books of reference are themselves to be found; and when found at all, found to a limited extent only.

It was conceived accordingly that a work might be framed, practically useful, based on the theory of being explanatory of principle; with sufficient only of illustration from decided cases to secure the intelligibility and authority of the principle stated; and with such restricted foot-note reference as seemed called for, in the instances in which the authorities were of a more leading character, or in which, in individual cases, it might be desirable otherwise to afford to those within whose command the books might chance to fall, the means of consulting them. Such is the work which the present purports to be.

It should be added, on the subject of the citation of cases, that with a view to give a higher authority to the statement of the law contained in the text, it has been attempted, so far as conveniently practicable, when that law was to be found in leading propositions enunciated by the Judges of the Courts, to set these out in the language of the Judges themselves. Both in original statement, and elucidation, the author too has borrowed largely from the many eminent text-writers on the Law of Evidence, particularly those of the present day; and no less from the intrinsic merit of this exposition, than on the principle that in transcribing their statements of the law into his pages, he was procuring for his work an authority he could hardly hope for on any reputation of his own. In fact, he has treated them as authorities in themselves. He trusts that, in doing so, he will not be considered as unduly availing himself of the labours of others; and the source of his obligation will, he believes, be found always acknowledged.

Some progress had been made in the work before he had become aware of the existence of, and more before he had seen, the able Treatise of Mr. Norton,—"The Law of Evidence applicable to the Courts of the East India Company;"—a Treatise, however, which, in effect, addresses itself still more generally to the Law of Evidence, and of course to English as well as Indian Law, and which is justly
entitled to a higher and more ambitious designation. Regard being had, however, to the somewhat differing scope and character of the two works, and the wideness of the field open to both, it was felt that there was still abundant room for each; and the author persevered in his original design. In acknowledging his obligations to other text-writers, he has to include those to Mr. Norton.

Allusion has been made to the attempted adaptation of the work to the wants both of the Student and the Practitioner. It is hoped that its scheme,—and based more particularly as this is on the theory of an exposition of principle,—will adapt itself to all whose business it is to make the English Law of Evidence their study, whether as students in England, or in India; and especially to those who are looking to the latter as the scene of their labours; while it is trusted that the practical character to which at the same time it aspires, will not make it useless to those of more advanced position; and particularly all who, scattered throughout the different localities of India, are, in one form or another, engaged in the administration of the Law there.

The author cannot conclude without offering his acknowledgments to Mr. Ninian H. Thomson, Advocate of the Supreme Court of Calcutta, (now one of the Professors in Presidency College,) for suggestions and valuable criticism on different portions of the work.

Calcutta, December 1861.
CORRECTIONS AND ADDITIONS.

ANALYSIS.

Page II. For,—summoning of Witnesses,—read summoning of Jurors.

BODY OF WORK.

14. For—Summoning of Witnesses,—read summoning of Jurors.

15. Note.—For subjecta, read subjecta.

22.—and some occasional subsequent pages.—For Phillips,—read Phillipps.

62. For,—would direct, &c., and would be presumed,—read might direct, &c., and might be presumed.

64. For,—so an action of ejectment proceeds, &c., read,—so, in India, an action of ejectment—(in conformity with the practice which prevailed in England prior to the Common Law Procedure Act of 1852)—proceeds, &c.

90. For—The true meaning of the phrase is “having gone to the well I did not see her there,”—read “I did not go to the well, I did not see her there.”

206. Note.—For Clark read Clark.

203. Marginal Placitum,—For indirect,—read indiscreet.

272. In reference to the formalities stated to be required for the execution of a will, and at the words ‘foot or end of the will,’ add Foot-note.—Explained by 25 Victoria, c. 24, to be in such a position as to render it apparent that it was the intention of the testator to give effect to the instrument by his signature.

292. Marginal Placitum—“Questionable obligation of Foreign Judgments”—Erase the words,—“Questionable obligation of.”
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THE LAW OF EVIDENCE.

CHAPTER I.

On Evidence in general—and its Classifications.

Where perception of any given fact is arrived at through the direct medium of the senses, the mind yields credence to its existence, almost as it were intuitively, and with little aid of the reasoning faculty. In all other cases every persuasion of the mind, on that which is submitted to its decision, is the result of a more elaborate exercise of the reasoning powers, upon the materials on which the judgment is to be formed. A man is struck down before one's face. The eye witnesses the scene, and the mind acknowledges its truth. But did the striking down not occur in our presence, so that we could only arrive at its knowledge on the information of others, before we admitted its existence as a fact, we should have to reason on the surrounding circumstances of the case, and the personal credibility of the narrator. Conclusion would be the result only of the more circuitous process.

In mathematical science alone, or that which partakes of its nature, is actual demonstration to be found. Every other species of reasoning, even when producing the impression of certainty, does, in reality, only establish a probability. The probability may be so high as to appear incontrovertible, and practically to result in conviction. Still the conclusion of the judgment is not one of demonstration.

This is attributable alike to the limited range of human knowledge; and to the infirmity of individual intellect. We can never know on the one hand, that all the facts bearing on the conclusion are submitted to our judgment; or that
such as may be presented to it exist in their rightful shape and just proportions; nor, on the other, can we be assured that the mental vision, the medium of observation, may not be imperfect, obscure, or colored, and the rays passing through it distorted.

It has been remarked by a French philosopher that some one event or diversion might change the whole course of after-time. So a single flaw in the process of induction might derange the apparently least faulty, and best constructed theory. One fact omitted, one erroneous influence given to another, and the whole chain of reasoning, through which a conclusion had been arrived at, might fail.

Mankind is not in this respect further advanced than it was in the days of the author of the Essay on the Human Understanding; and "He" said Locke, "that will not eat till he has demonstration that it will nourish him, he that will not stir till he infallibly knows the business he goes about will succeed, will have but little else to do but to sit still and perish."†

Though absolute certainty, however, is but sparingly given to human sagacity to achieve, enough has been granted us to guide our conclusions to a result sufficiently exact for every practical exigence; and under ordinary circumstances, all that is required is a knowledge of the facts, so far as they are fairly and reasonably capable of being collected, and an honest exercise of the reasoning faculty upon them.

As it is upon the facts that our conclusions should rest, and the facts again in their turn, before they can be admitted as such into the mind, depending on their proof, it follows that a knowledge, more or less ample, of the principles of evidence, lies at the root of all just conclusion.

Indeed, in arriving at its decisions, the mind has to exercise the two-fold operation; first of deciding for itself the credit due to the

---

* "Un seul pas trouble souvent la marche du Tems."—Condorcet. Équisse de l'esprit humain.

† Locke on the Human Understanding, Book IV., C. I, Section 7.
supposed facts of the case; and then of determining what inference is to be deduced from those to which it yields its credence.

The field of our enquiry must be confined to the principles of evidence which enter into and form part of the Judicial system: but, as these may claim for their basis the broad foundation of experience, and a philosophical adaptation of its results, the principles which prevail in our law of evidence would, in the main, afford a safe guidance in any other or more general investigation.

Evidence, in the popular sense of the word, is that on which the meaning of evidence in popular sense. manifestation to the mind of any given fact rests. In proportion to the force of the evidence is, or ought to be, our belief of the fact itself.

It is remarked by Mr. Wills that—

"Every conclusion of the Judgment, whatever may be its subject, is the result of Evidence,—a word which (derived from words in the dead languages signifying to see, to know) by a natural transition is applied to denote the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved."

So Mr. Best—

"Evidence, taken in its largest and most comprehensive sense, has been accurately defined to be any matter of fact, the effect, tendency, or design of which, when presented to the mind, is to produce a persuasion therein affirmative or disaffirmative of the existence of some other matter of fact; the latter of which may be called the principal fact, and the former the evidentiary fact; and when the persuasion is at its highest point, the principal fact may in a more expressive way be termed the fact proved," and the evidentiary the "probative fact."†

It will be obvious from these definitions that the Logicians speak with accuracy when they ascribe to the word proof the meaning rather of the effect of evidence, than of evidence itself—a distinction pointed out by Archbishop Whately in

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* Wills on Circumstantial Evidence, p. 2.
† Best on Presumption, p. 7.
his Treatise on Logic when he says—"The term proof is often confounded with that of evidence, and applied to denote the medium of proof; whereas in strictness it marks merely the effect of evidence. When the result of evidence is undoubting assent to the certainty of the event or proposition which is the subject matter of enquiry, such event or proposition is said to be proved; and according to the nature of the evidence on which such conclusion is grounded, it is either known or believed to be true."*

The proposition of Archbishop Whately is well illustrated by Mr. Best, in continuation of the passage from his work just cited:—

"Hence it is clear" he observes "that evidence of a fact, and proof of it are not synonymous terms. Proof (using the word in the sense of persuasion or belief brought in the mind) is the perfection of evidence; without evidence there can be no proof, although there may be evidence which does not amount to proof. Take the case for instance of a man found murdered at a spot towards which another had been seen walking a short time before; this would be evidence to show that the latter was the murderer, but, standing alone, would be far from proof of it."

It cannot be denied however that in common parlance, and even in legal phraseology, the two expressions are often confounded.

By writers on Evidence the subject of proof has been termed the 'Factum probandum' or matter to be proved; the means of proof have been styled the 'Evidentiary facts.' The extent to which any individual material of evidence aids in the establishment of the general proof, is called its 'Probative force.' These are distinctive appellations, which, though terms only, may help to clearness of apprehension, and may well be kept in view accordingly.

In much to which the mind yields its belief, the proof is derived from somewhat wide sources, and with little of defined rule for determining its quality. We admit the existence of facts, stated to have occurred in former times, in credence of what is called historic truth; of present

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* Whately's Logic, B. IV., C. III. S. I.
ones, often on public report, or private hearsay; in much, acting on mere personal impression of probability, without applying any standard probationary test. And in matters of less importance, the evidence suffices for the exigence. Indeed, it may happen, particularly in reference to the events of a by-gone period, that, though a scrutiny of the individual facts can be but sparingly exercised, the means of an accurate analysis may be wanting, yet within the wide range of an entire narrative, a volume of proof may be presented, carrying with it such an aggregate force as apparently to defy resistance.

The evidence, however, which we are usually content to accept for our own guidance in matters of private opinion, ordinary conduct, or even in the business transactions of life, far from suffices for the Judicial office. The Judicial tribunal has a peculiar, a high, may the highest demand imposed on it for the soundness of its conclusions—the solemn responsibility of administering Justice. In civil cases it has to deal with conflicting interests specially confided to its arbitrament, often of great variety, extreme complexity, and of large stake to the litigants; in criminal ones even life or death may hang on its decision. Yet it may have to exercise its functions with possibly but a narrow compass only of facts, on which to arrive at its conclusions; and at those conclusions it must come with a promptitude which brooks no delay for after-thought, or further consideration. Its very province is to ascertain the truth and within the compass of time allotted to a Judicial trial; and to ascertain this, both in its certainty and its exactitude; meting out to others the result of its own convictions; while miscarriage may be fraught with the most important results, alike to individuals and to society.

It is obvious that, under such circumstances, the material on which a Court of Justice allows itself to form its Judgment must be matter of nice discrimination; and where deficiency might exist in the quantity it must be made up for by the quality.

We have used above the expression 'certainty' and 'exactitude' in reference to the Judicial conclusion: we must be understood to mean that amount only of each
which is practically attainable. With all its vigilance, a Court can rarely arrive at its conclusions without risk of error. It may do its best towards an approximation to certainty, but as well pointed out by Professor Greenleaf;—"The true question in trials of fact, is not, whether it is possible that the testimony may be false, but, whether there is sufficient probability of its truth; that is, whether the facts are shewn by competent and satisfactory evidence. Things established by competent and satisfactory evidence are said to be proved."

Dr. Greenleaf then goes on to add a distinction very important to be borne in mind whenever the point of proof comes into discussion.

"By competent evidence is meant that which the very nature of the thing to be proved requires, as the fit and appropriate proof in the particular case, such as the production of a writing, where its contents are the subject of enquiry. By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof, which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible, is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon that conviction, in matters of the highest concern and importance to his own interest."

In its demand for competent and satisfactory proof, the court may adopt, in some larger or smaller degree, one of two opposite principles for its guidance. On the one hand, it may throw open its doors to materials of information from whatever source coming; taking on itself the decision of their value; their admission, as an element of Judgment, in so far as they are deemed reliable; and their rejection in so far as they are not. On the other hand, it might prescribe criteria for original admissibility, and exclude all which could not pass the ordeal. The

admissibility of evidence, and its credibility when admitted, are obviously two very distinct matters.

Did the time capable of being allotted to each separate trial in a Court of Justice afford opportunity for the investigation of all the discursive matter which the adoption of the first principle might let in,—and did the constitution of the Court, and the capacities of the human mind, secure that its admission would not rather tend to distraction than to sound judgment,—and were there not some classes of evidence, the insufficiency for reliance on which is obvious on their very face,—there might be reason for the adoption of the first principle as the governing one for the guidance of the Court. Experience, however, has shewn that, important as it is to restrain within its just limits the application of the principle of exclusion, still, at the same time, there are boundaries which it is necessary to assign to that of indiscriminate admission.

In no Court of Justice can more than a limited period be allotted to each individual trial; and all needless consumption of time wasted on one cause, is a wrong to the whole body of suitors whose causes are waiting behind it. The Court too sits not to foment litigation, or promote vexation, expense, or delay; but to administer practical Justice; and it is bound accordingly to set its face against all attenuation and spinning out, no less than all needless multiplication of proof. Indeed, not only might such matter be dictated by the personal malice or morbid apprehension of the parties, rather than demanded by the Court as the foundation for a just conclusion; but the evidence itself might be procurable only at a cost too high to be justified by the wrong alleged; or the suggestion of the existence of proof might be a mere pretense of fraud.

"By laying a barrel full of rubbish" says Mr. Bentham, "on a spot on which it ought not to have been laid, Titius has incurred a penalty of five shillings.* No man was witness to the transaction but Sempronius;

* 2 Rs. 8 As.
and in the station of Writer, Sempronius is gone to make his fortune in the East Indies. Should Sempronius be forced (if he would be forced) to come back from the East Indies, for the chance of subjecting Titius to this penalty? Who would think of subjecting Sempronius to the vexation? Who would think of subjecting Sempronius or any one else to the expense.*

The quaint Jurist was speaking, we presume, of the *Golden* age, and not of the present *Iron* one. Perhaps in an age in which an income tax has taken the place of the 'fortune' of the 'Writer,' and the 'longing to get back' is the normal condition of being away, the penalty might not be so weighty.

Mr. Best has also an illustration which we borrow,—

"Suppose a man sued for the commonest debt for goods sold and delivered or money lent, or the most ordinary tort, were to pretend that he had *fifty* witnesses to examine in his defence, who lived in different and remote parts of the world, and desired that all proceedings might be stayed, and Commissioners sent out to examine them, a Court is surely not bound to take his word or even his affidavit for all this."†—The meaning of which is that the suit is not to be delayed, and the decision postponed, until all these fifty witnesses had been examined, and their testimony returned to the Court.

Rules have thus come to be established defining the *quality* of the materials of proof on which the Court is to found its decision, by excluding from original reception as matter of evidence, all not falling within a prescribed limit; while, with a just exception in those cases in which it is manifested to the Court that the exclusion of ulterior evidence would be a miscarriage of substantial Justice, the decision proceeds upon that only which, being immediately and practically available, is brought before the Court at the regular time of trial, and with due precaution against its redundancy.

* Judicial Evidence, p 479.
† Judicial Evidence, p 44.
The principles which regulate this action of the Court in its rejection of materials of evidence, have been termed its excluding principles.

But not only may the Court, by defining the line of exclusion; be practically, at the same time, indicating that of admission; it may, on the other hand, invest evidence of a prescribed character with a peculiar and conventional value. Thus the same experience which has dictated the propriety of some exclusion, has also shown that there are things carrying with them a sufficient inherent probability of veracity to warrant ascribing to them a species of self-proof,—such matters for instance as we shall hereafter enter upon more largely under the heads of Presumption, Judicial notice, and so forth. These have come to be received accordingly as evidence, without any further proof than furnished by themselves in their own peculiar nature.

Evidence of this character has been sometimes termed Preconstituted,—at other times it is referred to as possessed of an Artificial or arbitrary value.

As regards the exercise of the excluding principles, the great problem in jurisprudence has always been, to define the line of admission or exclusion; and though, in the investigation of any matter of fact, it would obviously be the object to throw upon its elucidation all possible light, there must be a practical limit to the sources from which even light itself is admitted; and it is necessary to distinguish between that which casts a real illumination on the scene, and that which may be calculated only to give false coloring and to mislead. Delay too and expence, and especially when of disproportionate amount to the subject of dispute, must be ever prominent elements in the consideration.

Be the principle however adopted, whether that of admission or exclusion, it is obvious that before the judgment of a Court can be pronounced on any matter of contest which involves a disputed question of fact, the fact itself must be established by that species of proof, which the rules of law admit on the issue between the parties. It is these rules which constitute the Law of Evidence.
Judicial Evidence may accordingly itself be defined to be, that which (apart from argument) is received by the Judicial tribunal in proof or disproof of facts, the existence of which is in contest between the parties, on the issue joined between them for the decision of the Court.

Of course it is here intended not what is received in fact, but what ought to be admitted upon the principles prescribed by the Court to itself, in regulation of its own action.

This definition is, we believe, in substance that adopted by most writers on Evidence; and if we turn to one of the great authorities on primitive Indian Law, the Metacshara, we find one of the ancient Sage not very different in principle; and it has the advantage of conciseness.

"Evidence is that by which a matter is established or decided."

The passage then goes on to declare of what this Evidence is constituted; which it pronounces to be two-fold, Human and Divine—Human is sub-divided into the three-fold division of writings, possession, and witnesses,—a combination which would hardly be repudiated even by the civilization of modern times. The Divine is afterwards represented as composed of such matters as an English Lawyer would recognize in the now happily exploded trial by ordeal of ancient history.

The rules which regulate the rights of persons and of property, the remedies, and the punishments for their infringement, are known by jurists as the substantive rules of Law; while those which determine the nature of the Evidence receivable as proof of the facts, have been styled its adjective ones.

It is obvious from the nature of the thing that the 'adjective' must have been matter of slower growth than the 'substantive': in truth it was not until comparatively modern times that the English Law of Evidence

assumed its present well-defined form. — Even in later days a struggle had long been going on between the too rigid application, on the one hand, of the principle of exclusion, and, on the other, of that of a just extension of the principle of admission; and, as we shall see in a succeeding chapter, it was not until the present reign, that the latter has finally triumphed.

What however is slowly developed, is likely to be well matured. The rules by which the whole subject of judicial evidence is governed have now in England attained the fixity of a system; and if there yet remain imperfection in it, we trust we are not speaking with an undue partiality, when we venture to express the opinion, that at the point at which it has already advanced, the system is a noble monument of the genius, the learning, and the judgment, which have combined to mould it into its existing form.

Even before it had undergone the improvements to which the labors of Mr. Bentham largely served to pave the way, the Translator of his remarkable work on Judicial Evidence had passed on the English Law of Evidence the following encomium:—

"There is no branch of Jurisprudence in which England is more honorably distinguished from other countries, than in her Law of Evidence. Some of its particular doctrines, indeed, having sprung from nice technicalities in the forms of pleading, or from institutions and prejudices which have long since passed away, may be open to just criticism: but, on the whole, the system is in itself excellent, and, being fixed and definite, confers upon us at least the inestimable advantages of certainty and precision, where the Jurisprudence of other countries leaves every thing in vagueness and confusion."†

Classifications of Evidence into Personal and Real.

In reference to the sources from which it may happen to be derived, Evidence has been divided into the two-fold classification of Personal and Real.

* The curious will find in Mr. Best's work on Evidence an able historical sketch of the earlier growth and progress of the English Law of Evidence.

† Translator's Preface to Bentham's Judicial Evidence.
Personal is that which is supplied by any human agent in the way of narrative, as for instance the ordinary depositions of witnesses in Courts of Justice. Real evidence is that which is afforded by things, or deduced from their state; as for example, the material things brought into Court as part of the res gestae of any transaction.

Mr. Bentham’s neat illustration well lays the distinction before the mind.

“Paul deposes that he saw John pursue James using threatening words. James is found killed, and John’s knife, covered with blood, is found beside the dead body. The testimony of Paul is personal proof; the knife is what we call a real proof.”

Again, the media through which the knowledge of the facts is conveyed to a Court have been designated “Instruments of Evidence.” These are—1st, the Real evidence, or the evidence from things, we have just described. 2nd. The Witnesses who convey information to the Court in their testimony—and 3rd. Documents—if indeed the last are not included under the first; and certainly a document would itself, when proved, be of the nature of real evidence; though the testimony by which it was proved, that for instance of the witness who saw it executed, would be personal.

Division of Evidence into Immediate or Sensitive, and Reported.

Evidence may be either Immediate, or as it is sometimes termed Sensitive; or it may be Reported.

Immediate evidence is that which has to pass through no mediate channel, and manifests itself directly to the senses of the Tribunal which has to try the cause in which it is given. Beyond what is required to connect it with the matter, the subject of investigation, it needs the intervention of no witness. It is self-developing, self-proving, and tells its own tale to the Court.

We may take for example a Coroner’s inquest held super visum corporis (upon sight of the body), where the fact of death is brought home to the senses of

* Bentham on Judicial Evidence, page 12.
IMMEDIATE EVIDENCE.

the Inquisitors, the Jury, by the production of the corpse: or we may refer to that of the old trial of appeal of Mayhem, where the Court would itself inspect the wound or loss of limb; or the examination of the person which occasionally occurs in Court even in modern times, as in the instance of charges of assault, or other personal injury. A case in illustration may be cited from Sir Matthew Hale,* where a party defended himself from a charge of rape by exhibiting to the Court, on personal inspection, a rupture of a nature too formidable to have allowed his perpetration of the crime.

Further instances might be noticed where matters connected with the proof are brought into Court, as often more particularly happens in criminal charges, as for instance,—in murder the weapon by which the blow was struck;—either in murder or in rape, the blood-stained or soiled clothes;—in cases of felony, the stolen property;—in charges connected with the adulteration of the coin, the counterfeit money or coining apparatus, and so forth. Instances also will occur to the mind, happening perhaps more often in questions of civil judicature, such as comparison of hand writing, identification of seals, erasures, obliterations, or alterations of writings, and the genuineness of records.

Written documents too are, in themselves, immediate, in so far as they are taken as the evidence of the transaction which they profess to record, the Court adopting their statements, both as descriptive of the transaction, and its proof. Though, so far as the documents themselves might require to be proved by evidence of their genuineness, the testimony would fall under the head of reported evidence.

Even the general aspect of the media of testimony might be immediate evidence, such as the demeanor of a witness under examination; or the appearance of written documents, as for example, whether natural, or written on obliterations and so forth,—often valuable elements in the judicial investigation.

Cases too occasionally arise for the determination of which an accurate knowledge of locality is required; such, for example, as those touch-

ing boundaries, ancient walls, or lights, rights of way, and so forth. In such cases the spot is accustomed to be visited, for their better information, by those on whom the burden of the adjudication lies.

In the case where, the question being one of existing pregnancy of a woman, it might be referred to a jury of matrons, summoned under an old writ called the writ "de ventre inspiciendo" to try the fact by an examination of the person. The verdict of the matrons would, of course, be founded on immediate evidence, and the court would adopt their verdict as its own.

In early English history, and for some centuries of it, the evidence which prevailed in the courts in cases of jury trials, partook so much of the character of the "immediate" that the jurors before whom any trial took place (in some resemblance in this respect to the Dicasts of the Athenian Court) were selected from among a class who were themselves likely to be witnesses to the facts, or otherwise personally cognizant of them, and they gave their verdict, in part at all events, on their own knowledge. They were summoned from the vicinage of the scene; and upon the very theory that their residence in the locality afforded a presumption for their acquaintance with the facts.

In later times it came to be felt, that neighbourhood was apt to bring with it rather the warp of prejudice, than the knowledge required for impartial judgment, and the practice fell into disuse.

Now, in England, it is very common to apply to the Court, to change the place of trial, from the scene of the occurrence, to another locality; and on the very ground that the prejudice prevalent in the former place would preclude the possibility of an impartial trial.

It is obvious that, wherever immediate evidence is presented in a reliable shape, no proof could be more conclusive; for, coming unexposed to the filtration of testimony, it comes without the risk of its falsehood, and apart from the hazard of even its unintentional miscarriage. Even in a case so simple as that of comparison or admeasurement of material substances, say the
comparison of goods sold by the sample, or the admeasurement of things alleged to have been stolen, it is clear that the production of the article itself to the Court which is to try the question, would be more satisfactory than any account of the matter tendered in the testimony of others. The one would be primary, the other second-hand evidence only.

It hardly needed the authority of Horace to satisfy us that "those things which fall upon the ear only are more dull to impress the mind, than those which are brought before the faithful eye, and which the beholder realizes to himself"—a conclusion which Horace may perhaps himself have borrowed from the still older authority of Herodotus, who has told us that "men's ears are slower to belief than are their eyes."†

On the point of sensitive evidence it is necessary, however, to distinguish between that which is actual proof, and that which leads only to false conclusion. And here we refer to that class of circumstances, which, from the apparent tangibility or reality of their nature, may be proposed to beguile the judgment, or enlist the sympathies, but which, wanting the connecting link in the chain of evidence, furnish in fact nothing but the phantoms of proof.

Thus, to borrow an illustration, which from a familiar history of English childhood has got into our books on Evidence, that where the brethren of Joseph, having sold him to the Ishmaelites, dipped his 'coat of many colors' in the blood of a kid, and then brought it to exhibit to his father, Jacob, to deceive him into the belief that death had fallen on Joseph, and by some natural means. The device succeeded; and, from the sight of the coat, Jacob

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* Segnius irritant animos demissa per aurem Quam que sunt oculis subjectæ fidelibus, et quæ Ipse sibi tradit spectator. Ars Poetica, 180.

† ἀνα τινικάει ἀνθρώποις ἐξιτά ἀπίστειρα ὀφθαλμῶν. Herodotus Clio. I. VIII. 10.
at once jumped to the conclusion, "It is my son's coat: an evil beast hath devoured him. \textit{Joseph is without doubt rent in pieces}".

Again two amusing illustrations are pointed out by Archbishop Whately in his Historic Doubts.

The first is taken from a well known story in English history of the time of Henry VI., introduced into one of Shakespeare's plays, in which the rebel Jack Cade, contriving to stir up a riot in favor of his pretensions to the Crown of England, by reason of his assumed descent from Edward Mortimer, Earl of March, (who had married the Duke of Clarence's daughter) told the populace, that his mother having had two children:

"The elder of them being put to nurse,
Was by a beggar woman stolen away,
And ignorant of his birth and parentage,
\textit{Became a bricklayer} when he came of age,
His son am I—Deny it if you can."

This was re-echoed by Dick the butcher, one of his followers,

"Nay, 'tis too true, therefore shall he be king."

But the clenching testimony on the occasion was that of Smith, the weaver—

"Sir, he made a chimney in my father's house, and \textit{the bricks are alive at this day to testify it}; therefore deny it not."

No wonder if such evidence as this were to prevail that, speaking of the time when Jack Cade was to come to his Crown, Smith had already declared

"The first thing we do, \textit{let's kill all the Lawyers}."

The other illustration is the very common one which \textit{exhibits} the haunted house as proof of the existence of the Ghost who dwelt within it, or paid it flying visits before cock crow.

"Truly," says the Archbishop, speaking of the evidence of the bricks of the descent of Jack Cade, "this existence is such as country people give one for a story of apparitions; if you discover any signs

\* King Henry VI., 2nd part, Act IV., Scene 2.
of incredulity they triumphantly show the very house which the ghost haunted, the identical dark corner where it used to vanish, and perhaps even the tombstone of the person whose death it foretold."

To these we may add a story taken from the tale of the Amber Witch, where the poor girl charged with witchcraft, after complaining that she was the victim of the Sheriff who wished to do 'wantonness with her' added, that he had come to her dungeon the night before for that purpose, and had struggled with her 'wherefore she had screamed aloud, and had scratched him across the nose, as might yet be seen, wherefore he had left her.' To this the Sheriff replied 'that it was his little lap dog called Below, which had scratched him, while he played with it that very morning' and having produced the dog, the court were satisfied with the truth of his explanation.†

Certainly the court must have been very dogged in their support of the case of the Sheriff, to have acquitted him on this piece of sensitive evidence.

Reported Evidence, where the narration of a fact, is the report to the court by its witness. It is the report of that which has come under the cognizance of his senses, as contra-distinguished from those of the Judge; or, in those cases in which such evidence is permitted to be given, the report of what the witness has derived from the statements or conduct of others.

It is to some matter of fact that reported evidence is ordinarily addressed; and we may here state that facts have been divided by jurists into

1st—Positive or Affirmative and Negative.
2nd—Physical and Psychological.
3rd—Events and states of things.

* Historic Doubts relative to Napoleon Bonaparte, p. 28.
† Taylor on Evidence, Vol. I., p. 443, whence a portion of these illustrations is borrowed.
With respect to the first, a positive or affirmative or a negative fact is obviously, according as the case may be, one involving either an affirmation or negation, in the way of proof, of the issue to be tried; though its appropriation to either classification is dependant on the form in which the proposition is put, rather than on the substantial question involved in the issue. For example, A was at a particular place: this when thus put is an affirmative fact; yet in the feature of affirmation, it is not very different from the same put negatively, namely that A was not at the place.

As regards the second classification, a physical fact is that which manifests itself to the external senses; a psychological fact is that which exists in the mind. The shot of a musket, which kills a man, is a physical fact, the intention of him who fires it, is a psychological fact.

Psychological facts, as they lie concealed in the interior of man, can be ascertained only by physical facts, which are, as it were, the index of the watch. In a question of larceny, the intention to take and use the thing, and the consciousness of having no right to take it, are psychological facts, which are proved by the language of the individual, by the precautions he has taken to secure his escape or conceal the thing stolen, &c.*

In reference to the third classification, we may observe that a fact may be either an event, or a state of things, accordingly as it happened through some special agency, or it is the representation of a natural condition. Thus the fall of a tree may be an event, its existence, whether standing or fallen, a state of things.

A fact, in the sense of an event, is also termed an act or action; though this has been sometimes limited to the case in which the event was brought about by human agency.† This however does not appear strictly accurate, if it be intended to represent the view taken by Eng-

* Bentham on Judicial Evidence, C. V., p. 10.
† See Best on Evidence, p. 9.
lish Law on the subject. Take the case of the tree cut down by man, it would no doubt be an act, and the act of the man. But let the same tree be blown down by tempest: this the law would term the act of God.

A further distinction too has been suggested which puts facts in apposition to circumstances; though what is meant is we apprehend, in reality, no more than that in the relative position which, on the investigation of any given transaction, one fact may stand to another, that which as being the subject of investigation is taken as the main one, is to be regarded as the fact, and the subsidiary ones brought to bear on its elucidation, the circumstances.

Thus it has been said that every fact may be called a circumstance in relation to another, and for which the illustration has been put that it thundered or hailed on the day a murder was committed, though an event extremely independent of the principal fact, may be a circumstance worthy of being remarked, and may lead to evidence. In this view it has been suggested that circumstances are facts placed round some other fact, each fact being considered as a centre, and all others as ranged round it.

The distinction is in truth, however, one of words or form of expression only; and when what are thus called facts and circumstances are put in contrast to each other, the one class is more often known by the term of the main, the principal, or the major fact; and the other by that of the minor, or subsidiary one.

Beside these classifications of facts themselves as regards the nature of each, a further distinction has also been assigned to them as marking their effect. Some of the surrounding circumstances may of course render the principal fact under investigation more probable, while others may render it less so. A fact accordingly which diminishes the probability of the principal fact, has been styled an invalidating fact; one which augments its probability, a corroborating fact.
Reported Evidence may be either Positive, or as it is otherwise termed, Direct; or it may be Indirect or Inferential. Indirect has been occasionally termed, indiscriminately, sometimes Circumstantial, and sometimes Presumptive Evidence.

Of course all inferential evidence partakes of the double character of circumstantial and presumptive; for the conclusion arrived at upon it is one of presumption, and this presumption is founded on the circumstances. There is however, as will presently be pointed out, a distinct classification of legal conclusion known by the name of Presumption, in itself a branch of inferential evidence, where the conclusion is drawn, not from the circumstances proved in any particular case, but from a more universal experience of the ordinary course of things. Regard being had to the difference between this, and the class of cases in which the inference is the deduction from their own peculiar and individual circumstances, it may be suggested as a convenient distinction, were inferential evidence, instead of receiving, indiscriminately the applications of 'circumstantial' and 'presumptive' to be divided into the two, as separate classifications of the 'inferential,' the Evidence derived from the circumstances of the individual case being referred to the head of 'circumstantial,' and that derived from the wider field of deduction to be assigned to that of 'presumptive.'

As we shall presently see, one able writer more especially claims to range under the head of Direct Evidence, that which more ordinarily passes under that of Circumstantial.

Positive or Direct Evidence is either the testimony of witnesses deposing to what has come under the cognizance of their own senses; or it is that which is furnished by some documentary record of the transaction; the authenticity of the document being, of course, previously established.

Evidence indirect or inferential is either that of collateral circumstances or groups of facts tending, in the proof of their own existence, to the establishment of the main fact in question, as a legitimate inference
from themselves; or it is that species of proof which is afforded by a common experience of the course either of nature or human affairs, and the dictates of this experience when brought to bear upon the particular fact under investigation.

Where the proof is that of circumstances, such circumstances have been happily termed the 'inanimate witnesses' of a case.

"Testimony," says Mr. Bentham, "may apply directly to the principal fact; Paul saw John commit the offence in question; the evidence is direct. Testimony may apply to some fact which is not the criminal act itself, but which is so connected with it, that if the existence of the first be established, it produces a presumption, more or less strong of the existence of the second.

A theft has been committed in the house of A; his servant fled on the same night; this flight is circumstantial evidence against him.

All real evidence is circumstantial: A is accused of having uttered base money. Various instruments employed in coining money, cut pieces of metal, or metallic filings, are found in his possession. This is real and circumstantial evidence against him."*

The subject is somewhat more elaborated by Mr. Starkie, and we place before our readers his able exposition of it.

"Where knowledge," says he, "cannot be acquired by means of actual and personal observation, there are but two modes by which the existence of a by-gone fact can be ascertained.

1st. By information derived either immediately or mediately from those who had actual knowledge of the fact; or

2ndly. By means of inferences or conclusions drawn from other facts connected with the principal fact, which can be sufficiently established.

In the first, the inference is founded on a principle of faith in human veracity, sanctioned by experience. In the second, the conclusion is one derived by the aids of experience and reason from the

* Treatise on Judicial Evidence, p 12
connexion between the facts which are known, and that which is unknown. In each case the inference is made by virtue of previous experience of the connexion between the known and the disputed facts, although the grounds of such inference in the two cases materially differ.

All evidence thus derived, whether immediately or mediately, from such as have had, or are supposed to have had actual knowledge of the fact, may not improperly be termed direct evidence; whilst that which is derived merely from collateral circumstances may be termed indirect or inferential evidence.

It is obvious that the means of indirect proof must usually be supplied by direct proof; for no inference can be drawn from any collateral facts until those facts have themselves been first satisfactorily established, either by actual observation, or information derived from others who have derived their knowledge from such observation.”*

In using the term ‘actual observation’ Mr. Starkie was not, it may be presumed, intending to confine himself to that species of personal observation the means of which would be afforded by immediate evidence actually addressed to the senses. He must be understood as addressing himself alike to that class of observation presented in the knowledge of the course of nature and of the ordinary affairs of life, to which allusion has been made above.

As neatly put by Mr. Phillips speaking of indirect evidence. “It is obvious, that a presumption is more or less likely to be true, according as it is more or less probable, that the circumstances would not have existed, unless the fact, which is inferred from them, had also existed: and that a presumption can only be relied on, until the contrary is actually proved.”

And again—“A presumption is a probable inference, which our common sense draws from circumstances usually occurring in such cases. The slightest presumption is of the nature of probability; and there are almost infinite shades from the lightest probability to the highest moral certainty.”†

**EVIDENCE INFERENTIAL—ILLUSTRATION.**

Illustration of inferential Evidence.

It may serve to clearness of apprehension to elucidate the subject of inferential evidence by illustration.

Let us then take a case of supposed murder, with no witness to the act. Its proof would necessarily fail, and Justice accordingly be defeated, had it to rest on direct testimony, or what we have termed Positive evidence. To affix therefore the guilt on any particular individual, it would be necessary to investigate the circumstances surrounding the act itself. Here however there might transpire a series of subsidiary or minor facts, in connection with the main or major one, of the murder, which, consistently with the ordinary course of events, and on a rational probability, could not have existed otherwise than upon a theory which would fix the crime on the individual in question. His guilt would be the natural presumption from the circumstances; and, assuming these to be of the requisite force, he would be declared guilty by the Court which had to sit in judgment on him accordingly, though the fact of murder could only be established by inferential, and not by positive, proof.

Thus a party might be found dead, with marks of violence upon him, in a house wherein there was none resident but himself:—he might have been old, infirm, and incapable of resistance, and hoarded money, known to have been in the house, might be shewn to have been abstracted;—one may have been seen creeping out of the house, with apparent stealth, and about the probable time of the murder;—and this person may have been traced to some place where concealed clothes may have been found spotted with blood;—a bloody knife may have been found in his track;—he may have been seen at low houses of entertainment squandering money in drunkenness and debauchery;—and when apprehended he may have failed to explain away any of these damaging circumstances. The lone occupancy of the house, the age, infirmity, and hoarded money of its occupant, the furtive escape, the clothes, the knife, the dissipation of the drinking scene, would all be matters with which, in the ordinary course of things, nothing but the fact of this particular individual having committed the murder,
would fit in. In such a case, from the minor or subsidiary facts, the major would accordingly be presumed.

It would indeed be within the compass of possibility that the murder was self-committed—or that some other had done the deed, and escaped from the house by a different direction;—that the presence of the party at the spot was accidental;—that the clothes were deposited, the knife thrown away, by another hand;—men may be seen drinking at houses of debauchery without being murderers, and squandering money without being thieves. But, in the absence of contradiction or explanation, mankind, and jurors and judges especially, must put that construction on circumstances of which human experience dictates the rationality—must adopt their natural and legitimate deductions; and the codes of all civilized countries recognize evidence of this class as the most cogent of proof.

The class of inferential evidence derived from an ordinary experience, rather than from the individual circumstances of the case, may be illustrated by a reference to either of the two ordinary courses of nature, the one which would be inconsistent with the prolongation of human life to a period of two hundred years; and the other with that of a woman of seventy bearing a child. Let there be a case accordingly in which any given fact in question could not have happened without an inversion of this course of nature, and the dates or other circumstances indicative of the age be but established, there would arise an obvious inferential or presumptive evidence against the existence of the fact itself.

The distinction between these two classes of inferential evidence is well put by Mr. Starkie.

"When the connection of the facts," says he, "is so constant and uniform, that from the existence of the one, that of the other may be immediately inferred, either with certainty or 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."
CIRCUMSTANTIAL EVIDENCE NOT POSITIVE.

Circumstantial proof is supplied by evidence of circumstances, the effect of which is to exclude any other supposition than that the fact to be proved is true.

It is evidence of the character ascribable to either of these two classes which is ordinarily known as inferential. We referred, however, above, to the claim of one able writer to have even this class of evidence placed under the head of Direct or Positive Evidence.

Mr. Wills observes "The epithets Direct and Indirect or Circumstantial, as applied to testimonial evidence, have been sanctioned by such long and general use, that it might appear presumptuous to question their accuracy, as it would perhaps be impracticable to substitute others more appropriate. But assuredly these terms have frequently been very indiscriminately applied, and the misuse of them has occasionally been the cause of lamentable results; it is therefore essential accurately to discriminate their proper application.

On a superficial view, direct and indirect or circumstantial would appear to be distinct species of evidence; whereas these words denote only the different modes in which those classes of evidentiary facts operate to produce conviction. Circumstantial evidence is of a nature identically the same with direct evidence, the distinction is, that by Direct Evidence is intended evidence which applies directly to the fact which forms the subject of inquiry, the factum probandum. Circumstantial Evidence is equally direct in its nature, but, as its name imports, it is direct evidence of a minor fact or facts, incidental to or usually connected with some other fact as its accident, and from which such other fact is therefore inferred. A fact of this kind is therefore called factum probans. A witness deposes that he saw A. inflict on B. a wound, of which he instantly died; this is a case of direct evidence. B. dies of poisoning; A. is proved to have had malice against him and to have purchased poison, wrapped in a particular paper, the paper is found in his secret drawer, and the poison gone. The evidence of these facts is

* Starkie on Evidence, p. 80.
direct; the facts themselves are indirect and circumstantial, as applicable to the inquiry whether a murder has been committed, and whether it was committed by A.

So rapid are our intellectual processes, that it is frequently difficult, and even impossible, to trace the connection between an act of the judgment, and the train of reasoning of which it is the result; and the one appears to succeed the other instantaneously by a kind of necessity, as the thunder follows the flash. This fact obtains most commonly in respect of matters which have been frequently the objects of mental association."*

There is no doubt force in this reasoning. The whole matter, however, seems rather to turn on the point of view, in which the evidence in question is regarded. Each minor or subsidiary fact in a chain of circumstantial proof, is so far a matter of direct evidence in itself, that it forms part of the original and substantive proof of the major one; and to this extent it is in itself of the nature of Direct or Positive testimony. On the other hand no one of the minor facts taken singly would prove the major; nor indeed would the combination of the whole do this, without some ulterior process; and that process is an exercise of the reasoning faculty which enables the inference of one fact to be drawn from the existence of another. Viewed in the latter light, the evidence from the circumstances is inferential or presumptive, rather than direct.

Mr. Bentham's test would seem a very appropriate one.

"Evidence is direct, positive, immediate, when it is of such a nature, that (admitting its accuracy) it brings with it a belief of the thing to be proved. Evidence is indirect, or circumstantial, when it is of such a nature, that (admitting its accuracy) it leads to a belief of the thing to be proved, only by way of induction, reasoning, inference."†

On the whole we should prefer, as the more logical division, to place Inferential evidence in contrast to Positive, rather than as a division

* Wills on Circumstantial Evidence, p. 23.
† Treatise on Judicial Evidence, p. 186.
of the class; and, whether right or wrong, in this, the two have been generally treated in this way, both practically and by text writers; and where no substantial advantage is to be gained by the travelling on a new track it is better

"Stare super antiquas vias."*

The deductions arising from inferential evidence, ordinarily however in reference to this distinction termed 'Presumptive Evidence,' have been divided into the two classes of Necessary or Conclusive, and Probable.

An inference or presumption is said to be Necessary when it is the only possible conclusion from the facts. It is described as Probable when it is the natural conclusion from them; yet still a conclusion capable of being controverted.

Thus, as illustrations of the 'Necessary,' we may mention two cases of actual occurrence which are to be found in the books, and are referred to by most writers on evidence;—one where a female was found dead in a room having obviously met with a violent death, and there was on her left arm the bloody mark of a left hand;—another where a dead man, having been found with a discharged pistol, lying at his side, the discovered bullet, the cause of death, was ascertained to be too large to go into the pistol. In both cases a death by violence was palpable; but the question was, murder or suicide? The inference or presumption, however, that a murder had been committed was irresistible, or in other words necessary, from the conclusive fact, in the one case of the bloody mark of the left hand on the left arm, in the other of the bullet being too large for the barrel of the pistol. But for this, either case might have been open to the theory of suicide; and then the inferences either way, of murder or suicide, would have been probable only, according to the general circumstances of the case. In neither however could they have been necessary. So again to take a case of alibi, that of a murder at Calcutta, but the conjectured murderer established at the time to have been at Bombay.

* To stand upon the ancient ways.
Again:—Aristippus, ship-wrecked and cast on an unknown shore, saw geometrical figures traced in the sand. The presumption was irresistible that he had fallen among a people conversant with mathematics. Robinson Crusoe, cast on the barren Island, traced on the sand the fresh footprint of Friday. His conclusion was necessary that he himself was not its only inhabitant.

Presumptions of this class are characterized as necessary, because to admit any opposite conclusion would be to invert the fixed laws of nature. According to these laws, a left arm could not have borne the bloody mark of a left hand; a larger bullet could not have entered the barrel of smaller bore; one at Bombay could not have committed a murder at Calcutta, nor could marks be traced upon the sand without an agency. The alternative question of necessary or probable presumption may always be solved by the ulterior one of—Could the fact have been otherwise? Was there any other theory on which to account for it?

Referring as we are at present doing to the broad distinction between Evidence Direct and Indirect, we notice this class of indirect Evidence here. It perhaps however belongs more peculiarly to the head at which we have already glanced, as embracing rather the deductions of a general experience than the inferences from individual cases, and of which we shall presently treat under that of 'Presumptions.'

Necessary presumptions are naturally rare. It is with the probable only that inferential evidence ordinarily deals; and it is in criminal procedure that presumptions of this character are usually brought into play.

Their nature will be best understood by illustration; and curious instances are cited in the books.

There is one in which, in a case of burglary, part of the broken blade of a penknife having been left in the window frame of the house broken into, the fragment of the blade was discovered in the pocket of the accused. In another, part of an old ballad having been found in the wound of a person killed with a pistol, a part of the wadding, its corresponding part, was discovered in the pocket of the party appre-
hended on the charge. In another case of murder, a patch on one knee of the prisoner's breeches corresponded with an impression on the soil, close to where the murdered body lay. In the case of a robbery the party attacked struck the robber on the face with a key, and the mark of a key, with corresponding wards, was traced on the face of the prisoner. In an instance where an orchard was broken into, some of the fruits were eaten, and the rinds were found scattered about, with the appearance of having been bitten by a person who had lost two of his front teeth; and it was thus traced to a man in the neighbourhood who had had a corresponding loss of teeth.

Now, in each of these examples, a probable presumption arose from the peculiarity of the coincidence, and an inference of the guilt of the individual would have been the natural one to have drawn. Still in no one of them was the presumption a necessary one. In the cases of the penknife, and the ballad, both might have been put into the pocket of an innocent man, in the one instance by the burglar himself, and in the other by the murderer, put there with the view to turn the current of suspicion;* or they might have been thrown away by the criminal and picked up. In the case of the patch, the owner of the breeches might have been a passer by simply investigating the occurrence, or seeking to assist. The marks on the face might have been either natural, or the result of a different blow; and as to the fruit rinds, some other than the supposed culprit might have lost his front teeth, or the appearance itself might have been mistaken.† Hence the inference, though striking, could not be necessarily, but probably only correct; and the presumption merely a probable one.

Even the division into the classification of necessary and probable presumption has been cavilled at, and it may not be entirely accurate. Trying the necessary by

* See an illustration of this in the actual and very analogous case of Mullens the murderer subsequently quoted.

† See Beat on Presumption 297, where, in some of these instances, this explanation is suggested.
the test of some assumed law of nature, we know that, although the laws of nature themselves do not vary, what for this purpose is tantamount to a variation, must not be overlooked, namely that our knowledge of those laws is undergoing constant change;—witness for instance the once supposed law of the solar system, which would have sent the sun round the earth, and the present better ascertained one, under which the earth travels round the sun. The experience of a later day might accordingly displace any assumed conclusive presumption of a former one.—Nay, even nature exhibits itself in great variety; and often in somewhat fantastic shape: and he must be a very extensive observer of nature, and with very wide range of opportunity, one who like Lord Bacon “took all knowledge for his province” whose conclusions some of her phenomena did not baffle.

But some high authorities, with the great Patriarch of the law, Lord Coke, at their head, have introduced a still further classification, in the division of presumptive evidence into the violent, the probable, and the light or rash. To the two former is assigned a legal or probative effect—the letter is estimated at ‘nil’ or nothing.

Mr. Archbold’s example of the three classes may be taken as a practical illustration of each. “If,” says he, “upon an indictment for stealing, in a dwelling-house, the defendant were apprehended a few yards from the outer door, with the stolen goods in his possession, it would be a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof that they were actually stolen, would amount, not to a violent, but to a probable presumption merely; but, if the property were not found recently after the loss, as for instance, not until sixteen months after, it would be but a light or rash presumption and entitled to no weight.”

He had indeed previously defined a violent presumption to be ‘one when the facts and circumstances proved, necessarily attend the fact pre-

sumed; 'a probable one 'when the facts and circumstances usually
attend the fact presumed;' and 'light or rash presumptions as those,
which have no weight or validity at all.'

Now if violent is only to be understood as another term for

          Distinction an unsound necessary in the sense to which we have already
          referred a necessary presumption, namely the im-
          possibility of all other deduction from the facts, the distinction between
          the violent and the probable is sufficiently palpable, and we should not
          quarrel with it. A violent, as distinguished from a probable presump-
          tion, has been ordinarily, however, regarded not as an inference
          irresistible, but only as a higher degree of probability; and taken
          in this sense we may be permitted to doubt, in common with some
          other writers,* whether, after all, the division be not more fanciful
          than real; for when the limit is once passed which separates the
          necessary from the probable, all power of legal distinction would
          seem to terminate. Each case must be governed solely by its own
          individuality of circumstance; and who à priori is to furnish the
          definition capable of dividing the violent from the probable the probable
          from the rash? It would be as easy to decide whether twilight were
          the shade of night, or the dawn of morning; and even were the
          line of demarcation capable of being drawn, what is the practical issue
          of the operation?

        Lord Coke's illustration of the violent is that of a man run through
        the body, and another running out of the house
        with a bloody sword in his hand, and none other
        in the house at the time; on which the commentary of the Lord
        Chief Baron Gilbert is.—"This is a violent presumption that he
        is the murderer; for the blood, the weapon, and the hasty flight,
        are all the necessary concomitants to such horrid facts; and the next
        proof to the sight of the fact itself is the proof of those circumstances
        that do necessarily attend such facts."†

* See particularly Wills on Circumstantial Evidence, p. 36. Best on Presumption, p. 37.
† Gilbert's Law of Evidence, 157; and see Best on Presumption, p. 37.
If by the 'violence' of the Presumption be here meant the 'irresistibility' that is the unqualified irresistibility of the inference, it may be observed that no inference can be absolutely irresistible when the facts admit an opposite theory. Now hypotheses might be suggested other than that which would fix a murder on the accused. In the first place the deceased may not have been murdered at all, except by his own hands. The accused finding him in the state in which he was discovered may have rushed out for assistance. Again he may in fact have been murdered, and the real murderer might have escaped, and the accused coming in might have run out to give the alarm. In either case the sword may have been seized under some sudden impulse, say of curiosity, or the better to create belief for the narrative, or for some other reason, and its possession accordingly may have been accidental. Nay the deed itself may have been that of the accused; but in self defence and entirely justifiable. Thus the sword might have been originally a weapon of attack by the deceased, and wrenched from, and afterwards turned against him, by the accused, under threat of attack on life by pistol or otherwise. Or there might have been a quarrel, and the accused using the sword as a defence only, the deceased may by some accident have fallen upon it by an act or movement of his own. Any of these theories would appear to destroy what is called the 'Violence' of the presumption ascribed to it; however important the fact might be as an element in the conclusion.·

The bloody sword however, or what is tantamount to it, has been prolific of illustration, and has found its way to India as illustrative of Mahomedan law. This law authorized even the putting to death upon violent presumption; and the futwa of the Law Officers of the Nizamut Adawlut given in 1799, after pointing out that strong presumption might be produced by circumstances, without the testimony of witnesses, added as an illustration.—"Thus if a man come out of a house with a bloody knife in his

· See generally on this subject, Best on Presumption, p. 36.
hand; and he appear terrified, and run away; and the people immediately entering the house find a person whose throat has been recently cut; the blood dropping from it; and there be no other man in the house, these circumstances warrant a strong presumption that the man described is the murderer. A mere possibility of the person in question having cut his own throat, or that another may have cut his throat, and escaped over the wall is too remote from probability to be relied on."

Of the two classes of evidence, Positive and Inferential, there is not, in the sense of primary, and secondary, or any other legal sense, any priority of admissibility of the one over the other. Both are alike original in their nature, and both equal in degree. In fact, (to quote Mr. Best's description), "they are two distinct modes of proof, which may be considered as it were, acting in parallel lines, and wholly independent of each other."†

On the score of weight or probative force there is no doubt that (to borrow again from the same writer) "the superiority in point of weight, which, under ordinary circumstances, direct, and conclusive circumstantial, evidence possess over presumptive evidence, are too obvious to need remark; i.e. when we compare them in equal quantities. 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 the probative force of a chain of evidentiary facts, forming a body of presumptive proof, will well bear comparison with that of such limited portion. When the proof is direct, as for instance consisting of the positive testimony of one or two witnesses, the matters proved are more proximate to the point at issue, or to speak more correctly, are identical with the physical facts of it, and leave but two chances of error, namely those arising

* Harrington's Analysis, Vol. 1, p. 292 cited Beaufort's Digest, p. 120.
† Judicial Evidence, p. 315.
from mistake or mendacity on the part of the witnesses; while in
every case 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."

The truth is that the relative weight of either classification of evi-
dence must ever be a question of circumstances in each individual case;
and it will be alternately the inherent strength of the one, or the other,
which carries the highest conviction to the mind. In the instance of
positive evidence, assuming their means of knowledge, and assuming
their intelligence, the question of the degree of proof would ordinarily
resolve itself into one of the credibility of the witnesses. In one of cir-
cumstantial, assuming the establishment of the premises, it would become
one of the correctness of the inference, the soundness of the logic.

Positive Evidence may
be deceptive.
Impeached credibility.
Mistake.

Even the positive evidence, which when of
apparently adequate strength would seem the
more satisfactory, might, in truth, be altogether
deceptive.

Thus were half a dozen persons to come forward avowing their
presence on some particular occasion, and that they witnessed the fact
in question, and were there nothing to cast suspicion on their personal
credibility, nothing could apparently be more strong. But then this
credibility might be impeached, or there might have been the possibility
of some common mistake, as for instance a mistaken identity. Either
supposition would destroy the whole value of the testimony, and the point
is neatly put by Mr. Roscoe when he says;—"Presumptive Evidence
is usually so called in contradiction to direct or positive proof; though
all moral proof is in strictness founded on probability and presumption.
Thus a fact attested by the direct evidence of an ocular witness can
only be admitted to be true on the double presumption that the witness
neither deceives nor is deceived."†

* Judicial Evidence, p. 316.
† Roscoe on Evidence, p. 21.
Many curious instances of the failure of positive testimony on the ground of mistake are recorded. We select one or two.

Sir Thomas Davenant an eminent barrister of his day, and a person it might be thought, not likely to be mistaken on such a matter, having been robbed in the open day light swore positively to the persons of two individuals as the robbers. They established however on the trial a most conclusive alibi, and were acquitted, and the stolen property was afterwards found on other parties. *

Another is that of a young gentleman, an articled clerk to a solicitor in London, who was tried in the year 1824 on five indictments for different acts of theft, alleged to have been committed at the shops of London tradesmen, while over-hauling books, jewellery and other articles under the pretence of purchase, the supposition being that he made off with the goods, while the tradesmen were engaged in looking after other articles. In each case the prisoner was positively identified by several persons. The real fact, however, was that the depredations were committed by another party, bearing a strong personal resemblance to him. He proved an alibi, and was acquitted on all the indictments save one, on which he was actually found guilty. His innocence however being subsequently established, he received a pardon from the Crown. †

Another instance may be cited that of a respectable youth tried for highway robbery in the neighbourhood of London, that is for robbing the prosecutor of his watch. The identity was positively sworn to by the prosecutor, but a young lady to whom the youth was paying his addresses proved an alibi. A prisoner named Greenwood was at the time awaiting trial for another felony, and he bore a close resemblance to the individual charged. The prosecutor being ordered out of Court, Greenwood was introduced and placed in the Dock by the side of the accused. The prosecutor was then recalled, and after having been cautioned was asked if he would still swear to the party. He thereupon turned his

* Rex v Wood and Brown; Annual Register for 1784.
† Rex v Robinson. Wills, p. 144.
head to the Dock, where, perceiving two men so nearly alike, he became petrified with astonishment, dropped his hat, and was speechless for a time, declining to swear to either. Greenwood was afterwards convicted of the felony on which he was awaiting his trial, and, being about to be executed, confessed to having been the real robber of the watch.

On the other hand, if circumstantial evidence carry with it, as it ever must, the risk of erroneous conclusion, it is, unless when partaking of the character of mere single coincidence, more difficult of fabrication than positive, since to deceive in the latter a single fact only requires to be fabricated, while in the former there are ordinarily many; and, where facts are numerous and minute, fabrication becomes all but impossible.

Thus in the case of the murder in the lone house we have put above, one witness or class of witnesses might be found deposing to the solitary life of the murdered person—another to the hoarded money—a different one to the escape of the run-away from the house—another again to the bloody knife—others to the clothes—and others to the drinking house scene—so that instead of one fact attested by one witness—the proof would be that of a considerable variety and combination of facts—and attested perhaps by an actual cloud of witnesses.

Were the tale one of falsehood, it is obvious that the greater the variety of facts embraced, the greater is the exposure to the chance of detection; for, as every allegation is liable to be overturned by incompatibility with facts established to be true, the greater the number of false facts, the greater the probability of unmasking them.

While different facts too are likely to be furnished by different witnesses, the more numerous the witnesses, the more difficult to concert among themselves a plan of false testimony, and above all, to concert it successfully; and nothing is more rare than the success of a scheme of lying, which requires many actors.

* Wills, p. 145.
Thus, suppose a criminal founds his defence on an *alibi*; the greater the number of false witnesses, who depose that, at the time in question, they saw him in a place where he really was not, the greater is the chance of convicting each of them of falsehood.*

On the other hand let the case be one of Truth, not only does the fabrication of contradictory circumstances increase in difficulty with the number of those opposed to it; but the establishment of each separate fact as a truthful one only adds veracity to the whole; and as Mr. Starkie well observes:—

"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

* Bentham's Treatise on Judicial Evidence, p. 184.
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 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.”

Accordingly as respects all circumstantial evidence the greatest test of value is the multiplication or extent of the combination. In proportion to the extent of the series is the value of the proof.

What Lord Brougham has observed in respect to the cogency, to which a multiplication of the witnesses may bring any matter of proof, is emphatically apposite in reference to a series of circumstantial evidence.

“The degree of excellence and of strength,’ says he, ‘to which testimony may rise, seems almost indefinite. There is hardly any cogency which it is not capable, by possible supposition, of attaining. The endless multiplicity of witnesses—the unbounded variety of their habits, of their thinking, their prejudices, or their interests,—affording the means of conceiving the force of their testimony augmented ad infinitum, because these circumstances afford the means of diminishing indefinitely the chances of their being all mistaken, all misled, or all combining to deceive us.”

Nor indeed, in a case of circumstantial evidence, would it necessarily follow that the falsehood of one proof would diminish the veracity of another,—that is, at least, provided the two were of an independent nature, and that the proof which remained could stand, consistently

* Starkie on Evidence, p. 68
† Discourse on Natural Theology, p. 251.
with the loss of that which was destroyed. However much the
collection might rest generally on the entire combination, each cir-
cumstance in the chain of proof might be individual only in its character,
and the truth of one independent fact might well consist accordingly
with the falsehood of another. The probative force of that which
remained might be sufficient, even without the aid of that which was
taken away, and the proof would be dependant on the relative value
of what was left, as contrasted with that which was destroyed. Of course
the destruction of a single link might render the whole chain worthless;
and ordinarily it is not alone the existence of a chain, but that of the
variety of its links, which gives conclusiveness to the proof.

In all cases where the evidence approximates rather to the character
of a single coincidence than the combination of
a chain, it should be received, however, only with
strict caution; and it should not be forgotten that an insulated coincidence
is at least as likely to be fallacious as direct testimony, possibly even
more so.

One early, very striking, and it may be added often cited,
illustration of this is afforded in the Jewish
history. When the brethren of Joseph set out
to return to Canaan, stored, through the bounty of their prosperous
brother, against the famine for which they came up to Egypt to buy
food, Joseph whose "bowels did yearn" after the youngest of his brethren,
Benjamin, gave orders to his steward to put into Benjamin's sack his
(Joseph's) own silver cup; and then in furtherance of an apparent
scheme to bring up his father to Egypt, and retain Benjamin with
himself, had the whole party followed up, and brought back, charged
with the robbery of the cup.

"And he commanded" (the narrative says) 'the steward of his house,
saying, fill the men's sacks with food, as much as they can carry, and put
every man's money in his sack's mouth."

And put my cup, the silver cup, in the sack's mouth of the youngest, and his corn money. And he did according to the word that Joseph had spoken.

As soon as the morning was light, the men were sent away, they and their asses.

And when they were gone out of the City, and not yet far off, Joseph said unto his steward, Up, follow after the men; and when thou dost overtake them, say unto them, "Wherefore have ye rewarded evil for good?

"Is not this it in which my Lord drinketh, and whereby indeed he divineth? Ye have done evil in so doing."

And he overtook them, and he spake unto them these same words.

And they said unto him. Wherefore saith my Lord these words? God forbid that thy servants should do according to this thing.

Behold, the money which we found in our sacks' mouths we brought again unto thee out of the land of Canaan: how then should we steal out of thy Lord's house silver or gold?

With whomsoever of thy servants it be found, both let him die, and we also will be my Lord's bond men.

And he said, Now also let it be according unto your words: he with whom it is found shall be my servant; and ye shall be blameless.

Then they speedily took down every man his sack to the ground, and opened every man his sack.

And he searched, and began at the eldest, and left at the youngest, and the cup was found in Benjamin's sack."

What piece of circumstantial evidence could be more conclusive than the finding of the cup in the sack?—the very, and the individual

* Genesis, Chapter 44. It being anticipated that the narrative may be new to a large portion of the class to which this work is addressed, it is thus set out in extenso; and in no language more simple or concise than its own, could it be told.
ILLUSTRATION.

possession of the stolen property, and but just after the supposed theft; and yet very different hands than those of Benjamin's had placed it there.

The records of criminal jurisprudence abound in other illustrations; though we can only select two or three by way of example.

A curious instance occurred in England in the case of one John Fitter, a shoe maker, who was tried for the murder of his wife. He wore the leathern apron of his trade, and this, on examination, was found to exhibit pieces pared out, supposed to have been the blood spots of the murder, and removed to destroy their evidence. This looked at first sight ugly—Lady Macbeth could go no further than seek to exercise away the spot—"Out damned spot!" she exclaimed 'Out I say: yet who would have thought the old man had so much blood in him.'* It was thought however, in the case of the cobbler, he had taken the more effectual precaution of cutting it away. Fortunately he was less of a murderer than a Samaritan. He had cut out the pieces to make plasters for a neighbour.

Another is that of Bradford the English innkeeper. A traveller had come to his house, with a large sum of money; the guest was found murdered, swimming in his blood, and Bradford actually in the very room, and armed for the crime. It was not he, however, in fact, who was the murderer. He had himself been anticipated by another traveller, with whom he had no concert, and who confessed the crime on his death bed.

One illustration may be borrowed from the Causes Célèbres of France. In a house in Paris money having been missed, it was traced to the locked chest of a poor servant girl in the family, who had the key in her possession. This pointed to her as the thief;—she was taken up upon it,—tried,—found guilty,—condemned to death,—and executed. Strangely however the theft of the money still went on; and more strangely still the chest continued to be the place of its deposit. In the house was a tame magpie, and magpies are noted pilferers and cunning birds; but, though the bird might have had a bad character, who could

* Macbeth, Act V., Scene I.
suspect even a magpie's wit of forcing a locked chest? A watch however was set, and the guilty bird was subsequently caught in the very act; while a closer scrutiny of the chest brought to light a hole which had hitherto escaped observation, but through which the money had been obviously introduced. We are not told whether the real culprit was afterwards put on his trial. He may have possibly been shot; and certainly it was he, rather than the poor girl, who had incurred the extreme penalty of the law.

So recently as the year 1860, a murder having been committed in the neighbourhood of London, on an aged lady who lived in a house by herself, and a reward having been offered for the discovery of its perpetrators, one Mullens on whom suspicion had originally fallen, conducted the Police to the premises of a neighbour of the name of Emms, and pointed out to them on a shed, a slab behind which property stolen from the house of the murdered woman was to be found. This he did with the apparent view of obtaining the reward, but with the real one of throwing off the suspicion from himself, and fixing it upon Emms. Truly enough, there the property was, and Emms was taken up accordingly on charge of the murder. Circumstances, however, afterwards came to light, bringing it home to Mullens himself; and—being put on his trial at the August Sessions of the Central Criminal Court, it was he who was found guilty of it; and Emms, being examined as a witness against him at the trial, proved, most conclusively, his own alibi. It was not his hand but that of Mullens that had placed the things behind the slab, though on premises not his own, but a neighbour's. The coincidence, however, of the slab and the property was at first sight a very alarming one.

The trial presented another curious piece of circumstantial evidence. A shoe was produced which by the evidence was connected with Mullens, and which had two nails and a hole in the sole, and there was also produced a board stained with blood. On the board appeared the marks of two nails corresponding with those on the shoe. The hole in the shoe was saturated with blood and had three hairs in it, identified as those of the murdered woman.
ILLUSTRATION.

One of Shakespeare's minor plays affords an interesting illustration of the caution with which coincidence should be received as evidence, even where it partakes of the double character of Positive and Circumstantial. In Cymbeline, Iachimo wagers Posthumus that he (Iachimo) will prove the wife of Posthumus unfaithful; and resorts to Britain where she was, from Italy where he had left her husband, in prosecution of his design, he himself undertaking to be the agent of her dishonor. He contrives to get himself smuggled into her bed-room in a trunk, and there, while she is sleeping, he notes down those particulars of the scene of the alleged infidelity which could only be learned by an eye-witness; with the view of gaining credence, when he afterwards came to narrate to the husband the false tale of his wife's dishonor.

We will quote from the play itself:

"But my design?
To note the chamber:—I will write all down:—
Such and such pictures:—There the window:—Such
The adornment of her bed:—The arras, figures,
Why, such, and such:—And the contents o' the story,—
Ah, but some natural notes about her body
Above ten thousand meaner moveables
Would testify, to enrich mine inventory.
O sleep, thou ape of death, lie dull upon her!
And be her sense but as a monument,
Thus in a chapel lying!—Come off, Come off;

[Taking off her Bracelet.

As slippery, as the Gordian knot was hard!
'Tis mine; and this will witness outwardly,
As strongly as the conscience does within,
To the madding of her lord. On her left breast
A mole cinque-spotted, like the crimson drops
I' the bottom of a cowslip. Here's a voucher,
Stronger than ever law could make: this secret
Will force him think I have picked the lock, and ta'en
The treasure of her honor. No more."—*

* Cymbeline, Act II, Scene II.
Were the fidelity of Imogen a matter in issue in our courts, few would dispute, with Iachimo, that in this detail of circumstances, and all vouched for on the word of an eye witness, that there would appear at first sight

“A voucher stronger than ever law could make.”

Yet the testimony, when more closely scrutinized, is open to the explanation that, even admitting the witness to have beheld what he recorded, he need have been no further an actor in the scene, than that he chanced to have been at the place. He might have gained by stealth the opportunity of observation; but his narrative of the detail had no necessary presumption beyond this; and, for all its “pride and pomp of circumstance” Imogen all the while was, in fact, as true, as her vile traducer was false.

It is when taken in connexion with other evidence, that accidental coincidences are chiefly valuable. When standing alone, they must be very strong indeed to justify a Court in acting upon them; and in criminal cases more especially, a single proof of this nature is rarely, if ever, allowed to prevail.

Whether circumstantial evidence partake of the nature of a chain of proof, or of a single coincidence only, there is, under ordinary circumstances, one obvious sanction for its truth in the facility for its disproof if untrue; and, it is well observed by Mr. Archbold, speaking of the presumption arising from circumstantial evidence generally: “It is adopted the more readily, in proportion to the difficulty of proving the fact, by positive evidence, and to the obvious facility of disproving it or of proving facts inconsistent with it if it really never occurred."

Circumstantial evidence may be negative as well as affirmative, exculpatory as well as criminative; that is, it may be brought as much in disproof, as in proof of a fact.

Miss Edgeworth's tale of Patronage furnishes an illustration of this, in the exposure of the forgery of a Will, by which it was attempted to disinherit the family group which occupies the foreground of the novel. The cause came on for trial. The case in support of the will had been elaborately got up. The signature looked genuine. The witnesses had been well drilled; and they stuck to their story with a pertinacity which foiled the most vigorous cross examination. All seemed lost, when, by some happy impulse, attention became attracted to the seal, and the seal was broken. There dropped out a coin, introduced apparently for the purpose of rendering the wax more compact, and behold this coin bore a date later than that of the will itself. Of course the whole mine of forgery exploded, and the forgers were blown up, instead of their intended victims. Though worked into the novel, the story was a family and a true one.

The records of the Indian Courts have abundant tales to tell of the same class, and especially in the resort to paper of a modern die, or ink of a fresher color, for the manifestation of transactions of an earlier date.

It has been said that while all positive testimony may fail, circumstances themselves, "cannot lie;" and it is the existence of the notion which renders the more necessary the caution, which ought to put us on our guard against attaching an undue weight to single facts or coincidences.

On this point Mr. Bentham observes:

"In regard to circumstantial evidence, which is formed by way of argument, they, who maintain that it is superior to the other in proving power, have said in its favor, that it cannot lie. But this is true only of certain modifications of it.

The only evidence which cannot lie, is that which comes immediately under the senses of the Judge, without the intervention of human

* Mr Bentham mentions having learnt this from the authoress, and the writer has himself heard the fact in the family.
testimony; such is real evidence. The same may be said even of false testimony; there can be no error in the inference deduced from it against the veracity of the witness—an inference which gives to the false answer the character of circumstantial evidence.

But every species of evidence, which passes through the mouth or under the pen of a human being before reaching the senses of the Judge, is as liable to falsification as direct evidence; and this is the case with all the modifications of circumstantial evidence; not excepting even real evidence, when, coming through the medium of a witness, it ceases to be an original proof, and is merely a report.

Now, the falsification of written or real evidence may have the same effect in deceiving the Judge, as direct personal evidence in the mouth of a false witness. Their pernicious effects may be precisely the same.

Still, it is only by accident, and in certain cases, that real evidence can be falsified, or so altered as to deceive; whereas there is no case in which a witness may not mix up some falsehood in his deposition if he has a sufficiently powerful motive to make him run the risk."

The matter is happily illustrated by Mr. Taylor.

"Much," says he, "has lately been said and written respecting the comparative value of direct and circumstantial evidence; but as the controversy seems to have arisen from a misapprehension of the real nature and object of testimony, and can moreover lead to no practical end, it is not here intended to enter into the lists further than to observe, that one argument urged in favor of circumstantial evidence is palpably erroneous. "Witnesses may lie, but circumstances cannot," has been more than once repeated from the bench, and is now almost received as a judicial axiom. Yet certainly no proposition can be more false or dangerous than this. If "circumstances" mean,—and they can have no other meaning,—those facts which lead to the inference of the fact in issue, they not only can, but constantly do lie; or, in other words,

* Treatise on Judicial Evidence, p. 184.
the conclusion deduced from them is often false. Thus, when at Melita the viper fastened on St. Paul's hand, the barbarians said among themselves, "no doubt this man is a murderer;" but when they saw that no harm came to him, they "changed their minds, and said that he was a God." Here, both conclusions were alike false. So, in Macbeth, the master poet of nature has described Lenox, Macduff, and the other Chieftains as erroneously assuming, first, that the grooms had murdered the king, because "their hands and faces were all badged with blood, so were their daggers, which unwiped were found upon their pillows;" and next, that "they were suborned" by the King's two sons, who had "stolen away and fled." It is no answer to say that these are mere instances of hasty and illogical inferences, which display only the ignorance and presumption of the persons by whom they were drawn, and that the "circumstances which cannot lie" are such as necessarily lead to a certain conclusion. Who is to decide on this necessity? Clearly those who have also to decide on the fact in issue. Throw a case of circumstantial evidence into the form of a syllogism, and it will be found that the major premise rests solely on the erring experience of the tribunal to whom it is presented. Besides, these very circumstances must be proved, like direct facts, by witnesses, who are equally capable with others of deceiving or of being deceived. So that in no sense is it possible to say, that a conclusion drawn from circumstantial evidence can amount to absolute certainty, or, in other words, that circumstances cannot lie."

Mr. Taylor adds in a note the illustration we have already quoted, the display to Jacob of Joseph's coat, and his hasty and erroneous conclusion upon it.

It is almost needless to observe that, for inferences of the presumptive class only, it is impossible to lay down rules defining their limits, or prescribing their force. Each individual presumption can be a creature only of individual circumstances; and these must be ever

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* Page 72.
liable to modification, as well by concomitant ones, as the varying character of the subjects to which it may be sought to apply them.

It may be added that, from the very nature, and necessity of the case, although equally available in civil ones, it is in criminal proceedings rather than in civil, that resort is most usually had to circumstantial evidence, and for the very obvious reason given by Mr. Archbold, when he says:

"Presumptive, or (as it is usually termed) Circumstantial evidence is receivable in criminal as well as in civil cases: and, indeed, the necessity of admitting such evidence is more obvious in the former than in the latter; for, in criminal cases, the possibility of proving the matter charged in the pleading by direct and positive testimony is much more rare than in civil cases."

In criminal cases the evidence is more frequently applied to establish the guilt of the accused, than exculpate him from the charge. The law, however, assuming every one innocent until proved to be guilty, to insure conviction it should be, not to raising a case of suspicion only, but to proof that such evidence should amount; and by proof must be understood, that which on the proved facts in the case, and as the necessary deduction from them, leaves no other rational conclusion to the mind.

In fact, all presumptive evidence must ever be acted on cautiously, and in a future chapter it will be seen that in cases of felony, (and murder and manslaughter are included in the term) an additional prominent safeguard has been provided by the law in what is termed proof of the corpus delicti; that is, in one of ordinary felony, evidence that a robbery had in fact been committed, in one of murder, that the body is found.

Hitherto we have been treating of Inferential Evidence rather in its broad contrast only to Positive, than in reference to the distinction at which we have glanced, as to whether it be derived from individual circumstances, or a more extended experience of life. It remains to advert

* Archbold's Pleading and Evidence in Criminal Law, p. 199.
somewhat more specifically to a species of proof ranging under the head of 'Presumption' which, though in a sense referable to the general head of Inferential Evidence, stands upon a footing peculiar to itself; and has assumed a position, and appropriated a title of its own. It is to this we referred above when, speaking of the indiscriminate appellations of Circumstantial and Presumptive in reference to inferential evidence generally, we suggested its separate classification under each of these two heads distinctively.

Proof of this nature is sometimes only the embodiment of a judicial policy; and even when approximating more closely to the character of evidence, it is rather an inference deducible from other established facts of a general character, than drawn from the specific, and individual ones of any particular case to which it may be applied. In fact Presumption is a doctrine more of legal conclusion than of evidence; though the conclusions attach to themselves the force of proof.

Presumptions of this kind are divided into the threefold classification


1st. Presumptions of Fact, or as they are sometimes termed, Natural presumptions. 2nd, Presumptions of Law, occasionally styled Artificial ones, and 3rd, Mixed Presumptions. In the matter of proof, each has a probative force peculiar to itself.

Presumptions of Fact or Natural Presumptions correspond with what are in the civil law termed 'Presumptiones hominis' or, 'of the man,' from the circumstance that they are made, not by the law, but by the party who has to decide individually, from the circumstances before him. They are those where the existence of any particular fact is inferred,—from the experience of the ordinary course of nature, or of human affairs and dealings,—from a knowledge of the usual springs of human action, and the motives, passions, and feelings by which the mind is accustomed to be influenced,—from an acquaintance with the usages of society, whether in its domestic relationships, its transactions of business or otherwise;—in short, the natural inferences of the case.

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To furnish an illustration or two. It would be an inference to be drawn from the course of nature,—that the sun which rose to-day will rise again to-morrow; that the fruits of the earth would have their seed time and their harvest;—from the course of affairs that one would not perpetrate a crime without a motive, or part with his property without an inducement;—from a familiarity with the ordinary springs of human action, that self-love would dictate the desire for self-preservation; that a parent would prefer his own offspring to that of another;—from the usages of society in its domestic relationships that a man would not risk fame or fortune, without a motive, or enter upon a lower position, when he could achieve a higher;—in its transactions of business that a debtor making a general payment to his creditor, would intend the discharge first of the debt of longest standing or of most onerous obligation, one for instance bearing interest, before one which did not; that a contract would intend to embody as part of its terms the usage of the trade or of the place with reference to, or at which, it was entered into; and that a letter posted in conformity with an ordinary routine would reach its destination.

In any judicial investigation accordingly involving the operation of any of these deductions, the existence of the facts on which they were founded would be taken for granted, without proof in the particular instance. The law indeed on the question of effect, would assign to them no special probative value beyond the natural inference deducible from them; but whatever force the ordinary experience of mankind might ascribe to them, that force the law would admit as an element of proof, in other words, as the natural presumption from the circumstances.

"Experience and observation" says Mr. Starkie, "show that the conduct of mankind is governed by general laws, which operate under similar circumstances, with almost as much regularity and uniformity as the mechanical laws of nature themselves. The effect of particular motives upon human conduct is the subject of every man's observation, and experience, to a greater or less extent; and in proportion to his
attention, means of observation, and acuteness, every one becomes a judge of the human character, and can conjecture on the one hand, what would be the effect and influence of motives upon any individual under particular circumstances, and on the other hand is able to presume and infer the motives by which an agent was actuated, from the particular course of conduct which he adopted. Upon this ground it is that evidence is daily adduced in Courts of Justice of the particular motives by which a party was influenced, in order that the Jury may infer what his conduct was under those circumstances; and on the other hand Juries are frequently called upon to infer what a man's motives or intentions have been from his conduct and his acts. All this is done because every man is presumed to possess a knowledge of the connection between motives and conduct, intention, and acts, which he has acquired from experience, and to be able to presume and infer the one from the other."

The observation addresses itself more peculiarly in terms to motives and conduct; but in spirit it is applicable to the whole of the class of presumptive proof of which we are speaking.

The celebrated judgment of Solomon, the Jewish King,† was founded on a presumption of this class; and English Lawyers, in interweaving the principle into their system, but adopt, as an element of their Jurisprudence, that which, some three thousand years ago, had received the sanction of him who "passed all the kings of the earth in riches and wisdom, and made silver in Jerusalem as stones."‡ Two women were brought before him, each claiming a child as her own; and he decided the maternity, by the contrasted effect on the claimants, of an order to cut the child in pieces, and give one-half to each. The pretended mother exhibited only indifference to the application of the test. The real one, rather than submit, would have yielded

* Starkie on Evidence, p. 70.
† 1st. Kings, Chapter 3.
‡ II. Chronicles, Chapter IX. v. v. 22 and 27.
the child to the other. The conduct of the real mother in contrast with that of the pretended one, raised an adequate presumption on which to determine the motherhood; and the maternity was assigned to her who would have purchased the life of the child, even at the price of its surrender to her rival. No better illustration could be found of a Presumption of Fact.

We will add, however, one in which the conclusion founded on a course of nature, was applied to a case involving the instincts of the brute creation, as distinguished from that of the human, but in which the principle is the same. It is to be found in an anecdote related of the great Chancellor, Sir Thomas More. "It happened (says his Biographer) on a time that a beggar woman's little dog which she had lost was presented for a jewel to Lady More, and she had kept it some se'n-night very carefully; but at last the beggar had notice where the dog was, and presently she came to complain to Sir Thomas, as he was sitting in his Hall, that his Lady withheld the dog from her. Presently my Lady was sent for, and the dog brought with her; which Sir Thomas, taking in his hands, caused his wife, because she was the worthier person, to stand at the upper end of the hall, and the beggar at the lower end, and saying that he sat there to do every one justice, he bade each of them call the dog; which, when they did, the dog went presently to the beggar, forsaking my Lady. When he saw this, he bade my Lady be contented, for it was none of hers; yet she, repining at the sentence of my Lord Chancellor, agreed with the beggar and gave her a piece of gold, which would well have bought three dogs, and so all parties were agreed; every one smiling to see his manner of inquiring out the truth."

To borrow an illustration of a more modern date furnished by the records of our Courts. On a trial before him, Mr. Justice Maule put the case of a man going into the London Docks quite sober, but shortly afterwards found very drunk, staggering out of one of the cellars in which above a million gallons of wine were stowed. "I think" said the

learned Judge ' that this would be reasonable evidence, that the man had stolen some of the wine in the cellar, though no proof were given that any particular vat had been broached, and that any wine had actually been missed.'*

It is obvious that presumptions of this nature, though founded on a broad, and even universal experience, could only afford materials of proof, not positive rules for decision. Each separate presumption would derive its force, not from any arbitrary or artificial value attaching to it by a rule of law, but from the voluntary assent, the willing homage, which the good sense of society, and of Jurors and Judges in particular, might spontaneously yield to it in the particular case to which it was applied.

Thus for example, according to the course of nature, goods could not be moved from one place to another without an agency; while it would be only consistent with the habits of mankind to infer, prima facie, that he in whose house goods were found closely upon the committal of a theft, had had a hand in placing them there. Consequently the recent possession of stolen property would be so far an inference of guilt that, when proved as a fact, there would arise from it a presumption to be submitted to the court, as a matter of evidence on the trial. Yet this presumption, strong as it may be, is one only of the general array of facts, on the whole and the whole alone, of which the conclusion of the court has to be founded. This particular presumption indeed so far approximates to one of law, nay, may almost in a sense be said to be one, that, from the universality of its recognition, the Court has come to treat it as sufficient to put the party affected by it on his defence. Yet it is a presumption rather for trial, than save as a fact in the case, for conviction; and, beyond this point, the law assigns to it no artificial value.

Of course the strength of all such presumptions must necessarily vary with the degree of the established uniformity of their deductions; and it is from the obser-

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* R. v Barton; Pearce and Dearley's Crown Cases Reserved, p. I., 284.
vation and experience of a mutual connection between other facts, and those the subject of investigation, that the force of such presumptions is derived. In the ratio of the constancy of the connection, is the strength of the presumption.

Though Presumptions of Fact occupy a prominent place in most books on evidence, some writers have but reluctantly conceded them a place under the head of evidence, in the legal sense of the term, at all.

Thus Professor Greenleaf observes: "Presumptions of Fact, usually treated as composing the second general head of presumptive evidence,' [he puts presumptions of law as the first] 'can hardly be said, with propriety, to belong to this branch of the law. They are in truth but mere arguments, of which the major premise is not a rule of law; they belong equally to any and every subject matter; and are to be judged by the common and received tests of the truth of propositions, and the validity of arguments. They depend upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections, which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived, wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever. Such for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which, by means of such an instrument, had been burglariously entered. These presumptions remain the same in their nature and operation, under whatever code the legal effect or quality of the facts when found, is to be decided."*

To which Mr. Taylor adds in continuation of the passage.—"These presumptions embrace all the relations between the fact requiring proof and the fact or facts actually proved, whether such relations be direct or indirect, and whether they be physical or moral. A single circumstance may raise the inference, as well as a long chain of circumstances. For instance, the decision of King Solomon as to which of the two harlots was the mother of the living child, rested on the general presumption in favor of maternal affection, and on the sole fact that the "bowels" of the real mother "yearned upon her son," and she would in no wise consent to his being slain. So—to pass from history to fiction—the famous judgment of Sancho Panza acquitting the herdsman charged with rape, was founded on the ascertained fact, that the prosecutrix successfully resisted the attempt to take her purse which the accused made by order of the court. "Sister of mine," said honest Sancho, to the forceful but not forced damsel, had you shewn the same, or but half as much courage and resolution in defending your chastity, as you have shewn in defending your money, the strength of Hercules could not have violated you."

Mr. Taylor appends in a note, the anecdotes,—one given by Suetonius, in his life of the Emperor Claudian, that the monarch discovered a woman to be the real mother of a young man, whom she refused to acknowledge, by commanding her to marry him; for rather than commit incest, she confessed the truth; and the other—that related by Diodorus Siculus of a certain King of Thrace, who discovered which of three claimants was the son of a deceased King of the Cimmerians, by ordering each of them to shoot an arrow into the dead body. Two obeyed without hesitation, but the other refused.

We may observe however, with reference to the view taken by Professor Greenleaf, that notwithstanding his use of the expression "natural presumptions" we should infer from his illustration of the broken blade, that what he had in his mind was, not so much

* P. 177
the class of presumption deducible from the laws of nature as the coincidences (and thence the inferences) presented by individual cases, just indeed such as that of the illustration he cites. Inferences of this latter class may in a sense be characterized as argumentative, rather than evidentiary. But even if the view that a presumption is an argument only is to be conceded to this extent, it is submitted that concession should go no further. Let a presumption founded on some law of nature, or extensive human experience, have but once acquired a universality and stability sufficient to entitle itself to be received as a material of proof, proprio vigore, that is by its own inherent recommendation, it would seem to advance from the point of matter of argument to become matter of evidence, or equivalent to it. Such it is apprehended are those general presumptions of which we are here treating.

A Presumption of Law is so far analogous in its character to one of fact, that it is founded, in the main, on the like broad deductions from human experience, and the like dictation of a general probability. It differs however in this, (and this is the great distinction between the two) that it assumes the form of a rule of law, carrying with it the weight of an artificial value, and not that of a mere element of proof; and it will be seen that there is a class of presumptions which it is forbidden to dispute, albeit by even actual proof to the contrary. Indeed the law sometimes adopts as conclusions, matters not being of the nature of evidence at all, and as the mere assumption of a legal policy. In any suggested cases of presumption of fact it is open to the Tribunal before which it is laid (Jury or Judge as the case may be) to determine for itself whether the presumption ought to prevail; and by the exercise of its own judgment. But in the instance of a presumption of law, the fact in which the assumed presumption arises having been established, the Court draws the inference for itself; and, as it were, stamps the legitimacy of the presumption with its own judicial seal. A presumption of law is in truth a judicial hypothesis, which it is forbidden to controvert.

"Presumptions of Law" says Professor Greenleaf 'consist of those rules, which, in certain cases, either forbid or dispense with any ulterior
inquiry. They are founded, either upon the first principles of justice; or the laws of nature; or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things.

The general doctrines of presumptive evidence are not therefore peculiar to municipal law, but are shared by it in common with other departments of science. Thus the presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal found with webbed feet belong to the same philosophy, differing only in the instance, and not in the principle of its application. The one fact being proved or ascertained, the other, its uniform concomitant, is universally and safely presumed. It is this uniformly experienced connection, which leads to its recognition by the law without other proof; the presumption, however having more or less force, in proportion to the universality of the experience."

Thus the Court having laid down that crime is an act of the will, and having at the same time by a course of natural observation, arrived at the conclusion that infants of tender years are not imbued with the requisite judgment to constitute volition, it has been established as a presumption of English law, that under seven years of age, an infant cannot be an agent of crime; that a child under seven cannot commit a felony. So it has been determined as a matter of policy that persons in general, in all their acts, must intend their consequences, and, though certainly with little foundation of fact, that no member of the State should be held ignorant of its laws. Hence from the discharge by one of a loaded fire arm pointed at another, the court would presume the intent to inflict bodily harm; and a presumed knowledge of the law has even been ascribed to a foreigner, though the law in question were different from that of his own country.

The law abounds in legal presumptions, and we devote a chapter hereafter to their more detailed investigation. Here we are only

* Greenleaf on Evidence, p. 20.
dealing with principles in their generality; and we abstain accordingly from citing further examples.

*Legal presumptions are alternately termed Intendments of law, and by the Civilians *Presumptiones Juris*, and they are again sub-divided into the higher class;—1st *Presumptions Absolute, or Conclusive, or Irrebuttable;* and 2nd, the lower one, *Presumptions Conditional, Inconclusive, or Rebuttable*. The former are termed by the Civilians *Presumptiones juris et de jure*; the latter *Presumptiones juris tantum*—or simply *Presumptiones juris*.

By ' *Presumptiones juris*' are meant merely presumptions of law:—by 'presumptiones juris tantum' are intended presumptions of law simply when put in apposition to ' *Presumptiones juris et de jure*':—and by this last class is meant not only presumptions which the law draws, but to which it ascribes a certain truth. "It is," says its learned commentator 'called, presumptio juris' because it is a presumption made by law; and *de jure*, because the law holds for truth the presumption thus made and establishes a fixed right upon it."*

The instances we have quoted, those touching infancy, assumed intention, and knowledge of the law, belong to, and will illustrate, the higher class, that is Presumptions Absolute, and to these we may add such cases as—those in which, from the solemnity of the seal, the law in England (contrary as we shall hereafter see to the Regulation law of India) forbids to dispute that a deed or bond is founded on a previous consideration;—those in which it ascribes to instruments of a given age, all of thirty years and upwards, coming out of a rightful possession, and without obliteration or erasure, a presumption of genuineness, without proof of their execution;—and those in which, under the head judicial notice, it admits as proved, things theoretically ascribed to the personal knowledge of the Judge, but who perchance may be practically ignorant of them.

So conclusive are legal presumptions of this higher class that the

Court does not allow their contradiction, even by

proof the most conclusive of their being opposed
to the actual fact; indeed it would not permit evidence to be received
for the purpose.

Startling illustrations of the principle are to be found in the
records of Criminal Jurisprudence, as we shall hereafter see; and in Civil
proceedings, in any case of a trial by Jury in which the presumption
had been set at nought or passed over by the verdict, according to
English law, the court would, as a matter of course, ex debito Justitiae
simply direct a new trial; and that toties quoties, that is more than
once, indeed, as often as the case required.

To the lower class, that of Conditional Presumptons, the law
assigns a prevalence only, until either displaced
by proof, or met by some counter presumption.

Thus the fact is presumed until the contrary be
proved by the opposite party. In the language of the ancient maxim,—
"Stabitur in presumptione donec probetur in contrarium"—that is (con-
strued liberally) the presumption is to prevail until the contrary be shown.

Thus it is a presumption of this class that, within the probable
period of life's duration, life continues until shown
to have terminated. In the case accordingly of a
person once established to be alive, the presumption that he was living,
and for any probable period of life's duration, would prevail, until
displaced, either by proof of death, or met by a counter presumption.
It is an equal presumption, however, that a party not heard of for seven
years is to be presumed dead; in the case accordingly of an absence
without tidings for that period, such an absence would reverse the
original presumption, and raise one of death, in its own turn equally
liable to removal, by actual proof of life.

In truth presumptions of law, when only of the rebuttable charac-
ter, though furnishing, until displaced, not less
than the higher class, a rule of positive law, are
often found simply determining the burthen of proof, and shifting it
from one side to the other in the progress of a cause.
In civil cases, presumptions of law, whether of the higher or the lower class only, are frequently found supplying the case of evidence altogether. In criminal cases however, especially capital ones, though allowed to prevail for the defence of an accused, sometimes even to the extent of a miscarriage of criminal justice, these presumptions are resorted to but very sparingly against the prisoner, and even then only under the greatest exercise of caution.

**Mixed Presumptions** constitute a class intermediate between those of Fact, and those of Law; though the line which divides them is often so attenuated as practically to be almost, if not altogether, imperceptible. To a certain extent they partake of the nature of each, and yet are distinguishable from both.

Thus, as we have seen a presumption of fact is not equivalent to a rule of law, while a presumption of law is. There are however certain matters of fact which, from the repetition of their appearance in the courts, and the reliance accustomed to be placed on them there, have acquired a conventional value, which would almost withdraw them from the line of natural presumption to place them on that of legal, and they are received under the head of **Mixed Presumptions**.

The presumption we have just referred to, arising from the recent possession of stolen property, may be cited as an example.

Though more strictly belonging to the head of Fact, than of Law, presumptions of this last character have come to be referred to the latter by the partiality in their favor of individual Judges, and a want perhaps of sufficient discrimination between the two classes of presumption.

- **Mixed presumptions of the more recognized class will be found addressed to three general emergencies; and they grew out of a very natural impulse on the part of the administrators of justice, that is to say, the Judges of the courts, to apply a practical remedy for a grievance which the law would otherwise have left unprovided for.**
The object of the first was to apply the general policy of the legislature, indicated by its statutory provisions, to cases within their spirit, but falling without their letter;—that of the second to bring within the influence of the known rules of the court cases, dictated by the policy of the rules, but not contemplated by their terms;—and that of the third was to aid the establishment of some title to property, good in substance, but wanting some form or collateral matter to render it perfect. The great object was to prevent a miscarriage of justice, by supplying some technical omission; though, consistently with the object, it is only in favor of an actual or probable right, that this action of the court is allowed to be invoked—always only to support, never to defeat, the course of justice.

To illustrate the first of these three classes of presumptions. The policy of the State, from time to time, dictated statutes, having for their object to limit the period within which an action might be brought, either for the recovery of property, or the enforcement of demands; yet these statutes failed to provide for all the detail of circumstances to which their spirit would apply. Thus the statute formerly regulating the time for bringing an ejectment for the recovery of land (21 James 1) constituted an adverse possession of twenty years a title to the land, while it failed to address itself in terms to interests issuing out of the land; for example a right to take toll from a market or a ferry, or a right of way. From an undisturbed enjoyment however of sufficient length, an original rightful creation of title might naturally be inferred; while, if the proof were not forthcoming, its absence might be fairly ascribed to subsequent loss. Accordingly, in cases of this description, the Judges, in submitting to the Jury the evidence in support of such a right, have long been in the habit of advising the Jury to presume, under the circumstances, an original grant notwithstanding the want of any proof of one before them. So though it was not until a recent statute (3 and 4. W. 4. c. 42) that the lapse of twenty years without acknowledgment, or payment of interest, would operate as an extinction of the right of suit under a bond, yet, previously to the existence of that statute, that period had been fixed as an
ordinary statutory bar for the enforcement of claims. Juries under
such circumstances were accordingly recommended, or as it is termed,
directed to presume a satisfaction.

To illustrate the second of this class of presumptions. The action
called one of trover is one brought to establish
the title to moveable chattels, or to recover
compensation for their loss or abstraction; and it is founded on the legal
fiction that the goods in question have come into the possession of the
defendant by finding, and been converted by him to his use. Now, ac-
<missing>
cording to the strict technicality of the case, while, in this form of
action, evidence of this conversion is one of the first steps in the proof,
a refusal by the party in whose possession they may be, on the demand
of the owner, to deliver up the goods, does not fall within any legal
definition of a conversion. Consequently in any action of trover, were
the evidence of the original conversion to fail, yet that of a demand and
refusal to be given, still, but for the aid of a presumption, the action itself
would fail. He, however, who simply refuses to deliver, may be fairly
assumed to have previously converted. Consequently, to avoid the mis-
carriage involved in this failure of proof, a Jury would be directed to infer
or presume a conversion, as a fact, from the correlative ones of a de-
<missing>

And lastly, to illustrate the third subject of mixed presumption, a
party may be in the beneficial possession of an
estate, and rightfully so; but he may possess only
what is termed an equitable title to it, the legal or representative owner-
ship being outstanding in some trustee for him who, had he discharged
his duty, would have conveyed to the beneficiary the legal interest, and
thus given the latter a title perfect at Law, as well as in Equity. The
court under the circumstances would direct a conveyance to be presum-
ed. As for example, in the instance of an estate devised to A. B. upon
trust to convey to C. D;—or an estate once conveyed to a mortgagee,
who, his mortgage having been satisfied, had accordingly become con-
structively a trustee for the mortgagor,—a conveyance or a reconveyance
of the estate, as the case might require, would be presumed; and that,
notwithstanding there was nothing in the circumstances, beyond this imaginative supposition, to give credence to the fact that any such conveyance had been executed. On the contrary, it may have been pretty manifest that no such document had really existed. Again, in support of a rightful title, the execution by parties of documents conferring it, has been presumed, even, where on production of the documents, their apparent condition, for instance, the absence of the party's seal and subscription, would rather have negatived the presumption.

Nor indeed in these cases is it to the support of a rightful title, that the principle of presumption is confined. It has been allowed to prevail to defeat an unrighteous defence. Thus in the instance of an assignment of a patent to two assignees, by a deed purporting to contain a covenant on their part for payment of the consideration money by certain instalments, an action having been brought for its recovery, one of the defendants pleaded he had never executed the deed. It appeared on its production at the trial that the other of the two had executed, but that, as respected the one who had taken the objection, though there was a seal at the foot of the deed for each party, being the seal ordinarily used in the office of the attorney who prepared the deed, and who had attested the execution of the other defendant, the other seal had no signature attached to it, and there was an absence of attestation of execution. That which was apparent on the face of the document itself was a practical denial of the fact of execution; but the deed having come out of the possession of both defendants, and both having been shown to have acted under it, the Jury were allowed to presume an execution.*

Akin to presumptions, though more nearly allied to those of law, are certain things called Fictions, which, though opposed to the fact which they represent, are adopted by the law in favor of some right, real or supposed; and to prevent the defeat of Justice by a technicality.

One approaches the term Fiction, as a legitimate child of the law, with some disquietude; but we get more reconciled to it when reading

in it a corrective only to some other technicality, otherwise in itself likely to work mischief; and certainly we have authority for the principle in the civilization of a Roman Jurisprudence, where we find the loss of civil right which a citizen would have incurred by his absence from Rome under captivity, prevented by a legal Fiction, which, in the case of his return, supposed him never to have been made prisoner at all, but all the while in his own country. So, the same Law invalidating the will of a Roman citizen, made during captivity, this was corrected by another fiction which, in the event of his death during the captivity having made a will, supposed him to have died at the moment he was made captive, and so before his captivity had begun.

In English Law these fictions owe their use for the most part, either to the niceties of pleading, or to the formalities of some artificial rule, and it is to correct these they are resorted to. Thus in pleading, to confer jurisdiction on the Court, the place where the matter was transacted, the 'venue' as it is termed, is laid at some locality within the jurisdiction. Accordingly, a contract in fact entered into at sea, is represented or feigned as having been entered into at London; and the Court admits the fiction. So an action of ejectment proceeds on the theory of a previous lease, entry and ouster, all of which are fabulous; yet the Court sanctions the fiction to sustain the action in that form.

The object of these fictions is the furtherance of justice; and being made only for necessity and to avoid mischief, they are never allowed to work prejudice or injury to an innocent party; while the matter assumed by them as true must be something physically possible.

Fictions are of three kinds, affirmative, negative, and by relation.

An affirmative fiction is one which affirms something; such a one as that which asserts the lease entry, and ouster in the action of ejectment.

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* See the "Jus postliminis" Digest Lib. I. Tit. XII. Sandars, p. 133.
† Lib II. c 12, Sandars, p. 272.
A negative fiction treats as non-existing that which exists in fact; as for example, a disseisee after re-entry may maintain trespass for an injury done to the freehold during his disseisin; on the principle, that so far as the disseisor was concerned, the freehold was never divested out of its disseisee.

Fictions by relation are of four kinds.—1st, when the act of one person is taken as that of another; the act of the servant, for instance, as that of the master, the agent as that of the principal; 2ndly, where an act done by or to a thing is taken by relation as done by or to another; as in the case of a sale of goods, an acceptance of the portion of the goods is taken as equivalent to an acceptance of the whole; 3rd, those having relation to place; as in the instance we have put, where the contract entered into at sea, was taken as entered into at London; and 4thly, those having relation to time, as for instance, where the title of an executor has assigned to it a retrospective effect; and that not merely from the date of the probate, but from the time of the testator's death; or the instance of a ratification, which has a reference back to the time of the act ratified.

Positive and Inferential may be taken as the two great classifications of reported evidence. But there are two other broad distinctions to be pointed out, those between evidence which is called Primary, as distinguished from Secondary, and Original as distinguished from Hearsay, or, as it is sometimes called, Mediate.

To these may be added, though perhaps only a classification of each, Oral testimony, or as it is sometimes called, Parol, and Written.

Primary evidence is that which negatives, in itself, that is by its own production, the existence, as a matter of proof, of any evidentiary matter of its own class behind itself, in other words not produced, and of a nature superior to itself. It is the highest evidence, within the range of its class, of any fact the subject of proof. As a general proposition, so long as evidence of this character is capable of being produced, or its non-production is unaccounted for, (that is according to legal requisition,) no
inferior or subsidiary evidence can be admitted; and secondary accordingly is excluded. *Secondary* is that, where evidence exists of a corresponding species *superior* to itself, and the existence of which, ordinarily, though not necessarily, the production of the secondary bespeaks. Thus, suppose the subject of enquiry were any given transaction between individuals, the terms of which had been put into writing. The writing would be the *primary* evidence of the transaction which it defined. What purported to be a *copy* of the writing would be secondary evidence only, and so would be *oral* testimony of the transaction. The writing (save only in those exceptional cases in which it might be itself the subject of impeachment) would naturally, by its own *production*, *exclude the possibility of any higher evidence than itself*, and constitute all other accordingly secondary. The production of the copy purporting, as it only could, to be a copy, would be *self declaratory* of its own *secondary* character; and, in the case of *oral* testimony, did it transpire in the course of its being taken, upon cross-examination or otherwise, that there had existed any *writing*, the discovery would equally show itself to be *secondary*.

There might be *collateral* evidence of the same transaction, which in point of weight might be deemed higher than the other proof. Yet the differing *degree* of weight, would not vary the order of *admissibility*, or deprive either kind of evidence of its classification of *primary*. Thus let there be a question of hand-writing. Here ordinarily it would be supposed that the *testimony*, either way, of the assumed writer, would be a higher *order* of proof than the *mere comparison of writings*, and it would certainly be likely to be more conclusive to the mind. Yet the proof by comparison would be as much primary as the testimony of the supposed writer; and would be admissible as such, even though he were present in court and were not examined.

*Original evidence and Hearsay or Mediate*, in their contrast to each other, pretty much explain their nature. *Original* is what is deposed to, on personal knowledge: *Hearsay* is something arrived at upon the sayings, doings, or deportment of another; and not upon personal knowledge.
Prima facie, Original evidence is generally receivable; the principle applicable to it is one of admission, and there is no limit to its admissibility, beyond that in which, in specific instances, the application of some particular principle furnishes ground of exclusion. In the case of Hearsay evidence, however, on the other hand, the ordinary principle is one of exclusion. It is only by some special peculiarity recommending it to reception, that it is admitted. It comes through another medium, and accordingly is called mediate.

Of course so far as in a case in which hearsay evidence was admissible, a witness was found deposing to any fact, though the subject of deposition might be matter of hearsay, its narration by the witness would be original testimony.

We shall, however, see hereafter that much which, on a superficial view, might be regarded as hearsay, is in fact recognized as original. Thus for instance there are cases,—questions of public right, pedigree, marriage and so forth,—on which reputation of a fact is admitted as evidence of it;—as are such statements in the nature of hearsay as are derived from the declarations of persons made against their own interests, or in an ordinary course of business.

Oral or Parol evidence is obviously that common course of testimony which consists in the narration of witnesses by word of mouth. Written is the silent, yet often more speaking; testimony of documents.

Each separate head however of Primary and Secondary, Original and Hearsay, Parol and Written evidence, forming as it does a branch of more technical law than that to which in our present chapter we are addressing ourselves, will require to be treated in more detail; and we reserve them accordingly to subsequent ones devoted to their elucidation. They are only noticed here to complete the outline we have sketched of the more general nature of evidence as administered in the Courts of England.
In the chapter which follows, we shall offer some criteria for testing the value of testimony; and, in subsequent ones, fill up the broader outline we have here given by an exposition of those principles of technical detail which constitute the English Law of Evidence, so far at all events as applicable to India.

Our introductory chapter has expanded itself into some length; but it may be observed that, while an elemental acquaintance with the nature of evidence in its more jurisprudential view, is obviously an essential possession to all connected with the administration of the Law, whether as Judges, Magistrates or Practitioners, the possession of that knowledge itself will be found largely assisting in the mastery of the more practical parts of the system.
CHAPTER II.

On the Effect of Evidence.

The enquiry contained in the preceding chapter into what constitutes evidence, may properly be followed up by an examination of the principles by which the effect of evidence is governed. Not indeed that, like the rules determining the admissibility of evidence itself, these principles are capable of reduction to an absolute system. In the infinite variety of form which questions of fact assume, the moral kaleidoscope to which the court is called on to direct its view, the weight of evidence must necessarily vary in an infinite proportion, both according to the subject to which the testimony is applied, and the nature of the testimony itself; and the utmost that can be looked for towards an a priori adjustment of weight, is something in the nature of a guide, rather than that of a rule.

In truth after all the aid which juridical learning has to bring to the subject, the question of effect is one very much to be left to the ordinary apprehension of mankind, and the dictates of experience and common sense; and it was well observed by the Chief Baron Pollock in charging a jury:

"The conclusion to which you are conducted is that there is that degree of certainty in the case that you would act upon it in your own grave and important concerns, that is the degree of certainty which the Law requires, and which will justify you in returning a verdict of guilty.

Many Continental Codes prescribe imperative formulæ descriptive of the kind and amount of evidence requisite to constitute legal proof. But the diversities of individual men render it impracticable, thus definitely to estimate the fleeting shades and infinite combination of human motives and actions; or thus to fix, with arithmetical exactness, a common standard of proof, which shall influence with unvarying intensity and effect, the minds of all men alike. Such rules are not merely
harmless, nor simply superfluous; they are positively pernicious and
dangerous to the cause of truth; and while they operate as snares for
the conscience of the Judge, they are unnecessary for the protection of
the innocent, and effective only for the impunity of the guilty."*

These observations were elicited in a criminal trial, and were
addressed to a Jury; but they would equally apply to any civil pro-
cedure—and that whether the decision of the matter of fact was intrusted
to a Jury or rested with the Judge.

The ancient Hindu Law as prevailing in some parts of India
prescribed a mode of weighing testimony which
would probably have been viewed by the Chief
Baron, as casting even the Continental formulae into the shade. The
Hindu Code had reference however rather to a conflict of testimony
among the witnesses, than to the adjustment of the different values of
varying matters of proof.

"In a contradiction" says the Mitacshara, 'the assertion of the ma-
ajority; where the numbers are equal that of the respectable party; where
there is contradiction among respectable witnesses, that of the most res-
pectable. 'Respectability' being ascribed to "those endued with a
knowledge of revealed law, who shape their conduct accordingly, who
have children, wealth, and virtuous qualities."!!†

But while it would be hopeless to attempt to reduce the effect of
evidence to a system, there nevertheless exist some
broad tests capable of being applied with advantage
the value of testimony generally; and these we
proceed to point out.

They naturally divide themselves into those
affecting the credibility of the witnesses individually,
and those, regard being had to its nature or
subject, affecting the testimony itself.

† Macnaghten's Hindu Law, Vol. I, p 252.
To a certain extent no doubt, whatever the testimony may be, it cannot but be affected by the credibility of the witnesses. Still an obvious distinction will be perceived between that which is personal to the parties from whom the evidence proceeds, and that which is peculiar to the testimony; and we treat the subject under these two separate divisions accordingly.

And first as to the personal credibility of the witnesses;—though it must be premised, that what is here dealt with is credibility in its more popular view only:—the artificial discredit in particular instances which the rules of law have proclaimed, are reserved for the more technical portion of the work.

Now the personal credibility of every witness may be affected, either by a condition of things common to all deponents generally; or by circumstances individual in respect to each.

The condition of things common to all to which we refer is to be sought mainly in the constitution of the Court in which the testimony is delivered; and the sanctions for veracity afforded in its machinery; and, as the more prominent of these, at all events in the Courts of England, may be stated, provisions to enforce the public delivery of the testimony—its delivery upon oath or under corresponding solemnity—the separation or keeping apart of the witnesses when occasion may require it; and a fitting and fair course of examination for eliciting the testimony.

The last, beyond this general notice, we pass over for the present. It will be found to resolve itself mainly, on the one hand, into the security for the testimony being natural, afforded in the shutting out dictation to the witness, by putting into his mouth the answer desired of him, through the medium of a course of suggestive, or as it is termed 'leading' interrogation; and on the other, the sanction both for knowledge, and veracity, supplied by the scrutinizing power of cross-examination. These, connected as they are with the more technical parts of the treatise, will form matter for separate chapters, and their discussion is reserved accordingly.
To advert then, subject to this omission, to the condition of things common to all deponents generally, let us address ourselves first to the sanction for veracity existing in the public delivery of the testimony.

"Publicity," says Mr. Bentham, "is the most effectual safeguard of testimony, and of the decisions depending on it; it is the soul of justice; it ought to be extended to every part of the procedure, and to all causes, with the exception of a few, which will be noticed in the following chapter.

1. In regard to the witnesses, the publicity of the examination awakens all mental faculties which should concur to produce a faithful statement; particularly attention, so necessary to recollection. The solemnity of the scene puts them on their guard against thoughtlessness or indolence. There may be some, who are agitated from natural timidity; but this disposition, which is never mistaken, acts only during the first moments, and betrays nothing unfavorable to the truth.

2. But the great influence of publicity is exercised on the veracity of the witness. Falsehood may be bold in a secret examination; it is difficult for it to be so in public; it is even extremely improbable, with any but the utterly depraved. When every eye is fixed upon a witness, he is disconcerted, if he has formed a plan of imposture; he feels that the untruth, which he is about to state, may find a contradiction in every one who hears him. A countenance which he knows, and a thousand others which he does not know, disturb him equally; and he imagines, in spite of himself, that the truth, which he is seeking to suppress, will come forth from the very bosom of the auditory, and expose him to all the dangers of false testimony; he feels at least, that there is one punishment from which he cannot escape, shame in the presence of a crowd of spectators. It is true, that, if he belong to a mean class, his very meanness saves him from shame; but witnesses of this class are not the most numerous, and one is naturally on his guard against their testimony."

* Judicial Evidence, p. 67.
The passage quoted alludes to exceptional cases in which public examination might be dispensed with. These however in no way trench upon the soundness of the general principle. They are merely instances in which the term examination not in secret, but in private, would be put in opposition to that of public, and they are those where the publicity is only dispensed with out of consideration to a paramount and controlling policy; as, for instance, cases involving uncalled for exposure of domestic affairs, or those of an indecent or scandalous nature, as rape, incest or the like.

As a general result, few will dispute the superiority of evidence taken in open court, over that which is obtained under a commission; executed as the latter necessarily is in private.

The next sanction for veracity is that which requires the testimony to be delivered under the solemnity of an oath or (where this is permitted) a declaration in its stead; and this amounts to a solemn invocation of the Deity to the truth of the testimony by the witness; with an imprecation of the Divine vengeance on himself in case of its falsehood. But the sanction involved in the pledge does not stop at the religious invocation. It is composed of two elements, the temporal and the spiritual; the former the exposure which false testimony would involve to the penalties of perjury in this world; the latter that of its punishment in the world to come. In addition to these, a third has been suggested;—the sanction of honor, or the fear of the infamy which attaches to an untruth told upon oath; and it may not be without its influence. It is a sanction, however, not much adverted to by English lawyers generally.

"The first great safety," says Mr. Starkie, "which the law provides for the ascertainment of the truth in ordinary cases, consists in requiring all evidence to be given under the sanction of an oath. This imposes the strongest obligation upon the conscience of the witness to declare the whole truth that human wisdom can devise; a wilful violation of the truth exposes him at once to temporal and to eternal punishment."*
We shall hereafter see that there are certain exceptional instances in which a declaration is allowed to supply the place of an oath; but this, if not practically an oath in another form, still carries with it all the obligations of the oath, and all its penalties, whether spiritual or temporal.*

Among any people acknowledging either a moral responsibility, or a regard to even temporal consequences, one would have almost thought it sufficient to mention the sanction to carry with it a conviction of its importance. But no less eminent Jurist than the one we so freely quote, Mr. Bentham, and in common with some others, has treated somewhat lightly the guarantee involved in the religious portion of the ceremony, though mainly from the frequency of its practical prostitution. In reference to any country, however, owning the obligation of truth, though the effect of the oath may have been occasionally exaggerated, on the whole, we believe that, among thinking persons generally, the asserters of this theory would be left but in a small minority in their contention.

To a well constituted mind, a wilful falsehood, it may be admitted, would be a sheer impossibility; albeit without such a security for truth. But there are minds to which the influence of the spiritual invocation, to say nothing of the temporal sanction, might be a very wholesome addition to an ordinary prompting; and certainly the more solemn the occasion, and that perhaps even with the most truthful, the more are care and caution in statement awakened. It is a matter of familiar experience that people are often found advancing statements in private or ordinary conversation which they would scruple to sustain if put on their oath. Indeed, if we may trust the testimony of Lactantius cited by Lord Chief Justice Willes, in his celebrated Judgment in Omichund v. Barker—(to which we refer hereafter in the more technical portion of the work)—"some in his time" (that of Lactantius) "who were so very wicked as not to be afraid of even committing murder, yet had such a veneration for an oath, and

* See Post Chapter IV.
such a dread of being forsworn, that when purged upon their oath, they durst not deny the fact."

If the value which differing ages, and varying countries have attached to the sanction of an oath, be taken as any criterion of its value, it certainly cannot be regarded as inconsiderable.

"The next security says Mr. Best is a very remarkable one, and consists in requiring all evidence in Courts of Justice to be given on oath, according to the maxim "non creditur nisi juratis." Oaths however, it is well known are not peculiar to Courts of Justice, or even the creatures of municipal law; the most solemn acts of political and social life being guarded by their sanction, and having been in use before societies were formed or cities built. And however abused or perverted by ignorance or superstition, an oath has in every age been found to supply the strongest hold on the consciences of men, either as a pledge of future conduct or a guarantee for veracity in the narration of events."†

In the judgment of Chief Justice Willes, in Omichund v. Barker, he states;—"Oaths were instituted long before Christianity, were made use of to the same purposes as now, were always held in the highest veneration, and are almost as old as the creation." For the latter proposition he cites the contracts recorded in the Jewish scriptures between Isaac and Abimelech and between Jacob and Laban which were confirmed by mutual oaths. And various other examples taken from the histories and the literature of Greece and Rome.‡

To address ourselves to Courts of Justice only, we may add that the oath prevailed in ancient Rome, where the witness holding a stone in his hand dropped it as he uttered the words which, being translated into

* "Credence is only to be given to the sworn."
† Judicial Evidence, p. 51.
‡ The curious would find in this judgment a very elaborate investigation both jurisprudential and historical of the general subject of oaths. It is reported, Willes 545, and is also to be found in Smith's Leading Cases, vol. 1, page 105.
English, were “If knowingly, I forswear myself, then the City and Capitol being safe, let Jupiter thrust me out from among all good men as I do cast this stone.”*

So it was adopted under the Christian Emperors, the name of the Omnipotent God being invoked.

If the laws of Confucius are to be expounded by the history of English courts of Justice, the Chinese too, as we shall hereafter see, possess their oaths.

The Jurisprudence, we believe of the whole of Modern Europe, of America, and of the entirety of the British dominions alike recognize the sanction.

If we turn to India even prior to the introduction of English rule, we find that the Laws of Menu had their oath too; and in point of form, that prescribed by Menu is not very different from the English one:—

“What you know to have been transacted in the matter before us, between the parties, reciprocally declare at large, and with truth.”†

The imprecatory part too of the oath of Menu, if not framed exactly in conformity with the varying code of the religious belief of the swearers, was nevertheless in a form adapted to the peculiarities of the influences by which each individual might be presumed to be most affected.

“Let the Judge cause a Priest to swear by his veracity, a Soldier by his horse or elephant and his weapons, a Merchant by his kine, grain, and gold, a Mechanic or servile man by imprecating on his own head if he speak falsely, all possible crimes. The meaning is he shall adjure a Brahmin by saying, if you speak falsely your truth will be destroyed; a Cshetrye by saying your horse or elephant and weapons will become useless, a Vaisya ‘your cattle, seeds and gold will be unproductive. A Sudra he shall adjure by saying, ‘if you speak

* Adams’ Antiquities, 247. “Si scies fallo, tum me Dissapeter, salva urbe arceque, bonis ejiciat, ut ego hunc lapidem.”

† Strange’s Hindu Law, 318. Menu, Chapter viii, 80.
falsely all sins will be on your head.”* A course of imprecation though, by the way, which seems to address itself rather to the punishment of a present life, than a future one. This however appears not to have been the only course of swearing. According to Mr. Beaufort, the form of swearing by the water of the Ganges, and by copper and tools is virtually sanctioned by many shasters; but other prescribed forms are of equal validity; and all oaths, made by laying the hand on any symbol or image of the Deity have the same obligation.†

The old Mahomedan Law indeed as administered in India did not require the oath to give validity to the evidence, even in judicial cases; but it contained no prohibition against it.‡

Extensively, as Native false testimony must be admitted to prevail in the courts of India, it would be probably even worse were the sanction dispensed with; and certainly as regards the influences of a temporal punishment or its fears, some recent proceedings against false testimony in the Supreme Court of Calcutta, coupled with the decisive attitude its Judges have assumed on the subject, is said already not to have been without a considerable effect on the Native mind; though it has been doubted whether, as yet, the development of this wholesome principle has not been less the purifying the Temple of Justice than the emptying it of its suitors.

The security for veracity involved in keeping the different witnesses apart, that is to say, keeping the rest out of Court, while the examination of any other of them is going on, is too obvious to require more than a passing notice. To hear how a tale is told by one, is but to give shape to the testimony of all:—to avoid the shoal, by learning where the quicksands lie.

It is true that preconcert in its broader outline, would naturally precede the day of trial, and the appearance of the witnesses in Court;

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† Digest of Criminal Law, 496.
‡ Ibid.
and an antecedent drill there are no means of preventing. But falsehood, however well dressed up, wears a cloven foot, which in the long run is pretty sure to betray its ugliness; and, ingenious and complete, within its limits, as the drilling of the tutored may be, few false tales are found in practice, so perfect as not to break down by their contradiction, when, each individual confederate being kept out of hearing of the others, the tale gets sifted in its minutest details. Against an examination such as a few 'straw' or as termed in India, 'bazar' witnesses would be proof.

An historical illustration of the principle, often cited on the subject, is furnished in a story of remote antiquity to be found in the Hebrew Scriptures, in the history of Susannah and the Elders. The wife of Joacim, having rejected the advances of the two old libidinous judges, they, to avenge themselves, got up a charge of adultery against her, of which they affected to be eye witnesses. The perjury of their testimony was discovered by their examination apart from each other. They differed as to the place where the crime was committed (what English Lawyers would term the 'locus in quo') one affirming it to have been under a mastic, the other a holm tree. It may be presumed indeed that the circumstances rendered this discrepancy a material one. Otherwise a mere difference in the description of the tree might have been accounted for on a theory which might have left the main testimony unimpeached.

So established a principle of English Jurisprudence is that of keeping the witnesses apart in the way suggested, that it is noticed so long ago as, and by Fortescue, in his Treatise on the Laws of England, written for the instruction in those laws of his royal pupil, afterward King Henry the VI.

To these sanctions has been suggested the addition of another, namely that which consists in confronting the witnesses with each other; and we cannot do better than state it in the words of its author, Mr. Taylor.

"In former times," he says ' when the evidence of witnesses, called on opposite sides was directly conflicting, the court would often direct that the witnesses would be confronted; and on one remarkable occasion, no less than four witnesses were for this purpose placed together in the box. This practice, which still prevails largely in the County Courts, and is there often productive of highly useful results, has, for some unexplained reason, grown into comparative disuse at Nisi Prius. This is to be regretted, for the practice certainly affords an excellent opportunity of contrasting the demeanor of the opposing witnesses, and of thus testing the credit due to each; while it also furnishes the means of explaining away an apparent contradiction, or of rectifying a mistake, where both witnesses have intended to state nothing but the truth."

Mr. Taylor adds in a note, by way of illustration, a case borrowed from American Jurisprudence, where the erroneous, but persisting, deposition of a witness as to the credit of a given firm, was set to rights by a correction, coming out on his being confronted with another witness, whose explanation as to a change which had taken place in the membership of the firm, reversed the whole effect of the previous inaccurate statement.

To turn to the other branch of personal credibility,—the circumstances affecting the value of testimony individual to the witness; and by these circumstances, we mean those which, apart from the machinery of the Court, might be supposed influential on himself.

In their broader outline these are not more happily, than concisely, summed up by Archbishop Whately in his "Historic Doubts" when he says;—"I suppose it will not be denied that the three following are the most important points to be ascertained in deciding on the credibility of witnesses; first, whether they have the means of gaining correct information; secondly, whether they have interest in concealing truth or propagating falsehood; and thirdly, whether they agree in their testimony."†

* Taylor on Evidence, p. 1150.
As applied to the case of a single witness, the whole matter is also well put by Mr. Best:

"The credit due to human testimony, assuming that we correctly understand the language employed, is in a compound ratio of the witness’s means of acquaintance with what he narrates, and of his intention to narrate it truly."

‘Means of gaining information’ would of course imply, not only the original personal knowledge of the witness, but his existing recollection of the facts—‘interest,’ or rather its absence, would involve freedom from personal bias in the issue, whether in concern for himself or concern for others—and ‘agreement’ would be the substantial agreement, under circumstantial variety, to which we shall presently advert as one of the tests of veracity.

To these tests may be added as minor, yet still highly important accompaniments,—the character of the witness, of which station in life, and inadequacy of temptation to depart from the truth, will form elements—his intelligence—his demeanor under examination—the relative simplicity or inflation of his narrative—its clearness or indistinctness—its straight-forwardness or tortuosity—the dispassion or excitement under which it is delivered—and, almost above all, the adherence of the witness to it, under the testing ordeal of a vigorous and well directed cross-examination.

Truth easier to tell than falsehood.

Of all tales to tell the true one is that which might be expected to be told with the least apparent effort.

“To say,’ observes Mr. Bentham, ‘that the natural sanction operates in favor of truth, is to say, that, setting aside all political and religious punishments, and even shame and contempt, still there is a punishment which attends falsehood, a punishment which is not of human institution which acts immediately on the witness, and disposes him to tell the truth when there is no more powerful counter-motive.

* Judicial Evidence, p. 16.
TRUTH EASIER THAN FALSEHOOD.

This punishment consists in the effort, in the mental labour, which a falsehood costs. Truth comes of its own accord, and places itself spontaneously on the lips of the witness; a sort of violence, a sort of struggle must be used in order to remove it, and to substitute the falsehood which is opposed to it. Now it is natural to avoid the rugged path and take the more easy road. The motive is, the love of ease; a motive which frequently acts without our knowing it, but whose influence is greater than is commonly believed. Let us see, how it operates in the case of testimony.

To report a fact such as it presents itself to the mind is the work of memory; to report, as a real fact, circumstances which never existed, is the work of invention. Whatever degree of pain may be attached to the operations of reminiscence, when the object is to express real facts, much more is always required to combine imaginary facts. In a word, the labour of invention is more painful than that of memory.”

So Dr. Reid in his inquiry into the Human mind:—

“Truth is always uppermost and is the natural issue of the mind. It requires no art or training, no inducement or temptation, but only that we yield to a natural impulse. Lying on the contrary is doing violence to our nature, and is never practised by the worst men without some temptation. Speaking truth is like using our natural food, which we would do from appetite, although it answered no end, but lying is like taking physic, which is nauseous to the taste, and which no man takes but for some end, which he cannot otherwise attain.”

The apparent ease with which any testimony was given would be thus one great test of its deponent’s credibility; though it cannot be denied that it is sometimes matter of nice discrimination, to distinguish between the ease of truth, and the audacity of falsehood.

* Judicial Evidence, p. 29.
† Enquiry into the Human Mind, p. p. 196-197.
But not only is truth the easiest to tell; its promptings would naturally induce a clear and intelligible enunciation; just as he who best knows his subject ordinarily speaks or writes best upon it. Obscurity accordingly though occasionally attributable to other causes, as for instance want of mental power, or of facility of expression, is more likely to be the subterfuge of the cunning witness, and Mr. Bentham has well observed:—

"To these deviations from what constitutes good testimony, another must be added,—indistinctness.

Indistinctness may be the effect of incapacity, ignorance, or precipitation; but it is likewise the most ordinary resource of bad faith, and among its surest means of success.

There are cases, in which an indistinct deposition may have the effect of a false statement, leaving in the mind the same idea that a false assertion would leave. But generally, it is only a mode of evasion: the witness has recourse to it, that he may speak without saying any thing, and without being exposed to the dangerous impressions, which total silence would produce to his disadvantage."*

Fortunately for the cause of justice it is not to be disputed, as Mr. Bentham goes on a little further to add:—"The great art of evasion cannot exert itself successfully, except in written language. Examine *viva voce*, and the most crafty will not be able to go on long; he is stopped at his very first attempt; he is not allowed to weave the web in which he intends to conceal himself; if he persists in equivocal or obscure language, he betrays his bad faith, and his evasive answers turn out more to his disadvantage, than silence would have done."

In applying however the tests we have suggested, it must not be lost sight of, that different witnesses are liable to be impressed differently by the varying and opposite circumstances under which their testimony is given; and allowance must ever be made, on the one side or the

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* Judicial Evidence, 50.
other,—for the condition of life of the witness,—his ignorance, or his intelligence,—his habituation to the world and the business affairs of life, or his want of familiarity with them,—his personal temperament, as ordinarily nervous or composed—his age—or sometimes even state of health—and generally, the comparative excitement or calmness of the occasion and of the scene.

It was well remarked by a late Master of the Rolls, Lord Langdale, (a Judge of peculiar ability in dealing with the facts of a case);—“Witnesses, and particularly ignorant and illiterate witnesses, must always be liable to give imperfect or erroneous evidence, even when orally examined in open court. The novelty of the situation, the agitation and hurry which accompanies it, the cajolery or intimidation to which the witness may be subjected, the want of questions calculated to excite those recollections which might clear up every difficulty, and the confusion occasioned by cross-examination, as it is too often conducted, may give rise to important errors and omissions; and the truth is to be elicited not by giving equal weight to every word the witness may have uttered, but by considering all the words with reference to the particular occasion of saying them, and to the personal demeanor and deportment of the witness during the examination.

All the discrepancies which occur, and all that the witness says in respect of them, are to be carefully attended to, and the result, according to the special circumstances of each case, may be, either that the testimony must be altogether rejected, on the ground that the witness has said that which is untrue, either wilfully or under self-delusion, so strong as to invalidate all that he has said, or else the result must be, that the testimony must, as to the main purpose, be admitted, notwithstanding discrepancies which may have arisen from innocent mistake, extending to collateral matters, but perhaps not affecting the main question in any important degree.”

The whole subject of personal credibility is well and graphically handled by Mr. Taylor; though the materials for the observations may be recognized in earlier

Summary—

Taylor.

writings.

* Johnston v. Todd, 5 Beavan, 600.
It is obvious, he remarks, that, in the hasty progress of a trial at Nisi Prius, it is frequently difficult, and sometimes impossible, to ascertain with anything like certainty, what characters the witnesses respectively deserve for honesty and intelligence, and how far they are actuated by interested, malignant, or other improper motives. On these heads considerable doubt must almost always exist; although a rigid cross-examination, when skillfully applied will certainly throw much light upon the subject; and a careful attention to the demeanor of the witness will furnish a no less valuable guide. Thus, while simplicity, minuteness, and ease are the natural accompaniments of truth, the language of witnesses coming to impose upon the Jury is usually labored, cautious, and indistinct. So when we find a witness over-zealous on behalf of his party; exaggerating circumstances; answering without waiting to hear the question; forgetting facts wherein he would be open to contradiction; minutely remembering others, which he knows cannot be disputed; reluctant in giving adverse testimony; replying evasively or flippantly; pretending not to hear the question, for the purpose of gaining time to consider the effect of his answer; affecting indifference; or often vowing to God, and protesting his honesty; we have indications more or less conclusive, of insincerity and falsehood. On the other hand, in the testimony of witnesses of truth there is a calmness and simplicity; a naturalness of manner, an unaffected readiness and copiousness of detail as well in one part of the narrative as another, and an evident disregard of either the facility or difficulty of vindication or detection."

The tests previously pointed out address themselves rather to individuals, than to classes of witnesses. Certain classes of witnesses, however, have from peculiar, but almost perhaps unconscious, tendencies, been considered less independent in their testimony than ordinary persons; and their evidence, accordingly, as requiring to be especially watched. In this class have been usually placed Skilled Witnesses, Women, the Police, and Foreigners.

In the case of Skilled Witnesses, the obvious ground of mistrust is that of their coming pledged to the support of some particular theory of science or of art; and

of the bias to which this would expose them. In fact they might even happen to be enlisted as witnesses on the side on which they appear from the known existence of that bias; and they have been said at times, to present themselves, almost, as it were, on the very retainer of the party calling them.

The testimony of Women has been regarded as open to objection more peculiarly, when appearing under circumstances, or to testify to events, likely to excite their feelings, or kindle their imaginations. The vice to which their testimony is regarded as the most exposed, would seem to be that of exaggeration;—and a curious illustration of this has been cited in the instance of the woman of Samaria, who, when reminded by the Divine Stranger who had accosted her at the well to which she had come to draw water, of her having had five husbands, returned into the City saying "Come see a man who has told me all things that ever I did."

When however it is remembered that woman's wit has passed with us into a proverb, one cannot but allow some counterpoise, even to the influences of feeling or imagination, in the sagacity and powers of observation universally conceded to the sex; and practically women often prove most excellent witnesses, and their testimony is found to exhibit the 'plain unvarnished tale' of truth.

We speak however of the women of England, or indeed of those of the Western nations generally; rather than of them whose lives have been spent in the deadening confinement of the Harem or the Zenana; and away accordingly from all intermingling with civilized life.

In India too, as if this seclusion were not sufficient, among its Native females of any position at all, the purdah, behind which their testimony is given, adds its own miserable screen to falsehood; and, even when the farce of the examination of a purdah-woman has been gone through, the practical result ordinarily is, that the evidence either lies a dead letter on the table of the court; or, if noticed at all, is only noticed to point out its tissue of absurdity, lying, and contradiction.

In some countries, in the less civilized stages of their jurisprudence, the testimony of women has been even altogether excluded; and there was a period when it was but scantily received even in our own.

"One of the strangest and most absurd application of this principle' (to borrow Mr. Best's concise history of the matter) 'was the rejecting, or at least regarding with suspicion the testimony of women as compared with that of men. The Hindu code, it appears, rejected their evidence absolutely, as did Mohammed on charges of adultery, and probably in some other cases. Nor were these merely Asiatic views. The rule of the civil and canon laws of medieval Europe was, that the evidence of women ought not, in general, to be received; for which the following reason is given by Mascardus. "Feminis plerumque omnino non creditur, ob id duntaxat quod sunt fœmineæ, quæ ut plurimum solent esse fraudulenta, fallaces et dolose."* And Lancelotus, in his Institutes of the Canon Law lays down "varium et mutabile semper fœmina."† That these rules were plastic enough like the other rules of those systems, and admitted many exceptions, may easily be conceived; but the following extract, from an able French jurist of our time, shows how long the principle held its ground in his own country. After women had been admitted to bear testimony by an ordonnance of Charles VI of the 15th November 1394, it was long before their evidence was considered equivalent to that of a man. Bruneau, although contemporary of Made. de Sévigné, did not scruple to write, in 1686, that the deposition of three women was only equal to that of two men. At Berne, so late as 1821, in the Canton of Vaud down to 1824, the testimony of two women was required to counterbalance that of one man. We will say

* "The evidence of women is for the most part to be wholly disbelieved; for they are women; and are in the main, accustomed to be fraudulent, false, and tricky."

† "Woman is a thing ever changing and fickle."

We do not know whether it were from Lancelotus that Sir Walter Scott borrowed his woman

"Uncertain, coy, and hard to please."

If so however, he had the grace to convert her at last into

"A ministering Angel thou!"
nothing of the minor distinctions with which the system was complicated, such for instance, as the principle that a virgin was entitled to greater credit than a widow—"magis creditur virgini quam viduae." Even our old English lawyers occasionally rejected the evidence of women, on the ground that they are frail. Sir E. Coke in the reign of Charles I, writes thus:—In some cases women are by law wholly excluded to bear testimony as to prove a man to be a villein,—"mulieres ad probationem status hominis admitti non debent."* It seems also that in very early times their testimony was insufficient to prove issue born alive, so as to entitle a man to be tenant by the curtesy; neither could they prove the summons of Jurors in an assize."†

Mr. Best is, however not quite correct in stating the testimony of women to have been absolutely excluded by Hindu Law. The Mitacshara indeed enumerates women generally among the class of incompetent persons. But their testimony was nevertheless admissible on matters peculiarly affecting themselves. "So also" says Mr. Macnaghten, "women should be made the witnesses of women as Menu has said "women should regularly be witnesses for women."‡ A curious, (it is to be hoped rare) authority, cited by Mr. Macnaghten in his volume of authorities will illustrate the sort of case to which such testimony woul dapply. A woman, having committed adultery with her husband's younger brother, sued him for her maintenance, and selected his wife, as the witness, and the only one, to prove the fact. The case being that of a female, the evidence though but of one single female, was not only received, but held sufficient to establish the fact.§

The Mahomedan Law proceeded on much the same principle; that is to say at least in certain cases involving minor consequences when the evidence of two men at least was prima facie required, this might be supplied by the evidence of one man, and two women. But

* Women ought not to be admitted to the proof of the position of a man.
† Judicial Evidence, p. 63.
in cases inducing the penalties of what were termed hudd or kisas (penalties of the graver description) which were barred by a doubt of the truth of the charge, the evidence was inadmissible; because said the Law, the testimony of women involves in itself a degree of doubt; and it is considered merely a substitute for evidence, being taken only when that of men cannot be had. To even this rule, however, there was an exception, founded on a traditional saying of the Prophet:—"The evidence of women is valid with respect to such things as it is not fitting for man to behold."

Fortunately the improved moral and intellectual education of women in civilized countries, in modern times, has removed this degrading incapacity; and whatever the effect ascribable to it when delivered, female testimony is now universally admitted, not only in the courts of Europe, but in all those under British sway in India.

The prejudice against the Police addresses itself to those connected with the apprehension of, and obtaining punishment for, offenders, in fact with the administration of criminal justice generally; and certainly the Native police of India have not escaped the general suspicion. Its obvious foundation is the "esprit de corps" of the whole body; and the assumed existence of an impulse to convict, stimulated, if by no other reward, by a prospect of personal advancement proportioned to the zeal displayed in the cause; and, of which zeal, success is ordinarily taken as a test. Moreover familiarity with crime is usually anything but an incentive to veracity; and as respects the lower functionaries, at all events, of the police, these are taken from the lower section of the community itself. Of course we speak only in generals and of tendencies; it is not meant to be advanced that honest witnesses are not to be found among the police, as well as in any other body of the community.

* Beaufort's Digest of Criminal Law, p. 118.
With respect to *Foreigners*, these from the very fact of their being foreigners may be said, on the one hand to be *impartial* witnesses. On the other, however, supposing their deposition to be taken in the Courts of the country in which they may be temporary residents, or otherwise to relate to facts occurring during their residence there, they are not unlikely to be *mistaken* ones; from a lower degree of familiarity with the usages, and the language of those among whom they are sojourning; and the chances accordingly of original misapprehension. Moreover, while speaking to *circumstances occurring in another country*, and either examined under a commission *there*, or coming from a distance to depose in the *Court in which the trial proceeds*, the check of *contradiction and cross examination* would be of a lower than the ordinary degree. In the proportion too in which the *home* of any foreigner may be *distant from the tribunal* to which his evidence is submitted, or he himself *unknown to the Court* or *its suitors*, would be weakened that hold upon his veracity which is attributable to every *local* witness, both in the circumstance that his testimony would be liable to be submitted to the criticism of his neighbours, and the knowledge and appreciation by the Court of his character.

In one sense too, every witness whose testimony requires *translation* to make it intelligible to the *forum*, is a *foreign witness*; and in this sense, so far at all events, as regards the Supreme Courts of the Presidencies in India, a very large proportion of even the Native population is foreign. But translation always involves the chance of misapprehension and inaccuracy; exaggeration on the one hand, under-statement on the other; and sometimes total misconception.

Mr. Norton cites two striking instances of miscarriage, one of which would appear to have occurred in the Supreme Court of Madras.

In one:—"A witness examined in the Telugu language many years ago before the Supreme Court, was understood to say that a dying man had spoken four words. He was asked to repeat them. He commenced
a long narration. He was cautioned that the declarant had only said four words. He again repeated his long statement. One of the Jury cleared up the difficulty by explaining that the Interpreter had mistaken the word the witness used. Instead of *marl loo*, four words, he had said *marl la*,—four times."

The other is an illustration apparently of probable rather than actual occurrence; and it is this:—

"Again, a very common question, Did you see the woman by the well? according to Telugu idiom is answered thus. "Having gone to the well I did not see her." The true meaning of this phrase is "having gone to the well I did not see her there:" whereas to an inexperienced person, unacquainted with the idiom of the language, it might well seem that the witness admitted having gone to the well; and if the person alleged to have been there would have been in such a position, that she must have seen, the inference to be drawn would be that she was not there, because the witness having gone there, did not see her."

Nor is this all. In the Supreme Courts of the Indian Presidencies, and sometimes too (when attended by English Advocates) in those of the Mofussil, in the case of Natives, the question asked of the witness is put in one language, say English, before it is translated by the Interpreter (this in the Native Courts may be the Sheristidar, sometimes, even the Judge) into the language of the witness. Now it constantly happens, though more particularly in the Presidency Towns, or as regards the Mofussil among the higher classes of Natives only, that though the process of translation is resorted to, the witness in fact, to say the least of it, has a very decent knowledge of the language in which the question is originally put, often a much greater one than he cares to confess. The result is to afford greater time both to concoct and to mature an answer of falsehood,—to give opportunity for fencing,—and finally to get out of an embarrassment or a contradiction, under the plea of misapprehension.

* Norton on Evidence, p. 453.
Among rude nations the barbarous practice has prevailed of applying torture as well to elicit a confession from an accused, as to try the trustworthiness of a witness; and the Laws of Menu resorted to the torture test of veracity in every variety of form. "He saith Menu whom the blazing fire burns not, whom the water soon forces not up, or who meets with no speedy misfortune, must be held veracious in his testimony on oath."*

To Europe too, in the earlier and darker period of her history, the torture test was not unknown; nor was English Judicature in those days altogether free from the reproach. In the West, however, it did not so generally assume the form of trying the veracity of the witnesses, as that of either determining the litigated right itself by an appeal to Heaven of the litigants, or the existence of the crime alleged, by forcing a confession of guilt from the accused.

The ordinary phase of the two first was, in the case of a contested right, to subject its decision to the issue of a judicial combat, either of the parties, or the champions; in that of an alleged offence, its trial by the ordeal, say of fire or water, upon the theory, that, were it a case of guilt the elements would themselves avenge the crime by the destruction of the culprit; while innocence would be proclaimed by escape from their powers. Thus the guilty were burnt or drowned, the innocent,—(though few enough under such an ordeal they must have proved)—came out unscathed:—a double compound of superstition and barbarity, scarcely reconcilable with even the moderate advance in civilization in which it was practised.

Even down to a comparatively late period, this iniquitous mockery was applied in England to those unhappy creatures who, under the name of witches, had the misfortune to be charged by either ignorance or malice with communication with the unknown world, and the being armed with a sort of commission for mischief from it; and under its cruel process many harmless unoffending women, both old and young, have been put to a wanton death.

* Menu, C. V. S. 14 & 115.
The readers of Hudibras may not have forgotten the lines of the great Satirist on this abomination:

"It is no jesting, trivial matter,
To swing i' the air, or dance in water,
And like a water-witch try love;
That's to destroy, and not to prove."

To which his Annotator has subjoined the note:—"The common test for witchcraft was to throw the suspected witch into the water. If she swam, she was judged guilty; if she sank she preserved her character, and only lost her life. King James in his Daemonology explained the floating of the witch, by the refusal of the element used in baptism, to receive into its bosom one who had renounced the blessing of it."

Torture, however, as a means of obtaining a confession, had its larger scope in the field of political oppression; and though when it was proposed to put Felton, (the assassin of the Duke of Buckingham) to the rack, with the view of extracting from him a confession of the deed, the English Judges manfully declared that—"he ought not by the law to be tortured by the rack, for that no such punishment is known or allowed by our law;"—yet the history of the period has to blush for other instances in which torture was applied. Among many others there will occur to the reader of English history, that of Peachum, who being indicted for high treason, in the reign of James I, for some passages found in a manuscript sermon locked up in his desk, was examined, according to the note on the back of the interrogatories, "before torture, in torture, between torture, and after torture;" and yet with a defiant and sustained silence which baffled all the inhuman cruelty of his persecutors.

But to whatever class of cases torture has been applied, it has not been more atrocious in its action than useless in its results;—so useless indeed, that to escape from its terrors it has often been known to have wrung a confession of that which not only never happened, but which by the very laws of the universe itself, never could. Perhaps however in those ages appeal to the

supposed interference of Heaven, as either determining a contested right or
wringing a confession, is the less remarkable, when we bear in mind, that
even in a Roman civilization, no great undertaking was resorted to
without the previous consultation of the Augurs, and a flight of birds
would determine the march of an army.

Indeed in the earlier history of Europe the resort to this singular
ordeal was not confined to the Judicial Courts
of the country. Mr. Forsyth mentions two in-
stances which took place in Spain in the eleventh century, and which
would have been about as well adapted to the decision of the question,
whether the earth revolved on its axis, or the tides were subjected to the
influences of the moon, as to that to which it was applied:—

"Alphonso, king of Leon and Castile, in the year 1038, meditated
the introduction of the Roman law into his dominions; but being uncer-
tain whether this or the customary law which had hitherto prevailed
was the best, he appointed two champions to determine the question
with their swords in actual conflict; and the result was, that the Chevalier
who represented the civil law was beaten. During the reign of the
same monarch, the question was agitated whether the Musarabic or
Roman liturgy and ritual should be used in the Spanish Churches; and
the decision was referred, as in the former case, to the sword. Two
knights in complete armour entered the lists, and John Ruys de
Matança, the champion of the Musarabic, i.e. Gothic ritual was victori-
ous. The Queen and Archbishop of Toledo, however, were dissatisfied
with the result, and they had influence sufficient to have the matter
submitted to a different kind of ordeal. A large fire was kindled, and
a copy of each liturgy was thrown into it. The Musarabic (perhaps
being bound in some species of asbestos) stood the test, and remained
unscathed, while the rival volume perished in the flames.

But those

Who are convinced against their will,
Are of the same opinion still;

and because it was discovered, or asserted, the ashes of the latter had
curled to the top of the flames and leaped out of them, the victory was
claimed for the Roman ritual. The result was, that both liturgies were sanctioned; but as the Roman was chiefly favored, it gradually superseded its competitor."

Happily this dark and noxious mist of folly has now long rolled away from all European jurisprudence; and in England, at all events, the sole judicial test now resorted to for all that finds its way into her courts, is the evidence of the fact. If, in the system of Police administration which exists in India, the barbarous usage of torture, as it may be feared it does, still holds its ground there, in spite of all the efforts of the Government to put it down, it may safely be asserted that India is the only portion of Her Majesty’s dominions which has not yet been freed from the stain; and that it has there survived so long is attributable, rather to the character of its people, than to any oppressive tendencies on the part of their rulers.

We pass on to the criteria of testimony as displayed by the testimony itself, and contradistinguished from the personal credibility of those from whom it is received.

The scheme of the work restricts us to the suggestion of the broader tests; and these it is believed will be found to resolve themselves pretty much into the coincidence of the testimony with—the known and ordinary principles of human action—with the laws regulating either the moral or the natural world—with the common experience of mankind—with the general conduct of the actors in the scene—with the other facts of apparent truthfulness proved in the cause—in a word, the consistency of the evidence with the general probability of the case—and its consistency with itself.

The tests here suggested address themselves only to the general character of the testimony. To these must be added, on the one hand, the cumulative strength supplied by the filling up of the outline of proof by the production of such explanatory and corroborative detail of circumstances as the nature

* Hortensius, p. 256.
of the case might appear to dictate; with the support of corroborative witnesses;—or, on the other, the weakening effect of the absence of that production and support.

On this point it was well observed by the Lord Chief Baron Gilbert, the earliest and one of the ablest of English elementary writers on Evidence:—"That which renders the testimony of a witness doubtful is the attestation of the several circumstances, and yet no proof of any one of those circumstances to fall in with what he attests; this may render such a witness (standing alone without any assistant proof) to be very much suspected, and there must be great confidence in the integrity and veracity of the man to believe many circumstances on one man's single testimony, where if it were true, there might be a multitude of concurrent proofs to strengthen and confirm the evidence.

Another thing that would render his testimony doubtful, the not giving the reasons and causes of his knowledge; for if a man could give the reasons and causes of his knowledge, and doth not, he is forewarned; because he is obliged to tell the whole truth and by consequence he is of no credit, and that a man should know any thing, and not tell how he came to know it, is incredible."

In dwelling however on consistency, whether in generals or in details, as an element of trustworthiness, it is necessary to bear in mind that this may operate in two very opposite directions, and with two very antagonistic results, according as the consistency may be of a degree too high or too low; and each degree may alike indicate ground of mistrust.

As an illustration of the former we will borrow the judgment of the court in a case furnished by the records of the Sudder Dewanny Adawlut of the Presidency of Bengal, which is not only valuable as a case of actual occurrence, but it may be taken as a specimen of a very ordinary Indian trial.

"Now it is clear" says the judge 'that the memories of these witnesses must be either wonderfully retentive, or that their recollections must have been recently refreshed, to enable them to speak of details with such remarkable precision and accuracy; their testimony could scarcely be more perfect than it is in every minute coincident. But evidence I apprehend may be too perfect; and, after such lapse of time, naturally creates suspicion, for without very recent refreshing this concordance in regard to dates in different eras, the number of bags, the amount in each, even the number of sheets of stamped paper on which the bond was engrossed, and the conversation which took place, seems almost impossible. The only inference to be drawn is that the witnesses must have been tutored."

On the other hand it must be noticed, that trifling variations, when not breaking in on a substantial harmony, have been even treated rather as giving fidelity to a narrative, than as creating ground of mistrust.

It was observed by the acute Dr. Paley in a passage which has been transcribed into almost every book upon evidence, and the spirit of which is daily appealed to in our courts:—

"I know not a more rash or unphilosophical conduct of the understanding, than to reject the substance of a story, by reason of some diversity in the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. This is what the daily experience of Courts of Justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but often times with little impression upon the minds of the judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud. When written histories touch upon the same scenes of action, the comparison almost always affords ground for a like reflection. Numerous, and sometimes important, variations

* Sudder Dewanny Adawlut, 1853, p. 25.
present themselves; not seldom, also, absolute and final contradictions, yet neither one nor the other are deemed sufficient to shake the credibility of the main fact. The embassy of the Jews to deprecate the execution of Claudian’s order to place his statue in their temple, Philo places in harvest; Josephus in seed-time—both contemporary writers. No reader is led by this inconsistency to doubt whether such an embassy was sent, or whether such an order was given. Our own history supplies examples of the same kind. In the account of the Marquis of Argyle’s death, in the reign of Charles II, we have a very remarkable contradiction. Lord Clarendon relates that he was condemned to be hanged, which was performed the same day; on the contrary, Burnet, Woodrow, Heath, Echard, concur in stating that he was beheaded; and that he was condemned upon the Saturday, and executed upon the Monday. Was any reader of English history ever sceptic enough to raise from hence a question, whether the Marquis of Argyle was executed or not?"*  

So Mr. Hallam:—“The tendency of any mixture of error in testimony is to lessen the probability of the whole. This diminution is in many cases so small, as not perceptibly to effect our belief. But where an essential circumstance in a story is evidently unfounded, it is to pull a stone out of an arch; the whole fabric must fall to the ground.”†  

Nothing can be a more felicitous illustration than Mr. Hallam’s ‘stone out of the arch.’ The real question always is whether it be the stone, or the mere rubbish which is taken away.  

Sir A. Alison in his history of Modern Europe and M. Lamartine in that of the Girondists relate, with some difference of detail, the circumstances which attended the passage of Robespeire to the scaffold; and what took place on passing the house of the Prince, known as Egalité; yet no one ever doubted the substantial truth of their common narrative in the broader history both were giving.

* Paley’s view of the Evidences of Christianity, Part 3, Chapter 1.
It is for common sense and experience, to distinguish when the contradiction, the circumstantial variety, bespeaks accidental and unimportant inaccuracy, and when the breaking down of the got up tale; and probably contradiction will be found in its more damaging aspect when it is the contradiction of the individual himself, rather than the contradiction of one witness by another,—at least in the minuter class of circumstances.

Exposition of Mr. Starkie.

Mr. Starkie's observations will facilitate the appreciation of the suggested test.

"The consistency of testimony" he remarks, 'is also a strong and most important test for judging of the credibility of witnesses. Where several witnesses bear testimony to the same transaction, and concur in their statement of a series of particular circumstances, and the order in which they occurred, such coincidences exclude all apprehension of mere chance and accident, and can be accounted for only by one or other of two suppositions; either the testimony is true, or the coincidences are the result of concert and conspiracy. If, therefore, the independency of the witnesses be proved, and the supposition of previous conspiracy be disproved or rendered highly improbable, to the same extent will the truth of their testimony be established.

So far does this principle extend, that in many cases, except for the purpose or repelling the suspicion of fraud and concert, the credit of the witnesses themselves for honesty and veracity may become wholly immaterial. Where it is once established that the witnesses to a transaction are not acting in concert, then, although individually they should be unworthy of credit, yet if the coincidences in their testimony be too numerous to be attributed to mere accident, they cannot possibly be explained on any other supposition than that of the truth of their statement.

The considerations which tend to negative any suspicion of concert and collusion between the witnesses, are either extrinsic of their testimony, such, for instance, as relate to their character, situation, their remoteness from each other, the absence of previous intercourse with
each other or, with the parties, and of all interest in the subject-matter of litigation; or they arise internally, from a minute and critical examination and comparison of the testimony itself.

The nature of such coincidences is most important: are they natural ones, which bear not the marks of artifice and premeditation? Do they occur in points obviously material, or in minute and remote points which were not likely to be material, or in matters the importance of which could not have been foreseen? The number of such coincidences is also worthy of the most attentive consideration: human cunning, to a certain extent, may fabricate coincidences, even with regard to minute points, the more effectually to deceive; but the coincidences of art and invention are necessarily circumscribed and limited, whilst those of truth are indefinite and unlimited; the witnesses of art will be copious in their detail of circumstances, as far as their provision extends; beyond this they will be sparing and reserved, for fear of detection, and thus their testimony will not be even and consistent throughout; but the witnesses of truth will be equally ready and equally copious upon all points."

These, and indeed the previous observations generally, address themselves rather to discrepancies in the statements of the witnesses called on either the one side or the other, than to a case of a general conflict in the whole testimony, between the witnesses of the two opposing parties; and it frequently happens, and nowhere more than in India, that there being a mass of contradiction, and consequently perjury on the one side or the other, it becomes a task of no small difficulty to determine to which side to assign it. Probably no better guide could be furnished than that supplied by the judgment of the Privy Council, in a case on appeal before it from Bengal, where Lord Wensleydale then Baron Parke, in delivering the judgment of the court thus laid it down:—"We should therefore feel little difficulty in deciding on which side the truth lay, if we had nothing else to give our judgment than the comparison of these conflicting

* Starkie on Evidence, p. 828.
acts and declarations, parol and written, on the one side, and on the other; but we are not thus confined. There are some other facts which are established beyond all possibility of doubt, and there is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts according to the ordinary course of human affairs and the usual habits of life."

Of course in any case of contradiction, motive would be an important guide for determination however strong the affirmation on either side;—a proposition which may be illustrated by a decision in the native courts of India, where a girl having eloped from the house of her parents, returned sometime after, asserting that she was their daughter; but the parents denied the identity. The court refused to act upon the denial, from the obvious interest of the parties in disclaiming the relationship.

Both Hindu and Mahomedan Law, if their Commentators be accurate, had a very summary mode of disposing of contradictions in testimony.

According to the text of Nareda, as given by Macnaghten, it is declared by him:—"Of witnesses recorded and summoned by a litigant party, should one utter a contradiction, all are rendered incompetent by that contradiction."‡

The Mahomedan Law had somewhat of the same principle. "It seems' says Mr. Beaufort 'that where the evidence of two witnesses does not entirely agree; only so much is to believed as is confirmed by both; but the entire evidence must be rejected if they differ on points in regard to which it is improbable that the memory should fail; or on points not

* Meer Usdoollah v Mussumut Beeby Imainan, 1 Moore's Indian Appeal Cases, p. 44.
† N. A. R., vol 1, p. 194.
superficially apparent, any knowledge of which therefore bespeaks a more minute attention."

* Omissions in any important article of testimony approximate to the character of contradiction; and an omission coming out on cross-examination is frequently used with fearful force to attack the credibility of the witness. On the other hand, it may not impossibly happen that the omission may originate in the simple circumstance that the mind of the witness had not addressed itself, or his attention not been pointed, to the matter; and under circumstances, omission might well be treated as partaking of the character of inadvertence, rather than of contradiction.

It is remarked by Mr. Wills:——

"Still less are mere omissions to be considered as casting discredit upon testimony which stands in other respects unimpeached. Omissions are generally capable of explanation, by the consideration that the mind may be so deeply impressed by, and the attention so rivitted to, a particular fact, as to withdraw observation from concomitant circumstances; sometimes however they proceed from willful suppression. It is a curious fact, that Grafton in his Chronicles, published in 1562, in writing the reign of King John, has made no mention of Magna Charta; but our surprise is diminished when it is remembered that he was printer to Queen Elizabeth; and he probably considered his silence complimentary to that arbitrary Princess."

† It is on a principle somewhat analogous to this, that, as an ordinary rule, more value is attached to positive than to negative, or as it might perhaps be termed active rather than passive evidence; that is at least in the class of cases in which one deponent avers as a fact that some particular thing happened; and this is sought to be displaced by the testimony of another, who affirms, that though he was present on the occasion, no such fact came to his cognizance. Of course there may be cases in which the fact averred

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* Digest of Criminal Law, p. 119, Section 634.

† Circumstantial Evidence, p. 292.
could not have happened without the knowledge of the party ignoring it; and to such cases the observation would not apply. But, on the other hand, the thing may well have taken place consistently even with the veracity of the denying witness; as for example, in the case of a conversation not heard or not understood by him; and it was well observed by Lord Wensleydale, in an Indian appeal case in the Privy Council:

"The Kasi indeed, as the appellant's counsel has observed, when he is interrogated as to the same conversation, says that none such took place. But in estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place, is of more value than that of one who says that it did not, because the evidence of the latter may be explained, by supposing that his attention was not drawn to the conversation at the time."

In weighing the probability of any given theory as the result of the facts proved, it must be borne in mind that, however limited the knowledge of any age, or of any country, it would result from the fact of the evidence having to be tested in the judicial tribunals of the land, and by the light only with which such civilization as they possessed had illumined them, that the probabilities must be such as in the ordinary course of its action, the court would recognize.

Did Judges, and did Witnesses, achieve the age of the ancient race of men, the Methusalahs of old, with their nine hundred years of life, the judicial experience, as the age of the judge advanced, might give a very different turn to probabilities. Time was when the development of the principles governing the action of the solar system, now recognized by all philosophy, condemned its expounder to the prison of the Inquisition—when the theory of the circulation of the blood, now established by medical science, would have been treated as an idle dream—when the steam engine would have been regarded as a chimera, —and the electric telegraph but as the flash of a disordered brain.

* Chowdry Doby Persad v. Chowdry Dowlut Sing, S Moore's Indian Appeal Cases, p. 357.
A story is related of a certain King of Siam who, being visited by the Dutch Ambassador, believed all that was narrated by him until he came to the narrative of the frozen rivers of Holland, and was told that an elephant might walk over them. Arrived however at the tale of a river of ice, the king drew up,—pronounced his guest an impostor,—and would listen no more. "Hitherto" said he "I have believed the strange things you have told me, because I look upon you as a sober fair man, but now I am sure you lie."* Siam had no frosts to tell of, and to the King of Siam, Siam was the World.

Had the fair of Holland held on the ice been a fact to be tried in that age in a Siamese court, on the testimony of the traveller, we may be sure that, consistently with the principles prevalent even in our own courts, judgment must have been given against it, until more strangers had arrived to corroborate the tale. Were some sea-faring man to come into the courts of either England or India at the present day, and depose to having seen in his voyages a mermaid or a sea serpent, we doubt whether the evidence, direct and positive as it might affect to be, would obtain much credence; nay, were there brought with it in confirmation, the head of the mermaid, and the tail of the serpent.

The marvellous stories related by Bruce, the Abyssinian traveller, though subsequently turning out to be true, were long regarded by his mistrusting countrymen as fables.†

The anecdote of the visit of the Dutch traveller to the Siamese king presents a case of discredit of an existing fact, simply because it had not fallen within the limit of actual experience. There is another anecdote related, that of the visit of the Japanese to St. Petersburgh, which exhibits a curious contrast to this, in the admission of a non-existing one, under the influence of an imperfect knowledge; though both examples are alike illustrative of the same principle. Certain Japanese being at St. Petersburgh, in the year 1803, in the infancy of

* Locke's Essay on the Human Understanding, b. IV. chap. XV. Section V.
aeronautic science, and a vast concourse having collected to witness the then unknown exhibition of the ascent of a balloon, the Japanese became spectators among the rest. It was anticipated that the novelty of the spectacle of a huge machine travelling through the air would have struck them with astonishment. But they took it all as a matter of course; and being asked the explanation, ascribed the strange phenomenon to magic or sorcery. Being interrogated if they had seen the same in their own country, they admitted they had not, but they added that in fact nothing was more common among them; only that the sorcerers of Japan travelled the air by night and not by day.*

The fabulous stories of their sorcerers had prepared their minds to the belief of any, and every, thing.

Sir Isambart Brunel, the engineer, being examined in the early part of the present century before a Parliamentary Committee, on the subject of the introduction of steam carriages on roads, which had only then begun to be mooted as a practical question, was asked,—"How fast steam carriages might be expected to travel on rail roads?" He answered—"Very possibly ten miles an hour."—upon which the counsel contemptuously bid him "Stand down, for he should ask him no more questions;"—and the weight of his former evidence was much impaired.† Steam carriages have now been known to travel sixty.

The advance in knowledge in one individual, may so far place him beyond the age in which he lives, as to fit him to believe much which the rest of his countrymen might discredit. Had Archimedes the Philosopher of Syracuse (who would have moved the world could he have found a fulcrum for his lever) or Sir Isaac Newton that of England (who calculated the distances of the stars) been the jurymen to try any matter of fact, involving the application of some scientific, but as yet little understood theory, they might have pronounced a verdict very different from that which might have been given by less enlightened jurors; nay by the counsel who

* Bentham on Judicial Evidence, p. 263.
† Gresley on Evidence, p. 360.
bid the great engineer "Stand down," because he predicted that steam carriages might possibly travel even ten miles an hour.

The tests of credibility suggested above are generic in their character and apply to all testimony indiscriminately. But testimony itself is distinguishable into two separate branches, Oral and Written; and a marked distinction exists, with reference both to the probative effect, and the amount of credibility ascribable to each.

The more palpable superiority in point of proof, of a written and cotemporaneous record of any transaction, over the account to be derived of it from oral evidence,—("the uncertain testimony' as the latter has been termed, 'of slippery memory,'")—and exposed as this may chance to be not only to the uncertainties of memory, but to the bias of motive, and the risk of falsehood, is too obvious to require more than a passing notice. Certainly, in the whole law of evidence, no principle is more appreciated than that expressed by the Latin maxim,—"Litiera scripta manet,"—that is, (construed liberally) 'the written record remains, though all else may fail.'

But there is another feature in the case of written testimony, which does not lie so wholly on the surface; and which displays itself no where more prominently than in India. This is its peculiar liability to establishment if true, and discomfiture if false, inherent in itself, and existing in the circumstances by which it is surrounded, and under which it comes into existence. The distinction is very pointedly adverted to in a very recent case in the Privy Council, Bunwaree Lal v. Maharajah Hetnarain Sing:—and we state it in the language of Dr. Lushington in pronouncing the judgment:—

"It has also been said that this defence stands exclusively upon oral evidence, and though to a considerable degree that observation may be true, yet it cannot be received to the full extent to which it has been urged. The defence in this case, does, it must be admitted, depend

* Moore's Indian Appeal Cases, Vol. VII. p. 156,
upon the proof of a given instrument; but there is a very clear distinction and not an unimportant one, between pleading a written instrument as an answer to a demand and the setting up a defence founded exclusively upon oral evidence; for instance, if the defence were adoption where there was no written record of the transaction, and the fact was to be established merely by the evidence of witnesses who swear they were present at it, there the proof would be purely oral evidence, and might be liable to all the imputations which are in these cases cast upon it; but where the defence is rested upon a written document, as a release, there is an essential difference; for its genuineness, on the contrary, may be shown by many facts and circumstances very different from mere oral evidence; and moreover, the witnesses who are to prove a written document cannot resort to that latitude of statement, which affords such an opportunity of fabrication to purely oral evidence.

There are more means of trying the genuineness of a written instrument than there can be in disproving purely oral evidence. This is quite manifest even upon the present occasion; for the truth of the transaction may, as it has been, be investigated, by reference to the handwriting, to the seal, to the stamp, the description of the paper, and the alleged habits of him who is said to have written it.”

The case elicited some strong observations from the Court on the indiscriminate reception of documents there stated to prevail in the Native courts of India, which it may be useful to transcribe:—

“It is unfortunately” said Dr. Lushington ‘too much the habit of those courts to receive documents without that just discrimination which would prevail were the rules of evidence known and established; but their Lordships are of opinion that they cannot, in these cases, take upon themselves to determine what ought, or ought not, to have been received in the Courts in India; they may lament the great latitude with which documentary evidence is received, but it would be contrary to justice, in any particular case, to visit upon an individual penal consequences because the administration of justice was not more strictly
conducted with reference to the admission of evidence; and grievous
indeed, will be the task, and vain will be the attempt, of endeavou ring
to discriminate in these cases, what was the precise course the courts of
primary jurisdiction ought to have pursued."

On the subject of effect one other recognized
distinction remains to be pointed out, according
as the evidence may be sought to be applied to
a case of civil, or criminal procedure.

Scrupulously as the Law of England regards the civil rights of
parties, and prompt as it is to punish criminal offences when proved, the
consequence to the individual of miscarriage in the judgment may be so
much greater in the latter than the former, and the British Constitution
is so abhorrent of the conviction of a party innocent, that the proof in
criminal cases is required to be of corresponding conclusiveness; and
especially when the graver nature of the offence, such as felony or
treason, would involve the higher degrees of punishment. Of course
all civil judgment even, ought to be founded on such an amount of
evidence as would furnish sufficient materials for a rational conclusion.
But criminal procedure seems to require a proportion amounting rather
to that of moral certainty; in the language of Lord Wensleydale,—"Such
a moral certainty as convinces the minds of the tribunal as reasonable men
beyond all reasonable doubt."* In fact,—"to give the prisoner the
benefit of the doubt,"—has become a formulary in the charge of every
English Judge, in summing up for the Jury the evidence in a
criminal case.

Such terms, however, as those of 'moral certainty' and of 'giving
the benefit of a doubt,' may be very well as general landmarks
to indicate the necessity for proof of a convincing character, and
as cautions against a tendency, however remote, to indulge in specula-
tion or conjecture. But beyond this they are terms carrying no

actual definition in themselves; and, after all, the attempt to give them practical application to the mind, must very much depend upon the character and apprehension of the mind itself. The question of guilt or innocence, and the completeness of proof, alike in the case of criminal and civil proceedings, must be always practically left to individual discrimination, and the application of the rules of common sense.

Perhaps what is about to be stated appertains rather to the head of judgment than that of testimony; but in a discussion on the effect of evidence, it may not be out of place to notice the element of uncertainty existing in the necessarily varying constitution, the differing force, and the unequal powers of judgment of the mind to which testimony has to be addressed; and that whether that to which the appeal for decision is made be a Jury, or the more trained experience of the Bench. It was observed by that profound observer, Lord Chancellor Eldon;—"This inconvenience belongs to the administration of justice, that the minds of different men will differ on the result of the evidence which may lead to different decisions on the same cause."* Nor, it may be added, will the most accomplished Judges be found differing in the result of the evidence alone;—they often differ alike in the propositions of law applicable to the facts;—indeed every appellate court owes its existence to this consideration.

A curious instance will be noticed hereafter in which, out of a selection of five English lawyers, all of them Judges, and of the highest capacity, and in the most prominent Judicial positions, the opinion of a minority ultimately, by reason of the peculiar force of the judgment of an appellate tribunal, outweighed that of the majority;† that is the two prevailed over the three. In another case, itself one of appeal, Lord Lyndhurst, Lord Chancellor,

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* Marquis Townshend v. Stangroom, 6 Vesey, 333.
† Money v. Jordan, 5 House of Lords Cases, 185.
mentioned an instance (not after all of very rare occurrence) where a cause, which had run the gauntlet of litigation in all the courts of Westminster Hall, was finally carried on appeal to the House of Lords, “and the result” said his Lordship “was that the House of Lords reversed the decision of the Lord Chancellor in his presence.”

In the case of the Judge, legal training will do much; and a Judge ought to be an individual possessed of powers of investigation, and a capacity for judgment, to an extent proportionate to his vocation. Still even the judicial mind, albeit though subjected to a long previous professional training, must vary no less in the strength of its perceptive, than in the power of its analytic and reasoning faculties; and though much is said ‘of the uncertainty of the law,’ the wonder in fact is, not that Courts should be so uncertain, but that they should be so certain in their conclusions, as practically they are found.

Probably the best solution is found in the answer suggested by Mr. Wills, in the average uniformity of judgment to be looked for in the educated mind; notwithstanding the occasional instances of men either rising above, or falling below the common standard:—

“It may be objected” says he “that the minds of men are so differently constituted, and so much influenced by differences of culture, that the same evidence may produce very different degrees of belief; that one man may unhesitatingly believe an alleged fact, upon evidence which will not in any degree sway the mind of another. It must be admitted that scepticism and credulity are modifications of the same principle, and that to a certain extent this objection is grounded in fact; but, nevertheless, the psychological considerations which it involves have but little alliance with the present subject; the argument, if pushed to its extreme, would go to introduce universal doubt and

* See 1, Phillip's Report, p. 584.
distrust, and to destroy all confidence in human judgment founded upon moral evidence. It is as impossible to reduce men's minds to the same standard, as it is to bring their bodies to the same dimensions; but in the one case, as well as in the other, there is a general agreement and similarity, any wide departure from which is instantly perceived to be eccentric and extravagant. The question is, not what may be the possible effect of evidence upon minds peculiarly constructed, but what ought to be its fair result with minds such as the generality of civilized men are."

* Circumstantial Evidence, p. 20.
CHAPTER III.

On the application of the English Law of Evidence to India.

In the two preceding chapters we have discussed the general nature and classifications of evidence as recognized by English Law; and the more prominent criteria of the value of testimony. It may be convenient, before entering upon the minuter detail of this law, to point out its application to India.

In future chapters we shall take occasion to notice such difference as exists in specific instances; more especially under the operation of the recent Indian Evidence Act (Act II of 1855) and the Codes of Civil and Criminal Procedure; and we omit from the work what otherwise would have no bearing on Indian proceedings. As a general proposition, however, it may be stated, that the English Law of Evidence is that of India, and as well in the Courts of the Mofussil, as those of the Presidencies. In fact the Evidence Act, though with some occasional variation, is in the main borrowed from English Law, or founded upon its principles.

In the ordinary Common Law and Criminal Courts of England, the course of procedure is to entrust to a Jury of twelve individuals, specially summoned for the purpose, the determination of the fact involved in the trial, leaving to the Court the application of the Law. This is not however, the case with all the Courts of the country; and, as an ordinary one, subject to provision for invoking the aid of a Jury in certain prescribed cases, the practice of other Civil Courts, those of Equity, Bankruptcy, Insolvency, Probate, Divorce and Matrimonial Causes, the Ecclesiastical, Admiralty and Small Cause Courts, constitutes the Judge the arbiter of the fact as well as of the law.

The Supreme Courts of the Indian Presidencies, except in criminal cases, and their Small Cause Courts, are in conformity with the principle of the latter in leaving
the decision to the Judge; as are the Mofussil Courts in reference to Civil business.

Regulation Law, however, in the case of criminal trial, provides for the Native Courts of India, at all events in Bengal, when presided over by a Commissioner of Circuit or Judge of Session, the power of availing themselves, under the discretion of the Judge, of the assistance of respectable Natives, either for the purpose of constituting a Panchayet for the institution of enquiries apart from the Court—Assessors to sit with it, and aid it by its observations, particularly in the examination of the witnesses;—or persons to be employed more nearly as a Jury, attending during the trial of a case, suggesting points of enquiry, and after deliberation delivering their verdict. In cases too, involving the religious prejudice of Mahomedans or other classes, the Regulations more especially enjoin a trial under the assistance of a Jury.*

Apart however from the difficulty often found to exist of finding Natives of the prescribed character, within the locality, the Judge is not bound by the verdict of the Jury, even when summoned; so that practically in the native Courts too, not only in civil, but in criminal cases, the Mofussil Judge for the most part, has the fact to determine for himself as well as the law.

Both the Hindu and Mahomedan Codes of Law which once prevailed in India, or in different portions of it, had certain rules of evidence of their own; and many of them very much at variance with those of English Law.

It is a fundamental principle of Jurisprudence, however, that, in every country, the Law of its own Courts,—the 'lex fori,' as it is termed,—not only prescribes generally to all its suitors its own course of procedure, but adopts its own rules of evidence as those upon which the issues depending before it are to be tried; however much in transactions originating in foreign localities, a deference is yielded to the—'lex loci contractus,'—that is, the law or usage of the country in which the obligation was contracted; and though the Charter preserves to the Natives of

* Beaufort's Digest of Criminal Law (1857) Sections 1244-5.
India, in all matters of contract and succession, their own laws and customs, it fails to attach, as part of this, their peculiar Laws of Evidence.

A notion was indeed at one time abroad, that the Mahomedan Law of Evidence was that which was to prevail even in the British Courts of India. However this has long since been exploded in all the Presidencies.

So long indeed as the 'futwa' or certificate of the Law Officer of the Court, in cases involving the application of Mahomedan Law, was allowed, as it originally was, to furnish a rule for decision, some practical difficulty was presented by the opposition in which this futwa was constantly found to the principles of the English Law of Evidence. But this was got rid of, in the Bengal Presidency, by a Regulation so old as 1793;—which provided, that in cases where the evidence given on a trial would be deemed incompetent by the Mahomedan Law, solely on the ground of the persons giving such evidence not professing the Mahomedan religion, the Law Officer of the Sessions Court was to declare what would have been his futwa, supposing such witnesses had been Mahomedans. In such cases the Court was not to pass sentence, but to transmit the record of the trial, with such futwa, to the Nizamut Adawlut; and that Court, provided it approved of the proceedings held on the trial, was to pass such sentence as it would have passed had the witness been of the Mahomedan religion.*

To supply an illustration;—

There are few crimes less likely to be committed in the presence of a number of beholders than rape. Yet for a conviction for this, Mussulman law requires the testimony of at least four eye-witnesses. In an otherwise clearly established case of rape, accordingly, which is to be found among the reports of the Nizamut Adawlut, Oodasien's case,† the futwa of the Law Officer of the Court had declared that this condition not having been complied with, a conviction could not be sustained,

* Beaufort, (1857), Section 623.
† 1 Nizamut Adawlut p. 217.
and the prisoner ought to have been discharged; and, but for the Regulation in question, a crime of this dye would have gone unpunished.

Under the Madras Law, the like difficulty as to the futwa has been got over by a Regulation (Regulation XV of 1803) authorizing the Judge to dispense with it. Thus—(to borrow Mr. Norton's illustration)—suppose the case of a fact proved by only one witness and that a woman. The Mahomedan Law Officer might declare the case not proved, because, according to the Mahomedan Law, (save in certain exceptional cases) the evidence of a woman was not receivable. The Judge might then ask—Suppose the woman were a man? The second futwa would declare that under such circumstances the fact would have been proved. The Judge might then act upon the second futwa.*

So long ago as the year 1829, the Foujdarree Adawlut stated to Government, they considered themselves by Regulation I of 1818, released from following the Mahomedan Law of Evidence, and that they had accordingly turned to the Law of England as their legitimate guide, and as the acknowledged source of the provisions previously enacted, in the Regulations of the Madras Government, for the conduct of judicial proceedings.†

The Native Evidence Law of India would, for the most part, be wholly inapplicable, no less to the course of procedure in the Courts, than to the wants and habits of modern times; and that even so far as the Natives themselves are concerned.

A Code of Evidence could not very well find a place in a British Court, or be administered by British lawyers, which contained such articles as the following, taken from the ancient native Law of India.

According to Hindu Law as to be found in the Mitacshara;—"A man may speak falsely in a case involving death to any of the tribes;"—what is meant by the 'tribes' being explained by the passage;—"Where it is probable that by speaking truth

* Norton on Evidence, p. 6.
† Ibid
death may happen to a Sudra, a Vaiśya, a Cāshetra, or a Brahmīn then a witness may speak falsely; he SHOULD NOT speak truth.\footnote{Macnaghten's Hindu Law, Vol. II, p. 265.}

Indeed this is but an offshoot of the law of Menu, which declares:—

"Never shall the King slay a Brahmīn, though practising all possible crimes. No greater crime is known on earth than slaying a Brahmīn, and the king therefore must not even form in his mind an idea of killing a priest:"\footnote{Macnaghten's Hindu Law, Vol. II, p. 268.}—a pious tenderness for the class, not however very unlike what once existed in a law nearer the home of English lawyers, known by the name of "Benefit of Clergy."

The Mitakshara restricts the obligation of false testimony to the cases in which the interests of the privileged class is involved. Other authorities, however, carry it even further.

Thus it is said in Halhed's Gento Law:—

"Wherever a true evidence would deprive a man of his life, in that case, if a false testimony would be the preservation of his life, it is allowable to give such false testimony; and for absolution of the guilt of false witness he shall perform the Poojah Sereshthee: but to him, who has murdered a Brahmīn, or slain a cow, or who, being of the Brahmīn tribe, has drunken wine, or has committed any of these particularly flagrant offences, it is not allowed to give false witness in preservation of his life.

If a marriage for any person may be obtained by false witness such falsehood may be told; as upon the day of celebrating the marriage, if on that day the marriage is liable to be incomplete, for want of giving certain articles, at that time, if three or four falsehoods be asserted, it does not signify; or if, on the day of marriage, a man promises to give his daughter many ornaments, and is not able to give them, such falsehoods as these, if told to promote a marriage, are allowable.

If a man, by the impulse of lust, tells lies to a woman; or if his own life would otherwise be lost; or all the goods of his house spoiled; or if it is for the benefit of a Brahmīn, in such affairs falsehood is allowable."\footnote{Halhed's Gento Law, p. 115.}
The Mahomedan Law too, in the catalogue of smaller offences, allowed *equivocation* in testimony. Thus, though enjoining on the witness the *general* obligation to tell the truth, in cases of this description, it absolved him from the liability, by sanctioning his availing himself of the ingenious device of *not telling* the *whole truth*; and the same precept which declared that a denial of a positive fact would be wrong, proceeded to add—"*but equivocation is praiseworthy.*"

Mahomedan Law also, in certain prescribed cases, allowed the singular expedient of giving evidence by *proxy*. In the event of the death of the principal witness, the *absence of the witness on a three days' journey*, or his sickness, and in a certain class of cases in which the judgment was not barred by doubt, a witness, or the person who would have been such, was permitted to *supply a proxy*, substituting another person to detail facts or opinions for him.† To admit *evidence* by proxy, is but one step removed from undergoing *punishment* by substitution; and this provision of Mahomedan Law may recall to mind the history of the "Whipping Boy" given by Sir Walter Scott in his Fortunes of Nigel, in the person of Sir Mungo Malagrowther, who, in the pupilage days of King James I played the part of *proxy*, to receive the castigations which would otherwise have fallen on the back of the royal tyro; in order, as the historian of the tale relates;—"that the superhuman yells which the proxy uttered, might produce all the effects on the monarch who deserved the lash, which could possibly be produced by seeing another and an innocent individual suffering for his delict."‡

The Law of Evidence as dispensed in England in what are called the Superior Courts of Common Law, namely the Courts of Queen’s Bench, Common Pleas, and Exchequer, furnishes the rule for the general Courts of the country; including the Courts of Equity; and this is the law which is detailed in most of the established treatises on the subject.

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* Beaufort’s Digest of Criminal Law, 1857, Section 628.
† Beaufort, Section 635.
‡ Chapter VI, p. 67.
There are, however, in England, certain Courts of limited jurisdiction, principally the Ecclesiastical and Admiralty ones, in which the civil law, being adopted as the law of their procedure, the rules of evidence prescribed by the Civil Law prevail; and these are in some few respects at variance with ordinary English law; though in some few only.

On the recent establishment in England of the two Courts of Probate and Divorce, and the transfer to them, from the Ecclesiastical Courts, of the business for the administration of which the former were created, and in the two acts respectively constituting the new Courts, the legislature directed the adoption in both, in all matters of fact, of the rules of evidence observed in the Superior Courts of Common Law.

The Supreme Courts of India are constituted on the basis of the English Courts; with a corresponding jurisdiction separate from the ordinary one, in the matters ranging under Admiralty or Ecclesiastical cognizance. Previously according to the late Indian Evidence Act, these had to adopt alternately the different rules of evidence applicable to these separate jurisdictions, according as the subjects submitted to their decision ranged under the one jurisdiction or the other.

On a like principle with that adopted in the acts establishing the Probate and Divorce Courts in England, the Indian Evidence Act has however enacted (Section 27)—"That the rules of evidence in Her Majesty's Supreme Courts as to matters of Ecclesiastical or Admiralty, civil jurisdiction shall be the same as they are on the Plea side of the Courts."

The ordinary Evidence Law of England, as modified by the Indian Act, has thus accordingly become the Law of the Supreme Courts of the Presidencies, in every branch of their jurisdiction; and it may be understood that the law, which it will be our business to explain, is that now prevailing throughout India, and as well in the Courts of the Mofussil, as in those of the Presidencies.
The Evidence Act is of an *enlarging*, rather than a *restraining*
character, in its scope; and it has in its con-
clusing section a provision that nothing in the
Act contained shall be so construed as to render inadmissible in any
Court, any evidence, which, but for the passing of the Act, would have
been admissible in such court;—a provision which its marginal placitum,
points as having been framed with peculiar reference to the Courts of the
Mofussil.
CHAPTER IV.

On the personal Qualifications, and Disqualifications of Witnesses.

In the two earlier chapters a sketch has been given of the more general principles of Evidence in their broader classification. To fill up the outline in its detail, will be the province of the remaining portion of the work.

One of the first subjects for consideration is naturally the instruments of testimony; and here the personal qualification, or disqualification, of the Witnesses lies at the threshold.

According to English Law, certain persons having religious scruples to taking an oath, are allowed to give their Evidence on affirmation; though under a formal declaration of truth, substituted for the oath, and with the like penalties for perjury.

The excepted class was originally confined to certain religious sects called Quakers and Moravians; afterwards extended to one termed Separatists; but an act of 1854* confers the exemption from swearing, on all persons, unwilling from alleged conscientious motives to be sworn, on the court being satisfied of the sincerity of the objection.

With this exception, all testimony delivered in English Courts of Justice, or otherwise as part of a legal procedure, whether Bankruptcy, Insolvency, Inquisition, Arbitration or otherwise, is taken under the sanction of an oath.

So universal is this, that it extends even to the depositions of Peers of Parliament; whose verdicts when sitting in Judgment in the High Court of Parliament are delivered, and whose answers to suits in Equity are put in, upon Honor. The same principle, it seems too, would

* 17 and 18 Victoria, C. 125.
apply even in the case of the Sovereign; had the Sovereign to appear as a witness in a proceeding.

All false testimony thus delivered carries with it an exposure to the penalties of perjury; though to constitute perjury it is necessary that the testimony should be taken in the course of a regular proceeding, and the oath have been administered by, or the declaration made before, an authorized person.

This is applicable as much to India as to England; and in the Bengal Presidency it has been laid down in express terms in reference to the Mofussil, that a deposition taken on oath in a private dwelling is illegal; and a charge of perjury cannot be sustained upon it.\(^\ast\)

The Indian Penal Code (Act II of 1860) in propounding its definition of false evidence, declares (Section 191)—"Whoever being legally bound by an oath or by an express provision of law, to state the truth, or being bound by law to make a declaration on any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence."—Explanation I, points out that a statement is within the meaning of the clause whether made verbally or otherwise.

Section 192 provides:—"Whoever causes any circumstances to exist, or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry or false statement may appear in Evidence in a Judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement so appearing in evidence, may cause any person who, in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said to fabricate false evidence."

In pointing out what is to be taken as a judicial proceeding, within the meaning of its provisions, Section 193 of the Code supplies the following explanations.

\(^\ast\) Const. No. 267.
THE OATH—ITS ADDRESS TO THE CONSCIENCE.

I. "A trial before a Court Martial or before a Military Court of Enquiry is a judicial proceeding.

II. "An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

III. "An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice is a stage of a judicial proceeding, though that proceeding may not take place before a Court of Justice."

According to the form as prevailing in England, and adopted in the Indian Courts in reference to parties coming within the ordinary provisions of English law, the oath when taken pledges the witness to speak the truth, the whole truth, and nothing but the truth;—and it concludes with the adjuration of the Deity "'So help me God!'" Nothing could be better framed to meet the purposes of the oath itself.

"To lead' says Mr. Bentham 'to a good decision, testimony ought to possess two qualities; it ought to be accurate and complete—to contain nothing but the truth, and the whole truth; that is a just representation of all the facts essential to the case.

Testimony may be inaccurate in two ways; I. By positive falsehood, when the witness affirms a fact which did not really happen; II. By negative falsehood when he denies a fact which really did happen. In other words, testimony is inaccurate by false affirmation or by false negation.

Testimony is incomplete when it does not state some essential fact which really happened; false, by omission."

Tried by the tests here suggested, the formulary is obviously a very perfect one.

According to English Law, the religious or invocatory part of the oath and its appeal, are governed by the conscience of the individual; to be learned from himself

* Judicial Evidence, p. 49.
previously to swearing; and the oath itself is administered with reference to some outward symbol, supposed to be calculated to imbue the mind with the solemnity of the adjuration.

Thus, Christianity being the religion of the Nation, in England the prevailing ceremonial is the kissing by the witness of the Holy Scriptures—ordinarily the New Testament. Those, however, not professing the Christian faith are sworn in the form imagined most binding on their conscience;—the Jew on the Pentateuch;—the Mahomedan on the Koran;—and in a case to be found in the books in which a Chinese witness had to be sworn, the course adopted, in conformity with his explanation of the mode of swearing in his own country, was, that being put into the witness box, he immediately knelt down, and a China saucer having been placed in his hand, he struck it against the brass rail in front of the box, and broke it. The oath was then administered to him in these words, (translated by the interpreter into the Chinese language)—"You shall tell the truth and the whole truth; the saucer is cracked; and if you do not tell the truth, your soul will be cracked like the saucer."

It would be an idle ceremony however to administer an oath to one destitute of a sense of accountability to a Supreme Being, or incapable of distinguishing the obligations of the appeal:—consequently all persons in either position are by the law of England held incapable of giving evidence;—that is to say Atheists, Persons professing no religion, Madmen, Idiots, Children of too tender or uninstruct an age, or a Person in a state of drunkeness.

The test of competency on the score of religious belief underwent considerable discussion in a case of Omichund v. Barker† which occurred above a century ago; and which, though arising out of certain mercantile transactions at Calcutta, was that of a suit instituted in the Court of Chancery in England, during the Chancellorship of Lord Hardwick. The question was raised upon a commission issued to India to take the testimony of certain Native witnesses there, and the Chancellor

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* Regina v. Entrehman and Samut, 1, Carrington and Marshman, p. 248.
† 1, Atkyns, 21, Willes, p. 545.
THE OATH—CHILDREN.

had the assistance of the English Judges in arriving at his decision. It was there settled that the true test was the belief in an Omniscient Supreme Being as the rewarder of truth, and avenger of falsehood; and it is this governing principle which prevails throughout the courts of British India, amid all the varying modifications of belief exhibited by the Native inhabitants of the country.

It has been questioned whether the belief in a future state of existence be essential, provided accountability to God in this life be acknowledged.—"It may be considered however says Mr. Taylor "as now generally settled in this country as well as in America, that it is not material whether the witness believes that the punishment will be inflicted in this world, or in the next. It is enough if he has the religious sense of accountability to the Omniscient Being, who is invoked by an oath."

With respect to Children the precise age of exclusion has never, in England, been accurately fixed; save that the law will always imply sufficient understanding in one of fourteen years of age. Under that age, it is a question of circumstances, degree of intelligence, and instruction; but the testimony of children eight or nine years old is constantly received. In India, where children arrive at an earlier maturity, a child of this age would probably be considered hardly more advanced than an Indian one of six or seven.

In a case of Regina v. Williams tried by Mr. Justice Patteson,† where the evidence of a child of eight years of age was tendered, and the child appeared to have had no religious education but had, subsequently to the events she had been called to prove, received some general instruction from a Clergyman as to the nature of an oath and its obligations, the evidence was rejected; the learned Judge observing:—

"I must be satisfied that the child feels the binding obligation of an oath from the general course of her religious education. The effect of the

† 7, Carrington and Payne, p. 320.
oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath recently communicated to her for the purposes of this trial; and as it appears that previous to the happening of the circumstances to which this witness comes to speak, she had had no religious education whatever, and never heard of a future state; and now has no real understanding on the subject, I think that I must reject her testimony."

It should be observed, however, that in thus confining the test of the conscious obligation of the oath to a previous general education, the law has been thought to have been here somewhat too broadly laid down; and, although all sudden or recent awakening of the moral sense in such a case would certainly be open to suspicion, and would require great vigilance in testing its reality, yet, if that reality should be clearly established, there would appear no adequate reason why it should not be acted on. The difficulty would be to discover in that which had, in a sense, been mere passing instruction, what one would more naturally expect to find as the result only of longer training, and a more fixed and permanent action on the mind. The case itself indeed when examined seems but an example of this; for the concluding comment of the learned Judge pretty well tells the real state of things, when he says,—"and now has no real understanding on the subject."

Were a want of religious belief alleged in any witness tendered, 

Presumption of religious belief.

the court would nevertheless presume the existence of belief until the contrary were shown;—and this must be upon evidence of declarations previously made to others by the individual himself, and not upon his own personal interrogation. Though the law was otherwise formerly, the older cases on the point have now been overruled.∗ Until the party is sworn he does not in fact become a witness at all; and, after he is sworn, he is not allowed to be questioned on the point; since it would be a personal

scrutiny into a state of faith and conscience, foreign to the spirit of our institutions.

Nor can the objection be raised by any other than a party to the cause. No volunteer would be listened to.

Whatever may be the ground of disqualification, it is only co-extensive with the defect; so that a state of mind amounting to a partial insanity only, as for instance some particular delusion, would not preclude examination, were the Judge to satisfy himself, on investigation, that the individual could in fact appreciate the obligation of an oath, and understood the subject of examination. So in a case of more general insanity, testimony may be received during a lucid interval.

Trials, where the justice or necessity of the case required it, have been postponed to admit the evidence; if there were reasonable ground to expect a recovery, and competent fitness, within a reasonable period.

This, however, would not be allowed in the case of a child; as while the child was undergoing the requisite advance of age and instruction, the memory of the transaction would, at the same time, be fading from its mind. In the language of Pollock, Chief Baron:—"More would probably be lost in memory than would be gained in any other way."*

At one period those deaf and dumb from birth were excluded from giving evidence; being ranged under the head of idiots. But this rule has been questioned in modern times;† and the testimony of such a witness would probably now be received; did adequate means of interpretation exist; and were the Judge to satisfy himself of the capacity.‡

In India, among its Native population, Leprosy has been considered as carrying with it a sort of moral pollution; and Hindoo Law would have rendered the testimony of

* Wade's case 1, Moore's Criminal Cases, p. 86.
† See Harrod v Harrod, Kay and Johnson p. 9, per Wood, V. C.
a leper inadmissible. It has, however, been laid down as a rule for the
government of the Courts of the Mofussil, that the fact of a witness
being afflicted with leprosy does not bar the admission of his evidence;†
and no such question would be permitted to be raised in the Supreme
Courts of the Presidencies.

In the article of the oath, and its requisition as a security for testi-
mony, the general principles of English Law apply in the main to India. There exist, however,
some qualifications which require to be noticed.

In the Supreme Courts, as in relation to ordinary British subjects
in the Courts of the Mofussil, as a general rule, the administration of the oath precedes the taking
the testimony; and this, much in the same way as adopted in the Courts
of England. In the Supreme Courts, Natives, when Mussulmans are
sworn upon the Koran, and when Hindoos on the water of the Ganges;
or otherwise according to the different modes of obligation on their
consciences.

The Hindoo religion particularizes various acts as subjects of future
punishment, as for instance killing a Brahmin, slaying a cow, and so
forth; and the oath in more common use, as administered by the Native
Officer of the Court, is understood to invoke the like punishments for
false testimony.

By an Act of the English legislature,—IX George IV c. 74 Section
36—(the Act formerly regulating the Administration of Criminal Justice in India) the exemption of
the English Law in favor of Quakers and Moravians is extended to persons of those persuasions in India, and that in any pro-
ceeding whether Civil or Criminal; the parties substituting a solemn affirm-
ation or declaration as follows;—"I, A. B. do solemnly, sincerely and
truly declare and affirm, &c."—The same section also goes on to enact—
that every Native of any country within the limits of the Charter, who may

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† Const. No. 726.
be required to give evidence in any case, Criminal or Civil, and who should object on the ground of religious scruple to take an oath in the usual form, may, at the discretion of the Court, be permitted to make his or her solemn affirmation or declaration, in such manner and form as the Court should deem sufficiently binding upon the conscience. As respects any affirmation or declaration thereby authorized to be taken, it gives it the same force as if the witness had taken an oath in the usual form; and with the like penalties for perjury.

It is under this Act that, in the Supreme Courts, the testimony of Natives objecting to be sworn is taken.

Upon the same principle, Act V. of 1840, after reciting that obstructions to justice and other inconveniences had arisen, in consequence of persons of the Hindoo or Mahomedan persuasion being compelled to swear by the water of the Ganges, or upon the Koran, or according to other forms repugnant to their consciences, or their feelings—Enacts (Section I)—that except as thereafter provided, instead of any oath or declaration then authorized or required by law, every individual of the class aforesaid within the territories of the East India Company shall make affidavit to the following effect:—

"I solemnly affirm in the presence of Almighty God that what I shall state shall be the truth, the whole truth, and nothing but the truth."

It also subjects to the penalties of perjury, as well those giving false testimony, as those causing or procuring another to commit the offence.

The final section of the Act confines its operation to the Courts of the Mofussil.

The administration of the oath must precede the taking of the testimony; not follow it in the way of giving it authenticity; though the affirmation itself does not require to be signed.*

Translations of the oath are given in Bengallee and Urdu for Mahomedans and Hindoos; and, if it be necessary to use the Bengallee

form for the Mahomedans, the term used to designate the Supreme Being by persons of that persuasion, is to be substituted.*

In criminal cases, under the Regulations of Bengal, and the Ceded Provinces, the following admonition is to be repeated to the witnesses in the language they can best understand, immediately after they are sworn:—"In delivering your evidence now administered, you are required to declare the truth, the whole truth, and nothing but the truth. You are carefully to distinguish what you personally know, as an eye-witness or otherwise, from what you have heard from others, and are solemnly bound to answer all questions put to you on the trial before the Court, without any regard to the Prosecutor or Prisoner, to the best of your information and belief."†

Should occasion require, in the course of examination, the Judge is to remind the witness of the admonition.‡

* Ibid.  
† Regulations IV. 1797, No. VII. 1803.  
‡ Beaufort, 103.
The Evidence Act, however, addresses itself rather to the capacity to appreciate the facts and to relate them accurately, than to the obligation of the oath; and renders the former the test, and not the comprehension of the religious obligation.

The Act excludes from testimony those children under the age of seven, and those persons of unsound mind, who, at the time of their examination, appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly. At the same time it excludes from all liability to be summoned as a witness, any person known to be of unsound mind, save by leave of the Court, or the person, before whom his attendance is required.

It will be noticed that the language of the Act does not appear to involve the absolute exclusion either of children under seven, or even of persons of unsound mind; but, conditionally only on their incapacity to receive just impressions of the facts, and of relating them truly. The whole provision though seems somewhat an inversion of the ordinary course of procedure; since until the testimony itself be given, or at all events until it is in a course of being elicited, it is not easy to see how the capacity of the witness for 'receiving just impressions of the facts' or of 'relating them truly' is to be ascertained.

On the score of want of religious belief and immaturity of age, the Act contains a provision wholly unknown to English Law;—enacting that any person who, by reason of immature age or want of religious belief, or by reason of defect of religious belief, ought not, in the opinion of the Court or person before whom his attendance is required, to be admitted to give evidence on oath or solemn affirmation shall be admitted to give evidence on a simple affirmation, declaring that he will speak the truth, the whole truth, and nothing but the truth. It affixes at the same time, on false evidence, the penalties of perjury.

What the value of this affirmation, or of the testimony taken under it, may be, is not so obvious; and, in the case of children, at all events
it is not easy to see how practically an indictment for perjury could be sustained against one of years too immature to be admitted to the ceremonial of an oath. Indeed, as respects immaturity of age, the whole provision would look very much like a dead letter. It is presumed that it is not intended under this clause to let in the testimony of children excluded under the seven year's one; and it would puzzle the keenest casuistry to define the immaturity of age incapable of taking in a solemn affirmation, but yet comprehending a simple one. Of course, if the effect of the simple affirmation were not understood by the child, the whole proceeding would be a farce.

It may be observed though, as respects Children generally of whatever country, that, if their age render them somewhat awake to the responsibility under which testimony is received, there is a considerable set off to this in the probable artlessness with which the evidence would be given, and the greater unlikelihood either of their inventing a tale of falsehood, or sustaining one under the scrutiny of a cross-examination.

Probably there is no class of witnesses which would more entirely exhibit the sanction for truth, which Mr. Bentham has termed the natural guarantee, namely that "falsehood is more difficult to tell, as it is to maintain, than truth."

Mr. Norton, whose Indian experience renders his testimony on the subject the more valuable, says:—

"There is a proverb that fools and children speak the truth; and I cannot close these remarks without observing that Hindoo children of very tender years are remarkably intelligent, and veracious witnesses; and, perhaps on the whole, the most satisfactory class of native witnesses presented to our courts of Justice."*

Quintilian has recorded the practice prevalent at Rome in his time, of receiving the testimony of even very young children.

* Norton on Evidence, p. 20.
Formerly, according to the Law both of England and of India, no testimony was allowed to be entertained which was exposed to the taint of either, personal interest on the part of the party giving it, in favor of the side he was sustaining, or what was termed the infamy of his own character. The assumed bias in the one case, and the supposed absence of the moral check in the other, were treated as so inherently discursive, as to exclude the very admissibility of the evidence.

Subject also to certain exceptions, the mere circumstance of being party to the proceedings, was a ground of disqualification.

The wiser policy of confining interest or character as ground of objection to credibility only, and not to original admissibility, and of admitting the parties to a litigation to a capacity to give evidence, has at length prevailed both in England and India.

In England a statutory enactment of the present reign, or rather a succession of enactments in the present and the previous one,* has removed incapacity, on the ground of either crime or interest, as an objection to the reception of testimony; and, with one exception, it has admitted all parties to the record in civil proceedings to appear as witnesses. This exception is made in the case of the parties to any action either for criminal conversation, or for breach of promise of marriage, and the parties to any suit in the Ecclesiastical court (which would now apply to the Court of Divorce and Matrimonial causes) instituted by reason of adultery.

In India, the Evidence Act, save in the instance of children under the age of seven, and persons of unsound mind, incapable of appreciating or narrating—(the provision for whom we have already stated)—declares all persons competent.

* 3 and 4 W. 4 c 42.
6 and 7 Vic. c 85.
14 and 15 Vic. c 99.
16 and 17 Vic. c 83.
This would appear to be sufficiently comprehensive to have embraced as well the case of infamy of character, as either interest, or that of being a party to the record; and to have removed, in respect to any of them, all as ground of exclusion. The act in a later clause has gone on, however, in express terms, to provide that interest shall not exclude, whether interest in the result of a suit, or connected with it, or by reason of relationship to the parties. In like manner it has also declared parties to a suit both competent and liable to give evidence, either on their own behalf, or on behalf of any other party.

In the case of parties to a suit, the Act contains no such exception as is to be found in the English one, in reference to actions for criminal conversation, or breach of promise of marriage, or suits for adultery.

In certain of these provisions the Act in question in effect only applies to the Supreme Courts what, under the previous Act, XIX. of 1853, had existed in relation to the Courts of the then Company.

By the English Acts, defendants in criminal proceedings, whether on trial in Court, or in charge before a Magistrate, save in the case of a voluntary confession, are prohibited from giving evidence for, or against themselves; as well as protected from answering questions tending to their crimination.

The Indian Act, in opposition to the English, contains a provision withholding from a witness all protection against answering criminating questions, to which we shall advert in a subsequent chapter. It is silent, however on the subject of defendants giving evidence on criminal charges against themselves; and the law on this point would stand as it did before the Act, and on the footing of English law.

It has been attempted indeed, in the Mofussil, to apply to the case of a party charged with a criminal offence, the provision of the Act compelling persons present in Court to give evidence on the requisition of the Court; and in one reported case, a Deputy Magistrate imposed on a defendant a fine, and three months imprisonment in default of payment, for a refusal to depose; which order was actually confirmed

† Chapter V.
by the Sessions Judge.* Fortunately, however, for the character of British Judicature, it was reversed on appeal to the Nizamut. 'It appears to me' said the appellate Judge 'that the object of Section XXV. was to give power to the Civil Court, to examine any party to a suit present in Court though not summoned. The words of this section are exactly the same as the words in Section XXV. of Act XIX. of 1853, which Act amended the law of evidence in the Company's Civil Courts; and surely, if it had been intended by the reinsertion of this Section in Act II. of 1855, which was chiefly enacted for Her Majesty's Court, to introduce that desirable reform in our criminal courts, viz., the examination of a defendant as a witness in certain cases, it would have been specified in more express and unmistakeable terms. Moreover, as the law (Section XXII.) distinctly enacts that witnesses in criminal proceedings are bound to answer questions tending to criminate themselves, if a defendant in a criminal trial could, under Section XXV, be examined as a witness on points on which he would be likely to criminate himself, the law would have laid it down distinctly, and not have left it uncertain."

The English Law relieves husbands and wives from the liability, and disqualifies them from the competency to give evidence, for or against each other, in any criminal proceedings, or in a case of adultery, or to disclose communications made during marriage by the one to the other; though it subjects them to the liability in all other cases.

The Indian Act, addressing itself to the like subject, is silent with respect to the exception of adultery. It simply enacts, in general terms, that a husband or wife shall, in every civil proceeding, be competent to give evidence for or against each other; with a proviso that any communication made by husband or wife to the other, during their marriage, should be deemed a privileged communication, and should not be disclosed without the consent of the party making the same, unless such communication should relate to a matter in dispute in a suit pending between such husband and wife.

This language as respects criminal proceedings, leaves the Law where it was before the Act; and this, as administered in the Supreme Courts of the Presidencies, may be considered as precluding the testimony, with the exception only perhaps, (should that exception prevail) of the case of high treason, and the exception of certain offences of the husband and wife against each other. In the Courts of the Mofussil, there have been cases in which the evidence of the wife has been received against the husband in corroboration of other evidence.* In the latter of the cases however cited in the note, the practice was reprobated by the Superior Court; except when resorted to as a case of 'urgent necessity'; and opposed as such an admission is, to the general and wholesome principle of English Law, it is presumed that such a practice would be generally discountenanced, even in the Native Courts.

Mr. Beaufort indeed refers to Section 14 of the Act of 1852, as conferring on a wife a general competence to testify, and thence one to give evidence against her husband.† With all deference to so accurate an authority as the learned author of the Digest, this is submitted to be a misconception. Antecedently to the Act, and wholly independently of it, there was nothing to disqualify a married woman from testifying, any more than her husband; and the question is not one of general competency, or the conferring it, but of the abridgment of this competency, in an individual and specific case. Now the general previous law having forbidden husbands and wives to give evidence against each other, Section 20 of the Act, empowers them to do this in civil proceedings. It can hardly be supposed that if so large an alteration in the law had been in contemplation, as the extension of this competency to criminal ones, it would not have been expressed, and that unequivocally. "E.\textit{pressio unius est exclusio alterius}"‡ is a very well established rule of construction; and as applicable to Legislative Acts, as to all other documents.

* See particularly Mussummat Mughnee against Ohareya. 1 Nizamut Adawlut, 144. —Musst Luitea against Lurrye Chung 2 (ct) 149. And see Beaufort, 108.
† Beaufort Section, 560.
‡ "The expression of one thing or intent is the exclusion of another."
The rule with reference to criminal proceedings extends in England, as it is to be presumed it would in India, to the case in which the interest of the married party might be affected, though only indirectly so. Thus on an indictment for conspiracy against the husband and another, the wife could not be a witness for a co-defendant, if her testimony for him would tend to the acquittal of her husband.

So far indeed has this been carried, that, where the wife of one prisoner was called to prove an alibi in favor of another jointly indicted with her husband for burglary, her testimony was rejected, on the ground, that by shaking the evidence of a witness for the prosecution who had identified the prisoners, it would materially weaken the case against the husband.*

But the interest at an end, the exemption ceases to apply; as where the trial against either husband or wife was concluded by either conviction or removal from the record, the other might give evidence as against remaining parties to it.

The exception, however, would not apply where no criminal proceeding was actually pending against the married party; notwithstanding the evidence of the one might tend to subject the other to a criminal charge.

The rule is personal in its character; so that either husband or wife would be precluded from giving testimony as to matters occurring prior to the marriage, or even touching the marriage itself.

Accordingly were a man under prosecution for bigamy, his first wife cannot be called to prove her marriage with him.†

A question has been raised whether it be essential that the relationship be a subsisting one at the time of the proposed testimony, in other words whether the prohibition would apply to a widow or widower, or after a divorce. The better opinion seems to be that it would. In the

* R. v Smith, 1 Moody's Crown cases, 289.
† Grigg's case, T. Raymond 1.
case of a wife divorced, and afterwards offered as a witness against her husband, Lord Alvanley rejected the evidence. "It never" he said 'can be endured that confidence which the law has created while the parties remained in the most intimate of all relations shall be broken, whenever, by the misconduct of one party, the relation has been dissolved."

The exemption extends only to lawful marriages, or to those presumably to be so considered. Thus on a trial for bigamy, the first marriage being proved and not controverted, the woman with whom the second marriage was had is a competent witness either for or against the prisoner, the second marriage being void.† Were the proof of the first marriage doubtful, and the fact controverted, it appears that she would not be admitted.‡

Though inadmissible, however, as a witness, the wife may be produced in court for the purposes of identification.


A doubt has been raised whether the exemption in the case of husband and wife apply to cases of high treason, which is as yet unsettled.

It still too remains a question in which the authorities differ, whether the rule of exclusion may be relaxed by consent.

It has not been decided whether, in the cases in which the wife would be permitted to testify against her husband, she could be compelled to do so.

In all three cases the opinion more likely to prevail is, that which would uphold the consecration of the marriage state against all other consideration; and which would accordingly exclude the testimony.

It will be observed that the Indian Act merely makes the wife competent. It says nothing of her being compellable to testify.

* Monroe v. Twistleton referred to 6 East, 192.
† Buller's Nisi Prius, 257.
‡ Grigg's case cited before.
The rule of exemption, whether as respects England or India, does not apply to civil suits, or proceedings between third parties; and in such cases, husbands and wives are permitted to contradict, and even to discredit, one another.

Nor would it hold even in criminal cases, when the crime is the act or conduct of the one towards the other. Otherwise there might be no remedy for personal injury. Thus for instance, an assault by the husband upon the wife—his assisting at a rape committed by others upon her—his forcible abduction of her before marriage, the force continuing to the time of marriage,—in all these the evidence of the wife would be receivable as against the husband, and she might exhibit Articles of the Peace against him on her own affidavit.

A statute of the reign of Queen Anne,* in cases of high treason or misprision of treason, prescribes the delivery to the accused, ten days before the trial, and in the presence of two or more witnesses, of a list of witnesses to be called by the Crown against him; and all not in the list are excluded from giving testimony.

According to English Law, and the practice of the Supreme Courts of the Indian Presidencies, a Prosecutor, in ordinary cases, is not concluded either by the list of witnesses appearing on the Indictment; or examined before the Magistrate; while on the other hand, though usual to call the witnesses endorsed on the Indictment, this is not compulsory on him. He should, however, have the witnesses in attendance, that, if desired on the part of the defence, they may be submitted to examination; and the Judge may call any witnesses whose names have been omitted.

In the Bengal Presidency in the case of a trial before the Sessions Judge, prima facie, the examination of Witnesses is restricted to those examined before the Magis-

* 7 Anne, c. 21 s. 11.
trate and returned in his calendar. This, however, may be extended at
the discretion of the Judge, on application to him for the purpose,
usually made at the opening of the proceedings, though not necessarily
so; and indeed the Judge has power of his own suggestion to order the
production of particular witnesses at any stage of the trial.*

No Judge who is to try a cause can give evidence in it,—testimony
on which he would himself have to determine,—which would be an anomalous and highly objec-
tionable state of things. At least such would be the rule were the trial
before a single Judge only, where the objection would be more glaring.
The rule of exclusion would appear, however, not to apply to the case
in which the Witness-Judge was only one of a bench of Judges; though
propriety, in such a case, would dictate his withdrawing from the
adjudication.

It would be equally unseemly for one whose testimony was required
as a Witness, to take on himself the office of a

Nor Counsel. Counsel, were his evidence wanted to support his
own opening statement, and that evidence of a material nature.

There seems however, though once thought otherwise, to be no
absolute rule of exclusion; and there might be cases, and the more
especially so perhaps, where the retainer of the counsel was on the side
of the defendant, in which the most fastidious need not object to dis-
charge the double duty; particularly where the proof required was of a
merely formal character, as for example handwriting, or the execution
of a deed.

A Jury-man is not precluded from giving evidence, though, if he
have any private personal knowledge of a fact, it ought not to be simply told to his fellow Jurors.
—It can only be revealed by him, on oath, in the character of a Witness; for which he must be duly sworn to testify; when he would of course be
open to cross-examination.

* Beaufort's Digest (1857) p. 221.
The above constitute the only grounds of exclusion as regards the personal qualification of the witness.

Question has been raised, whether objection to the competency of a witness must not be taken and disposed of before he is sworn on the examination in chief, or in the case of declarants, before their declaration; and in the earlier history of the English Courts there was a preliminary examination, called the examination on the "voir dire," under which the investigation took place, on a special oath administered to the witness for the purpose. This, however, has gone into disuse; and, though where the objection is known to exist antecedently to the swearing the witness on his examination in chief, under ordinary circumstances, that would appear the appropriate time for objecting, it is now considered, that objection may be taken at any period of the examination at which the fact may first transpire; and, if allowed, the previous examination is struck out from the record. It has even been laid down that a party aware of the objection may lie by, without putting questions to elicit it; — a course he might not improbably or improperly adopt, unless the witness were apparently departing from truth, and the motive accordingly arose to get rid of the testimony.

The leading authority on the subject is a case of Jacobs v. Layborn, where Lord Abinger, Chief Baron, in delivering the Judgment of the Court, thus expressed himself:

"I am of opinion that this rule ought to be made absolute. 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 recognized 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, when-

* 11 Meeen and Welsby, 685.
ever 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 court, 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 this 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, and 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 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 circumstances showing him not to be so may appear afterwards. Suppose,
for instance, a man examined on the *voir dire* were, in answer to ques-
tions put to him, to swear distinctly that he had never been convicted
of felony or perjury, he is then *prima 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 inquiring at any moment
into the Witness's 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. In short, there is ample authority to shew that the ancient, if
not universal, practice has been to allow objections of this kind to be
taken as was done in this case. For the sake of convenience, it is
the usual practice to swear him, in the first instance, to give his evidence
in the cause, and the peculiar form of the oath administered on the *voir
dire* arises from the circumstance, that the points to which the witness
is about to be examined are not evidence in the cause. It may be very
proper to interpolate that oath at any period of the examination of the
witness that justice may require, and this consideration will reconcile
all the difficulties which have been raised."

It is suggested by Mr. Taylor* that cases of high treason might
still possibly furnish an exception to the rule thus laid down, on the
principle of the list of the witnesses having been previously furnished
to the accused. However we are not aware that the point has ever
arisen, and the law having reduced the objection on the score of in-
competence to such narrow limits, it is probably not a very important one.

In the case of a party aware of the objection, but not taking it, a
new trial, even according to English Law, would only be granted on this
ground, if at all, under very special circumstances. The Indian Evi-

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* Taylor on Evidence, 1069.
WIDE ADMISSION OF TESTIMONY.

dence Act (Section 58)—removes the improper rejection or admission of Evidence as any ground of new Trial, should it appear to the Court that there was sufficient independent Evidence to justify the decision.

Such is the personal status of the witness, such his qualification, and disqualification; and it will have been seen that the recent improvements in the law, both in England and India, have thrown the door very widely open to the admission of testimony.

Summary.
CHAPTER V.

On Privilege from Examination.

THOUGH as a general principle, a witness is bound to submit himself to any course of examination, and to answer all questions put to him, there are exceptions to the obligation; and these rest partly on grounds personal to the witness, and partly on those of either a social or a public nature.

The exception on the personal ground, when existing, will be found to fall under one of three heads:

1. The assumed tendency of the examination, and the answers to be elicited under it, to expose the witness either to civil liability or forfeiture, or to penal consequences;—

2. Its infraction on the proprietary rights—either of the witness himself, or of some third party for whom he may be in the position of a trustee of the privilege of silence; or—

3. The disclosure of matters of confidential communication involved in the examination.

It should be added that, somewhat akin to the first ground of exception, is one which addresses itself to the protection of the witness from a course of examination discreditive of character; even when not involving any direct penal consequence; and, in a sense no doubt, character is property, and its protection a civil right. Still it is so but indirectly only; and conceiving that this branch of the doctrine of protection may be more conveniently treated under the head of discreditive examination, we leave its discussion to that part of the work in which this is dealt with.*

* See the chapter on Cross-examination.
With respect to the portion of the first head of exception relating to civil consequence, it has long been established as a principle of English Law, and apart from the question of exposure to criminal charge, that a witness is relieved from the obligation of testifying, wherever his answer to the questions put to him might expose him even to civil penalty or forfeiture of whatsoever kind; penalty for instance in the shape of fine, liquidated damages or other penal obligation; forfeiture such as that of a lease under a proviso for re-entry;—and this ground of protection subsists in England to the present day.

It was even at one time matter of question, whether a witness might not also claim exemption, on the ground that the answer to the question put to him might expose him to some civil action, or pecuniary loss, or might charge him with a debt. This has now, however in England, for some time past, been set at rest by an Enactment of the Legislature which, in the case of a question relevant to the matter at issue, declares that the witness cannot by Law refuse to answer, on the ground that the answer may establish or tend to establish, that the witness owes a debt, or is otherwise subject to a civil suit.*

The statute partakes less of the character of a new Enactment, than an act declaratory of the existing Law;—(which in fact on its face it purports to be)—and, though India is not mentioned in it, nor has there been any actual Indian legislation on the point, the statute has been treated as regulating the Law there.

It will be observed, however, that it makes relevancy a condition to the right of examination; and it preserves the protection, on the ground of exposure to penalty or forfeiture.

In this last respect the Evidence Act of 1855 places the Law in India on a different footing from that of England. Requiring only as a preliminary condition that the question be relevant to the matter at issue, Section 32 of the Indian Act declares the witness liable to

* 46 George III, Chapter 37.
answer, notwithstanding the answer may expose, or tend directly or indirectly to expose him to a penalty or forfeiture of any kind.

The English statute does not in terms refer to the production of documents; but documents are considered to fall within its spirit; and their production has been held compellable accordingly; notwithstanding it might be prejudicial to the civil interests of the witness, as respects exposure to action, pecuniary loss, or the charge of debt.*

The Indian Act has the like silence in this particular as the English one. Documents in connection with this point are not in terms referred to.

Clause 21, indeed, of the Indian act addresses itself to the subject of documents; and enacts that a witness, whether a party to a suit or not, shall not be bound to produce any document, held by him for any other person who would not be bound to produce it if in his own possession. Clause 22 provides that, in the case of a party to a suit, being a witness, he shall not be bound to produce any document not relevant or material to the case of the party requiring its production; and though Clause 23 enacts that a witness summoned to produce a document shall bring or cause it to be brought into Court, albeit there may be a valid objection to the right to compel production, or to put it in evidence, or to disclose its contents, it leaves the validity of the objection to be determined by the Court; to which for that purpose, it gives power of inspection; and in discharging the duty of inspection it directs the Court to receive any admissible evidence respecting the document which may be given by the objector, and to call in the aid of Interpreters. None of these clauses however would seem addressed to the point of production, where production might involve exposure to either civil liability or penalty. Indeed they appear rather framed to protect from, than enforce production; and that, whenever either the document is held by one as a trustee for another not himself bound to produce it, or the document is itself irrelevant to the issue.

* Doe v Dale, 3, Queen's Bench Report, 609.
It may be considered accordingly that the production in question would in India be regulated by English Law: and as we have just seen that exposure to pecuniary consequences has been held in England to constitute no ground of protection to the document sought to be produced, it may be taken that so neither would it in India. Moreover the Indian Act withdrawing even the exposure to penalty or forfeiture as a ground of protection, it would seem to follow, on a corresponding principle, that the production of documents might be insisted on, notwithstanding the pretext of their exposure to penalty or forfeiture.

With respect to the ground of protection against answering, in the exposure to criminal charge, it might be anticipated that if English law had its protection against exposure to civil penalty or forfeiture, a fortiori would this exist in relation to criminal liability; and against any course of examination having this tendency the law of England protects.

"Upon a principle" says Mr. Starkie of humanity, as well as of policy, every witness is protected from answering questions, by doing which he would criminate himself. Of policy, because it would place the witness under the strongest temptation to commit the crime of perjury; and of humanity, because it would be to extort a confession of the truth by a kind of duress, every species and degree of which the law abhors. It is pleasing to contrast the humanity and delicacy of the law of England in this respect with the cruel provisions of the Roman law, which allowed criminals, and even witnesses in some instances, to be put to the torture for the purpose of extorting a confession."

Whether, however, the exposure be one to consequences either civil or criminal, those consequences must have a still possible existence. Thus in a case of crime, if its punishment have been undergone, or in the case of penalty, if the time for enforcing it have passed, or in one of forfeiture, if the forfeiture have been released, the cause for protection ceasing, the protection would cease with it, and the witness be bound to answer.

* Starkie on Evidence, p. 41.
It is not necessary, that the exposure should be the necessary result of the disclosure. It is sufficient ground of protection if such be even its indirect tendency. Whether it be a case of crime, penalty, or forfeiture, the protection would extend to every link in the chain of exposure, however remote.

The protection once claimed, the tendency of the question is one for the decision of the Judge; and this he must decide on such general statement only of the probable effect of the testimony as may suffice to make the objection intelligible. To require of the witness a full or minute explanation would in itself, by its very statement, destroy the protection. But the mere declaration of the witness as to the effect of the testimony, even though delivered on oath, would, it seems, be insufficient; were the circumstances detailed inadequate in themselves to induce the Judge to award the protection;—though the point has not been definitely settled.

A Foreigner cannot object to answer on the ground that his testimony might expose him to prosecution in his own country.

It has been doubted whether the chivalrous consideration of the

English law has not been carried beyond the verge at which the purposes of justice would require it to stop; and a distinction has been suggested, though never formally recognized, between the case in which the examination is sought to be pursued from its direct bearing on the issue the subject of trial, and that in which its only object is to discredit the witness. It has been said that, even assuming the protection should exist in reference to the latter, it should be withheld in the instance of the former; and the distinction appears a reasonable one.

Be this, however as it may, so far as relates to testimony bearing on the issue—(and what has not this bearing seems hardly worth a discussion)—the knot, as regards India, has been cut by the Indian Act, which
EXPOSURE TO LIABILITIES.

(though called for probably in the peculiar circumstances of the country) is, in this respect, in antagonism to the protective principle of the English law. The Evidence Act enacts—(Section 32)—that a witness shall not be excused from answering any question relevant to the matter at issue, 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 him, or that it will expose, or tend directly or indirectly to expose him to a penalty or forfeiture. It contains, however, at the same time, a provision that no answer the witness may thus be compelled to give shall, except for the purposes of punishment for false evidence, subject him to arrest or prosecution, or be used as evidence against him in any criminal proceeding.

It will be noticed that the Act makes relevancy to the matter at issue a condition of the obligation; so that, even under this provision, an answer, it is apprehended, could not be compelled for the mere purpose of discrediting a witness, did not the matter, the subject of enquiry, fall within this condition of relevancy.

As in the case of documents involving an exposure to pecuniary liability, so neither in those affecting self-crimination, does the Indian Act, in terms, contain any express provision. We have already suggested, as respects the cases in which the Act withdraws the privilege from answering on the ground of exposure to civil debt, penalty, or forfeiture, that the protection to the document would follow the fate of the protection against answering; and the like principle would seem to apply to documents obnoxious to the establishment of criminal liability.

The next ground of exception—that of trenching on proprietary rights—addresses itself to the title deeds of property; and these the law protects from production, whether belonging to the witness himself, either beneficially or in the character of a trustee, or held by him as the solicitor or other agent of another. It does this in the latter instance, whether the real beneficiary be before the Court or not.
Such is the undoubted law of England on the subject; and it is apprehended that the same would prevail in India; and that even in the Courts of the now extinguished Company.

The Evidence Act, indeed, of 1855 contains, as we have seen, a provision—(Section 22)—relieving a witness being a party to a suit from the production of documents not relevant or material to the case of the party requiring its production, and so far accordingly apparently implying antecedent obligation to produce what was relevant or material. It will be observed though, that if the clause imply, it does not create, the obligation; and it is apprehended that there is nothing in this provision which can abrogate the well-established rule which protects title deeds from production in the hands of a witness whether party to a suit or not.

The expression 'document' is not very definite; and had title deeds been intended to have been dealt with under it, it may be presumed these would have been more pointedly described. Of course we speak of a general principle only. There might be special cases of exception, as for example, where the deed itself, though one of title, was the subject of impeachment; but there can be little question that the rule would, or at all events ought, to be upheld, wherever there was nothing very special to justify a departure from it. It is clear that it ought to be so where the object of production was the mere establishment of the title of one party, by showing the defect of that of the other; as in the instance of an ejectment, and the attempt on the part of a plaintiff to pick holes, or detect flaws, in the deeds of the defendant. Trying the question even by the test of relevancy or materiality, in such a case (as well suggested by Mr. Norton*) the plaintiff having to succeed on the strength of his own title, and not on the weakness of his adversary's, the deeds could be hardly either material or relevant to the case of the plaintiff.

In the instance of a witness not being a party, Act XIX. of 1853, which still affords the rule for the Courts of Civil jurisdiction in the Presidency of Bengal, enact—(Section 19)—that such a witness shall

* Norton on Evidence, p. 269.
not be bound to produce his own title deeds, unless he shall have agreed in writing with the party requiring the production, or with some person through whom he claims to produce such deeds. Act X. of 1855, which addresses itself more particularly to the same Courts in the Presidencies of Madras and Bombay, contains—(Section 9)—a like provision with respect to them. The general repealing Act—(Act X of 1861)—exempts these provisions from its operation.

A will, as well as the title deeds of an estate in mortgage to the party whose privilege is invoked, and the mortgage deed itself, would be within the protection. The object is to protect property by excluding the means of picking holes in the documents under which it is held.

Indeed, it is not necessary that the deeds should be even those establishing the title. They would be within the protection of the rule, though called for to show the title's defeasance. Thus in a case in which the witness, an attorney, was required to produce a deed of assignment, with a view of showing a departure with the interest in the property, but objected on the ground that it was the deed of his client, the objection was upheld by the Court; Cresswell J, observing;—"The attorney was bound to exercise all the control over it which the law authorised him to do. He was fully justified in refusing to produce it, or to answer any questions respecting it. It was said that this was not a title deed. It was, however, called for as such; and it was intended to show that the title was no longer in the defendants."

It need not be even strictly a deed;—any document or paper having relation to the title would be within the protection.

Were the deeds, instead of being required in the shape of collateral testimony on some foreign issue, to be the subject of impeachment themselves, or to be connected with a fraud the subject of investigation, they would not fall within the protection.

The document too must be one by the production of which title might be capable of being affected. Thus in an action of ejectment,
where the title of the lessor of the plaintiff was disputed, the solicitor of a gentleman, who had been in treaty with him for the purchase of the property, but which treaty had gone off, was allowed to produce, on behalf of the defendant, the abstract of title that had been delivered to his client, as furnishing secondary evidence of the contents of the deeds relating to the property, which the lessor of the plaintiff had refused after notice to produce."

The protection against the production of the deeds would extend to all discovery of their contents.—It was observed by Baron Alderson;—"It would be perfectly illusory for the law to say that a party is justified in not producing a deed, but that he is compellable to give parol evidence of its contents; that would give him, or rather his client through him, merely an illusory protection, if he happens to know the contents of the deeds, and would be only a roundabout way of getting from every man an opportunity of knowing the defects there may be in the deeds and titles of his estate. I am clearly of opinion, therefore, that when a party refuses to produce a deed, and is justified in so doing, he ought not to be compelled to give parol evidence of its contents."

There have been cases in England in which the Court has taken on itself the inspection of the document, with a view of determining whether its production would be prejudicial to the client; but this course has been considered as objectionable, and would not, according to English law, it seems, be now upheld; and for the cogent reasoning advanced by Maule J, in Volant vs. Soyer above referred to. "Suppose' said his Lordship, 'the Judge were bound to examine the document, and, upon doing so, were to say that it was not a title deed,—his decision might be made the subject of an argument in open Court, by bill of exception; and thus the contents of the deed might be communicated to all the world."

* Doe v. Langdon, 12, Queen's Bench, 711.
† 9, Macson and Welsby, 612.
The Indian Act, in the case of objection to the production of a
document by a witness summoned to produce it,
leaves the validity of the objection to the decision
of the Judge on an inspection by him of the
document. As pointed out above, it does not appear very clearly
whether documents of the nature of title deeds were intended to be
dealt with at all by this provision; and even assuming that they were, did
the inspection show the document to be in fact a title deed, there can
be little doubt that, under ordinary circumstances, the objection would
be sustained, and the document be protected.

In the case in which a witness being the holder of the deeds
claimed a lien upon them, were the lien created by
the party seeking the production, or those through
whom he derived title, the witness would be entitled to withhold the
production until the lien were satisfied.

Were the production, however, sought by a third party, the claim
to a lien would be no answer, and the protection would fail. Question
has been at times raised on the latter point; but it may be now
considered as definitely decided by two cases which occurred in the year
1857, one of Hope vs. Liddell before the Lords Justices,* and the other
of the Cameron Coalbrook Railway Company before the present Master
of the Rolls.† In the latter the Master of the Rolls observed:—
“A person who has created a lien, or those claiming under him, cannot
compel production of the document on which the lien is claimed. But
that is not the case here, and it is very important to bear in mind the
distinction which was pointed out by Lord Justice Turner in Hope vs.
Liddell, namely, ‘the cases in which the application to the Court has
been, not for the production of documents under a subpoena duces tecum,
but for the delivery up of the documents; and secondly cases in which the
person requiring the production has been the person against whom the
solicitor has claimed a lien.’ And again:—“So far as relates to the lien,

* 7 De Gex Macnaghten and Gordon’s Reports, 331.
† 25 Beavan, p. 1.
my opinion is, that the solicitor has no right to insist on it as regards the company, against whom he has no claim."

The distinction referred to by the Master of the Rolls as pointed out in Hope vs. Liddell, between production and delivery up was, that admitting that the existence of the lien might be an answer to an application for the delivery up of the document, it would be none against its production under a subpoena. Antecedently to those two later cases, it had previously been held by the Court of Queen's Bench that a broker who had effected a policy, and had a lien on it for his premium, might be compelled by the assured to produce it on the trial of an action against the under-writer;* and this was recognized as law in the later case in the Court of Exchequer of Ley vs. Barlow.†

Exemption on ground of Professional confidence. The third head of exception is the protection against the disclosure of communications under the shelter of a professional confidence.

The interests of society require, for its members, the power of unrestricted communication with their professional advisers; and this could not be had unless the communication which passed between them on the occasion were protected from divulgement.

"The foundation of this rule," says Lord Brougham in a leading case on the subject, that of Greenough vs. Gaskell,‡ is not on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. But it is out of regard to the interests of justice, which cannot be upheld, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings."

What "the interests of justice" here alluded to were, Lord Brougham points out in another governing case on the same subject, that of

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* Hunter v. Leathly, 10 Barnewall and Creswell, 858.
† 1, Exchequer, 800.
‡ 1, Mylne and Keen, 103.
Bolton *vs.* the Corporation of Liverpool, where he explains, that if such communications were not protected, no man would dare to consult a professional adviser, with a view to his defence, or to the enforcement of his rights; and no man could safely come into a Court, either to obtain redress, or to defend himself.*

Doubtless, in any case in which the rule screens a portion of evidence, however small, and withdraws it from the trial, there may, in that individual instance, be a sacrifice of truth, or of the means of establishing it. Yet that sacrifice is a demand only of a paramount principle of social policy; and that it is a legitimate one we may cite the cogent reasoning of the Lord Justice Knight Bruce in a case before him involving the discussion, and conveyed in his usual happy language.

"*Truth, like all other good things* says he *may be loved unwisely—may be pursued too keenly—may cost too much.* And surely the meanness and the mischief of prying into a man’s confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion, and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place, uselessly or worse, are too great a price to pay for Truth itself."†

The interest involved in the protection, is, of course, that of the individual the disclosure of whose affairs is its subject; but it is obvious that, in order to work this out, the protection must be extended to the Witness, and as a trustee of the objection. Were the latter compelled to a disclosure, the protection of the former would be a dead letter.

So completely indeed, does the Witness become the representative of the privilege, and so entirely is that representation limited to him, that it has always been considered not to lie in the mouth of any other individual to take the objection; and the legal formulary announces the privilege as not that of the *party* but of the *witness*, meaning of course by the term ‘party,’ the *party to the cause*. Indeed, according to

* 1, Mylne and Keen, 94, 95.
† Pearse *vs.* Pearse, 1, De Gex and Smale 28.
English law the objection to examination could not be sustained on behalf of the former, nor could counsel on either side, or indeed on behalf of the witness, be heard to argue it.

The Indian Act, however, as we shall presently see, contains an express prohibition against disclosure by the professional agent, and consequently stamping all testimony involving it with illegality. In India a door would thus appear to be opened to the objection, even at the instance of a party.

As a corollary from the proposition that the protection is that of the Client or actual beneficiary, it follows that did he himself not object to the production, it would be enforced. It was laid down by the Master of the Rolls in the case of the Cameron Coalbrook Railway Company, adverted to above, with reference to the document referred to in that case;—"And with respect to professional confidence the witness is bound to produce it, if the client does not object. I therefore think it desirable that I should know what Colonel Cameron (the client) says to the witness producing it."

The consent of the client would of course be a fact to be ascertained and proved like any other in the cause; and where it was anticipated that personally he would not object, it might be prudent, under circumstances, to subpoena him as a witness to declare it.

Subject to the qualifications which will be pointed out, the Indian Act, on the subject of privileged communication, but re-enacts the English law.

On this subject the Act has two classifications, communications with the Party, and those with the Witness.

Clause 22, which is that directed to the Party, confines itself in this particular to writings and correspondence, as contradistinguished from more general communications; and enacts that the party shall not be bound to produce any confidential writing or correspondence which may have passed between him and any legal professional adviser. It provides, however, at the same time that, in the event of the party offering himself as a witness, he shall be bound to produce any such
writing in his custody, possession, or power, if relevant or material to the case of the party requiring its production.

This, it will be observed, addresses itself only to written communication. It does not notice any other; and consequently leaves all else to be dealt with according to English law.

Clause 24, which is the one addressed to the case of the Witness, is based on the same principle. In one particular, indeed, it even goes beyond the English law. It not merely protects the professional agent from the liability to examination, but prohibits him from disclosure. It enacts that a barrister, attorney, or vakeel shall not, without the consent of his client, disclose any communication made by the client to him in the course of his professional employment, nor any advice given by him professionally to his client, nor the contents of any document of his client, the knowledge of which he shall have acquired in the course of his professional employment. But then it goes on to declare that the privilege is that of the client; and it provides that, if any party to a suit shall give evidence therein at his own instance, he shall have thereby waived his privilege and consented to the disclosure of any relevant matter, which the barrister, attorney, or vakeel would have been bound to disclose but for the privilege, and which is to be disclosed accordingly.

The provision compelling production in the case of the party offering himself, though a novelty, may possibly be no great hardship; for it is at his own option to tender himself as a witness, and perhaps he could not well complain of a disclosure of secrecy which he had himself provoked. At the same time, though the course of Indian litigation, and the known habits of the people, may afford a justification for the provision, one cannot but look with extreme jealousy upon any departure from a principle of such recognized soundness, as that which secures to every member of the community the full freedom of communication with his professional advisers; and this can only be perfectly secured by the knowledge that the law recognizes it as sacred. The appearance might even have been forced by circumstances, such, for example, as to supply a mere formal proof; and to make this appearance a ground of disclosure would be to sacrifice a broad general principle upon very slight justification. Other illustrations might be added.
According to English law, though the Judge is at liberty to warn the witness of his privilege, he is not bound to do so. Indeed, when the question has arisen on the point of secondary evidence, in cases in which the professional agent has, though in violation of his duty, communicated to a stranger the contents of an instrument with which he was confidentially intrusted, secondary evidence of the contents of the instrument has been treated as receivable, notwithstanding the breach of confidence, and resistance of the production on the ground of privilege.* The mode of acquiring the information has been treated by the Court in such a case, as one on which it was not competent for it to enter.

The Indian Act, however, going the length of shutting the mouth of the witness as to matters of privileged communication by prohibiting him from the disclosure, it may be presumed that, in the cases to which the Act extends, the Court would not be at liberty to receive from the witness himself the testimony in question; and such an objection it would appear competent as well to the party, as the witness, to bring to, and press upon, the notice of the Court.

The Witness, though having commenced to answer, may stop short and claim his protection, at any stage of the enquiry. He cannot be carried further than he chooses voluntarily to go himself.

The privilege having once attached, it is not confined to the suit or other subject, in which it derived its existence. 'The seal of the law,' as it has been termed, once fixed, it remains for ever; until withdrawn by the party himself in whose favor it was placed, or by some competent authority.

It may be released or waived, however, with the consent of the Client; or after his death, by his representatives.

A mere calling of the attorney by the client as a witness, would not be a waiver of the privilege, unless the witness were examined by him in chief to the matter privileged.

The right of withholding or forbidding the discovery being personal to the client, it would not, in the event of his bankruptcy, or insolvency, pass to his assignees, so as to be exercisable without his consent.

Even the death of the Client would not loose the Witness; unless in the case of two parties both alike claiming under the client, when it would be unjust to assign the privilege of secrecy, or rather the power of dispensing with it, to one claimant rather than to the other. Thus, in a case where the contest lay between the executors and residuary legatees on the one hand, and the next of kin of the testator on the other, and the question was, whether the former took beneficially, or were trustees for the latter; the solicitor who had prepared the bill was allowed, at the instance of the next of kin, to disclose what had passed between him and the testator on the subject.* The death of the client would not, however, open the door to disclosure, as between the representatives and strangers. The whole principle is well stated by the Lord Justice Turner then V. C. in the case of Russell v. Jackson just above adverted to, where he says:—

"That the privilege does not in all cases terminate with the death of the party, I entertain no doubt. That it belongs equally to parties claiming under the client, as against parties claiming adversely to him I entertain as little doubt; but it does not, I think, therefore follow that it belongs to the executor as against the next of kin in such a case as the present. In the one case the question is whether the property belongs to the client or his estate, and the rule may well apply for the protection of the client's interest. In the other case the question is, to which of two parties claiming under the client the property in equity belongs; and it would seem to be a mere arbitrary rule, to hold that it belongs to one of them rather than to the other."

* Russell v. Jackson, 9 Hare, 393.
Neither, in the case of documents deposited by a client with his solicitor, and the subsequent death of the latter, would that death extinguish the privilege, or the obligation to its assertion, as regarded his executor.

In the instance of the employment by two parties in the same transaction of one common adviser, say, for example, a solicitor, the privilege exists for the benefit of both parties alike; and the production could not be enforced prejudicially to the interests of either. Thus, where an attorney having been resorted to by a borrower to raise money for him, perused, on the part of the proposed lender, the borrower's abstracts of title, he was not allowed to give evidence concerning them against the borrower. *

The mere existence, however, of a common professional relationship to both parties, though in reference to the same business, would not create any privilege, unless the communication in question partook of the nature of a community of interest in both. Thus where, on the sale of an estate, an attorney was employed for both vendor and purchaser, and a communication was made from the purchaser to the attorney, seeking a postponement in the time for the payment of his purchase-money; this, on an action brought by the vendor against the purchaser for the purchase-money, was held not protected; the communication, though made through the common attorney, being made to him on behalf of one party only, and not the other. Parke Baron observes in the case;—"I have not the least doubt, if the party employs an attorney who is also employed on the other side, the privilege is confined to such communications as are clearly made to him in the character of his own attorney. It is plain this was not, but in his adverse character of attorney for the vendors. The attorney, therefore, stood in the character of an ordinary witness, and the evidence was properly received."†

So, in the case of an offer made by one to be communicated by the solicitor to the other, either party would have a right to call for its disclosure.

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* Doe, d Peter vs. Watkins, 3, Bingham's New Cases, 421.
† Perry vs. Smith, 9, Meeson and Welby, 683.
"In all these cases' says Mr. Taylor 'the question would seem to be, was the communication made by the party to the witness in the character of his own exclusive attorney? If it was, the bond of secrecy is imposed upon the witness; if it was not, the communication will not be privileged."

When a trustee for two parties, being himself a solicitor, had acted for one of them in respect of disputes concerning the trusts, it was held, that his position as trustee for both rendering his assumption of the office of solicitor for one improper, the communication between himself and his client was not privileged, as against his other cestui qui trust.

The communication to which the protection addresses itself is that which passes in relation to any of the affairs of life in which an individual may have had occasion for the aid of the legal practitioner. The protection applies as well to communications between the Client and his Counsel, Solicitor, Vakeel, or other Professional Agents, as to those between themselves respectively, on the subject of the business; and that whatever may be the form of the communication, whether oral, documentary, or otherwise written; and (subject to the question subsequently adverted to in the case of the client himself as to the communications preceding the controversy), at whatever stage of the business taking place.

The protection would embrace communication as well with a foreign professional agent, as one directly resorted to at home, as for instance, a Foreign Counsel. It includes all as well between the subordinate agents of the professional party, Clerks, Interpreters, and so forth, as any intermediate ones employed on the business; for instance, as respects the latter, it has been held to apply to a party sent out to India as the Agent of the solicitor to collect information; and it would of course equally apply to those sent from India to England, or indeed elsewhere.

† Tugwell vs. Hooper, 10 Beavan, 348.
‡ Steele vs. Stewart, 1 Phillips, 471.
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_Mere agents, not being professional ones, and communications with them, even though in reference to a litigation, would not, however, be within the exemption. Thus in a case* where agents had been sent abroad by a company to collect information in reference to the winding up of their affairs, and designed to aid in the defence of a suit, and to be ultimately laid before the solicitor of the company for the purpose, Lord Cranworth (then Vice Chancellor) refused the protection, laying down the rule:—"There is no protection as to letters between parties themselves, or from a stranger to a party, merely because such letters may have been written, in order to enable the person to whom they were addressed to communicate them in professional confidence to his solicitor."

A question has been sometimes raised whether the person employed to collect the information was to be regarded as the mere agent of the party, or the employé of the solicitor; inasmuch as the privilege which would prevail in the latter instance would not be recognized in the former. The law on this subject has been clearly laid down by the Vice Chancellor Wood in a recent case,† and in part in comment on a former one before Lord Lyndhurst, Lord Chancellor:—

"It seems to me," says the Vice Chancellor, 'that the principle there laid down by Lord Lyndhurst is, that the true test is not whether the person who is at a distance, and communicates the information in question, is the agent of the solicitor and sent out by the solicitor, or the agent of the defendant and sent out by him;—as Lord Lyndhurst there says, he may have been sent out by the defendant, and yet, in collecting the information, he may have acted under the direction and as the agent of the solicitor;—but the true test is, whether such person in transmitting that information was discharging a duty which properly devolved upon the solicitor, and which would have been performed by the solicitor if the circumstances of the case had admitted of his performing it in person."

* Goodall v. Little, 1 Simons n. s. 135.
† Lafone v. The Falkland Islands Company, 4 Kay and Johnson, 35.
In the case of the witness, it is necessary to distinguish between the
acquisition of knowledge, as part of the professional communication, and on which the witness
was consulted, and its mere derivation during the period of professional relationship. The former alone is privileged.

Thus, were the witness himself a party to the transaction, as well as
the professional agent employed in it, the privilege would not be allowed. It would be impossible to ascribe his knowledge more to one of his
two characters than the other,—to weigh the scales of his information;—and
his obligation accordingly in the one character, could not be released by
his protection in the other. So, were the issue in question that of the
handwriting of the client,—the attorney would not be relieved from his obligation to give evidence as to this, even though he had arrived at the
knowledge by seeing the client write in the course of his professional em-
ployment. The writing would have been a simple and independent matter of fact. The subscription itself could not have been a matter of advice but of manual operation, however much the attorney had counselled
the act. So an attorney might be called to identify his client; because the
personal identity would be no secret, but a matter of public notoriety.

A further distinction too is to be borne in mind between advice to
the client, and the mere statement to him of a fact, even though in answer
to the enquiries of the client. It is the circumstance that the communica-
tion partakes of the character of advice, and upon some requisition
for it, which constitutes the keystone.

The protection would not relieve from a liability voluntarily assumed
by a solicitor or other professional agent in taking on himself a character not necessarily part of his professional obligation, though in connection with the affairs of the client. Thus, in becoming an attesting
witness to a deed, the agent assumes the liability to the proof of its execution, which every witness incurs by his attestation, and could not accordingly be heard to object against its proof.

The knowledge must have been acquired in the very exercise of the professional duty; not previously or subsequently to it, or casually
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come to during the subsistence of the relationship, or by means 
de-hors; and it must be of a private character,—not that which any one 
might have known.

The witness must be the professional adviser employed in the actual 
matter the subject of the communication, that is, as the responsible legal 
adviser or actor in it. A party, albeit a lawyer, merely casually con-
sulted or asked about it as a friend, or even confidentially consulted while 
another was the acting counsel or attorney, would not be within the 
exception. In one case an attorney had been even consulted confiden-
tially, but, not having been actually employed professionally, from the fact 
that he was acting as Under Sheriff at the time, he was held bound to dis-
close the communication.* No formal retainer is required. It is suffi-
cient if the party be consulted in his professional character.

The communication must be one having a bearing on the subject on 
which the professional adviser was being consult-
ed, not unnecessary to it, or a mere gratuitous 
piece of information; as when, for instance, a prosecutor had told his 
attorney that he would give a large sum to have the prisoner hanged;† 
or a party, after having compromised a suit, had casually told his lawyer 
“he was glad he had settled it.”‡ In both these cases the statement was 
held not to be protected.

All communication of the nature of pacification is protected. A 
letter accordingly written with a view to compro-
mise, and saved by the reservation that it was 
written “without prejudice,” has been held protected. In the battle of 
the Courts, as in the war of Nations, the flag of truce is inviolate.

The privilege would not be allowed to prevent a disclosure demand-
ed by criminal justice; nor indeed the exposure 
generally of whatever is unlawful. In a case be-
fore the present Lord Justice Turner, (then Vice Chancellor,) of Russell

* Wilson v Rastall, 4 Term Report, 750.
† Annesley v Earl of Anglesea, 11 Howell's State Trials, 1223.
‡ Cobden v Kendrick, 4 Term Report, 431.
v. Jackson mentioned above, he thus stated his view of the subject:—"I am very much disposed to think that the existence of an illegal purpose would prevent any privilege attaching to the communications. Where a solicitor is party to a fraud, no privilege attaches to the communications with him upon the subject, because the contriving of a fraud is no part of his duty as solicitor; and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law." His Lordship might, it is apprehended have expressed himself even more strongly.

In a still more recent authority† it has been denied by the Vice Chancellor Wood, in reference to a case of ordinary fraud, that the privilege would prevail. The Judge in that case adopted an argument of Counsel employed in one of much earlier date, one of the State trials, where the Counsel says:—"I should first beg leave to consider whether an attorney may be examined to any matter which came to his knowledge as an attorney. If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed contrary to the laws of the society, to destroy the public welfare. For this reason, I apprehend, that if a secret which is contrary to the public good, such as a design to commit treason, murder, or perjury, comes to the knowledge of an attorney, even in a cause where he is concerned, the obligation to the public must dispense with the private obligation to the client."

The observation of the Counsel was applied to treason, murder, or felony. But the principle would not, in the present day, be confined to those particular offences.

According to English Law, should the question arise in relation to the Party himself, it does not appear to be yet definitively settled, whether the communication to entitle it to protection must not, in the case

* Russell vs. Jackson, 9, Hare, 392.
† Gartside vs. Outram, Weekly Reporter, 1856-7, p. 85.
of his interrogation, have passed before the dispute had arisen. The leaning, however, of modern decision is to treat even this species of communication as within the principle of protection; notwithstanding one case to the contrary, that of Radcliffe v. Fursman;* but which, as a decision of the House of Lords, it is certainly rather difficult to pass over. The decision in that case must be conceded, however, to have been pronounced at a time when the subject had not received the more elaborate investigation it has since undergone.

Even to the extent to which it might prevail, the restrictive authority of Fursman v. Radcliffe would be confined to the statements of the client; that is to say, the cases submitted by him for professional advice:—the advice itself is admitted to be protected.

As respects every thing reduced into writing, the Indian Evidence Act would, as regards India, appear to remove all question on this point. Subject to the proviso in the case of a party tendering himself as witness, it contains an actual protection in favor of all confidential writing or correspondence, without reference to the question of antecedent controversy.†

In the case, at all events, of the Witness, there is no restriction even in English Law to the period of the communication, whether in reference to a litigation either pending or contemplated. As a general rule, all professional communication with him, at whatever time made, is privileged.

It was observed by Lord Brougham in Greenough v. Gaskell, referred to above:— "To force from the party himself the production of communications made by him to professional men, seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases warrants it. But no authority sanctions the much wider violation of professional confidence, and in circumstances wholly different, which would be involved in compelling counsel or attorneys or solicitors to

† Section 24.
disclose matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed of.

As regards them, it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation. If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client, or on his account, and for his benefit in the transaction of his business, or which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and it may be the most important, of all communications, those made with a view of being prepared either for instituting or defending a suit, up to the instant that the process of the Court issued."

The privilege in question does not extend to any other Office than that of a Legal adviser, such for instance as that of a Minister of religion, a Medical man or a Friend.

The policy, however, which leaves this class of communication to stand without the pale of protection has been cavilled at by writers on the subject; and is to some extent peculiar to English jurisprudence.

According to the Law of Papal Rome the Priest who reveals such a communication is liable to punishment. Even in the sister kingdom of Scotland, a confession to a Clergyman by a prisoner in a course of preparation for trial is protected, though not in an ordinary communication to him.
As respects Medical men both in France and America, communications to them are protected.

However much in criminal proceedings it might be fitting that the secrets of individuals should be sacrificed to the good of the State, there would appear as regards civil ones to be less reason why, in a contest at all events between strangers, the sort of property which one has in one's own secret should be entrenched on to promote the interests, either on the one side or the other, of stranger litigants. It must be admitted though in truth, that it is not so much in reference to the interest of strangers that the question usually arises, as between the parties to a litigation itself, and what the antagonist may have done, admitted, or said, in relation to the question in dispute.

Such are the exceptions which, on grounds personal to the Witness, exempt him from the liability to examination.

It remains to point out those which are founded on considerations of either Social or Public Policy.

The Social Grounds are either those existing in the sanctity of the relationship of Husband and Wife; or the outrage which the testimony might inflict on either Public Decency, or Private Feeling.

The former we have already disposed of in our investigation of the qualifications and disqualifications of witnesses. That as to which the witness is disqualified from giving as testimony, he or she is of course protected from divulging.

The Tendency to shock public morals, or private feeling.

We proceed to the latter;—and here it may be stated, as a general rule, that the purity and the charity of the court alike preclude all that class of testimony which, if given, would be calculated wantonly, from its indecent character, to shock Public Morals; or, from its impertinent intrusion on the affairs of others, hurt Private Feeling.

Thus for example, all such matters would be excluded as wagers respecting the sex of a third person, or involving the question whether an unmarried woman had had a child, or the like.
The protection, however, would not prevail, were the result to defeat the purposes of real justice, either criminal or civil. Thus for instance, were it a case of rape,—a question as to the sex of a party claiming an estate as heir male or female,—a case of legitimacy,—or an action by a husband for criminal conversation with his wife,—the evidence could not be withheld, notwithstanding either its inherent indecency, or the painfulness of its disclosure.

To this head may be referred the rule which, in a dispute as to the legitimacy of a child, excludes the testimony of the parents as to the fact of sexual connection between them; which has been carried to the length of shutting out letters written by the wife, asserting another than the husband to have been the father,* and questions as to intimacy before marriage. †

The rule excludes not only direct questions as to access, but all having an indirect bearing upon it.

Thus in the case last referred to, that of Anon vs. Anon, a child had been born three months only after the marriage; and it was suggested that the wife had not seen the husband until immediately before the marriage, and that at the period of conception he was married to another person. It was proposed, in cross-examination of the mother, to ask her,—"How long she had known her husband before her marriage?" The Court would not allow the question to be put in that form, as raising the direct issue of connection; though permitting her to be asked;—"When first did you become acquainted with L. II. (the husband)?" She having answered;—"Twelve months before the marriage;"—the examination was not allowed to be carried further.

The protection on the ground of Public Policy, exists wherever the disclosure is treated as at variance either with the principles of public propriety, or the requisitions of the State.

† Anon vs. Anon, 22, Bevan, 481.
Hence, as a general proposition, neither Judges, Arbitrators, or Counsel can be called upon to give any compulsory testimony in matters as to which they have been judicially or professionally engaged; and the like exemption prevails in the case of Grand Jurors, or their subordinates, touching proceedings before them, and of Petty Jurors as to mistake in their verdict, or misbehaviour in any of their body.

In all these cases, however, the protection would not go beyond the exigency. Consequently, it would not relieve any of these functionaries from the liability to testify as to any extraneous or collateral matters passing in their presence, and not mixed up with the exercise of their office.

Though a Judge or arbitrator cannot be compelled to give testimony, he may by his own consent be examined respecting the facts proved, or the matters claimed, at the trial or on the reference.

In the same way persons concerned with the administration of Government, and that whether Home or Colonial, and whether Civil or Military, are not compelled to disclose secrets of State, or other matters the disclosure of which might be prejudicial to the interests of the public, or inconvenient to the service. Under this head is comprised all matters concerning the administration either of the Government, or of Penal Justice, or rather perhaps as respects penal justice where the prosecution is in the nature of a State one, though not a mere ordinary prosecution. Thus for example, the proceedings of a Court of Military Enquiry,—Official communications between a Governor and Law Officer of a Colony,—or between a Governor and Military Officer under him,—or between an Agent of Government and a Secretary of State,—or the East India Government and the Board of Control,—or an Officer of Customs and the Commissioners,—or letters addressed to the Government Officials,—disclosure of the Channels by which Criminals are brought to Justice,—would all fall within the protection.

Nor is the privilege confined to the public officers themselves. It extends to all cases generally where the disclosure might be prejudicial to
the Community. Accordingly, for example, a witness on a State prosecution, cannot be compelled to disclose the names of those to whom he has given information of practices against the State. "It is perfectly right," said Lord Chief Justice Eyre, in Hardy's case, "that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons, who are the channel by means of which that detection is made, should not be unnecessarily disclosed."*

The principle, however, would not protect a communication which, though made to an Officer, was not made in the discharge of any public duty.

Members of either of the two Houses of the British Parliament cannot be called on, without the previous permission of the House, to disclose what goes forward within its walls. Upon the like principle, it may be presumed that the Members of the Executive and Legislative Councils of India would be entitled to protection, in reference to the matters the subject of their proceedings.

Clause 21 of the Evidence Act, enacts that a witness, whether party or not, shall not be bound to produce any document relating to affairs of State, the production of which would be contrary to good policy; and Clause 23, which gives to the Court the power of inspection of documents for the purpose of determining the question of their production, exempts State ones.

In fact the Indian Act, with very trifling variation, seems but to re-enact the previous general law on the species of protection the subject of the present chapter; and thus leaves it pretty much on the footing of the English Law. In those cases in which it is silent, the antecedent law would prevail.

* 24, Howell's State Trial, 808.
The old Mahomedan Law which once prevailed in India had embraced rather a singular ground of protection, and partaking partly of the social, and partly of the private consideration. Though in all cases of crime punished by the heavier penalty called *kisas* it was incumbent on all to testify on being required so to do by the parties concerned, a witness was at liberty either to *give* or *withhold* evidence which might lead to the conviction of a Mussulman liable to the less severe punishment termed *hudd*. The pious reason assigned for this was, that to a person who had borne testimony the prophet said;—"Verily it would have been better for you if you had concealed it." And again;—"Whoever conceals the vices of his brother Mussulman *shall have a veil drawn over his own crimes* in the two worlds by God:"—what Jurists would term a "*sanction,*"—and not the weakest one, which could be devised, for the discharge of the religious obligation.

It only remains to be added that the question of protection can only arise after the witness has been sworn; and then on some proposed course of examination itself, and upon some specific discovery or production sought of him.

* Beaufort's Digest, 1857, p. 118.
CHAPTER VI.

On the means of procuring the Attendance and Examination of Witnesses; whether in Court, or under Commission.

"The Law," says Mr. Best, "allows no excuse for withholding evidence which is relevant in a cause; and is not protected from disclosure on some principle of legal policy. Any witness therefore, who, without just cause, absents himself from a trial to which he has been duly summoned, or who, appearing, refuses to give evidence; or to answer questions which the Court rules proper to be put, is liable to punishment for contempt. An exception exists in the case of the Sovereign; against whom, of course, no compulsory process of any kind can be used."*

Non-attendance, or refusal, entails liability to imprisonment and to damages. English Law. Indian.

The punishment for the contempt here pointed out is committal to imprisonment; and the duration of this is discretionary with the Court. In addition to the liability of the witness to punishment, he is subject to be sued on his subpoena for damages.

Later in the chapter there will be pointed out certain provisions of Indian Mofussil Law, affording additional security for attendance, in the way of fine, arrestment of property, and so forth. It may here, however, be added, in reference also to India,—(so far as concerns the Civil Courts of the late Company in the Bengal Presidency)—that Act XIX. of 1853 (Section 26) adopts the analogy of English Law in reference to the liability to damages;—enacting that any person summoned either to give evidence or produce a document, who shall, without lawful excuse, neglect or refuse to obey the summons, or who shall be proved to have absconded or kept out of the way to avoid service, and any person who, being in Court, and upon being required by the Court to give evidence or

* Best on Evidence, 141.
produce a document, shall, without lawful excuse, refuse to give evidence or sign his deposition, or to produce a document, shall be liable to the party at whose request the summons shall have been issued, or at whose instance he shall be required to give evidence or produce the document, for all damages which he may sustain in consequence of such neglect or refusal, or of such absconding or keeping out of the way, to be recovered in a civil action.

According both to English Law and that of the Supreme Courts of the Indian Presidencies, the ancient and ordinary compulsory process for enforcing the attendance of the witnesses, is, in the case of a criminal prosecution, either a recognizance or a subpoena ad testificandum. The former is a bond to the Crown, required of the witnesses on their attendance before the Magistrate, on the original preferring of the charge, or in the case of a Coroner's Inquest before the Inquest. The latter is a judicial writ issuing from the Court for their attendance under a penalty. In a case of civil proceeding the subpoena is the process.

Under some special jurisdictions, as for instance Bankruptcy or Insolvency, the process is a summons, as in an Arbitration it is an order; and there will be pointed out, in a later part of the chapter, certain legislative enactments, authorizing orders for examination and attendance under the circumstances there specified. The distinction between the subpoena and the summons or order, is, however, rather of form than of substance; except, perhaps, as respects the mode of remedy for default; an order being enforceable only by attachment. All alike carry with them a legal compulsion for attendance, and penalties for infraction.

"From the earliest time," says Mr. Phillips, (addressing himself more particularly to the subpoena,) "our Courts of law, in order to give effect to their proceedings, have resorted to these compulsory measures for the production of evidence; measures obviously essential to the existence and constitution of Courts of Justice."

Both in civil and in criminal trials, where the production of documents in the possession of the witness is required, the process may embrace a command to bring them. This, where the process is a subpœna, is termed a subpœna duces tecum.

The document is regarded as being in the possession of the witness, if so in fact; though the right to the possession might belong to another.

Should the witness, in a case in which the production of a document is required of him, have any objection to offer to its production, he must nevertheless, even according to English Law, bring the document with him to the Court; leaving the validity of the objection to the decision of the Judge.

The requiring the recognizance rests with the Magistrate; and is in his discretion. The subpœna, whether to testify or to bring documents, issues, as of course, on the application of the party.

In criminal cases, the accused has an equal right with the prosecutor to the benefit of the process; though practically the benefit is to a great extent neutralized, by the absence of provision for reimbursing the witnesses their expenses.

Where the witness is in custody at the time of trial, he is brought up by the gaoler, or other party having him in charge. This is done under a writ called a habeas corpus ad testificandum; for which special application must be made, and a case shown to the Court. In India, the Court would, of course, be the Supreme Court of the Presidency.

The application should be supported by an affidavit; stating the place and cause of confinement,—that the evidence is material,—and that the party cannot, in the absence of the witness, safely proceed to trial;—and, if the confinement be at a distance from the place of trial, the nature of the materiality would, it seems, be required to be stated.

It has been sometimes laid down that the affidavit should also state the willingness of the party to attend; but says Mr. Taylor;—"If the witness be required to give evidence in a civil suit, it is usual to add in
the affidavit that he is willing to attend: but this would seem, on principle, to be a needless averment, and it is certainly unnecessary in criminal proceedings."

As regards India, Act VI. of 1854 (the Act regulating proceedings in Equity in the Supreme Courts there)—empowers the Court, upon either the hearing of any cause, or upon any interlocutory proceedings, to require and enforce the attendance before itself, of either witnesses or parties; as well as the production of documents; and it confers on the Court power to direct payment of the costs of attendance, examination, and production of documents in such manner as the Court may direct.

Affidavits of particular witnesses, or to particular facts, may, under this Act, be used at the hearing of a cause, either by consent, or by leave of the Court, to be obtained upon notice.

A subpoena addresses itself by name to the witness; and it should state the title of the cause, and the place and time of trial; and with such accuracy that the witness be not misled.

In an action of ejectment, the names of all the persons in whom the title is alleged to be, must be introduced.

The subpoena should be served personally on the witness, and this even in the instance of a married woman; and personal service is not dispensed with, although it were sworn that the witness keeps out of the way to avoid service. The rule of personal service, however, is confined in its strictness to subpoenas. In the instance of a summons in bankruptcy and so forth, an order for substituted service is obtainable from the Court.

The mode of service is the handing to the witness a copy of the writ, showing the party the original at the same time; and this is an essential condition of the validity of the service. The service of the

copy, in preference to the statement of its effect, is the simpler and more usual course: the original is retained by the party serving. This copy or statement is called the subpoena ticket.

In the case of a statement, this must substantially correspond with the writ itself; and especially in its particulars as to date and place of attendance. Thus where the writ named the 27th of the month as the day of attendance, and the ticket the 24th, the attachment was refused. Variation in any important particular would be fatal to subsequent proceedings of attachment.

The subpoena must be served within reasonable time before trial, to enable the witness to put his affairs in such order that his attendance at the Court may be as little detrimental as possible to his concerns.

What is reasonable time, must ever be matter of circumstances; and on this, regard being had to the difference between the two Countries, the English decisions would afford comparatively little criteria for the regulation of Indian practice. It may, as some guide, be stated, however, that in England a summons in the morning to attend in the afternoon has been held insufficient, though the witness lived in the same town, and near the place of trial. On the other hand, where a witness was served at noon, while standing on the steps of the court house, and on being told that the case was coming on on that day replied "Very well," which it did at five in the afternoon, the service was held good; the answer "Very well" being treated as equivalent to an admission that the service was in time.

A person actually present in Court as a spectator could not object that he had only just been served; and indeed, as regards India, the Evidence Act renders any person present in Court liable to examination. Attendance at the trial would be a waiver of irregularity in the service.

* Doe vs. Thompson, 9, Dowling, 948.
† Barber vs. Wood, 2, Moody and Robinson, 172.
‡ Manswell v. Ainsworth, 8, Dowling, 869.
EXPENSES.

In the case of civil proceedings, the subpoena must be accompanied with a payment of the witness's expenses for his attendance; though this, as an ordinary principle, is unnecessary in criminal ones.

A statutory exception, however, to this has been made in England, in favor of persons coming from a distant part of the country.

Statutory provisions have also been made, enabling the Court to award expenses to both prosecutors and witnesses, as well in felony, as on some specified misdemeanors.

The expenses to which in ordinary cases the witness is entitled, are those of the journey to and from the place of trial, and of the necessary stay there. They are adjusted by a common recognized scale; varying according to the position in life of the witness, and the distance from the place of examination. Except in the instance of Professional men, for example, Lawyers, Doctors, Engineers, Surveyors, and so forth where a compensation is sanctioned, as a general rule, a compensation for loss of time cannot be insisted on.

In special cases allowance has been made both for the attendance of witnesses who had not been subpoenaed, and, for the detention beyond the time of a trial, of those who had. Thus in the case of a foreign witness, who, as not being within the jurisdiction of the Court, would not be amenable to a subpoena, and whose testimony being material, he refused to attend without a remuneration, a reasonable allowance to him would, on the taxation of costs, be ordinarily allowed, even as against a losing party. This would extend even to the witness’s detention in the country to the day of trial, and even after a previous permission of the Court to examine him on interrogatories; the preference of an examination in open Court being considered a sufficient justification for the detention. So where a Captain of a ship was detained at home for a long time to give evidence at the trial,

* 45, George 3, c. 92, s. 4.
† Lonergan vs. Royal Exchange Assurance Company, 7, Bingham 725.
a sum of £150,* calculated at the rate of a guinea a day,† was allowed for the detention, Tindal, Chief Justice, observing—"The Captain was not like an ordinary witness, who could be sent for at any time."‡

A statute of Elizabeth (5, Elizabeth, Chapter 9, rendered perpetual by Chapter 29 of the same reign) is the foundation of the English Law giving the witness a right to his expenses. This requires the attendance of the witness, and on tender, "according to his countenance or calling, of such reasonable sum for his costs and charges as, having regard to the distance of the place, is necessary to be allowed."

The question of reasonable expenses and their amount, was formerly left very much to the discretion of the taxing Officers of the Court. But under the recent Common Law procedure Act of 1852, which governs the English practice, this, as regards the Courts of Common Law, has been regulated by a scale propounded by the Judges, and the Court of Equity is accustomed to act on the analogy.

As in the case of time, so in that of expense, England would fail to afford an accurate criterion for India. The practice in England, however, it may be stated, has been to allow, according to the station in life of the party, from 5 Shillings to £3-3§ per day, exclusive of the cost of conveyance; and to professional men, as a compensation for loss of time, a sum in addition of, if residing at the place of trial, £1-1 a day; and, if at a distance from it, from £2-2 to £3-3, according to the distance.¶

If a witness attends in more than one cause, the allowance must be apportioned.

The witness is entitled, so far as practicable, to require the payment before hand; and for the very appropriate reason stated by the Vice Chancellor, Wood, in a recent case before him;—"I think that, on principle, it would be very objec-

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* 1,500 Rupees.
† Rupees 10-8.
‡ Stewart vs. Steel, 4, Manning and Granger, 669.
§ Rupees 2-8 to Rupees 30 odd.
¶ That is from Rupees 10 odd up to Rs. 30 odd.
tionable that the payment should not be made before hand; because otherwise it might be held out as an inducement to such a witness to give his evidence in a certain way, that, if he did so, he would be compensated, and not otherwise.

The expenses should be tendered at the time of service, or at all events a reasonable time before trial; and appearance would be no waiver of the right to require payment previous to examination.

It is apprehended that even the provision of the Indian Evidence Act, requiring parties casually present to testify, would not extinguish this right when the party appeared under an actual summons; or at all events that the Court would not, under the circumstances, enforce the compulsive, though discretionary power, with which the Act invests it.

Non-payment of old scores, that is previous unpaid expenses for former attendances, could not be set up.

Married women.

In the case of a married woman, the tender, notwithstanding her coverture, should be to herself, not to her husband.

Witnesses subpoenaed on both sides.

In the case of a witness subpoenaed by both parties, he is entitled to be paid, by the party actually calling him, all not exhausted by the payment received from the opposite side.

Waiver to claim of payment.

The right, however, to payment may be waived; and as well indirectly as directly; for example, by conduct, as by accompanying the parties to the place of trial without preferring the claim.

As pointed out above, for default in his attendance the witness is liable to attachment as for a contempt of Court; or to an action for damages; and this is at the election of the party subpoenaing him. In the case of a recognizance, he is liable to its being put in suit by, or in the name of, the Crown, at the instance of the prosecutor.

* Clark vs. Gill, I, Kay and Johnson, p. 19.
† Newton vs. Harland, I, Manning and Granger, 956.
In an Equity suit recently tried in the Supreme Court at Calcutta, where a question arose as to the form in which the process of attachment should issue, the proper initiatory step was determined by the Court to be the issuing of what is ordinarily termed the four day order; and which called on the absenting witness to show cause, within four days, why he should not stand committed for his contempt of Court in his non-attendance.* On default of appearance within the prescribed time, on due evidence of service, an order absolute for committal would issue. In the event of appearance, the result would be, of course, according to the excuse given and substantiated.

To sustain an attachment, it would be necessary to show that, on the cause being called on for trial, the witness was wilfully absent, under such circumstances that, had the trial proceeded, he would not have been forthcoming when required. In the case of a trial by Jury, the Jury need not have been actually sworn. Though a convenient proof of absence, it is not essential that the witness be called on his subpoena.

All contempts of Court, require clear proof; and the proof consequently must be distinct, to justify so special a course as committal.

The motion for attachment should be prompt; and the affidavit should state all the facts which go to show the regularity of the proceeding; and it should appear that the absence of the witness was an intentional defiance of the process of the Court.

The offence being that of contempt to the Court, the immateriality of the evidence would be no justification; save in so far as it might operate as a negation of intentional misconduct. The Court, however, would not allow its process to be perverted into a mere course of needless vexation, or the gratification of personal malice.

It would be no sufficient excuse that the witness was merely speculating on time; as for instance expecting that the cause would not be called on until some later period.

* Sreemutty Kameenee Dabce vs. Conylall Johurree, 22nd May 1860.
The witness is privileged from arrest upon any civil process, pending his attendance at, and in going to, and returning home from, the trial; termed in technical language "eundo, morando et redeundo," and as respects either going or returning, this intends a reasonable time for the purpose. He is not protected from arrest upon a criminal charge.

The principle is neatly put by Mr. Justice Erle in a recent case of Ex-parte Cobbett when he says;—"It is the duty of a person in the situation of Mr. Cobbett, having writs out against him, to satisfy his creditors; and Courts should assist the demands of justice by giving effect to writs of execution. There is an exception made from this demand of justice on the one side by a greater demand of justice on the other side, when a person is required as a witness; and thus far the privilege from arrest is recognized and universally acted upon, but further than that the Courts have not gone."†

The tribunal before which the witness is summoned must be a lawful one, and having jurisdiction in the cause. But the privilege applies to any proceeding in the nature of a judicial one; as for instance to an Arbitration had under an order of Court; and, a fortiori, the attendance before any Bankruptcy or Insolvent Court, or so on.

It has been questioned whether, under the head "legal tribunal," would be embraced the case of a witness attending before a Magistrate, or other inferior Judicial Officer, under a summons or writ of subpoena; and though it has been held in America that such persons are privileged, it has never been expressly so determined in England. In stating the American decision, Mr. Taylor adds:—"And on the principles of English Law this decision would appear to be sound, since the privilege should surely be co-extensive with the power of enforcing attendance." In the case of ex-parte Cobbett, referred to above, Mr. Justice Crompton says;—"I agree with Mr. Taylor in his second Volume on Evidence, 859,

* "In going, staying, and returning."
† Weekly Reporter, 1856-57 p. 708.
that on the principles of English Law, the privilege from arrest should be extended to a witness attending before a Magistrate or other inferior judicial officer. There has been a decision to that effect in America, though no positive decision in this country."

In determining the question of reasonable time, the Court acts with liberality towards the witness. It would not, however, allow any abuse of the privilege, such for instance as improper loitering or deviation, though it would not enquire too strictly whether the party went as quickly as possible, and by the shortest possible route.

The solution of the question of reasonable time must of course be always one of circumstances; and individual cases will throw but little light upon it. It may, however, be stated on the one hand, that in one English case the rule of protection was extended to a witness arrested about a mile and a half in the direction of his house, though two hours after he had left the Court;* as it was in another where the witness, after leaving the Court, first called at his office for refreshment, and then, on his way home calling at his tailors, was arrested there.† On the other hand, the privilege was denied where a witness, who was to be examined on interrogatories, went, three days before the day of examination, to his attorney's office, to see the instructions;‡ as it was in another where there was an actual disability to return home in the want of pecuniary means.§ It has been said, it would have been otherwise in the latter case, had the detention been caused by illness.

It is not necessary to the privilege, that the witness should be served with subpœna; if, on application to him for the purpose, he voluntarily consent to attend.

* Selby v. Hills, 8, Bingham, 166.
† Pitt v. Coomes, 5, Barnewall and Adolphus, 1078.
‡ Gibbs v. Phillipson, 1, Russell and Myln, 19.
§ Spencer v. Newton, 6, Adolphus and Ellis, 623.
The privilege is confined to a witness. It would not protect an informer.

A party discharged from an illegal arrest upon any civil process is privileged during his return home, though of course a return within a reasonable period. In the case, however, of a discharge from criminal process, even in consequence of an acquittal, the case would be otherwise, unless the apprehension on the criminal charge were a mere contrivance to get the party into custody in the civil suit.

The application for discharge may be made either to the Court from which the process under which the witness was arrested issued, or to that to the attendance at which the witness was subpoenaed; and refusal to interfere on the part of one Court, would not preclude application to the other.

According to English law, the freedom of the witness from liability to arrest is considered not so much a personal privilege of his, as one in assertion of the dignity of the Court, and established for the benefit of its suitors, and the advancement of justice generally. Consistently with this principle, it appears to be considered that the right to a discharge from the custody cannot be forfeited by any waiver, or other personal conduct of the witness, and that it would not be lost even by laches in the assertion of the privilege.

So jealous, indeed, is the Court of all trenching on its sanctity, that it will not allow service on a witness of any sort of process within its precincts; and would treat the act of service as a contempt, and punishable accordingly.

No action is maintainable against either the Sheriff or his Officer, for the illegal arrest; even though shown to have been with knowledge of the circumstances; nor will any lie against either the Plaintiff or his Attorney; unless, perhaps, (and which latter is even doubtful,) knowledge and proof of malice be brought home to him.
Though the witness, however, may have no remedy by action, the party shown to have abused the process of the Court, would be liable to attachment as for a contempt.

Under English Law the evidence of witnesses physically incapacitated from attendance in Court at the trial, as by reason of absence abroad, or illness, may be obtained under a Commission, upon a special application to the Court; as may that of those about to leave; the evidence being taken de bene esse only; and its use at the trial being subject to the condition of absence or illness then. Formerly commissions of this description were only obtainable by consent; the depositions had under them being considered in the light of secondary evidence only. A Legislative enactment, however, of the late reign, in dispensation of this condition, authorized the examination, whenever it was made apparent to the Court that it would be necessary or conducive to the due administration of justice in the matter; with powers of directing the examination before its own Officer, or other appointed person, when the parties to be examined were within the jurisdiction; and when without it, to issue a commission for the purpose abroad.

The principle of the English Act has been carried out in India under legislative enactment. Beside the provisions of the Civil Procedure Act, to which we shall presently advert,—(and which are applicable only to the Courts not established by Royal Charter,) Act VII. of 1841 empowers all Courts within the territories of the Government, in every Civil proceeding, to order Examination before an officer of the Court or other persons, of any witness within the jurisdiction of the Court, or to order a Commission to any subordinate or other Court for examination of witnesses out of the jurisdiction. It also authorizes the issuing of Commissions otherwise than to a Court, under special circumstances, appearing to the Court to render the direction expedient.

* 1, William IV, c. 22.
In cases of examination within the jurisdiction, the Act empowers the Court to order the attendance of witnesses.

As a preliminary condition, however, the Court is to be satisfied, there is good reason for believing the witness unable to attend at the usual time for examination, by reason of absence from the jurisdiction, sickness, or other cause allowed by law; and, save by consent, the deposition when taken is not to be read, unless on proof that the witness is beyond the jurisdiction, dead, or unable from sickness or infirmity to attend to be personally examined, or distant without collusion more than fifty coss from the Court, or exempted from personal appearance, either at law or under the discretion of the Court. The Court may, however, dispense with proof of any of these circumstances, or authorize the deposition to be read, notwithstanding proof that the causes for taking the deposition have ceased.

In the case of a witness attending and giving evidence at the trial after a previous examination under a Commission, the Court may authorize the reading the deposition.

The Mofussil Courts are empowered by the Act to issue Commissions and orders within the local limits of the Supreme Courts; and all Courts may do the same within the Territories of Princes and States in alliance with the Government; and all persons in its service are required to pay obedience to them.

Courts to which Commissions are issued may punish as for contempt of Court.

In addition to this general enactment, the Act regulating proceedings in Equity in the Supreme Court, Act VI. of 1854, empowers the Court to order Commissions for the examination of any witnesses, either within or without the Court, with such discretionary directions as the Court may think fit.

Commissions too may issue, as we shall presently see, under the Civil Procedure Act.

Whether as respects England or India, except in a case of emergency, or to prevent a defeat of justice, it is not usual to grant either Commission or Order until
issue has been joined; though the application for the Commission should be made promptly after this, and a substantial case must of course be made out, that the Court may be satisfied that the application is not a contrivance for delay. In Equity cases, however, involving a reference to the Master, a Commission abroad has been allowed when the evidence would be too late to be made available on the hearing; on the ground that it might be made use of in the Master's office, as was done in a late case in the Supreme Court of Calcutta.*

In the case of a foreign Commission, the Order must specify the place, and, (within certain limits,) the time of examination; though not the names of the witnesses or the Commissioner. The latter, however, the Commission itself must of course do.

The Affidavit on which the application is made should point out at least some of the witnesses; unless in a case in Equity, where the occasion for the examination is sufficiently disclosed by the pleadings. The Affidavit should also disclose the general grounds of absence, or so forth, on which the application may be founded; and it should state that the witnesses are material and necessary; and, in the event of a contest being raised on the point, (though not otherwise,) the materiality might be required to be shown in some detail. In one case, in England, where a commission was sought to examine witnesses in a distant place, namely in New Zealand, the Court required an affidavit from the attorney, showing that the proposed evidence was both material and necessary to the defence.† The object was to avoid a wanton or improper tying up of the cause, and delay in its trial.

In Commissions to examine witnesses out of the jurisdiction, it is usual to insert a clause requiring the Commissioners to be sworn but this is not essential. Mr. Taylor states three occasions of omission where the Commission was addressed to the Judges of a foreign Court;‡

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* Gladstone and others v. Lindsay. Not reported, but in which the writer was Counsel.
† Healy v. Young, 2, Common Bench, 702.
and the writer is enabled to state on his own personal knowledge, a recent case from the Scotch Court addressed to an advocate of the Supreme Court of Calcutta, where the like omission occurred.

As a general principle the Commission itself must be the chart by which its execution by the Commissioners is to be regulated; but the Court will not look out critically for objections, especially when those rather of form, than of substance. Thus, on the one hand, where the Commission requiring that the examination having been taken, the same should be transmitted to England, the transmission of copies was held insufficient;* while, on the other, where the Commissioners were required to reduce the examination into writing in English, and to swear an interpreter to translate the deposition, it was held sufficient that the depositions, originally taken down in the Foreign language, had, six weeks after, been interpreted by the interpreter into English.†

In matters the contrary of which is not necessarily transparent on the Commission, the Court will presume a regularity of execution; notwithstanding the Commission may be silent on the subject.

Thus a Commission containing a direction that the witnesses should be examined apart, the Court presumed a separate examination, though the return was silent on the subject.‡ According to one case in Chancery, however, the taking of the oath not having been returned, it would not be presumed.§

All original documents produced in evidence, must be returned with the Commission, unless the law of the country prevented the removal. In no other case would copies be admissible; unless by the mutual consent of the parties.

* Clay vs. Stephenson, 7, Adolphus and Ellis, p. 185.
† Atkinson vs. Palmer, 4, Barnewall and Alderson, 377.
‡ Sims vs. Henderson, 11, Queen's Bench, 1015.
§ Brydges vs. Barnhill, 12, Simons, 334.
The evidence must be taken on the ordinary principles by which
the examination would be regulated, were it taken
in Court, instead of under a Commission. The
admission of improper evidence, that is evidence
not legally admissible, or the exclusion of proper, would be a ground for
the suppression of the examination by the Court at the hearing; and,
either in whole or in part, according to the circumstances.

As regards the Courts of the Mofussil in India, these on the subject
of the present chapter have a course of procedure
peculiar to themselves; regulated, as respects
civil proceedings, by the Civil Procedure Act, No.
VIII. of 1859, and as respects criminal ones by Regulation Law.

It is presumed, however, that so far as the general course of English
Law, stated above, is matter of principle, as contradistinguished from
mere procedure, it would afford guidance for the Government of the
practice of the Mofussil Courts; and the exposition of English Law,
which has been given in the present chapter, will, it is hoped, be found
useful accordingly, as having a bearing on that practice, and its regulation.

The Civil Procedure Act contains a provision for the summoning of
witnesses, whether for the purposes of the hearing,
or the settlement of the issues,—the production
of documents,—the apprehension of witnesses on default of appear-
ance,—and for the attachment of their property on absconding or
keeping out of the way. In the event of their appearing, but refusing
to give evidence, or to produce the documents, it subjects them to com-
mittal;—and should they persist in their refusal to ulterior punishment.

At the same time the Act enjoins due specification in the summons
of the time and place of attendance;—with mention whether attendance
be required to give evidence or produce a document, or for both pur-
poses;—and, in the case of production, it requires a description with
convenient certainty.

Safeguards are also furnished for the due service of the summons,
and its being made within reasonable time for attendance, including
preparation and travelling;—and the Act authorizes, in case the witness cannot be found, service on some male adult member of the family.

In the case of the witness not being resident within the jurisdiction of the Court, the summons is to be transmitted to the Court having jurisdiction at the place where he resides.

The Act secures to the witness the payment of his expenses; requiring payment into Court on application for the summons of a sum adequate to defray his reasonable travelling and other expenses in passing to and from the Court, and for one day’s attendance; and these are to be tendered to the witness at the time of service: provision is also made for further payment, in case the sum, in the judgment of the Court, prove insufficient, or the witness be detained.

 Witnesses living beyond a certain distance from the Court, or privileged not to attend by reason of sickness, rank, or sex, may be examined under a Commission.

The Act has a provision for enforcing the attendance of parties; and their production of documents; with a power, in default, of awarding judgment against them, or making other appropriate order according to the exigency of the case.

In criminal cases in the Courts of the Mofussil in the Presidency of Bengal and the Ceded Provinces, the attendance of witnesses is also provided for under summons, specifying the party at whose request issued, and the day and place of attendance; and this is required to be served by an officer of the Court. The summons is enforceable under the penalty of fine or imprisonment, in the case either of non-attendance, or refusal on attendance to testify, or to sign the depositions.

Indigent witnesses, as well as prosecutors, are also entitled to a small daily allowance for their maintenance.

In ordinary cases, in trials before the Sessions Judge, the examination is confined to the witnesses mentioned in the calendar sent up by the Magistrate. Upon special application to the Court, others may be summoned, and the Sessions Judge has a discretionary power of
summoning at any stage of the trial. A large latitude of summons is always afforded to the accused.

As the present work addresses itself rather to general principles than to technical procedure, and as in reference to India, the procedure as respects the procuring the attendance of witnesses, and the Code and Regulations by which respectively it is governed, will necessarily be familiar to all parties engaged in the administration of the Law in the Mofussil, whether as judges or practitioners, it is thought unnecessary to encumber the present work with the detail.

Neither in the Supreme Courts, nor in the Mofussil, would the 

Native plea of disgrace, by attendance, be listened to; with the exception only, that, in the case of Purdah females, the privilege of examination at their own dwellings under a commission, in substitution for an appearance in Court, is conceded to them; — a concession of which the practical result is, that the Court seldom places but the slightest, if any, reliance on their deposition.

Even in the case of parties claiming to be purdah women, any previous voluntary exposure of themselves to publicity would be a forfeiture of the privilege; and a tendering of themselves as witnesses in a Court of law on a former occasion would amount to this; or at all events if in reference to the same subject matter, and connected with the prosecution of the same right.

Thus, in the case of Sreemutty Kamenee Dabee, vs Konyloll Johurree, to which reference has above been made on another point, * Kamenee had already, on a former occasion, instituted criminal proceedings against certain parties, charged with the forgery of a deed which purported to be a conveyance of her property on its alleged sale, and had appeared personally (though covered) both at the Police and at the Sessions trial in support of her charge. She then instituted a suit in the Supreme Court of Calcutta against the purchaser under the sale;

* Supreme Court of Calcutta, May 1860, unreported, but in which the writer was Counsel.
and the object of which was to have the deed avoided as against him, and delivered up to be cancelled, and on the ground of the forgery. Under these circumstances, the usual commission which had been obtained by her in her civil suit for her examination as a purdah woman was discharged; and (as the result showed, fortunately for herself), she had to submit to an examination in Court.

Under both the Civil Procedure and Evidence Act, any person present in Court, whether party or not, may be called on, and compelled by the Court to give evidence, and produce any document in his possession or power, in the same manner and subject to the same rules as if he had been summoned, and may be punished in like manner for disobedience.

So, under the Evidence Act, any person, whether a party to the suit or not, may be summoned to produce a document, without being summoned to give evidence. Having been summoned merely to produce, production through another hand would be a compliance with the summons; personal attendance might be dispensed with.
CHAPTER VII.

On Examination-in-Chief.

Speaking of the oath prescribed, by the laws ofMenu to be administered to the witnesses, Sir William Strange observes:

"The noble warning with which the subject, as detailed by Menu, is ushered in is, that either the Court must not be entered by Judges, Parties, or Witnesses, or Law and Truth must be openly declared."

A noble warning it is; and we proceed to the investigation of these principles by which, in attainment of this Truth, the examination of the Witnesses is regulated.

These will be found in their leading features to be reduced into a system; though as respects matters of detail, and the general regulation of the working of the system itself, it is true, as observed by Professor Greenleaf, that—"the examination lies chiefly in the discretion of the Judge, before whom the cause is tried, it being from its very nature susceptible of but few positive and stringent rules. The great object is to elicit the truth from the witness; but the character, intelligence, moral courage, bias, memory, and other circumstances of witnesses are so various, as to require almost equal variety in the manner of interrogation, and the degree of its intensity to attain that end. This manner and degree, therefore, as well as the circumstances of the trial, must necessarily be left somewhat at large, subject to the few general rules which we shall proceed to state."

This would apply alike to the Courts of England and India; and in reference to those of the latter regulated by the Civil Procedure Act (Act VIII. of 1859) the

* Strange's Hindu Law, 312.
AFFIRMATIVE ISSUE.

Act, after providing for the taking the evidence of the witnesses orally in open Court, declares that this is to be "in the presence, and hearing, and under the personal direction and superintendence of the Judge." Among other provisions for the more efficient eliciting the testimony, (which it is thought unnecessary here to repeat) the Court too is to "record such remarks as it may think material respecting the demeanour of the witness while under examination."

Among the rules for the examination of the witnesses might perhaps be expected to be found those which address themselves to the relevancy of the examination. The question of relevancy belongs, however, equally to the quality of evidence, and its admissibility; and to the portion of the work devoted to this, it is reserved accordingly. We only here observe that it is to an affirmative proof that an examination in chief is mainly addressed; and the proof is that of the issue to which the party producing the witness has, by his pleadings in the cause, challenged his antagonist; and this in avoidance of all diverting, and collateral matters.

"The object of evidence," says Mr. Roscoe, "is to prove the point in issue between the parties; and in doing this, there are three general rules to be kept in view; 1st, that the evidence be confined to the point in issue; 2nd, that the substance of the issue only need be proved; 3rd, that the burden of proof lies on the party asserting the affirmative fact if unsupported by any presumption."

We have seen in a former Chapter† that under certain given states of circumstances, there are legal deductions of fact called Presumptions, which the law draws for itself, apart from actual proof. It is to a presumption of this nature Mr. Roscoe refers in his third category; and, in the exception which he makes to the onus of proof where the support of a presumption exists, he is contemplating the case in which that presumption itself would be tantamount to proof, and might supersede the occasion for evidence.

* Roscoe on Evidence, 61.
† Chapter I.
It should be noticed, however, that in stating an Examination in chief as addressed to an affirmative issue, the expression 'affirmative' is used in the sense of something which is affirmed on either one side or the other. In this view a negation by a defendant of the case of the plaintiff would have to be regarded as an affirmation of the former. A, the plaintiff, avers that he sold goods to B, the defendant, while B says that he did not. The examination on the part of B of his witnesses, and in support of his defence, would be as much an examination in chief as that by A of his witnesses.

A witness when under examination must speak to facts within his knowledge. Except in certain exceptional cases, which will be pointed out, his opinion or belief would not be admissible.

Nor does this rule exclude only that which would ordinarily fall under the head of belief; such matters, for instance, as one believed because a narrator of credibility had averred their existence. It would extend even to inferences, in the nature of opinion, which the witness might himself draw from the facts before him.

Thus in a case in which goods had been supplied to a firm, and it was sought to fix the defendant with the liability, as himself constituting the firm, a witness called to prove the order, was not allowed to be asked, "With whom he dealt?" because such a question was only a skillful mode of ascertaining the witness's opinion of the constitution of the firm; and this opinion might be founded on hearsay evidence. The enquiry of the witness was accordingly limited to the acts done, leaving to the Court the inference. So in an action for slander, where the words are alleged to have been spoken in a sense different from their ordinary meaning, a bystander could not be asked in the first instance, "What he understood by them?" but the course would be to ask the witness,—"Whether

* Bonfield v. Smith, 12, Meeson and Welsby, 405.
† Duke of Brunswick v. Harmer, 8, Carrington and Payne 10.
there were any thing to prevent the words conveying their ordinary meaning?" And then, if he state facts leading to the inference that they were used in some peculiar sense, a foundation having been laid, the question might be put—"What did you understand by those words?"

Testifying as to facts, the witness can of course only do so according to the extent of his knowledge or recollection. He is not required to speak with such certainty as to exclude all doubt from his mind.

"If" says Professor Greenleaf 'the fact is impressed on his memory, but his recollection does not rise to positive assurance, it is still admissible, to be weighed by the Jury; but if the impression is not derived from recollection of the fact, and is so slight as to render it probable that it may have been derived from others, or may have been some unwarrantable deduction of the witness's own mind, it will be rejected."† To use the expression of Mr. Taylor in modification of the passage—"He may express it as it lies in his memory."‡

This view of the case assumes original knowledge. The question accordingly is, how far the image, or to speak less figuratively, the recollection of the circumstance, may have faded from the mind; or still be living in it. Assuming it to be yet sufficiently vivid in the memory, it may become subject of testimony; though of course the weight of the evidence would be dependant on the degree of vitality. It will be observed, however, that all testimony, though even as to belief or recollection only, is given under the sanction of an oath or other judicial solemnity; and the establishment of any intentional falsehood in the statement would expose the witness to the penalties of perjury, just as much as if he affected to testify on knowledge. The proof may be more difficult; but the perjury would be the same.

A witness deposing, in the instance in which such a deposition would be admissible, to the existence of a general reputation, would not trench on the rule requiring him to depose upon knowledge; since what he would be speaking to, would be no more than the fact of reputation; and of this he would speak on his personal acquaintance with its existence.

Knowledge, however, as a general principle, must be taken as lying at the root of all testimony.

But there are exceptions to the rule; though they will be found limited to the instances where the nature of the case does not admit more positive evidence.

Thus, in a question of identity between persons and handwriting, a witness is allowed to speak upon belief. So, in one requiring for aid in its determination, the experience to be derived from science, art, or trade, witnesses skilled in such matters, or as they are termed 'experts,' are admitted to give, as evidence, the results of their own craft bearing on the issue; as in questions of foreign law or usage skilled or competent persons are admitted to pronounce authoritatively, and as matter of evidence, what that law or usage is. So in actions for criminal conversation, or for breach of promise of marriage, the terms of attachment on which the parties lived toward each other may be proved upon belief.

In such questions, indeed, as those of identity, there must, from the nature of things, be a certain amount of knowledge to constitute an element, even of belief. Thus, were the identity one of person, the witness must speak from a previous acquaintance, either greater or smaller, with the individual; were it of handwriting, his belief of the resemblance could only be founded on an antecedent familiarity with the general style of the writing of the party to whom the one in question was sought to be ascribed. Still, testimony derived from such sources would fail of establishing, upon actual knowledge, the fact itself;—and the connecting link, that which enables the witness to assert, from the premises, the fact of identity,—would, in strictness, be only matter of belief.
The case of identity of person may be very summarily dismissed. The question would always be the simple one of the extent of the witness's acquaintance with the person of the party with whom the identity was to be made out, and the opportunity of comparison.

Identity of hand-writing, as one might naturally expect, has been prolific of legal discussion; and the question has ordinarily arisen on the point of signature. The great struggle has been, in the case of one who did not witness the act of writing himself, to assign those limits to his opportunities or means of knowledge which would, on the one hand, either exclude his testimony; or, on the other, make it admissible.

In a leading case on the subject, Doe vs. Suckermore, the general limit is thus defined by Mr. Justice Petterson:—

"The knowledge of hand-writing may be acquired either by seeing the party write, in which case it will be stronger or weaker according to the number of times, and the periods and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness, (however little weight may be attached to it in such cases,) even if he has seen him write but once, and then merely signing his surname; or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the hand-writing of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness, which, in the ordinary course of transaction of life, induces a reasonable presumption that the letters or documents were the hand-writing of the party; evi-

* 5, Adolphus and Ellis, 730.
dence of the identity of the party being of course added *aliusnde*, if the witness be not personally acquainted with him."

Of course, the learned Judge is only speaking of the *admissibility* of the evidence. Its *weight* in each individual case would be always a question of circumstances.

He treats one *single* opportunity only of witnessing the signature as sufficing to render the evidence admissible. It has been held that the testimony might be received, although the witness had not seen the party write for *twenty years*. And a bare signature would suffice, albeit it were no more than a surname.†

The admission of the evidence has been extended even to the case of a *marksmen*. This, however, as an authority must be acted on with great caution. Ordinarily one mark would scarcely be distinguishable from another, and there should be something special to identify. In one case in which the evidence was received, one before Tindal, Chief Justice, the witness stated that he had *frequently* witnessed the mark; and he pointed out some *peculiar*ity in it. Yet it was not without hesitation that its reception was permitted.‡

In the instances in which the acquaintance is derived from some antecedent witnessing of the signature of the party, it must have been witnessed under *natural* circumstances or opportunities. Were the circumstances those in which question might arise whether disguise were being practised for the purposes of deception, such an opportunity of witnessing would not suffice. Therefore, on a question of forgery, where the signature seen by the witness, and on which his knowledge was founded, was *after the commencement of the suit*, and exhibited for the purpose of showing to the witness the *true manner of writing* by the party, the evi-

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† Per P atte son Justice in Doe vs. Suckermore.
‡ George vs. Surrey Moody and Malkin, 516.
Evidence was held inadmissible by an experienced Judge, Lord Kenyon, on the ground that the party might, through design, and to mislead the witness, have written differently from his common mode of signature.*

In referring, as Mr. Justice Patteson does in Doe vs. Suckermore, to an acquaintance acquired in the course of transactions in business, he embraces a somewhat wide range; and of which a correspondence in the course of mercantile affairs may, perhaps, be taken as the illustration of most ordinary occurrence. In the same case, the knowledge derived from an ordinary course of business was treated by Lord Denman, Chief Justice, as embracing the instance of a servant, who, being in the habit of carrying his master's letters to the post, might have thereby acquired a knowledge of his writing; though he had never seen him write, nor had any further means of knowledge.

In these cases of knowledge, derived from business transactions, the witness need not be the actual party to whom the correspondence was addressed. Did the clerk or broker of the ostensible correspondent, or other like party, transact the business, their evidence would suffice.

Where, however, communication in the course of business is the foundation of the acquaintance, it must be one carrying with it a legitimate inference that the communication was in fact had with the party. Thus, in the case of a retainer to defend an action, purporting to have been signed by three individuals, and received by the attorney employed and acted on by him, and the question being the hand-writing of one of the three, but who had never, in fact, done anything to acknowledge the signature to the attorney, the evidence of the attorney was held inadmissible; it being said that the two others might have signed it for the third.†

In an early case the evidence of identity was received, though it went no further than to assert that the writing was like that of the assumed writer. Later authorities, however, have questioned the propriety of this reception, and

* Stanger vs. Searle, 1, Esplinisse 15.
† Drew vs. Prior, 5, Manning and Granger, 264.
among them Lord Chancellor Eldon;* and certainly one thing may be like another, as may be two persons, and yet there be no actual identity between them. The difficulty in these cases is, that all belief is founded on an imaginary likeness; and, where the witness goes the length of recording his own belief, he, in fact, does little more than adopt the resemblance. Merely to say, loosely, that one writing is like another, might be consistent with the view that the likeness was too faint to enable any actual belief to be formed on the subject.

The comparison of the disputed writing with one known to be genuine would be an obvious, though not an unfailing test of authenticity. It will be noticed, however, that the formulary as propounded by Mr. Justice Patteson in Doe vs. Suckermore does not include this; nor, subject to certain exception, did the law admit it at the time that formulary was given.

An exception, indeed, even in the old state of the law, was made in the instance of ancient writings, in which, all ordinary proof failing, from the necessity of the case, the evidence of belief was allowed to be received; had the witness acquired his knowledge of the hand-writing by the inspection of other ancient writings bearing the same signature, and preserved as authentic documents.

Apart, too, from the case of actual comparison between specific writings, the evidence of experts would have been receivable as to the general character of the writing of a by-gone age; with the view, by aid of the general comparison, of throwing light on the date of the particular writing in question.

Another exception also was made where the materials of test existed in the cause, and were in Court at the trial, in other authenticated documents, or indeed the document itself. Here a comparison between these, with the writing in dispute, might have been instituted by the Court or Jury; though a witness called for that purpose would be rejected. It was considered

that the circumstance of the document being already, and for another purpose, in evidence in the cause, would be a security against the charge of unfair selection for that of comparison; and being in evidence, though for one purpose, it was practically difficult to shut it out for another. The test must, however, have been previously in evidence; and for the general purposes of the cause. Thus, where the genuineness of the endorsement on a bill of exchange, purporting to be that of the drawer, having, in an action against him by the endorsee, been disputed by the acceptor, and the bill being already put in; in order to test the authenticity of the endorsement as his, a comparison was allowed to be instituted with the admitted signature of the drawer.*

The Law, however, as respects the test of comparison has now been extended, both in England and in India, and on the principle of a sounder policy.

In England, an Act, passed in the year 1854,† enabled this comparison to be made; the genuineness of the writing, which was to constitute the test, having first been proved to the satisfaction of the Judge.

In India, the Evidence Act provides (Section 48) that on an enquiry whether a signature, writing, or seal is genuine, any undisputed signature, writing, or seal of the party, whose signature, writing, or seal is under dispute, may be compared with the disputed one; though such signature, writing, or seal be on an instrument which is not evidence in the cause.

The English Act (though it is said from an accidental miscarriage on the point ‡) is confined to civil suits. The Indian one, however, not being so restricted, would equally embrace criminal proceedings.

Under either Act the comparison may be made, not merely by witnesses acquainted with the hand-writing, but by experts skilled in deciphering; and in all cases the general resemblance may be traced, not

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* Allport vs. Meek, 4, Carrington and Payne, 267.  
† 17 and 18 Victoria, c. 135, section 27.  
only by conformity of composition, whether of language or of words, but by minute details of correspondence or difference; such, for instance, as the shape of particular letters, or the orthography of the words. Science too is allowed to bring its material aid; of which the resort to magnifying glasses, which frequently occurs on trials, may be taken as an example. Were the party whose hand-writing is in dispute in Court, the obvious test might be applied of calling on himself to write. His presence, however, would not exclude the reception of evidence by comparison.

After all though, the test of comparison is not an infallible one; and must be received with caution. The hand-writing of the same individual will often vary at different periods of his life, may even at the same; and, to say nothing of the more obvious influences of age, infirmity, or sickness, may be acted on by a variety of differing, and controlling circumstances. The strongest apparent identity too may not in truth be real. Lord Eldon, after he became Lord Chancellor, (the story was told by himself,* ) was represented as an attesting witness to a deed, and the solicitor in the cause had satisfied himself of the genuineness of the signature, by comparing it with that of various pleadings to which, when a drafts-man at the bar, his Lordship's signature had been affixed. Yet for all that the signature was not Lord Eldon's; he had never attested a deed in his life.

In the case of experts,—which is the other exception to the rule requiring witnesses to depose on actual knowledge,—their testimony, with the exception of the case of legal experts, is not so much of the facts themselves at issue, (of which, indeed, they might probably be wholly ignorant,) as of what science or their peculiar art or calling would pronounce concerning them, under corresponding circumstances.

Thus it is every day's practice to receive as evidence the opinions of medical men as to the cause of disease or death,—the probable consequences of wounds,—or the propriety or effect of any given course of

* Eagleton vs. Kingston, 8, Vesey, 476.
medical treatment. So, in the case of ancient hand-writing, antiquaries have been allowed to fix its date by conjecture. So the opinion of a person conversant with insurance may be given by him, as to whether the communication of particular facts would have varied the terms of insurance. So, in a case where a seal had been forged, the opinion of seal engravers as to the difference between a genuine impression and the one supposed to be false. So the former existence of pencil marks alleged to have been rubbed out has been permitted to be proved upon the opinion of an engraver, who had examined the paper with a glass. So a post mark may be proved by a clerk in the Post-office, or probably one who has been in the habit of reading letters with that mark. So the opinions of engineers have been received on the subject of the choking up of a harbour, or the effect of a particular embankment,—of naturalists as to the abilities of certain fish to overcome obstructions in a river,—of an artist as to the genuineness of a painting;—and, in a case involving a question of foreign law, or the customs or usages of foreign states, it would be by the evidence of foreign lawyers or persons in official situations, presumed to invest them with adequate knowledge as to what that law was, or those usages or customs were, the Court would be governed. Indeed, in the instance of customs or usages it is not required that the witness should be either a lawyer or an official. Any person acquainted with the fact would be competent to speak to it. All these are cases of familiar practice.

The ground on which the evidence is admitted is the necessity existing in the peculiarity of the subject; which, placing its elucidation beyond the power of ordinary testimony, requires the aid of this special proof; and the rule which regulates the admission is thus well laid down by the late lamented author of "The Leading Cases" in his exposition of the law on the subject:—

"On the one hand, it appears to be admitted, that the opinion of witnesses possessing peculiar skill is admissible, wherever the subject matter of enquiry is such that inexperienced persons are unlikely to
prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science, as to require a course of previous habit or study, in order to the attainment of a knowledge of it; while, on the other hand, it does not seem to be contended, that the opinion of witnesses can be received, when the enquiry is into a subject-matter the nature of which is not such as to require any peculiar habit or study in order to qualify a man to understand it."*

The exigence of the emergency thus prescribing the limit to the reception of the testimony, it is obvious that, however learned a man may be on subjects open to the cultivation of all, his more advanced knowledge could not confer on his opinion the weight of evidence. Thus persons are not permitted, in the character of witnesses, to state their views on matters of moral or legal obligation, or the manner in which other persons would probably have been influenced had the parties acted in one way, rather than in another. Accordingly the opinions of medical practitioners on the question, whether a certain physician had honorably and faithfully discharged his duty to his medical brethren, have been rejected; because, on such a point, the Jury were as capable of forming a judgment as the witnesses themselves.†

It is necessary, too, to distinguish between a proof of the fact in issue on the trial, and that of the scientific theory.

* Smith's Leading cases, Vol 1 p. 426,—Note to Carter vs. Boehm
† Ramadge vs. Ryan, 9, Bingham, 339.
inference from these facts. Where, indeed, the facts are admitted, or not disputed, and the question thus becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though it cannot be insisted on as a matter of right."

It is, of course, fitting to preserve accuracy of distinction. Practically, however, the distinction here taken, though certainly one which a Court would recognize, somewhat savours of the distinction without the difference.

In most cases in which the testimony of experts is involved, the testimony is, in truth, to a certain extent, a compound both of knowledge and belief. It is knowledge, so far as the sources of information on which the witness speaks is concerned, that is, his own science or art; it is belief, so far as the facts in the case on which it is brought to bear are involved. The testimony but imports into, and applies to, one thing, a knowledge derived from another.

In the case of legal experts the testimony, perhaps, ought more appropriately to be classified altogether under the head of knowledge. The Court, for example, requires for its decision to know what the foreign law is. This accordingly, and this alone, it asks of the witness; and he deposes to it as a fact.

We shall see hereafter a provision of the Indian Evidence Act constituting certain codes, reports, and so forth, evidence of foreign law; and, so far accordingly, apparently, abridging the occasion for much discussion on evidence by its experts. It may, however, be permitted here to suggest, that there is no case in which the ancient proverb, that "a little learning is a dangerous thing," is more likely to prove true than in that of the individuals of one country, even when themselves lawyers, assuming to determine, although by the books of another, what the law of the latter is. Even as respects the law of one's own land, one not a lawyer, is rarely a very sound or safe interpreter, however plain

to his unsophisticated mind the statute or the treatise may appear to be. There are shoals, quicksands, and rocks beneath the smoothest surface; and which the experienced and skilled navigator alone knows how to avoid.

In the case in which a foreign law is established on the evidence of an expert, the proof is that of his own notion of the law; and does not even involve the production of the law itself. In fact, the proof is not that of the Book of the Law, but the Evidence of the Witness.

Thus, in the case of the Baron de Bode, the testimony of a French Advocate was given to prove the abolition of a particular law by a decree of the National Assembly. Being asked the particulars and contents of the decree itself, the question was overruled. Lord Denman, Chief Justice, after advertting to the general rule which precludes evidence of the contents of documents not produced, observed;—"In my opinion, however, the question is within another general rule, that the opinion of skilful and scientific persons is to be received on subjects on which they are conversant. I think that credit must be given to the opinion of legal men who are bound to know the law on which they practice; and that we must take from them the account of it, whether it be the unwritten law, which they must collect from practice, or the written laws, which they are also bound to know. I apprehend that the evidence sought for would not set forth generally the recollection of the witness of the contents of the instrument, but his opinion as to the effect of the particular law. The instrument itself might frequently mislead, and it might be necessary that the knowledge of the practitioner should be called in, to show that the sense in which the instrument would be naturally construed by a Foreigner is not its true legal sense."

The doctrine here enunciated was adopted and acted on in a still later case in the House of Lords, that of the Sussex Peerage one.

* Baron de Bode vs. Reginam, 10, Jurist, 217.
† 11, Clarke and Finelly, 85.
The witness, however, under the doctrine of *refreshing memory* about to be adverted to, may himself assist his own knowledge by reference to books or other sources of professional information; and if he describe these as truly stating the law, they may be read as *part of his testimony*, though not as *evidence in itself*.

Confining, as a general rule, a witness to speak from his own personal knowledge or recollection, there are circumstances under which he is allowed to aid this by what is called *refreshing his memory*.

Mr. Bentham in his work on Judicial Evidence puts the question:—
"Should a witness be allowed to consult notes?" and he answers it thus:—

"This may appear a strange question. The witness to whom you refuse permission to consult his memorandum, his journal, his letters, claims it as absolutely necessary to *refresh his memory*; and asserts that, without this assistance, it is impossible for him to give accurate and complete testimony.

"On the other hand, what you want is a prompt and unpremeditated answer; if you allow him time to consult notes, you partly loose the advantage of that lively and quick examination which does not give bad faith time to think.

"But the balance between these two inconveniences is not equal. For if notes be excluded, there are cases in which the evil you produce (by evil I here mean inaccurate and incomplete testimony,) is certain; if they are admitted, there is merely a *chance* of error, a chance that a witness may take advantage of this facility to escape from the danger of unexpected questions.

"Since the propriety of admitting the auxiliary does not depend on any specific quality of certain causes, but on the circumstances of the particular case at issue, it is impossible for the legislator to draw the line. *It must be left to the Judge to decide whether notes shall be allowed.*"
English Law has, within certain limits, adopted, or rather is in conformity with, the view of the able jurist; and by refreshing the memory, in the technical sense of the expression, is meant the resort, as a means of recalling the transaction to mind, or otherwise enabling the witness to speak to it, to some writing, either co-temporaneous with the transaction itself, or made so recently afterwards, as to secure its accuracy.

Where the instrument of refreshment is in the nature of some written narrative or other memorandum of it, this must have been taken down by the party at the time,—or in his presence,—or it must have been examined or seen by him recently afterwards,—or at all events while the facts were fresh in the memory, and he knew the statement to be correct. A deposition formerly made by an aged witness has been allowed to be read to him to refresh; as might a paper written by himself be read to a blind man.

"Recently" is an expression of some latitude. In one case a date of six months,* and in another, which occurred in the Scotch Courts, one of some weeks † was considered as too far removed from the period. The rule as stated by Mr. Taylor appears the sensible one:

"In all cases of this kind" he observes 'the practice must be governed by the peculiar circumstances; but perhaps if the witness will swear positively, that the notes, though made ex-post facto were taken down at a time when he had a distinct recollection of the facts there narrated, he will in general be allowed to use them, though they were drawn up a considerable time after the transactions had occurred.‡

It is not necessary, however, that the refresher should bring with it any independent recollection, provided only that the witness is prepared to show that it was, at the time a true record of the circumstances; or

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* Jones v. Strand, 2, Carrington and Payne, 196.
he is otherwise satisfied to vouch for the accuracy, as by seeing his own signature.

This refreshment may present one of two phases. It may be resorted to either to revive a faded memory; or, to give to a record of the past the life of a present deposition by the witness’s attestation of its truth, even where memory itself may have wholly vanished. The latter, perhaps is hardly very logically termed ‘refreshing the memory;’ though undoubtedly it is so called in practice.

The general principle is well stated by Mr. Starkie:

"Although in general," says he, "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."*

* Starkie on Evidence, p. 177.
It is not necessary that the instrument, be it what it may, which is resorted to to refresh, should be in itself admissible as evidence in the cause. Thus it has been held, that a receipt, which could not be received as evidence for want of a stamp, might be used to refresh.*

The above is the state of the English law on this subject, and the Indian Evidence Act substantially adopts it.

In general terms the Act (Section 45) enacts, that a witness shall be allowed to refresh his memory by any writing made by himself or by any person at the time when the fact occurred, or immediately afterwards, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing.

It has been made in England a question, to what extent a copy may be resorted to for the purpose of refreshing, whether in reference to the second, or even the first class of cases, to which we have referred,—that in which the witness has no present recollection, or that in which the recollection has been revived. As regards the latter, if the witness in fact arrive at a recollection, it has been suggested to be immaterial by what specific means he does so. The better opinion appears to be that, for whichever of the two purposes the copy is produced, it must be placed on the footing of secondary evidence, and be permitted to be resorted to only under the same conditions as all other evidence of this description is receivable in substitution of the original, and for which we must refer to a later part of our treatise. In a leading case of Barton vs. Plummer,† one of the learned Judges, Mr. Justice Patteson, thus stated the law on the subject:—‘‘The copy of an entry not made by the witness cotemporaneously, does not seem to me to be admissible for the purpose of refreshing a witness’s memory. The rule is, that the best evidence must be produced, and that rule appears to me to be applicable, whether

* Maughan vs. Hubbard, 8, Barnewall and Cresswell, 14.
† II. Adolphus and Ellis, 341.
a paper be produced as evidence in itself, or be used merely to refresh the memory."

It is at all events clear that no copy, being a mere imperfect extract only, or not proved correct, would suffice, in a case in which the witness had no independent recollection.

The rule of exclusion would not, however, apply when, though in form a copy, the paper were, in reference to the question of refreshing, in the nature of an original or duplicate. Thus in Barton vs. Plummer which was the case of a transcript from the Waste Book kept by the clerk, copied thence into the Ledger day by day under his checking, the Ledger was admitted without production of the Waste Book.

A mere extract from the original, though made by the witness himself, would not suffice. Not having the whole document before it, the Court would be without the appropriate means of testing its fullness or accuracy.

Were the original, however, but a partial statement only, as for example, such a case as that of recording a speech, a conversation, or the like, where it failed to set out the whole verbatim, it might still be used to refresh, would the witness swear to its substantial correctness. Thus, where a short-hand-writer had taken a verbatim note of such parts of an address as he deemed material, and was merely able to swear to the substantial correctness of the remainder, he was permitted to read the whole, notwithstanding the objection that the note was a partial one; the fullness and consequent accuracy of which rested on his private opinion of the materiality of what was spoken.*

The Indian Act adopts the principle of what we have stated to be the English law, in treating the copy as primarily not admissible; though it provides for its reception under the leave of the Court, in the case in which the non-production of the original is sufficiently accounted for. It enacts that wherever a

* The O'Connell case, Armstrong and Trevor, 235.
witness may refresh his memory, by reference to any document, he may, with the permission of the Court, refer to a copy of such document, provided the Court, under the circumstances, be satisfied that there is sufficient reason for the non-production of the original.*

According to English law, the memory may be refreshed previously to the trial, without the production of the document there, however much its absence might be matter of observation.

The Indian Act being in its character rather enlarging than restraining, it might have been inferred that the same would be allowed in the Courts of India. It will be observed, however, that the enactment itself in terms runs—"A witness shall be allowed before any such Court or person aforesaid to refresh his memory,"—which would rather appear to be restrictive to a refreshment in Court; and it goes on to provide that the writing should be produced, and may be seen, by adverse party. Whether this be designed to provide a canon of exclusion, or merely to deal with that which takes place as the more ordinary course of refreshment, namely one in Court, may be open to question. Probably the latter only was intended to be dealt with.

The practice in England awards to the opposite side a right to the inspection of all that is made use of for the purpose of refreshment; and the opponent is entitled to cross-examine, not only on the particular part referred to, but on the document generally. It would be otherwise, however, were a paper merely put into the hand of the witness to prove handwriting, or did the paper itself fail to produce the required refreshment. Should the cross-examination be extended beyond the entries referred to in the examination in chief, this would be at the risk of the cross-examining party making the document his own evidence; and having to put it in accordingly.

The Indian Act, in the case of any document used to refresh, or at all events any used in Court, orders in general terms that it be produced,

* Section 46.
and may be seen by the opposite party; with a right to cross-examine upon it."

Besides these two classes of cases, the one in which the Memory is restored, and the other in which the History is verified, there is a third, which has also been referred to this head of refreshment. Of this we cannot do better than cite Mr. Starkie's statement.

"There is also," says he, '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 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.'"

In fact, cases of this description are of the most ordinary occurrence, and particularly when arising in the course of any extensive business, whether private, or more particularly perhaps official; when the nature of the transaction would have been likely to make

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* Section 45.

† Starkie on Evidence, 178.
no impression on the mind of the witness, or none but the most evanescent.*

Let us now turn to the mode in which the testimony of the witnesses is to be obtained. And here the subject of consideration is the form of the interrogation.

The great canon on this is, that when the disputed ground is once arrived at, the examination must not be what is called 'Leading,' that is, framed in a shape to suggest to the mind of the witness the answer desired. It is obvious that a question, skilfully thrown into the right form of suggestion, could hardly fail, in the case of a pre-instructed and willing witness, to provoke the answer sought.

"A question" says Mr. Bentham, 'is a leading one when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. Is not your name so and so?—Do you not reside in such a place? Are you not in the service of such and such a person?. Have you not lived so many years with him?

It is clear that under this form every sort of information may be conveyed to the witness in disguise. It may be used to prepare him to give the desired answers to the questions about to be put to him; the examiner, while he pretends ignorance and is asking for information, is, in reality, giving instead of receiving it."†

This prohibition of all leading interrogation is a principle of the Principles applicable alike to England and India. Courts, no less of India than of England; and as respects the Criminal Courts of all the three Indian Presidencies, leading interrogation is in express terms excluded by the Regulation Law under which they are governed.‡ The oldest of the Regulations on the subject (that governing the Presidency of

* According to Mahomedan law—"A man must not swear to his own signature, unless he remembers the act of signing."—Beaumont's Digest, 1857 p. 118.

† Bentham on Judicial Evidence, p. 181.

‡ Bengal Regulation IV. of 1727, Section 6; Madras Regulation VII. of 1802, Section 18; Bombay Regulation XIII. of 1827, Section 98.
Bengal) and which may be taken in principle as a sample of the others, provides:—"In the examination of witnesses, leading questions suggesting an answer, or having a tendency to such suggestion, are to be carefully avoided, and the interrogatories to them are to be proposed in such general terms, as may bring forth all the information they possess, and lead to a discovery of the truth."

Up to the point of dispute, however,—that is, while the examination is introductory only to what is material,—the witness may be led. Were it otherwise, a very unnecessary consumption might be had of the time of the Court, and a great infliction practised on its patience.

"It is often a convenient way of examining," says Mr. Alison, 'to ask a witness whether such a thing was said or done, because the thing mentioned aids his recollection, and brings him to that stage of the proceeding to which it is desired he should dilate. But this is not always fair, and when any subject is approached, on which his evidence is expected to be really important, the proper course is to ask him what was done or what was said, or tell his own story. In this way also, if the witness is at all intelligent, a more consistent and intelligible statement will generally be got than by putting separate questions."

So Mr. Starkie:—

"When the time and place of the scene of action have been once 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

* Alison's Practice, 546.
without 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."

Unfortunately however it often happens, and with Native witnesses in India especially, that the witnesses are not of the class from whom this volunteer statement can be so readily obtained,—at all events within any reasonable convergence to a point. It becomes essential, accordingly, to indicate a good deal to the mind of the witness the point to which his evidence is to be addressed; and the great practical difficulty always is to effect this, and at the same time to avoid making the interrogation leading.

But the determination of what is, and what is not, leading is in itself frequently one of difficulty, whenever the test has to be applied to any particular question. And the practical difficulty on the one hand is to secure that all the essential portion of the narrative be given in its entirety; and on the other, to prevent a needless prolixity of statement.

"It is not a very easy thing," says Mr. Starkie, "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 on the circumstances of each individual case."†

The "Yes or No" test suggested by Mr. Starkie, is not however, it is submitted a very accurate, and at all events must not be taken as an universal, one. There are

* Starkie on Evidence, p. 167.
† Ibid.
Leading Questions.

many instances in which it would be the natural response, without the question which evoked it being leading. Thus, suppose it was required to show the presence of the witness on any particular occasion, he might be asked—"Were you present on that occasion?"—notwithstanding the natural answer to the question might be "Yes or No." It could hardly be requisite in such a case to go the round-about way of asking:—"Who was present?" There might have been a hundred people there; and the form of the question in this shape might leave the witness to exhaust the series, in other words, to tell over the ninety and nine, before he arrived at himself. On the other hand, all such questions as—"Did one say so and so?"—or, "Did he do so and so,"—while obviously capable of being answered by the curt—"Yes or No,"—would, by suggesting what it was required of the witness to state, naturally provoke the reply.

An illustration may be supplied from the daily practice of all Courts, where the question is one of personal identification. If there be no ground of suspicion, the individual is pointed out to the witness, and he is asked directly;—"Is that the party?" and the answer is the simple—"Yes or No." Let the witness, however, be suspected, the question would not be allowed to be put in that form; and the witness would be told to look round the Court, and point out the individual in question.

The invitation to the answer—"Yes or No"—would in truth be leading or not, according to the circumstances.

One great test as to whether a question were to be regarded as leading, would be its tendency to elicit an answer conveying rather in itself the legal result of the facts, than a statement of the facts themselves, from which the Court was to draw the result. Thus, if it were a question of some given arrangement come to at a particular meeting, the witness ought to be interrogated, not as to the result, which he himself ascribed to the meeting, that is to say, whether such and such was then arranged, but generally only as to the detail of what took place, leaving it to the Court to draw the legal inference from the narrative.
It is necessary, however, to distinguish between a leading course of interrogation, and one, where the emergence arises, merely suggestive; and it is obvious that, while (to borrow Mr. Starkie's expression cited above) 'the mind of the witness must be brought into contact with the subject of enquiry', when once there, the examination must be assisted, not only with such checks upon wandering, but with such suggestions to recollection, as occasion might require.

Mere suggestions in the way of stimulants to the memory accordingly would not fall within the category of leading questions; and may be made wherever the incapacity to answer sufficiently appears to arise either from, a want of recollection, or the absence of some connecting link with the subject of examination.

Thus the names of persons, or places, or dates, may be suggested, and sometimes particular transactions, or connecting circumstances. Though a touchstone only to memory, they might awaken the whole association in the mind; just as in music to strike one chord would be to recall the entire tune.

In a question accordingly as to the component members of a firm, the names might be repeated, the witness stating that he could recognize them on repetition, but could not rehearse them from memory. So he might be asked as to his knowledge or recollection of a particular date or circumstance, and he might be led from them to more detailed allusions as to occurrences in connection with them. Again, some prior witness may have made a given statement which another might be called to contradict. Here the statement must be narrated to the latter, or he would be at fault to what to address his denial; and passages even of a lost letter might be suggested to him. So a witness unable to detail an entire conversation might yet have sufficient recollection to negative certain particular statements as part of it. Here the particular statements might be put to him, and he might be asked if they were in truth made.

"It may frequently happen," says Mr. Starkie, '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."

There are exceptions even to the rule which prohibits leading questions.

Cross-examination is the prominent exception; though this we reserve to a succeeding chapter specifically dedicated to that subject.

Another exception is made where the original position of the witness is adverse, as for instance, one side examining the other.

So too in the case of a witness of tender years or of weak capacity; where, with the sanction of the Judge, leading questions may be put.

In fact, the rule may be relaxed generally under the sanction of the Judge, whenever he can be satisfied that the substantial justice of the case requires it.

It occasionally happens that a witness, on examination, proves adverse to the party calling him. As a provision against this emergency, the Indian Evidence Act (Section 30) expressly empowers any party at whose instance a witness is examined, with the permission of the Court, 'to cross-examine the witness to test his veracity, in the same manner as if he had not been called at his instance.' It also, in terms, allows it to be shown 'that the witness has varied from a previous statement made by him.'

By the expression 'in the same manner as if he had not been called at his instance' is meant to confer the ordinary power of cross-examina-

* Starkie on Evidence p. 170.
tion which takes place in reference to the witnesses produced by an opponent. The limits within which this power of cross-examination, and inclusively of that of contradiction by previous inconsistent statement, may be exercised, will be found in the Chapter on Cross-examination; and it is unnecessary accordingly to enter on the subject here.

It should, however, be observed, that, in conferring a general power to test the veracity by cross-examination, the Act would seem to imply that of instituting a discreditive course of interrogation; that is, one aimed to elicit admissions tending to impeach the personal character of the witness, and hence to throw discredit on his testimony; or at all events a power to do so within the limits in which this may be exercised by an ordinary cross-examination. If so, the Indian Act is, in this particular, in some advance on the English law.

It was formerly, and indeed had in England long been, a moot question, to what extent a party could be at liberty to discredit his own witness; and, as regards personal character as a ground of discredit, there is an obvious amount of incongruity in seeking to show the untrustworthiness of one, the very production of whom as a witness would, as against the party producing him, appear to carry with it a species of guarantee for his veracity. The question was settled in England by the common Law Procedure Act of 1854, which in express terms prohibits a party from impeaching, by general evidence of bad character, a witness produced by himself. The Act goes on, however, to provide that, in case the witnesses should, in the opinion of the Judge, prove adverse to the party, he may contradict him by other evidence; or, by leave of the Judge, prove that the witness has made at other times statements inconsistent with his testimony; requiring, however, as a condition to the latter proof, that the circumstances of the supposed statement sufficient to designate the occasion be mentioned to the witness, and he be asked whether he has made the statement.

* 17 and 18, Victoria, Chapter 125.
In the construction of this Statute a very recent decision of the English Court has construed the term 'adverse' not to mean unfavourable merely, but actually hostile.*

It will be observed that both the English and the Indian Acts address themselves, in terms, to the examination of the witness himself, and in reference to the trial of his veracity. It should be stated that the provisions of both Acts are cumulative. It was antecedently well established law that, on every point relevant to the issue, even a party's own witness might be contradicted by others, produced by himself.

In the case just referred to, (Greenough vs. Eccles,) it was observed by Mr. Justice Williams in delivering the judgment of the court, speaking of the state of things anterior to the Statute—"The law was clear that you could not discredit your own witness by general evidence of bad character, but you might, nevertheless, contradict him by other evidence relevant to the issue. Whether you could discredit him by proving that he had made inconsistent statements was, to some extent, an unsettled point."

The reasoning on which the law allowing a party to contradict his own witness is founded, is well put by Tindal Chief Justice, in an earlier case of Bradley vs. Ricardo. "The object," says he "of all the laws of evidence, is to bring the whole truth of a case before a jury; but if this rule were to be discharged, that would no longer be the just ground on which the principles of evidence would proceed, but we should compel the plaintiff to take singly all the chances of the tables, and be bound by the statements of a witness, whom he might call without knowing that he was adverse, who might labor under a defect of memory, or be otherwise unable to make a statement on which complete reliance could be placed. Suppose a case in which, for some formal proof, the plaintiff is obliged to make a witness of the defendant's attorney, who, on cross-examination makes a statement adverse to the plaintiff, is the plaintiff to be precluded from calling the witness whom he had prepared before to show the real state of the case? It has been urged as an

objection that this would be giving credit to the witness on one point, after he has been discredited on another; but difficulties of the same kind occur in every cause when a jury has to decide on conflicting testimony. The general rule is, that a party shall not be permitted to blast the character of a witness called in support of his case, by adducing general evidence to his discredit; but I have never heard it said, that when surprised by a statement contrary to fact, he may not call another witness to show how the fact really is. It is a common occurrence that persons called on to give their testimony decline to make any statement before they appear in Court. It would be a great hardship if the party compelled to call such persons should be bound by every thing they choose to say."

The principle upon which, according to English law, a party is prohibited from discrediting his own witness by a general impeachment of character, and yet at the same time is allowed to give evidence contradictory of specific statements, is well put by Mr. Starkie when he says—"A party who is prepared with general evidence to show that a witness whom he calls is wholly incompetent, acts unfairly and inconsistently; for, knowing his witness to be undeserving of credit, he offers him to the jury as the witness of truth, and attempts to take an unfair advantage, by concealing or disclosing the real character of his witness, as best serves his purpose. But a party may contradict his own witness by the mode in question, without incurring any such blame; he may have been purposely deceived by the witness, or, though not under a legal necessity to call him, may be constrained by paucity of evidence under the particular circumstances; as when he cannot easily prove some other fact except by the testimony of that witness, or when the not calling him might afford a strong ground for observation against him. It may frequently happen in such cases, that a party may with great propriety call a witness as to a particular fact, and yet impeach his testimony upon another material fact, of which the witness, without intending to deceive, may have obtained but an imperfect knowledge, or in respect of which his memory may have erred."

* Bradley v. Ricardo, 8, Bingham, 57.
† Starkie on Evidence, p. 245.
Quintilian, the great classic writer of ancient Rome, on the examination of witnesses, suggests in the case of an unwilling witness, in a passage often quoted on this subject, a course of examination certainly not less adapted to the East than it was in his time (as it still may be) to the West; and it would be alike applicable whether in reference to an examination in chief or cross-examination.

"With respect to a witness" says he—(we use the translation)—"unwilling to speak the truth, the chief excellence of an interrogation is to extort from him what he is unwilling to declare. This can only be done by a constant repetition of the interrogation. For he will answer what he does not think will hurt his cause. Out of the many things he has to state, he may be so led on that he cannot deny what he is unwilling to state. For as in a prolonged oration we generally collect arguments which, by themselves individually, do not seem to aggravate the crime, then by their aggravated force prove the fact; so a witness of this kind is to be interrogated many things concerning past transactions and their consequences, concerning place, time, persons, and the rest, so that he may fall unawares into some answer, after which he must necessarily either admit what we wish, or contradict what he has already stated. If that do not happen, it remains to show that he is unwilling to speak; and he is to be drawn on, so that he may be caught slipping even in something irrelevant to the cause; nay, he is to be led still further, so that by speaking even more than necessity calls for in favor of the accused, he may be suspected by the Judge, which will not be less damaging than if he had spoken truth against the accused. The first thing is to know the witness. For a timid witness can be terrified, a fool taken in, an angry man excited, an ambitious may be puffed up, a tedious man made more so; but a cautious and constant man ought to be dismissed at once, as though he were hostile and pugnacious; or if any thing can be said against his mode of life, he is to be destroyed by the infamy of his crimes."

* Quintil. Inst. Orat. Lib. 5. c. 7.
CHAPTER VIII.

On Cross,—and Discreditive,—Examination.

The ordinary object of Cross-examination is to displace, so far as it is adverse, the effect of the Examination-in-chief; and, in doing this, the interrogation may either address itself to the sifting of the facts deposed to in the latter, or it may lead the witness on to a new field of enquiry. Under the name of a cross-examination, it may even be converted by the examiner into a practical examination-in-chief, the very proof of his own case. Indeed, it occasionally happens that the witness is put into the box without a single question being asked of him by the side producing him;—'tendered' as it is termed, for the purpose of showing that there was no desire to shrink from an adverse examination.

The term Cross-examination is more usually applied to the examination of the witnesses of the other side; whether, on the part of the defendant, the witnesses of the plaintiff; or on the part of the plaintiff, those of the defendant. It has been seen in the preceding Chapter, however, that there are circumstances under which a party is allowed to conduct the examination even of his own witnesses on the principle of a cross-examination, when proving adverse to himself; and perhaps the best definition of cross-examination is the one furnished by Mr. Best, when he describes it as:

"The interrogation by an advocate of a witness really hostile to his cause, whether in form coming before the Court as his witness, or that of his opponent."

Examination-in-chief is restricted in its course of interrogation to the direct and obvious issues in the cause; while Cross-examination is allowed a greater latitude;

* Best on Evidence, p. 402.
and, under the discretionary sanction of the Judge, questions of apparent or prima facie irrelevancy are permitted, on the faith of their relevancy being undertaken to be shown in some later stage of the trial; or where the demeanor of the witness or other circumstances may appear to demand such a course for the discovery of the truth. We shall presently, however, see that there are limits to this, even when resorted to for the purpose of throwing personal discredit on the witness.

All witnesses examined in chief, or even sworn, are subject to cross examination; unless in the instance of swearing only, it were by mistake, and the matter had proceeded no further; or not further than the answering of an immaterial question, stopped on the intervention of the Judge.

The mere production by an individual of a document where—(the occasion not requiring it)—he had not been put on his oath, would not give a right to his cross-examination; if indeed the term cross-examination be properly applicable to such a case.

A witness on one side, afterwards called and examined-in-chief by the other, may be cross-examined by the party originally producing him; and, subject, as will be presently pointed out, to the control of the Court, where such a course might work unfairness, upon the ordinary principle of a leading examination. A practice to this effect, for some time established by a decision of the Irish Court, has been recognized by a recent one of the English,—Lord vs. Colvin.*

The same case established, what down to that time (1855) had in reference to Civil proceedings been an open point, namely, that it was competent to co-defendants generally to cross-examine the witnesses of each other. From the peculiar character of proceedings in Equity, where issues are often found arising between co-defendants, and particularly in proceedings in the Master’s Office, the occasion would be likely to arise there, rather than in the Courts of Common Law, where the contest

* Lord vs. Colvin, 3, Drewry, 222.
ordinarily lies between two only litigants or classes of litigants, the plaintiff on the one hand, and the defendant on the other, or a plurality of either; and Lord vs. Colvin was in itself a case in Equity. It is presumed, however, that the principle would apply, whatever the nature of the procedure, whether legal or equitable, provided only that it was one in which the rules of the court would recognize a possible conflict of interest between the parties; and the principle was put by the Court as one by which "Justice would be best worked out."

In Criminal cases, it had long been established, that prisoners included in the same indictment might cross-examine the witnesses of each other, on testimony tending to criminate themselves.

In criminal cases, except under very special circumstances, it is not usual to cross-examine witnesses to character produced on behalf of the prisoner, though competent on behalf of the prosecution to do so, and even to bring forward contradictory testimony.

The cross-examination, when resorted to, must be directed to a general reputation only; and not to specific acts. But suspicion of a particular misconduct forming part of a general reputation, the witness may be asked as to the suspicion. Thus on an indictment tried before the then Baron Parke, a witness to character on behalf of the prisoner under trial for a highway robbery, was proposed to be asked;—"Whether he had not heard that the prisoner was suspected of having committed a robbery which had taken place some years before in the neighbourhood?" This was objected to as raising a collateral and specific issue; but the objection was overruled; for said his Lordship;—"The question is not whether the prisoner was guilty of that robbery, but whether he was suspected of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one."*

* R. vs. Wood, 5, Jurist, 225.
Witnesses whose names are endorsed on the indictment, not having been called on behalf of the prosecution,—and it is not compulsory on the prosecutor to call them,—are liable to be examined on behalf of the prisoner or at the desire of the Judge.

Any other persons, too, supposed to be possessed of information, may be called for at the direction of the Judge; subject to the usual liability to cross-examination by the prosecutor.

It has been questioned whether, in the event of the sudden death of the witness in the course of his cross-examination, and before its completion, the evidence already given might yet be received. In one Irish case it was held that it might; though with great division of opinion among the Judges. There has not that we are aware of been any later authority on the subject, and the reasoning of the Judges, who in the case in Ireland supported the reception of the testimony, has been cavilled at, and with much reason. It is true that the accident of death might deprive the party on whose side it was given of testimony which cross-examination might fail to shake. But then, on the other hand, until it had been put into the crucible, who could say whether the testimony were in fact genuine or not? and evidence can hardly be conceded to be proof, until tried by this test. The loss of the test may have been as great a loss to the one side, as that of the testimony itself to the other.

American law is in close proximity to English, and it has been held in America, "that the testimony would be inadmissible; at least that it would be so in a Court of Law, though in one of Equity it would be matter for the discretion of the Court, under the circumstances."*

In an early case indeed in the English Court of Chancery, the deposition was ordered to stand.† It may be doubted, however, whether this would be acted on at the present day; and at all events the

† Arundel vs. Arundel, 1, Chancery Report, 90.
decision could hardly be considered as a precedent for the Courts of India, where the depositions, even on the equity side of those of the Presidencies, are taken \textit{viva voce} at the hearing. In the English case, the practice at that time was to take the evidence previously to the hearing, before an officer of the Court, on interrogatories exhibited to the witness; and the examination-in-chief, which under ordinary circumstances would form materials for a cross-examination, not being known beforehand, the point became subject of less importance.

As a general principle \textit{Leading Questions} may be put on cross-examination; the objection which would apply to this on an examination-in-chief not ordinarily holding here. The function of a cross-examination is to \textit{sift} the previous testimony-in-chief; and the interrogation usually proceeds upon the basis that the sympathies of the witness under examination are in favor of the side originally producing him, and adverse to the one cross-examining; while the cross-examination takes place under the assumed disadvantage of being addressed to one reluctant to tell.

Perhaps the rule, and its principle, are nowhere better or more neatly put than by Mr. Phillipps, when he says;—

"Leading questions are admitted in the cross-examination of a witness, when much larger powers are given to Counsel than in the original examination. Witnesses under cross-examination may be led immediately to the point on which their answers are required. If they betray a zeal against the cross-examining party, or show an unwillingness to speak fairly and impartially, they may be questioned with minuteness as to particular facts, or even particular expressions. \textit{There can be no danger in leading too much, where the witness is obstinately determined not to follow.}"

Still the privilege must not be abused: the examination must not be made a mockery. It must not put the words into the mouth of the witness which he is to echo back again;—nor may it assume, as its basis, facts as proved which have not been proved;—or ascribe to the witness statements as made by him, which have not been uttered.

* Phillipps and Arnold, Vol. II., p. 472.
It is probably not very easy without illustration, to convey to a mind not versed in the experience of Courts, the precise meaning of the restrictive qualifications here noticed. As respects the 'echoing back of the words', the case which first furnished the expression will be the best example; and this was one of the State trials,—that of Hardy for high treason,—where the question being as to the proceedings of a political society of which Hardy, the prisoner, was a member, and the witness under examination having given a representation of its designs favourable to the prisoner, his Counsel was proceeding to follow this up, by suggesting particular expressions, and asking if they had not been used. Chief Justice Eyre thereupon reminded the Counsel, that he "could not put the very words into the witness's mouth;" and when the subject occurred again on the following day, Mr. Justice Buller observed—"You may lead a witness upon a cross-examination to bring him directly to the point as to the answer; but not go the length, as was attempted yesterday, of putting into the witness's mouth the very words which he is to echo back again."* In reference to the points of an assumption of facts not proved, or the ascribing to a witness statements not in reality made, a course of interrogation taken from an example of the French Courts, which will be found cited for another purpose in the Chapter on Confession, in the examples of the trials of the Duc de Praslin and of Madame Lemoine, though the interrogation of the Judge rather than of the Advocate, may be referred to as good practical illustrations of the matter.

Admitting, however, within due limits the ordinary admissibility under cross-examination of a leading course of interrogation, there are exceptions to the rule dictated by the necessity of providing against its perversion.

Thus it may happen that the witness under examination, instead of really being a hostile, is in truth a friendly one to the party cross-examining; notwithstanding the witness's original production on the opposing side. It may have been that

* 24, Howell's State Trials, 755.
he was put into the witness-box under some strong compulsion, and from an extreme necessity only of the case, such for example as the proof of a fact for which there was no other testimony—possibly to supply a mere formal one. Indeed, not only might his leaning be against the side of the party producing him, but he might be even a partisan of the very one cross-examining,—the opposite attorney for instance, that is to say, the very attorney on the cross-examining side. It is obvious that to allow, under such circumstances, a course of leading interrogation, would be to act in pointed opposition to the principle on which the rule allowing leading questions is founded; and be a perversion of the rule itself. It is well observed by Mr. Taylor;—

"The rule ought also to receive some further qualification when the witness is evidently hostile to the party calling him; for although it appears in one case to have been laid down, that leading questions may always be put on cross-examination, whether a witness be unwilling or not, some restriction should surely be imposed, where the witness betrays a vehement desire to serve the cross-examining party. It is no answer to say that the party who originally called the witness, has brought the evil on his own head, for a fraudulent witness might purposely conceal his bias in favor of one party; and thus induce the other to call him; or he might be an attesting witness or other person whom it was necessary to examine in order to establish some technical part of the case. To allow such a witness to have the most favorable answers suggested to him through the medium of leading questions, would be obviously unjust; and the more so in criminal cases, because there the prosecutor who originally called the witness would often have no opportunity of pointing out to the jury the unsatisfactory nature of his testimony. In accordance with these views, it has been determined in America that a Judge in his discretion may prohibit leading questions being put to an adversary's witness, who shows a strong interest or bias in favor of the cross-examining party, and needs only an intimation to say whatever is most favorable to his cause."*

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Mr. Taylor uses the expression 'vehement' as characterising the desire to serve the cross-examining party, and speaks of a 'betrayal' by the witness. If the expression be adopted advisedly, and in the common sense of the term 'vehement,' we should be even disposed to go beyond Mr. Taylor; and as the whole course of every examination is admitted to be to a considerable extent subject to the discretionary interference of the Judge, it is submitted that in all cases even of cross-examination, to secure a fair trial, and let the course of Justice run free, the latitude of the rule should be restricted, and assuredly so in the Courts of India.

It has been stated above, that the right to put leading questions on cross-examination extends to the examination of a witness originally produced by the cross-examining party, but called again by his opponent. This must, however, be taken subject to the qualification that it leads to no unfair result.

Whether a party re-producing as a witness of his own, one of his adversary previously cross-examined by himself, would have a right to treat this fresh examination as a cross one, for the purpose of putting leading questions to the witness, has been made a question, though the better opinion is that he would not. The very fact that the witness was placed in that situation by the act of the party himself, would be pretty strong presumption, that, at that period at all events, he was not to be considered as hostile.

Resorted to as a criterion to try the value of the testimony given on the original examination, it is scarcely possible to overstate the value of cross-examination.

"The power of cross-examination," says Professor Greenleaf, "has been justly said to be one of the principal, as it certainly is one of the most efficacious tests, which the law has devised for the discovery of truth. By means of it, the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudice, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which
he has used those means, his powers of discernment, memory, and description, are all fully investigated and ascertained, and submitted to the consideration of the jury before whom he has testified; and who have thus had an opportunity of observing his demeanor, and of determining the just weight and value of his testimony. It is not easy for a witness who is subjected to this test to impose on a Court or Jury; for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended."* "The fraud, therefore," (continues Mr. Starkie, who has engrafted the passage on his text,) "is open to detection for want of consistency between that which has been invented, and that which the witness must either represent according to the truth, for want of previous preparation, or misrepresent according to his own immediate invention. In the latter case, the imposition must obviously be very liable to detection; so difficult is it to invent extemporaneously, and with a rapidity equal to that with which a series of questions is proposed, in the face of a Court of Justice, and in the hearing of a listening and attentive multitude, a fiction consistent with itself and the other evidence in the cause."†

When it is added to the considerations suggested above, that the hand to which the working of this powerful engine is for the most part committed is that of the party interested to give it effect to the utmost, its force becomes even more obvious. No wonder if, under the operation of the process, the testimony given on examination-in-chief is daily seen to melt away like a "dissolving view."

On the other hand, where the witness is in fact speaking the truth, the effect of a cross-examination may be only to bring out the hostile facts even in a stronger light than they stood before. In pushing one line of examination, new grounds may be opened up, which, but for the imprudent question, would never have been brought to light; and the result may be, that, instead of damaging the cause of the opponent, it may be a discomfiture of one's own.

† Starkie on Evidence, p. 195.
The principles here explained received a very early Indian recognition. The Regulations of the Bengal and Madras Presidencies, pointed out in the preceding chapter on the subject of Leading Questions, went on to provide,—that with a view to bring forth information, and lead to a discovery of truth, the parties were to be allowed to cross-examine the witnesses; and the Judge or Magistrate was directed to cross-examine them, when necessary, for the same purpose. *

Where the object of the cross-examination is simply to displace the effect of the examination-in-chief, this, according to the circumstances, is accomplished by one of two classes of means,—the direct or indirect.

The direct are,—the showing either the inadequacy or the falsehood of the testimony; and this, as regards the former, by extracting from the witness a confession of the absence of the means of knowledge requisite to give value to his statements; as regards the latter, either the eliciting facts subversive of the testimony itself, or involving it in contradiction.

The indirect are,—the impeaching the personal credibility of the narrator; and this either by forcing from him statements the contradiction of which by other witnesses may destroy belief in himself,—or by wringing from him confessions prejudicial to his moral or his impartial character; and consequently, in the proportion of their extent, destructive of reliance on his veracity.

Of course all direct exposure of falsehood would be alike destructive of personal credibility; but though the direct means would involve the indirect, just as the major premise comprehends the minor, the operation of the indirect means would be one of tendency only.

Want of adequate means of knowledge needs but little commentary. Want of means of knowledge. In the case of a witness deposing in general terms to the existence of some broad fact, as for example, that A killed B, an obvious test of the value of the statement would be to

* Bengal Regulation IV. of 1797.—Madras ditto VII. of 1862.
ask the witness, How he became acquainted with the fact? Was he present? Or did he hear it only from another?

As respects subversion of the testimony itself, the facts to be elicited may range, more or less, under one of two characters, or partake more or less of the nature of each. They may be either subversive of the whole, by demonstrating the impossibility of the truthfulness of any part; or, being but partially inconsistent with the general narrative, they may be so in such important particulars, as to amount to the practical annihilation of its truth.

As regards contradiction, this too may exhibit one of two phases. It may be the direct inconstance of one part of the statement with another; as for instance, opposite representations of the same matter; or, it may be indirect, as by the statement of other facts inconsistent with those already deposed to.

A curious instance is referred to in books on Evidence* as an exposure of a case of entire fabrication by the proof of its physical impossibility. The case occurred in France; and is known as that of the Compte de Morangeis; and the question was, whether the Compte had received a large sum of money from one Veron? The sum was alleged to have been transported by the witness on foot to a given place, in different bags, in a certain number of journeys, and within a certain number of hours. The fabrication was shown by an elaborate calculation of times, distances, and quantities, establishing its physical impossibility.

In a modern case in the Supreme Court at Calcutta, involving a large amount of property, the circumstance that a particular individual, a Hindoo widow, was living at a given period, was sought to be established by the production of the family khatta books, showing payments to her for her maintenance; and the proof at first looked formidable. On a minute examination of the books in the course of the cross-examination, it turned out, however, that though insect bites established the age and

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* It will be found at length in the Law Magazine, No. 65, p. 34, and Mr. Best on Evidence, p. 495, and Norton on Evidence, p. 191.
general authenticity of the books, the insects had left off biting at the very pages containing the entries relied on for the proof, beginning again at their successors. This of course showed the interpolation, and the proof broke down.

To these examples of entire fabrication, we may add one of individual contradiction, which, if it partake of the quaintness of its author, Mr. Bentham, also exhibits his usual felicity of illustration.

"What," says the great Jurist, 'had you for supper?' To the merits of the cause the contents of the supper may be in themselves altogether irrelevant and indifferent. But if, speaking of a supper given on an important and recent occasion, six persons, all supposed to be present, give a different bill of fare; the contrariety affords evidence pretty satisfactory, though but of the circumstantial kind, that at least some of them were not there.†

The ordinary false case set up, however, is one having a foundation of truth, either broader or narrower, but with more or less superstructure of falsehood. As it has been gracefully said, "Truth is made the groundwork of the picture, and Fiction lends but light and shade."

It was forcibly observed by Lord Brougham in his celebrated speech on the trial of Queen Caroline before the house of Peers—"If an individual were to invent a story entirely,—if he were to form it completely of falsehoods, the result would be his inevitable detection; but if he build a structure of falsehood on the foundation of a little truth, he may raise a tale, which, with a good deal of drilling, may put an honest man's life, or an illustrious Princess's reputation, in jeopardy." And again—"The most effectual way, because the safest, of laying a plot, is not to swear too hard, is not to swear too much, or to come too directly to the point; but to lay the foundation in existing facts and real circumstances,—to knit

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† Sreenutty Jadomoney Dabee vs. Saroda Prosoo Mookerjee and ors. Boulnois' Report, vol. I, p. 120. The judgment turning on the legal point only is reported; the facts do not appear. The writer, however, chanced to be engaged as Counsel in the cause.

† 2, Judicial Evidence cited, Best 491.
the false with the true,—to interlace reality with fiction,—to build the fanciful fabric upon that which exists in nature, and to escape detection by taking most special care, as they have done here, never to have two witnesses to the same facts, and also to make the facts as moderate and as little offensive as possible."

The demolition of this structure of falsehood,—the unknitting of the false from the true,—it is the province of cross-examination to achieve. Mr. Starkie, adverting to the same principle, has furnished a somewhat curious illustration of it.

"No falsehoods," says he, "are so difficult to be detected as those which are mixed up with a great portion of truth; the greater the proportion which the true facts bear to the false ones, the less opportunity will there be to detect the false, by comparison with facts ascertained to be true. An ingenious mode of proving an alibi with consistency has long been known, and practised by roguish adepts. The intended witnesses meet, and pass the afternoon or evening together in convivial entertainment; when they are afterwards examined, they are all consistent as to the circumstances which attended their meeting, for so far they relate nothing more than the truth; they misrepresent nothing but the time when the transaction took place, which, but for the purpose of the alibi, is of course represented to be that of the robbery."

Still it is not to be overlooked, that, although the exposure of falsehood, in whatsoever originating, when ascribable to invention, has a necessary and direct tendency to cast discredit on any witness;—and this apart from that broader discomfiture of the testimony involved in an exposition of the falsity of the general tale itself;—yet the degree of discredit must always be dependent on the amount, nature, and apparent object of the invention; and it is not every inconsistency in a tale which necessarily proves its untruth. Indeed, as we have seen in a former chapter, even inconsistency itself, by negativing the fact of preconcert, may, under circumstances, be indicative rather of truth than of falsehood.

* Starkie on Evidence, p. 199.
Mr. Best addressing himself to this distinction has well observed;—

"The maxim *Falsus in uno falsus in omnibus,* may be pushed too far. It must not be supposed that all the untrue testimony given in courts of justice proceeds from an intention to mis-state or deceive. On the contrary, it most usually arises from interest or bias in favor of one party, which exercises on the minds of witnesses an influence of which they are unconscious, and leads them to give distorted accounts of the matters to which they depose. Again, some witnesses have a way of compounding with their consciences. They will not state positive falsehood, but will conceal the truth, or keep back a portion of it; while others, whose principles and whose testimony are sound in the main, will lie deliberately, when questioned on particular subjects, especially on some of a peculiar and delicate nature. The mode of extracting truth by cross-examination is, however, pretty much the same in all cases, namely, by questioning about matters which lie at a distance, and showing the falsehood of the testimony by comparing it with established facts."

India is certainly not an exception to the application of the doctrine thus, in its broader statement, propounded by Mr. Best; though the general untrustworthiness of Indian testimony may not be attributable so much to the causes suggested by him, as to a more wide-spread and more inherent perversity. We fear that the picture of Indian evidence drawn by the Privy Council on the hearing of the appeal in the great Vassareddy case† is but too faithful a likeness. The question in the case was one of Adoption; and in part as to the fact of an adoption having taken place; and what purported to be the instrument of adoption was produced, with an endorsement containing the opinion of the Pundits, and signed by twelve persons, represented as present. On this state of things the judgment of the Court thus avowed.—"These instruments are produced, and the facts tending to this conclusion are sworn to by a vast number of witnesses. There appears to us to be no objection to this testimony, beyond the observation,

* "False in one particular, therefore false in all".

† Rungama *vs.* Atchama, 4, Moore's Indian Appeal Cases, p. 1.
which may be made on all Hindoo testimony, that perjury and forgery are so extensively prevalent in India, that little reliance can be placed on it."

No one conversant with the Courts of India can dispute, that there it is the rarest of all possible things to witness a narrative of even general truthfulness, without some coloring embellishment; and the mercerious dress in which Truth is ordinarily disguised, but well nigh destroys the power of recognizing her own identity.

Some allowance, however, must be made for the habit, the failing, of a Nation; and we agree with Mr. Norton when he says, treading with ourselves on the footstep of Mr. Best;—"There is a maxim, *Falsus in uno falsus in omnibus*, false in one particular, false in all. We need hardly say that this is everywhere a somewhat dangerous maxim, but especially in India; for if a whole body of testimony were to be rejected because the witness was evidently speaking untruth in one or more particulars, it is to be feared that witnesses might be dispensed with; for in the great majority of cases, the evidence of a Native witness will be found tainted with falsehood. There is almost always a fringe or embroidery to a story, however true in the main. The falsehood should be considered in weighing the evidence; and it may be so glaring as utterly to destroy confidence in the witness altogether. But when there is reason to believe that the main part of the deposition is true, it should not be arbitrarily rejected because of a want of veracity on perhaps some very minor point."*

The difficulty of course always is to distinguish the "fringe or embroidery" from the fabric of the work; and the web is certainly for the most part difficult enough to disentangle.

Practically, this state of things often leaves the Indian Courts no other alternative than almost to reject the actual testimony, as well on the one side as the other, and decide according to the inherent probabilities of the case. In fact, Indian decision not unfrequently presents the somewhat singular anomaly, that it is not so much a decision upon evidence as one upon inference, almost *even conjecture*, even if judicial.

* Norton on Evidence, p. 193,
Of that species of cross-examination which addresses itself to the impeachment of the testimony-in-chief by the more direct means adverted to above, it is obvious, from its very nature, that it admits but little rule for its regulation, beyond that which would require a general course of relevancy and propriety necessarily applicable to all examination; though as regards relevancy, allusion has already been made to the latitude conceded to it.

In the case, however, of the indirect impeachment involved in attacking the personal credibility of the witness, apart from the impeachment of the testimony itself, rules have come to be passed, to confine the course of examination within certain defined limits. These are prescribed in part to restrict to reasonable bounds the judicial investigation invoked for each individual trial; and in part within due bounds, on the one hand to protect the witness from a wanton or improper attack on his personal character; and on the other to preclude a personal sensitiveness from interfering with the demands of public Justice.

One means of discredit has been glanced at above, that of seeking to elicit from the witness statements shown by other witnesses to be untrue; and thus, by a reflective process, operating to impeach his own veracity. This course of interrogation, however, must be confined to relevant matters, and it has become a prominent canon in the law of examination, that a witness cannot be cross-examined as to any distinct collateral fact for the purpose of afterwards by contradiction impeaching the veracity of the witness. To allow an examination of this nature would be to branch out a case into a series of indefinite issues; foreign to the one for trial between the parties; and leading perchance to infinite complication and prolixity.

Thus, in an early and leading case on the subject, an action was brought founded on certain laws against usury, and for the recovery of a penalty alleged under these laws to have been incurred by a contract entered into with the witness. The witness had deposed to a contract, the nature of which, according to his representation, exposed it to the
charge of usury, being, as he said, a contract on the footing of a loan, while the case of the defendant was, that the contract in question proceeded on that of partnership. It was proposed on cross-examination to ask the witness as to other contracts said to have been made on a partnership footing. This was with the object, if answered in the affirmative, of raising the inference that that was the character of the defendant's contract; or, if in the negative, of contradicting him by the testimony of other witnesses. The question was not allowed to be put, and on the ground of the irrelevancy of other contracts to the issue in the cause.* It will be observed that in this case the contradiction challenged was in relation to another contract, and a distinct subject-matter; and was so far accordingly treated as wholly irrelevant. So in a more modern and very leading case of Attorney General vs. Hitchcock,† where it was proposed to ask the witness whether he had not been offered a bribe to give his evidence, the question was also rejected upon the ground that as the mere offer of a bribe not followed up by acceptance would be no impeachment even of the testimony itself, the question of the offer was in itself irrelevant.

That case, however, though adopting relevancy as the broad test by which to try the admissibility of the interrogation, somewhat qualified the more general statement of the rule which, as laid down in Spenceley vs. DeWillott, would seem to confine the relevancy absolutely to the issue in the cause. In Attorney General vs. Hitchcock, such a course of interrogation was treated as allowable in any case in which it was resorted to as a test of the testimony of the witness on the subject of his deposition, provided only it was to found a case of contradiction on some prior portion of the witness's statement. Thus, it was observed by Pollock, C. B.—"My view has always been, that the test, whether the matter is collateral or not, is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence,—if it have such a connection with the issue,

* Spenceley vs. DeWillott, 7, East, 108.
† 1, Exchequer, 91.
that you would be allowed to give it in evidence,—then it is matter on which you may contradict him. Or it may be as well put, or perhaps better, in the language of my Brother Alderson this morning, that if you ask a witness whether he has not said so and so, and the matter he is supposed to have said would, if he had said it, contradict any other part of his testimony, then you may call that witness to prove that he had said so, in order that the jury may believe the account of the transaction which he gave to that other witness to be the truth, and that the statement he makes on oath in the witness-box is not true.” And again—“It must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness’s testimony; and if it is neither the one nor the other of these, it is collateral to, though in some sense it may be considered as connected with, the subject of enquiry. A distinction should be observed between those matters which may be given in evidence by way of contradiction, as directly affecting the story of the witness touching the issue before the jury, and those matters which affect the motives, temper, and character, of the witness, not with respect to his credit, but with reference to his feelings towards one party or the other.” Baron Alderson too lays it down to much the same effect, when he say,—“It seems to me that the rule must be thus laid down. A witness may be asked any question which, if answered, would qualify or contradict some previous part of that witness’s testimony, given on the trial of the issue; and if that question is so put to him, and answered, the opposite party may then contradict him: and for this simple reason, that the contradiction qualifies or contradicts the previous part of the witness’s testimony, and so removes it. It is true that the effect of the contradiction is somewhat beyond that, as tending to show that no part of the witness’s testimony can be relied on; but the effect would have been the same if the question had been answered in the affirmative. Now the question is this, can you ask a witness what he is supposed to have said on a previous occasion? You may ask him as to any fact material to the issue, and if he denies it, you may prove that fact, as you are at liberty to prove any fact material to his issue; and in that case, though it may not be thought necessary to put the question
previously to the witness, yet it would be just to do so. The witness may also be asked as to his state of equal mind or impartiality between the two contending parties, questions which would have a tendency to show that the whole of his statement is to be taken with a qualification, and that such a statement ought really to be laid out of the case for want of impartiality."

These passages, (which from their elucidation of the subject are transcribed at length,) if taken in their literal terms, and without the qualification of the consideration to which they were addressed, might possibly be taken as implying a sanction for any course of interrogation which might end in the contradiction of the witness. They must be read, however, in connection with the subject of adjudication in the cause; and we apprehend that what was intended to be conveyed by them simply was that though the contradiction sought to be elicited was not confined to a matter strictly forming part of the issue in the cause, still it must have a direct bearing on the testimony of the witness, as illustrative of its value either as affecting prior statements of the witness, or by drawing out the circumstances under which the testimony was given impeaching its impartiality. That this is so,—(at all events as respects the bearing on the testimony)—is pretty obvious from the illustration of Baron Alderson, when he says, in relation to the alleged offer in the case;—"In this case the party is asked—"Have you not said A, B offered you £20, to make a certain statement? which I agree is material in the cause. He says no. I have not said any such thing. Is that material to the issue? or does he qualify or contradict any thing he had said before? What he had said before was that the cistern was used; the offer of a bribe to make a statement to the contrary, if he had not accepted it, would not have a different tendency. If he had said that he had been offered a bribe, if he had answered in the affirmative, it would not in the slightest degree have disproved the matter. If it would not, it does not qualify or contradict that which he had before stated; and I think it is not allowable to call a witness to contradict him in that which, if answered by him in the affirmative, would not have qualified or contradicted his statement."
In a very modern case, one tried in England in the year 1858, an action had been brought for goods sold and delivered; and the question was, whether the sale was absolute, or subject to a condition? It was held clearly that it was not competent to the defendant to call witnesses to prove that the plaintiff had made contracts with other persons subject to the suggested condition, as being a collateral issue. The Judge, however, who tried the cause had allowed the plaintiff to be asked on cross-examination whether he had not made such conditional contract, with others,—with a view to testing his credit, or the accuracy of his memory. On the cause again, coming before the Court, on a motion for a new trial, the learned Judge himself recanted the original propriety of the question. 'I entirely agree' says he, 'with the view presented by my brother Willes [that on the main point—the objection of collateral matter] and I must say that it has rather inclined me to think that I was wrong in allowing the evidence even to the limited extent I did. I admitted it only for the purpose of pressing the memory of the witness, expressly ruling it to be inadmissible for the purpose of proving the substantive fact. As to this there could be no doubt whatever. It would manifestly lead to great inconvenience if the parties were to be allowed incidentally to investigate other transactions and dealings having no connection with the cause of action with respect to which they are at issue.'

Should questions thus put be inadvertently answered, evidence in contradiction cannot afterwards be adduced.

Apart from this reflective process of contradiction (to the extent to which it may be resorted to,) there are four general grounds on which the question of the power of impeachment of the personal credibility of the witness is ordinarily treated as arising.

1st. Want of moral character.

2nd. Partiality of the witness in favor of the side on which his testimony is given.

* Hollingham vs. Head, 4, Common Bench, p. 388.
3rd. Previous inconsistent statement, and

4th. A defect of memory as to parts of a transaction concurrently with an assumed accurate recollection of others.

The question in each is often one of some difficulty, both as to the mode by which the discredit is to be effected, and the limits within which the process is permitted.

And first as to want of character. And here it may be observed, that with a view to discrediting his testimony, a witness may be always asked on cross-examination questions having the object of impeaching his character, in reference to alleged crimes or other misconduct of his. To question, however, is one thing—to force an answer is another;—and to compel a party to an answer of self-crimination, could, according to the policy of English jurisprudence, be only justified by some extreme necessity.

In a former Chapter* there has been already pointed out the extent of the protection which the law awards to the witness from this course of examination; and we have seen that, while the English law protects him from all answer involving, whether directly or indirectly, a penal liability, that of India withdraws the privilege, wherever the examination fulfils the contradiction of relevancy to the issue; leaving, however, the matter in other cases to be dealt with according to English law; and a question aimed merely at discrediting would not be relevant, unless so constituted by the issue in the cause.

It remains accordingly here to add only on this point, that, according to the law both of England and of India, in the case of either a felony or misdemeanor, followed by conviction of the witness, where the question put is met by his denial of the fact, and, according to the English law, where it is met by even a refusal to answer, the conviction may be given in

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* Chapter V.
WANT OF CHARACTER.

Evidence;* and this would so far dispose of the question of credibility, or at least of the occasion for entering on it, where a conviction for either of these two crimes constituted the ground for impeaching the witness' credibility.

To what extent, under either English or Indian law, a witness is bound to answer questions addressed to general charges of misconduct, with their possible tendency to a degradation of character, is a point of some nicety, and hardly even as yet finally determined by decision.

If the matter of charge be relevant to the issue to be tried, there is, however, little, if any doubt, that the question must be answered, like any other one of relevancy, however disagreeable to the witness; and the obligation to answer would acquire strength if the matter were not only relevant but material to the issue. Indeed, the obligation would seem to be in the ratio of the materiality.

Tried, indeed, even by the question of relevancy, the testimony of a witness whose answer bespeaks his own degradation would appear likely to be of but little value, on whichever side of the issue it was ranged. Still, such as it might be, the purposes of justice might well be treated as outweighing the personal consideration; and, as it has been well observed—"It seems absurd to place the mere feeling of a profligate witness in competition with the substantial interests of the parties in the cause."†

If the answer be only required for its collateral effect of discrediting the testimony, by degrading the character of the witness, the point becomes one of more difficulty. On the one hand, all wanton infliction of individual pain is opposed to the spirit of British institutions; on the other, Justice has paramount demands of its own. The more prevailing opinion

* Evidence Act, Section 38, Common Law Procedure Act of 1854.
† Starkie on Evidence, p. 193.
awards the weight of reasoning to the latter consideration—the preponderance, over mere feeling, of a sanction for fidelity. The matter is well put by Mr. Starkie, when he says;—

"The great question, therefore, whether a witness is bound to answer a question to his own disgrace, has not yet undergone any direct and solemn decision, and appears to be still open for consideration. The truth or falsehood of testimony frequently cannot be ascertained by mere analysis of the evidence itself; the investigation requires collateral and extrinsic aids, the principal of which consists in a knowledge of the source or depository from which such testimony is derived: the whole question resolves itself into one of policy and convenience, that is, whether it would be a greater evil that an important test of truth should be sacrificed, or that, by subjecting witnesses to the operation of this test, their feelings should be wounded, and their attendance for the purposes of justice discouraged? The latter point seems to deserve the more serious consideration, since the mere offence to the private feelings of a witness who has misconducted himself cannot well be put in competition with the mischief which might otherwise result to the liberties and lives of others. No great injustice is done to any individual upon whose oath the property or person or security of others is to depend, in exhibiting him to the jury such as he is. As to the other consideration, it does not seem to be very clear that by permitting such examinations any serious evil would result; the law possesses ample means for compelling the attendance of witnesses, however unwilling they may be. The evil on this side of the question is at all events doubtful and contingent; on the other side it is plain and certain.

The principle on which such evidence is admissible is clear and obvious; the reason for excluding it is extrinsic and artificial, and, it may be added, but theoretical; for Courts are in the constant habit of permitting such questions to be put and answers to be given and received as evidence for the consideration of the jury."

* Starkie on Evidence, p. 211.
At the same time every course of discretive examination thus individually distressing, should be vigilantly watched by the Court to secure its legitimate purpose against perversion.

"For instance, as is justly observed by Mr. Taylor, all enquiries into discretitable transaction of a remote date might in general be rightly suppressed; for the interests of justice can seldom require that the errors of a man's life, long since repented of and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked."

As regards the question of date, the importance of the investigation would be likely to have a bearing in the ratio of approximation to the time of examination; and as regards the nature of the misconduct sought to be elicited by the enquiry, it may be suggested that this, to fulfil the condition of discretive, ought to portray a species and amount of moral prostration calculated to carry with it the banishment of truthfulness from the mind. A man hardly becomes a leper from a single spot. There are offences against society, offences against morals, which would not destroy the whole moral feeling, and might co-exist with veracity. It is obvious that, though Truth could not survive an entire wreck of Conscience, she might still subsist amidst some wandering from its dictates.

While withholding accordingly the protection claimed, when the effect would be to sacrifice substantial justice at the shrine of a fastidious delicacy, it might be quite right to prohibit a course of prying investigation, which would be only torture to the individual, without the justification of its advancing the cause of Truth.

† Taylor on Evidence, vol. II., p. 1137.
Where the purposes of Justice require the rejection of the claim for protection,—in India, at all events, abundant sanction would be found for it in the recent legislation, which compels an answer to these inquisitorial questions, notwithstanding the higher penalties to which their answer might expose the witness.

Whenever the question, too, of protection arises, a distinction has to be taken between a course of examination, point ed to elicit a case of obvious and direct degradation; and one of which degradation would be only its indirect, and possibly even remote tendency. A claim of protection for the latter would necessarily come with less force; and it is generally conceded that, at all events to any such feeling as this, substantial Justice could not be allowed to be sacrificed.

In any case of discreditive examination, were the witness either to deny the charge, or, where it was open to him to do so, to decline to answer, with the exception of the case in which resort might be had to the record of conviction, or if it were part of the issue, the party questioning must put up with the answer in the one case, be it what it may, and with the silence in the other. Contradictory, or supplying evidence cannot be gone into. Were it otherwise, it would be to pursue an issue not raised by the dispute between the parties themselves, and foreign to the pleadings; while, were the principle once admitted, the result might lead to the challenging a witness to every act of his life, for which of course he could not come prepared. At the same time it would be dragging the court into an enquiry, possibly almost interminable, since each distinct act of alleged misconduct would be a new field of investigation—a process not altogether unlike the cutting off the head of the ancient Hydra.

It was tersely put by Lord Wensleydale, then Baron Parke, in Attorney General vs. Hitchcock, referred to above* ;—

* 1, Exchequer, 94.
"There are two reasons why collateral questions, such as a witness having committed some particular crime, cannot be entered into at the trial. One is that it would lead to complicated issues and long enquiries without notice; and the other that a man cannot be expected to defend all the acts of his life." In the same case it was well also observed by Baron Alderson—"If you were allowed to try the collateral issue of the witness having committed some offence, you might call witnesses to prove that fact, and they again might likewise be cross-examined as to their own conduct; and so you might go on proving collateral issues without end, before you could come to the main one."

Lord Cranworth, then Baron Rolfe, another of the Judges in the case, thus puts the point of the impracticable consumption of time to which the process would lead:—"The laws of evidence as to what is receivable or not are founded on a compound consideration of what, abstractedly considered, is calculated to throw light on the subject in dispute, and of what is practicable. Perhaps, if we lived to the age of 1,000 years, instead of sixty or seventy, it might throw light on any subject that came into dispute, if all matters which could by possibility affect it were severally gone into, and enquiries carried on from month to month, as to the truth of every thing connected with it. I do not say how that would be; but such a course is found to be impossible at present; and the rule, therefore, which has been established is, that you may contradict any part of that testimony only which is given in support or contradiction of the matter in question between the parties."

The fact, however, that the contradiction in question had a relevancy otherwise in a case of relevancy to the issue in the cause, would of course open the door to the admission of evidence destructive of the contradiction itself; as in the event of silence, would be proof of the fact. Were it otherwise, the witness would have only to deny, or to hold his tongue, and the party would be excluded from testimony to support his own case.

The books abound in discussions as to the discrediting of witnesses on their own admissions on examination, whether in reference to criminal or more general misconduct;
and we have already set out legislative enactments on the subject. In truth, however, the matter is, perhaps, of less practical importance than it might at first sight appear. Under ordinary circumstances, while guilt, on the one hand, would be too prompt to shelter itself in silence, innocence, on the other, would be equally eager to vindicate itself by assertion; so that the refusal of a witness to answer criminating or discrediting questions, under the mere shelter of exposure to jeopardy or degradation of character, would be likely to leave but one impression on the mind. In strictness every fact ought to be determined on its evidence; but there is always a silent as well as a speaking testimony; and, whatever may be the theoretical propriety of the case, practically the one is often as influential on the mind as the other; nor are we altogether prepared to say, not rightly so.

An authoritative writer, Mr. Taylor, indeed suggests that a refusal to answer may not always be a confession of guilt; that it may arise less from a feeling of assent to the charge, than from indignation at its having been preferred, and by way of resentment at the insult.* No doubt this might be so; but personal observation of the witness and his demeanor would very easily enable a judgment to be formed as to whether the refusal to answer were the confession of guilt, or the ruffle of a wounded honor; and we must deal with these questions as practically they are found ordinarily to present themselves.

In none of the cases of discrediting, either by evidence of misconduct, or by the contradiction of his testimony, is the witness allowed to be taken by surprise in the proof. Before this can be given, a foundation must be laid, by the interrogation of the witness himself as to the facts relied on to constitute the ground of discredit, and the witness's denial.

In any case in which a witness is protected by law from answering questions of either a self-criminatory or discreditable character, it is competent to him, even though having commenced to answer, to stop short at any subsequent stage of the interrogation, and claim his privilege.

PARTIALITY.

Whether a witness may be discredited by a course of examination showing motives, interest, or conduct adverse to the side against which he is called, is a question on which the authorities are in some conflict. The prevailing opinion, however, is that he may.

Its solution might be different according to the form which it assumed; that is, whether the point were the rejection, on the ground of irrelevancy, of questions put to the witness to ascertain the fact of influence,—or the production, in the case of denial, of evidence in contradiction. The latter would probably be considered the one in which the objection would be the strongest, though even here it is apprehended, it ought not to prevail.

In Attorney General vs. Hitchcock the Court, as we have seen, intimated a strong opinion that not only might questions be asked tending to impeach the partiality of the witness, but the answers be contradicted by other testimony and it is impossible to dispute that the partiality of the witness is an important element in the value of his testimony. Disguise the fact as one may, nay, let an honest witness even struggle against the effect, constituted as the mind is with a liability to have all its perceptions influenced by the medium through which they pass, it is not possible to deny that motives or interest might, however imperceptible to himself, often give a very important colouring to the facts, even in the mind of the witness, to say nothing of their grosser influences against the cause of veracity.

"No doubt," observes Mr. Taylor, "it is an object of great importance to confine the attention of the Jury as much as possible to the specific issues; but it seems highly essential to the discovery of truth, that those who are to determine the respective value of conflicting testimony should be enabled to discriminate between the interested and disinterested witnesses; and no test of interest can be more sure than that which is afforded by the conduct of the witness himself. The argument that a witness cannot come prepared to defend himself against particular charges without notice, may be a very good reason why evidence that he has been
guilty of a specific crime, unconnected with the cause or parties, should not be adduced; because, even were such a fact proved, it would raise, in the absence of interest, only a very faint presumption that he had been guilty of perjury; but this argument should not be allowed to extend to a case where the charge, if true, would show that the witness either had a motive to swear falsely, or was not very scrupulous in the selection of means to attain his end. A charge too of this nature would almost of necessity apply to some act of recent date, and such as might be easily explained or rebutted by the witness, if it were made without foundation. Moreover, this, at the present day, would appear to be all the more necessary, as witnesses are no longer incompetent to testify on the ground of interest or crime.”

Wherever it is sought to impeach the impartiality of the witness by contradiction of his denial, it must be previously shown that the anticipated answer, and consequently the tendency of the question, would have been to prove a bias in his mind. Thus, as has been pointed out in Attorney General vs. Hitchcock, where the object was to establish that the evidence given had been purchased with a bribe, and the witness was interrogated as to whether he had not said that a bribe had been offered to him, and he had denied it, the denial was not allowed to be contradicted, because, however different the case might have been had the question been one as to a receipt of a bribe, its mere offer would involve nothing from which a bias could be legitimately inferred.

But independently of either question or denial, the want of veracity in the witness may be so far established by independent testimony, that his general reputation for untruthfulness among his neighbours may be shown by any party competent to speak to it; and of course one coming from the neighbourhood himself would be the party appearing the more natural to fulfil the condition of competence. The statement of that party, that from his knowledge of the reputation

he would not believe the witness on his oath, would be receivable as evidence to discredit. The required evidence is that which would go the length of establishing a general reputation for untruthfulness; as contradistinguished from a loose information of what certain others may have said, and it must be a reputation. Particular facts of untruthfulness could not be gone into.

The regular mode of examining into the character of the person in question, is to ask the witness—Whether he knows his general reputation among his neighbours? What that reputation is? and Whether from such knowledge he would believe him upon his oath?

We have seen, indeed, in a previous part of the chapter, a case,* in which the question being one of reputation, the witness was permitted to be asked, whether the individual in question were not suspected of a particular act of misconduct. The case, when examined critically, will be found not to militate against the proposition here stated. The question there was only in fact one of reputation, and of reputation suspicion was in itself part.

The opposite party is entitled to examine as to the grounds on which the belief of untruthfulness is founded.

Whether evidence of reputation is to be confined to the strict article of veracity, or may be extended to moral character generally, is a question not finally settled, though the leaning appears in favor of the latter; and logical conclusion would support it.

The reputation impeached may be re-established either by cross-examination of the witness attacking it,—the like impeachment by other testimony of the character for veracity of the impeaching witness,—or testimony in support of the reputation of the original witness.

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* R. vs. Wood.
How far this plan of recrimination may be carried is not yet determined. The more prevailing opinion is, that although a discrediting witness may himself be discredited by other witnesses, no further witnesses can be called to attack the character of these last.*

Let us turn now to the head of contradiction, involved in that of previous inconsistent statement.

A witness may be always interrogated on cross-examination as to the existence of statements made or acts done by him on some former occasion, inconsistent with qualifying or at variance with his present testimony. The object of course is to displace the trustworthiness of the witness, by the contradictions afforded by himself, or capable of being established aliunde against him. If he deny the contradictory matter, independent evidence may be given of it.

Before this can be done, however, by way of warning to the witness, his attention must be pointed to the occasion of the supposed contradiction, with all requisite allusion to time, place, and circumstance; and if in writing, the statements must be brought specifically to his notice. "This course of proceeding," says Mr. Phillipps, (though addressing himself more especially to verbal statements,) "is indispensable from a principle of justice due to the witness; for as the direct tendency of the evidence is to impeach his veracity by contrasting his present statement with that supposed to have been made by him to some other person, common justice requires, that before his credit is attacked, he should have an opportunity of declaring whether he ever made such statement to that person, and of explaining, in the re-examination, the nature and particulars of the conversation, under what circumstances it was made, from what motives, and with what design. The former account, given by him in conversation, may have been only partially heard, or misunderstood,

* And see Taylor on Evidence, vol. II., p. 1148.
or partly forgotten, or intentionally misrepresented; and where the variance between his present statement upon oath and the former statement as reported by a third person, may be as much owing to the mistake of the one witness as to the misrepresentation of the other, it will be necessary that the memory and credit of both witnesses should be fairly tried and contrasted."

It has been questioned, to what extent such contradictory evidence can be gone into, where the witness neither admits nor denies, but simply professes his forgetfulness of it. Baron Parke ruled the evidence to be admissible;† and was in the practice of receiving it; and for the very sensible reason given by him:—"If the rule were not so, you could never contradict a witness who said he did not remember." On the other hand, two other high authorities, Tindal, Chief Justice and Lord Abinger, Chief Baron, took a different view of the matter; and refused to admit the evidence. We agree with Mr. Phillipps when he says:—"However, the ruling of Baron Parke appears to be most sound, and fittest to be followed. It is true the proof of the statement imputed to the witness, which he says he does not remember to have made, is not admissible as a contradictory statement, for, until further enquiry be made, there is no apparent contradiction; but still, it seems, the evidence should be admitted, for the imputed statement, when proved, may be such as to amount to a direct contradiction of the witness, and may also possibly convince the jury that the witness did not speak truth in saying he did not remember making the statement. If the rule were otherwise, it might happen that, under the pretence of not remembering, a witness who has made a false statement, and who knows it to be false, would escape contradiction and exposure. If the ruling of Baron Parke is adopted, and the statement imputed to the witness should appear on inquiry to contradict his evidence in Court, it would evidently be proper to give

* Phillipps and Arnold, vol. II., p. 505.
† Crowley v.s. Page, 7, Carrington and Payne, 791.
him an opportunity, on re-examination, to make any explanation in his power as to the apparent contradiction."

The Common Law Procedure Act of 1854 † so far carried out this view of the case, that it enacts (Section 23) that—"if a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it." The Act provides only that before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

The Indian Act, while containing provision for cross-examination in reference to prior inconsistent statement, ‡ is silent on this particular point. It may be presumed, however, that though the English Act does not in terms apply to India, the Indian Courts, whether Supreme or Mofussil, would adopt a principle, not only so salutary in itself, but sanctioned by English legislation, and the authority on which that legislation was founded; and certainly it is important that it should, when it is remembered how completely the "non mi ricordo" (I don't remember) is the normal state of mind of every reluctant Native witness.

It was at one time a matter of considerable discussion in England, whether, in the instance in which the contradiction to be insisted on existed in writing, the writing itself required to be produced in order to found the questions to be put to the witness. It was considered on the one hand, that to allow the examination in the absence of the document, would not only contravene the rule which forbids all use of the contents of a written instrument so long as that instrument is itself producible, but that it might be to leave the Court to the partial contents only of the document, instead of

† 17 and 18, Victoria, c, 126.
‡ Section 34.
having the *whole* before it. On the other hand it was urged, that to put the document into the hands of the witness would at once acquaint him with its contents, and so defeat the object of the enquiry. The *latter principle has at length prevailed*; subject only to the qualification enjoining the production of the writing itself when this is ultimately to be used as the contradiction, and placing it at the control of the Judge; and this has been accomplished in England by a further enactment of the Common Law Procedure Act of 1854*; which, save that the English Statute is restricted to the Courts of civil judicature, is in the form, and has furnished the precedent for, the Indian enactment on the same subject.

The Indian Evidence Act provides (Section 34) that a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but it declares at the same time, that if it be intended to *contradict such witness by the writing*, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradiction. The Act contains a provision that—"*it shall be competent to the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit."

It will be observed that the Indian Act is not restrictive to the case of Civil proceedings. It would equally, accordingly, apply to Criminal ones.

The Indian Act, like the English, is silent as to the case in which the writing itself has been lost or destroyed, or is not otherwise forthcoming. It is apprehended, however, that in such a case the ordinary principle would apply, and secondary evidence become admissible; and this is the opinion entertained by English text writers in reference to the like clause in the English Act.†

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* Section 24.
† Taylor on Evidence, Vol. II., p. 1126.
Ordinarily speaking, the original document containing the contradiction, when in fact producible, is that which should in strictness be produced to the witness. In the instance, however, in which this is some record of Court, as for example an answer, deposition, or affidavit in some proceeding, and the removal of the record might be attended with practical inconvenience, it is presumed that the Court might in its discretion dispense with the original, upon production of the usual Office copy of the record.

Mere opinions given by the witness, on some former occasion would not form matter for contradicting his statement, unless the opinion were in itself a matter of evidence; as for instance in the case of opinion on handwriting,—a question of science,—or so forth, the witness being examined as an expert. Accordingly, a witness having been asked in cross-examination whether on a former occasion he had not expressed an opinion adverse to the merits of the side he was then supporting by his testimony, viz., "that the defendant had not a leg to stand upon," and having denied it, evidence in contradiction of the denial was refused.

Though inconsistency in statement is a necessary element of suspicion, and may amount to a total destruction of credibility, it is always, however, important in weighing its effect, to test the contradiction by its circumstances.

Now, one very frequent matter of contradiction on the trial of a cause, is the exhibition to the witness of some affidavit or answer of his; it may be in some other cause, or even in the cause itself: and of course an opposite statement in writing, and especially when made under the solemnity of an oath, is naturally startling. Yet the real test by which to try the value of the discrepancy even here is,—Was the former statement in fact that of the witness? or was it his only in form? And here we must

* See ibid p. 1127, where the same view is taken as regards the records of the English Courts.
† Elton v. Larkins, 5 Carrington and Payne, 385.
be allowed to quote the very pertinent observations of a late Master of the Rolls, Lord Langdale, on the point.

"I do not think," said his Lordship, 'that the veracity or even the accuracy of an ignorant and illiterate person is to be conclusively tested by comparing an affidavit, which he has made, with his testimony given upon an oral examination in open Court. We have too much experience of the great infirmity of affidavit evidence. When the witness is illiterate and ignorant, the language presented to the Court is not his: it is, and must be, the language of the person who prepares the affidavit: and it may be, and too often is, the expression of that person's erroneous inference as to the meaning of the language used by the witness himself; and however carefully the affidavit may be read over to the witness, he may not understand what is said in language so different from that which he is accustomed to use. Having expressed his meaning in his own language, and finding it translated by a person on whom he relies into language not his own, and which he does not perfectly understand, he is too apt to acquiesce; and testimony not intended by him is brought before the Court as his. Again, evidence taken on affidavit, being taken ex parte, is almost always incomplete and often inaccurate, sometimes from partial suggestions, and sometimes from the want of suggestions and inquiries, without the aid of which the witness may be unable to recall the connected collateral circumstances, necessary for the correction of the first suggestions of his memory, and for his accurate recollection of all that belongs to the subject. For these and other reasons, I do not think that discrepancies between the affidavit and the oral testimony of a witness are conclusive against the testimony of the witness."

Lord Langdale's observations address themselves more particularly to the case before him,—that of an illiterate witness,—and to the particular subject-matter of an affidavit. But the spirit of the observation would apply alike whomsoever the person, or whatever the subject-matter of contradiction, did it appear that the circumstances surrounding the

* Johnston vs. Todd, 5, Bravan, 600.
document would fairly relieve the case from the charge of intentional misinterpretation. It would especially apply to a case of possible misinterpretation, and consequently all cases where the language in which the statement was ultimately recorded was a foreign one to the witness himself, or different from that in which it was taken down,—an observation, it would seem, peculiarly applicable to India. The question would always be,—Did the witness, or did some one else dictate the statement as recorded and produced? and, whether the witness or any one else,—Did the witness in fact mentally adopt it?

Apart from the question of direct contradiction, it is obvious that in the instance of a witness speaking to any set of facts connected with a transaction, yet affecting forgetfulness of others, the value of his testimony would be open to be impaired on the ground of defective memory, did the record of the other facts connected with it, as to which he might profess forgetfulness, exist in any writing brought home to himself, and capable of being produced against him at the trial. Of course the impairing effect would be the greater, were the facts, the subject of deposition-in-chief, of a minute or detailed character, and of a date more remote than that of the writing. It has been shown above, that even as respects statements in writing desired to be used in direct contradiction, until obviated by specific legislative enactment, it was questionable whether the contradiction could be made available without the production of the document; and it is manifest that when this course of examination was required as a means of testing the memory of the witness, its whole object would have been defeated by the previous exhibition of the document to the witness. However, as in the case of direct contradiction, so in that of the indirect one, in which the effect of the examination would be to destroy the testimony by impeaching the memory, or the veracity, the embarrassment is now removed by the legislative enactment pointed out above; and both under the English Act and the Indian one, whether for the purpose of contradiction, or merely for that of testing the memory, the examination may proceed without production of the document.
itself; though subject of course to the condition, leaving that production to the control of the Judge.*

It should be added, that in the course of a trial when documents are produced to a witness while under cross-examination, without at that stage of the proceeding being made formal evidence in the cause, it occasionally becomes question how far the introduction of the document into the proceeding at all gives to the opposite side a right to inspection. The Courts of India would naturally be governed in this respect by those of England, and speaking of these Mr. Taylor states the practice thus:—

"The cases on this subject are somewhat conflicting; but the practice seems to be as follows:—If the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, or respecting the character of the handwriting, his adversary will have no right to see the document; but if the paper be used for the purpose of refreshing the memory of the witness, or if any questions be put respecting its contents, a sight of the document may then be demanded by the opposite counsel."

* Common Law Procedure Act, 1854 Sec. 24. Indian Evidence Act, Sec. 34.
CHAPTER IX.

On the Re-examination,—and Recalling of Witnesses,—and of Evidence Corroborative and in Reply.

When Cross-examination either involves the testimony of a witness in any apparent confusion or contradiction, or where it elicits new matter adverse to the side on which he was originally called, the witness may be again examined on behalf of the latter; for the purpose of clearing up what is confused, explaining or reconciling what is contradictory, and investigating what is new. This is called Re-examination.

The object in the former instance is to clear up the meaning of what, as the joint result of the Examination-in-chief and Cross-examination, is to be ascribed to the witness; and while it is sought to render his testimony intelligible, to rescue it from the depreciation of contradiction. In the latter it is to neutralize statements, of which further probing might remove the effect.

Thus, as an illustration of the latter—(the former sufficiently speaking for itself)—may be mentioned an action brought by a merchant against a shipowner;—where the issue was whether a cargo of the merchant loaded on deck had been improperly so loaded by the shipowner;—and the plaintiff's witnesses had deposed to the danger of such a mode of loading; but had admitted on cross-examination that the practice was a usual one in the trade, as respected Spring and Fall voyages*; they were allowed to be asked on re-examination—"Whether this were at the risk of the shipowner or of the merchant?"—Prima facie the evidence of usage would have been adverse to the case of the plaintiff; but this would have been neutralized, in its turn, by throwing the risk on the shipowner.†

* That is Spring and Autumn.
† Gould vs. Oliver, 2, Manning and Granger, 208.
As a general principle the interrogation on re-examination must be confined to matters arising on cross-examination. It must not enter upon an original field of enquiry; which, indeed, would have been the province of the examination-in-chief alone.

Occasionally, however, with a view of eliciting the truth, particular questions are allowed to be put under the sanction of the Judge; or the Judge may himself interpose them.

There are exceptions too to the rule restricting the re-examination to the cross-examination.

Thus were the witness on cross-examination to vary from the statements made on his examination-in-chief, the re-examination might go into new facts, for the purpose of showing that he had been betraying the party calling him.

If, the witness chance in his cross-examination to have been examined to facts irrelevant and not properly admissible in evidence, the opposite party may re-examine him on the evidence thus given.

Thus in an action for trespass in land G, to which a plea of prescription had been put in; and the plaintiff's witnesses were asked, in cross-examination, questions respecting the user in other places than G, which user, though in fact irrelevant, they proved; it was held that the plaintiff in re-examination might show an interruption in the user in such other places.*

A witness not being allowed on his cross-examination to obtrude irrelevant matter, should he do so, in fact, the re-examination might be addressed to these; save that the party cross-examining might prevent a re-examination, by a previous application to the Court to have the statement struck out from the deposition.

* Blewett v. Tregonning, 3, Adolphus and Ellis, 554.
In the instance in which the cross-examination has brought out former statements or expressions of the witness, not only where these are doubtful, may all such questions be put on re-examination as are necessary to draw forth an explanation of their sense, but the witness may be interrogated as to the motives or inducements under which they were made.

Thus, for example, were a witness, with a view to discrediting his testimony, asked on cross-examination as to vindictive expressions used by him, and to admit that he had used them, he might be asked in re-examination to explain the circumstances under which the expressions were used, or state the provocation.

Notwithstanding some former difference of opinion on the point, it has now been established that, in the case of conversations, the re-examination must be confined to the part of the conversation spoken to in the cross-examination, or bearing upon, and explanatory of it. Other parts of the conversation cannot be gone into. Were the remaining portion of what passed a matter of independent evidence, it should have been elicited on the examination-in-chief.

A witness may be recalled.

A witness may be Recalled with the leave of the Court, at any stage of the proceedings.

To supply an omission in the examination-in-chief this is ordinarily granted at any time before the case of the party desiring the recall is closed. After that, it is done only with reluctance; unless to supply some mere formal matter of proof accidentally omitted.

Indeed, for the purpose of supplying a formal proof, not only may a witness already examined be recalled, but a new witness may be produced; and even after the plaintiff has closed his case. Thus a witness has been allowed to be called to prove the dishonor of a note, without which proof the action must have failed:—Best, Chief Justice,
FORMER CORROBORATIVE STATEMENTS.

(by whom the case was tried,) observing,—"that he would always allow a party to adduce fresh evidence on points of this kind." In the same case he mentioned a conversation he had had with the then Chief Justice Abbott, afterwards Lord Tenterden, in which the Chief Justice had stated—"that although he would never allow a witness to be called back to get rid of any difficulty on the merits, or on any thing which went to the justice of the case, he always allowed it to be done to get rid of objections beside the justice."* So similar proof has been admitted when, after the close of his case, the Counsel stated that he had omitted to prove a fact in its proper place, because it was so plain that he supposed it could not be disputed.† The observation of Lord Tenterden, as quoted by C. J. Best, might, on a superficial perusal, be open to misconstruction, as implying a disregard of merits, while allowing for miscarriages of form. What, however, was meant was simply that, in an ordinary trial, a party having exhausted his evidence, and closed his case he should not expose his opponent, or expose the Court, to the inconveniences of a re-opening.

If, after the cross-examination of a witness, it transpire that he has made former statements inconsistent with his present testimony, he will be allowed to be recalled for further examination; to lay a foundation for impeachment, by producing witnesses in contradiction. Should he have left the Court, and not accordingly be producible, this course of contradiction could not be resorted to. The common convenience of the Court and of its suitors alike, requires that a limit be interposed to the indefinite protraction of any suit.

According to English law, though the effect of testimony may be displaced by proof of prior contradictory statement, it cannot be corroborated by proof of analogous representation by the witness of the same matter on some former occasion; and that

* Giles vs. Powell, 2, Carrington and Payne, 259.
† Cited Phillipps and Arnold, vol. II., p. 475.
even were his veracity attacked on the ground of a previous inconsistent account, for his mere declaration of a fact would not be evidence.

"His having given a contrary account," says Mr. Starkie, 'although not upon oath, necessarily impeaches either his veracity or his memory; but his having asserted the same thing does not in general carry his credibility further than, nor so far as, his oath."

Chief Baron Gilbert indeed was of opinion, that the party who called a witness against whom contradictory statements had been proved, might show that he affirmed the same thing before on other occasions, and that he was "still consistent with himself."

However, this is at variance with the more modern policy of English law.

Still there are exceptions even to this policy; as in the instance in which the testimony is impeached as being a fabrication of a modern date, and the evidence is resorted to for the purpose of showing that at some prior period, and before the ultimate effect of the statement could have been foreseen, the witness had given a like account. Thus in the instance of an injury done to an individual, his complaint at the time, and before any thing could have been devised in respect to it for his own personal advantage, would be admissible as evidence; as in the instance of an indictment for a rape or assault upon a wife would her contemporaneous complaint of the injury.

On the subject of corroborative statement, however, Indian law has according to Indian law admissible.

According to Indian law, a provision somewhat in advance (if it may be so termed) of English. The evidence Act, Section 31, admits in corroboration of the testimony of a witness, any former statement of the witness relating to the same fact, and made at or about the time when the fact took place; or before any authority legally competent to investigate it; with a provision in the case of depositions or statements made before a Court and so on, making certain certified copies evidence.

* Starkie on Evidence, 253.
† Gilbert on Evidence, 135.
Section 43, too, constitutes books proved to have been regularly kept in the course of business in any public office admissible as corroborative, though not as independent proof of the facts therein stated. Section 44 extends this to certain specified documents—viz., share certificates, bills of lading invoices, account sales and receipts on payment, deposit or delivery, provided they were given in the ordinary course of business.

We have seen in the preceding Chapter, that, in the instance of an impeached reputation, this may be restored by testimony in the nature of evidence in reply again setting it up.

With this exception, in the ordinary progress of a trial, the witnesses called on the affirmative side having been examined, cross-examined, and re-examined, and the like process having been gone through as regards the witnesses on the negative one, (subject to the right of address on the part of Counsel,) the case is closed as respects the testimony; and it only remains for the Court to pronounce its judgment. As a general principle, a party will not be permitted, in reply to the case set up by his adversary, to adduce evidence by way of contradiction to it, and only generally corroborative of his own, which might have been adduced in support of his own case in the first instance.

Thus in an action for use and occupation, the question was, whether a house had been let to the defendant, or her sister. A witness for the plaintiff had deposed that he had let the house on behalf of the plaintiff to the defendant. While the defendant's witnesses were under examination, the defendant came into Court, and was identified as the defendant by one of them. After the close of the defendant's case, the Counsel for the plaintiff proposed to recall his witness in reply, for the purpose of stating that now he had seen the defendant in Court, he was quite sure that it was she and not her sister who had taken the house; but Park, Justice, would not allow this to be done. "If the defendant's witnesses," his Lordship said, "had introduced any new matter, which it was material to contradict,
the witness might have been recalled for that purpose. But the question being, which of the two sisters had taken the house, and the plaintiff’s witness being called, and having sworn that it was the defendant, he could not be recalled to say the same thing again; otherwise, in cases of conflicting evidence, all the plaintiff’s witnesses would have to be re-examined in reply, for the purpose of contradicting the witnesses called for the defendant."* So, where the plaintiff sued as indorsee of a bill of exchange, and, on a traverse of the indorsement, relied in the first instance on a prima facie case, by merely giving evidence of the defendant’s handwriting. The defendant then proved that the plaintiff was too poor to have discounted the bill,—had denied all knowledge of it,—and had said that the action was not brought by his authority;—it was held, that the plaintiff in reply could not produce evidence to show that he had the means of discounting the bill, and had in fact done so; for the fresh evidence was merely confirmatory of the plaintiff’s case.†

Under certain circumstances, however, (and apart from the process of discrediting noticed in the preceding Chapter,) it is competent to the affirmative side, after the close of the case on the negative one, to call witnesses in displacement of the testimony given on part of the latter; and this is termed Evidence in Reply.

This may happen either when,—1st, from the form in which the issue for trial is presented to the Court, the case of the defendant as—sumes the shape of an affirmative one, requiring disproof in its turn; or—2ndly, new matter comes out on the defence, the proof of which could not have been anticipated on the part of the complainant.

Thus, as illustrative of the first, may be cited the case of an action of ejectment by an heir at law, where proof of the seisin and death of the ancestor and his own heirship being prima facie sufficient proof of his title, this was met on the part of

* Roe vs. Day, 7, Carrington and Payne, 705.
† Jacobs vs. Tarleton, 11, Queen’s Bench, 421.
‡ Doe vs. Gosley, 2, Moody and Robinson, 248.
the defendants, by proof of a will. Here the plaintiff was allowed in reply to give evidence of a subsequent will, devising the estates to himself. It will be observed that the second will set up a title different from that by heirship, on which the plaintiff in fact had originally rested his claim. But then it equally operating as a revocation of the former will, it thus demolished the case of the defendants, and the proof accordingly re-established the title of the heir.

As an illustration of the second case, may be mentioned an action for services, where a witness having been called by the defendant to prove conversations negating the right of action by showing a refusal on the part of the defendants to sanction the employment, witnesses were allowed to be called by the plaintiff in reply to negative the conversations.

In the case last cited, the evidence was allowed, notwithstanding the course of the examination had indicated the refusal as the line of defence; and justly so, for until the witnesses of the defendant had in fact appeared in assertion of the refusal, there would have been nothing actually to contradict.

Sometimes, indeed, the nature of the proceedings throws the burden of proof of the affirmative issue, on the side of the defendant, rather than of the plaintiff; or in a case of plurality of issues, these may be distributed, according to their nature, between both sides alike. In these cases the side sustaining the affirmative would be that of an ordinary plaintiff; and as a general principle, the privilege of giving evidence in reply would be restricted accordingly.

Indeed, in a case of distribution of issues, though the plaintiff may at his option, either go into his whole case in the first instance, or confine himself to the proof of the particular issues devolving on himself, reserving his right as regards the issues devolving on his adversary, to their disproof in the event of a prima facie case being established against

* Cope v. Thames Haven Dock Company, 2, Carrington and Kirwan, 758.
him; still, if he elect at all to enter into such negative evidence in the first instance, he must produce the whole of it. Evidence in reply would not be permitted.

In all questions touching the right to give evidence in reply, regard must be had to the circumstances of the individual case, and much latitude is left to the discretion of the Judge.

Upon all evidence adduced in reply, the Counsel of the opposite side has a right to comment; but to the evidence in reply his observations must be confined; though in connection of course with the general case.
CHAPTER X.

On Evidence Pre-constituted,—or Artificial.

Having investigated the general nature of evidence, and the media through, and the means by, which it is obtained, we arrive at the consideration of the quality of evidence itself; and of what species of proof is required, and what admissible, as evidence on a judicial trial.

According to English law, and in the main, when not interfering with the peculiar exemptions of Natives, that of the Supreme Courts of the Indian Presidencies, certain things, either by common law or statute, have assigned to them specific modes of proof; and under ordinary circumstances, can be proved by no other. For other things there is permitted either some conventional proof; or a knowledge ascribed to the Court as altogether substitutionary for evidence. All may be classed under the general head of Pre-constituted, or, as it is sometimes termed, Artificial evidence.

In the former class of cases, the particular evidence is required, on the principle that it is demanded to meet embarrassments to which a proof of less stringency might open a door. In the latter, the nature of the evidence is considered to carry within itself an adequate sanction for its trustworthiness.

The former class of evidence—that in which the court requires proof of a specific character—may be treated under two heads; one addressing itself rather to the nature or mode of proof;—the other to the quantum of evidence; and first as to the former.—
Without entering into details beyond the scheme of the work, it may, as a general rule, be stated, that a transfer inter vivos of immovable estate is required to be by deed; while, subject to an exception in case of a species of gift called donatio mortis causa, the bequest of property, whether moveable or immovable, taking effect only after the death of the donor, must be by a will. So ships, and, for the most part, shares in public Companies, can only be transferred under certain regulations involving formal documents of transfer. It should be observed, however, that, save in the instance of testamentary disposition, what is here spoken of is a transfer of the property itself, and of its legal ownership. In transactions inter vivos, there are cases, in which, though the legal ownership can only be passed by an instrument of the prescribed solemnity, the beneficial interest may be bound in equity by less formal means.

A ‘donatio mortis causa’ is a gift of chattels in anticipation of impending death, accompanied by actual delivery; and this may, under circumstances, supply the solemnity of a will.

A deed is an instrument of which the distinguishing characteristic is, that it is under the seal of the party.

A will requires no seal, but it must be executed under certain formalities prescribed by statute. These, as respects the English statute,† are, the signature, at the foot or end of the will, of the testator, or some person in his presence, by his direction; and the signature must be either made or acknowledged by the testator, in the presence of two or more witnesses, present at the same time; who must attest and subscribe the will in the testator’s presence. No form of attestation is necessary; though one is always a prudent precaution.

* This must be taken, subject to the qualification of not applying to the Natives of India, when it would be at variance with their own personal privileges or usages.

† 7, William 4, and 1, Victoria, c. 26.
The Indian Will's Act * (which does not apply to Natives) is in conformity with the English one; except that, though, like the English Act, it in terms requires the witnesses to subscribe the will, it does not in terms enjoin on them to attest. This, however, in result, constitutes no distinction; the subscription of the witness being in itself considered an attestation; and in a case in the Privy Council it was stated by Lord Brougham to make no difference in the construction.†

Under a statute of the reign of Charles II. ordinarily known by the name of the Statute of Frauds,‡ not applicable, however, in India to Natives, original trusts (though not resulting ones) of lands must be shown by a writing signed by the party creating the trust; and by the same statute, contracts for the sale of lands, and of goods in value above £ 10, where no earnest-money is paid, or part delivery had—agreements in consideration of marriage,—or any other not to be performed within twelve months, must be in writing;—as must promises by an executor to answer a debt of his testator out of his own estate;—or of any other person to answer for the debts or defaults of another. So, subject to some exception in matters of more daily occurrence, and where too strict adherence to the rule would work practical inconvenience, and subject also to a distinction between executed and executory ones, the contracts of Corporations must be under their common seal—"the hand and mouth of the Corporation" as it has been quaintly termed.

In like manner the proceedings in Courts of Justice are shown by the record, or its authenticated copy.

It will be observed that in all these cases the proof required is, in some form or other, a written one; and the principle on which this is based, is thus stated by the learned Civilian Domat§:

"The force of written proofs consists in this, that men have agreed to preserve by writing the recollection of things which are past, and

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* No. 25 of 1838, Section 7.
† Casement vs. Fulton, 5, Moore's Privy Council Reports, p. 137.
‡ 29, Charles II., c. 3.
§ Les Lois Civiles, part 1, liv. 3 tit. 6, s. 2.
the remembrance of which they desire established either as rules for their own guidance, or to have thereby a lasting proof of the truth of what is written. Thus contracts are written to preserve the remembrance of what the contracting parties have prescribed for themselves to do, and to make a fixed and immutable law as to the matters agreed on. So wills are written to establish the recollection of what the person who had the right of disposing of property has directed, and thereby make a rule for the guidance of his heirs and legatees. In like manner sentences, judgments, edicts, ordinances, and all things intended to confer title or take the place of law, are reduced to writing. 'The writing preserves unchangeably what was entrusted to it, and expresses the intention of the parties by their own testimony. So the fact of marriages, baptisms, and other similar matters, are inscribed in public registers, in order to have a public and perpetual depository of the truth of the acts so registered.'

The specialty of the proof but adapts itself to the peculiarity of the subject-matter; and the object is to conclude dispute by requiring the reduction of terms into writing, and affixing solemnities. Were other proof permitted to be substituted, the whole object of the precaution would be defeated.

An authority much older than Domat may be cited to show how, even in the ages of antiquity, mankind had resort to written evidences to record their transactions of business.

"And I bought' says Jeremiah,—(speaking of a period six hundred years before the Christian era)—'the field of Hanameel, my uncle's son, that was in Ananoth; and weighed him the money, even seventeen shekels of silver.

"And I subscribed the evidence, and sealed it, and took witnesses, and weighed him the money in the balances.

"So I took the evidence of the purchase, both that which was sealed, according to the law and custom, and that which was open.

"And I gave the evidence of the purchase, unto Barach, the son of Neriah, the son of Maasheiah, in the sight of Hanameel, my uncle's son, and in the presence of the witnesses that subscribed the book of the purchase, before all the Jews that sat in the Court of the Prison.
"And I charged Barach before them, saying, thus saith the Lord of Hosts, the God of Israel: take these evidences, the evidence of the purchase, both which is sealed, and this evidence which is open; and put them in an earthen vessel, &c."

Domat instances marriages, births, and the like as the subject of proof by registration; and, according to the practice of the Courts in England, the register, as it is usually the convenient, is the ordinary proof. It should be noticed, however, that the register is not an exclusive mode of proof. Marriage, birth, or death would be a very simple matter of fact; and might be proved by any of the means of proof of ordinary facts,—by witnesses (for example) present on the occasion.

Formal instruments in the nature of transfer of property, and many documents attested—ordinarily proof may be given aside than by witnesses.

others too, (even when this is not prescribed for their validity,) are for the most part executed under the attestation of one or more witnesses; and a requisition formerly prevailed, that if an instrument on production had such an attestation, one at least of the witnesses should be called to prove its execution. This was found to lead to practical inconvenience; and, as it was considered, without a corresponding occasion; and as respects England, the Common Law Procedure Act of 1854,† dispensed with the necessity. Upon the like principle Section 37 of the Indian Evidence Act provides that—"an attested document may be proved as if unattested, unless it be a document to the validity of which attestation is requisite."

The exception in the case requiring attestation to give it validity will be noticed, and this but adopts the principle of the English Act, which contains in substance the like exception. The requisition in question may either exist under statutory provision, or be created under some private dictation. As an instance of the former may be stated the provision

* Jeremiah, Chap. xxxii.
† 17 C., 18 Vict., C 125.
of the Will's Act referred to above, requiring the attestation of two
or more witnesses;—as one of the latter the case—(often arising
under family settlement)—in which the donor of a power prescribes for
its execution the attestation of some given number of witnesses: and
other examples might be added.

Even in the cases, however, in which the proof still continues to
be required, with one exception, it is not ne-
cessary to call all the witnesses who attest; one
only would suffice. The exception is the case of an issue directed out
of the Court of Chancery in England to try the validity of a will;
where the object is to establish it against the heir. There all the attes-
 witnesses producible, are required to be examined.

In the case in which proof by the attesting witness is required, so
inexorable has the rule been considered to be, that in England it has been refused to be dispensed with, even where the execution of the document is admitted by the party against whom it is sought to be established. Section 38, however, of the Indian Act, provides that the admission by a party to an attested instrument of its execution by himself, shall be, as against him, sufficient prima facie proof of such execution of it; though it be an instrument which is required by law to be attested.

But the rule itself is a general one only, and
subject to exception.

Thus if the witness be not in fact producible, as if he be dead,—
insane,—out of the jurisdiction,—incapable of
being found after diligent inquiry,—or be absent
from the trial in collusion with the opposite party;—in all these cases
the production will be dispensed with.

So if the document be in a condition from its antiquity, to prove
Document above 30 years old.

itself; as it is termed,—that is, if it be upwards of thirty years old, when the witnesses might be
presumed to be dead.
Again, production might be superseded by a solemn admission of the adverse party, made in reference to the cause; as where a party called upon by notice to admit the execution of an instrument, and, in order to avoid expense, agrees to do so, he cannot afterwards require the attesting witness to be examined: or as in a case where a party agreed to admit a warrant of attorney, to enable judgment to be entered upon it, the Court held that judgment might be entered up without an affidavit of the subscribing witness.†

Were the document in question in the possession of the adverse party who refused after notice to produce it, secondary evidence of the contents being let in by the non-production, the witness need not be called; and that albeit he were actually present in Court.

The like would prevail, did the adverse party, even when producing the deed, himself claim an interest under it, in the cause; the claim admitting the validity. But the interest must be in the subject-matter of the cause; and subsisting at the time of trial.

In the case of a Public Officer, bound to procure the execution of a document, were it tendered in evidence against him, and he be shown to have dealt with it as a document duly executed, this would supersede the occasion for proof of the execution. Thus in an action against a Sheriff for taking insufficient securities on a replevin bond, the attesting witness need not be called to prove the execution, if it can be shown that the Sheriff has assigned the bond.‡

In the cases in which the Legislature has for revenue or other purposes provided for documents of different characters to warrant the reception of the document in evidence, it must bear the

* Freeman vs. Steggal, 14, Queen’s Bench, 203.
† Laing vs. Kaine, 2, Bosanquet and Puller, 85.
‡ Plumer vs. Brisco, 11, Queen’s Bench, 46.
prescribed Stamp, or one of equal amount; though this would not apply to a document either lost, or in the possession of an adversary, refused after notice to be produced, and on which secondary evidence of contents had to be resorted to.

As regards India, the Civil Procedure Act (Section 130) in the case of documents appearing on production to bear an insufficient stamp, empowers the Court (that is the Court to which the Act itself applies,) to admit them, on payment into Court of the deficiency of the duty, and a penalty; though subject to a power of rejection on the part of the Court, should the object originally appear to have been to evade the Stamp Laws.

In the case of documents appearing on their production to have undergone alteration, as an ordinary rule the alteration has to be accounted for by, the party offering the instrument in evidence, the alteration raising a natural suspicion against its genuineness. Notice, however, of the alteration, in the attestation clause, would restore the credit of the document and supersede the occasion; and a party who had previously admitted the document for the purposes of the trial, would be estopped from taking the objection on its production. In the instance too of a deed, where the alteration was a simple interlineation, in the absence of anything appearing to the contrary, the law would presume the interlineation to have been contemporaneous with the execution; though it would be otherwise in the case of a bill or note, where it would presume nothing.

It may be questioned, however, whether, even as respects a deed, the principle would prevail in India, at all events, in the Courts of the Mofussil, and particularly as regards Native documents, where the same importance and effect are not attached to a document under seal, as by English law.

Material alteration in any written instrument would be fatal to its validity, whether made by a party or a stranger; provided it were subsequent to execution, and
without the privity of the party to be affected by it. But such would not be the result of a mere formal variation; as for instance, the correction of an obvious error; or the insertion of words either of operation, or which the law would supply; or the filling up of blanks, when the matter inserted was consistent with the original intention; unless (as respect blanks) in the case of deeds, the omission would have rendered the document a nullity.

It is necessary, however, here to distinguish between an invalidating of the document as against a party seeking to establish an interest under it, and the use of it as evidence for some collateral fact. A document bad for the former purpose, may be good for the latter. Speaking of an instrument in the case before him, Lord Abinger observed—"It may be void for the purpose of taking an interest under it; but nevertheless admissible to prove a collateral fact. No case has gone the length of saying that when a deed is altered and thereby vitiated, it ceases to be evidence."

Ancient documents or papers might naturally often be expected to be found in a mutilated or imperfect state. Their very antiquity would relieve the party producing them from the burthen of accounting for the mutilation; and that notwithstanding an appearance of its not having been accidental.

In the case in which a disputed right had received the adjudication of a Court, and where the judgment or decree unreversed would, in any future controversy on the same subject, conclude the right, as between the parties to the renewed litigation, the judgment would be the proper and the necessary, as it would be the natural evidence, to defeat the subsequent proceedings.

To what extent, however, a judgment in one suit may be set up in bar to another, is often a question of considerable nicety; and it may be desirable to state the leading principles guiding to its determination.

* Hutchins v. Scott, 2, Merson and Welsby, 806.
A judgment may be either that of some tribunal of the Country in which the fresh or renewed controversy arises, or that of some Foreign one. These may be classified under the two denominations of Home and Foreign judgments; and it will be convenient to treat of them under their separate heads. And first as to the former.

In a governing authority on the subject, the case of the Duchess of Kingston before the House of Lords, Chief Justice De Grey, in delivering to the House the opinion of the Judges, thus laid down the law on this subject:

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow, as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive between the same parties upon the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter coming incidentally in question in another court, between the same parties, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter, which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

In reference to the distinction taken by the Chief Justice between Courts of concurrent and Courts of exclusive jurisdiction, and the contrasted obligatory effect of the judgments of one Court on the proceedings of another, it should be explained that, according to the system of English jurisprudence, the ordinary judicial business of the Country is transacted in the general Courts of either Common Law or Equity; and subject to a distinction which assigns procedure in criminal cases to special Courts, and subject also to a qualification which, according to the

* 20, Howell's State Trials, 543.
nature of the remedy sought in civil cases, confines to each Court the matters more appropriately falling within its peculiar means of redress, all these Courts alike possess, in the main, a jurisdiction common to each and exercisable by all. On the other hand, there are particular Courts having a jurisdiction in matters exclusive to themselves, and not exercisable by the more general Courts of the country. As for example, the Court of Divorce and Matrimonial causes, where the object is the dissolution of a marriage or the like,—the Court of Admiralty, where what is sought is the condemnation of some prize ship taken in war,—and the Court of Exchequer, where the matter is breach of the revenue law, and the object, possibly, the forfeiture of contraband goods. The Courts of the former class would be Courts of concurrent, those of the latter, of exclusive jurisdiction.

In like manner, in India, in all matters falling within the common jurisdiction of both, the Supreme Courts and those of the Mofussil would have concurrent jurisdiction; while in those alone capable of being dealt with in either the Admiralty, or Ecclesiastical sides of the Supreme Courts, these Courts, in these their more isolated and separate branches, would be Courts of exclusive jurisdiction.

As regards Courts of concurrent jurisdiction, the subject-matter being common to the jurisdiction of all, but for the doctrine in question, a litigation raised in one Court might be directly raised over again in another; and hence it is, and to attain finality in litigation, that the judgment in one is held conclusive on the proceedings of another. Thus, let there be some civil right dependant upon the original validity of a deed, on the construction of its language. Now, according to the form which it assumed, this might be brought into contest in any ordinary Court; yet the judgment of that Court in which the litigation was had would directly bind all the rest in any renewed contest between the parties.

In the case, however, of the judgment of a Court of exclusive jurisdiction, it is incidentally only that the question of the effect of the judgment would arise in any other Court; for, being a Court of exclusion,
the direct litigation must be confined to itself. Still the subject of adjudication in the court of exclusive jurisdiction might come incidentally before another Court. As for example, let us suppose a case in any ordinary Court, in which the rights of the litigants might be dependant on a question of legitimacy, and this question of legitimacy be itself dependant upon one behind it, namely, the validity of a particular marriage. Now the validity of that very marriage might have been decided in the Court of exclusive jurisdiction, say for instance, in England, in a suit for Divorce in the Divorce Court; and if so, the sentence of that Court, either of nullity of the marriage or affirmance of it, would be received in the ordinary Court as conclusive on the question of legitimacy; because, though the legitimacy was the actual question in the latter, that of the marriage which lay behind it would already have been conclusively adjudicated upon in the Court of exclusive jurisdiction.

The exposition of the Chief Justice also points to another distinction which may require explanation, when he says that the judgment 'is a plea, a bar, or as evidence conclusive.' By this it is intended merely to point to the distinction between pleading a judgment, and setting it up by way of evidence; — and what is meant is that the judgment, if pleaded, would be a direct bar to the action itself; if not pleaded, its proof would be only matter of evidence to defeat the action. In the former case it would conclude absolutely on its own proof, and by way of estoppel. In the latter, however strong as a matter of evidence, it would be evidence only, and might be counteracted. In an early case, it was laid down that, if a party will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for they are to find the truth of the fact.

In treating a judgment as evidence, it is necessary to distinguish between facts involved in or conducive to the judgment, and the conclusion of the judgment itself. It

* Trevivan vs. Lawrence, 1, Salkeld, 276.
would be the latter alone for which, in any future proceeding, the judgment could be evidence; and that, whether as respected a series of facts, or any one fact in particular. A judgment indeed must be founded on either *proof* or *presumption*. But it might be founded on the latter, or it might rest on a *compound of both*; and whether in a case of fact simply, or one of a combination of both fact and presumption, who, in any subsequent litigation, is to measure the weight ascribed by the Court in the former one to its separate facts or circumstances? to what extent it admitted any one or more of them as *proved*? and who is to tell whether the judgment itself might not even have been arrived at on *presumption* only, and apart from any *proved* facts at all?

The judgment would be evidence, however, and the proper one, of the *contest*, its *nature*, and its *decision*; and the proof of the judgment would suffice for whatever might properly flow out of this. Thus for example, a judgment in *assumpsit* against three defendants as partners is, for the purpose of establishing the liability of each to the other, evidence for one against the other in an action for contribution; and the record of a conviction for felony is admissible against an accessory, as evidence of the fact of conviction, though not of guilt.

A further distinction is pointed out by the rule propounded in the case of the Duchess of Kingston, that the judgment was not to be taken as evidence of any matter 'merely collateral' in question, or 'incidentally cognizable,' or 'to be inferred by argument from the judgment.'

The principle is to limit the effect of the judgment to its *natural* and *intentional* results; not to allow it the operation of an adjudication on that which, though *inducing* to the judgment, was not in fact matter of either *question* or *adjudication in the cause*.

Accordingly, in an early case, known by the name of Blackam's case,* Letters of Administration had been granted to a party on the theory of one Jane Blackam having died *unmarried*, which was afterwards

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* 1, Salkeld, 290.
disputed. The Letters of Administration were thereupon set up as concluding the dispute, since, having been granted on the assumption that there was no such marriage, it was contended that the grant was in itself a negation of the marriage. But the plea was not allowed to prevail; Lord Holt, Chief Justice, saying—"that a matter which had been directly determined by the sentence of a proper Court could not be gainsayed; but that was to be intended only on the point directly tried; otherwise it is if a collateral matter be collected or inferred from the sentence; as in this case, because the administration is granted to the defendant's wife, they infer that the plaintiff was not the intestate's husband, as he could not have been taken to be, if the point there tried had been married or unmarried, and their sentence had been not married." It will be observed that the grant of Administration simply assumed it as a fact that Jane Blackam had died an unmarried woman; and it was on that assumption, the grant issued. The result would have been the other way had the fact of marriage or no marriage been contested and decided. Accordingly, in a modern case of Barrs vs. Jackson, where the right to Administration depended on the status of a party as next of kin, and this status having been contested, was ultimately decided in his favor, and Administration granted to him on the faith of the decision, that decision, in another court, and in a different suit, namely, one for distribution, was held conclusive as to the title of the party as next of kin.

To give conclusiveness to any judgment as a bar to other proceedings, it would, however, be an obvious condition, that it should have been an actual, and not a mere nominal or formal, proceeding. Consequently, it has been held that a judgment in one proceeding to be conclusive on another, must have been pronounced upon merits and as a determination upon them; and by 'merits' is intended the substantial issue between the parties and its proof; and by 'determination,' a formal hearing of the case, and decision upon it. Suppose therefore a judgment founded on some preliminary or technical objection, as for instance, one on a plea in abatement,—on default or

* Barrs vs. Jackson, 1, Phillips' Reports, 582.
for defect of pleadings,—or misconception of the form of action,—or by way of nonsuit,—or on dismissal in the case of a suit without hearing;—in none of these cases, or the like, would the judgment or decree be capable of being set up in bar.

Provided the matter in dispute be the same, it is immaterial whether the *marshalling of the parties* in the second proceeding were the same as in the first; that is to say, whether marshalled respectively as plaintiffs and defendants in a corresponding position in both.

They must have been parties, however, in the *same right*. Therefore, one afterwards becoming *executor* would not be bound by a judgment in a suit in which he appeared as *administrator*; nor would an heir claiming exparte *paterna*, be afterwards estopped from suing exparte *materna*.

Under the term *parties* are necessarily included all named in the *record*; though the *next friend* of an infant would not be a party within the rule.

In the peculiarity, however, of the form of the action of *Ejectment*, as still retained in the Supreme Courts of India, the lessor of the plaintiff would be treated as a party, since he would have been the substantial and the actual litigant. Thus, though the shape of the action would have been that of Doe on the demise of A against B, in which Doe would be the nominal Plaintiff, A being the real Plaintiff, he would be bound by a verdict for the Defendant. The Common Law Procedure Act of 1852 has, however, as respects England, changed the old form of the writ by converting the nominal into the real plaintiff.

Whether, where the parties on the *record* were not those *substantially interested*, the estoppel would include all in whose immediate and individual behalf the action had been brought or defended, appears open to some doubt, and there is no conclusive authority upon it. Mr. Taylor's view appears the correct one, when he says;—"It would certainly be convenient and reasonable if the rule, in conformity with that which governs admissions, were extended to all persons who were *substantially* parties to the former action. Indeed, it is highly probable,
notwithstanding the absence of direct authority, that the courts would now determine in favor of such extension; and the more so as, as beyond all doubt, the rule applies to every person who claims under the original parties, or in privity with them.*

In the converse case, in which, though the interest might be the same as respected the question for determination, the contest proceeded in fact between two parties alone, and under circumstances precluding a third from making himself party to it, the third would not be bound by the issue, notwithstanding the sameness of the interest. Thus were one devisee to bring ejectment against an heir, and the heir to defeat the action by disproof of the will, the heir could not insist on the judgment in bar to a subsequent action at the instance of another devisee; notwithstanding the disproof of the will would have been disproof of the title of both. So, were one to bring several ejectments against several persons, though founded on the same common title, a verdict obtained against one could not be set up as against another. No man could be bound to leave the defence of his own case to the chance of another's defence of his; nor could one be held to proceedings to which he had no means of making himself party.

It has been stated that all persons claiming through the original litigation, or rather the parties to it, would be bound. This class of persons is ordinarily referred to under the head 'Privies.' In a subsequent part of the work under the head of Estoppel, we enter on this; and we defer to that the further discussion as to who would be Privies within the meaning of this doctrine.

In any controversy between Strangers, or as against any one not party to the original litigation, or claiming through one who was, the judgment (except as to the particular class of judgment called 'in rem,' to which we are about to advert,) would be inoperative, both as respects the matter of fact and decision. Indeed, unless under the coercion of some paramount necessity, it would be contrary to all propriety that, save when represented by some

former litigant, any one should be bound by a proceeding to which he was no party.

'It is true,' says the Chief Justice in the Duchess of Kingston's case,' as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous. Hence the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding a fact, and the judgment of the court on facts found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers.'

This applies to the question of making the judgment evidence against a person not party to a former suit. On the converse case of making it evidence for a stranger, the principle is well put by Mr. Phillipps as follows:—"And the reason why the verdict would not be evidence for a stranger, even against a party who was engaged in the former suit, seems to be, because, if he had been party to that suit, instead of the person who gained the verdict, the result might have been different; for as the parties would in that case have been constituted differently, the evidence might have varied; part of the evidence might then have appeared inadmissible, or of a doubtful character, or perhaps other evidence might have been produced by the party who lost the verdict. Under such circumstances, to admit a verdict as evidence, would be giving a party indirectly the benefit of testimony, which he might be precluded from using directly in his own suit. But this reason, it is evident, only applies where the verdict is offered in evidence by a third person against the party who failed in the former action, and not where it is produced against the party who succeeded.'*

Even if this carried that the judgment could not be made available at the instance of a stranger, even as against the party whose right it had concluded, since the one seeking to set it up being himself a stranger to the

proceedings, he would not have been bound by them; and the want of mutual obligation would prevent its being turned against the other. "No body," says Chief Baron Gilbert, "can take benefit by a verdict who had not been prejudiced by it had it gone contrary."

In questions of Public Right, such for instance as those affecting the general inhabitancy of any particular neighbourhood, —rights of common—boundaries—tolls—ferries, liabilities to repair of sea walls, tanks, ghauts, and so forth—the public of one day would stand on the same footing as the public of another. Judgments on such questions would, accordingly, on the point of conclusion, stand on the footing of private ones. Indeed, these have sometimes been put under the classification of judgments 'in rem.'

As regards India,—at least the Civil Courts of the Mofussil,—the Civil Procedure Act adopts the analogy of English law in the matter of Judgments; enacting that these Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim.†

But Judgments, whether Home or Foreign, have been divided into two classes,—Judgments in Personam, that is, operating on the person—and Judgments in Rem, that is, operative on the thing. It has been pointed out by Mr. Smith, however, in his Treatise on Leading Cases,‡ that the former ought rather to be called a judgment inter partes, that is, between parties, meaning the parties to the litigation, since "an adjudication upon the status [or position] of a particular person is as much entitled to the conclusive effect of a judgment in rem as an adjudication on the status of a particular individual thing."

* Gilbert on Evidence, p. 28.
† Act VIII. of 1859, chap. I., sec. 2.
A Judgment, whether termed 'in personam' or 'inter partes,' is the ordinary judgment in a suit between individuals. It is so called, as distinguished from one in rem, because, having decided the respective rights of the parties in relation to the matter of dispute, it stops there, and dealing only with the parties, rather than being operative on the subject-matter of dispute, it is so far accordingly personal only. A judgment in rem, however, goes beyond this. It deals with the subject itself; as for example in a suit to avoid the marriage, it sets the marriage aside; in one of condemnation of prize, it condemns the very ship; in a case of contraband, it declares the goods forfeited.

It is not very easy to give a definition of a Judgment in rem. Its operation is upon the thing, rather than upon any independent rights between parties; and hence it would appear to derive its title. Perhaps the best definition is that of the author of the Leading Cases, when he says;—

"A judgment in rem I conceive to be an adjudication pronounced (as its name indeed imports) upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose. Such an adjudication being a most solemn declaration from the proper accredited quarter that the status of the thing adjudicated upon is as declared, precludes all persons from saying that the status of the thing adjudicated upon, was not as declared by the adjudication."*

Thus, were it a question of marriage or of adoption, the validity or invalidity of the marriage or of the adoption would be what is called its status;—were it one touching a ship seized in war, the question whether it were liable to be condemned from its belligerent character, would be that of its status, prize or no prize;—were it that of goods seized as contraband, the declaration of forfeiture would be the decision on the status.

Still even Mr. Smith's definition (as pointed out by Mr. Taylor,)† must be taken with some qualification, as it would include such matters as convictions on criminal prosecutions, adjudications on bankruptcy and insolvency, inquisitions in lunacy, and inquisitions post mortem,

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† Taylor on Evidence, vol. II., p. 1291.
which would not be governed by the same rules. With this qualifica-
tion, however, it seems sufficiently accurate.

It is obvious, from the very nature of the thing, that such a judg-
ment must be final, in other words conclusive on the world in general. Were it otherwise, the
embarrassing inconvenience might arise of conflicting decisions in varying
Courts on the same identical subject; and it would be idle to give
peculiar and direct jurisdiction to one Court, were its decisions liable to
be thwarted, and indirectly set aside by the conclusions of another.

The practical view of the subject is thus well put by Mr. Norton;—

"Certain classes of judgments are, however, conclusive upon all the world: this from necessity, and also from regard to general convenience. Such for instance are judgments in rem; judgments declaring personal status or condition, as judgments of Bastardy, Adultery, and in this country, of Adoption. For the absurdity of holding that A was at one and the same time a bastard, and not a bastard, adopted and not adopted, is manifest. If therefore this status has once been established in a regular judicial trial between A and B, to permit C, or all the world to re-try that question, on which perhaps a different decision might be come to, would be to declare that as against B, A is adopted, and against C, that he is not, and this at one and the same time. Of course if the judgment between A and B has been fraudulent or collusive, its validity may subsequently be questioned in another suit on that ground, for fraud avoids the most solemn transactions. Where, however, no such imputation can be cast upon the original judgment, it stands good against the world."†

No judgment, whether in rem or in personam, in any civil case, is
available in a criminal one; nor with one exception, (if indeed it ought properly to be termed one) would the judgment in any criminal case be binding in a civil or any other criminal one—that is to say, as respects

* India.
† Norton on Evidence, p. 40.
both, for any thing beyond proof of the fact of adjudication, and of its legal consequences. The exception is that in which the accused, on being arraigned of the crime, pleads guilty to it. There the confession would be evidence; for it would not rest on testimony which might be impeached, but on the acknowledgment of the party himself under the solemnity of a plea on his arraignment, and it might be treated accordingly as an admission past all power of being controverted. Indeed such an acknowledgment ought more properly perhaps to be referred to the head of admission, than that of judgment. This would be even more pointedly so as respects the Courts of the Mofussil in India, Regulation law prohibiting an acting even on the plea of guilty without corroborative proof. In a civil case the issue is always between parties, that is to say (except in the instance of Corporations or Companies suing or defending by their public Officers,) individuals, and the question the breach of some civil right. In a criminal one, the prosecution is that of the Crown, and in respect of a criminal offence. This distinctive nature of the two procedures will sufficiently indicate the propriety of the principle; and it is obvious that, whether it were sought to set up the verdict or conviction in the criminal proceeding in the civil one, or the judgment in the civil one in the criminal, it would be to set up that, in reference to which neither the individual in the one case, nor the Crown in the other, would have had the opportunity of controverting the testimony which formed its basis. Moreover, there would be the want of that mutuality which is required as one of the elements of conclusiveness.

In noticing, however, the rule which excludes the judgment in a criminal case from being set up in a civil one, it is necessary, to avoid misapprehension, to advert to a case which, though not an actual, might unexplain ed be taken as an apparent, infraction of the rule. No person acting in a judicial or magisterial office, in what falls within his jurisdiction, is liable to civil proceedings at the instance of the party against whom his authority is exercised, for what is done by him in the
exercise of his office. Consequently for example, in an action against a Magistrate for false imprisonment, the conviction might be itself set up as a bar to the action, much in the same way as if the conviction had been a judgment against the party preferring his complaint. In truth it would be a species of judgment in rem. Did not this protection exist, no Judge or Magistrate would be safe in the exercise of his official functions.

It only remains to be added in reference to either class of judgments, that, whether judgments in personam or judgments in rem, they are all alike impeachable either on the ground of fraud, or the want of competent jurisdiction in the Court which pronounced them.

Let us pass on to the consideration of foreign judgments; and here it may be observed that a judgment of the English Court would be a foreign one to India, as would an Indian judgment be foreign to England.

Foreign judgments are susceptible of the same general classification into judgments in personam and judgments in rem as Home ones; and, when once established to be binding, the effect of the former is in general coincidence with that of the latter, both as respects the rights on which, and the parties on whom, they operate; and with the corresponding distinction of application as between those in personam and those in rem.

It should be observed, however, with respect to judgments in rem, that although in such matters as condemnation of prizes, sentences concerning marriage or divorce, and the like, (when not open to be impeached on some of the general grounds of impeachment to which all foreign judgments are liable,) the judgment would be binding on all Courts whether domestic or foreign; yet there are Foreign judgments or proceedings in the nature of judgments, which according to English law are regarded as local in their character, and not conclusive accordingly, beyond the Country in which they were pronounced. Thus, in the case of the guardianship
of an infant, the appointment of a guardian in a Foreign Country would confer no legal right in the property of the ward in England, whether real or personal, or of representation to it. So the decisions of Foreign Courts of Bankruptcy and Insolvency, though conclusive in respect to contracts made or to be performed in the Foreign State, would not be binding in England on those made or to be performed elsewhere. And again in the case of suits by persons claiming to be executors or administrators of a deceased, the Foreign Probate or grant of Administration would not be held to clothe the parties with a legal right of suit. To obtain this, Probate or *Letters of Administration, as the case might be, would have to be granted in England. The same principles it is apprehended would apply to India.

Considerable discussion has arisen as to the extent to which the judgments of a Foreign Tribunal are liable to examination and controversy in the Home one; though the question has arisen more particularly on the class of judgments termed *in personam*.

So far as we are aware, the most modern authority on the subject is a judgment of the present Master of the Rolls in January 1857,* in which that learned Judge thus puts, and it may be said *exhausts*, the general question:—

"The first point raises the much-litigated question of the effect in this country of a Foreign judgment,—whether it must be treated in this Court as conclusive between the parties, or whether the Court is bound to examine it;—and if so, to what extent it will ascertain the correctness of the decision.

"The plaintiff declines to enter into any question respecting the correctness of the judgment, insisting that the judgment is not examinable by an English Court, but that it is and must be treated as conclusive here. This is a question of considerable importance, which has been the subject of grave discussion and consideration in our Courts, and one as to which I was desirous of considering the authorities before I pronounced my decision upon it.

* Reimers v. Druce, 23, Beavan, 145.
"The authorities are numerous, and, to a considerable extent, conflicting. The examination may, however, be very much curtailed, by examining those only which have reference first to judgments in personam, inasmuch as a new principle is introduced in the cases of judgments in rem, whether wholly so, or partly in rem and partly in personam; but this is the case of a judgment exclusively in personam, and therefore to be governed by the class of cases which relates to such judgments. There is also one observation which lies at the root of the question, and which is applicable to all classes of judgments, namely, that the judgment must be examined to some extent to see what it professes to decide, and also its authority to decide the question which it professes to decide. It is therefore clear, that for some purposes, a foreign judgment can be examinable to some extent, before it can be held to be conclusive. So that the question is, to what extent a Foreign judgment is examinable, and to what extent it is conclusive in the Courts here.

"In the numerous authorities that bear on this subject, a distinction is also taken between the cases where the Foreign judgment is brought before the cognizance of an English Court, upon an application by the successful party to enforce and obtain the fruits of it against the defendant, and those cases where the defendant himself sets up the Foreign judgment, as a bar to the proceedings instituted by the person who has failed against the same defendant, with reference to the same subject-matter. Lord Chief Justice Eyre in Phillips and Hunter, considered that distinction to rest upon this principle:—that as, in the former case, the judgment is submitted voluntarily to the Court, the question arises, whether it is sufficient as a consideration to raise a promise, and that, thereupon, it must be examined as all other considerations for promises are examined, and that evidence of the Foreign law is admissible to show that the judgment was or was not warranted; but that it is otherwise in the case of a defence; that the party living abroad is not entitled to sue the successful defendant again in another country, for the same subject-matter, but that the protection of a Foreign judgment is complete everywhere, as well as in the place where it was pronounced. This distinction has certainly not been carried out to the extent laid down by Lord Chief Justice Eyre: still it is a distinction
which has so much authority to support it, that it must be regarded at
least, to some extent, in considering the value of a Foreign judgment
here; and it must not be lost sight of, in the present case, that this is
the instance of a party seeking to enforce, in this country, a judgment
obtained abroad.

"According to my impression of the law, when the question was
argued before me, I thought that a Foreign judgment sought to be
enforced in this Country was examinable for the following purposes,
and for those only, namely, 1st.—For the purpose of showing that the
defendant abroad had no notice of the suit, and never knew of it until
after judgment given. 2ndly.—That it was obtained by fraud. 3rdly.—
That the Court which pronounced the judgment had no jurisdiction.
4thly.—That there was error on the face of the judgment; by which I
mean error sufficient to show that the Court had come to an erroneous
conclusion, either of law or fact. Lastly.—That it was contrary to the
law which it professed to administer, but which, with reference to the
merits of the case, the facts and other matters, was absolutely con-
clusive between the parties, both as to the points raised and the facts
which it professed to decide." And then after examining certain of the
authorities so far as regards the general law of the case, His Honor
winds up his judgment thus:—"Upon the whole, having regard to the
decisions of the Queen's Bench, in Pollard vs. Bell and Bird vs. Apple-
ton, particularly Novelli vs. Rossi, and various others which might be
stated, I am of opinion, that a Foreign judgment sought to be enforced
in this country is, in addition to the cases referred to by the Chief
Justice, impeachable for error apparent on the face of it sufficient to show
that such judgment ought not to have been pronounced. But this leaves
open the nature and extent of the error apparent upon the face of the
judgment, which is sufficient to invalidate the judgment. Upon that
my opinion is, that it must be such error upon the face of the judgment
itself, as, without any extrinsic evidence, shows that the Judges have
come to an erroneous conclusion, either of law or fact."

The case was afterwards appealed and compromised, so that its
authority on the point actually decided is not absolutely conclusive.
At the same time it is valuable as an authority; no less from the clear enunciation it contains of the condition of the law on the subject, than for the authority of the eminent Judge on the questions this state of things leaves open for future decision.

It could not be expected in a treatise of this nature to pursue such a question to a more elaborate investigation; and we will merely add to the judgment of the Master of the Rolls, the short summary of the law on the subject which Mr. Taylor has furnished.

"Besides the rules," says he, 'already stated, which are common to foreign and domestic judgments, others may be cited, which, if not exclusively applicable to foreign adjudications, are at least far more frequently applied to them than to the decisions of our own Courts. For instance, if it be apparent upon the face of the proceedings, or can be made so by extrinsic proof, that a foreign judgment is contrary to the law of nations, or is repugnant to natural justice, or is founded on a mistaken notion of the English law, or is obviously opposed to the law of the country where it was pronounced, or is so grossly defective as to render it doubtful what point, if any, was actually determined or is manifestly erroneous, as professing to be made upon particular grounds, which plainly do not warrant the decision, its effect as evidence will be wholly neutralised."

In criminal proceedings at all events the judgment of the Foreign Court would appear conclusive. In accordance with this principle it has been held that a person who had been charged with having killed another in Spain, and had been tried and acquitted there by a competent tribunal, could not be afterwards tried again in England for the same offence.†

Turning from the question of the nature or mode of proof, let us address ourselves to that of its quantum.

† Hutchinson's Case, 1, Shower, 6.
And first as to the proof of what in criminal proceedings is called the "Corpus delicti."

In certain criminal cases, in order to sustain a conviction, antecedent and unequivocal evidence must be given of the fact of crime, however strong may be the presumption of some criminal act, and of the guilty connection with it of the accused. The act of guilt must be shown before its agency can be affixed. This act is called the "Corpus delicti."

The usual application of the principle is to cases of homicide and larceny; and it requires in the one the direct proof of the violent death, ordinarily by inspection of the body; in the other the unequivocal establishment of the act of theft.

The doctrine, if not altogether originating with Sir Mathew Hale, at all events received an early recognition from him, for he laid down tworules on the subject which have been governing ones ever since.—"I would never," says he, "convict any person for stealing the goods of a person unknown, merely because he,—[that is the party in whose possession they may have been found,]—would not give an account how he came by them, unless there were due proof made that a felony was committed of those goods. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least, the body found dead."

Lord Stowell observes on the same subject—"When a criminal fact is ascertained, presumptive proof may be taken to show who did it; to fix the criminal; having then an actual "corpus delicti;" but to take presumptions in order to swell an equivocal and ambiguous fact into a criminal fact, would, I take it, be an entire misapplication of the doctrine of presumptions."

The books abound in cases showing the necessity for this caution.

Illustrations of necessity of proof.

One of them is mentioned by Sir Mathew Hale himself, and is said to have led to his rule. It is one where a person long missing was supposed to have been murdered

* 2, Hale’s Pleas of the Crown, 90.
† Evans vs. Evans, 1, Haggard’s Consistory Reports, 105.
by another, and the body consumed to ashes in an oven; and, the latter having been tried and executed for the offence, the supposed dead man re-appeared. He had been sent to sea against his will by the supposed murderer. Another is related of an inn-keeper, accused by his servant of having strangled his travelling guest, and who was executed for the supposed crime. No marks of violence, however, were found on the body; and it afterwards turned out that the guest had died in a fit of apoplexy.

In Dr. Chevers' valuable work on Medical Jurisprudence, he cites a case which happened in India, furnished to him by Dr. Mackinnon, then Civil Surgeon of Cawnpore, which is singularly corroborative of the necessity of this proof; and we transcribe his note, which is as follows.

"When I was at Cawnpore, a case occurred strongly illustrative of the desirableness of producing the bodies of persons supposed to have been murdered. Two boys set out on a journey from Bundlekund; and while bathing together, one, for the object of appropriating his property, threw the other into deep water, where he was supposed to have been drowned, as he disappeared for a long time. The supposed murderer returned to Cawnpore, and after a time, I think confessed his crime. At any rate he was tried by Mr. Spiers, one of the most conscientious and cautious men that ever sat on the bench, and condemned to death. While the proceedings were before the Agra Sudder, the lad supposed to have been drowned returned to his home."

Mr. Norton's book contains many other curious cases of the like description, collected from various different sources.

Mr. Starkie in commenting on the natural caution which such possibilities engender, observes:—"Hence upon charges of homicide, it is an established rule that the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact, or by inspection of the body,—a rule warranted by melancholy experience of the conviction and execution of supposed offenders.

* Manual of Medical Jurisprudence for Bengal and the North Western Provinces, p. 34.
charged with the murder of persons who survived their alleged murderers. So Lord Hale recommends that no prisoner shall be convicted of larceny in stealing the goods of a person unknown, unless the fact of the robbery be previously proved. The same principle requires that upon a charge of homicide, even when the body has been found, and although indications of a violent death be manifest, that it shall still be fully and satisfactorily proved that the death was neither occasioned by natural causes, by accident, nor by the act of the deceased himself. In considering the probability of the latter supposition, it is to be recollected that it is by no means improbable that a person bent on self-destruction would use precautions to protect his memory from the ignominy, and his property from the forfeiture, consequent on a verdict of \textit{felo de se}.’’

Mr. Best in noticing the propositions thus laid down by Sir Mathew Hale, Lord Stowell, and Mr. Starkie, adds:†—

"Such is the language of these eminent authorities; but the general principle which they lay down must be taken with considerable limitation; and in order to treat the subject with accuracy, it is to be remarked that in some offences the evidence establishing the existence of the crime also indicates the criminal, while in others the traces or effects of the deed are visible, leaving the author of it undetermined.” And he cites as illustrations of the former, a conspiracy the essence of which consisting of intention \textit{can} only, as he observes, be established by \textit{presumptive} inference, and that of adultery, in which the direct proof of the fact is not required.

If one \textbf{may} be permitted to comment on Mr. Best’s criticism, he hardly appears sufficiently to notice that, although the proposition of Lord Stowell is certainly in its terms more universal, that of both Sir Mathew Hale and Mr. Starkie is confined to the cases of \textit{larceny} and \textit{homicide}.

No doubt, as applied to cases of the class \textit{suggested by Mr. Best}, the proposition he ascribes to the parties would be somewhat in-

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* Starkie on Evidence, p. 862.
† Best, 320.
accurate. However, it would still apply to all those instances in which, as observed by that able author, the distinction exists, namely, that "proof of the crime is separable from that of the criminal," and, as he states, "the finding of a dead body, or a house in ashes, may indicate a probable crime, but do not necessarily afford any clue to the perpetration." Mr. Best goes on to add:—"The corpus delicti, in cases such as we are now considering, is made up of two things; first, certain facts, forming its basis; and, secondly, the existence of criminal agency as the cause of them. Now, it is with respect to the former of these that the general principles of Lord Stowell and Sir Mathew Hale especially apply, and it is the established rule that the facts which form the basis of the corpus delicti ought to be proved, either by direct testimony, or by presumptive evidence of the most cogent and irresistible kind. This is particularly necessary in cases of murder, where, as has been already stated, the two rules above laid down by Sir Mathew Hale seem to have been generally followed; namely, that the fact of death should be shown, either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead: or, if found in a state of decomposition or reduced to a skeleton, it should be identified by dress or circumstances."

It has been suggested that there may possibly be even extreme cases in which the rule demanding the actual proof of the corpus delicti might be relaxed. "Were it not so," says Bentham, "a murderer, to secure himself with impunity, would have no more to do but to consume or decompose the body by fire, by lime, or by any other of the known chemical menstrua, or to sink it in an unfathomable part of the sea."*

According to Indian law as administered in the Nizamut, the finding of the body is not indispensably necessary to warrant even a capital sentence, but in such cases an irrevocable sentence is not usually passed.†

* 3, Judicial Evidence, 234.
† Beaufort's Digest, 1857, Homicide and Murder Index C., Section 3980.
CORPUS DELICTI.

In a case of Kealal vs. Chundwa, 2, Nizamut Adawlut Report, 82, bones were found, but these not being identified, the Court withheld the capital sentence, notwithstanding a confession; and in one of Haubil vs. Wuzeer Khan, 3, Nizamut Adawlut Report, 122, the result was the same, notwithstanding the recognition of the skull by a peculiarity in the jaw bone.

In one English case, the body was not found for a lapse of twenty-three years; when its identity was established by the widow from some peculiarity about the teeth, and the identification of a carpenter's rule and a pair of shoes found with the remains.*

An amusing story is repeated by Mr. Best, in which a very efficient test was applied to try the corpus delicti. We transcribe his note.

Eastern nations have, as is well known, a practice of simulating death, to attain particular objects. See Family Library, No 63, Sketches of Imposture, &c., c. 9. p. 139.

"When some officers in India were breakfasting in the commander's tent, the body of a Native, said to have been murdered by the Sepoys, was brought in and laid down. The crime could not be brought home to any one of them, yet there was the body. A suspicion, however, crossed the Adjutant's mind, and, having the kettle in his hand, a thought struck him, that he would pour a little boiling water on the body. He did so; on which the murdered remains started up and scampered off."

As in the case of murder the mere discovery of the body would not establish the act of murder or fix its agency, so neither in that of larceny would even the possession of the stolen goods, however recent, establish the theft, or prove the possessor the robber. The fact that a robbery had been committed must be first established. Possession would, however, be always a feature more or less strong, according to the individual circumstances of the case,—though strong of course in proportion as it was recent;
and strong also in the degree in which it partook of the nature of an exclusive one, or existed under circumstances of less obvious suspicion.

In either case, the corpus delicti having been established, the connection of the accused with the transaction may be shown by any connecting fact, or chain of circumstances.

It has been doubted, and still remains unsettled, whether even a confession of the crime, not-being a judicial one, would be sufficient to dispense with the proof of the corpus delicti. In India, in the Courts of the Nizamut, it is apprehended however, that no confession unsupported by other evidence would avail; it not being regular to convict a prisoner solely on his own confession.

In requiring this proof of the corpus delicti, the law, it will be noticed, is prescribing the conditional proof of a given fact. There are cases of a different class in which it prescribes the mode of proof by requiring the testimony to the fact, of witnesses of a given numerical amount.

Thus, in a prosecution either for Treason or Misprision of Treason, the offence is required to be established on the testimony of not less than two witnesses. This is a statutory provision of the reign of William the 3rd,† and requires the oath of either two witnesses to the same overt act, or one to one, and the other to another, overt act of the same transaction; unless the accused should, willingly without violence, in open Court confess it. The Act passed in jealous protection of the subject against the supposed power and influence of the Crown; and, with a merciful and just consideration of the weighty consequences involved in a conviction of the crime.

* Beaufort’s Digest, 1857, p. 126.
† 7, William III., Chap. 3.
The confession of guilt on the trial, that is to say pleading guilty, as it would supersede the process of trial, would be a waiver on the part of the accused of all right of proof; though were a confession merely sought to be given against him as matter of evidence, this could be receivable only when given on the testimony of two witnesses; and even its reception at all appears questionable.

The rule, however, addresses itself only to the treasonable transaction itself. It would not embrace any collateral or incidental matter not being part of the Act of treason even though part of the general proof; as for instance, in an indictment for adherence to the Queen's enemies, proof that the accused was a subject of the Crown.

It would be confined too to the ancient Statutory Treasons, and would not extend to those modern offences which, though in the nature of treason, as for instance imagining the death, destruction, or harm of the Sovereign, are governed by certain statutes of recent legislation.

In the case of an indictment for perjury, the perjury could only be established on either the testimony of two opposing witnesses, or of an equivalent to it;—as in a suit in equity a decree could not be had against the positive statements of the answer, on the testimony of a single witness only. In both cases it would be only the setting of one oath against the other.

What, however, is meant by the rule, as applicable either to the case of perjury or a decree against answer, is not absolutely, that there must in every case be two opposing witnesses, but that there must be a second, where there is nothing else sufficiently conclusive to corroborate the testimony of the one. In a case of R. vs. Parker* the Chief Justice Tindal thus propounds the law on the subject as respects the case of perjury:—""With regard to

* 1, Carrington and Marshman, p. 639.
the crime of perjury the law says, that where a person is charged with that offence, it is not enough to disprove what he has sworn by the oath of one other witness, and unless there are two oaths, or there be some documentary evidence, or some admission, or some circumstance, to supply the place of a second witness, it is not enough."

On the point of decree against answer, the like principle would prevail in Equity.

It has been suggested, and with reason, that the perjury might be established upon Circumstantial Evidence alone; and the evidence arising from circumstances might be stronger than the testimony of any single witness.

In the case of two conflicting statements, both of them on oath, no charge of perjury could be sustained on the mere fact of the conflict; since it would be impossible to say which of the two statements was the false one. And were one of the two only sworn to, so far from the sworn one being capable of being proved false by the unworn, the former, from the solemnity of the oath, would, in legal presumption, be taken as outweighing the latter. In either case, however, the inconsistency of the statements would constitute matter of independent evidence on the charge.

The English law casts the maintenance of an illegitimate child on the father. On a principle, corresponding with that to which we have been adverting, it will not act on the single evidence of the mother, unless corroborated by some material circumstance. According also to the law on this subject, as administered in the Courts of the Mofussil, the evidence of the mother is primâ facie good as far as it goes; but should be sifted and weighed as any other testimony, and tested, as far as practicable, by any circumstantial evidence that may offer.*

In the case in which the commission of a crime is sought to be proved against another on the evidence of an Accomplice, there is no actual rule of law demanding

* Beaufort's Digest, 1857, p. 998.
corroboration to justify a conviction. Juries, however, are rarely, if ever, instructed by the Judge to convict in its absence; so that convention has supplied what the law does not require.

The Indian Evidence Act has a provision addressed to the general case of proof on the testimony of a single witness, which, however, seems practically to leave the law much as it stood before. It enacts that, except in cases of treason, the direct evidence of one witness who is entitled to full credit shall be sufficient for proof of any fact. But with the important proviso that the enactment shall not affect any rule or practice requiring corroborative evidence in support of the testimony of an accomplice, or of a single witness in the case of perjury.

Before the Act, treason was the only case in which a positive requisition for two witnesses existed, and this is left untouched. As respects perjury, the enactment is still, in terms, directed to be subordinate to the antecedent practice, as is the case of an accomplice. In every instance the witness is to be entitled to ‘full credit,’—which is certainly a very protective salvo. Whether overlooked, or an intentional omission, the case of a decree against answer is not noticed; and if the act is to be construed by its literal terms, it would appear to go the length of a statutory repeal of the pre-established practice. It would probably, however, be saved by the ‘full credit’ condition.

But while the Law has thus, in the cases to which we have adverted, enjoined a specific species of proof of a more stringent character, it has in another class of cases permitted the adoption of evidence of a less rigid one;—a relaxation of the stricter proof in favor of a necessary convenience.

Thus, though in the instance of Judicial proceedings, the record of the Court is their more appropriate proof, authenticated copies of the record itself are permitted to be received, in substitution of the original.
In the Court itself, and between the same parties, the ordinary evidence of the record is an official copy of it, furnished by the Officer of the Court; but if there be a question as to the existence or contents of the record, the record itself must be produced for inspection.

If the proof be required for another Court, or between different parties, the evidence is either that of the seal of the Court, termed an Exemplification, or an examined and sworn copy of the record. When, however, the law casts a special obligation on the Officer to furnish the copy, the copy is admitted in all Courts alike upon his authentication.

Matters forming the subject of Public Registration, for example, marriages, births, and deaths, are ordinarily proved by the Books of Registration.

Public Acts of Parliament may be proved by the Printed Copy of the Act; or rather the Act proves itself, the print being mere matter of reference. Private Acts are universally constituted public by a clause in them to that effect.

Acts of State are proved by the official printed documents authorized by Government, ordinarily the Gazette, or the print of the Government press, or by an examined copy. Other documents printed by the Queen's printer are proveable by the print; as for instance a declaration of war, and copies of royal proclamations.

The Judicial or State proceedings of a Foreign Country or British Colony, are proved by sworn copies, or by exemplified ones, under the proper seal of the country or colony.

Commercial Regulations are proved by copies.

The general Public Records of the country, which in England are under the custody of the Master of the Rolls, are proveable by copies under the seal of the Court, and the certificate of the Officer.

The proof of all ordinary Public Books and Documents, as for instance those of the Bank, the late East India Company, Journals of the Houses of Parliament, Public Registers, and so forth, is by an examined and sworn copy.
In all cases the document may also be proved by a sworn Copy.

Matters of Antiquity are proveable by the production of certain ancient recognized proofs; such as Surveys, Inquisitions, Terriers, and so forth, as for example, Doomsday Book; and these in their turn are proveable by examined Copies.

Various Acts of Parliament, and particularly of recent years, have passed to facilitate the proof of Public Documents; though, being accumulative and not substitutionary in their provisions, they still leave the old mode of proof to be pursued where convenience would dictate, and these Acts do not apply to India. We do not accordingly burthen our pages with their detail.

We will only add that, in a corresponding spirit with the course of English Legislation, the Indian Evidence Act embodies the provisions rendering the Government Gazette proveable by bare production. It constitutes the appearance in any such Gazette of Proclamations, Acts of State, Nominations, Appointments, and other Official Communications, proof of the fact itself. It renders recitals in Acts of Legislation prima facie evidence of the fact recited,—and the publication in the Gazette of certain defined public advertisments of a Government or Judicial nature proof of the publication under due authority. It makes authoritative Books, Maps, or Charts receivable as evidence on matters of History, Literature, Science or Art;—and certain specified Books and Authorities evidence of Foreign Law;—and it stamps with an evidential authenticity Maps made under the authority of Government or of any Public Municipal Body not made for the purposes of suit. It declares Impressions of a Document made by a Copying Machine correct copies.

Beside constituting books kept in the course of business or in any public office corroborative proof of the facts therein stated, it makes certain other documents corroborative evidence; 'to wit Certificates of shares, and of registration thereof,—Bills of lading,—Invoices,—Account Sales,—Receipts usually given on the payment deposit or
delivery of monies, goods, securities, or other things. It makes admission on production a Power of attorney executed above 100 miles distant from the place where the proceeding is depending, when it purports to have been executed before or authorized by a Notary, or any Court, Judge, Consul, or Magistrate; and proof of despatch and receipt of letters by Letter Book.

The particulars will be seen in the Appendix, on a reference to the Act itself.

We turn now to that substitution for proof which is admitted by the Court in a knowledge attributed to its Judges.

This knowledge is what is termed 'Judicial Notice'; and it is the assumption of certain things as realities, without actual proof of their existence. This addresses itself to such matters as those of public character connected with the State, its foreign relationships, or its domestic economy, or connected with the Courts themselves,—to usage as affecting the Public,—usage as affecting particular relationships of it,—and matters arising as part of the ordinary course of Nature or Human Affairs.

The notoriety of the facts, and particularly as attributable to those so largely connected with public affairs as to have to administer the Justice of the country, combined with the character of the facts themselves, is deemed to justify a dispensation with ordinary technical proof.

Addressed as this treatise is more particularly to India, it is not deemed necessary to exhaust the detail of matters of judicial notice in reference to England; nor to do much more than illustrate the principle; though we shall cite some examples for this purpose. It is fitting, however, that the principle should be understood, because, though the Indian Act contains some provision on the subject which will be pointed out, that provision is cumulative, and not substitutional or restrictive, and what is recognized as matter of principle in England would equally afford the rule for guidance in India.
Of *Matters of State* then, of which under English law judicial notice would be taken *in reference to its Foreign relationships*, we may cite as examples—the existence, and titles of Foreign Sovereign Powers—a state of War or of Peace with them, and what is called the Law of Nations. By a Foreign State, however, would only be intended one accredited by the Government of the Home Country. In the instance of any revolutionary, or other intestine movement, splitting the Foreign State, or extinguishing its previous acknowledged Head, the Court would take notice of no new Government until recognized by its own, though it would be bound to know the *fact* of recognition or non-recognition. As respects matters of Law too, the notice would be confined to that of the Law of Nations. The Municipal law of any Foreign Country could be only received on *évidence*; and even the peculiar laws of a British Colony would be Foreign within the meaning of the rule of exclusion.

As examples of judicial notice of *Matters touching the Domestic Economy of the State* may be taken,—the territorial extent of its Sovereignty, its political Constitution and the frame of its Government,—the essential Officers or Agents of its administration, as for instance the heads of departments,—the accession and demise of the Sovereign,—the prerogatives of the Crown,—Royal Proclamations,—the Articles of War, including those for the Government of the Indian army,—various (being the principal) Seals of State or of its different offices,—the laws of the Realm,—the laws and customs of Parliament,—the course of proceedings and privileges of each branch of the Legislature, their sittings,—days of Public Fast and Thanksgiving;—the local Divisions of the Country, such as counties, cities, towns, parishes, but not relative positions or boundaries of these, —the Weights and Measures or Coin of the Country,—the meaning of the terms of its Vernacular Language.

Of *Matters connected with the Courts* themselves, notice would be taken of,—their own Rules and Course of Proceedings,—the Limits of their Jurisdiction;—the
Privileges of their Officers,—the Seals of each other, and those of their own Courts,—the seal of a notary public,—the Signatures of the Judges,—the beginning, and end of Term, and the Practice of Conveyancers.

As Matters of Public or Social Usage may be cited, as to the former, what are called the Rules of the Road or Navigation, as that horses and carriages should keep on the right or left side of the road, according as they were going or coming,—ships on the left of the sea or river,—steam boats in narrow channels should keep to the right—and as to the latter, particular Customs, such as gavelkind, or borough English, or those of merchants or others; when respectively settled by judicial determination or certified by proper authority to the Court; though not all customs indiscriminately.

Touching Matters arising in the course of Nature or of Human Affairs, notice will be taken of the events of Public History;—of the course of Time, and of the Heavenly Bodies;—Public Fasts and Festivals;—the Coincidence of the Reign of the Sovereign with that of the Year;—that of the Days of the Week, with the Days of the Month;—and the Number of Days in a particular Month.

These are among the more prominent subjects of judicial notice, and will sufficiently illustrate the law; though there may be others not included in the category.

Should the Judge chance himself to be at fault in his recollection or knowledge, as, regard being had to the subject matter, he might well be excused for being, as to some of the particulars cited, he may bring to his aid, if the question be a date, an almanac, if the meaning of a term, a dictionary, if it be a statute, a copy of it, if it be a proclamation, or the articles of war, he may decline to act without being furnished with a copy, or as to matters of foreign relationship or the practice of the court, or conveyancers, he may himself seek information from the proper sources.
As respects India, the Indian Act contains provisions constituting as matters of judicial notice all Regulations and Ordinances of the Local Governments of the three Presidencies, made on or before the 22nd April 1834, having the form of law in any part of the territories—all Acts and Regulations of the Government of India—all public Acts of Parliament and all local and personal Acts declared public—the Members and Officers of the Courts of each respectively, their officers or assistants, or officers acting in execution of its process;—and of all Advocates, Attorneys, Proctors, Vakeels, Pleaders, or other persons authorized to act before it;—of the names, titles, and authorities of certain enumerated High Functionaries;—and the Divisions of Time;—Geographical Division of the World;—Territories under the British Crown;—and Hostilities with Foreign States.
CHAPTER XI.

On Relevancy;—including Variance,—Amendment,—and Surplusage.

We pass from the discussion of evidence of a prescribed or pre-established character, to evidence of a more general nature;—in fact the ordinary class of testimony. And here it is obvious that one of the first conditions of the admission of any evidence,—and the observation applies alike to preconstituted and all other,—must be its relevancy to the subject in dispute.

Whatever the matter for decision, whether Civil or Criminal, this must come before the Court in the form of some particular issue for trial. It is that issue, and none other, to which the Judicial investigation addresses itself; and the materials of decision are the evidentiary matters produced in either its affirmation or negation. In the terse phraseology of the ancient maxim, the judgment of the Court is to be "secundum allegata et probata," that is to say, "according to that which is alleged, and that which is proved."

"In the early ages of the Common law," says Professor Greenleaf, (speaking of the law of England) 'the pleadings were altercation in open Court, in presence of the Judges, whose province it was to superintend or moderate the oral contention thus conducted before them. In doing this, their general aim was to compel the pleaders so to manage their alternate allegations as at length to arrive at some specific point or matter, affirmed on one side, and denied on the other. If this point was matter of fact, the parties then by mutual agreement, referred it to one of the various modes of trial, then in use, or to such trial, as the Court should think proper. They were then said to be at issue (ad exitum, that is, at the end of their pleading); and the question thus raised for decision, was called the issue." In this course of proceeding every allegation, passed
over without denial, was considered as admitted by the opposite party, and thus the controversy finally turned upon the proposition, and that alone, which was involved in the issue. This method was found so highly beneficial, that it was retained after the pleadings were conducted in writing, and it still constitutes one of the cardinal doctrines of the law of pleading."

In England, and in the Supreme Courts of the Indian Presidencies, the framing of these pleadings,—on the one side and the other,—is the province of the professional advisers of the respective parties.

In India in the Courts of the Mofussil, there are also preliminary pleadings; but these were found so ill to define the real subject of contest, that, even previously to the late Civil Procedure Act, Regulation law had assigned to the Judge, the province, as it is called, of "settling the issues;" that is defining the matters to be established, and to which the proofs were to be addressed; and this adjustment pointed out the real issues of the case; but for which assistance they would have been often left in some obscurity.

Now, by Section 139 of the Civil Procedure Act, the Court is directed at the first hearing of the suit, to inquire and ascertain, upon what questions of law, or of fact, the parties are at issue, and thereupon to frame and record the issues on which the right decision of the case may depend. In doing this, the Court may frame the issues from the allegations, of fact which it collects from the oral examination of the parties or their pleaders, notwithstanding any difference between such allegations and those contained in the written statements tendered by the parties or their pleaders.

By Section 140. If the Court shall be of opinion that the issue cannot be correctly framed without the examination of some person, other than the persons already before the Court, or without the reading of some document not produced, it may adjourn the framing to a future

day; with power to compel the attendance of such persons, and the production of such documents by summons, or other suitable process.

By whatever process, and in whatever Court, the matter of dispute is adjusted, the evidence must be of a nature, either on the one hand to support, or, on the other to contradict, the issue as challenged; and in prohibiting all other, the Court proceeds on the principle only of excluding what, by its tendency to distract, would be likely to mislead, rather than guide to truth; while to allow any case to be overloaded or branched out at the instance of one suitor, would, by its necessary protraction of the hearing of the cause, be an injustice to all others on the roll behind him. Accordingly it has become a primary canon in the Law of Evidence that all evidence must be confined to the allegations, and be consistent with them;—sometimes divided into its two branches, and stated as two separate rules;—or perhaps the rule may be more tersely expressed in the terms,—that the evidence must be relevant to the issue.

By the term ‘issue’ is to be understood the very issue to which the litigation is narrowed by the pleadings; or in the Courts of the Mofussil, the issues as settled by the Judge.

In the Common Law Courts of England, as well as in the Supreme Courts of India at all events, the principle is somewhat strictly adhered to; for example, were it the case of an action for an assault by beating or battery met by no other plea on the record than that of not guilty, which would amount to an allegation merely that the defendant had not perpetrated the act,—proof that the party complaining had struck the first blow would be irrelevant on the issue. According to the form of the pleading, this had resolved itself into, not whether there were provocation, but whether the defendant had in fact committed the assault. Had a justification been pleaded, the result would have been different.

The pleadings in Courts of Equity may be somewhat less rigid in their form than those of the Courts of Common Law; but on the score of relevancy, even in a
Court of Equity, the principles of procedure all converge to the same point.

It will be presently seen, however, that by the term 'issue,' the relevancy to which is thus prescribed, is to be meant the substantive issue of law, and not that of words or of form only.

The general doctrine, though addressed more particularly to India, and the Courts of the Mofussil, is thus well stated by Mr. W. Macpherson, the late Master in Equity of the Supreme Court of Calcutta, in his able and well known Treatise on Civil Procedure;—

"It is not only necessary that the substance of the case set up by a party should be proved; it must be essentially the same case, and not a different case; for the Court will not allow a man to be taken by surprise by a case proved on the other side, which, though plausible in itself is substantially different from that which was set up in the pleadings.

There must be a direct and real conformity, though not perhaps a minute literal conformity, between the proofs and the pleadings; parties who come for the execution of agreements must state them as they ought to be stated, and not set up titles which, when the cause comes to a hearing, they cannot support.

Thus a party should not set up a general title, such as inheritance, and then seek to recover under a particular deed merely.

Where the plaintiff sues on a special ground, such as an oonomuttee putr, or deed granting power to adopt, the judge should confine himself to the investigation of that point only; and, on its not being established, he should simply dismiss the suit. He should not decree any portion of the property in suit, on a ground totally different from that on which the claim was preferred, that is to say, upon the general right of inheritance, when the claim was founded on right to adopt, which was rejected as invalid.

* Macpherson on Civil Procedure, p. 293.
A party cannot be allowed to prove facts inconsistent with his case as stated in the pleadings. It must be decided with reference to the allegations upon which he has himself rested it; and when his averments have been of an original and exclusive right and unbroken possession on his part, no presumption of his having acquired the property by purchase or in any other manner can avail him.

In cases where the burden of proof rests manifestly upon the plaintiff, if the plaintiff do not establish the special grounds on which he comes into Court, there is no necessity to investigate the grounds upon which the defence rests.

When a man advances one set of claims and establishes another, Judges are very often tempted to take irregular courses for the purpose of saving further litigating, but it is reasonable and just that the right of parties litigating should be decided secundum allegata et probata: and attempts to reach the supposed equity of each case by departing from the rules which have been established for the purpose of maintaining and administering Justice, generally lead in the particular cases to results, which were never contemplated, and introduce disorder, uncertainty, and confusion into the general practice of the Courts."

Relevancy, however, is often a matter of nice discrimination, and it has to be regarded in a double aspect. First, the general connection with the subject of the matter tendered as evidence, as that subject is defined by the pleadings; and secondly the directness of its own bearing on the issue.

"Evidence" says Mr. Best "may be rejected as irrelevant for one of two reasons; 1st.—That the connexion between the principal and evidentiary facts is too remote and conjectural; 2nd.—That the state of the pleadings excludes it. The use of pleadings is to enable the tribunal to see the points in dispute; and to enable the parties to know beforehand what they must come prepared to attack or defend; consequently, although evidence tendered may, if merely considered in se, establish a legal complaint, accusation, or defence, yet, as the opposite party has had
no intimation before hand that the ground of complaint, &c., would be insisted on, the adducing proof of it against him, would be taking him by surprise and at a disadvantage. Hence the maxim of pleading, "certa debet esse intentio, et narratio, et certum fundamentum, et certa res qua deducitur in judicium;" that is to say "certain [or defined] should be both the intent and the narrative, and certain the foundation of the right, and certain the point propounded for judgment."

For the relevancy as regards the pleadings, the pleadings themselves can alone afford the test; and this branch of the requisition sufficiently speaks for itself.

Relevancy in respect to the pleadings, to be left to the pleadings themselves.

Relevancy in the sense of approximation to, or remoteness from, the issue, is often a question of greater difficulty; and the more so as it is necessarily one of individual circumstances only. It arises in that class of cases in which it is sought to be deduced, that what happened in relation to some other transaction would throw light on, and help to govern, the one in dispute. Still such a light must be obviously but a reflective one; and it must be dependent on its character, whether it be calculated to throw a deceptive only, or a real, illumination on the matter.

Collateral transactions of this nature are technically termed "res inter alios acta," that is, things done or transacted between others, or third parties; and they are only admissible as evidence when capable of affording the reasonable presumption or inference that what took place in the one instance would do so in the other. This is very much a question for the discretion of the Judge in the individual case; though there are some leading principles by which to guide to a decision.

In a case of Carter v. Pryke,† usually cited on this subject, one between a landlord and his tenant, the issue was, whether the rent were payable quarterly or half-

* Best on Evidence, p. 278.
† Peake's Reports, 95.
yearly; and evidence was tendered of the mode in which other tenants paid their rent. This was upon the theory that the dealing of a landlord with one of his tenants would show the way he would have dealt with the others. The evidence, however, was rejected. In another, that of Holcomb and Hewson,* the question was whether the beer supplied by a brewer to a customer was good; and evidence was tendered of the quality of supply to other customers; and this upon the notion that if the brewer had supplied good beer to one customer, he would not have supplied bad to another. The evidence however was rejected. The landlord might have dealt differently with one tenant, the beer seller with one customer, from another; so that no necessary inference in truth would have arisen from the facts when proved.

The like point was mooted and the law re-stated by Mr. Justice Willes, in a very modern case on the subject, where the terms on which certain guano had been sold were sought to be established by other contracts on similar sales;† and we cite the judgment as a modern and judicial exposition of the law.

"It appeared" (said the learned Judge,) "that in cross-examination of the plaintiff by the defendant’s counsel, it was proposed to ask him;—Whether he had not made other contracts in similar terms? The question was disallowed, as I understand it, as being intended to prove that it was on that account more probable that this contract was made in similar terms. I think that the question was rightly disallowed, as not being pertinent to the issue which the jury were to try. There can be no doubt that the rules which relate to the relevancy of evidence are of great importance; not only with regard to the particular cases in which they have to be applied, but also with reference to the saving the time of the public. They are nowhere more clearly laid down than in the very valuable work of Mr. Best on this subject. In page 319, that author says:—"Of all rules of evidence the most universal and most obvious is this—that the evidence adduced should be alike directed and confined to the matters which are in dispute, or form the subject of investigation.

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* Holcomb vs. Hewson, 2, Campbell, 391.
† Hollingham vs. Head, Weekly Reporter, 1858 p. 448. 4 Common Bench N. S. 388.
And the evidence must be such as renders the affirmative of the proposition which it is adduced to prove more probable.” It does not, however, appear to me that the evidence in question would render it more probable. The question is whether a man having once or more in his life done a particular act renders it more probable that he would do it again. Suppose that in any case the question in issue was whether certain goods were sold upon credit or not; would it be reasonable to call witnesses to prove that they had obtained goods from the same person on credit? Or, in an action of assault, could it be proved that the defendant had committed assaults upon other persons on other occasions? The extent to which this evidence might be carried, the prejudice which it would cause in the minds of the Jury, and the time which would be wasted in receiving it, are quite sufficient reasons for its rejection. The fact of a person having entered into contracts of a particular kind on other occasions cannot properly be admitted, where no custom of trade to make such contracts is shown, and no connexion between these and the one in question appears to exist.”

It has been even held that an admission by a prisoner that he has at another time committed an offence similar to that on which he is charged, and that he has a tendency to perpetrate such crimes would not be received.*

It is obvious, in all cases of mere collateral transaction, that, notwithstanding some general similarity between the one in litigation, and the other from which the elucidatory matter is proposed to be drawn, each may have taken place under varying influences or circumstances; and these of a strength sufficient to destroy all necessary inference. Consequently where there exists nothing beyond the mere general similarity of the transactions, the Court holds that no reasonable or legal presumption can be drawn. Indeed it may be taken that in all cases of collateral transaction, the rule “res inter alios acta” would prima facie operate to exclude the evidence.

Exceptions to rule of exclusion.

There are however exceptions to the rule of exclusion; and to these we proceed.

It will be noticed that the judgment of the Court in Hollingham v. Head, pointed to a distinction where a connection could be shown between the two transactions; and it is always held that a connecting link establishing sufficient community between the transaction in question, and that by which it was sought to be proved, would be a ground for the reception of the evidence.

Thus, in an early and leading case on the subject, that of Gibson v. Hunter, where the issue in a question on a Bill of Exchange was whether the acceptors knew the payee to be a fictitious person, and evidence was tendered to show a general authority given by them to the drawers to draw bills on themselves (the acceptors) in favor of fictitious parties, the evidence was received; notwithstanding the objection was taken, that the question before the Court being upon a particular bill, the general authority was not connected with the transaction, and its proof accordingly irrelevant. So where a party was sued on a Bill of Exchange which had been accepted in his name by another person, and evidence had been given that this person had a general authority from the defendant to accept bills in his name; it was held that an admission by the defendant of his liability on another bill so accepted was receivable as evidence to sustain the general authority. In each case the Court inferred a sufficient connection between the general and the particular to raise a fair presumption of the fact.

The point is well illustrated by the contrasted decisions of two classes of cases in which the question was, whether the customs of one Manor were to be taken as affording any inferential proof as to the customs of another. In one class, the question was a simple one, namely, whether the custom of one was evidence of the customs of another; and the two Manors being foreign to each

† Lewellyn vs. Winckworth, 13 Meeon and Welsby, 598.
other, with no connecting link to establish a community between them, it was decided that it was not. In the other all the Manors were originally held under the same common tenure or title; and the issue being upon some incident as to that tenure, the community of the link, in other words the natural connection between the two, was considered to justify the reception of the evidence of the custom.

*Another exception exists where the question is one of Science; and the facts the subject of the evidence, though not directly in issue, tend to illustrate the opinion of the scientific witnesses. Here the evidence would be receivable. Thus where the question was whether a sea wall had caused the choking up of a harbour; and engineers had been called to give their opinion as to the effect of the wall; evidence that other harbours where there was no embankment had begun to be choked about the same time, was admitted as elucidatory of the reasoning of the skilled witnesses.*

*Another exception prevails where, the question being one of Knowledge, other transactions in which the party may have been engaged, may furnish an adequate presumption in reference to the one in investigation.

*Thus there are cases of a criminal nature, where the essence of the offence is the guilty knowledge of the offender; and in which the knowledge is allowed to be proved by that inferential species of evidence involved in a participation in transactions of a corresponding character. For example in a charge of uttering a forged document or false coin, with a knowledge that it was so, other cotemporaneous utterings by the party, or his possession of other base coins at the time, are admissible to prove the knowledge. Provided however (though this is an essential condition) that the knowledge that the contemporaneous instrument was a forgery, or the original coin known to be counterfeit, be first brought home to him. What the prisoner said or did, however, with respect to the uttering, would be too remote to be admitted. So on a charge of*

* Folkes v. Chadd, 3 Douglas, 159.
receiving stolen goods with a knowledge that they were stolen; the finding of other articles in the prisoner's possession at the time, would be good evidence of the knowledge.

In the case of an indictment against either thief or receiver, evidence would be admissible of the pledge with a pawnbroker, as raising some presumptive guilty knowledge with reference to the articles in question. Yet, on the other hand, evidence could not be received of the pledge by the prisoner of other property stolen from different persons. The inference accruing from the latter would be too remote.

Again, there are other cases where, the offence turning on Intent, the act in question is allowed to be illustrated by others.—Thus in a charge of malicious shooting, that is shooting with intent to do bodily harm, were the question whether the shooting were an accident or intentional, evidence would be receivable of another shooting by the accused at the prosecutor, shortly before the one with which he stood charged; and this with a view to prove the particular intent from the analogous one.

So on an indictment for murder, evidence of the terms on which the parties lived towards each other, would have an important bearing on the question of malice. Consequently evidence would be admissible, on the one hand of former menaces or quarrels; and, on the other, of acts or expressions of kindness.

And where on an indictment for separate offences, though each offence were distinct in itself, yet if there were an apparent community of design or execution pervading the whole, what took place in reference to each would be allowed to throw its light upon all. Accordingly where four indictments were preferred against a woman on the charge of having poisoned her husband, and two of her sons, and attempted the poison of the third; on the trial of the first of the indictments only, evidence that arsenic had been taken by the three sons a few months after their father's death,—that all four parties when ill, exhibited the same symptoms,—and that the woman lived in the house and prepared the meals, was admitted on this indictment, though dealing with the
death of the husband only, for the purpose of establishing his death to have been caused by the taking of arsenic, and not to have been accidental.—So where three burglaries had been committed in one night, and property taken from one house left at another, the three cases were treated as so connected together, that the evidence of what transpired in reference to one, was allowed to be received in relation to the others.† The same was done on a charge of firing; where three stacks, though belonging to separate parties, were within sight of each other, and all fired about the same time.‡

So in cases of actions for defamation, evidence of other libellous expressions indulged in by the defendant, whether before or after action brought, is receivable in the action as proof of the malice. The mode of publication too might have an important bearing on the question of malice; as for instance the sending of printed placards to the plaintiff's house, or parading them before him. Evidence of this would be receivable accordingly.

On the other hand, evidence palliative of the Act, though not an entire justification, would be receivable in mitigation of damages; as for instance, provocation at the hands of the plaintiff, or inadvertence, as that the publication in question was a mere copy from some other one.

Another exception which remains to be noticed is that in which evidence of Character is admitted; and this is received, sometimes as having a bearing on the issue itself, and sometimes as affecting the question of damages.

Thus in criminal cases, and in favor of a party under trial for some specific offence, evidence of general good character would be admissible; though the presumption arising from character can have no other bearing on the fact itself than a general improbability of specific acts of

† Cited by Lord Ellenborough in R. vs. Wylie, 1 New Report, 94.
‡ H. vs. Long, 6, Carrington and Payne, 179.
misconduct by one who had hitherto borne a good character. It could not, however, outweigh specific proof of crime. The like indulgence is not extended to a prosecutor, except in rebuttal (seldom attempted) of evidence of character produced by the accused.

In the cases in which the evidence of character is admitted, it has been pointed out in a preceding chapter that, as an ordinary rule, the proof must be confined to a general reputation, and not address itself to particular facts; though the witnesses deposing to it may be cross-examined, both as to grounds of belief and particular circumstances. Where the intention however formed an ingredient in the offence, and the character might have a bearing on the issue of intent, it would be otherwise.

So in certain civil cases character may be urged, and evidence given of it, on a question of damages, either in increase or diminution; as for example, in actions for seduction or criminal conversation, the previous character for chastity of the daughter or wife; or in the latter the antecedent insidelity, cruelty or other misconduct of the husband. In the case, however of female unchastity, the evidence must be prior to the act of misconduct; since the demoralization itself may have conduced to the subsequent misconduct.

In aggravation of damages, the evidence can only be gone into to rebut the effect of the like evidence set up on the other side.

It has been much mooted, whether in an action for defamation, and in mitigation of damages, evidence would be admissible showing that at the time of the publication, the plaintiff labored under a general suspicion of having been guilty of the act imputed to him, and the question has not yet been decided. The more prevailing opinion, however, is that it would be admissible. The arguments on either side are thus put by Mr. Taylor;—

"On the one hand it is urged, that the admission of such evidence would be cruelly unjust, as it would throw upon the plaintiff, while
seeking redress in a court of justice for a specific injury, the difficulty of showing an uniform propriety of conduct during his whole life, and would give the defendant an opportunity, under pretence of mitigating the damages, of continuing and aggravating the original calumny; and that, too, under circumstances, when, from the absence of any plea of justification, his opponent was utterly unprepared to disprove the aspersions. It is further contended, that if such evidence were admissible, any man might fall a victim to a combination made to ruin his good name, even by means of the very action which he should bring, in order to free himself from the effects of malicious slander; that timid, though well-conducted men, would consequently not dare to vindicate their characters in courts of Justice, and thus libellers would enjoy a most dangerous impunity. To this it is replied with much force, that, though the arguments on the other side would be entitled to great weight, if the question respected the right of proving particular acts of misconduct, they do not apply where evidence is offered of merely general reputation; that every man, who demands compensation for the ruin of his good character, ought to be prepared to rebut any evidence of his general bad character; that the danger of admitting testimony of this kind is only imaginary, since the witnesses, on cross-examination, might be compelled to state the grounds of their belief; that, as any failure in the evidence would probably much increase the damages, witnesses would scarcely be called, except in support of a decisive case; that the law will not presume the existence of criminal conspiracies to ruin reputations, and cannot be moulded to suit the convenience of irrational timidity; that to estimate the extent of the injury which a plaintiff has sustained, and consequently, the amount of damages to which he is entitled, the Jury must first ascertain what was the real value of his character at the time when it was attacked by the defendant; and that they can best, if not only, arrive at a safe conclusion on this point, by inquiring what opinion was previously entertained respecting him, by those with whom he was personally acquainted. Such being the arguments on either side of this vexed question, it remains only to observe that the weight of authority inclines slightly in favor of the admissibility of the evidence, even
though the defendant has pleaded truth as a justification, and has failed in establishing his plea."

The above observations address themselves to the question of relevancy in its more ordinary shape.—There is a branch or off-shoot of the general doctrine which is referred to under the head of Variance; and to that we proceed.

It happens not unfrequently, from the application of the rule of relevancy, that the pleadings in a cause not having been framed with sufficient antecedent enquiry as to the actual proof to be anticipated at the hearing, in other words without due investigation of the precise and minute facts of the case, the most righteous one, notwithstanding a general proof of its merits, miscarries at the hearing. There is presented between the case as laid in the pleadings, and the evidence to support it, what is termed 'a Variance;' and this, though of a mere formal character, may, in its result, defeat the substantial Justice. This arises most frequently in actions at law, or on indictments; where the narrower scope of the issues, and the stricter course of the procedure, hold the Court more rigidly to the pleadings, and conformity of the Evidence with them.

An illustration of this may be cited in an early case† where a horse having been sold, as it was alleged in the declaration, with a general warranty of soundness, and the evidence proved unsoundness, the horse having died in fact of dropsy; the plaintiff was nevertheless nonsuited, because the warranty turned out in evidence not to be general, but to have an exception of a kick in the leg; and though the dropsy of which the animal in fact died was wholly unconnected with this kick, still the existence of any qualification at all was at variance with the general warranty laid. In another case,‡ an action for libel failed, because the libel as detailed in the pleadings imported "mismanagement or ignorance" while the expression as it transpired in the evidence was "ignorance or in-

† Jones vs. Cowley 4, Barnewall and Cresswell, 445.
‡ Brooks vs. Blanchard, 1, Crompton and Metson, 779.
attention." Both these cases would seem to carry the doctrine on this subject to its utmost verge,—a verge it may be thought beyond the rules of common sense; and in fact the former of the two was pronounced by an eminent Judge, Baron Alderson, to be "a great disgrace to the English Law!"

It is not indeed every instance in which the evidence shows a state of facts differing from the exact form in which the case is laid by the pleadings, that what the Law would recognize as a Variance takes place. Though true it is, whether it be a matter of civil or criminal complaint, the court requires both distinctness and certainty in the allegation of the wrong or the offence, as the case may be, and necessarily so, that the party complained of may be apprized of the precise charge he is called on to meet, by this is to be understood, not a mere verbal but a substantive precision, not a definition of words, but a definition of matter. Were it otherwise, the slightest variation in the proof, however insignificant, would be fatal; and hence in considering the bearing of any particular evidence upon the issue, in other words the question of variance, we have to distinguish between what has been appropriately termed a rational, and what a legal, identity between the two.

"An act" says Mr. Starkie 'done at one day or place cannot be the same with an act done on another day, or at a different place; a robbery, where ten sovereigns were stolen, cannot be the same with a robbery where nine only were taken. It is easy, therefore, to see that to require this, as it were, natural and absolute identity of the allegations and proofs would be, at the least, highly inconvenient, if not wholly impracticable. Hence it is, that an artificial and legal identity, as contradistinguished from a natural identity, must be resorted to as the proper test of variance; that is, it is sufficient if the proofs correspond with the allegations, in respect of those facts and circumstances which are, in point of law, essential to the charge or claim. The rules

* Hemming vs. Parry, 6, Carrington and Payne, 580.
which govern the connection between the allegations and evidence must obviously result immediately from the principles which regulate the allegations themselves."

Accordingly all such allegations as those of quantity, time, place, or value, become substantive parts of the issue, and require proof accordingly, only in the ratio in which they form the element of the legal offence, as either constituting part of its gist or being descriptive of it. If they fail to do this, the offence may be proved, not only without them, but in spite of their contradiction. All that is requisite is that what is left, after striking them out, constitutes sufficient ground of offence, and embodies sufficient accuracy of description.

Thus as to the gist of the offence, let us take the illustration of the sovereigns put by Mr. Starkie. The legal offence would be the same, did the proof show a robbery of five sovereigns only instead of ten; and, as the party could not have been misled in the charge he was to meet by the misdescription of the number, such a proof would be no variance, and would support a conviction. The variance though natural would not be legal.

So were the discrepancy brought out by the evidence one of time, it might still leave the legal offence sufficiently proved; as in the case of an indictment for a nuisance alleged to have had a given duration, say twelve months, proof of its existence for one month would equally constitute a legal offence, however the shorter duration might affect the question of punishment. On the other hand, time might be of the essence of the offence. Thus in a case of burglary, the gist of which is that it was committed at night, that is to say, as respects England between the hours of 9 P. M. and 6 A. M., the time would of course be of the utmost materiality, and proof fixing it without these hours would present a case of fatal variance.

* Starkie on Evidence, p. 625.
Assuming *sufficient* of the matter proved as laid to constitute a legal offence, it is not requisite that the *whole* laid should be proved in its entirety. Thus in an indictment for *composing*, printing, and publishing a libel, it has been held sufficient if the mere *printing* and *publication* be established, *without proof of the composition*, since the composition, though an *additional*, is not a *necessary* ingredient, and the two others constitute an offence without it.* Again in an indictment for *murder*, the party may be convicted of *manslaughter*; for though there might be no proof of the element necessary to give the slaying the character of murder, to wit the malice, homicide would be manslaughter in itself; and the *greater* charge would include the *less*.

On the other hand, the allegation might from its very nature be *incapable of being split*, so that if the proof disclosed any infraction on the integrity of the allegation, it would be no proof of the allegation at all. Thus, though in the case of *nuisance* put above as illustrative on the point of time, proof of the subsistence of the nuisance for a shorter period only than that laid would present no variance; yet in a case of *contract*, where the declaration alleged one of service for *twelve* months, for £12, and the contract proved was one for *one* month at £1, though by a process of *multiplication* a sameness of *result* would be arrived at, the contract itself, as proved, would be essentially different from the one as laid, and would present a case of variance. A contract is from the nature of things one *integral* matter.

Then as to the question of *description*. Now in the case put above of the robbery of the sovereigns, the taking of sovereigns in some larger or smaller quantity was the offence, and the sovereign was *descriptive* of and *defined* the subject of taking. Let the taking actually proved, however, have been that of *rupees* and not sovereigns, there would have been no taking proved of *any thing* described; and the charge must have failed.

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* R. vs. Williams, 2, Campbell, 507.
So the identity of an article may be destroyed by a *false addition* given to it. Thus a party might be indicted for the theft of a *shirt*; were it described in the indictment as a *linen* shirt, but turn out to be a *worsted* one, there would be a fatal variance. It might have been described as a *shirt simply*; but the *addition* would have destroyed the identity, and might have misled the prisoner in his defence. Mr. Norton, after putting the case of an indictment for stealing *brass* pots, while the evidence was that of a taking of *silver* ones, pertinently observes:—"In the case above put it would have sufficed to charge the prisoner with stealing *pots simply*: and then proof of *silver or brass* pots would have sufficed for his conviction. But to charge him with stealing pots of a *description which he knows he did not take*, as for instance *silver or gold pots*, might mislead him as to his defence; and if the description, though not essential to support the charge, be stated with needless particularity, the prosecutor is bound to prove it as he himself has elected to lay it."* So one indicted for stealing a *live* fowl could not be convicted on evidence showing he had stolen a *dead* one. Again suppose the place in which the offence was alleged to have taken place, the *locus in quo* as it is termed, was the *dwelling house* of A B, and the evidence only pointed to a place not being his *dwelling* but his *shop*, there would be a variance. In none of these cases would there have been any extent of conformity between the charge and its evidence.

In short, the question always comes round to whether the proof be an adequate one of the *legal* ground of ultimate question—degree of conformity of *complaint*, and with adequate *identity of description*; and after all, the issue may be *found at the trial* in a form to exclude the real contest upon the *merits*; and consequently to leave a case of variance as between the *evidence* and the *record*; and that possibly to the substantial *injury* of one party, while adherence to the form might not be demanded by the *protection* of the other.

* Norton on Evidence, p. 306.
A very frequent instance of this has been the mis-statement on the record of some document shown by the evidence to be different in its terms, though only perhaps in some minute point, or at all events in one not of the substance of the merits; and where the defendant could not have been misled by the inaccuracy. So too matters not reduced to writing at all, may be found at the hearing, though consistent in substance with the case made by the pleadings, nevertheless in point of form, to be laid inaccurately; and to be at variance with the literal proof.

To obviate the chance, in this state of things, of a miscarriage of Justice, successive Statutes have been passed in England, authorizing an amendment of the record at the hearing, at the discretion of the Judge.

The first which was a statute of Geo. 4. (9. G. 4. c. 15.) addressed itself to civil actions and indictments for misdemeanors, and authorized amendment where a variance might appear in any matter of writing or in print produced in evidence, and its recital upon the record. The next was one of the succeeding Reign, 3 & 4. W. 4. c. 42, by way of extension of the original act; and this authorized an amendment in every case of variation between the proof and the recital on the record of any contract custom, prescription, name, or other matter, in any particular not material to the merits, and by which the opposite party could not have been prejudiced in the conduct of his defence; or, in case of prejudice, on terms of withdrawing the record,—postponement of trial,—and so forth. The Common Law Procedure Acts of the present Reign (those of 1852 and 1854) contain still more sweeping extensions. The first gives by one clause a specific power of amendment in case of misjoinder, and by another a general power of amendment of all defects and errors in any proceeding in civil causes, whether there be any thing in writing to amend by or not, and whether the defect be that of the party applying to amend or not, with a declaration (after a provision for costs and terms) that "all such amendments as may be necessary for the purposes of determining in the existing suit, the real question in controversy between the parties, shall be so made." The second Com-
mon Law Procedure Act contains a clause to the like effect, author-
izing the amendment of "all defects and errors in any proceedings
under the provisions of that Act, if duly applied for."

None of these Acts, except the original one, apply to Criminal
proceedings, and that was confined to Misdemeanors. An Act of 1848
(11 and 12 Vic. c. 46) extended the provisions of the previous one to
Criminal offences generally; and one in 1851 (14 and 15 Vic. c. 100)
places the whole matter, as respects Criminal proceedings, on much the
same footing as by the Act of the following year (the first Common
Law Procedure Act) Civil ones were, as we have above seen, placed.

This principle of English legislation has in

Ditto in India. Civil cases been to a certain extent adopted in

India.

As respects the Supreme Court of Calcutta, a rule of Court,
pronounced shortly after the passing of the Act of William IV., adopted
its provisions in reference to all Civil matters.

The Bombay rules, in larger extension, provide that the Court
may at any time, before or at the trial of any cause, amend any formal
errors or mistakes in the plaint, on such terms as justice may require;
declaring the extension of the rule in particular to misjoinder in cases
of contract, or to that effect. 

These powers of amendment were confined to Civil cases; and
Act XVI. of 1852, (which is applicable to the Supreme Courts of the
three Presidencies,) in relation to Criminal ones gives the Court a
general power of amendment on the trial of any individual for
misdemeanor or felony, whenever there shall appear to be any variance
between the statement in such indictment and the evidence offered in its
proof. It contains, however, a proviso—"that the Court considers such
variance not material to the merits, and that the defendant cannot be
prejudiced in his defence on the merits;"—and it gives a power of
postponement of the trial. In a corresponding spirit, Section 141, of the
Civil Procedure Act confers on the Mofussil Court the power of

* See Smoul and Ryan, 49.
amending the issues, or framing additional ones, at any time before
the decision of the case, for the purpose of determining the real question
or controversy.

Still it will be observed that the whole of this power of amendment,
whether as respects England or India, is conferred simply to prevent the forms designed for
the protection of the suitors being converted into a denial of justice, and is limited to that object. Both alike leave
unaffected the broad requisition—(the creation alike of substantial justice
and the soundest common sense)—which casts on every suitor the
onus of an appropriate definition of his complaint, and its corresponding
support by the testimony.

We have already pointed out that this obligation of relevancy of
proof, exists as well in the Courts of Equity, as
in those of Common Law. The ampler scope of
the pleadings in the former, however, leaves the case less open to a
risk of miscarriage at the hearing, on the ground of variance; and the
power of amendment on the trial there, is for the most part confined
either to the bringing on the carpet new parties to the litigation, the
absence of whom might have prevented an adjudication, or to the modification of the prayer, where the operation of the prayer for
general relief (always to be found in a chancery bill) is considered
to be excluded by the frame in which the specific relief is prayed.*

The amendment is in effect to enable a relief to be administered,
not different from, but in conformity only with, the general case made
by the pleadings; but which was shut out, either by the absence of
parties required to be present at the decision of the right, or by the
imperfection of that particular portion of the pleadings which con-
stitutes the prayer.

Accordingly in a leading case on this question Watts and Hyde†
where the Vice Chancellor being of opinion that the facts appearing in the
evidence would have supported a more favorable case for the plaintiff

* Palk vs. Clinton, 12, Vesey, 62.
† 2, Phillip's Reports, 406.
than that made by the bill, and one which if unanswered would have entitled him to the relief, and an order enabling an amendment had been made by that learned judge accordingly, by laying a case to correspond with the evidence as recorded, the order was discharged on appeal to the Lord Chancellor Lord Cottenham; his Lordship observing:

"The evils which must necessarily attend making a new case after the cause has been brought on for hearing, are so obvious that it cannot be necessary to enumerate them, and I have frequently of late taken occasion to express my opinion of any relaxation of the practice in that respect. The rules which regulate pleading and the conduct of a cause, and particularly the taking of evidence, are framed for the purpose as far as possible of enabling both parties to bring their case fairly and fully before the Court, and to guard against those dangers, particularly with respect to evidence, which the mode of proceeding in Equity is too much calculated to produce. These objects would be defeated and these guards become inoperative, if a new case were permitted to be made at the hearing; and such an order as this has the additional objection, that it holds out a kind of promise to the plaintiff, that if he can make out such a case as the order suggests, the Court will grant him relief. It is true that the order prohibits the plaintiff from going into any evidence without leave of the Court; but if he has already, and before any such case was made, given evidence upon which he can rely to support it when made, such evidence must have been given improperly, there being no matter in issue to which it could apply; and the defendant who for that reason was not bound, and could not be expected to answer it, is now with full knowledge of his adversary's evidence to do what he can to contradict it—a course contrary to all the rules of Courts of Equity, whatever may be the merits or demerits of such rules."

Surplusage; what constituting; and how dealt with.

It would be foreign to the scope of this Treatise to go into a discussion as to that which, in a case of common pleadings, ranges under a head known as that of surplusage; and the exclusion of irrelevant matter stands on a footing different from that of redundant, the former being shut out because it is no proof;—the latter because it is not wanted.
In dismissing, however, the subject of relevancy, we will just add, that there frequently creep into pleadings statements of *redundancy* not essential to the issue for trial whether civil or criminal; and as these need no proof, so a proof *different* from their representation as laid would be innocuous. A very slight illustration will indicate the nature of this, and we confine ourselves to a selection of one in a case of *criminal*, and another in one of *civil* procedure.

Thus as to the former, suppose to a charge for stealing a watch, there were added an allegation, that the accused stole the watch,—"being armed with a bludgeon and disguised with a visor,"—the arming and disguising would be wholly foreign to the charge, and would be pure matter of surplusage accordingly.

As to the latter, we may cite what has been usually referred to as a leading authority on this subject,* where in a Case of certain claret exported to India under a *warranty* of fitness, an action having been brought for breach of the warranty with an allegation of the "*scienter,*" as it is called, that is, that the defendant *well knew* its unfitness, but no evidence was given of the knowledge, and objection was taken on the ground, it was overruled. Lord Ellenborough in pronouncing the judgment of the Court observed:—"If the whole averment respecting the defendant's knowledge of the unfitness of the wine for exportation were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved. For, if one man lull another into security as to the goodness of the commodity, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale; the warranty is the thing which deceives the buyer, who relies on it, and is thereby put off his guard. Then, if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit."

*Williamson *v.* Allison, 2, East, 446.
CHAPTER XII.

On the Rule which requires the Best Evidence to be given.

The condition of Relevancy being fulfilled, the next condition which the law enjoins is, that what is received as Evidence should be the best evidentiary matter of its kind attainable; or as the rule is ordinarily (though not with strict accuracy) expressed, that the Best Evidence should be given.

Addressing himself to a general proposition, Mr. Starkie observes;—"The law wisely requires that the evidence should be of the purest and most satisfactory kind which the circumstances admit of, and that it should be warranted by the most weighty and solemn sanctions."* And Mr. Taylor, to the like effect, points out that it should be that,—"which in the eye of the Law affords the greatest certainty of the fact in question."†

And no doubt both writers, in the broad proposition which they lay down, correctly describe the legal requisition. It will be seen, however, in the sequel that by the 'best evidence' prescribed by the rule under discussion is meant, not the best possible evidence which might be capable of being brought to bear on any given subject, but the best only of its own particular class.

In the Introductory Chapter of the Work, there has been pointed out the division of evidence into the twofold classification of Primary and Secondary. Primary, as its name denotes, is the original and higher proof;—Secondary is that which is received in substitution for it. It is obvious that if, while the original were itself producible, substitutionary evidence were admitted in its stead, the least satisfactory

* Starkie on Evidence, 20.
PRINCIPLE OF RULE.

and certain would have supplied the place of the most, and the issue would have been tried on the inferior, instead of the superior proof. So long as the fact rested on the substitutionary evidence, there could be no assurance but that the original, on its production, might prove in direct contradiction to its substitute; while resort to the secondary, the primary being withheld, would beget the suspicion of suppression and sinister motive. Necessity indeed, as that the primary evidence was unproducible, might justify the reception of the secondary, as a lesser mischief than the failure of proof altogether; but even then the secondary could only be received at the risk of its certainty.

Thus in any transaction reduced into writing,—be it one of sale, gift, contract, or so forth,—it is manifest that the writing itself would be its appropriate, as it would be its natural record. What the parties had themselves defined, and defined for the purpose, and with the solemnity of a record, would be the best definition of the transaction. "To admit oral evidence," says Mr. Starkie, "as a substitute for instruments to which, by reason of their superior authority and permanent qualities, an exclusive authority is given by the parties, would be to substitute the inferior for the superior degree of evidence; conjecture for fact; and presumption for the highest degree of legal authority; loose recollection and uncertainty of memory for the most sure and faithful memorials which human ingenuity can devise, or the law adopt;—to introduce a dangerous laxity and uncertainty as to all titles to property, which, instead of depending on certain fixed and unalterable memorials, would thus be made to depend upon the frail memories of witnesses, and be perpetually liable to be impeached by fraudulent and corrupt practices."

That even the most honest purpose often affords no security against inaccuracy, we have the high authority of an eminent Chief Justice of the Queen's Bench, Lord Tenterden, who says;—"I have always acted most strictly on the rule that what is in writing shall only be proved by the writing itself." My experience has taught me the extreme

* Starkie on Evidence, p. 651.
danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments; they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule."* So another Chief Justice, Lord Wynford;—"I seldom pass a day in a Nisi Prius Court, without wishing that there had been some written statement evidentiary of the matters in dispute. More actions have arisen, perhaps, from want of attention and observation at the time of a transaction, from the imperfection of human memory, and from witnesses being too ignorant, and too much under the influence of prejudice, to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of parol testimony. Our ancestors were wise in making it a rule, that in all cases the best evidence that could be had should be produced; and great writers on the law of evidence say, if the best evidence be kept back, it raises a suspicion that, if produced, it would falsify the secondary evidence on which the party has rested his case. The first case these writers refer to as being governed by this rule, is that where there is a contract in writing, no parol testimony can be received of its contents, unless the instrument be proved to have been lost."†

*What is applicable to a transaction recorded by writing, applies also to a considerable, though to a less, extent to the writing itself, and its proof by the substitutionary one of what might purport to be a copy. Whether by design or by mistake, the copy might be itself inaccurate.
—There might have been either interpolation or omission; and a word, possibly even a letter, might change the whole sense; while the copy would not tell the state of the original; and this might be that of erasure, interlineation, or mutilation;—all perhaps having an important bearing on the question.

Let the case be even that of depositions, put into writing and taken in the same cause in some earlier stage, or in some other cause between the same parties; still the

* Vincent vs. Cole, Moody and Malkin, 258.
† Strother vs. Barr, 5, Bingham, 151.
further examination of the witness, were he there to be examined, might elicit new facts, which might materially qualify his former testimony, if not entirely destroy its effect.

We find it laid down so long ago as the time of the Lord Chief Baron Gilbert, and by that eminent authority;—

"The first and most signal rule in relation to evidence is this, that a man must have the utmost evidence that the nature of the fact is capable of." And again;—"The true meaning of this rule is that no such evidence shall be brought which ex natura rei supposes still a greater evidence behind, in the parties' own possession or power."*

The rule has been recognized from that early period; and may be propounded alternatively in the terms, that no Evidence shall be admitted which is not the best attainable of its class; or that none of a secondary character shall be received, while primary of the same degree is capable of being produced.

Here it is necessary, however, to distinguish differing modes of proof, from those different degrees of evidence, which range under the head Primary or Secondary.

Accordingly in propounding the rule, Mr. Phillipps justly observes;—

"The true meaning of the rule is, not that the Courts of Law require the strongest possible assurance of the matter in question, but that no evidence shall be given which, from the nature of the thing, supposes still greater evidence behind in the parties' possession or power."†

Were the "strongest possible assurance" required, transactions would in some instances demand a most inconvenient and burthensome redundancy of proof. Thus, to comply with such an exigency, were there twenty witnesses present on even the most ordinary occasion, the whole twenty would have to be called; since, until the testimony of each was exhausted, the strongest proof would not have been given.

* Gilbert on Evidence, p. 4—16.
—Yet this might take place, albeit the transaction was one of which the evidence of any single credible one of the whole twenty might be sufficient to bring conviction to any reasonable mind. Indeed, under ordinary circumstances, an instrument although required to be attested by two witnesses may be proved by the evidence of one; or, what is perhaps a still more striking illustration, in a case of disputed handwriting, it is not even necessary to call the supposed writer, either in affirmation or negation of the writing. The fact might be established by other evidence; even by that of comparison;—and that without accounting for the non-production of the writer;—nay, in his very presence in Court, without examination. So money may have been paid and a receipt given for it. The natural evidence of the payment would be the receipt; or at all events, if not the receipt, either the evidence of the party paying, or the party paid, or both. Yet the proof might be equally that of one who merely casually witnessed the transaction.

In none of these cases would the evidence be secondary. Each proof would be as much primary, as the other; though, in some of them certainly, if it were a question not of the admissibility, but the weight of the testimony, the best would hardly appear to have been adduced. It is, however, a question not of weight, but of admissibility.

The meaning of the rule therefore is simply this, that although the same fact may be proved on varying sources of information, or in other words, by different modes of proof, the particular proof resorted to must be the best of its kind, the primary and not the secondary of the class.

The distinction is thus well put by Mr. Best:—"The important rule in question has been very generally misunderstood; partly from the ambiguous nature of the language in which it is enunciated, and partly from its being commonly accompanied by an illustration which has been confounded with the rule itself." "If," say the books, "a man offers a copy of a deed or will when he ought to produce the original, this carries a presumption with it that there is something in the deed or will that makes
against the party, or else he would have produced it, and therefore the
proof of a copy in this case is not evidence." This is undoubtedly true,
but it is a great mistake to suppose it the full extent of the rule.
Sometimes, again, it has been misunderstood as implying that the law
requires in every case the most convincing or credible evidence which
could be produced under the circumstances. But all the authorities
agree that this is not its meaning; as further appears from the max-
ims, that "there are no degrees of parole evidence," and "there
are no degrees of secondary evidence." Suppose an indictment for
an assault—and to make the case stronger, let it amount to wounding
with intent to murder (an offence still capital)—the injured party,
though present in Court, is not called as a witness, and it is
proposed to prove the charge by the evidence of a person who witnessed
the transaction at the distance of a mile, or even through a telescope;
this evidence would be *admissible*, because it is connected with the
act—the senses of the witness having been brought to bear upon it;—
and the not producing the, what would probably be the more satisfac-
tory, evidence of the party injured, is mere matter of observation to
be addressed to the Jury. Again, by "secondary evidence" is
meant derivative evidence of the contents of a written document;
and it is a principle that such is not receivable unless the absence
of the primary evidence, the document itself, is satisfactorily accounted
for. But when this has been done, any form of secondary evidence
is equally receivable; thus the parole evidence of a witness is admissi-
ble, although there is a copy of the document, and the probability
that it would be more trustworthy than his memory, is only matter of
observation."*

*Elucidation of the rule.*

Bearing this distinction in view we proceed
with the *elucidation of the rule* itself.

It will have been seen, in the Chapter on Pre-constituted Evidence,
that there are cases in which the Court excludes all
proof other than the prescribed one; for example,
in the case of judicial proceedings, transfers

* Best on Evidence, p. 93.
of land, or bequests, all other than the judicial record, the conveyance, the will. It is hardly necessary to point out, that in these instances the question of the admission of secondary evidence does not even arise, so long as the prescribed mode of proof has an actual existence. The appropriate evidence existing, the Court admits no other. Thus parol evidence would be inadmissible of the time of a trial, the record of the proceeding being the proper proof.

But this evidence like all others might, under circumstances, fail in its capacity of production. The record might have been destroyed;—the conveyance might have become obliterated by age;—or the will might have been lost. In all such emergencies even prescribed proof, as regards the reception of secondary evidence, stands on the same footing as all other documentary evidence; and to the conditions under which secondary evidence of this is receivable, we proceed.

Addressed as the rule of exclusion so prominently is to the mischief of allowing transactions the terms of which have been put into writing to be proved by any other evidence than the writing itself, it will have been anticipated that the rule should prohibit, as it does, in such cases, all evidence short of the writing, wherever that writing is producible.

This is one of the most ordinary applications of the principle; and so universal is it, that, subject to an exception we shall point out, did it transpire in the course of the hearing of a cause, even if not disclosed by the pleadings, that in reference to the transaction the subject of the litigation there was any writing defining its terms, the cause would not be allowed to proceed without either the production of the writing, or a sufficient accounting for its absence. A frequent example of this arises in practice in cases touching the occupation of land, and the terms of its holding. Here should it transpire, either upon examination-in-chief or cross-examination, that the tenancy was under a written contract, the contract must be produced or its absence accounted for, or the case would be stopped. Another illustration of the doctrine
often occurs in cases of building contracts, with a claim for extra work. The extra work not having been done under the contract, there would *prima facie* appear no ground for requiring the contract's production; yet so jealous is the Court of dispensing with what is written, that, unless there be the clearest proof that the work was done under a *distinct* order, it always requires the production of the contract; that it may be seen, on an inspection of the writing itself, that the items sought to be recovered were not in fact included in it; and the agreement would be the proper evidence to show what the extras were.

The exception to which we have adverted is that of a plaintiff managing to establish a *prima facie* case, without betraying the existence of the writing, and its only coming out on the part of the defence. There the defendant, if he mean to rely on the writing, must produce it as part of his defence; and in this state of things the plaintiff's proof will still stand, until rebutted by the contradiction of the writing. Had the existence of the writing come out on the plaintiff's case, it would have shut the door to the proof, which in its absence would have got established.

Mere *preliminary memoranda*, however, not signed, though having a reference to the transaction, and even purporting to define its terms, would not be within the prohibition;—nor would even a document read over to a party as showing the terms of the bargain, if not signed although acquiesced in by him, as for instance, one containing the terms of holding read to a tenant even though he actually held under it;—nor would a writing which did not contain all the terms of an agreement. In all these, and such like cases, the written evidence would, from the imperfection of its obligation, have failed to acquire the title of primary; and other evidence accordingly might be given notwithstanding the existence of the writing. Illustration of the principle will be found in the cases referred to in the Chapter on Parol Evidence, in which oral testimony has been permitted to be received notwithstanding the existence of written memoranda having a relation to, and in a sense defining the transaction.
In the application too of the rule, it is necessary to bear in mind
a distinction which exists, between those cases in
which the writing is itself the definition of a trans-
action, and those in which it is only the record
of a fact, and one of different modes of its proof. Thus, in the
instance of a public register, the record it contains of the birth, marri-
age, or death of a party, would be only one mode of proof of that which
might have been equally established by any other, as for example, the
testimony of persons present on the occasion. The written record
could not accordingly prevent any other proof.

Of course if the existence or contents of the writing itself be disputed
in any point material to the issue, there are few
cases in which the question could be solved,
only by the production of the writing;
and, when this is so, no secondary evidence could be admitted.

The same principle, which restricts the evidence to the writing
in every case in which the primary, evidence is
something written and producible, prohibits all
other evidence of the writing than the original
itself; and that in spite of evidence proffered
with a view of showing the accuracy of the copy;—and this has been
applied in England to a duplicate taken from an autograph by means
of a copying machine.

The Indian Evidence Act, however, contains a provision that an
impression of a document made by a copying machine shall be taken
without further proof to be a correct copy.

Even according to English Law, printed copies struck off in one
common impression, though merely secondary evidence of the contents
of the paper from which they are taken, are primary evidence of
each other's contents.

* Section 35.
It occasionally happens that the same transaction is manifested by different documents; and a question arises whether one is, or all are, to be taken as primary. This must always be a question of circumstance. Ordinarily, where deeds are executed in duplicate, each duplicate is an original; and so where executed in counterpart; as for instance, in a case of a lease or contract to sell, where one party may execute the lease, and the other the counterpart, or one, one copy of the contract, and the other the other. In these cases, as against the party executing or signing, the document executed or signed by him would be an original.

The question often arises, and with some difficulty of solution in the case of Mercantile Contracts effected through Brokers. According to the course of dealing in England, the bought and sold notes, if merely signed in compliance with the exigencies of the Statute of Frauds, are considered as constituting the contract; and, when the contract is effected by these means, it yet remains undecided whether the broker's books are not to be treated as merely secondary evidence, and only to be resorted to on failure of the primary. When no notes, however, are transmitted to the principal, it is admitted that resort may be had to the books of the broker as primary evidence, or indeed to any other memorandum made by him as agent for both parties. But the question becomes more difficult where there is a disagreement between the bought and sold notes; and this too yet awaits decision. Probably it is not a very important one in Indian jurisprudence; and we do not enter upon it further.

Taking it then as a rule that, in the case of a producible writing, no evidence can be given of its contents, short of its own production, the next question which arises for consideration is, in the event of the writing not being forthcoming at the time of trial, the limits within which the rule requiring its production may be dispensed with, and substitutionary, or secondary evidence of contents, given.

The dispensation is matter for the discretion of the Judge; and, before this could be invoked, preliminary proof would of course be requisite of the original existence of the writing, and its authenticity,
and if a deed or will, its execution or genuineness; though evidence only in generals would suffice. Were it the case of a document requiring attestation, the attesting witness must, if known, be called, or, in the event of his death, his handwriting must be proved, just as if the deed had itself been produced.

Prov'd destruction would be an obvious ground for the admission of the secondary evidence; as would loss; and throwing aside as useless would be presumptive evidence of destruction. But there must be proof of the circumstances; and a curious illustration of this is furnished by a case which occurred in the Madras Presidency, and went on appeal from the Sudder Dewanny Adawlut to the Privy Council. An action was brought on a bond the execution of which was denied by the defendant. The plaintiff in rejoinder alleged the bond to have been destroyed, or partially so, by rats; and under the Madras Regulation XVII. of 1802, put in as evidence a registered copy of the bond, producing at the same time, what he represented to be the fragments. He, however, called no witnesses to prove the fragments to have formed part of the original bond. The Madras Court admitted the copy as evidence, and found for the plaintiff. The Privy Council, however, held the secondary evidence of the copy improperly received, and reversed the judgment. "The material evidence," observed the then Vice Chancellor Knight Bruce, 'was the bond itself; failing that, evidence should have been given of its destruction. Secondary evidence can only be received, when the absence of the bond is accounted for." So Lord Brougham.—"It is not upon the fragments the case rests, but upon the requiring of secondary evidence. The Judge seems to have assumed without evidence that these scraps were portions of the bond; and these scraps it appears do not agree with the description on the Registry."*

If the instrument were executed in duplicate, the proof not being that of the duplicate itself, the duplicate must be accounted for, before any secondary evidence could be given.

In case of loss, what adequate search?

But the question of loss always involves another question; and that is the adequacy of search. Of this the leading elements would be;—search in the right place, in the proper custody or depository, and with reasonable diligence; in other words, a fair exhaustion of all accessible and appropriate sources of discovery or information.

What is expected, however, is not conclusive demonstration of loss, but only reasonable presumption, after an honest search; the proof required being more or less stringent, in proportion to the importance of the document, or its being open to suspicion of suppression.

When the document might be expected to be found in alternative custodianships, each should be searched. Thus, at the expiration of a tenancy, the lease might be in the custody of either lessor or lessee. Resort should accordingly be had to both.

If the original custodian were dead, application should be made to his representatives.

Ordinarily, the party to whom the law would assign the rightful custodianship must be subpœnaed to produce the writing; and examined to account for it; unless its appropriate place of deposit were a public office or other exceptional place; when proof of search would usually be sufficient, without production of the officer.

It is not actually necessary that the search should have been made, for the purpose of the cause, or even recently; though generally more satisfactory that it should. In one case there had been an interval of three years between the search and the bringing the action, yet the search was held sufficient.*

The writing, however, even though in existence may yet be beyond the control of the party requiring its production, by reason either of its being in the possession, or under the dominion, of his adversary,

* Fitz vs. Rabbits, 2, Moody and Robinson, 60.
or its being in that of a stranger; and it would be considered as under the adversary's dominion, were it in the possession of a person in privity with him, as for instance, his solicitor, banker, agent, servant, or the like.

In these cases, the production being withheld, secondary evidence might be given, under the conditions to which we advert.

Adequate foundation must be previously laid to trace the possession to the party charged with it; though slight circumstances would be sufficient. Thus it would be enough did the writing belong to him, or ought according to the course of business to be in his possession, or were last traced to him, or were he entitled to its possession under the order for its delivery out to him of any Court in which it may have been deposited, even though still in the hands of the Court.

The possession, however, must be one under a right to retain it;—not that of a mere casual holder, as for example, a stakeholder.

In the case of the document being in the possession or under the dominion of the adversary, the rule of exclusion would cease to apply; and secondary evidence might be given on his withholding the writing at the time of trial, after due notice to produce; or under circumstances dispensing with this notice as a condition. Having once declined to produce when formally called on at the trial to do so, he could not shut out the secondary evidence, by afterwards changing his mind, and on production of the original, call for proof by evidence of the attesting witness. Neither, after such refusal, would he be permitted to put the document into the hands of his opponent's witnesses for the purpose of cross-examination, or to produce it as part of his own case. The possession once traced to the party, it would be no objection to the admission of the secondary evidence, that he had ceased to have any control over the instrument even previous to the notice, unless he had pointed out the party to whom it had been delivered; and a voluntary parting with the instrument, after a notice to produce, would be no answer.
In all these cases, however, there must have been a previous due notice to produce; and due notice is notice to the party or to his solicitor; which may be either verbal or in writing,—(the latter, however, is less open to question, and is the desirable one,)—and of which the main ingredients are, that the notice should indicate, with adequate precision, the cause in which it is given, the time and occasion of production, and what is required to be produced;—and it should be served in sufficient time to admit a compliance. In one case a notice was held bad for a mere misdescription of the title of the cause. But this it seems would not prevail at the present day, unless the misdescription were of a nature to mislead the party. Were strict accuracy to be required, the absurdity would follow that even a variation of a name, the omission of a single party (perhaps among many) to the record, would be fatal, and even under circumstances where it would be idle to suppose any misleading. In a case in which a notice had been objected to from being entitled (obviously by mistake) in a wrong Court, Baron Alderson observed;—‘One does not know where we are to stop. Would the notice be bad, if one of the names was spelt wrong?’

The notice need not, however, enter into too great a minuteness of detail as to dates, names, contents, &c.; in fact this might under circumstances be even mischievous, as constituting a limit to the subject not designed by the notice. Notices in the form of "all letters written by the plaintiff to the defendant relating to matters in dispute in the action,"—"all books and papers relating to the subject matter of this cause,"—and the like, have been held sufficient.

If that of which the production is called for is alleged to be either in a Foreign Country, or otherwise at such a distance as to be practically out of reach of access at the time of trial, it becomes a question of circumstances whether, notwithstanding the shortness of the notice, the rule would be dispensed with, and the secondary evidence allowed. For example, in one case of a party who had gone abroad leaving his cause in the hands of his attorney, the court acted on the presumption that he

* Lawrence vs. Clark, 14, Meeson and Welsby, 251.
had left his papers likewise with the attorney; or if not, that he must be answerable for the consequences; and though the notice to produce was only served on the attorney, the Court admitted the secondary evidence. In another case, the ordinary four days notice to a defendant in England to produce letters written by him to his partner in New South Wales, was considered sufficient; a long previous litigation on the subject making it probable that they had been remitted to England.

Whether an attorney of a party called on by his opponent to state if he had a particular document in his possession, and averring that he could not answer without search, would be compelled to make the search, is a point which yet remains undecided. It seems reasonable that he should be.

But the notice itself may be dispensed with under circumstances; and those circumstances are the following:

1st.—Where the notice is itself a notice. Otherwise the series of notices to be proved might become infinite, each one of the series requiring proof in its turn.

2nd.—Where the nature of the proceeding must sufficiently apprise the defendant that he will be charged with the possession, and called upon to produce the writing, as in the case of an action to recover a bond, or of trover for its conversion, the bond itself; or in a prosecution for stealing a document, the document. In a prosecution for forgery, however, the instrument must itself be produced.

3rd.—When after suit the writing has got into the defendant's own possession, by his wrongful act; as for instance, an instrument after action commenced fraudulently procured by him from the witness subpoenaed to produce it.

4th.—Under a statutory enactment, in the case of actions brought by seamen for their wages, the ship's articles.

* Bryan vs. Wagstaff, Ryan and Moody, 327.
† Sturge vs. Buchanan, 10, Adolphus and Ellis.
‡ 17 c. 18 Vict. c. 104 s. 165.
5th.—Where there has been an admission of the loss, either by the adversary, or his attorney.

And lastly, by proof that the party, or his attorney, has the writing in Court.

In the case of a stranger not compellable by law to produce the writing in question, and refusing to do so, whether having been subpoenaed to produce it, or, on being sworn, admitting having brought it into Court, secondary evidence of the contents would be admissible. In a very modern case of the possession of a letter by a party beyond the seas who declined to produce it, though the point was not decided,—(the case going off on another ground,)—the Court seemed to think that under the circumstances secondary evidence might have been given.*

The mere refusal to produce, however, of an ordinary witness having no protection, and called on his subpoena to produce, would not let in the secondary evidence. The sole remedy would be against the witness.

In the case of an attorney refusing to produce an instrument on the ground of privilege, though not avering any special instructions to that effect, it would appear necessary, for the purpose of letting in the secondary evidence, to call the client, in order to ascertain from himself that he objected to the production:—otherwise the party would not have complied with the rule which requires him to have exhausted all means of original production within his power, before he is let in to give the secondary evidence.

Were the attorney, however, to swear that he was acting under the direct instructions of the client, the Court would give credence to the statement; and assume the client to be still continuing in the same mind; and the secondary evidence might be given.

* Boyle vs. Wiseman, 10, Exchequer, 647.
Absence of control is not confined to the case of possession in the hands of another. The writing may be out of control, by reason of its production being either physically impossible, or so highly inconvenient as practically to amount to the same thing.

Thus it may be an inscription on a rock, or on a wall, monument, or grave stone,—marks on a tree—or a proclamation in a foreign country, or the like. To require the production of the original would, in such cases, be a negation of the proof altogether. Consequently whatever is sufficiently brought within the range of this impracticability of production, is allowed to be proved by secondary evidence. In the case of a document, it must however be shown that it is not in fact removable; or practically so. Thus, where a notice was merely suspended to the wall of an office by a nail, it was considered necessary to produce the original itself, and secondary evidence was not allowed.*

The Indian Evidence Act has a clause providing that, when an original document is out of the reach of the process of the Court, it shall be lawful to the Court, on application to it in any civil suit or proceeding, and on notice to the opposite party at a reasonable time before the hearing, to make an order for the reception of secondary evidence of the execution and contents.†

Akin to the last ground of exemption, so far at least as it turns on the point of inconvenience, is another where, if the original were produced, it would be in a form of such voluminous a character as to baffle all profitable scrutiny as to result, within compass of the time allotted for a trial,—as in the case, for instance, of bulky or complicated accounts,—a course of mercantile dealing as manifested by a long series of bills of exchange,—the result of an examination of a number of old records,—and so forth. On general questions, such for example as solvency,—a general

* Jones vs. Tarleton 9, Meeson and Welsby, 675.
† Section 36.
balance,—or the mercantile usage of a House,—the evidence of competent parties to whose scrutiny these materials had been submitted, and the results of their investigation, would be admissible as evidence, without reference to the production of the originals themselves.

It is necessary, however, here to distinguish between evidence as establishing some broad general fact, and the taking of an account on the materials of the books, so as to charge accounting parties with specific sums; and to this the general evidence could not be stretched. It must be to matters of fact too deducible from such materials, that the secondary evidence would be confined. Were the subject, for example, a correspondence and its construction or effect, it must be produced, and speak for itself; since the result of a correspondence could be only matter of personal impression, and by which different minds might be affected differently.

In the case of the written appointments of Public Officers, evidence has been received of their acting in the Office, in substitution of their written appointment; and this has sometimes been referred to the head of secondary evidence. One may be allowed to doubt, whether it would not be more properly referable to the head of legal Presumption. The criticism however is not a very material one. It is sufficient to know that the ground of exception exists.

It should be added, as respects all secondary evidence, that, although there may be a great variety of degree as to its quality, and consequently its effect, there are no degrees as respects its admissibility. In the case for instance of a deed, the evidence of its contents most satisfactory to the mind next to its own production, would be that of some examined and authenticated copy of it. On the score of admissibility, however, oral testimony of the contents of the deed would be as receivable as the written copy, and in the first stage of investigation. The production of the original itself once got rid of, it is not necessary to exhaust the superior series before any article of the inferior is let in; however much it might be matter of observation prejudicial to
the party, that he produced the inferior only, while the superior might have been forthcoming; and the suggestion of suppression might arise.

What is offered, though, as secondary, must *sustain the character* of evidence. Thus for example, what purported to be a *copy* could not be received without proof that it was so; nor would a mere *copy of a copy* be receivable at all, that being rather in the nature only of hearsay evidence. This appears somewhat in disregard of the axiom of the Mathematicians, that—"things equal to the same are equal to one another."

Hitherto we have been addressing ourselves to the question of the substitution of parol for written evidence; where there had been *antecedent, original evidence of the higher class*. We now come to one in which the question of the admissibility of secondary evidence assumes a phase somewhat the converse of the other; and it is whether statements originally oral, but reduced into writing, and recorded in the shape of depositions, are themselves receivable, or obnoxious to the objection that they are but secondary evidence only. This arises where evidence has been taken in some former proceeding between the parties, or some preceding stage of the existing one; and the question is, whether the deposition of the witnesses is to be received in the new proceeding, or the later stage of the existing one.

*Were the witness himself producible, the deposition would obviously be excluded; since his production would afford the means of primary evidence being given.*

*Unproductibility exists* in the case of the death of the witness subsequently to the date of the deposition;—his being *out of the jurisdiction* of the Court;—when he cannot be found after diligent enquiry;—when he is either *insane,*—or *permanently sick*;—or when he is *kept out of the way,* by the contrivance of the opposite party.
FORMER DEPOSITIONS.

It should be observed, though, that compliance with the condition of non-producibility after search applies only to civil cases. In criminal cases even this is insufficient to justify the admission of the depositions; though the distinction does not prevail with respect to either permanent insanity, or sickness; the existence of either of which would warrant the admission of the deposition in criminal equally with civil cases.

Of course in all these cases, foundation must be laid for the admission of the deposition by proof of the prescribed condition; proof at least to the extent of affording sufficient for the Court to act upon.

In one case in which the admissibility turned on the death of the witness, the deposition was fifty years old, yet the Court declined to act on the supposition of death, until evidence of enquiry and want of tidings had been given.*

In the instance of absence from the jurisdiction a proved residence without it would of course suffice. But in civil cases, some latitude has been allowed when the proof stopped short of absence at the very moment of trial. Thus in the case of a naval Captain about to go to sea, and excused accordingly on account of his expected absence, it was held unnecessary that he should be actually on his voyage when the trial came on. Had the ship sailed, though it had put back, or had the witness gone on board and was ready to sail, though detained by contrary winds, that would have been sufficient.†

On the subject of the party not being found on enquiry, it may be stated that the decisions have left it in some uncertainty how far answers to enquiries are admissible in proof of the fact. If tendered as mere proof of the fact of absence, they might properly be rejected as mere

* Benson vs. Olive, 2, Strange, 920.
† Fousick vs. Agar, 6, Espinasse, 92.
hearsay. "But where," says Mr. Taylor,—(and this seems the correct view of the case,)—"the question is simply whether a diligent and unsuccessful search has been made for the witness, it would seem, both on principle and on authority, that the answers should be received as forming a prominent part on the very point to be ascertained."

**Confirmed** insanity, or permanent sickness, would be obvious grounds for admitting the depositions; and as respects insanity, the same rule has been stated to prevail, even though the insanity were casual.

**Temporary** sickness, however, is rather ground for postponing the trial, than for the reception, as secondary evidence, of the previous depositions; and, when in the case of a casual insanity, the expectation of a speedy recovery might be sufficiently strong to justify the course, this would appear to stand on the same footing.

The **degree** of illness which, within the meaning of the rule, awards to it the character of permanent, is not very clearly defined, as indeed it could hardly well be. It must always be a question more or less of individual circumstance; but the main criterion seems to be the rational expectation of recovery, within a reasonable period.

In the criminal Courts, the approaching confinement of a woman so closely as to prevent her attendance at the trial, has never been allowed as a ground for admitting the depositions.

Assuming the position of the witness under any of these heads is such as to admit the reception of the secondary evidence at all, the general rule by which the admissibility of any evidence of this description is regulated is thus laid down by the Vice Chancellor Kindersley, in a very recent case before him:

"The general rule with regard to the admission of evidence is, that when an issue has been raised between certain parties, and evidence has

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been adduced upon that issue by one of those parties which could be used by him as against the other party, and in a subsequent proceeding the same issue is raised between the same parties, and the witness who gave the evidence in the former proceeding has died, the Court will admit the evidence given by the deceased witness in the former, as evidence in the subsequent proceeding. But the evidence is not admissible unless the issue is the same, and the parties are the same in both proceedings."

Though the principle would be the same as applied to depositions, the case indeed before the Vice Chancellor was one of affidavits. The rule as addressed more particularly to the former is thus stated by Mr. Taylor:—

"Bearing in mind the broad proposition before stated, that such proof is only admissible where the production of primary evidence is out of the party’s power, it may be advanced as a general rule of law, where a witness has given his testimony under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given will, if the witness himself cannot be called, be admitted in any subsequent suit between the same parties, or those claiming under them, provided it relate to the same subject, or substantially involve the same material questions."†

The ‘judicial proceeding’ must be one to which the party against whom the testimony is offered was legally bound to submit, and by an ‘oath’ of course is meant an oath duly administered and by a competent tribunal. Testimony taken on affirmation, however, would be within the rule; and so in India it may be presumed would any testimony taken under the special provision of the Evidence Act authorizing the dispensation with the oath.

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Actual cross-examination unnecessary, if power existed.

The power of cross-examination is a very prominent feature in the condition of reception.

* Lawrence vs. Maule, 4, Drewry, 472, (1859.)
It is not necessary, however, that there should have been actual examination, though the proceedings must have been in a form to have admitted the power. Accordingly in the case of an examination under a Commission, and one party declining to attend, depositions taken in his absence would be admissible; as would even those taken under an exparte Commission for which notice of application had been given, on the abandonment by the other, side of examination, under a previous joint Commission.

In addition to the power of cross-examination, the opponent must be the same in both suits. Otherwise there would be that want of reciprocity in the binding character of the evidence which is the condition of its reception. Thus on an issue from chancery between A. and B., depositions produced by B. in an equity suit of C. against B., were not allowed to be read as part of A.'s evidence, though the question in both suits was precisely the same.*

It would be in civil suits inter partes that the question of reciprocity would arise. In criminal proceedings the previous deposition would be admissible, provided only it were taken in the prisoner's presence, and with power to cross-examine. Thus a deposition given on a charge of assaulting, stabbing, or so forth, can, after the death of the witness, be read on a trial of the accused for murder, where the two charges relate to the same transaction.

Though to render the depositions admissible, there must be an identity of the parties, by 'identity' is to be understood one of substance, and not of mere form. Thus the parties may be differently marshalled in the two proceedings; as for instance, the plaintiff in one may be the defendant in the other; or there may have been a plurality of parties on either side in one suit; and a lesser number, or one only in the other. Thus testimony given in a suit where A. and others were plaintiffs against B., has been received

* Atkins vs. Humphreys, 1, Moody and Robinson, 523.
in a subsequent suit brought by B. against A. alone; the subject-matter being the same.\(^*\)

The same latitude which exists in relation to identity of person, applies with respect to identity of subject-matter. Thus if in a dispute respecting lands, any fact were to come directly in issue, the testimony to that fact is admissible to prove the same point in another action between the same parties, and their privies, though the last suit relate to other lands.\(^†\) On the other hand mere similarity of subject-matter would not suffice; unless there were sufficient identity to give the same turn to the general course of examination. Thus if the proof or disproof of the issue in the former proceedings required but a partial cross-examination only of the witness, on the matters in controversy in the latter one, the evidence would not be admissible. The fuller cross-examination in such case would have been irrelevant, and unnecessary; and the opportunity accordingly of pursuing it would have been nominal only, and not actual.

In the case of representatives, representation of course means privity, in the sense of succession to the same right; and which obviously would be subsequently to the first trial.

It only remains to be added that all depoisions of the class to which we have been addressing ourselves are open to the same objection as might have been taken to them, had the witness been personally under examination at the trial at which they are tendered. That accordingly would be rejected which was elicited by questions either leading or otherwise illegal; save that a party could not himself repudiate an answer given to an illegal question put on his own side. Thus in a case in which a witness, examined in a Foreign Country, had stated the

\(^*\) Wright \textit{vs.} Doc dem Tatham, 1, Adolphus and Ellis, 3.
\(^†\) Doc \textit{vs.} Foster, 1, Adolphus and Ellis, 791.
contents of a letter not produced, that part of the deposition was struck out;—Tindal Chief Justice observing—"We have no power to compel the witness to give any evidence at all; but if he does give an answer, that answer must be taken in relation to the rules of our law on the subject of evidence."*

* Steinkeller vs. Newton, 9, Carrington and Payne, 319.
CHAPTER XIII.

On the Admissibility of Parol Evidence in Control, or Aid, of Written Documents.

In the preceding Chapter we have investigated the principles which, in the instance of documents, preclude the reception of all evidence short of the documentary, whenever this is producible; and in the term 'documentary' is intended to be included any thing in writing.

We turn now to a subject in some connection with this, namely the case in which, either the document is alleged to tell its tale untruly, or fails to chronicle its own design; and to the extent to which, under that state of circumstances, Foreign, or as it is termed, Parol or Extrinsic evidence, is allowed to be resorted to in control, explanation, or application of the document.

As respects Control, it is a general rule that parol testimony cannot be received to—contradict, vary, add to, or subtract from,—the terms of a valid written instrument. "It would be inconvenient," says Lord Coke, 'that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by an averment of parties to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchasers and all others, in such cases, if such nude averments against matter in writing should be admitted."* This addresses itself in terms, rather to instruments inter partes, that is, between more than one party; but the proposition would apply to a will, as much as to any other document.

Lord Coke's exposition of the rule affords at the same time its principle. To the parties to the instrument, it prohibits to dispute the definition of a transaction

* Lady Rutland's Case, 5 Coke's Reports, 26 a.
afforded by their own solemn record of it, as well as to those claiming under them. It is obvious, however, that much as so weighty an admission would, on the score of proof, tell in even collateral matters, no arbitrary rule of this character need conclude even parties beyond the exigency of the occasion; and strangers of course could not be bound by averments with the making of which they had nothing to do. We shall accordingly have hereafter to point out exceptions contravening the application of the rule in its extremity; but in the first place, it will be proper to elucidate the rule itself, and as a general one none is more established.

Thus on the point of contradiction. In a case of purchase ultimately carried out by a deed, the deed becomes the governing charter of the transaction. Accordingly where it was affirmed by a vendor that a garden which passed under the terms of the conveyance was not included in the sale, and not intended to pass accordingly, the conditions of sale, though themselves in writing and signed by the vendee, were not allowed to be given in evidence in opposition to the deed itself; and the vendor lost a garden which he never sold.* So, in the converse case, where there had been a previous contract for the purchase of a ship, and certain iron kintelde; but the bill of sale was confined to the ship, and said nothing about the kintelde, the purchaser's claim for the kintelde, and the evidence to support it, were excluded; so that he failed to recover the kintelde he had bought and paid for.† In the instance of a promissory note in terms joint, it is not permitted to show that one of the parties was only a surety;‡ and in that of an instrument signed by a party as principal, it has been held not competent to him, in proceedings against himself on that footing, to show that his position was that of an agent merely. §

* Doc vs. Webster, 12, Adolphus, and Ellis, 441.
† Lano vs. Neal, 2, Starkie's Reports, 105.
‡ Abbot vs. Hendricke, 1, Manning and Granger, 794,—per Tindal, C. J.
§ Higgins vs. Senior, 8, Meeson and Welsby, 854.
In the matter of variation. In an action on a bond conditioned for payment absolutely, the defendant was not allowed to set up an agreement that the bond was to operate merely as an indemnity. In one on a note payable on its face on a day certain, it was not permitted to show that it was to be payable only on a contingency; or that it should not be demanded when due, but should be renewed.

On the point of addition. In Millar vs. Travers, a very leading case on this subject, that of a will, where the testator's instructions to his attorney, and in fact an original draft in conformity with them, included as part of the intended testamentary disposition certain large estates, but by mistake these were ultimately omitted from the will itself, evidence was not allowed to supply the devise. So under a tenancy constituted by written agreement, which was silent as to the ground rent, and which, in the absence of stipulation, would have fallen on the landlord, parol evidence that the tenant had in fact agreed to pay it, was rejected.

The engrafting of any intention ultra the legal one ascribable to the expression used, would be equally an addition within the terms of the rule of exclusion. Thus as an ordinary principle,—(apart from an exception created by the Statute of Wills in favor of children dying leaving issue,)—to constitute a legacy transmissible to the representatives of the legatee, the legatee must have survived the testator. In a case, accordingly, in which a legacy had been given to A B, who was dead at the time, evidence was refused to show the intent of the testator that it was to be transmissible.

On the subject of subtraction.—Where a policy of insurance was on an adventure from Archangel to Leghorn, evidence was not allowed to be given of an agreement

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* Mease vs. Mease, Cowper, 47.
† Rawson vs. Walker, 1, Starkie's Reports, p. 361.
‡ Hoare vs. Graham, 3, Campbell's Reports, 57.
§ Millar vs. Travers, 8, Bingham, 254.
|| Maybank vs. Brooks, 1, Brown's Chancery Cases, p. 84.
previous to the signing of the charter party, that the risk was to begin at a shorter point only. * And again where an insurance was effected on goods "in ship or ships from Surinam to London," parol evidence was held inadmissible to show, that a particular ship which was lost, had been verbally excepted at the time of the contract. †

It will be observed, however, that though (as in the cases we have put of the deed of conveyance prevailing over the condition of sale,—the bill of sale of the ship over the antecedent contract) all preliminary matters of evidence would be held to have merged in the final formal deed, there is nothing in the rule which, in the case of a plurality of writings, precludes the Court from resorting to the aid afforded by all contemporaneous ones; provided only they be of equal solemnity, and would bespeak their community by themselves, without the aid of extrinsic evidence;—but the community must be clearly made out.

"When a disposition of property" says Mr. Phillipps "can only operate by a writing (as in case of a will) an instrument referring to another must describe it so clearly, that by the description it may be identified: to allow parol evidence to show an intention to connect two instruments together, where there is no reference to a foreign instrument, or where the description of it is insufficient, would be to give it an effect independent of the writing, and contrary to the provisions of law, which require the whole disposition to be expressed."§

Still evidence may be admitted in aid of the description, and to identify the subject of reference. In one case an agreement for a lease contained a reference to a plan agreed upon, according to which certain buildings were to be erected, and evidence was admitted

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* Kaines vs. Knightly Skinner, 44.
† Weston vs. Emes, 1, Taunton, 115.
‡ The case of a will is merely put as an example. The proposition would apply to all writings alike.
by Lord Lyndhurst, Lord Chancellor, to determine what plan was meant; his Lordship stating in his judgment;—“As the written agreement refers specifically to a plan, if there be parol evidence, clear and satisfactory, to identify the particular plan, that evidence may be properly admitted for the purpose of so identifying it.”

Still this would be confined to the parties themselves, or their representatives. A stranger who had acted on the faith of the principal document, would not be allowed to be prejudiced by collateral ones withheld from him.

In the application of the rule which excludes parol evidence, it is necessary, however, to bear in mind, rather the principle in which it originated, than its formal character; and this principle is simply to make the instrument’s record of the transaction conclusive of its obligations.

Accordingly, the rule would not exclude contradictory evidence of mere formal matters, such as dates, recitals, and so forth, not being of the essence of the transaction; since, while presumable not to have been stated with formal precision, their correction would not trench on the obligatory portion of the instrument.

Nor would it preclude the supplying a fact not forming an article of the terms of obligation; as in a case where the instrument required consideration to give it legal validity, but simply omitted to state the consideration on its face, collateral evidence of consideration has been allowed to be given;† and where a conveyance purported in terms to be founded 'on divers good considerations,' but without specifying what, evidence was permitted to be adduced, that the party gave money for his bargain.‡

It would be a condition too to the exclusion of the parol evidence, that the document in question was of a completed and formal character, and one naturally designed

* Hodges vs. Hornfall, 1, Russell and Mylne, i16.
† Peacock vs. Monk, 1, Vesey, 128.
‡ 2, Phillipps on Evidence, p. 353.
to indicate the whole terms of the bargain,—not a mere loose memorandum, or partial definition only. Accordingly, where a person, after having agreed to hire a horse, had merely given the owner a card, on which he had written in pencil,—"Six weeks at two guineas, W. H."—the owner was allowed to prove by parol evidence, not indeed a different term of hiring, or a larger rate of payment, than those stated in the memorandum, but an additional term of the contract, namely, that all accidents occasioned by the shying of the horse should be at the risk of the hirer.*

A distinction also would exist between a writing intended to operate as the instrument of obligation, and one which was a mere ex post facto narrative of the transaction. Thus where a plaintiff had bought and paid for a horse on a verbal warranty by the defendant, and shortly after the purchase was completed, the defendant gave him a paper in the following form:—"Bought of A. B., a horse for £7.—A. B."—the Court, in an action for breach of warranty, held that the plaintiff might prove the warranty by parol evidence; "as the paper appeared to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, and not as containing the terms of the contract itself."†

The rule, however, is simply a Canon of evidence. It will be noticed that in the terms of its definition previously given, the instrument must be a valid one; and the rule addresses itself accordingly only to the contradiction, and so forth, of an instrument, the validity itself of which is not in question.

Accordingly, the rule would not preclude the impeachment of a document on any ground of avoidance to which it might be open, by the fitting course of procedure; and by the fitting course of procedure, we mean either a suit in Equity, where it might be necessary to resort to this actively to accomplish the object, or a defence either to a suit in Equity or an action at Law to enforce the obligations of the

* Jeffery v. Walton, 1, Starkie's R., 267.
† Allen v. Pink, 4, Meeon and Welsby, 140.
document, where the rules of either Court would allow such a defence to be set up by the pleadings.

Thus were an instrument obnoxious to the charge of having been obtained by, or used for, the purposes of fraud,—having been given without consideration, or on an illegal one,—having been framed in mistake,—or open to any other of the grounds capable of displacing its own validity whether in a Court of Law, or one of Equity, the rule would not forbid to contravene the contents of the instrument, wherever the nature of the proceeding left it open to the Court to institute the enquiry. Could the contents of a deed be set up in estoppel to its own impeachment, the necessary control of the Court would become a dead letter.

Fraud and illegal consideration speak for themselves without the aid of illustration:—if properly raised by the pleadings, they might be set up in defence as well in a Court of Law, as one of Equity, and even to the extent of the avoidance of the entire instrument. In Equity, in a suit regularly framed for the purpose, not only might a deed established to have been fraudulent, be ordered to be delivered up to be cancelled, but a reconveyance would be directed of any estate passing under it. Relief against mistake, if in any material portion of the instrument, could alone be had in Equity. A Court of Law could only refrain from giving effect to the instrument. Whenever, however, a case of mutual mistake is conclusively (though it must be conclusively) made out, and the rights of third parties are not prejudiced, it is the habit of the Court to give relief by the necessary reform of the instrument;—a relief which, with the exception of that of the will, would be even extended to such cases as those we have cited above as illustrative of the rule, provided the parties came with the requisite promptitude, and under such other conditions as the exigency of each case might require. The written instructions and other materials forming the groundwork of the instrument would be the most natural, as they would be the most reliable, evidence of the mistake. In the instance of the will, remedy would be obviously beyond the powers of the Court; since though it might act upon an instrument inter vivos, such a document for example
as a deed, it could not make a dead man speak; and this would be the
effect of introducing a devise into a will.

We have used the expression 'impeachment.' But there is a class
of cases where the object is not so much to
impeach, as to preclude a perversion from the
original purpose of the instrument; and here too
parol evidence would be admissible to establish the real nature of the
transaction. Thus in the case of a conveyance absolute on its face, but
in fact designed to operate only as a mortgage, it would be open to the
parties in a Court of Equity to establish this, and by evidence which
would necessarily so far contradict the deed itself. This is a well-estab-
lished principle in the Court of Equity in England; and, after some discu-
sion, it was recognized in a recent case in the Supreme Court at Calcutta,
where the parties having executed a conveyance, purporting on its face to
be a purchase deed, filed a bill to establish it as a mortgage; and on the
strength of an alleged contemporaneous agreement simply verbal only. So,
on a like principle, where securities have been taken from parties
having mutual dealings with each other,—in such a relationship for ex-
ample as that of banker and customer,—and the securities purported on
their face to be in the form of common money obligations,—bonds, or
notes, for instance,—evidence has been allowed to show that they were
not given for liquidated sums, but only to secure a general and floating
balance of account.

Evidence too might be given, not only to impeach a document on
the ground of fraud, but to rebut the evidence of
fraud arising from the averments of the deed itself.
Thus where, after an assignment by a father to
his son, purporting to be in consideration of mutual love and affection
only, the Sheriff had seized goods, the subject of assignment, as being
in fact the property of the father, relying on the voluntary character

* Aviemall vs. Madubchunder Mitter. Englishman. 1st June 1861:—for the accuracy of the report of which the writer can vouch, having been Counsel in the cause. The suit failed on the Evidence; but the principle was admitted.
of the settlement as apparent from the consideration stated on its face, and its fraud, accordingly upon creditors; in an action by the son against the Sherriff, the son was allowed to give evidence of valuable consideration, though in fact in contradiction of the averment of the deed itself, which had represented the consideration as one of 'mutual love and affection' only. Lord Abinger, Chief Baron, observed;—''The evidence is used to explain away fraud; and, even in the case of a deed, fraud may be proved or disproved aliunde. A deed cannot be altered as between the parties to it, but the rule is different as between third parties.'''

The rule, it will be observed, merely binds to a given relation of the transaction itself. Accordingly, in any case of an agreement not under seal, it would not preclude the showing a subsequent parol waiver or discharge, at any time before breach. "By the general rules of the common Law,' said Lord Denman, 'if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add or to subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms grafted upon what will be thus left of the written agreement.'"†

The case would be different, that is at least as regards the legal remedies, were the agreement by deed; since in an obligation under seal, the rule of law would require its discharge by an instrument of equal solemnity. Accordingly, in an action of covenant for non-payment of money, a parol discharge in

* Gale vs. Wilkinson, 8, Meeson and Welsby, 408.
† Goss vs. Lord Nugent, 5, Barnewall and Adolphus, 64.
satisfaction of all demands could not be set up; nor were an act required by deed to be done within some certain time, could an agreement even in writing but not under seal, to extend the period, and the doing of the act within the extended period, be pleaded in bar to an action founded on the deed; whatever relief might in either case be granted in a Court of Equity.

In the cases in which the reduction into writing of the transaction is enjoined by a Statute, as, for instance, the Statute of Frauds, it would appear to depend upon the statute itself whether a parol waiver could be had; though the better opinion is, as respects the Statute of Frauds at all events, that it could. It must, however, be a total waiver:—a mere modification of the terms, the statute would itself prohibit.

There is a distinction too between an instrument constituting the definition of a transaction itself, and propounded in some proceedings founded upon it, and something, albeit in writing, offered as proof of some isolated fact. Thus a written receipt tendered as proof of a payment, would not be received as conclusive of the fact, even as against the party signing it, if adequately impeached. Indeed, as a general rule, whenever a written document is given in evidence as an admission, parol evidence is receivable to explain the admission, or to show that it originated in mistake, or was otherwise untrue in fact. To this head also might be referred the case of Gale vs. Wilkinson cited above, where evidence was received in contradiction of the consideration specified on the face of the settlement.

Hitherto we have been treating of the admissibility of parol evidence when set up to defeat a written instrument. But the question assumes a very different form when the evidence is proffered, either to explain the instrument, or to apply its provisions. And here an important condition of Lord Coke's principle of exclusion should be noticed, when he speaks of the writing, as finally importing the certain truth of the agreement; and this it may fail to do, either from its own inartificiality
of structure, or from embarrassments raised by extrinsic facts, not contemplated, or provided for, by itself.

In every instrument, whatever may be its nature, the first effort of the Court is naturally to discover the meaning from its own context; and in doing this, the process is by a general collation of the whole document;—by ascribing to language its natural import;—to specific terms their ordinary meaning;—and, where there are terms of art or of a particular usage not within the knowledge of the Court, their appropriate technical interpretation.

"The general rule," says Tindal, Chief Justice, in a leading case on the subject in the House of Lords, that of Shore vs. Wilson, "I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of these words to claimants under the instrument, or as to the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that, in such case, evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself."

It may happen, however, that, from some peculiarity of the character in which it is written, the instrument is itself illegible to the Court called upon to expound it, without the aid of persons skilled in decypherment;

* Shore vs. Wilson, 9, Clark and Finelly, 555.
—its language may be foreign to the Court;—or it may contain terms—
as being either of an obsolete character, or those of abbreviation, art, local
or mercantile usage,—which may not be understood by the Judges;—
or which having assigned to them by peculiar usage an interpretation
different from their ordinary and popular one, may be themselves
equivocal. Accordingly, until placed before the Court in a form decy-
phered, translated, or, as to the meaning of particular characters or
expressions, explained, it would have no means of adjudication. Until
brought before it by interpretation in a living shape, it would be
a dead letter only, the Court would be called on to expound; and it
is obvious, accordingly, that to this extent at all events, parol evidence
must, from the very necessity of the case, be admitted.

It is not because the language is ambiguous, however, but because
it is unknown, that for this purpose the evidence
is received,—received not as proof of any parti-
cular intention in its use, but simply to affix an
interpretation to characters or expressions used.

"The question whether language is ambiguous," says the Vice Chan-
celloor Wigram in his masterly Treatise on the subject of Extrinsic Evidence,
"must depend mainly upon this—whether it is ambiguous when addressed
to a person competent to interpret language. Words cannot be ambi-
igious, because they are unintelligible to a man who cannot read; and,
within the same reason, words cannot be ambiguous, merely because
the Court which is called upon to explain them may be ignorant of a
particular fact, art, or science, which was familiar to the person who
used the words, and a knowledge of which is therefore necessary
to a right understanding of the words he has used. If this be not
a just conclusion, it must follow, that the question, whether a
will is ambiguous, is dependent,—not upon the propriety of the
language the testator has used,—but upon the degree of knowledge,
general or even local, which a particular Judge may possess,—a propo-
sition too absurd for an argument. It must, therefore, it is conceived, be
admitted, that a Judge is not competent to explain a testator's words,
unless he has conusance of those extrinsic facts, with reference to
which the testator expressed himself; and, consequently, that, where the meaning of the words, aided by the light derived from the circumstances of the case, is certain, there an ambiguity cannot, with truth or propriety, be said to exist. The language may be inaccurate; but if the Court can determine the meaning of this inaccurate language, without any other guide than a knowledge of the simple facts, upon which, from the very nature of language in general, its meaning depends, the language, though inaccurate, cannot be ambiguous."*

What the Vice Chancellor says with regard to wills would apply to all documents alike.

The principle is also well stated by Tindal, Chief Justice, in continuation of his judgment in Shore vs. Wilson, to which we have just referred, when he says:—"Where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself; for reason and common sense agree, that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language;—in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed;—in cases where terms of art or science occur;—in mercantile contracts, which, in many instances, use a peculiar language, employed by those only who are conversant in trade or commerce;—and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in the instrument,

* Wigram on Extrinsic Evidence, p. 105.
in order to enable the Court or Judge to construe the instrument, and
to carry such real meaning into effect."

In the same case the Law is thus stated by Lord Wensleydale (then Mr. Baron Parke) with an important distinction to which we shall hereafter advert:—

"I apprehend, (says his Lordship,) 'that there are two descriptions of evidence, (the only two which bear upon the subject of the present enquiry,) and which are clearly admissible in every case for the purpose of enabling a court to construe any written instrument, and to apply it practically. In the first place, there is no doubt that not only where the language of the instrument is such as the court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms, or indeed any expressions are used, which, at the time the instrument was written, had acquired an appropriate meaning either generally or by local usage, or amongst particular classes.

This description of evidence is admissible, in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate. For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, a second description of evidence is admissible, viz, every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court, whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it."

We shall presently advert to the distinction between interpretation and application; but, for the present, we confine ourselves to the former; and to the enunciation of the principle by the eminent individuals already quoted, we have to add its short and terse statement by another learned Judge, Chief Justice Gibbs, in a case on a charter party involving the meaning of the term 'privilege' (a sum in lieu of privilege having been
reserved to the Captain) where he says;—"Evidence may be received to show the sense in which the mercantile part of the nation use the term 'privilege';—just as you would look into a dictionary to ascertain the meaning of a word; and it must be taken to have been used by the parties in its mercantile and established sense."*

In the majority of instances the question being of a narrower description, and of mere private right, the evidence would be restricted accordingly in its character. But there sometimes occur cases of a wider range, and affecting the interests of the public at large, where the evidence would fall within a more extended circle; and in delivering his judgment in Wilson vs. Shore, Mr. Justice Coleridge thus adverts to this subject;—"The rules of evidence must expand with the necessities of the case, or the end for which they are established would be sacrificed to the means; and, accordingly, it is well known that in what is matter of history, and relates to the public at large, a class of evidence has always been admitted, such as histories and chronicles, which would not be received in an issue upon a matter of private right. Cases to this effect are collected or referred to by Mr. Phillipps in his "Law of Evidence." Among them I may mention particularly that this House,† after argument, in Warren Hastings' case, allowed the History of the growth and decay of the Ottoman Empire, by Prince Cantemir, to be read, to prove an universal custom of the Mahomedan religion. Evidence, indeed, of this description was read in great abundance on the hearing of this appeal, by the appellants as well as respondents, irregularly of course (and it may be taken to have been by consent) as to the time of its introduction, but not objected to, I believe, as inadmissible in itself."

The principle thus so clearly laid down requires but slight illustration to secure its being understood; but we will add some little.

† The House of Lords.
Illegibility might arise from the use of cypher, or short-hand, or other peculiarity of character, as the medium of expression; or it might be merely bad writing. Referring to a case of cypher, Alderson, Baron, observed:—"Words on paper are but the means by which a person expresses his meaning, and short-hand is, in this respect, like long-hand, and equally admits of interpretation."

A case of initials would be very much like one of cypher. In a will a legacy was given to a "Mrs. G.;" and evidence was adduced to show that the testator was in the habit of calling a Mrs. Gregory, Mrs. G; and she was allowed, accordingly, to take under the initial.†

The translation of Native documents in the Supreme Courts of the Presidencies will afford familiar illustration to the Indian student on the point of language foreign to that of the Court.

As regards obsolete expressions, the case of Walker and Shore is itself an example. Here it being necessary in modern times to put a construction upon an ancient charitable foundation, and as to who were designed to take under the terms of "Godly preachers of Christ's Holy Gospel," evidence was given from history, cotemporaneous with the deed, of the existence of a particular sect assuming to themselves that denomination, and of the founder's connection with them.

On the point of abbreviation. A wager contract to run one greyhound against another, concluded with the initials P. P. Evidence was received to show that it meant—'Play or Pay,'—that is to say;—Win the match, or forfeit the stakes. Alderson B. observed in the case:—"Standing by themselves, those letters are insensible; but the evidence confers a real meaning upon them, by showing what the parties intended by them, and that they were

* Clayton ex. Lord Nugent, 13, Meeon and Welsby, 206.
† Abbott ex. Mason, 3, Vesey, 146.
inserted with the view of expressing a given thing." So Parke, B:—

"There can be no doubt the evidence was receivable. It is like the
case of a word written in a foreign language."*

The will of a celebrated sculptor, Nolekens, containing a bequest.
under the term of his "mod—tools for carving," is a familiar illustration
on the point of terms of art. The word 'mod' was there contended on the
one hand to mean modelling tools, and on the other models, which
latter were of great value; and evidence of sculptors and others was
received in interpretation of the word 'mod.'†

Of local usage, a striking illustration is afforded by the case of a lease
of a rabbit warren, where the lessee covenanted to
leave on the warren at the expiration of the term
10,000 rabbits, the lessor paying for them £60 per thousand; and
evidence was received to show that, according to the local usage of that
part of the Country, 1000, as applied to rabbits, meant 1,200. ‡

In mercantile contracts the question has often arisen on expressions
denoting time, as for instance 'months' whether
lunar or calendar; 'days' as meaning working days
or running ones; 'freight,' 'in turn to deliver,' and so forth—In a very
modern one§ in a contract for purchase of bales of gambier in passage from
Singapore, and expected to arrive in London, evidence was received
to show that by the custom of the trade a bale of gambier was under-
stood to mean a package of a certain description; Cockburn C. J. remark-
ing:—"If the term 'bale' as applied to gambier has acquired in the
particular trade a signification differing from its ordinary signification,
evidence must be received on the subject, otherwise effect is not given
to the contract." So a bale of cotton may mean a bag in the Alexandrian
trade, and a compressed bale in the Levant one, according to the usage
of either trade;|| and, in a contract to pay at so much per ton for goods

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* Daintree vs. Hutchinson, 10, Meeson and Welsby, 85.
† Goblet vs. Beechey, 3, Simons, 24.
‡ Smith vs. Wilson, 8, Barnwell and Adolphus, 728.
|| Taylor and Briggs, 2, Carrington and Payne, 825.
shipped at Bombay, cotton to be calculated at 50 cubic feet per ton, evidence would be receivable of a usage to pay according to the measurement at Bombay.*

In the case of Mercantile contracts, the evidence is not even confined to the explanation of the written terms. Provided they are not inconsistent with the contract, it is allowed to supply terms of known usage in control of the contract, and which is known by the expression of annexing incidents." This is upon the principle that the contract was itself framed with reference to the usage; and so as to incorporate the usage in, and as part of, itself. Indeed, it is in part also upon this principle, that even as respects the actual terms of the contract, it is by the usage they are expounded.

Accordingly, where a ship was to depart with convoy, but without any definition of the spot at which the convoy was to start, evidence was allowed to fix this as from the place of rendezvous.† So a sale of tobacco was allowed to be explained as a sale by sample, though the bought and sold notes were silent on the point.‡ And in England, a bill of exchange is allowed 3 days' grace for payment, beyond the day specified on the face of the bill itself.

These incidents are sometimes the creatures of mere usage. But usage may come at length, by Judicial recognition, to be received as part of the law merchant, and this would be obligatory without special evidence. Consequently, the law merchant annexing to a Marine Insurance the condition of sea worthiness at the commencement of the voyage, it would ipso facto become annexed to any ordinary contract of such insurance.

In a very late case, § when there had been a contract for purchase by brokers, not disclosing their principal, and evidence was admitted to show a usage of trade

* Bottomley vs. Forbes, 5, Bingham's New Cases, 121.
† Lathulian's case, 2, Salkeld, 443.
‡ Syers vs. Jonas, 2, Exchequer R., 111.
holding the brokers liable, Lord Campbell, then Chief Justice, laid down the law in extenso on this subject; and as it is both a very modern and a very comprehensive exposition of it, we transcribe the judgment at some length.

"Now," says his Lordship, 'neither collateral evidence, nor the evidence of a usage of trade is receivable to prove any thing which contradicts the tenor of a written contract; but subject to this condition, both may be received for certain purposes. To use the language of Mr. Phillipps, in vol. 2, p. 415 10th edition:—"Evidence of usage has been admitted as to contracts relating to transactions of commerce and trade, farming, or other business, for the purpose of defining what would otherwise be indefinite; or to interpret a peculiar term, or to explain what was obscure, or to ascertain what was equivocal, or to annex particular incidents, which although not mentioned in the contracts, were connected with them or with relations growing out of them; and the evidence in such cases is admitted with the view of giving effect, as far as can be done, to the present intentions of the parties." Now, here the plaintiff did not seek by the evidence of usage to contradict what the tenor of the note primarily imports, namely, that this was a contract which the defendants made as brokers. The evidence is based on this: the usage can have no operation except on the assumption of their having acted as brokers, and of there having been a contract made with their principal. But the plaintiff by the evidence seeks to show that according to the usages of the trade, and as those concerned in the trade understand the words used, they imported something more, namely, that if the buying broker did not disclose the name of his principal, it might become a contract with the broker as principal, if the seller pleased.

"Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is not material. In either point of view it will be admissible, unless it labors under the objection of introducing something repugnant to, or inconsistent with, the tenor of the written instrument; and, upon consideration of the sense in which that objection must be understood with reference to this question, we think it does not. In a certain sense
every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If by the side of the written contract without, you write the same contract with, the added incident, the two would seem to import different obligations, and be different contracts. Take a familiar instance by way of illustration. On the face of a bill of exchange, at three months after date, the acceptor will be taken to bind himself to the payment precisely at the end of the three months; but by the custom he is only bound to do so at the end of the days of grace; which vary according to the Country in which the same is made payable, from three up to fifteen. The truth is, that the principle on which the evidence is admissible is, that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which an uniform usage would annex, and according to which they must in reason be understood to contract, unless they expressly exclude them. To fall within the exception, therefore, of repugnancy, the incident must be such as, if expressed on the written contract, would make it insensible or inconsistent. Thus, to warrant bacon to be prime, singed adding "that is to say slightly tainted," as in Yates v. Pym, 6 Taun. 446; or to insure all the boats of a ship, and add "that is to say all not slung on the quarter," as in Blackett v. The Royal Exchange Assurance Company, 2 C. and J. 244, and other cases of the same sort scattered through the books, would be instances of contracts in which both the two parts could not have full effect given to them if written down.

Therefore, when one part only is expressed, it would be unreasonable to suppose that the parties intended to exclude the other also. Without repeating ourselves, it will be found that the same reasoning applies where the evidence is used to explain a latent ambiguity of language.

Merchants and traders with a multiplicity of transactions pressing on them, and moving in a narrow circle, and meeting each other daily,
desire to write little and leave unwritten what they take for granted in every contract. In spite of the lamentations of Judges, they still continue to do so; and, in a vast majority of cases of which Courts of law hear nothing, they do so without loss or inconvenience; and upon the whole they find this mode of dealing advantageous, even at the risk of occasional litigation. It is the business of Courts reasonably so to shape their rules of evidence, as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them. It cannot be doubted, in the present case, that in fact this contract was made with the usage understood to be a term in it; to exclude the usage is to exclude a material term of the contract, and must lead to an unjust decision."

The case was affirmed on appeal.

As has been well observed in reference to these cases of mercantile contracts:—"The witnesses for this purpose may be considered to be the sworn interpreters of the mercantile language in which the contract is written."—Indeed, the observation applies to all usage evidence.

It will be observed that Lord Campbell's judgment takes the distinction between what is adduced to explain and what to contradict; and there is nothing more established than that for the purposes of contradiction no parol evidence of usage is admissible.—In the case of Blackett v. The Royal Exchange Assurance Company, referred to and recognized by Lord Campbell in his judgment, Lord Lyndhurst, c. n., thus states the Law on this point:—"The objection to the parol evidence is, not that it was to explain any ambiguous words in the policy, or any words which might admit of doubt, or to introduce matter upon which the policy was silent, but that it was at direct variance with the words of the policy, and in plain opposition to the language it used; namely, that whereas the policy imported to be upon ship, furniture, and apparel generally, the usage is to say, that it is not upon furniture and apparel generally, but upon
part only, excluding the boat. *Usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain.*

It has been questioned in modern times, and by very high authority, whether the relaxation of the earlier strictness of the rule of the Common law which left all instruments to speak for themselves, has not been carried too far in relation to mercantile contracts.—"If," said Lord Denman, Chief Justice, 'a legislator were called to consider the expediency of passing a law upon this subject, the conclusion at which he would arrive is hardly open to a doubt. He would decide at once that the written contract must speak for itself on all occasions; that nothing should be left to memory or speculation. There is no inconvenience in requiring parties making written contracts to write the whole of their contracts, while in mercantile affairs, no mischief can be greater than the uncertainty produced by permitting verbal statements to vary bargains committed to writing. But the nature of this explanatory evidence renders it peculiarly dangerous. Those who have heard it must have been struck with the hesitating strain in which it is given by men of business, and their wish to secure the correctness of their answer by referring to the written document. Again, what can be more difficult than to ascertain, as a matter of fact, such a prevalence of what is called a custom in trade as to justify a verdict that it forms a part of every contract? Debate may also be fairly raised as to the right of binding strangers by customs probably unknown to them, a conflict may exist between the customs of two different places; and supposing all these difficulties removed, and the custom fully proved, still it will almost always remain doubtful whether the parties to the individual contract really meant that it should include the custom."†

However the relaxation is too well established to be now departed from; and the authorities which have expressed their disapproval have still felt themselves bound to yield to it. Indeed, in the instances in

* Crompton and Jervis, 244.
† Trueman v. Loder, 11, Adolphus and Ellis, 597.
which usage is resorted to supply a term of the contract, particularly in the way of annexation of incidents, it is submitted that the observations of Lord Denman should be read in contrast with those of Lord Campbell in the case of Humphrey vs. Dale, referred to above; and especially where, he points out the desire of merchants and traders "to write little, and leave unwritten what they take for granted in every contract."

In the illustrations cited, we have been addressing ourselves to evidence contemporary with that of the instrument in the explanation of which it was brought to bear.

In the case, however, of ancient documents, particularly those of a public character, as in the instance of Acts of Parliament, Charters, or Charitable foundations, and where the language has been obscure from antiquity, or the construction is otherwise doubtful on the face of the document itself, not contemporaneous only but even subsequent usage has been received as expository, the Court considering that such usage would be a practical interpretation. It was observed by Lord Lyndhurst in delivering the judgment in the case of Lady Hewley's charities; (and the observation would apply to all other ancient foundations)—"If, as they have stated,—the terms of the deed of foundation be clear and precise in the language, and clear and precise in the application, the course of the Court is free from difficulty. If, on the other hand, the terms which are made use of are obscure, doubtful, or equivocal, either in themselves or in the application of them, it then becomes the duty of the Court to ascertain by evidence, as well as it is able, what was the intent of the Founder of the charity,—in what sense the particular expressions were used. It is a question of evidence; and that evidence will vary with the circumstances of each particular case: it is a question of fact to be determined, and the moment the fact is known and ascertained, then the application of the principle is clear and easy."

This Evidence has been allowed to embrace the acts of the Authors of the instruments, under them. Thus the application of the funds of a charity by its Founder, have

* See page, 378.
been received as evidence in construction of the grant. "Tell me,"
says Lord St. Leonards, (in a case which came before him as Lord
Chancellor of Ireland,) 'what you have done under such a deed, and I will
tell you what that deed means."*

Indeed, even modern usage of sufficient duration, say for example forty
or fifty years, has been received, upon the presumption that it was only a
continuance of the earlier usage, and, accordingly, was to be taken as
evidence of it. Says Lord Coke "optimus interpres rerum usus."—that
it to say a usage is the best interpreter."

The same principle has, in some instances, been applied as well to

But this not applicable to Private instruments.

private as to public instruments; but its application to the former has been cavilled at; and the recep-
tion of such evidence, at the present day, must, in the case of private
documents, be considered as doubtful. Usage, in a matter of publicity,
would carry with it a weight not having any bearing on a private
right; where the parties might well be supposed ignorant of what their
rights were.

In all these instances of ancient documents, however, the evidence
is receivable only to explain what is ambiguous,
and not to contradict what is clear. Accordingly,
in a case of modern date, turning on the con-
struction of an old charitable foundation, Sir J. Romilly M. R. refused
to act upon a usage of 150 years, it being in contradiction of the
clear ostensible purpose of the Founder as expressed by the instrument
itself.†

Having thus pointed out the state of things under which, on the
mere principle of interpretation, evidence may be
received in manifestation of the terms of an instru-
ment, we come now to the case in which it
may be made available in applying the instrument to some given subject-
matter, or in favor of some particular person.

* 1, Drury and Warren. 388.
† Attorney General v. St. Cross Hospital, 17, Beavan, 435.
And here, at the outset, we may advert to the distinction taken by Lord Wensleydale, in the passage cited from his judgment in Shore and Wilson, between evidence to enable the Court to understand the meaning of words, and that which is given for the purpose of ascertaining what passes, or who takes under it. And what is meant by the latter is, that whenever extrinsic circumstances, when brought into contrast with an instrument, create an ambiguity as to the meaning either of the thing intended to be operated on by, or the person designed to take under, it, parol evidence may, within certain limits, be brought in aid of the construction.

Up to a certain point, and apart from any question of ambiguity, extrinsic evidence would be necessary to point the operation of the simplest instrument. Thus, were it the case of a deed conveying all the lands at A in the grantor's occupation; until it was defined by proof what lands were in his occupation, the operation of the deed could not be known. So, were it a case of a will, and a bequest to the children of a party, or even the testator's own children; to give effect to the bequest it would be necessary to define who the children were. "Some evidence," says V. C. Wood, in a very modern case, "is necessary in any case of a will, that is to say evidence to show the subject and objects of the gift." So Sir James Wigram:—"The most accurate description possible must require some development of extrinsic circumstances, to enable a Court to decide upon its sufficiency,—and the least accurate description, which is sufficient to satisfy the mind of a Judge or Jury as to a testator's meaning, must be within the same principle. The principle cannot be affected by the consideration that a more ample development of circumstances is necessary in one case than in another."†

* Ante, p. 374.
† In the matter of Feltham, 1, Kay and Johnson, 528.
‡ Wigram on Extrinsic Evidence, p. 85.
This, however, we only notice as illustrative of the principle. Practically it is upon some imperfection of the instrument as applied to the facts, that the difficulty as to determining its meaning usually arises; and nothing is more settled than that evidence is receivable of all the circumstances surrounding the instrument, for the purpose of throwing their light on its interpretation. Indeed it is by these, as by a lamp, the Court reads the document.

The question has more often arisen upon wills than upon other documents, and it is from cases on these, accordingly, that the Law has mainly to be taken. The principles, however, which they enunciate would be alike applicable to other instruments generally.

In Doe d. Hiscocks v. Hiscocks,* a very leading authority on the subject, Lord Abinger, Chief Baron, thus propounds the admissibility of this species of evidence, and the purport of its admission:—

"It must be admitted that it is not possible altogether to reconcile the different cases that have been decided on this subject; which makes it the more expedient to investigate the principles upon which any evidence to explain the will of a testator ought to be received. The object, in all cases, is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained, without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements, and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property to which the will relates, are undoubtedly legitimate, and often necessary,

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* Doe d. Hiscocks vs. Hiscocks, 5, Meeson and Welsby, 363.
to enable us to understand the meaning and application of his words." Again;—"The testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivables as evidence to explain the meaning of his will."

In this case, the testator, after the gift of a life estate to his own son John Hiscocks, devised the property in question to "John, the eldest son of the said John Hiscocks."—The son had been twice married; and his actual eldest son was Simon, the child of his first marriage; but John was the eldest son by the second marriage, and the question was which of the two sons was intended to take.

Cases indeed abound illustrative of the same principle; and from their general result the doctrine is thus stated by V. C. Wigram:—*

"In considering questions of this nature, it must always be remembered, that the words of a testator, like those of every other person, tacitly refer to the circumstances by which, at the time of expressing himself, he is surrounded. If, therefore, when the circumstances under which the testator made his will are known, the words of the will do sufficiently express the intention ascribed to him, the strict limits of exposition cannot be transgressed, because the Court, in aid of the construction of the will, refers to those extrinsic collateral circumstances, to which it is certain the language of the will refers. It may be true that, without such evidence, the precise meaning of the words could not be determined; but it is still the will which expresses and ascertains the intention ascribed to the testator. A page of history (to use a familiar illustration,) may not be intelligible till some collateral extrinsic circumstances are known to the reader. No one, however, would imagine that he was acquiring a knowledge of the writer's meaning from any other source than the page he was reading, because,

* Wigram on Extrinsic Evidence, 39.
in order to make that page intelligible, he required to be informed to what Country the writer belonged, or to be furnished with a map of the Country about which he was reading. The extrinsic evidence in the cases now adverted to, does not per se approach the question of intention. It is wholly collateral to it. It explains the words only by removing the cause of their apparent ambiguity, where, in truth, there is no real ambiguity. It places the Court which expounds the will in the situation of the testator who made it, and the words of the will are then left to their natural operation."

The principles here propounded were recognized by the Privy Council as applicable to India, in a very recent case in appeal from the Supreme Court of Calcutta,* where Turner, Lord Justice, in delivering the judgment of the Court, thus expresses himself:—

"This, therefore, is the question which we are called upon to decide. It is a question between the estate of Surroopchunder and the parties claiming under the gift over; and, as it seems to us, it must depend wholly on the construction. What we must look to, is the intention of the testator. The Hindoo law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily, the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, those circumstances, no doubt, must be regarded. Amongst the circumstances thus to be regarded, is the law of the Country under which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator,

* Sreemutty Soorjesemoney Dossee vs. Denobundo Mullick, 6, Moore's E. I. Appeal Cases, p. 526.
in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the Will or the surrounding circumstances displace that assumption.

"These are, as we think, the principles by which we ought to be guided in determining the case before us; and we must first, therefore, consider what was the intention of this testator to be collected from the words of his will." And again;—"If, therefore, we are to impute to this testator any intention different from that which is to be collected from the words of his will, it must be upon the ground that there are extrinsic circumstances which disprove the expressed intention, and prove the different intention. The expressed intention ought, as we conceive, to prevail, unless the different intention be clearly demonstrated. We may doubt whether the testator really intended what his words import, but a Court of construction must found its conclusions upon just reasoning, and not upon mere speculative doubts."

The short exposition of the whole matter is, that the knowledge of the external circumstances of which their proof puts the Court in possession, places the Judge in the position of the donor, settler, or other party to the instrument; and it is upon the survey which that position affords him, he exercises the office of an Expositor.

It was stated above that, although the exposition of the principle was for the most part to be found in cases arising upon wills, the principle itself was one of general application. This was distinctly recognized in two very modern cases (1859 and 1860) before the Queen's Bench, Macdonald v. Longbottom,* and Mumford v. Geething,† where it was applied to cases of mercantile contract.

In Macdonald v. Longbottom, the question arose on a contract for purchase of wool, and the quantity, the subject of purchase, was not otherwise defined than by the expression, "Your wool." The contract was, on the one hand, a letter containing an offer to purchase—"your wool

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† Ibid. vol. VIII, p. 187.
16 per stone,"—and on the other an acceptance by another letter of the offer; and evidence was received to fix the quantity the subject of the bargain. "I am quite clear," said Lord Campbell, Chief Justice, "from the letters which were put in at the trial that there was a contract between the parties. An offer was made, and was accepted, and the only question is as to the subject-matter of the contract. I am clearly of opinion that when a specific thing is the subject of a contract, and it is doubtful upon the contract what that specific thing is, that any fact may be given, in evidence, in order to identify it, which is within the knowledge of both parties—meaning by that expression the knowledge upon the strength of which both parties dealt." Erle, Justice, thus added in his judgment. "The defendant says, 'I will buy your wool.' Now it is the universal practice to admit parol evidence to identify the subject-matter of a contract, as no Judge can have judicial knowledge of what it is. It is not contended that this contract is on the face of it void for uncertainty: parol evidence must therefore be admissible to explain to what it refers."

In Mumford v. Geething, the defendant had been employed by the plaintiffs, who were tradesmen, as a traveller to solicit custom for them, over certain districts in which their commercial connection lay; and he having afterwards left their service, and travelled for other parties, contrary to his agreement with them, they sued him on his agreement, which was in writing, to recover damages. The agreement, however, was imperfect on its face; and it becoming necessary to explain the meaning of its expressions "your employ" and "the ground the defendant was to travel," parol evidence in explanation, though objected to, was admitted. Erle, then Chief Justice said:—"I am of opinion that the parol evidence is admissible, in order to apply the contract to the matter in question. It is not to alter or vary it. The parol evidence is admissible to show the circumstances under which the words were used." So Byles, Justice.—"Then it comes to the question of the mis-reception of the evidence:—It seems to me that it was properly admitted. The words are in consideration of my entering upon your employ." It does not appear from the face of the document what the employment was. It does not appear what the "ground" was. The subject, therefore, requires to be identified. The contract to be applied to some subject-matter; and
that is just the case when parol evidence is admissible. *It is the case of every-day occurrence in the construction of a will."

Here it will be convenient to advert to a distinction which is often taken between an ambiguity which is termed *Patent*, and one which is called *Latent*. "There be two sorts of ambiguity of words," says Lord Bacon, "the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for any thing that appeareth *upon* a deed or instrument; but there is some collateral matter *out* of the deed that breedeth the ambiguity."

A Patent ambiguity is that which exists either,—in the want of adequate artificiality in the composition, including under the term, expressions requiring interpretation;—or the omission of something requisite to give operation to the document.

Thus, in the former case, the language may be not only *inartistic, language, inartistic*, but confused, contradictory, and generally incomprehensible; or it may exhibit a capacity of double meaning, with no adequate solution as to which meaning was intended; or it may use *terms of art, or terms otherwise not intelligible* without explanation. If, with the aid of such extrinsic evidence as may be necessary to clear up *unintelligible* or *equivocal* expressions, the Court cannot struggle through the maze, the instrument itself must fail for want of adequate expression; and, in attempting to solve the meaning, the Court is not at liberty to indulge in mere conjectural surmise: it must be governed by the ordinary rules of legal construction. In a medium of total darkness the eye could not exercise its power of vision; and the mind would not be allowed to *speculate* on what it could not see.

In the latter case we have put, the instrument may *omit the very essence of its intended operation*.—Thus, a blank may have been left for the *subject* or *person* to be dealt with, or to take; say—in a deed the property intended to be passed;
—in a will the legatee;—in a contract the thing bought; or, if not a total blank, what is tantamount to it, as in a devise to one of the sons of J. S. without specifying which; or a gift to Lady——without saying what Lady. Here the blank cannot be supplied.

The province of the Court is to interpret,—not to make. It is to construe the expressions the parties have themselves furnished, not to supply others. For cases such as these, extrinsic evidence of mere surrounding facts would, from the nature of things, afford no remedy. Were the Court, by the process of construction, to insert in the blank the property or the thing omitted, which of the sons was meant by the gift to one, or who was the Lady——this would be to supply, not to interpret; and, though the law admits evidence to explain, it excludes that which would only be to add to. Hence it is laid down that, in a case of Patent Ambiguity, parol evidence is inadmissible.

But even this proposition, sometimes too broadly advanced, must be understood with a certain qualification. So far as extrinsic evidence may be required to affix a meaning to expressions, or to bring out the cotemporaneous circumstances under which the document was framed, there is no doubt that this evidence would be receivable, whether the ambiguity is what is called Patent, or Latent; for, according to the authority of Lord Abinger, quoted above:—“To understand the meaning of any writer we must first be apprised of the persons and circumstances which are the subject of his allusions;”—and what would apply to persons, would equally apply to things. To understand, therefore, the real meaning of the rule of exclusion, as applied to Patent Ambiguity, and thus advanced, one must always bear in mind its two classifications of ambiguity which we have pointed out,—that in which the ambiguity is the result of inartistic composition; and that in which it is one of omission of subject-matter; and we must refer the statement that “Parol evidence is inadmissible in a case of Patent Ambiguity” to one or other of these two classifications;—indeed as regards the former to something beyond that of individual expressions admitting interpretation. On the first, beyond assigning a meaning to
expressions, extrinsic evidence would have no bearing; and it is unnecessary to discuss its admissibility. From the second it would be excluded.

The Law on this subject was thus well laid down by a former distinguished Master of the Rolls, Sir William Grant, in a leading authority on the subject, that of Colpoys vs. Colpoys.*—

* In the case of a Patent Ambiguity, that is, one appearing on the face of the instrument, as a general rule, a reference to matter dehors, the instrument is forbidden. It must, if possible, be removed by construction and, not by averment. But in many cases this is impracticable; where the terms used are wholly indefinite and equivocal, and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity thus arising can be removed. If in such cases the Court were to reject the only mode by which the meaning could be ascertained, viz., the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common sense, and the Law of England (which are seldom at variance,) warrant the departure from the general rule, and call in the light of extrinsic evidence. The books are full of instances sanctioned by the highest authorities, both in Law and Equity. When the person or the thing is designated, on the face of the instrument, by terms imperfect and equivocal, admitting either of no meaning at all by themselves, or of a variety of different meanings, referring, tacitly or expressly for the ascertainment and completion of the meaning, to extrinsic circumstances, it has never been considered an objection to the reception of the evidence of those circumstances, that the ambiguity was patent, manifested on the face of the instrument. When a legacy is given to a man by his Surname, and the Christian name is not mentioned; is not that a patent ambiguity? Yet, it is decided, that evidence is admissible. So, where there is a gift of the testator’s stock, that is ambiguous, it has different meanings when used by a farmer and a merchant. So, with a bequest of jewels; if by a nobleman, it would pass all; but if by a jeweller, it would not pass
those that he had in his shop. Thus, the same expression may vary in meaning according to the circumstances of the testator."

The whole matter is thus well stated by Mr. Starkie:

"By patent ambiguity must be understood an ambiguity inherent in the words, and incapable of being dispelled, either by any legal rules of construction applied to the instrument itself, or by evidence showing that terms in themselves unmeaning or unintelligible, are capable of receiving a known conventional meaning. The great principle on which the rule is founded is, that the intention of parties should be construed, not by vague evidence of their intentions, independently of the expressions which they have thought fit to use, but by the expressions themselves. Now, those expressions which are incapable of any legal construction and interpretation by the rules of art, are either so because they are in themselves unintelligible, or because, being intelligible, they exhibit a plain and obvious uncertainty. In the first instance, the case admits of two varieties: the terms, though at first sight unintelligible, may yet be capable of having a meaning annexed to them by extrinsic evidence, just as if they were written in a foreign language, as when mercantile terms are used, which amongst mercantile men bear a distinct and definite meaning, although others do not comprehend them: the term used may, on the other hand, be capable of no distinct and definite interpretation. Now, it is evident that to give effect to an instrument, the terms of which, though apparently ambiguous, are capable of having a distinct and definite meaning annexed to them, is no violation of the general principle, for in such a case effect is given, not to any loose conjecture as to the intent and meaning of the party, but to the expressed meaning; and that, on the other hand, where either the terms used are incapable of any certain and definite meaning, or being in themselves intelligible, exhibit a plain and obvious uncertainty, and are equally capable of different applications, to give an effect to them by extrinsic evidence as to the intention of the party, would be to make the supposed intention operate independently of any definite expression of such intention. By Patent ambiguity, therefore, must be understood an inherent ambiguity, which cannot be removed either by the ordinary
rules of legal construction, or by the application of extrinsic and explanatory evidence, showing that expressions *prima facie* unintelligible, are yet capable of conveying a certain and definite meaning."

**Latent ambiguity**, in the more ordinary application of the term, arises from the existence of facts external to the instrument; and the creation, by those facts, of a question not solved by the document itself. In strictness of definition, such cases as those to which we have referred, in which peculiar usage may afford a construction to a term, different from its natural one, would be instances of latent ambiguity, since the double use of the term would leave it open to the doubt on which of its two senses it were to be taken. It is not, however, to this class of cases we now advert; but to those in which the ambiguity is rather that of description, either *equivocal* itself from the existence of two subject-matters, or two persons, both falling within its terms, or *imperfect* when brought to bear on any given person or thing.

Thus, a man having two estates called Blackacre, may devise generally his estate Blackacre (not saying which);—or having two sons John, may give to his son John. Here, upon the face of the will, all would be apparently plain. It would be the external facts alone which would create doubt. Nothing on its face could be more simple or less ambiguous than a gift of, "my estate Blackacre,"—or a gift to 'my son John.' The embarrassment is raised when it is sought to apply the gift; and then the discovery is made of that which did not occur to the testator, namely, that there are two estates Blackacre, or two son John. In either case, accordingly, to give effect to the gift, the subject must be ascertained and defined.

Again there may have been enough of description in the instrument to have indicated some specific thing as the object of its operation, or some given individual as the object of its provisions; but it might turn out, on seeking to apply the instrument to its supposed subject-matter or object, that, from an

* Starkie on Evidence, 658.
imperfection of description, there was neither subject or object in exact correspondence with it, so that it would be uncertain on what, or in whose favor, the instrument was designed to operate. Thus, in the case of a devise of Trogues Farm in the occupation of M.; the testator had a farm called Trogues; but a portion of it only was in M's. occupation.* In a gift to A and B, legitimate children of C. D,—C D had children A and B, but they were il-legitimate; yet the farm was allowed to pass, and the children to take. It was the extrinsic circumstances in both cases which created the uncertainty, and the question which extrinsic circumstances created, extrinsic evidence was admitted to clear up. The distinction will be obvious between clearing up an ambiguity, and creating a subject.

The Law, in this particular, dates from a very early period. One of Lord Bacon's maxims is,—"Ambiguitas verborum latens verifications suppletur; nam quod ex facto oritur ambiguous, verifications facti tollitur;"†—the interpretation of which is, "that a latent ambiguity of words may be supplied by Evidence, for the ambiguity which arises from the fact, may be removed by the evidence of the fact."

Consistently with this maxim, in a case called Lord Cheyney's Case, which occurred so long ago as, and is to be found in the reports of Lord Coke, a testator had two sons, of whom the elder, having been long absent, was supposed to be dead; and the testator devised to his son generally. Evidence was received to establish these facts, and the younger was allowed to take.

Such cases as these, where there are two estates or two persons, both answering the general description in which the gift is couched, are described by Lord Bacon as those of "equivocation," and "to be holpen by averment," and with these, probably, the practice of admitting parol evidence in explanation may have originated. It has long, however, been extended generally to cases in which, apart from equivocation, a design is indicated to operate

* Goodtitle ex. Southern 1, Maule and Selwyn, 299.
† Bacon's Maxims, Reg. 23.
on some specific thing, or in favor of some particular person; but, the description used being imperfect or otherwise in terms erroneous, it is necessary to bring in the aid of external circumstances to clear up the description and apply it. In some instances, in the attempt to do this, the application of the principle has been carried by the Court to a very extreme verge.

Thus, in an early case, that of a gift by a testator of his black horse; it turning out on the evidence that he had no black, but a white one, the white was allowed to pass; an authority which might perhaps be cited in support of a charge sometimes made against Lawyers of turning black into white. Again, a legacy given to Catherine Earnley, was claimed by Gertrude Yardley; and it appearing that no such person was known to the testator as Catherine Earnley, proof was received that the testator usually called the claimant Gatty, which might easily have been mistaken by the scrivener who drew the will for Katy; and the Court, acting on this, and on the other evidence of a like nature, awarded the legacy to the claimant†. — So, in another case‡ a testatrix bequeathed 'to Mrs. and Miss Bowden, of Hammersmith, widow and daughter of the late Revd. Mr. Bowden, £200 each.' These legacies were claimed by a Mrs. Washbourne and her daughter. It appeared in evidence, that Mrs. Washbourne was the daughter of the Revd. J. Bowden, who died in 1812, and the widow of the Revd. D. Washbourne, a dissenting minister at Hammersmith. Mrs. Bowden died in 1820, since which time no person had lived at Hammersmith, answering the description in the will. It further appeared that the testatrix, who was of great age, had been intimately acquainted with the Bowdens and the Washbournes; that she had been in the habit of calling Mrs. Washbourne by her maiden name of Bowden; and that being often reminded of the mistake, she had always acknowledged that she had confounded the two names. Under these circumstances, Vice Chancellor Wigram decided, that the claimants were entitled to their respective legacies.

* Door vs. Geary, I., Vesey Senr., 255.
† Beaumont vs. Fell, 2, Peere Williams, 141.
‡ Lee vs. Pain, 4, Hare, 251.
In the former case Gertrude Yardley took a legacy in terms given to Catherine Earnley:—in the latter, Mrs. and Miss Washbourne, one given to Mrs. and Miss Bowden.

Upon a corresponding principle, bequests given in the terms of nick-name have been established on evidence coupling the party nick-named with the legatee.

In the cases previously cited, the misdescription was that of the parties themselves; and their own immediate designation. In others, it has occurred in that of some third party, in right of whose connection with whom, the gift has in terms been made. Thus, in a devise* to the second son of Edmond Weld of Lulworth;—a second son of Joseph Weld was allowed to take, upon evidence that the testator was accustomed to call the possessor of Lulworth Edmond.*

Sometimes the description may be applicable in part to one person or thing, and in part to another, yet not applicable in its entirety to either; and then the question arises whether it be capable of reference to either, and if so, to which.

Thus, in a devise to the testator's nephew for life, with remainder over to "Elizabeth Abbott, a natural daughter of Elizabeth Abbott of Gillingham, single woman, who had formerly lived in his service;"—Elizabeth Abbott, the mother, had 2 children, both living, one a natural son, whose paternity was ascribed to the nephew, and the other a legitimate one, a daughter. Both the son and the daughter claimed the estate, beside the heir at law, who asserted the devise to be void for its uncertainty. Parol evidence being admitted, the estate was awarded to the son, as the intended object of the gift, notwithstanding the mistake in both name and sex.†

So, where his wife being alive, a testator had gone through the ceremony of marriage with another woman named Caroline, which, according to English Law, would not have constituted Caroline a wife,

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* Blundell v. Gladstone, 1, Philips, R., 279.
† Ryall v. Hannam, 10, Beavan, 536.
and then bequeathed to his *wife* Caroline;—Caroline was allowed to take, though another fulfilled that part of the description constituted of the *wife.*

In the instances in which *terms of more general description* are used, it often turns out, in attempting to apply the instrument to the subject, that there is *nothing* corresponding with that which the law assigns to the term, and there arises an ambiguity accordingly. Thus a testator having *Leasehold houses only*, devises his *Freehold* ones. On evidence that the testator had no freehold one, the *leasehold would pass.* So, as has been seen above, in a gift to *children*, which would *prima facie* imply only *legitimate* ones, *illegitimate* might take, on evidence coupling themselves with the gift, and showing the non-existence of legitimate ones. In the one case, however, had there existed freehold houses, and in the other legitimate children, to satisfy the terms, the will could only have operated on them.

It not unfrequently happens that the *substantive* description of the thing dealt with literally comprehends it, but there is some *inaccurate addition* in the way of demonstration,—hence called *False Demonstration,*—which taken by itself would destroy the identity. As for instance, a house in a street described by a wrong number, the party attempting to deal with it having no other house in the street,—or property described by a wrong occupation. In these instances, upon evidence of the facts, the inaccurate addition would be rejected. The Court would adopt the principle of the Civil law;—"*Fals(as demon)stratio non nocet, cum de corpore constat;*"† and would not invalidate, so long as the thing indicated is known.

The law on this subject is thus laid down by Lord Wensleydale;—

"The rule is clearly settled, that when there is a *sufficient description set forth* of premises, by giving the particular name of a

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* Doe *v.* Rouse, 5, Common Bench, 422.
† "A false demonstration will not avoid [literally ‘*hurt*’] when it can co-exist [literally ‘stand together with’] the subject itself."
close, or otherwise, we may reject a false demonstration; but that if the premises be described in general terms, and a particular description be added, the latter controls the former."

"In these cases," says Sir J. Wigram, 'the substance of the subject intended is certain, and, if there be but one such substance, the superadded description, though false, introduces no ambiguity. To such cases, the maxim "falsa demonstratio non nocet" may with propriety be applied."†

In this class of cases it is, however, of the essence of the thing that there should be but one substance falling within the terms of the description.

Accordingly, in a devise of the testator's estate at Ashton, Ashton being a known locality, the description of the will was confined to that literally falling within the local description of Ashton, notwithstanding evidence that what was treated by the testator as falling within the description of his Ashton Estate, extended to property in sundry contiguous localities.‡

On the other hand in a devise of the testatrix, Quendon Hall Estates in Essex, Quendon Hall not having any specific local restriction, land around the mansion and other detached premises accustomed to be treated as part of the estate, were allowed, on the evidence, to pass under the general denomination.§ The case is one of the latest on the subject, and containing as it does an exposition on the law on this matter generally from an eminent authority, the V. C. Wood, we transcribe the expositions accordingly.

"The law," says the Vice Chancellor, "has become so settled by numerous decisions, as to how far external evidence is admissible, and what that species of

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* Doe vs. Galloway, 5, Barnewall and Adolphus, 43.
† Wigram on Extrinsic Evidence, p. 34.
‡ Doe d Chichester vs. Oxenden, 3, Taunton, 147.
§ Webb vs. Byng, 1, Kay and Johnson, 589.
evidence must be, that I need only sum up what appears to be the result of the authorities. Of course in interpreting any instrument which purports to deal with property, some extrinsic information is necessary, in order to make the words, which are but signs, fit the external things to which those signs are appropriate. In reality, external information is requisite in construing every instrument; but when any subject is thus discovered, which not only is within the words of the instrument, according to their natural construction, but exhausts the whole of those words, then the investigation must stop; you are bound to take the interpretation which entirely exhausts the whole of the series of expressions used by the testator, and are not permitted to go any further. To that extent the Court is always at liberty to go, in interpreting a will; in other words, I am to place myself in the position of the testator, with the knowledge of all the facts with which he was acquainted; but I am not, in the course of interpretation, to introduce any evidence whatever of what were the intentions of the testator, as contrasted with, or extending, or contracting the language which he has used. Therefore, when I find such a description as 'my estates without the word 'all,' in the parish of A, and I learn that there are two estates in the parish of A, both of which correspond with the devise, they will pass. They do not, however, exhaust the words of the gift; there may be a third estate; but as soon as I have ascertained all the estates which the testator had in the parish of A, then his own language has drawn the boundary as strictly as if I had a map designating the parish, and designating the property therein comprised, and I cannot take one step beyond the limit which he has prescribed. Where a testator uses language which in itself is not thus definite, but is to a certain extent popular, and does not point out the subject referred to by any strict boundary, then again of course I have to apply the knowledge I may acquire from extrinsic circumstances to the interpretation of the words he has used in his will; and when I arrive at anything which completely exhausts the whole of those words, then, and not till then, am I restricted in my inquiry and examination into extrinsic circumstances."

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In one very modern case, the rule of restriction to the letter of the description, was attempted to be carried to a very extreme length. A testator having made a devise of all his lands in a particular parish, and to which parish at the time the lands were ordinarily reputed to belong, it subsequently, but not for some years afterwards, turned out that there had been a mistake about the parish boundaries, and that the property in question was in fact in a different parish, and it was contended accordingly not to have passed under the will. However, the Court held the land to have passed; Pollock, Q. B. stating;—"It was said that the testator left only such of his lands as were situate in the parish of Doynton; and that the land in question was not in the parish of Doynton. This is not like a case of parcel or no parcel; but the question is, what lands the testator meant to include in the devise. It is impossible to resist the conclusion, that in giving all his lands in the parish of Doynton, he meant the parish as it was then reputed, supposed, and known. He did not mean that, if it should turn out that the parish boundaries were different from what was supposed, and a piece of his land then reputed to be within this parish was in another, it should not pass; or that a piece of his land, supposed to be in an adjoining parish, which should turn out to be in this parish, should be included. The local description of the land, as being in the parish of Doynton, must be taken with reference to what the testator must, beyond all doubt, have meant, the parish according to its then supposed boundaries."

Where the words of demonstration are of the essence of the description,—(a matter always more or less to be determined from the context,)—they cannot be rejected. Thus in a devise of all my messuages at, in, or near Snig Hill, which I lately purchased of the Duke of Norfolk; and it appeared that the testator had not only bought from the Duke four houses in Sheffield, about 20 yards from Snig Hill, but two in Gibraltar Street in the same town, about 400 yards from it, and all included in the same

conveyance; yet the description "at, in, or near Snig Hill" was held to be of the essence of the devise and not to be rejected, and the Snig Hill houses only passed accordingly. And so in a bill of sale assigning,—"all the household goods of every description at 2, Meadow Place, more particularly set forth in an inventory referred to,"—the inventory was treated as demonstrative, and all not included in it was excluded.†

In every case of false demonstration following a correct designation of name, the ordinary rule has been,—"Veritas nominis tollit errorem demonstrationis," or as to be expressed in English,—"The truth (or accuracy) of the name removes the error of the description,"—in other words,—a true designation of a party by name, is not prejudiced by a mistaken description.

In a recent case of Drake vs. Drake in the House of Lords,‡ there was a devise to a person described as, "my niece Mary Frances Tyrwhitt Drake." The testator had a sister-in-law of that name, but no niece; yet there was nothing in the evidence to point out the sister as the person intended to take, any more than other individuals who respectively claimed, and nothing accordingly to show error of demonstration. It was contended, however, on the part of the sister, that the case was governed by the rule mentioned above, and that the name alone ought to prevail; but said the Lord Chancellor (Lord Campbell) in delivering the judgment;—"I see nothing that can warrant us in saying that the testator intended that his sister, Mary Frances Tyrwhitt Drake, should take the residuary estate under his will, unless the maxim which is contended for by the appellant (the sister-in-law) should govern the case, that without any evidence whatever to prove error of demonstration, there is a rigid rule that the name should prevail. But, my lords, I deny that there is any such rule. There is a maxim that the name shall prevail against an error of demonstration; but then you must first show that there is an error of demonstration, and until you have shown that, the rule veritas

* Doe vs. Bower, 8, Barnewall and Adolphus, 453.
† Wood vs. Rowcliffe, 6, Exchequer Reports, 407.
‡ Drake vs. Drake, 8, House of Lords' Cases, 172.
nominis tollit errorem demonstrationis does not apply. I think that there is no presumption in favor of the name more than of the demonstration. Upon referring to the numerous cases that have been cited at the bar, it will be found that there are more instances in which the demonstration prevailed, than in which the name prevailed."

The illustrations cited of ambiguity, and the admission of evidence to remove it, have been cases of wills. We will add one or two of deeds. Where certain premises were leased, including a yard described by metes and bounds, and the question was whether a cellar under the yard was or was not included in the lease; verbal evidence was held admissible to show that, at the time of the lease, the cellar was in the occupancy of another tenant; and therefore that it could not have been intended by the parties that it should pass by the lease.* Again, in a contract of guarantee running thus;—"In consideration of your having this day advanced to A. B. £750," which might mean either in consideration that you had then actually advanced, or that you shall have this day advanced, evidence was admitted to show that the advances were contemporaneous with the guarantee.†

In the preceding discussion we have confined ourselves to the broader question of the reception of parol evidence at all in aid of the construction of written instruments. A very important distinction, however, has to be noticed in reference,—(when admitted at all,)—to the nature of the evidence receivable. And here it is to be pointed out that with the single exception of the case we have described as that of equivocation,—(namely, where there are two things or persons responding to a given description,)—the evidence receivable is, not that which would affect to enunciate directly the intention of the parties as proclaimed by themselves, but simply that of those general surrounding circumstances, which, by placing the Court in the position of the Author of the instrument, enables the former to ascribe to the latter some

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* Doc v. Burt, 1, Term Reports, 701.
† Goldshede v. Swan, 1, Exchequer Reports, p. 154.
particular intention demonstrated by the *circumstances*. Thus (with the exception of the case of *equivocation*) all such evidence of direct declaration of intention as consisted in *statements of what or who was designated by particular expressions*,—or (without regard to expression) *what or who was intended to pass or take*,—or of *indirect avowal*, such as instructions to the party employed in drawing up the instrument, would be rejected; while all would be received, *showing the position of things under which the instrument itself had its existence*. The indiscriminate reception of the former class of evidence would lead to all that mischief of uncertainty, contradiction, and confusion, the shutting out of which is the foundation of the whole principle of exclusion; while to inform the Court, which is to expound the document, of the mere historical facts, would be simply to place it in the position of the Author; and, (to borrow the language of the present Lord Justice Turner, in a case which came before him when Vice Chancellor)—“to collect from the words which he has used, taken in connection with the surrounding circumstances, the Court placing itself in the position of the testator, for the purpose, not of *speculating* upon what his intentions may have been, but of *ascertaining* whether the circumstances by which he was surrounded afford any certain indication of his intentions.”*

Accordingly we find Sir J. Wigram laying down affirmatively *what is receivable* in the following terms:—†

“For the purpose of determining the *object* of a testator’s bounty, or the *subject* of disposition, or the *quantity of interest* intended to be given by his will, a Court may inquire into every material fact relating to the *person* who claims to be interested under the will, and to the *property* which is claimed as the subject of disposition, and to the *circumstances* of the testator, and of his family and affairs, for the purpose of enabling the Court to *identify the person or thing intended* by the testator, or *to determine the quantity of interest* he has given by his will.

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* Blackwell vs. Pennant, 9, Hare, 552.
† Wigram on Extrinsic Evidence, 32.
"The same (it is conceived) is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancilliary to the right interpretation of a testator's words."

In the case of Blundell vs. Gladstone above referred to, where the question was who was to take under a devise to a second son of Edward Weld, Mr. Justice Patteson, in delivering the opinion of the Judges, after observing,—"that much evidence had been adduced on both sides to show the state of the family of Weld, and the names of the different members of it at the time of making the will, and to prove how far the testator was acquainted with them,"—thus follows this up:—"The case is therefore free from any question as to admissibility of evidence: all that has been received is only what was necessary to put the Court into the same situation with regard to knowledge of extrinsic circumstances as the testator himself was in, and so to enable them the better to put that construction upon his words, which it is to be presumed he himself would have put if asked. So far, at least, such evidence has been uniformly received according to all the authorities, and it is unnecessary to discuss or even to refer to them. The case is one purely of construction, and the Court will have to determine, whether, looking at the whole contents of the will, and having the same information which the testator had when he made it, they can clearly see who was intended to be the devisee, or whether that is left in so much uncertainty that the will must be declared void, and the heirs at law take the estates."

On the other hand, in addressing himself to the Evidence to be excluded, the Chief Justice Tindal, in continuation of the passage from his judgment we have cited from Shore vs. Wilson, thus adds:—

"But whilst evidence is admissible in these instances for the purpose of making the written instrument speak for itself, which, without such evidence, would be either a dead letter, or would use a doubtful tongue, or convey a false impression of the meaning of the party, I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed; and that in
no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, whether religious, political, or otherwise, any more than by express parol declarations made by the party himself, which are universally excluded; for the admitting of such evidence would let in all the uncertainty before adverted to: it would be evidence which in most instances could not be met or countervailed by any of an opposite bearing or tendency, and would in effect cause the secret undeclared intention of the party to control and predominate over the open intention expressed in the deed."

In accordance with this view of the matter,—after stating as above in Doe d. Hiscocks vs. Hiscocks, the admissibility in evidence of the surrounding facts of any case,—Lord Abinger goes on to draw the distinction between the two opposite classification of evidence to which we have adverted, and the principles of exclusion as affects the one, in language which has ever since been recognized as a leading exposition of the law on the subject.

"But," says he, "there is another mode of obtaining the intention of the testator, which is by evidence of his declarations,—of the instructions given for his will,—and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous.

"Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted; and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons, (each answering the words in the will,) the testator intended to express.

"Thus, if a testator devise his manor of S to A B, and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls 'an equivocation,' i.e., the
words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shews what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction.

"It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded; upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made, to appear by the writing, explained by circumstances, there is no will."

The distinction thus recognized by Lord Abinger has been acted on in later cases. In the case of a devise to John Allen, the grandson of the testator's brother Thomas, charged with pecuniary legacies to each of his brothers and sisters, and Thomas had two grandsons named John Allen, declarations of the testator were received to show which of the two grandsons was intended.* In the recent case of Drake vs. Drake, in the House of Lords, referred to in the earlier part of the Chapter, evidence was tendered of the instructions given to the solicitor on the occasion of making the will, which, if admitted, would have cleared up the whole matter, and of course settled the construction; but the Court below felt itself bound to reject the evidence; and this was upheld by the House of Lords.

In the instances in which declarations are receivable, these are not confined to antecedent or even contemporaneous ones. Even subsequent would be admitted; nor is either the mode or the occasion of making them material on the question of admissibility, whatever bearing either may have on the point of weight. Lord Denman in pronouncing the judgment in Doe vs. Allen observed;—"The only remaining point is, whether the time when those declarations were made, viz., some months after the will was executed, makes any difference. Cases are referred to in the books to show that declarations contemporaneous with the will are alone to be

* Doe dem Allen vs. Allen, 12, Adolphus and Ellis, 451.
received; but, on examination, none of them establish such a distinction. Neither has any argument been adduced which convinces us that those subsequent to the will ought to be excluded, wherever any evidence of declarations can be received. They may have more or less weight according to the time and circumstances under which they were made, but their admissibility depends entirely on other considerations. In this case, therefore, the rule for a new trial must be discharged.”

Such is the general illustration of the more ordinary cases in which parol evidence is admissible in explanation of written documents; and in conclusion of that portion of the discussion which addresses itself to those in which the application of the instrument is in question, we subjoin Mr. Taylor’s general summary of the law on the subject.

“From the preceding cases and observations,” he remarks, “the following rules may be collected:—First.—Where in a written instrument the person or thing intended is applicable with legal certainty to each of several subjects, exclusive evidence, including proofs of declaration of intention, is admissible to establish which of such subjects was intended by the author. Secondly.—If the description of the person or thing be partly applicable and partly inapplicable to each of several subjects, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author’s declarations of intention will be inadmissible. Thirdly.—If the description be partly correct and partly incorrect, and the correct part be sufficient of itself to enable the Court to identify the subject intended, while the correct part is applicable to any subject, parol evidence will be admissible to the same extent as in the last case, and the instrument will be rendered operative by rejecting the erroneous statement. Fourthly.—If the description be wholly inapplicable to the subject intended, or said to be intended by it, evidence cannot be received to prove whom, or what, the author really intended to describe. Fifthly.—If the language of a written instrument, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may
be resorted to, in order to show that in some secondary sense of the words, and in one in which the author meant to use them, the instrument may have a full effect."

To complete the subject, there remains to be noticed the case in which, the peculiar doctrines of the Court of Equity attributing to certain states of things, certain Presumptions, as the legal result, Parol evidence is received in rebuttal of the Presumption, or in contradiction of the Rebuttal itself.

Thus, in a case which will be familiar to the Indian student, that of the purchase by one in the name of another, on proof of the payment of the purchase money, the Court, in contradiction of the deed of conveyance, would presume the property his who had paid its price, and the purchase a bonamee one accordingly. So in a case of double bequests to the same person of the same amount, one by will and the other by codicil, the Court, from the correspondence of the two, presumes the second to have been a repetition only of the bequest, and not a second, or as it is called cumulative legacy. In both these cases parol evidence would be admitted to displace the presumption; and others might be cited to the same effect, though these will suffice for illustration of the principles. It will be observed, however, that in truth in these cases the evidence is received not in contradiction of the instrument, but in support of its apparent effect, though in contradiction of the presumption itself.

On the other hand this evidence may be in its turn rebutted, and the legal presumption established by counter-proof; though the counter-proof would be neither admissible, nor in fact required, until evidence had been given originally to displace the presumption.

CHAPTER XIV.

On Hearsay Evidence in General.

Hearsay evidence, in the ordinary acceptation of the word, is simply a statement made by one on the information of another; and—(to quote from Mr. Phillipps)—"is confined to that kind of evidence (whether spoken or written) which does not derive its credibility solely from the credit due to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness may have received his information."* 'Hearsay' is its more familiar term; but some writers have described it as 'Mediate'; from the circumstance that it is derived mediately, that is, through the medium of some other source than that of the witness's own personal knowledge.

Thus A deposing to what he had been told by B, would be making a statement merely hearsay or mediate; while its trustworthiness would rest, not merely on his own veracity, but on the credibility ascribable to an absent informant; and one whom the Court could not subject to the responsibility of an oath, or the scrutiny of an examination. It is obvious that to admit this, under ordinary circumstances, might be to admit as evidence a mere tale, with no security for its truth; and, subject accordingly to exception in individual cases, the admission of all this class of evidence, the Law, as a general rule, prohibits.

As in the earlier history of our Law of Evidence, was well put by Chief Baron Gilbert,—"Credit being derived from attestation and evidence, it can rise no higher than the fountain from whence it flows, and if the first speech was without oath, an oath that there was such a speech, makes it no more than

a bare speaking, which cannot be of more worth derivatively than at first; and so of no value in a Court of Justice, where all things are determined under the solemnity of an oath. Besides, nothing can be more indeterminate than loose and wandering testimonies taken upon the uncertain report of the talk and discourse of others.

If a man swear to his own knowledge, he must show the circumstances and incur the risk of confusion; but if a man were allowed to swear to an hearsay, it would admit general allegation, for the proof or disproof of which no concomitant particulars could be expected of the witness: yet on this evidence many in almost every reign prior to the Revolution, and some great and excellent men, were deprived of liberty, of honor, and of life; and their posterity consigned to poverty and dishonor.*

The Chief Baron, though putting forward the absence of the sanction of an oath as the more prominent ground of objection, alludes also to the want of adequate means of scrutiny, in other words, the searching test of cross-examination; and the rule which excludes hearsay has been propounded accordingly as founded on two reasons;—"what the other person said was not upon oath; and the party who is to be affected by it, had no opportunity of cross-examining him."

So completely, indeed, is the power of cross-examination always coupled with the existence of the oath, that the absence of either safeguard would be sufficient to exclude; nor would it be any ground of distinction that the statement had been made in a judicial proceeding, were the parties different, and there had been no power of cross-examination.

In one of the cases on this subject, the ex parte deposition of a pauper as to his place of settlement was rejected, though taken on oath


The portion of the passage "If the first speech were without oath," &c., is to be found in Buller's Nisi Prius 294 b., and it is attributed by succeeding writers on Evidence generally to the learned Author of that work. Mr. Justice Buller must, however, have himself borrowed it from Chief Baron Gilbert.
before a Magistrate, notwithstanding the pauper himself afterwards either absconded or died."

The illustration we have put of A's deposing to what he had been told by B, would be subject to neither of the prescribed tests, oath, or cross-examination. B might have been imposing, and wilfully so, on A; or, assuming B to have intended a truthful narrative, he might have failed in its adequate enunciation; or A might have failed in its correct and perfect apprehension; and neither party might have been in that state of vigilance, the one to tell and the other to hear, which the law imposes in the solemnity of a judicial investigation.

If what B told to A were receivable on the mere representation of A, though there might be a difference in degree, the principle would be the same, were A permitted to depose on the same information of B what C had told to B, or D to C, and he to B, and so on throughout the alphabet; and the exaggeration of Report is as great now as it was in the days of Virgil, who has told us:—

"Ingrediturque Solo, et caput inter Nubila condit."†

or those of Pope, in whose graphic description of the Temple of Fame, we read;—

"The flying rumours gathered as they rolled;
Scarce any tale was sooner heard than told,
And all who told it added something new,
And all who heard it made enlargements too,
In every ear it spread, on every tongue it grew."‡

To open the doors of the Court indiscriminately to such Rumour as Evidence, would be to convert the Temple of Justice into a gossip shop.

After adverting to what he terms the highest description of evidence, that of the senses, and to the next inferior to this, that of information from those who had possessed it, Mr. Starkie observes:—

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* R. vs. Nuneham Courtney, 1, East, 373.
† Virgil, Æn. Lib. IV. "It walks the Earth—yet rears its head among the Clouds."
‡ The "Temple of Fame."
"A third and still inferior ground of belief, consists in information which we derive, not immediately from one who has had actual knowledge of the fact by the perception of his senses, but from one who knows nothing more of the fact than that it has been asserted by some other person: this species of evidence, which is generally termed 'hearsay evidence,' is evidently inferior, in point of certainty, to the former, even for the common purposes of daily intercourse in society; for although the author of the assertion may be known, and his veracity highly appreciated, there is a greater latitude afforded for deception, mistake, and misapprehension, and for defect of memory; and hence a degree of doubt must result, which must evidently be increased in proportion to the number of persons through whom the communication has been transmitted; and, consequently, where the author is unknown, and the number of intermediate parties who have acted in the transmission is also unknown, the knowledge must be vague and uncertain, even as applied to the common affairs of life. But for the purposes of proof in a Court of Justice, a still stronger reason operates to the rejection of such evidence, namely, that it cannot be subjected to the ordinary tests which the law has provided for the ascertainment of truth, the obligation of an oath, and the opportunity afforded for cross-examination; for these, or equivalent ones, are the guarantees of truth which the law in ordinary cases invariably requires. In the common course of life, evidence of this nature is frequently, nay usually, acted upon without scruple; but in the ordinary affairs of life there is, in general, no considerable temptation to deceive: on the contrary, a legal investigation of a fact, which involves the highest and dearest interests of the parties concerned—property, character, nay liberty, or life itself—presents the greatest possible temptations to deceive; and therefore that evidence which is admitted before a jury must be guarded by greater restraints and stricter rules than those which are sufficient for the common purposes of life.

Even if it were to be assumed that one who had been long inured to judicial habits might be able to assign to such evidence just so much and no greater credit than it deserved, yet, upon the minds of a jury unskilled in the nature of judicial proofs, evidence of this kind would frequently make an erroneous impression. Being accustomed, in the
common concerns of life, to act upon hearsay and report, they would naturally be inclined to give such credit when acting judicially; they would be unable to reduce such evidence to its proper standard, when placed in competition with more certain and satisfactory evidence; they would, in consequence of their previous habits, be apt to forget how little reliance ought to be placed upon evidence which may so easily and securely be fabricated; their minds would be confused and embarrassed by a mass of conflicting testimony; and they would be liable to be prejudiced and biased by the character of the person from whom the evidence was derived. In addition to this, since every thing would depend upon the character of the party who made the assertion, and the means of knowledge which he possessed, the evidence, if admitted, would require support from proof of the character and respectability of the asserting party; and every question might branch out into an indefinite number of collateral issues.

Upon these grounds, it is that the mere recital of a fact, that is, the mere oral assertion or written entry by an individual that a particular fact is true, cannot be received in evidence."

Mr. Starkie alludes to the case in which the party to decide on the effect of the evidence being one long inured to judicial habits, that is to say the Judge, evidence of this description might be entrusted to his discrimination; and in the Berkeley Peerage Case, in the House of Lords, Lord Mansfield, Chief Justice, stated that,—"in Scotland and most of the Continental States, the Judges determine upon the facts in dispute as well as upon the law, and they think there is no danger in their listening to evidence of hearsay, because, when they come to consider of their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve."† So in the English, as well as the Supreme Courts of the Indian Presidencies, in matters tried upon affidavit, the like evidence is, within certain limits, daily received and acted on by the Judges.—It must be admitted, however, that the function

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* Starkie on Evidence, p. 54.
† 4, Campbell's Reports, 515.
thus conceded to the judicial mind, is not always very easy of exercise in any grave contest of fact; and, on the question of the policy of such an exception, the condition of an inurement to judicial habits is obviously a very elemental one.

If Sir W. Macnaghten correctly represent the text of Menu, that ancient sage of the Hindoos declares that,—"Evidence of what has been seen or of what has been heard is admissible;"—and Sir W. Macnaghten, on the authority of the passage, says;—"A witness may be either from seeing or hearing, as has been declared by Menu."* Possibly this may merely mean to enunciate, that evidence derived through the perception of either sense, seeing, or hearing, is admissible; and to restrict evidence generally to what is derived from one of these two sources. If it intend the indiscriminate adoption of what is ordinarily termed 'hearsay,' the Code of Menu is very much at variance with the Codes of most civilized nations.

According to Mahomedan Law as formerly prevailing in India, hearsay evidence was generally inadmissible; though with an exception in proof of such matters as admitted the privacy of only a few persons. Indeed, it has a peculiar exclusiveness as to one piece of hearsay; for it declared evidence dependent on the recognition of the voice to be imperfect, and not to be allowed; for which reason a blind man was not a competent witness.†

In its mode of dealing with hearsay evidence, ancient Athens stands out in some contrast to British jurisprudence in this particular; since Common Report was there admitted as evidence of guilt, and to an extent sometimes, sufficient to warrant conviction, though without specific proof.—"Thus, (to quote Mr. Forsyth's account) Æschines, in his speech against Timarchus, strongly insists upon the point that the Prosecutor may proceed upon the notoriety of the facts charged against a party; and we find him constantly presuming the guilt of Timarchus, simply on the ground that every body knew it, although he acknowledges his inability

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* Macnaghten's Hindu Law, 239.
† Beaufort's Digest, vol. I., p. 118.
to bring direct evidence. Nay, he goes so far as to pronounce a
panegyric upon the power of Rumour; to which, as a mighty Goddess,
he says, the State formerly had an altar; and he quotes Homer, Hesiod,
and Euripides, to prove the respect due to her influence. And this too
in a criminal trial, where the character of the defendant was at stake,
and the question was whether he had been guilty of certain specific
offences of the most disgraceful nature." Well might Mr. Forsyth add;—
"What more dangerous method for the destruction of the innocent can be
imagined than this;—"* and we will take the liberty of adding too;—what
stronger proof of the incivility of, rather than the civilization of, at all
events, the legal institutions of Athens.

It is true that in the earlier stage of our own Law of Evidence, and
indeed down to a comparatively modern date,—but
when England herself had not arrived at the pre-
ent more advanced condition of her Jurisprudence,—the principle which
excludes hearsay evidence did not prevail to its full extent in reference
to criminal proceedings; and, during a darker period of English history,
even when generally acknowledged as a constitutional one, it was shame-
fully outraged on certain political trials, in which Justice was
sacrificed at the shrine of arbitrary power. However, those days have
happily passed away; the principle has now been long firmly established
in our Courts; and there is not a more fundamental one in the whole
range of the English Law of Evidence.†

Indeed, hearsay evidence would be excluded even were there no
other to be had; and possibly so far accordingly
in defeat of Justice itself; as where the statement
in question was that of the only eye-witness to the transaction, and he
was dead; or in the case of a rape of a child of too tender years to
give evidence, its statements to the mother shortly after the offence was
committed.

* Hortensius, p. 44.
† A concise, but valuable, historical sketch of the progress of this branch of the Law
of England, as well as its condition in other Countries, ancient and modern, is to be found
in Mr. Best's work on Evidence.
Though, as a *general* proposition, it may be laid down, however, that hearsay is not to be received as evidence, it is to be borne in mind that this is a *general* one only; and it will be subsequently seen that there are particular subjects on which evidence usually designated as hearsay is received; as for example, *collateral circumstances* elucidatory of some particular matter under investigation, or *general reputation* on matters of public right or private pedigree.

Nor does the expression 'hearsay' carry with it a very accurate description of what is intended to be dealt with under the term. In its *apparent* sense, hearsay evidence might be taken to imply that only which was deposed to on *information*, and as something *heard* as contradistinguished from any thing *written*; while the ordinary formulary pronouncing "hearsay evidence inadmissible," would seem, from the very terms of its statement, to involve the proposition, that what was *written* was not intended to be dealt with, that is not meant to be comprehended in the rule of exclusion; whereas what is written, when obnoxious to the mischief, is as much within the rule as more obvious hearsay.

"The rule in question," says Mr. Best,* 'is commonly enunciated both in the books and in practice, by the maxim that 'hearsay is not evidence,'—an expression inaccurate in every way, and which has caused the true nature of the rule to be very generally misunderstood. The language of this formula conveys directly the idea that what a person has been *heard* to *say* is not receivable in evidence, and by implication, that whatever has been *committed* to *writing*, or rendered permanent in any other way, would be receivable—positions neither of which is even generally true. On the one hand, what a man has been heard to say against his own interest, is not only receivable, but is the very best evidence against him: and on the other, as has been already stated, written documents, with which a party is not identified, are frequently

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*Best on Evidence, 371.*
rejected. Hence it is that hearsay evidence is so often confounded with res gestae, i.e., the original proof of what has taken place; and which the least reflection will show may consist of words quite as much as acts. Thus on an indictment for treason in leading on a riotous mob, evidence of the cry of the mob is not hearsay, and is as original as any evidence can be; and so are the cries of a woman who is being ravished. So, although the relation of what a stranger has been heard to say is rejected as evidence of the truth of those words, seeing that it comes obstetricante manu,* yet whether certain words were spoken is a fact, and may be proved as such, if relevant to the issue raised. Thus although common rumour cannot be received as proof of a fact, being hearsay in its worst form, yet whether a certain rumour reached the ears of a particular person may be perfectly receivable. The true principle is to consider, not whether evidence comes by word of mouth or by writing, but whether it is original in its nature, and not indicating any better source from whence it derives its weight."

We are not sure that even Mr. Best's test of not indicating a better source is quite correct; since, not hearsay only, but secondary evidence (for example, the copy of the deed for the deed itself), would indicate the existence of something better behind, and this would not be hearsay evidence within any received acceptation of the term.

It is not always easy to define what would fall under the head of hearsay; and be inadmissible as such, and what not. Illustration, however, will conduce to an understanding of the subject; and we will first address ourselves to the case of inadmissibility.

Various examples, taken from the books, are given by Mr. Taylor, in which evidence has been rejected as falling under the head of hearsay; and they are so well selected, that we transcribe them for their elucidation of the subject.

"On a question," says he, "respecting the competency of a testator, the conduct of his family or relations taking the same precautions in his

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* Literally, "with the hand of a Midwife,"—that is not at first but second hand.
absence as if he were a lunatic, or his election in his absence to some high and responsible office, or the conduct of a physician who permitted him to execute a will,—all these, when considered with reference to the matter in issue, are mere instances of hearsay evidence, mere statements expressed in the language of conduct instead of the language of words; and consequently they are inadmissible in a Court of Justice, although in the ordinary transactions of life, they would deservedly be considered as cogent moral proof. So, on a question of seaworthiness, the fact that a deceased Captain, after examining every part of the vessel, embarked in it with his family,—and on a question respecting the loss of insured property, the fact that other Underwriters have paid on the same policy,—cannot be received in evidence. On the same ground the fact, that, after the issuing of a fiat, certain creditors of the bankrupt returned to his assignees goods which they had received from the bankrupt before he delivered other goods to the defendant, was in an action of trover brought by the assignees, held inadmissible as proof, that an act of bankruptcy had been committed prior to the time when the goods came into the hands of the defendant; and, not to multiply instances, where a servant was indicted for perjury, in saying that her deceased mistress had never had a child, declarations of the mistress were rejected as evidence for the Crown, although in an action of ejectment, where the same question was in issue, and the words charged as perjury were uttered, such evidence was admitted, as relating to a matter of pedigree.

In most of the instances given above, as illustrating the occasional inconvenience of the rule, the evidence rejected amounted to something more than the mere declarations of parties not examined on oath nor subjected to cross-examination; for these declarations were accompanied by acts done in confirmation of their sincerity, and as such, the evidence was, morally speaking, entitled to great weight. The law, however, will not on this account allow any exception to be made in favor of hearsay; for although, if an act done be evidence per se, any declarations accompanying that act are, as we shall presently see, admissible for the purpose of illustrating, qualifying, or completing it; yet if
the act be in its own nature irrelevant to the issue, and the declaration be inadmissible, the union of the two cannot render them evidence.”

It will be noticed in the case put by Mr. Taylor of the conduct of the family, the electors, and the physician, towards the lunatic, that conduct itself, notwithstanding the prima facie weight it might carry with it, was at best matter of opinion only, and when tested by a judicial investigation, might turn out to have been based on a misconception; or the very conduct might have existed under motives adequate to account for it on some other theory than that of the lunacy. It might have been even feigned in aid of some scheme in assertion of the fact of lunacy itself. So the Captain in his examination of the vessel might have overlooked some important defect, some material unsoundness;—though a good navigator, he might have been a bad ship-builder;—or he might have been a man altogether of unsound judgment in such matters. Again, the Underwriters might have paid too rashly;—the first one might have been deceived, and the rest have been following only in his track. The creditor who returned the goods may not have had the same information as the assignees who brought actions to recover them. The mistress might have had an interest in asserting her maternity; and after all her declarations were but mere statement. Even the assumed sincerity of the parties themselves, as manifested by their corroborative acts, would still carry the evidence no higher than matter of personal belief; and in any view of the case, whatever took place, did so behind the back of the individual proposed to be bound by it, and between parties to whom he stood in no position of privity or connection.

But as suggested above, the line is often somewhat finely drawn between what is in truth original, and what hearsay evidence; and while there is much on a superficial observation passing for original evidence, which in fact is regarded in the law but as hearsay, so, on the other hand, there is a good

* Vol. I., p. 450, and see dictum of Mr. Justice Coltman in Wright vs. Tatham cited, post.
deal wearing somewhat of the aspect of hearsay, which is admitted as original; and to the discussion of this we proceed.

Thus, though in a question involving the state of mind of any individual, the conduct of others towards him, when taken by itself, would, as pointed out above, be hearsay evidence only, the mode in which that treatment was responded to by himself; or the way in which he was affected by it, would be strictly original. This is well illustrated by a leading case of Tatham vs. Wright, where the contrast is put between the conduct of the party himself, and that of others towards him. The issue was, the competency of a testator at the date of his will; and question having arisen on the admissibility of letters addressed to him by third parties on the footing of his sanity, Tindal, Chief Justice, thus delivered the judgment of the Court:

"The question to be determined by the Jury was, whether or not the testator, John Marsden, was and had been, from the time he attained his full age in 1719, and down to and at the time of his making his will and codicil in the years 1822 and 1825 respectively, a person of sane mind and memory, and capable of making a will. And, in order to determine that question, I conceive all that was said, written, or done by the testator himself at any time during such period was the most direct and the best evidence to ascertain the state of his understanding; and that the next in degree, because intimately connected with it, would be all that was said to him, written to him, and done to him during the same period, by his friends and others who had access to him; provided always, that what was so said, written, or done to him by others, is shown to have come home to his actual knowledge; but I consider this condition to be indispensable as to the admissibility of this second class of evidence; for, as to what was said by others but not heard by the party whose understanding is the subject-matter of inquiry, or written by others but which never reached him, or done by others but never known by him to have been done, it appears to me that such speaking, or such

* Wright vs. Doc dem Tatham, 7, Adolphus and Ellis, 400.
writing, or such acting, can amount to no more than an expression of the opinion of the speaker, or the writer, or the actor, and that such opinion, not having been given upon oath, and not being subject to cross-examination as to the grounds upon which it was originally formed or continued, cannot, upon that account, be deemed admissible in evidence. I cannot, therefore, accede to the position which has been contended for by the learned Counsel on the part of the plaintiff in error, that the mere treatment of the party by others without or beyond the reach of the knowledge of the party himself, or, as it was sometimes expressed, conduct of others towards him, although not amounting to conduct to himself, can form a legitimate or admissible species of evidence.”

In a somewhat recent case in which an action had been brought for the recovery back of a sum of money paid by the plaintiff for the purchase of an estate, on the ground that he was in a state of mind incompetent to contract, in short a lunatic, evidence was received of his conduct both before and after the date of the transaction, in order to show that the malady was of a character to make itself apparent to the defendant at the time he was dealing with him."

There are many cases in which even mere information constitutes in itself original evidence. For example, the propriety of a party’s own conduct in reference to any given transaction may depend on the information he has received, as in actions for malicious prosecution, or libel, that on which he acted. So the conduct of a bankrupt being under investigation, the denial by his servant on enquiry whether he was at home, may have an important bearing on the question. Yet neither would the truth of the information in the one case, or of the denial in the other, be any part of the issue; but the fact would simply be whether the representation was made, or the denial took place.

So there are cases in which general reputation or notoriety of any given fact, though in a sense in the nature of hearsay, is received as substantive evidence of

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* Beavan v. McDonnell, 10, Exchequer Reports, 184.
it; the Court inferring from the existence of the reputation that of the fact itself; much in the same way as in a case proved upon circumstantial evidence, the fact would be inferred from the circumstances.

"General reputation," says Mr. Starkie, 'is the general result or conclusion formed by society as to any public fact or usage, by the aid of the united knowledge and experience of its individual members: such a general concurrence and coincidence of opinion on facts known to many, affords a reasonable degree of presumption that their conclusion is correct; and therefore in particular cases, where the fact is of a public nature, general reputation is admissible evidence to prove it. But as it would not be necessary, and otherwise would not be practicable, to examine the whole body of society as to the prevalence of general reputation on any particular fact, it is sufficient to call individual witnesses, a portion of society, who can, under the sanction of an oath, and subject to cross-examination, pledge their personal knowledge that such representation exists.

"It is observable that, in one respect, such evidence can scarcely be considered as forming an exception to the general rule which requires the sanction of an oath and the opportunity to cross-examine; for the witnesses are called to prove what they actually know, viz., that such a reputation exists: they are sworn and subject to cross-examination, and the very nature of such evidence excludes any more solemn sanction."

The observations are in terms addressed to matters of a public character only, rather than a mere social one. In principle, however, making allowance for the difference of degree, they would alike apply to the latter.

Thus in the case of a marriage, (it not being one of bigamy or adultery, where stricter proof is required,) proof of the reception of the parties by the family, or in society, on the footing of marriage, would be good original evidence of the fact of marriage; as would that of their own demeanor towards each other, addressing each other for

* Starkie on Evidence, p. 48.
instance as man and wife, or attending public places together as such. In one case, the only evidence of the marriage was that of a witness who did not appear to be related to the parties, or to live near them, or to know them intimately; and he proved only that he knew the assumed wife when she was single, and that he had heard she had since married the assumed husband. The evidence, however, was admitted; and, in the absence of cross-examination or contradiction, prevailed; Bayley, Baron, observing—"It goes to show the reputation of the neighbourhood."*

So on a question of reputed ownership, arising under the Bankrupt * laws, the opinion of neighbours would be admissi- * ble in proof or disproof of the fact. "What,' says Gibbs, Chief Justice, 'is reputed ownership? It is made up of the opinions of a trader's neighbours; it is a number of voices concurring in one or other of two facts."†

So in a case involving a matter of public rumour, as in an action for keeping a mischievous dog, by which the plaintiff's child was bitten, a witness was allowed to be questioned as to a report in the neighbourhood that the dog had been bitten by another, and a mad one; with a view of raising the presumption that it might have been affected itself, and thus showing its own mischievous character.‡

So the personal character of an individual may be shown by what has been reported in the neighbourhood of his residence. Thus in an action for breach of promise of marriage, where the defence was that the plaintiff was a woman of bad character, a witness was allowed to give evidence of what he had heard at the place where the plaintiff lived.§

So on the point of general notoriety, in a case where an artist having painted a portrait of a Gentleman of fashion and his Wife, the wife being very handsome, but the

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* Evans v. Morgan, 2, Crompton and Jervis, 453.
† Garr v. Rutton—Holli's Nisi Prius Cases, 317.
‡ Jones v. Perry, 2, Espinasse, 482.
§ Foulkes v. Sellway, 3, Espinasse, 238.
husband very plain, the artist, under some circumstance of irritation, subsequently exhibited the picture in public under the title of "The Beauty and the Beast." A brother of the lady, taking the law into his own hands, cut the picture in pieces; and an action was brought by the artist against him to recover damages. The defence set up to this, in support of the plea of 'not guilty,' was the libellous character of the picture. It becoming necessary accordingly to establish the recognition of the likeness by spectators,—evidence was received of their declarations to the fact while looking at the picture, though not called themselves;*—"to show," says Mr. Phillipps, 'that the public generally understood, by looking at the picture, that certain individuals were there intended to be portrayed."

In all these cases of reputation, the Court gives credence to the truth of the common belief,—"the concurrence of many voices,"—as it has been not inaptly termed.

Evidence furnished by a general reputation is also applied to the elucidation of ancient facts; such as those governing questions of pedigree, or of parochial, manorial, or other local rights of a public character. Here it is admitted, alike from the extent of credit naturally due to it; and the emergence of the case; which latter would be likely to leave matters of antiquity incapable of proof at all, were none but modern and direct evidence receivable. These, however, will form the subject of a separate and subsequent chapter devoted to their elucidation, and we abstain accordingly from entering on them here.

Another and a leading example in which, in this class of cases, matter of apparent hearsay is treated as original evidence, is that in which some one given fact being under investigation, others are admitted as illustrative of it. Ordinarily the acts of strangers to a transaction,—"res inter alios acta",—as they are called, that is things transacted by others, are excluded from admission. Thus, what another did or said about a particular matter would, prima facie,

* Du Bost v. Beresford, 2, Campbell's Reports, 572.
be mere hearsay, and not be received accordingly. But were this 
interwoven with the matter, so as to form as it were portion of the 
transaction itself; part as it is technically termed of the res gestæ, it 
would be admitted as an incident of the whole, and explanatory of it. 
This is in truth only the exposition of the main fact itself, by the aid 
of the circumstances which surround it; and, as a general principle, 
whatever surrounding circumstances may be necessary to explain the 
nature of the prominent or principal fact in a case, are received as 
original evidence.

"There are other declarations," says Professor Greenleaf [using the 
word 'declaration' as comprehensive of surrounding circumstances gene-
really] 'which are admitted as original evidence, being distinguished from 
hearsay by their connection with the principal fact under investigation."

"The affairs of men consist of a complication of circumstances 
so intimately interwoven as to be hardly separable from each 
other. Each owes its birth to some preceding circumstances, and 
in its turn becomes the prolific parent of others; and each, during its 
existence, has its inseparable attributes and its kindred facts, materially 
affecting its character, and essential to be known, if order to a right 
understanding of its nature. These surrounding circumstances constitut-
ing part of the res gestæ may always be shown to the Jury along with 
the principal fact, and their admissibility is determined by the Judge 
himself, according to the degree of their relation to that fact, and in the 
exercise of his sound discretion; it being extremely difficult, if not 
impossible, to bring this class of cases within the limits of a more 
particular description. The principal points of attention are, whether 
the circumstances and declarations offered in proof were contemporar-
aneous with the main fact under consideration, and whether they are so 
connected with it as to illustrate its character."

And the principle is thus stated by Mr. Starkie:—

"In the next place, although the general principle above announced 
[the admissibility as evidence of things taking place between those not
parties to the transaction] excludes the declarations, writings, acts, and conduct of strangers as falling within the general description of res inter alios acta, the objection 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."

Thus to cite the familiar example taken from one of the State Trials, (the case referred to by Mr. Best in the passage cited above,) that of Lord George Gordon,† where, in a case of alleged treason, it became necessary to enquire whether certain proceedings in which a riotous mob were headed on by the accused, amounted to the offence, the cry of the mob which accompanied Lord George Gordon was admitted as evidence of the nature of the common enterprise, and of the objects which he, in common with the multitude, had in view; though that cry was the act of the third parties only, and not that of the individual sought to be implicated.

In another leading case, too, that of O'Connell, where the defendants were charged with summoning monster meetings of the people for illegal purposes, papers publicly sold at the meetings were received in evidence of their objects, though no proof was given connecting the defendants with the sale, or the persons effecting it.‡

So in indictments for manslaughter, statements by the deceased made immediately after the accident as to how it happened, are receivable. In actions for criminal conversation, evidence has been received of cotemporaneous declarations of the wife at the time of her elopement, illustrative of the act of elopement, and of the circumstances under

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* Starkie on Evidence, 87.
† 21, Howell's State Trials, 514.
‡ Armstrong and Trevor's Reports, 275.
BODILY OR MENTAL FEELINGS.

which it took place. In an action against the Sheriff for a false return, where the defence is a fraudulent bill of sale, declarations by the debtor made at the time, would be receivable as explanatory of the transaction. So the declarations of a bankrupt have been constantly received in illustration of acts in themselves equivocal; as for example, a declaration made by a trader at the time of deserting his house or place of business as to his intention in doing so, in order to prove an act of bankruptcy.

So far has the doctrine been carried, that a party's own declarations have been received as evidence in his own favor. Thus, in an action on the case for fraudulently representing the solvency of a person, whereby the plaintiffs trusted him with goods, their declarations at the time they were applied to for the goods were admitted, for the purpose of showing that they gave trust in consequence of the representation.*

It is on this principle that, where proof becomes necessary of the bodily or mental feelings of an individual, statements by the party at the time, in manifestation of these, have been admitted, though merely made in casual statement on conversation. These statements are regarded as being but the natural development of the feeling itself,—the condition of the party whose condition was the subject of enquiry; and the admission of the statement as evidence, would still leave the genuineness of the representation open to determination by the Court.

Thus the representations made by a sick person of the character of his malady, have been received; even although not made to his medical attendant, but to some indifferent person; as, in the case of an insurance effected by a husband on the life of his wife, has been the result of a conversation with her declaratory of the state of her health at the time the insurance was effected.—The like sort of evidence has often been received on criminal proceedings; as for example, in a case of poisoning, statements made by the deceased in conversation as to the state of his health previously to the administration of the poison;

* Fellowes vs. Williamson, Moody and Malkin, 306.
or in actions or indictments for assault, where the party assaulted has told his Surgeon of the extent of his suffering from the injury. So on an indictment for a highway robbery, a complaint to a constable of the robbery by the party attacked would be received as to the fact of the crime having been perpetrated on the party speaking to it; as, in the event of her death, on a prosecution for rape would be the statement of the woman of an outrage having been perpetrated on her. In both instances, however, the evidence would be confined to the general fact, and would not be permitted to go the length of affixing the crime upon any particular individual. Accordingly, in the case cited of the complaint of the robbery, it would not be allowed to ask,—whether, in making the complaint, the prosecutor had mentioned the name of the prisoner.

Again, in an action for criminal conversation, on the subject of damages, the behaviour of the husband and wife towards each other, and their correspondence and conversation with each other, or with third persons, are original evidence; provided only that the reference was to a period antecedent to the act of guilt, and that there existed no ground to suspect collusion.

The doctrine may be considered as having gone even further, in its application, in criminal proceedings, to co-conspirators, or co-trespassers; in each of which,—(the community of design having, however, been first established),—the acts and statements of one in the course of the common enterprise are receivable as illustrative of the general design, and as evidence accordingly against the others. "It is an established rule," says Mr. Phillipps, "that where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party; it follows, therefore, that any writings or verbal expressions, being acts in themselves, or accompanying and explaining other acts, and so being part of the res gestae, and which are brought home to
one conspirator, are evidence against the other conspirators, provided it sufficiently appear that they were used in the furtherance of a common design."

A leading authority as to the case of conspirators, is another of the State Trials, known by the name of Hardy's case;† where one Hardy being indicted for treason, letters written by the conspirators, and writings distributed by them, were received as evidence against him. As an illustration of the case of co-trespassers may be cited one of Wright vs. Court, where, in an action of trespass for false imprisonment, the declaration of a co-defendant showing personal malice, was received as evidence against the others.‡ It is true that in that case attention does not appear to have been drawn to the long interval of time which had occurred between the act in question and the time when the statement was made; and had this been done, the decision would probably have been different. That, however, would not affect the recognition the case contains of the general principle.

Though evidence of the common design, however, and even personal evidence against each individual conspirator, still in the case of conversations of co-conspirators, the weight of the evidence, as bearing upon any particular party, would be liable to be affected by the circumstances, as for example, attention or inattention to what was said,—approval, or disapproval of it.

It is immaterial at what time the party accused is shown to have entered into the combination; or whether the acts or statement in question took place in the presence or absence of the one against whom they are brought to bear. The entrance into the common design is the adoption by all of the acts of each in its furtherance, from the commencement, and throughout the progress of the undertaking.

Still this must be taken with the qualification that, what took place was prior to the apprehension on the charge, of the party accused.

† R. vs. Hardy, 24, Howell's State Trials, 703.
‡ Wright vs. Court, 2, Carrington and Payne, 232.
Thus papers found at the lodgings of a co-conspirator, after he was taken into custody, would not be evidence against him; unless they were shown to have had a previous existence; since he could not be responsible for acts or writings which might possibly not have existed until after the common enterprise, so far as he was concerned, was at an end.

In any case of illustration by collateral acts or declarations, concurrence of time would be always material as establishing the connection of the circumstances or statements offered in proof with the main fact which they were designed to illustrate; but, though formerly deemed otherwise, it is now established not to be necessary that they should be actually co-temporaneous with it,—if sufficiently, in point of fact, connected with the transaction itself. Thus in a question of bankruptcy, and where the subject of enquiry was the fact of the bankrupt leaving home, the circumstance under which it took place, and what he said, even on his coming back, as to his motive in leaving, have been admitted as evidence to elucidate the fact of leaving. It is the connection of the statement with the transaction itself as part of it which forms the test; and said Lord Wensleydale in Rawson vs. Haigh:—

"It is impossible to tie down to time the rule as to the declarations."*

It must be always borne in mind, however, that it is the connection with, or illustration of, the main fact which constitutes the admissibility of this species of evidence. Thus Mr. Roscoe, in propounding the limits of admission, lays down the rule:—

"When hearsay is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, and explanatory of it, it is admissible."†

The point is also well illustrated by Mr. Starkie when he says:—

"If, for the sake of illustration, the question for what purpose a sum of money was paid by A to B were material to the issue, what A

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* Rawson vs. Haigh, 2, Bingham, 104.
† Roscoe on Evidence, p. 36.
said to B on paying the money, would be most important, it may be, conclusive evidence. But if A and B were strangers to the cause, and the fact of payment were not material to the issue, then, although A at the time of payment made a declaration as to the truth of a fact material to the issue, as that he had lost a wager betted on that fact, the declaration would neither be evidence in itself, nor as explanatory of the act of A, which, as being the act of a stranger, was also inadmissible."

Perhaps the point is nowhere better stated than by Mr. Justice Coltman in the case of Wright vs. Tatham, above referred to.—"Where (says his Lordship) 'an act done is evidence per se, a declaration accompanying that act may well be evidence, if it reflects light upon or qualifies the act. But I am not aware of any case, where the act done is, in its own nature, irrelevant to the issue, and where the declaration per se is inadmissible, in which it has been held that the union of the two has rendered them admissible."

A subsequent narrative consequently, or that which only in effect amounted to one, or an isolated conversation, or statement, would be excluded;—in short every thing not actually part of the "res gestæ."

Thus, in Lord George Gordon's case referred to above, a witness having been called by the Crown to speak to what took place at a meeting held on a particular day, with a view of making out the case of treason, it was proposed to ask the witness on cross-examination, and with a view of displacing the criminal character of the meeting, what Lord George had on the preceding night said in relation to it. But this was not allowed, the Court holding that, though the witness might be questioned as to the whole conversation at the meeting, the private declaration of the accused, whether prior or subsequent to the meeting, was inadmissible, even as explanatory of his intention in convening or attending the meeting. So in Hardy's case, a letter by a co-conspirator to a private friend, unconnected with the plot, giving an account of a society to which the writer and the accused belonged, and enclosing seditious songs represented to have been sung at one of its meetings, was rejected
as no part of the conspiracy itself; but as being merely a narrative of the part which the writer had taken, admissible only against himself.

Mr. Roscoe's definition cited above, points to the distinction between that which is propounded as evidence of a fact, and that which is offered as merely illustrative of it. It is scarcely necessary to observe, that it is for the latter purpose alone that evidence of this nature is receivable. Indeed, the main fact itself must be proved, before any thing could be tendered in its illustration.

Thus, supposing the question to be as to the acts of an insolvent, his statements showing his knowledge of his embarrassments, will only be admissible, after the fact of insolvency has been established. Let it be one as to the act of a bankrupt's departure from home,—the fact of departure must be proved, before the nature of the act, necessarily in itself an equivocal one, can receive the illustration of his own statement.

The extent to which unpublished writings would be received, as illustrative of any particular act, has never been accurately defined. Had they a distinct connection with the act, and so as to be capable of being identified with it, there seems no reason why their want of actual publication should affect their admissibility; and it may be presumed that they could be received accordingly; and that even without actual proof of any intention to use them in furtherance of the design.*

In the case of the unfortunate Algernon Sydney, an unpublished treatise composed some years before, and containing merely speculative opinions on abstract subjects, was received as evidence against him, under the authority of the infamous Judge Jefferies. But those were days in which judicial Trials were but too often judicial Murders; and, while Murder is the verdict which posterity has pronounced on the issue of that celebrated trial, there is no doubt that an English Court of Justice would, in the present day, be no longer disgraced by the reception of such matters as evidence.

* And see Taylor on Evidence, vol. I, p. 469, where this view is supported.
Having thus explained the principle which, as a general one, excludes the reception of what is termed hearsay evidence, and having shown the distinction between that which, though apparently falling within the term, has ordinarily ascribed to it the character of original, we shall, in the two succeeding Chapters, detail the remaining exceptions which have been admitted to the rule of exclusion. It will be seen that, so far from shaking the rule itself, they rather establish it by the specialty of the grounds resorted to to rest them on; and there is no one case in which exception has been permitted to prevail, which has not its own particular sanction for the departure from a principle of universal recognition, even in the authorities admitting the exception.

We treat these, though exceptive to the general rule of exclusion, as ranging under the head of hearsay, because they are more usually so ranged, both by text writers and others. If, however, as we think it is, it be correct to treat as matters of original evidence, the different classes pointed out as such in the present Chapter, as, notwithstanding an apparent resemblance to hearsay, distinguishable in fact from it, it may be allowed to suggest that the species of proof, the subject of the two succeeding Chapters, might, with equal propriety, have attracted to themselves too the character of original. Reputation on a question of public right or of pedigree, would appear to be as much original evidence, as reputation in a case of marriage,—a declaration of a dying person as much so as a statement of a surviving one,—and an entry in a book against interest, or in a course of business as original in its classification as either. However, the point is not very material; each species of the evidence in question is rested for its admissibility on grounds peculiar to itself; and it is only with the view of preserving right elementary principles, that we suggest the correspondence.

It has been suggested that the principle of exclusion might be relaxed, with advantage, in the cases in which, from the nature of things, no other evidence would be admissible, particularly in such as those of pedigree or ancient
right; and in a very modern case* an able and experienced Judge, the Vice-Chancellor Kindersley, is reported to have said;—"that gradually by decisions and statutory enactments there had arisen a just disposition to consider the rules for shutting out hearsay evidence, which were almost peculiar to this Country, as too strict, and modifying and relaxing them. In cases of pedigree, *ex necessitate rei, unless you admitted such evidence, except in cases of yesterday, it was impossible to arrive at the truth, although there might be a moral conviction of it."

We presume his Honor was merely addressing himself to cases of the description suggested by himself as illustrative of his statement, and was not seeking to break in upon a principle which, as a general one, and in its ordinary application, has been recognized as a most wholesome one, by, we believe, most, if not all, Jurists; and by the whole Profession of the Law.

* Bauer *vs. Mitford, 7, Weekly Reporter, 570.
CHAPTER XV.

On the Exceptions to the rule which excludes Hearsay Evidence in the cases of Public Right;—Ancient Possession;—and Pedigree.

In the preceding Chapter we have pointed out certain classes of cases, in which evidence, savouring of the nature of Hearsay, has been admitted, as either more properly referrible to the head of Original Evidence, or as exceptive to the rule of exclusion. Ascribing to these the character of original, and notwithstanding the doubts suggested towards the conclusion of the last Chapter as to the propriety of the reference, and treating the Evidence, the subject of this Chapter, as properly attachable to the classification of Hearsay, we proceed to the consideration of the subjects there referred to as constituting the exceptions to the rule which excludes the reception of Hearsay evidence.

These may be divided into two classes;—one that of certain defined subjects, to the elucidation of which a given description of this species of Evidence is allowed to be applied;—the other consisting of certain peculiar descriptions of the Evidence itself; part being of universal application, and the remainder applicable to one particular subject only.

The former class is confined to three cases,—those where the question at issue is one of Public Right or General Interest,—one relating to Ancient Possession,—or one of Pedigree.—The latter ranges under three heads, Declarations against Interest,—Declarations made in the ordinary Course of Business,—and Dying Declarations.

Two others are indeed sometimes classified with the latter division,—Admissions and Confessions. These, however, are conceived to range more appropriately under the specific heads which their names denote; and we treat of them hereafter separately accordingly.
We devote the present Chapter to the elucidation of the first class of exception—Public Right,—Ancient Possession,—and Pedigree.

As respects the case of Public Right, the issue on which the evidence in question is ordinarily brought to bear, is such a one as the boundaries between different districts or other divisions;—the limits of a town or village;—rights to water-courses, and, in India, tanks or ghauts;—the existence of ancient customs in particular localities;—ancient privileges or immunities, such for example as a right to take toll on a road, bridge, or at a ferry; or an immunity from its payment;—a right to turn cattle out to pasture on some common or maidan,—liability to the repair of a highway, ancient sea wall, or bridge;—in short all such matters of an analogous description as would affect either the public, or a general neighbourhood.

The evidence admitted is that of traditionary reputation; and this may be either,—the statements of deceased persons conversant with, and interested in, the subject, ordinarily old inhabitants of the neighbourhood;—or such matters as ancient maps, (when made with sufficient means of knowledge, or when duly recognized,) ancient deeds, leases, surveys, books, transactions of public meetings, or doings of the place, and so forth; and, as Mr. Norton points out in reference especially to India, copper grants or sasanums of pagodas. In a former Chapter too, we have seen that verdicts and judgments in suits, where the same right was in dispute, are also receivable.* The declaration of living witnesses could not, of course, be admitted.—These must appear, and be examined themselves.

The ground on which, in questions of public or general right, the rule of exclusion of hearsay evidence is thus so far relaxed, is twofold,—the necessity of the case, and the sanction for the truthfulness of the evidence afforded in its own nature. Transactions of an ancient date could be hardly susceptible of proof at all, if left to the mere testimony of modern times; while a narrative of past history under the sanction of cotemporary concurrence in

* Chapter on Preconstituted Evidence.
its truth on the part of those to be presumed cognizant of the facts, and where there existed no apparent or probable motive to distort, would carry within itself a fair security for its veracity.

The principle is well explained by Lord Campbell, then Chief Justice, in a modern case,* contrasting the exclusion of this species of evidence on matters of private right, with its reception in those of public, where, after alluding to the rule of excluding hearsay evidence and its exceptions, he expresses himself as follows:—

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

* Regina vs. The Inhabitants of Bedfordshire, 4, Ellis and Blackburn, 541.
this relaxation of the rule against the admission of hearsay evidence would often be found unavailing."

It is to the fact of a general reputation only that the evidence in question must be confined. It is not permitted to go into individual facts, even in support of the reputation. Accordingly, in a case in which the question was whether a particular road were public or private, though proof of general reputation would have been receivable, declarations of old persons that they had seen repairs done upon it were rejected.*

At first sight it might appear, that evidence of individual circumstances ought to be receivable; on the ground that specific facts could but better test the value of the more general evidence of reputation; and so, if they could be relied on, no doubt they would. But further reflection will show, that particular facts might not possess the notoriety which is the value of the evidence involved in that of general reputation, or they might have been misreported or misunderstood, or they might have been connected with other facts by which, if known, their effect might be limited or explained; and isolated facts which have taken place in a bygone age would naturally baffle the powers of judicial investigation of a later one.

It is well observed by Mr. Phillipps:—

"Single facts are so frequently misrepresented, or misreported, either from intention or ignorance, and the various circumstances which have accompanied a fact, and which may be eventually characteristic, are often so little known, or, if known, are so likely to pass unobserved, and to be forgotten in the course of time, that no credit can be safely given to such a tradition."†

Even the documentary evidence we have pointed out above, such as maps, deeds, and so forth, is receivable only as declaratory of a reputation.

* R. v. Bliss, 7, Adolphus and Ellis, 552.
† 1, Phillipps, p. 238, 6th edition.
One of the leading authorities on the general subject is the Berkeley Peerage Case,* and there Sir James Mansfield, one of the Judges, thus enunciated the law:

"In cases of general right which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what passed in their own time; and to supply the deficiency, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right, is inadmissible."

In determining the admissibility of the evidence in question, it frequently becomes necessary to consider whether the right in dispute be a public one, within the strict sense of the term, or be general only; since a right may concern a whole neighbourhood or locality, and be very general accordingly, and yet not come up to the definition of a public one, which would require to be something affecting the whole community. It would be dependent on the solution of this whether the statement of all would be admissible, or whether the reception of the statement would have to be preceded by evidence connecting the party making it with the matter. Thus, were the question one affecting the entire public,—for example, a public highway,—subject to any observation as to the weight of the testimony from the absence of local connection with the subject,—all are competent witnesses. When, however, the right in question, though affecting many, is in legal construction not public, but general only,—as, for instance, merely a particular district,—the Court requires, as a condition to the admissibility of the evidence, proof of competent knowledge, or means of it, in the witness tendered to depose.

Thus it was laid down by Lord Wensleydale, in Crease vs. Barrett, (a leading authority on this subject,) referring to the point of actual

* Campbell's Reports, 515.
connection with the subject in dispute:—"Where the right is really public,—a claim of highway, for instance,—in which all the King's subjects are interested, it seems difficult to say that there ought to be any such limitation; and we are not aware that there is any case in which it has been laid down that such exists. In a matter in which all are concerned, reputation from anyone appears to be receivable; but of course it would be almost worthless unless it came from persons who were shown to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. In the case of public rights, in the strict sense, the want of proof of the persons from whom the hearsay evidence is derived, being connected with the subject in question, appears to affect the value and not the admissibility of the evidence."

The Court, however, gives credence to a presumable knowledge, when transparent from the nature of the thing; as for example, in a question of manorial custom, that the deceased was a copyholder of the manor, and possessed accordingly a competent knowledge.

Evidence of this nature may be given, as well against the existence of a right, as in its support.

It used formerly to be considered that proof of the exercise within living memory of the right claimed was a condition to the reception of the evidence. It is now, however, held otherwise, though, of course, on the question of the weight of the evidence, the absence of usage would go far to exclude the effect of the reputation.

It was said by Lord Wensleydale in Crease vs. Barrett;—

"An observation was made in the course of the argument, that all evidence of reputation was inadmissible; unless it was confirmed by proof of facts. We think that such proof is not an essential

* Crease vs. Barrett, 1, Crompton, Meeson, and Roscoe, 929.
condition of its reception, but is only material as affects its value when received."

Having stated above that evidence of particular facts was inadmissible in reference to traditionary evidence of a reputation, and the observation of Lord Wensleydale recognizing an admissibility of some proof of facts, we should, to avoid misconception, here point out, that the class of facts to which his Lordship was addressing himself was, not those affecting the existence of the reputation itself, further than was to be inferred from the circumstance of the exercise or non-exercise of the right which the reputation proclaimed.

To entitle the evidence of reputation to be received, the question must be one either affecting the Public generally, or large Sections of it, such, for instance, as the entire inhabitants of the locality. The evidence would not be admissible on the trial of a mere Private, though Ancient, right, notwithstanding the point at issue had some general semblance to one of a public nature;—"Evidence of reputation upon general points," said Lord Kenyon, 'is receivable, because all mankind being interested therein, it is natural to suppose that they may be conversant with the subject, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs, or private prescriptions? How is it possible for strangers to know anything of what concerns only private titles?"

As regards the exception of Hearsay Evidence in favor of Ancient Possession, this is confined to ancient documents, tending to establish the rightfulness of the possession claimed, by the evidence they afford of acts of ownership; and these documents are receivable as evidence, even against those neither party nor privy to them, and their representatives;—in fact against all the world.

Thus, in a question touching the ownership of any particular property, the supposition of ownership involved in the fact of granting a lease of

* Morewood vs. Wood, 14 East, 329.
it by any given individual, would constitute the lease evidence of a title in himself in the property; as would any other dealing with it based on the theory of a proprietorship.

The ground of the reception of the document is its assumed connection with the res gestae of any particular act of ownership or exercise of right; and the part it would purport to have formed of it; and credence is given to the document on the supposed ground of its being genuine, founded in part on its antiquity, and in part on its apparent naturalness.

"No doubt," says Mr. Taylor, "this species of proof deserves to be scrutinized with care; for, first, its effect is to benefit those who are connected in interest with the original parties to the documents, and from whose custody they have been produced; and, next, the documents are not proved, but are only presumed to have constituted part of the res gestae. Still, as forgery and fraud are, comparatively speaking, of rare occurrence, and as a fabricated deed will, generally, from some anachronism, or other inconsistency, afford internal evidence of its real character, the danger of admitting these documents is less than might be supposed; and, at any rate, it is deemed more expedient to run some risk of occasional deception, than to permit injustice to be done by a strict exclusion of what, in many cases, would turn out to be highly material evidence. On a balance, therefore, of evils, this kind of proof has, for many years past, been admitted, subject to certain qualifications."†

The instrument deriving its authority as evidence from its connection with, and proof of, the act under investigation, it must necessarily, accordingly, be part of the transaction itself, as contra-distinguished from a mere narrative of it.

It has been sometimes stated that, to render this species of evidence available, it should be accompanied with that of Acts done under, or in reference to, the document, that is to say, at least, at all events, where the antiquity

* The learned writer was obviously speaking of England—not of India.
would not preclude the practical possibility of the proof. This, however, seems to be rather a confounding of the weight of the evidence with its admissibility. No doubt on the former question the omission would have a very important bearing; but that of the admissibility of the evidence is obviously a distinct and independent one in itself; and however the effect of the evidence when received might be likely to be counteracted by the absence of proof of subsequent usage in conformity with it, it is apprehended that the evidence would be in itself admissible.*

Documents of this description prove themselves by their own production; none falling under the description of ancient which are less than thirty years old; and these are admitted without actual proof of execution, subject only to any question which might arise touching their genuineness, in the event of interpolation or other circumstances creating suspicion.

As a security for their authenticity, the Court ordinarily only requires that they should issue from the proper custody; and 'proper custody' was thus defined by Tindal, Chief Justice, in a leading case in the House of Lords, the Bishop of Neath vs. the Marquis of Winchester;†—

"Documents found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, are precisely in the custody, which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than their proper place of deposit that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious, that, while there can be only one place of deposit

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* See Taylor on Evidence, vol. I, p. 572, where the same view is taken.
† 10, Bligh, 462.
strictly and absolutely proper, there may be many and various, that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody which is held sufficiently genuine to render a document admissible, appears from all the cases."

In the familiar instance of a deed being an ordinary conveyance of land, the Law is thus shortly and neatly put by Mr. Justice Coleridge;—"If such a deed is found in the custody of the party, who, if it were such conveyance, would have a right to it, and kept amongst his title deeds, such custody tends to show that it is what it professes to be."

* Exception in case of Pedigree.
The exception in favor of Pedigree addresses itself to the elucidation or proof of some genealogical fact arising in the history of a family.

"In questions of pedigree," says the late Mr. Hubback, in his valuable work on the Law of Succession, "hearsay evidence is admitted, from the necessity of the case. As it would be impossible to establish descents according to the strict rules by which contracts are established, and rights of property regulated, courts of law are obliged, in matters of pedigree, to depart from their ordinary rules, and to have recourse to a secondary kind of evidence, the best the nature of the subject will admit."

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From the very nature of things, facts of distant date, and which have occurred so long antecedently to the day of trial as not to have fallen within living knowledge or memory, must baffle all power of proof other than that of traditional evidence; and to exclude this accordingly would be to exclude proof,—nay, to exclude Justice itself.

* Hammond v. Radstreet, 10, Exchequer, R. 396.
† Hubback on the Evidence of Succession, 648.
On the other hand, as in matters of public right, so in those of private and family history, the tradition of the past, as the natural report of the time, the "dropping out," as it has been termed, of the fact, would carry with it the presumption of truth; and this, due precaution being taken that it was neither distorted by interest nor warped by prejudice, might legitimately, accordingly, be received and acted on as evidence.

It is not required in the case of pedigree that the evidence should be cotemporaneous with the events to which it relates. To restrict it to this might defeat its own purpose, since it would shut out all beyond the life-time of the person whose declaration was to be adduced as evidence. In the Lovatt Peerage Case,* a statement made by the witness's mother as to the state of the family six generations back, was allowed to be received.

Under the term 'Pedigree' are embraced, not only general questions of descent and relationship, but, when forming part of the main genealogical fact, the particular ones of birth, marriage, and death; and their dates, either absolutely or relatively to some others or some other event; as well as that of a failure of issue.

"It is not easy," says Mr. Hubback, 'to define exactly what are matters of pedigree, with reference to the subject under consideration, otherwise than by enumerating them separately. It has been observed, that such points as the following: 'Who was related to whom; by what links the relationship was made out; whether it was a relationship of consanguinity or of affinity only; when the parties died, or whether they are actually dead,' may be proved 'as matters relating to the condition of the family,' by the declarations of deceased members of the family."†

Nor is the evidence to be confined to the affirmative proof of the genealogical fact in question. It may be equally addressed to its disproof; or in other words to the negative issue. Thus il-legitimacy is as much a subject for such proof as

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† P. 649.
legitimacy; and this may be proved even by the acknowledgment of the reputed father, or those of the illegitimate himself.

It has been laid down in some of the authorities that evidence of this nature is not to be received on the question of locality, on the ground that locality is not in itself a genealogical fact; and a case of R. vs. Erith, has been cited as an authority for the proposition. The time of a man's birth, and so on, it has been said, may be matter of genealogy, but not the place at which it took place.

In a somewhat late case, however, of Shields vs. Boucher before the now Lord Justice, but then Vice-Chancellor, Knight Bruce, this proposition has been very vigorously attacked by that eminent Judge, and in an elaborate and masterly judgment; and R. vs. Erith is there shown not to have decided the point ascribed to it. It is probable that, whenever the point should come to be submitted to a formal decision, the distinction would be held not to prevail; and locality, as much as time, be allowed to receive the elucidation of this species of evidence. On the question of identity of parties, in particular, locality might often have a most important bearing.

In the case of Public rights, the evidence, as we have seen, is that of a general reputation. In that of Pedigree it is, according to English Law, the family one, and that alone.

"The tradition' said Lord Chancellor Eldon, 'must be from persons having such a connection with the party to whom it relates, that it is natural and likely, from their domestic habits and connection, that they are speaking the truth, and that they could not be mistaken." The principle too is well pointed out by Lord Erskine, Lord Chancellor, in the observation;—"that the hearsay of relations was evidence from the interest of those persons in knowing the connections of the family."§

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* 8, East's Reports, 541.
† 1, De Gex and Smale's Reports, 52.
‡ Whitelocke vs. Baker, 13, Vesey, p. 514.
§ Vowles vs. Young, 13, Vesey, p. 140.
The nature of the connection required was formerly somewhat undefined; and, originally, it does not appear to have been restricted to actual relationship. It is now established, however, to be limited to a relationship by either blood or affinity, to the exclusion of servants, neighbours, friends, and all others; and, upon the principle, that, unless some limit were affixed, great uncertainty would be introduced into each individual case;—that the restriction to blood or affinity affords a certain and intelligible rule;—and that, if this were once passed it might be necessary on every occasion to enter into a long, and almost endless enquiry, as to the degree of intimacy which subsisted between the family and the party making the declaration.*

In the case of affinity by marriage, the original connection would suffice, even though dissolved at the date of the declaration, as by death, or it may be presumed, divorce.

An illegitimate, however, would not be a member of the family within the rule of admissibility.

Such at least is the Law of England on the subject. The peculiar state of India, however, and more particularly that of its Native inhabitancy, has given rise to the adoption of a different principle there; and the Indian Evidence Act enacts that in cases of pedigree, the declarations of illegitimate members of the family, and also of persons who, though not related by blood or marriage to the family, were intimately acquainted with its members and state, shall be admissible in evidence after the death of the declarant, in the same manner and to the same extent as those of deceased members of the family.

In all cases, proof of the connection, or, as it might be in India, acquaintance, with the family of the party whose declaration is to be given in evidence, must precede the admission of the declaration itself.

* Per Best C. J. in Johnson vs. Lawson, 2, Bingham, 86.
In a question of Public Right it has been pointed out, that the evidence, when assuming the shape of hearsay, is confined to that of reputation,—and to the exclusion of specific facts. In one of Pedigree, specific facts are admissible.

In the Berkeley Peerage Case, referred to above, Sir James Mansfield, in continuation of the passage quoted, goes on to address himself to this distinction thus:—

"In matters of Pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on particular facts, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighborhood; and the family transactions among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects, may be presumed to be true."

By the statement, however, that the reputation must proceed on particular facts, it is not meant that the evidence is to be confined to those facts. Evidence of a general family reputation would be in itself proof, without tracing it to its sources.

In the case of isolated facts, it often becomes necessary to distinguish between one elucidatory of the genealogical question, and one collateral only to the issue; and it is the former only which would be receivable. Thus in a case where three children were born at a birth, and names were given to them, and strings tied round their arms, indicative of their relative seniority, the evidence was received from its illustration of that point;* while in another,† in which a woman, then deceased, had suckled the child of her sister, and, a question having arisen as to the legitimacy of the child,

* Viner's Abridgment, Evidence, T. C., 91.
† Isaac v. Gompertz, cited Hubback on Succession, 650.
a declaration by the deceased of the fact of her having suckled her sister's child, was considered by Lord Chancellor Cottenham to have been improperly received, as being only a species of circumstantial evidence, having no direct bearing on its age or legitimacy. In the first case the assigning the names, and the tying the strings, were so closely connected with the birth and seniority, as to form portion of the transaction of birth itself, part of the whole res gestae; in the second, the act of suckling was no test of either the legitimacy, or the age of the child. It might indeed have thrown corroboration on the general fact that a child was born; but this was wholly beside the question of either age or legitimacy.

It is not, however, always easy to define the line at which fact terminates, and reputation begins. Thus, in a question of marriage or no marriage, the family reputation of the parties, on the supposition of their being married, would be a sort of compound of both fact and repute.

The description of evidence usually offered under the head we are discussing, is ordinarily as follows:—

1st. Statements, or Declarations as they are technically termed, of deceased parties, being, as above pointed out, (subject in India to the extension introduced by the Evidence Act,) members of the family, and recorded upon the evidence of those who represent themselves to have heard them.

It is not necessary, however, that the declaration should be a formal statement of the genealogical fact. It is sufficient if it be a necessary inference from it.—Thus, allusions to the benefit which an individual derives from his position would be admissible on the question of the existence of that position itself. Accordingly, in Isaac vs. Gompertz above referred to, declarations by the mother that her child would have the property and would be a gentleman, were admitted on the question of the child's legitimacy.
Nor is it essential that the statement should be made on the *actual knowledge* of the person to whom it is attributed.—It would suffice if it were on *information* only, as a *traditional fact*; as indeed we have seen above in Lord Lovatt's case, where the statement was of what occurred *six generations previously*. In *Slaney vs. Wade,* Lord Cottenham, speaking of cases of declarations generally, observed,—"It is not supposed that the party is speaking from his own knowledge, but that he speaks from what he has *learned as a member of the family.*"

Testimony, however, of this kind would naturally require to be very carefully watched; both from the imperfection of memory on the one hand, and the difficulty on the other, in case of misrepresentation, of establishing and punishing it.

The hazard to which evidence of this class is exposed, is well described in a judgment of the present Master of the Rolls, Sir J. Romilly, in a case of *Crouch vs. Hooper.*†

"It must always be borne in mind," says his Honor, 'in judging of evidence of this description, *how extremely prone persons are to believe what they wish.* And where persons are once persuaded of the truth of such a fact, as that a particular person was the uncle of their father, it is every day's experience, that their *imagination is apt to supply the evidence of that which they believe to be true.* It is matter of frequent observation, that persons dwelling for a long time on *facts,* which they believe must have occurred, and trying to remember whether they did so or not, *come at last to persuade themselves* that they do *actually recollect* the occurrence of circumstances which, at first, they only begin by *believing* must have happened. What was originally *the result of imagination* becomes in time *the result of recollection,* and the judging of which, and drawing just inferences from which, is rendered much more difficult, by the circumstance, that, in many cases, persons do really, by attentive and careful recollection, *recall the memory of*

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* 1, Mylne and Craig, 355.
† 16, Beavan, 182.
facts which had faded away, and were not, when first questioned, present to the mind of the witness. Thus it is, that a clue given or a note made at the time, frequently recalls facts which had passed from the memory of the witness. I look, therefore, with great care and considerable jealousy on the evidence of witnesses of this description, even when I believe them to be sincere, and to be unable to derive any advantage from their testimony. Once impress the witnesses with the belief that Charles Crouch, the father of the intestate, was the brother of their grandfather, and the further steps follow rapidly enough. In the course of a few years, by constant talk and discussion of the matter, and by endeavoring to remember past conversations, without imputing any thing like wilful and corrupt perjury to witnesses of this description, I believe, that in 1847 they may conscientiously bring themselves to believe that they remembered conversations and declarations which they had wholly forgotten in 1830; and that they may in truth bona fide believe, that they have heard and remember conversations and observations which in truth never existed, but are the mere offspring of their imagination. It is also always necessary to remember, that in these cases, from the nature of the evidence given, it is not subject to any worldly sanction, it being obviously impossible, that any witness should be convicted of perjury for speaking of what he remembers to have been said in a conversation with a deceased person."

Sir John Romilly is known at all times to have acted with great caution in the reception of evidence of this description; nor does he stand alone in this. In Morewood vs. Wood,* Mr. Justice Grose refers to a case,—"where there was a strong reputation throughout all the country in one way, and a great number of persons were examined to it; but after all, the whole was overturned, and proved to have no foundation whatsoever, by the production of a single paper from the Herald's Office: which shows" (observed the learned Judge) "how cautiously this sort of evidence ought to be admitted."

* 14, East. 329.
Indeed, the present Master of the Rolls carries his mistrust so far as to refuse, or almost so, to act upon such evidence at all, when uncorroborated by that of a more permanent and reliable character. In a case somewhat later than that of Crouch vs. Hooper, after referring to the slight reliance which the experience he had of these cases compelled him to pay to the declaration of persons said to have been made before, but remembered after the cause of litigation had arisen, he ultimately concludes his judgment with the observation;—"I am compelled, as I have already stated, in these cases, to disregard declarations remembered and given in evidence for the first time after the necessity of the case has arisen; always given with a minute particularity (as in this case, the feeling of the arm and the clothes, with the yellow Kerseymere waistcoat) and given also, subject to no worldly sanction, but with the certainty, that whether true or false, no personal risk or liability is thereby incurred, so far as regards temporal punishment.

"I am far from saying, that, occasionally, declarations by members of the family so given may not constitute most important and valuable evidence; but when this is the case, it is because it is explained and supported by entries and documents which cannot be misrepresented, and which were made before the question had arisen. I have found myself compelled to reject a case which depends exclusively on evidence of this description."

2nd—Conduct; such as, for example, the extension to parties of the offices of relationship or friendship on the supposition of their being married;—for instance corresponding with, or visiting, or receiving visits from, them, the recognition of children as being the issue of one party or that of another; or testamentary or other dispositions founded on a given supposition.

Evidence of this class would not be confined to the conduct of the family. That of strangers even would be admissible. In the instance

* Webb vs. Haycock, 19, Beavan, 342.
of families, the proof of intercourse would have a two-fold operation. It would create an affirmative presumption, and displace the negative one to which its absence might give rise.

3rd.—Entries made by parents or relations in bibles, almanacs, old books or the like, or indeed elsewhere, as to marriages, births, or deaths of members of the family, particularly their own nearer relations;—or sometimes even the like entries made by others, where, for instance, a presumption of sanction or approval by the relations might arise.

4th.—Marriage settlements, wills, or ordinary deeds, letters, letter books, or papers under the signature of members of the family, containing statements bearing on the question of pedigree.

There is one case in which a slip of parchment said to have been found in a shoe-maker’s shop, and marked “Mr. A B’s measure,” but which contained two lines of an old deed reciting a particular descent, was admitted.*

In these cases the evidence does not turn on the validity or legal effect of the document, but only on its authenticity. Accordingly a paper found among the family repositories, purporting to be a will, signed by the testator, and attested, but with the seal torn off, and not appearing to have been itself proved as a will, has been admitted as evidence.†

Nor is it necessary that the instrument should contain actual, or specific, recitals or statements.—It is sufficient if the fact be capable of being inferred from the whole transaction, or the effect of the instrument.

5th.—Compilations from Registers sanctioned by a member of the family,—at all events when any reasonable presumption of traditional knowledge of the matters may be capable of being imputed to him.

* 3, Peake’s Nisi Prius Cases, 205.
† Doc d. Johnson vs. Earl of Pembroke, 11, East, 204.
6th.—Inscriptions on the repositories of the dead, tombs, and coffin plates, family portraits, rings, hatchments, genealogical tables, armorial bearings, and the like. If traced to a deceased member of a family these are all admitted as his declarations. If publicly exhibited, and not gainsayed by the family, they are supposed to involve their tacit assent.

In the case of monumental inscriptions, their credit would be a good deal affected by the time at which they were set up, as whether contemporary or otherwise; and it would be always a circumstance impeaching their credit, or at all events until the contrary was shown, that the preparation of this sort of memorial is often committed to undertakers, executors, or other persons not members of the family, and therefore not unlikely to be but ill-informed, at all events in matters of detail, often, however, on such questions of the highest moment. In the instance in which the death of a party occurred away from his home and his family, as for example, the case of Europeans, Americans, or others dying in India, this observation would apply with double force; though certainly it is singular in what detail of precision, in the Presidency Towns of India, at all events at Calcutta, not only as respects years, but months, and even sometimes weeks or days, the age of a deceased is announced.

7th.—Legal Proceedings,—such for instance as bills or answers in Chancery, depositions, affidavits, and so forth, all which would be admissible on the footing of declarations, as respects their particular statements.

We shall advert immediately to a rule precluding the reception of hearsay evidence generally on matter which has become the subject of litigation, and it has been suggested that evidence taken in the course of any proceedings is, from its very nature, obnoxious to this objection. This, however, has arisen from want of sufficiently distinguishing, that statements of matters not in dispute in the litigation itself, may be made, even in the course of litigious proceedings.
This distinction had been pointed out by Mr. Phillipps, and the rule thus propounded by him, even before the case of Gee vs. Ward about to be mentioned;—"The general rule upon this subject may perhaps be thus stated,—that recitals of facts, which are not in dispute, may be admitted as ordinary declarations; but recitals of facts in controversy are inadmissible."

The whole subject subsequently underwent discussion in a modern case of Gee vs. Ward,† where Lord Campbell, then Chief Justice, concludes his judgment by saying;—"The subject is ably treated by Mr. Phillipps in his book upon Evidence, and, after examining his authorities, we concur in the rule which he there lays down."

To address ourselves, however, to the broader question, the admission of hearsay Evidence made after a controversy had arisen, it has to be pointed out, that whether on a question of public right, or on one of pedigree,—that is to say, at least so far as concerns that species of it which consists in the statements of parties,—a qualification has been introduced excluding statements made subsequently to any controversy on the subject; or, as it is termed, "post litem motam," that is to say, "after the strife had been stirred or the dispute arisen;"—controversy being intended to mean, not the mere actual commencement of the litigation, but the raising the dispute.

The ground on which evidence of this description is excluded is the supposition that, when a controversy had once arisen, parties would be likely to range themselves passively, if not actively, either on one side or the other, or to have imbibed their impressions from those who had; and thus the testimony would become tainted at its very source.

It is observed by Mr. Justice Lawrence, in the Berkeley Peerage Case referred to above,—(an observation which, though made in one of Pedigree, would apply in principle alike to a case of Public Right)—"We know that passion, prejudice, party, and even good will, tempt many

† Gee vs. Ward, 7, Ellis and Blackburn, 509.
who preserve a fair character with the world, to deviate from the truth in the laxity of conversation. Can it be presumed that a man stands perfectly indifferent, upon an existing dispute respecting his kindred? His declarations post litem motam—not merely after the commencement of the lawsuit, but after the dispute has arisen, for that is the primary meaning of the word lis—are evidently more likely to mislead the Jury than to direct them to a right conclusion, and therefore ought not to be received in evidence."

The limits, however, of this qualification are not definitively adjusted.

There seems to be no doubt that the principle of exclusion would not apply to what was done in prevention of dispute; even were it in support of the title of the declarant; and although in the belief that his title would be affected by the same circumstances as the party seeking to avail himself of the declaration.

Thus in Goodright d. Stevens vs. Moss,* Lord Mansfield, Chief Justice, and obviously in effect admitting that the evidence would be receivable, stated:—"I have known advice given to a father and mother to make attested declarations in writing, under their hand, of the precise time of the birth of the bastard eignè, and the subsequent marriage, to prevent controversy in the family touching the inheritance."

And in the Berkeley Peerage Case the Judges lay down that—"an entry in a Bible or any other book, or any other piece of paper, would be admissible, notwithstanding it was proved that such entry was made by a parent for the express purpose of establishing the legitimacy of his son, and the time of birth; in case the same should be called in question after his father's death."

Lord Mansfield's doctrine has been sanctioned by later and high authorities, particularly Lords Brougham, Cottenham, and St. Leonards, successively Lord Chancellors.

* Cowper, 591,
In Moncton vs. Attorney General, Lord Brougham ascribes Lord Mansfield's view of admissibility to the principle that the declaration was,—"not made with a view to their own interest, but to preserve a constat, as it were, on record of facts peculiarly within their knowledge (which is one of the main grounds of admitting such hearsay evidence)."

Nor would it be an objection that the party whose declaration tendered, stood in the same position, or as it is termed, in pari jure, with the one seeking to avail himself of it, and might thus be supposed open to the bias of a personal interest. Thus the declarations of a person entitled in remainder, stating the extinction of the issue of persons standing in the line of entail between her and the possessor of the estate, have been held admissible for a party claiming through her.†

"The reason," says Mr. Phillipps, 'of admitting the evidence in these cases, appears to be, that since competent knowledge is required to make hearsay receivable in matters of tradition, and a probability also of the declarations having occurred naturally in the course of familiar intercourse; it would almost dry up such sources of information, to require further an absence of all bias on the subject of the declarations. It has been thought to be some safeguard, sufficient at least to warrant the admissibility of the evidence upon points where no better evidence can commonly be expected, that the declarant could derive no advantage from his own statements, and that there was at the time no exciting cause to induce him to depart from the truth."‡

Again, any controversy to exclude must be on the particular subject in issue; controversy in a merely analogous one, but not the issue itself, not necessarily carrying with it the elements of mistrust.

Thus, in a case respecting copyholds, where the question was whether the fine was to be assessed by the jury of the Lords' court, depositions

* 2, Russell and Mylne, 164.
† Doe d. Tilman, vs. Tarver, Ryland and Moody, 141.
taken in a former suit, where the controversy turned on the amount of the fine, were admitted to negative a custom for the jury to interfere.* In this case the principle was thus stated by Mr. Justice Bayley;—"The distinction had been correctly taken, that where the lis mota was on the very point, the declarations of persons would not be evidence; because you cannot be sure, that in admitting the depositions of witnesses, selected and brought forward on a particular side of the question, who embark to a certain degree with the feelings and prejudices belonging to that particular side, you are drawing evidence from perfectly unpolluted sources. But where the point in controversy is foreign to that which was before controverted, there never has been a 'lis mota,' and consequently the objection does not apply." 

If the matter, however, were in fact really in dispute in some former proceeding, and under discussion there, it would not be necessary to exclude the evidence that the controversy should have been between the same parties, and related to the identical property or claim.

Thus, in the Sussex Peerage Case, where the right of the claimant, Colonel D'Este, was founded on the validity of the marriage of his parents, the late Duke of Sussex and Lady Augusta Murray, declarations of the Duke, testamentary and oral, were rejected, on the ground of a previous suit at the instance of the Crown to annul that very marriage.†

That which yet remains to be defined is, in the case of a controversy admitted to affect the matter in issue, whether, if proof were offered that the existence of the controversy was not known to the declarant, the evidence might be received on that proof. Great authorities have taken opposite views of the question, and nothing but actual decision can set it at rest. Those who contend for the exclusion rest it mainly on the inconvenience of having in each particular instance to decide the preliminary point of knowledge or no knowledge.—Mr. Taylor suggests

* Freeman vs. Phillipps, 4, Maule and Selwyn, 86.
† 11, Clark and Finely, 85.
the propriety of the reception of the evidence on "proof satisfactory to the Judge,"—that the declarant was in all probability ignorant of the existence of the controversy,"*—in other words a sort of prima facie proof of ignorance.—It may be permitted, however, to observe, that even this is an issue of some uncertainty.

Mr. Taylor indeed cites the Roman Law in support of the suggestion, which though rejecting hearsay, originating "post litem motam," recognized a distinction in favor of those declarations which were made at a place so remote from the scene of controversy, as to remove all suspicion that the declarant had heard of its existence. And in a case so simple as one of established absence, the simplicity of the proof would seem to go far to neutralize the objection against entering upon it. It must be remembered, however, that even absence does not, under ordinary circumstances, cut off communication.

CHAPTER XVI.

On the Exceptions to the rule which excludes Hearsay Evidence in the cases of Declarations against Interest;—Declarations in the course of Business;—and Dying Declarations.

We now turn to that exception to the rule excluding Hearsay evidence, which addresses itself rather to the material of the evidence, than the subject-matter of exception; and which consists of Declarations against Interest—Declarations in the Course of Business—and Dying Declarations.

In speaking of these as evidence, it will be understood that the evidence meant is not evidence in reference merely to the parties making the declarations as against themselves, but testimony in itself of an independent character, available to all the world.—Thus to take a case, (which, though arising on one of the three heads only, would be illustrative of all,) one in which a book had been kept by a deceased tax collector, containing entries of his collections, the entries would be receivable as evidence of their receipt, in an action brought against his surety to recover the balance due upon the collection; and that, notwithstanding the parties who had made the payments to the collector were alive, and might have been called.* Indeed, so completely is evidence of this description evidence in itself, and that irrespectively of the position of either the parties, or the declarant, that though question was at one time,—(during the state of the law which precluded the evidence of parties interested,)—raised upon the point, it is now clearly established that the declaration would be receivable even had the declarant, if living, been himself incompetent to testify to the facts contained in the declaration.

* Middleton vs. Melton, 10, Barnewall and Creswell, 317.
In reference to the two first (put by him as one) classes of evidence, Mr. Phillipps remarks;—"This exception applies to a description of facts, the evidence of which, being usually confined to the knowledge of a few persons, would frequently be lost, if the strict rule, which excludes hearsay evidence, were enforced. And it will be seen, that by the qualifications under which this kind of evidence is admitted, many of the general objections to hearsay evidence are obviated."—A corresponding observation might be extended to the third. Each subject of exception will be seen to have its own peculiar ground of justification.

First as to a declaration against interest; and by which is meant a statement made by a person to his own pecuniary or proprietary disadvantage.

According to English Law, this is admissible only after the death of the party;—subject only to some question as respects declarations against proprietary interest, upon which the better opinion appears to be that, in this case too, the declaration would be inadmissible during the life of the declarant. Mere incapacity from attendance, on the score of illness, would not warrant the reception of the evidence, nor would that of the absconding of the witness, or his production being otherwise out of the power of the party seeking to avail himself of the testimony.

The Indian Evidence Act, however, makes the evidence admissible, though the party be not dead, if he be incapable of giving evidence by reason of his subsequent loss of understanding,—or his being at the time of trial bonâ fide and permanently beyond the reach of the powers of the Court,—or if he cannot after diligent search be found.†

This species of evidence is received on the faith of the security for its truthfulness afforded in the natural probability of the declaration as being one against the interest.

† Section 39.
of the party to make; since what is said or done by a man in opposition to his interests, carries with it a strong presumption, at least, in favor of its integrity. The sanction for admission is in the main, based on the two-fold presumption—that self-love would be a natural protection against a declaration prejudicial to self-interest; while in the case of a statement against interest, its very nature excludes the supposition of fraud. It is observed by Mr. Phillipps, speaking of the admissibility of this class of evidence:

"It is presumed where declarations are made under these circumstances, that they are entitled to credit, because the regard which men pay to their own interest, may be safely considered as a sufficient guarantee against their prejudicing themselves by any erroneous statement; and the assumed tendency of the declarations precludes the probability of any fraudulent statement. Indeed, the apprehension of fraud in such cases is, in a great measure, removed, without reference to the fact of the declarations being against interest, when it is considered that declarations are not receivable during the life-time of the authors of them; and that it is always competent for the party against whom they are produced, to point out any sinister motive for making them. It is true the great tests of the fidelity, accuracy, and completeness of judicial evidence are here wanting. But the inconveniences which would result from the exclusion of evidence are considered as outweighing, in the generality of cases, the inconvenience of admitting such hearsay declarations under the limitations and securities above mentioned."

Knowledge on the part of the declarant has been sometimes stated as constituting an element of admissibility; indeed, it has been even treated as a condition that the subject of declaration should be a matter peculiarly within the declarant's own means of knowledge. It should be pointed out, therefore, that, however much knowledge of the entire transaction must always add to the weight of the declaration, and

a fortiori a peculiar knowledge, if by the reference thus made to knowledge be intended even an actual personal knowledge beyond that involved in the fact of the declaration itself, this is not in truth a preliminary condition to the reception of the evidence.—Thus, in a case in which a clerk, whose duty it was to keep a book containing entries of tin brought on the premises, was chargeable to his employers with the amount of the tin entered, but made his entries, not on his own personal knowledge of the tin brought, but on the report made to him by others on the establishment, the Court held that it was not necessary that the declarant should have any actual knowledge of his own of the fact stated; but that if the entry charged himself, the whole of it became admissible against all persons, and that the absence of such knowledge went to the weight, not the admissibility of the evidence.* The evidence was admitted accordingly, and that case has been considered as establishing the principle.†

The interest must be an actual one, and the declaration be so pointed as to show itself palpably a declaration against interest. Thus, in a case ‡ where the question was whether a farm servant belonged to a particular parish, and the evidence offered to prove it was that of an entry in the books of the farmer, then deceased, who had hired the servant, made by the farmer as follows:—"April 4th, 1824, W. W. came, and to have for the half year 40 s§ September 29. Paid this 2l."||—The evidence was tendered as a declaration against the interest of the farmer as showing the creation of an obligation on his own part which he was bound to discharge, that is the payment of the forty shillings; but it was rejected. "This," said Mr. Justice Patteson, 'was not an entry against the interest of the maker. It showed only an agreement, which we must suppose to have been made on fair and equitable terms: and, on that supposition, it was as much for

* Crease vs. Barrett, 1, Crompton, Meeson, and Roscoe, 925.
‡ R. vs. Inhabitants of Worth, 4, Queen's Bench, 132.
§ That is forty shillings.
|| That is two pounds or sovereigns—a sum equal to the forty shillings.

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the party's interest to have the service, as against his interest to pay for it. At the time of making the entry, nothing more than an agreement subsisted; though, after performance, the party hiring would be a debtor. As to the argument that this entry was made in the course of the party's employment, the writer in this case was a principal."

No interest, however short of one, either pecuniary or proprietary, would suffice. This, after some fluctuation of opinion, was finally established in the Sussex Peerage Case referred to in the preceding Chapter, where the marriage in question being illegal, statements by a deceased minister who performed the ceremony were tendered in evidence, on the ground that they would be contrary to his interest, an Act of Parliament subjecting him to a prosecution for his solemnization of an illegal marriage. The statements, however, were rejected; such an interest being held not to be of the prescribed character, that is, neither pecuniary nor proprietary.

In some earlier cases it seems to have been considered sufficient if the declaration in question were apparently only against interest, and without any very accurate reference to whether there were any real transaction to which the declaration could in fact relate. It is now, however, settled that the declaration must be against an actual and existing interest.

An interest once made out, its quantity, however, would not require to be weighed by scales too nice. It is sufficient if an interest only be shown.

The declaration must be made while the interest continues. One after its termination would be inadmissible.

As regards Pecuniary Interest, the more usual phase of this is, that of entries in books, either debiting the party keeping them with monies for which he would be accountable, or containing acknowledgments of the discharge of some obligation to himself. These books are ordinarily the usual books of account kept by parties in relation to their own affairs, either private or
business ones; or of the affairs of others; as for instance those kept by stewards, bailiffs, receivers, tax-collectors, public officers, and so forth.

Though entries in books are probably the most frequent form of this species of declaration, other acknowledgments have, however, been repeatedly admitted.

Thus, in a question whether a consignee of goods shipped to him had an insurable interest in the goods, the signature by the master of the vessel, of the bill of lading, acknowledging his receipt of the goods for delivery to the consignee, was received as evidence on the ground of its charge of the master.* Again, in a case of a promissory note,† where the question was, whether one of the parties to it, say E. H., was the principal debtor, another of the parties being, say W. D., evidence in support of the fact that the former was the principal, was received in an endorsement on the note signed by the creditor in the form following:—

"Received of W. D. the sum of £280 on account of the within note, the £300 having been originally advanced to E. H." This, too, though the receipt was given not with any view to the point of who was the principal debtor, but simply as an acknowledgment of the payment; the reference made to the advance to E. H. being merely in explanation of the receipt from W. D. The statement, however, forming, in fact, part of the entry itself, the whole, with its consequential evidence, became receivable.

In the cases cited, the evidence embodied an actual averment of the fact in issue. But it is not necessary that it should be thus pointed. It is sufficient if the statement, entry, or whatever else it may be, though silent on the point, carry the proof within itself.

Thus, in a leading case on the subject of Higham and Ridgway,‡ the time of a child’s birth was proved by the books of a deceased man-midwife, (or, as he is termed in the language of modern refinement,

* Haddon vs. Parry, 3, Taunton, 303.
† Davies vs. Humphreys, 6, Meeson and Wood, 153.
‡ Higham vs. Ridgway, 10, East, 116.
an accoucheur,) referring to his ledger in which his charge for his attendance on the occasion was entered as ‘paid’; and in another an entry in the books of a solicitor of payment of his charges for drawing a lease, as drawn on a certain day, was admitted as evidence of the drawing the lease.

In each of these two last cases there was, if not in terms, still a direct inferential averment of a simple fact, the birth of the child in the one case, the preparation of the lease in the other. But the same principle has been applied where the inference to be deduced would be rather one of Law than of Fact, that is to a case where the proof would not be so exactly that of a simple fact, as of title or ownership. Thus, entries made by a deceased steward of money received by him from different persons in satisfaction of trespasses committed on the waste, and charging himself with the amount received, have been admitted to prove the right to the soil of the waste in his master. So, receipts by bailiffs of rentals have been received as evidence, establishing the right to the property of the party on whose behalf they were received. In all these instances it will be observed that, that for which the evidence was used was a wholly collateral fact to the main one recorded by the entry.

The principle on which the original evidence is received as proof of its collateral result, is thus put by Lord Ellenborough in Higham vs. Ridgway (referred to above), where, as will be noticed, the word paid was found opposite to the charge for the accoucheur’s attendance;—“It is idle to say that the word paid only shall be admitted in evidence without the context, which explains to what it refers: we must therefore look to the rest of the entry, to see what the demand was, which he thereby admitted to be discharged.”

* Doe vs. Robson, 15, East, 32.
† Barry vs. Bibbington, 4, Term Report, 514.
‡ Manning vs. Letchere, 1, Atkyns, 453, Musgrave vs. Emmerson, 10, Queen’s Bench, 326.
In the case of Davies vs. Humphreys, however, (also quoted above, that of the promissory note) the Court, though feeling itself bound by authority to act upon the doctrine, considered that it would have been better were the evidence in these cases allowed only for the more limited purpose of showing a payment, and not the collateral fact. Lord Wensleydale, in delivering the judgment in that case, thus states:—

"That the receipt was evidence of the fact of the payment which it admitted, in every case in which the proof of payment would be relevant, was not disputed; but it was denied that the whole entry would be admissible to shew that the £300 was advanced to Evan Humphreys: and certainly if this point were now, for the first time, to be decided, it would seem more reasonable to hold that the memorandum of a receipt of payment was admissible only to the extent of proving that a payment had been made, and the account on which it had been made, and that it would have the same effect only that proof by parol of like payment would have had. In the case of stewards' books, the receipt of money, as rent, would be equivalent to the proof of payment of money as rent, and establish the title of the person receiving it, and the like. But the authorities have gone beyond that limit, and the entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it; as in the case of Higham vs. Ridgway, where the memorandum of the payments of the midwife's charge for attending a birth was held to be evidence of the date of the birth; and Doe vs. Robson, where the entry of charges paid for a lease, as drawn on a certain day, was held to be evidence that the lease was so drawn, which the proof by an eye-witness of the same payment, on account of such charges, would not have been; and there are other cases to the same effect. Without over-ruling these cases, (and we do not feel ourselves authorized to do so,) we could not hold the memorandum in question not to be admissible evidence of the truth of the whole statement in it, and consequently to be evidence, not merely that £280 was paid by the plaintiff to the payee, as for a debt due from Evan Humphreys as
principal, but also of the fact that the debt was due from Evan Humphreys to him. The effect of the evidence was for the Jury, to whom the question was properly left on this and the parol testimony in the cause, whether he was the principal debtor or not; and no fault is found with their verdict."

In the later case of Doe d. Kinglake vs. Beviss,* the Court adopted the same general view; Mr. Justice V. Williams thus expressing himself;—

"It seems to me that the doctrine laid down by the Court of Exchequer, in Davies vs. Humphreys upon the authority of Higham vs. Ridgway and Doe vs. Robson,—that the entry of a payment against the interest of the party making it, is to have the effect of proving the truth of other statements contained in the same entry, and connected with it—has gone quite far enough. I, for one, do not feel inclined to carry it further."

Notwithstanding this feeling of the Court, there have, however, been cases in which the reception of evidence of the class in question, has been carried to a considerable length,—even to that of admitting it where, without the aid of another and explanatory one, the entry itself was incomplete, either as a declaration against interest, or as telling, on its own face, the required tale.

Thus in Marks vs. Lahee,† where the object was to prove a tender of a sum of £100 made to get possession of some drawings, and which £100 had been given to the clerk of the solicitor to make the tender, and, the clerk having died, proof of the tender was offered, as presented, by two entries made by him in his books, the first being an acknowledgment of the receipt of the money from his employer, and the second being thus;—"Re Colnaghi. Attending Mr. Lahee, tendering him £100 for each of the plates, and the etching of the Queen separately; when he declined to let me have the same; and said he had no objection to deliver up the impressions, upon payment of the expenses

* Kinglake vs. Beviss, 7, Common Bench, 456.
† Marks vs. Lahee, 3, Bingham's New Cases, 408.
of making them." The second entry was objected to as containing no declaration against interest. The evidence, however, was received. Tindal, Chief Justice, in giving judgment, saying:—

"I am unwilling to extend the effect of the decisions on this subject; for I am sensible how important it is to proceed, if possible, upon evidence given upon oath, and subject to cross examination. Exceptions to that practice ought to be strictly limited; but the ground on which I consider this entry admissible in evidence is, that I cannot read it without seeing that it does charge the party making it with the receipt of £100, for which he was to account to his employer. There is a former entry, from which it appears that, in the course of the same morning, the clerk had received £100 from his employer, for the purpose of making a tender; and no objection was offered to the reception of this entry, because it plainly charged the party making it, by admitting the receipt of the money. Then comes the second entry, to which the exception is taken. Now, if an action had been brought by the Official Assignee of the bankrupt, against the clerk, for money had and received, this entry would have been material evidence to shew that he had received £100, and had not disposed of it according to his instructions; so that it remained in his hands to be accounted for to the Assignee. In such an action, the Assignee could not have relied on the first entry alone; he must have gone further, and have shown that the object for which the money was placed in the clerk's hands had not been attained. Therefore, without going into the question whether this entry was admissible as having been made in the usual course of business, I think it ought to be received as the entry of a fact within the knowledge of the deceased, which rendered him subject to a pecuniary demand."

Another case, that of Stead vs. Heaton,* is so far the converse of Marks vs. Lahee, that a second entry, containing a declaration against interest, a prior one was received to give point to its particular subject. This was a case where, it being sought to establish the existence of a customary payment, two entries in a Parish book were put in, the former stating the

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* 4, Term Reports, 669.
custom, and the latter being as follows;—"Received of Haworth, who this year disputed this our ancient custom, but afterwards paid it £8." Both entries were admitted, the latter as constituting the charge against interest, the receipt of the money; the former from the reference to, or incorporation of it in the latter, and its immediate antecedent. It is obvious that the first entry would have been inadmissible but for its connection with the second, and the second, standing alone, would have proved no particular custom, the language being simply "this our custom." Though put by the learned Judge upon the ground that the matter stated referred to something else, it required that other thing to be read in order to explain the fact as stated. It should be, however, noticed in reference to Stead vs. Heaton itself, that this has been pronounced by a late eminent Judge, Baron Alderson, to carry the doctrine in question "to the extreme verge of the Law."

Still, though the principle evolved by the two authorities set out would doubtless be upheld, it is clear that it is only in those cases in which it becomes necessary to resort to the collateral entry, to explain the charging one, that the collateral one would be receivable in evidence.

Thus, in the earlier history of the law, in a case of ordinary accounts of mutual charge and discharge, it has been attempted to set up the items of the latter as evidence, on the ground that those of the former being charging ones, and declarations, accordingly, against interest, and the latter only detailing their expenditure, the whole was one document; but this was not allowed to prevail. So, in Knight vs. The Marquis of Waterford, just above referred to, where the question was the liability to the payment of a particular rate, proof of its payment by former proprietor's was offered in the books of the steward, which, debiting himself on the one side with receipts in respect of the rents of the premises, contained entries on the other in the way of discharge of payment of the rates in question. But the evidence was rejected, the discharging entry being

* Knight vs. Marquis of Waterford, 4, Younge and Collyer, 294.
an independent one, and not requiring the charging one for its elucidation. In the still later case of Doe d. Kinglake 75. Bevis, also above referred to, where the same principle was recognized and acted on, Mr. Justice Cresswell thus observed;—"The principle upon which entries made by deceased stewards and other persons are held to be admissible is, that they are admissions against the interest of the parties making them, and are therefore to be presumed to be true. Here, the reeve's accounts were admitted to the extent to which he purported to charge himself.

But then it was said, that the reeve's admissions of the receipt of money having been received, the accounts were also to be looked at for the purpose of seeing how he had disposed of the money. That, however, is a totally different matter. The statements on the one side and on the other may be so blended together, that the one cannot be read without the other: but it does not follow that, in all cases, the entire account must be read. If the discharging part of the account be necessarily resorted to for the purpose of explaining the charging part, it may be evidence. The manner in which the reeve disposed of money that had come to his hands, clearly was not necessary to explain his admission of its receipts."

On the other hand, in these cases in which entries in accounts are offered as evidence, they do not cease to be declarations against interest, merely because the final balance may, on the face of the account, be in favor of the declarant; for not only would the balance be diminished by the admission of the receipt which constituted the declaration, but in an action founded on the account, though the evidence of discharge might be strictly admissible, on the point of weight it would have less effect with the Court or the Jury than that of the charge.

Where the account constituting the declaration was in the handwriting of the accounting party, it would obviously not be a condition to its admission that it should require his formal signature. Nor would it be necessary that the name of the individual to

* The party collecting the rents—the accounting party.
whom the declarant was accountable should appear on the face of the account, could it be shown aliunde, that the person making the entry did not receive the money on his own account, but was in fact accountable for it to another.

In the instances in which entries have been received as declarations against interest, they have ordinarily been those of an acknowledgment of a payment to the declarant. In a modern case, however, before the present Master of the Rolls, an entry of a payment by the declarant was, after much consideration, received. There the entry in question was the entry by a Trustee of a payment made by him to a wrong party; and as a wrongful payment, accordingly, was treated by the Court as an entry falling within the common principle of one tending to charge its maker.

It has been questioned whether, when the entry is the only evidence of which it shows the subsequent liquidation, the entry is sufficiently inoculated with the character of a declaration against interest to allow its reception. For example;—an entry in a deceased tradesman's books acknowledging payment for certain work he had done; or a receipted bill for repairs; the entry in the one case, and the receipt in the other, constituting the only evidence that any demand had ever existed. The ground of objection taken to the admission of the evidence has been that, though the declaration showed the satisfaction of a demand, and was so far accordingly against interest, it was the sole evidence of the existence of the demand itself; and it has been urged, that to admit a declaration on so slender a foundation, would be unsafe, and might even lead to fabrication. In reply, however, to this, it may be stated that Courts must act on an ordinary experience; and it is highly improbable, that a party would set up a false claim against himself, for the mere apparent object of showing its satisfaction. Though the evidence has been rejected by some Judges, it has been admitted by others of considerable eminence, particularly Lords Denman and Wensleydale; and

* Orrett vs. Corser, 21, Beavan, 52.
the better and more received opinion appears to be, that the evidence would be admissible.

In all these cases of entries, the fact that the declaration involved in them is against the interest of the party making them, is in itself sufficient ground for the admission of the evidence. On the score of its weight, however, it might, according to circumstances, be matter of consideration whether, as in the case of stewards, collectors, or persons in that position, the books were handed over to the employer, or otherwise available to his scrutiny; or, in the case of a private individual, accountable to none but himself, and only keeping his own books of account, the books containing the entries remained in his private keeping. The effect of the evidence would be obviously greater in the former, than in the latter instance.

It is not necessary that the entry should be the personal one of the party to be charged. Any entry had under his authority, or which had been sanctioned by him, would suffice; though the proof of this must precede the admission of the entry. The requisition for this has been so strictly adhered to, that in one case an entry was rejected, though of an antiquity so great as the year A. D. 1673. "The character of the evidence," said Mr. Baron Bayley in that case, 'must be established, before the entry is read. You cannot read it to show the position of the party making it:—that must be proved aliunde.*

It is not necessary, however, that the entry should be coemporaneous with the transaction; the check of the adverse interest being the same, at whatever time the entry was made.

It has been doubted in a somewhat modern case of Fursdon vs. Clogg † (though rather in the argument of Counsel than any observation of the Court) whether a

* Davies vs. Morgan, 1, Crompton and Jervis, 590.
† 10, Meeson and Welsby, 572.
mere oral statement against interest would be receivable; and the point has not, that we are aware of, yet received a final judicial decision. Though any oral statement would naturally carry less force with it than what was written, the weight, however, of authority is in favor of the reception.

In the edition of Mr. Phillips' work on Evidence, published in 1852, and subsequently to Fursdon vs. Clogg, occurs the following:—

"It will be seen that the greater number of cases decided upon this subject refer to written entries, but there seems to be no reason why the admissibility of such evidence should be limited to statements in writing; and, in fact, in several cases verbal declarations have been admitted without objection, when they were clearly against the interest of the party making them.

Such verbal declarations will of course be entitled to less weight than written statements, as being more carelessly made, often unfaithfully reported, and less frequently connected with any course of business; but this objection will not affect their admissibility. The question, whether such verbal statements are admissible, was much discussed in the case of Fursdon vs. Clogg; but the court do not appear to have expressed any opinion on the point, and gave their judgment upon another ground."*

Though the question was again raised, in 1853, in a case of Stapylton vs. Clough,† but not decided, the majority of the Judges, including Lord Campbell, then Chief Justice, expressed opinions in favor of the reception of the evidence, and Mr. Taylor in the edition of his work published in 1855, seems to lean to the same view of the case.‡

* Phillips and Arnold, p. 254.
† 2, Ellis and Blackburn, 933.
title to it; and which, like all other declarations, are evidence for or against strangers. They are ordinarily (and it would seem more appropriately so) addressed to the elucidation of the title to, or interest in, property; though evidence of this nature has undoubtedly been received as to both the tenure and extent of the property itself, and the landlord under whom it was held, without being confined to the question of the actual extent of interest of the party in possession.

It is immaterial what particular form the declaration assumes. It may be as well verbal, as by writing; by less formal document, as by deed; and it may exist in the proceedings of a Court; as for example an affidavit or answer to a bill in Chancery. It must be something, however, within the party's own knowledge, or on which he has himself formed an opinion; and therefore an answer to a bill in Chancery narrating what he had heard another person state, would not be admissible; unless he went on to couple with it, his own belief of the truth of the statement.

Possession prima facie carrying with it the presumption of absolute ownership, any representation of an interest less than the absolute one, would be obviously a declaration against the proprietary interest of the individual making it. A party for instance in possession, making a statement involving an admission that he was tenant in tail, or for life only, or for years, and à fortiori that some other person than himself was owner, would be making a declaration in abridgement of the prima facie seisin in fee which would be the legal implication of possession, and consequently against his own interest.

Indeed, so far has the presumption of ownership from possession been carried, that declarations have been received of persons whose possession may probably have been of the most transitory character. Thus in Doe dem Stransbury vs. Arkwright,* it was desired to show that one Stransbury was the owner of a wood; and it was sought, in support of

* 5, Carrington and Payne, 575.
his title, to give in evidence the admission of a man since dead, who had been seen felling timber in the wood, and consequently, as it was said, *prima facie* in its possession, and notwithstanding objection, the evidence was allowed;—Mr. Justice Park observing;—“He exercised an act of ownership, and he is, therefore, *prima facie* owner. And what he says as to any one else being the owner, is a declaration to cut down his own title.” To this it was replied by the Counsel;—“He was a mere workman;—” but said the Judge;—“I do not know that he was only a workman, except from what he may have said”;—And of this nothing appeared.

This was no doubt applying the doctrine to rather an extreme case; and the authority must be received with the caution that, had it appeared, in evidence, that the man was in fact *the mere labourer he was stated to be*, the declaration would not have been received.

The declaration must be something in disparagement of actual *title*, as contradistinguished from a mere assertion of a *burthen upon the land* itself,—as for example its intersection by a highway, or an easement in it. A declaration amounting to the latter only would not be admissible; as it might be assumed that such a state of circumstances need not be necessarily opposed to the *interest of the occupant*; as for example the case of a disputed right of way, where the tenant kept a public house to which it led.

A question sometimes arises in these cases as to the admissibility of the declaration where it may present a *conflict of interest* in the declarant; that is to say it being matter of doubt on which side the interest of the declarant actually lies, and the condition of admission being that the declaration should be against the interest, it becomes questionable, accordingly, whether the original condition of admissibility is complied with. The true solution of the doubt is that given by Mr. Phillipps, when he says:

“"It seems not to be sufficient that a declaration, in one or more points of view, may be against interest, *if it appear upon the whole that*
the interest of the declarant would be rather promoted than prejudiced by the declaration."* The admissibility in these cases would turn upon the balance.

The next head of exception is that of Declarations made in the course of Business; and it embraces all statements made in the ordinary routine of either business, or professional, or official employment; though the statement must be made by the party making it, on his own personal acquaintance with the matter, and be within the scope of some duty imposed upon him.

Examples of such a declaration would be that of the entry of a shopman or servant in his master's book of the delivery of goods to customers, such entries being required by the usual business routine of the shop,—an endorsement on a notice, by an attorney's clerk, of the fact of service of the notice, the endorsement being made in conformity with a rule of the office requiring it,—a return of an arrest by a Sheriff's officer, called for by the regulation of the Sheriff's office.

An early case ordinarily cited as an example, and in fact the leading authority for the doctrine, is that of Price vs. Lord Torrington,† where the entry of beer delivered in the course of the day by a brewer's servant, being entered in the books of the concern on the close of the day by the foreman, on the servant's information, and afterwards signed by the latter, the entry was received as evidence to prove the sale of the beer, in an action by the brewer against the customer.

It will be observed that the leading conditions for the reception of the class of evidence we are treating of, are personal acquaintance with the fact, and discharge of a duty in the act of statement.

It will have been seen that in the case of declarations against interest, personal knowledge of the transaction is not an ingredient of admissibility. It will be

† 1, Salkeld, 285.
obvious, however, that a converse principle must apply to the case of 
declarations in the course of business; since there the essence of the 

Accordingly in a case of Brain vs. Preece,\footnote{11, Mceson and Welsby, 773} which was an action 

Illustration.

for the price of coals sold at the pit's mouth, 
it appeared that it was the duty of a person of 
the name of Harvey, who worked at the coal pit, to give notice to Yem, 
the foreman, of the coal which was sold. Yem was not present when 
the coal was delivered, and not being able to write, employed a person 
of the name of Baldwin to make entries in the books from what he, 
Yem, told him. Both Harvey and Yem were dead, but in order to 
prove the delivery of the coals, Baldwin was called as a witness, who 
produced the book, and stated that he made it out from Yem's directions; 
and that every evening he read over the entries to him. The book, 
however, was rejected as inadmissible, on the ground of the want of 
actual personal knowledge of the transaction on the part of the individual 
making the entry. Lord Abinger, Chief Baron, observed, after referring 
to the case of entries made by the parties themselves:—"But the case 
where the books are not written by the party himself; but at his supposed 
d dictation by another man who is dead, is widely different. As regards 
the case of Price vs. Lord Torrington, it is better to adhere to that case 
as it stands, and not to give any extension to it."

The principal is thus well illustrated by Mr. Norton:—

"It is necessary that the party making the entry should have a personal 
knowledge of the fact to which it relates. Thus in Price vs. Lord Torrington, the drayman, who delivered the beer, signed the entry. But supposing you were to go into a shop and purchase an article on credit from the tender, who merely reported the fact of your purchase to a clerk in another room, who entered the sale: such an entry would not be receivable because the clerk would have had no personal knowledge of the sale, but merely have made an entry of something told him by a third party (the tender), which so far as he (the clerk) knew, might be true or not true. So
again, if a rough draft were made at the time of sale by a clerk whose duty it was to watch the sale and make the entry then and there, and such rough draft were afterwards written up fair into a ledger, by another clerk, the ledger entry, on the same principle, would not be receivable."

As regards the point of discharge of duty,—it seems that, under ordinary circumstances, the duty must be that of an employed to his employer, as contra-distinguished from what might be done by a principal in accordance with a practice of his own.

Accordingly, in the case of Doe dem Patteshall vs. Turford† where, in the case of a firm of Solicitors, one of the principals had, in the absence of a clerk, served a notice to quit, and, in conformity with the usage of the office, made an endorsement of the service on the duplicate notice, the endorsement was only admitted as evidence, on the ground, that the endorsement being the duty of the clerk, had the notice been served by him, the principal, when he took on himself the service, also assumed the duty. In the case of the Queen vs. Worth, already referred to on the subject of a declaration against interest, the entry, by the farmer, of the hiring, was also sought to be held admissible, on the ground of its being an entry in the ordinary course of business, and Doe dem Patteshall vs. Turford, was relied on as an authority; but the admissibility on that ground was also repudiated too, on the principle that, though the making such entries may have been a habit, it was not a duty of the party making them. "It cannot be contended," said Mr. Justice Coleridge, 'that Stone (the farmer) made these entries in the course of any duty. In Doe dem Patteshall vs. Turford, the person who did the act relied upon was a partner in the firm of Attorneys, but both Attorneys were equally the agents of the client; and it was the duty of each to serve the notices by himself or by his clerk. It was usually done by a clerk; but on the particular occasion the

* Norton on Evidence, p. 93.
† 3, Barnewall and Adolphus, p. 890.
Attorney himself did it; and, while so doing, he was acting in the discharge of a duty to another person. This is an entirely different case." "And," said Mr. Justice Patteson,—"the person who acted, though a partner in the Attorney's firm, gave the notice as an Agent. That was properly a matter of employment within the rule."

According to English law, this species of evidence requires, as a condition to its admissibility, the death of the person making the entry;—but the Indian Act makes it admissible under the same circumstances as we have stated above in reference to declarations against interest.*

The evidence is received upon the natural probability of its truthfulness which the circumstances carry with them themselves; and which are well summed up by Mr. Taylor in the following category:—

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

To which we may add the statement of Mr. Starkie; who says;—

* Section 39.
“In the absence of all suspicion of any motive to the contrary, it is fairly presumable that all entries made in the ordinary routine of business are truly made. The same motive which induced a party to use the pains and trouble of making an entry at all, would usually induce him to make a true entry; a false one would be of no value, and the making it would frequently be more troublesome than to make a true one; it would require the additional trouble of invention; and although the sparing of trouble might, in many instances, induce a party to state particulars without sufficient accuracy, it would seldom cause him to invent and state a transaction which never happened.”*

As in the case of declarations against interest, it has been questioned whether oral statements in the nature of declarations in the course of business would be admissible within the rule. Both cases, however, seem to rest on the same principle; and it has been already pointed out in reference to the former, that the weight of authority sanctions the admission. In Stapylton *v.* Clough, already referred to on the point, Lord Campbell (then Chief Justice) addresses himself in terms to the case of entries in the course of business, and states himself to adhere to what he had before stated in the Sussex Peerage case that,—“Where a declaration by word of mouth, or by writing, is made in the course of the business of the individual making it, then it may be received in evidence, though it is not against his interest.”

Unlike the case of a declaration against interest, the entry must be either contemporaneous with the act, or made so closely upon it, as to be a guarantee for its accuracy, and as reasonably to be considered as part of the transaction.

No entry is admissible as evidence of any independent fact; nor indeed of any, even if recorded by itself, not necessary to be so recorded, as part of the transaction to which it relates. Thus, for example, in the case of the return of the Sheriff’s Officer cited above, a case of Chambers *v.* Bernasconi,† where the Officer had included in his return the locality of the arrest; this not

* Starkie on Evidence, p. 466.
† 1, Crompton, Meeson and Roscoe, 347.
being necessary matter of return, it was treated as an independent fact, and the evidence in the statement of the return was rejected. It was contended there, that an entry written by a person deceased in the course of his duty, where he had no interest in stating an untruth, is to be received as proof of the fact stated in the entry, and of every circumstance therein described, which would naturally accompany the fact itself. Lord Denman, Chief Justice, however, in delivering the judgment of the Court, thus addressed himself to the contention;—"We are all of opinion that whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. Admitting then, for the sake of argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made, (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place; that circumstance being merely collateral to the duty done."

The whole law on this matter (subject, as respects India, to the qualifying operation of the Evidence Act as regards the death of the declarant), is well stated by Mr. Taylor in the following concise terms:—

"From the cases cited above, it may be collected, that, in order to bring a declaration within the present exception, proof must be given that it was made contemporaneously with the fact which it narrates, and in the usual routine of business, by a person whose duty it was to make the whole of it, who was himself personally acquainted with the fact, who had no interest in stating an untruth, and who is since dead; and provided all the terms of this proposition be satisfied, it seems to be immaterial, excepting so far as regards the weight of the evidence, that more satisfactory evidence might have been produced, that the declaration is uncorroborated by other circumstances, or that it consists of a mere oral statement, which has never been reduced to writing."*

In reference to India, there should be pointed out two important provisions of the Evidence Act, in relation to Books kept in the course of Business, one as aiding in the evidence of Identification of certain defined matters; and the other as affording a general means of Corroboration of evidence; the latter of which, in particular, has been found a highly useful provision.

Section XL. enacts that,—"Any entry in any books proved to have been regularly kept in the course of business or in any public office, so far as such entry merely refers to and tends to identify by name, description, number or otherwise any Bank-notes or other securities for the payment of money, or other property, and the payer in, or receiver of, them, shall, in any case where such identification is necessary to be proved, be admissible in evidence for that limited purpose; if it shall have been made at or about the time of the transaction to which it appear relates, though the person who made it, or he on whose information it was made, is alive and capable of being produced as a witness."

Section XLIII. enacts;—"Books proved to have been regularly kept in the course of business or in any public office, shall be admissible as corroborative, but not as independent proof of the facts stated therein."

Mr. Norton (referring probably more pointedly to the Madras Presidency) points out a species of evidence which has been admitted in the Courts of the Mofussil, and the reception of which, though certainly at variance with the more general principles of English Law, and always requiring to be watched with great vigilance, may not be so objectionable as might at first sight appear.

"It may be well,' he says, 'to remark here that in the practice of the Mofussil courts, the entries made by a party himself in his own books have been held sufficient to prove his case. This was certainly not in accordance with the English law, though it is admitted by the Roman law, the French, and the Scotch; and when the books are regularly kept, and the entries evidently contemporaneous, it would seem that the objection should, with reason, go to the credibility rather than the reception of the
evidence. When accounts are kept on loose cads, forgery, by way of interpolation or extraction, is of course easy; much credit might not be attached perhaps to the memoranda of a wandering hawker: no exception might possibly be taken to the books of the Madras Bank. So I have always understood that the Guzzarettee Soucans place the most unlimited confidence in one another's books, and I remember a case in which one Soucar offered to be bound, if the claim made against him could be found in the claimant's books. Any conceivable degree of credit may be given in each particular case to the books offered, according to the whole of the circumstances which surround them: and perhaps as a concession to this principle, Act II of 1855, Section XLIII. has provided that "books proved to have been regularly kept in the course of business, or in any public office, shall be admissible as corroborative, but not as independent proof of the facts stated therein."

The practice which prevails in America would also afford its sanction to the reception of this kind of evidence; and indeed, even in England itself, there is an exceptional case in which it has been admitted; that in which an account being taken in the Court of Equity, the books in which the account has been kept are, under the direction of the Court, received as *prima facie* evidence.

"In the United States," says Mr. Taylor, "this principle has been carried further than in England, and has been extended to *entries made by the party himself* in his own shop books; at least, where they were evidently contemporaneous with the facts to which they refer, and formed part of the *res gestae*. Being the acts of the party himself, they are received with the greater caution; but still they may be seen and weighed by the Jury. Though this American doctrine is not in accordance with the principles of the common law, it is with those of other systems of jurisprudence. Our courts of equity have, for some years past, acted upon it to a certain extent, where accounts have been required to be taken, and vouchers have been lost; and now, by virtue of the Chancery Practice Amendment Act, they are expressly empowered, "in cases where they shall think fit so to do, to direct that in taking

* Norton on Evidence, p. 95.
accounts, the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as primâ facie evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised." And Mr. Taylor, after adverting to the adoption of the principle in the jurisprudence of both ancient Rome and modern France and Scotland, in reference to the books of merchants and tradesmen when duly kept, concludes with the observation:—"Especial reference is here made to these laws, because it is conceived that the adoption of a somewhat similar practice in the English Courts of Common Law would prove highly beneficial; especially in cases where actions are brought or defended by the representatives of a person deceased."*

Upon a principle corresponding with that of the English Act of Procedure, the Indian Act, Act VI. of 1854, regulating the Equity practice of the Supreme Courts of the three Presidencies, enacts (Section XXXIII.) that it shall be lawful for the Court, in any case where any account is required to be taken, to give such special directions, if any, as it may think fit, with respect to the mode in which the account should be taken or vouched, and special directions may be given, either by the decree or order directing such account, or by any subsequent order or orders, upon its appearing to the Court that the circumstances of the case are such as to require such special directions; and particularly it shall be lawful for the Court, in cases where it shall think fit so to do, to direct that in taking the account, the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as primâ facie evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised.

In extension of this principle to all accounts generally, and on whichever side of the Court taken, Section LV. of Act II. of 1855 provides;—"The thirty-third Section of the Act No. VI. of 1854, which

applies only to proof of accounts on the Equity side of the said
Supreme Courts, shall extend to and embrace all accounts directed to be
taken on any side of the said Courts."

The third and last exception to the rule of exclusion of Hearsay
Evidence remaining to be treated of is that of a
Dying Declaration. The nature of this declaration,
and the sanction under which its reception has
been allowed, are thus stated by Chief Baron Eyre:—

“They are declarations made in extremity, when the party is at the
point of death, and when every hope of this world is gone, when every
motive to falsehood is silenced, and the mind is induced, by the most
powerful considerations to speak the truth; a situation so solemn, and
so awful, is considered by the law as creating an obligation equal to that
which is imposed by a positive oath in a Court of Justice.”

The Chief Baron’s reporter cites an apt authority for the doctrine,
to be found in a scene from King John, where Shakespeare puts into the
mouth of his wounded man, the reason for the credibility of the narrative
he was relating:—

“Have I not hideous death within my view,
Retaining but a quantity of life;
Which bleeds away, even as a form of wax
Resolveth from its figure 'gainst the fire;
What in the world should make me now deceive,
Since I must lose the use of all deceit?
Why should I then be false, since it is true,
That I must die here, and live hence by truth.”

On the other hand, if the solemnity of the occasion be a sanction
against an intentional deception, it is not to be
denied that, not only may bodily suffering have
produced mental fallibility, but the very confusion of the occasion (the
original cause of death) may have impaired the powers both of observation
and of judgment; and even the feeling of resentment, and the irritation

* R. v. Woodcock, 1, Leach’s Crown Cases, 500.
† Act V., Scene IV.
of passion may prevail over the marvellous lesson which taught:—
"Father, forgive them, for they know not what they do."* Above all, the declaration wants the great test of all narrative evidence, the power of cross-examination. Though its admissibility accordingly is not to be disputed, evidence of this description requires to be very closely scrutinized; and there ought never to be lost sight of the observation of Baron Alderson;—

"When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a Court of Justice under the sanction of an oath, and his declarations as to the cause of his death, are considered equal to an oath, but they are, nevertheless, open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost, by the absence of the opportunity of more full investigation by the means of cross-examination."†

It is truly said by Mr. Phillipps:—

"With respect to the effect of dying declarations, it is to be observed, that although they may have been on utter abandonment of all hope of recovery, it will often happen that the particulars of the violence, to which the deceased has spoken, were likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed. The consequences also of the violence may occasion an injury to the mind, and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Such evidence therefore is liable to be very incomplete. He may naturally also be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill-will. Nor is it to be forgotten, that animosity and resentment are

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* Luke, Chapter XXIII. v. 34.
† Ashton's Case, 2, Lewin's Crown Cases, 147.
not unlikely to be felt in such a situation. The passion of anger, once excited, may not have been entirely extinguished, even when all hope of life is lost. Such considerations shew the necessity of caution in receiving impressions from accounts given by persons in a dying state, and the importance also of inquiring into their manner and deportment at the time.

The remark before made on verbal statements, heard and reported by witnesses, applies equally to dying declarations, namely, that they are liable to be misunderstood and misreported from inattention, from misunderstanding, or from infirmity of memory."

Notwithstanding some former question on the point, it is now admitted that this species of evidence is to be confined to criminal cases, and, with reference to these, to those of homicide. Declarations are admissible only where the death of the declarant is the subject of the inquiry, and where the circumstances of the death are those of his dying declaration.

Declarations thus limited are received no less from a natural Ground of application necessity, than the solemnity of the occasion on which they were uttered; since the very nature of the crime charged would imply secrecy for its commission; and the circumstance that there may have been no eye witnesses, would render the admission of other sources of testimony the more imperative.

Solemnity of occasion, however, operating only as a dispensation with the oath, were the declarant a person incompetent to take one,—a person for example of unsound mind, no religious belief, or of too tender an age,—the declaration would not be admissible.

It would not be an objection that the declarant was a particeps criminis† in the act which caused his death. Thus the dying declaration of a woman, who took part in an act which caused her own death,

† A participant in the crime.
was admitted on an indictment for murder charging the prisoner as a principal.*

These declarations are admissible as well in favor of the party charged, as against him.

According to English law three circumstances must combine to allow their reception,—actual danger of death, full apprehension of danger, and death ensuing;—all which are matters for the decision of the Judge.

The rule was thus propounded by Lord Denman, Chief Justice, in the Sussex Peerage Case in the House of Lords:—

"With respect to declarations made by persons in extremis,† supposing all necessary matters concurred, such as actual danger, death following it, and a full apprehension at the time, of the danger of death, such declarations can be received in evidence; but all these things must concur, to render such declarations admissible.

Such evidence, however, ought to be received with caution, because it is subject to no cross-examination."‡

The Indian Act, though it leaves the law the same in all other particulars, provides that where dying declarations are evidence they shall be received, if it be proved that the accused was at the time of making the declaration, and then thought himself to be, in danger of approaching death, though he entertained, at the time of making it, hope of recovery.

The distinction between the English and the Indian Law, it will be noticed is, that to render the declaration admissible, the former requires a full apprehension of the danger; while the latter admits the element

* Tinkler's Case, 1, East's Pleas of the Crown, 354.
† On the point of death.
‡ 11, Clark and Finelly, 106-112.
of a hope of recovery. It may not be always very easy to draw the line between apprehension of danger, and hope of recovery. Practically the Act would only seem to lower the scale or degree of apprehension. According to English law, any hope of recovery would exclude.

Independently of the effect as regards India of the Evidence Act, it is not, however, necessary, that the apprehension should be of a death immediately impending. In a recent case, the Queen vs. Reany, a party lived eleven days after he had made the declaration; and which concluded with the words,—"I have made this statement, believing I shall not recover." He was in a state at the time from which it was impossible that he could recover, but on the day he made the declaration, and shortly before it, he had stated to a third party,—"I have seen Mr. Booker (the Surgeon) to-day, and he has given me some little hope that I am better, but I do not myself think I shall ultimately recover." The declaration was objected to on the ground that it was not made while in extremis, that is, under immediately impending death; but it was nevertheless received; Pollock, Chief Baron, in delivering the judgment of the Court, observing;—"No doubt, in order to render a declaration by a deceased person admissible in evidence as a dying declaration, it is necessary the person should be under apprehension of death; but there is no case to show that such apprehension of death must be of death within a particular time. The question turns rather on the state of the man's mind at the time, than upon the interval between the declaration and the death."—And all the Judges were content to rest the reception of the declaration, upon the fact that it was made under the impression of impending death, without the qualification of 'immediate.'

It is not necessary that the declarant should have avowed a sense of his condition, or stated that he was speaking under it. It is sufficient if it can be inferred from the surrounding circumstances, whether his own conduct afford the inference, or it be the necessary implication of the general facts.

* Weekly Reporter, 1866, p. 352.
DYING DECLARATIONS.

The declaration must be upon matters of fact, and not of opinion. It must be upon such matters as those, as to which, if alive, the declarant could have been examined as a witness.

Moreover, it must be the genuine statement of the party;—not a declaration brought cut and dried, as it were, to him. Indeed, though it is no actual objection to the admissibility of the declaration that it was extracted by a course of leading interrogation, or was the result of solicitation, such circumstances would naturally affect the weight of the statement; and, where such a declaration is conceived important to be obtained, the proper course would be to elicit it by a calm and a fair course of examination and investigation.

The declaration must be complete in itself. If it were desired by the declarant to qualify it by other statements, or it were otherwise imperfect, it could not be received.

We cannot, we believe, ascribe to the English law of Dying Declarations, the antiquity of a Grecian origin; but it is certainly a matter of coincidence that, in cases of murder, the laws of Athens, no less than those of England, appear to have given effect to these declarations.

In his description of the Athenian Courts, Mr. Forsyth recalls to the notice of his classic readers an instance of this, occurring in a speech composed by Antiphon for the prosecution of a wife charged with having suborned a person to take off her husband by poison; and we take his translation, which is as follows:—

"You may be sure that those who design the death of their neighbours do not plot and take their measures in the presence of witnesses, but do it as secretly as possible, and so as that no one knows what they are about; and those whose lives are attempted are in utter ignorance until they are attacked, and discover that destruction has overtaken them."
Then, however, if they have sufficient time before they die, they summon their friends and relations, and take them to witness, and tell them who the persons are by whom they were murdered; and charge them to avenge their death; as my father charged me, when he lay dying in his miserable and mortal sickness. But if they cannot get their friends around them, they write down the facts, as they have occurred, and call upon their domestics to be witnesses, and make known to them the names of their assassins."*

* Hortensius, p. 45.
CHAPTER XVII.

On Admissions.

In treating on the subject of Admissions, it will be understood that we are addressing ourselves to admissions in the sense of Evidence, and not to those the result of a course of Pleading.

It may happen in an action at Law, that the defendant, not being able to dispute the original cause of suit, instead of traversing it by his pleading, meets it by the averment of some subsequent transaction; as for instance, in the case of a money demand, by that of its satisfaction, say payment, or its release; technically termed "a plea in confession and avoidance." Resting the defence on this new issue, is a virtual acknowledgment of the original liability; and accordingly amounts to an admission of it; as, in like manner, would the omission to traverse any particular allegation forming part of the general case of the plaintiff, and requiring denial, be a confession of the allegation. Again, in a suit in Equity, the defendant though challenging either the circumstances under which a deed, which may constitute the title of the plaintiff, has been obtained, or the construction which awards a right to the plaintiff in it, may nevertheless admit the mere factum of the deed itself. So, whether in Law or in Equity, a demurrer to the pleading, that is to the case made against the party demurring, would amount to an admission of the facts stated, albeit a challenge of the legal liability assumed to be derivable from them.

The discussion of such and the like course of admission occupies a place in most works upon Evidence.

Yet admissions of this class, are not, as it is apprehended, properly referrable to the head of Evidence; nor could any of them strictly be treated as evidence against the admitting party. They would, indeed,
relieve an opponent from the burthen of their proof; but the admission would not seem to make them evidence for him. It would rather amount to a withdrawal only of their subject-matter from the contest.

On the discussion accordingly of admissions of this nature we abstain from entering; thinking it more properly the province of a work on Pleading, than one on Evidence; and whether so or not, regard being had to the scheme of the present work, and the field to which it is more particularly addressed, it is felt that the addition would be only an inconvenient encumbrance. It will be understood, therefore, that, in the Admissions of which we are treating, we address ourselves only to those which, in a litigation between parties, may be used in the nature of proof, by the one against the other, in the way of any ordinary piece of evidence.

Of course, before any admission can be set up or insisted on, the fact of admission must be established like any other in the cause; though, even in the case of oral admission, it may be proved on the testimony of any person who has heard it, without calling the party by or to whom it was made.

The admission once established, it is, to the extent of its own statement, received as evidence; and on the faith of its own natural truthfulness, and in dispensation of the ordinary tests of oath and cross-examination.

"Another class of evidence," says Mr. Starkie, "which is admissible, though the usual tests are inapplicable, consists of declarations made by one of the parties to a suit, in the nature of a confession or admission contrary to his own interest. Whatever a party voluntarily admits to be true, though the admission be contrary to his interest, may reasonably be taken for truth. The same rule, it will be seen, applies to admissions by those who are so identified in situation and interest with a party that their declarations may be considered to have been made by himself.

As to such evidence, the ordinary tests of truth are properly dispensed with; they are inapplicable: an oath is administered to a witness in order to impose an additional obligation on his conscience, and so to
add weight to his testimony; and he is cross-examined to ascertain his
means of knowledge, as well as his intention to speak the truth. But
where a man voluntarily admits a debt, or confesses a crime, there is little
occasion for confirmation: the ordinary motives of human conduct are suf-
ficient warrants for belief."

This description is perhaps open to be considered as addressing itself
only to admissions to be collected from the statements of the party, either oral, or written. The
evidence, however, in question, must not be un-
derstood as confined to this. As we shall presently see somewhat more
in detail, acts or conduct are alike receivable; and, indeed, the learned
writer elsewhere says;—"Presumptions from a man's conduct operate, as
has been seen, in the nature of admissions; for, as against himself, it is
to be presumed that a man's actions and representation correspond with
the truth. These are in all cases evidence of fact."

Nor under the head 'Declaration' is to be understood a mere formal
admission only with reference to the matter in
question. The admission may present the substance,
without assuming the form of one. Thus, in the
case of written statements, things in no way originally designed to
connect themselves with the litigation, as for example, statements in
deeds, accounts, letters, answers in Chancery, affidavits, and so forth,
made in reference to an entirely different proceeding, would be all
admissible under this head of evidence; and conduct, of course, could
be in the nature of an admission, by implication only.

Indeed, that which is relied on as an admission might be a represen-
tation by a party of his belief only of a fact, rather
than a statement of the fact itself. Thus, in a
Chancery suit, where a defendant, challenged by the bill to his knowledge
of certain facts, to say by his answer simply, that he 'believed' them to
be as alleged; this would in itself be held tantamount to an admission;

* Starkie on Evidence, p. 50.
† Same p. 762.
since, as it has been said, what, as against himself, a party believes, the Court will believe too."

Even an incidental representation in a wholly collateral matter might amount to an admission; as, for instance, an auctioneer, selling goods, and describing them in the particulars of sale as the property of the bankrupt, would be held to have admitted the bankruptcy, in an action brought against him by the assignees to recover the proceeds of the sale.†

Evidence derivable from the statements or acts of a party himself has sometimes been termed by Jurists—"Self-regarding evidence";—that which is in favor of the party being pronounced to be "Self-serving," that against his interest,—"Self-disserving."

It is observed by Mr. Best;—

"The general rule of law with respect to Self-regarding evidence is, that when in the self-serving form, it is not receivable, but that in the self-disserving form it is, with very few exceptions, receivable, and is generally considered proof of a very satisfactory kind. 'No man,' say the books, 'can be a witness for himself, but is the best witness that can be against himself.' For although, when viewed independent of Jurisprudence, it would be difficult to maintain that the declarations or acts of one man may not have some probative force as evidence against another, our law rejects them in obedience to its general principle, which requires judicial evidence to be proximate; and also from the peculiar temptations to fraud and fabrication, which the allowing such evidence would so obviously supply. But on the other hand the universal experience of mankind testifies, that as men consult their own interests, and seek their own advantage, whatever they say or admit against their interest or advantage, may, with tolerable safety, be taken to be true, as against them at least, until the contrary appears."‡

* Potter vs. Potter, 1, Vesey, 274.
‡ Best on Evidence, 393.
In reference, however, to all proof derivable from admission, the pertinent observation of Mr. Phillipps should never be lost sight of:—"The force and effect of an admission must of course depend upon the circumstances under which it has been made. In many cases it will be evidence of the strongest kind if clearly proved; in some it amounts to little."*

So, Lord Wensleydale, after addressing himself to the question of the admissibility of evidence of this description in a case of Slatterie vs. Pooley, added:—"The weight and value of such testimony is quite another question. That will vary according to the circumstances, and it may in some cases be quite unsatisfactory to a Jury."†

Admission evidence has been occasionally referred by text writers to the head of 'Hearsay'; and said to be receivable on the ground of a declaration against interest, and therefore as probably true. In the sense of what another has been heard to say, no doubt such evidence might be described as 'hearsay.' Still the admission of a party hardly falls within the notion one ordinarily ascribes to hearsay evidence generally; and so far as regards the point of declaration against interest, it is well pointed out by Professor Greenleaf:—"In regard to many admissions, and especially those implied from conduct and assumed character, it cannot be supposed that the party, at the time of the principal declaration or act, believed himself to be speaking or acting against his own interest, but often the contrary." 'Such evidence,' he adds, 'seems, therefore, more properly admissible as a substitute for the ordinary and legal proof; either in virtue of the direct consent and waiver of the party, as in the case of explicit and solemn admissions, or on grounds of public policy and convenience, as in the case of those implied from assumed character, acquiescence, or conduct.'‡

Indeed, evidence of this description, seems to be much more pointed and direct, much higher in degree, than any thing resting upon

† Slatterie vs. Pooley, 6, Meeson c Welsby, 664.
hearsay; nor does it seem quite consistent to ascribe to the character of hearsay, which is emphatically a tale told by another, that which the party has himself acknowledged. On the whole, it seems more logical to assign to admission evidence, especially when of a direct character, a classification of its own, rather than to range it under that of Hearsay, and we so treat it accordingly.

We have been speaking of admissions generally, and without distinction between those which, as made in reference to civil procedure, have ordinarily received the designation of Admissions, and those which, having reference to criminal ones, have acquired the distinctive appellation of Confessions. To a certain extent, both are governed by the same general principles; and the admissibility of each is traceable to the same foundation. However, there are distinctions between the two; and it will be more convenient to treat of them separately. We devote the present Chapter accordingly to Admissions in Civil cases, emphatically styled Admissions, dedicating a succeeding one to Confessions in reference to Criminal ones.

So there is a class of admissions which, being of a character so conclusive as to preclude dispute, has appropriated to itself the title of "Estoppel;" and stands upon grounds distinguishable from those attributable to ordinary Admissions. This too we reserve for a separate discussion in a distinct Chapter on the subject.

There is no limit to the reception of admissions as against the party making them, beyond that which secures the fidelity of the admission itself. It was at one time questioned whether, in the case of written documents not produced or accounted for, such evidence should be permitted; on the ground that its reception would be an infraction of the rule which excludes all other than the primary evidence. But, said Lord Wensleydale in Slatterie vs. Pooley,* a leading case on the subject,—'the reason why such statements or acts are admissible, without notice to produce,

* 6, Meeon and Welby, 664.
or accounting for the absence of the written instrument, is that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true may reasonably be presumed to be so."

This reasoning, indeed, even backed by the high authority of its propounder, was for a time insufficient to save the admissibility of evidence of this nature from much cavil. Mr. Taylor has some strictures on it in his work on Evidence; and it elicited the disapprobation of the Bench in an Irish case;* Chief Justice Pennefather there observing;—"The doctrine laid down in that case [Slatterie vs. Pooley] is a most dangerous proposition; by it a man might be deprived of an estate of £10,000 per annum derived from his ancestors, through regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear that they heard the defendant say he had conveyed away his interest therein by deed, or had mortgaged, or had otherwise incumbered it; and thus, by the facility so given, the widest door would be opened to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty."

The matter, however, came subsequently before the Court of Common Pleas, in a case of Boulter vs. Peplow,† under which, notwithstanding these objections, the admissibility has now been considered as established. Mr. Justice Maule observed in that case;—"Slatterie vs. Pooley was decided on the broad ground, that a party's own statement is, in all cases, admissible against himself, even to the extent of proving the contents of a deed or writing. That law is well established. The reasoning upon which Slatterie vs. Pooley is founded, may not be satisfactory, and has been disapproved of by several members of this Court as well as by the Irish Judges, on the grounds which are pointed out in Taylor on Evidence, 294. But the decision in that case is recognised and acted upon

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* Lawless vs. Queale, 8, Irish Law Reports, 382.
† 14, Juristic., 248.
every day at Nisi Prius, and we cannot be expected to overrule it; and I do not think the question will arise."

This, of course, only sets at rest the question of the admissibility of the evidence. The considerations involved in the objections of the Chief Justice Pennefather, still, on the subject of danger and weight, naturally point to the necessity of a cautious vigilance to secure that the admission in such case ascribed to the party, was actually made, and on knowledge and deliberation.

In securing the fidelity of any admission, one of the most obvious conditions would be that, not a garbled or partial, portion only of the admission should be before the Court, but that it should be there in its entirety, that its effect, when taken as a whole, may be fairly judged of;—a rule which would equally apply whether the admission were in writing, or oral only.

Consequently, in the case of a written admission, not merely the individual paragraphs relied on, but the whole writing itself, must be taken into the construction; as in the case of an oral one must the entire conversation connected with the subject, and elucidatory of it; or, when what is relied on is the examination in chief of a party, his cross-examination. The like principle would apply to an examination commenced on one day, and not concluded until another.

The portion of a conversation, however, extending to other topics, though relating to the general subject of the suit, could not be received on any isolated point, unless in so far as it might operate in qualification or explanation of the part of it out of which the admission was sought to be extracted; and what in this particular would apply to a conversation, would be alike applicable to any other admission.

It may be necessary for the purpose of explanation to travel even beyond the document itself relied on as furnishing the admission; and where this is so, this is allowable. Thus, were the admission insisted on, some statement in an
answer in Chancery, the party against whom it was to be used would have a right to insist on the bill being read, for the purpose of explaining the intention of the answer, by the statements of the charge which elicited it; on the principle that, even in an ordinary conversation, the replies of a party must be understood with reference to the questions put to him.

The statements of the bill itself, however, would be no independent evidence. This point came before the Court in a case of Boileau v. Rutlin,* now considered as the governing one on the subject, where the statements of a bill were attempted to be assimilated to the records of the Court, and its allegations put as the deliberate assertions of the party. The Court, however, treated these as the mere frame in which the Pleader chose to shape the case, and as put hypothetically for the purpose of eliciting discovery from the antagonist, and refused to ascribe to them the character contended for. The true character of all pleadings generally, and whether at Law, or in Equity, was well there defined by Lord Wensleydale, where he describes them,—"not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and if denied, to be proved, and ultimately submitted for judicial decision."

The pressing, indeed, into the service of any one part of an admission necessarily exposes the whole to a liability to be converted into hostile evidence on the part of the opponent. But though each part is thus made evidence, all may not be entitled to credit alike; and, even in admitting, for the purposes of evidence, any entire statement, it would be quite competent to the Court, in weighing the effect, to reject that portion of it on which it attached no adequate reliance.

* 2, Exchequer Reports, 665.
Accordingly, to take the common case of a plaintiff relying on a debtor and creditor account rendered to him by the defendant as proof of the plaintiff’s demand,—though the putting in of the account makes it, at the same time, evidence on behalf of the defendant in support of his set-off, it still leaves the plaintiff at liberty to impeach the items of set-off by other evidence.

A distinction, however, as regards written statements, prevails in Equity, and would seem properly to apply in principle to all analogous cases, when the statement is in the form of an answer of the party to the suit in question, or his examination under the decree; both being, in such proceeding, not so much in the nature of evidence against the individual, as of admission made by him in the cause itself. Thus, were a particular passage of his answer read against a defendant, he would not be entitled by the reading of that passage to any adoption of the other and general statements of his answer, nor even to those grammatically, but grammatically only, connected, as by the conjunctive particles ‘But’ or ‘And.’

In the instances of passages read in explanation of some former or other one, and containing new and distinct statements, even these would be admissible so far only as they were explanatory. So, in his examination under a decree, were a defendant to set out his accounts, the debit side might be read against him, without involving a setting up of the credit side in his favor.

Whatever, however, might have a bearing on the passage read, either by way of explanation or qualification of the first statement, the defendant would be entitled to have read too; and this would thus be made evidence for him, and of course with all its consequences. But even this would not let in distinct or disconnected statements, further than as they might be explanatory of the original passage.

"Where a plaintiff," said the Lord Chancellor in Bartlett and Gillard, 'chooses to read a passage from a defendant's answer, he reads all the
circumstances stated in the passage. If the passage so read contains a reference to any other passage, or to a fact stated in any other passage, that other passage must be read also; but it is to be read only for the purpose of explaining, so far as explanation may be necessary, the passage previously read, in which the reference to it is made. If, in the passage thus referred to, new facts and circumstances are introduced, in grammatical connection with that which must be read for the purpose of explaining the reference, the facts and circumstances so introduced are not to be considered as read.”

Should an original passage be read through inadverence, and thus opening accordingly the door to other explanatory ones of a damaging character to the case of the plaintiff, it is always, however, in the discretion of the Court to relieve the plaintiff from the consequence of his indiscretion, by permitting him to withhold the original passage. Such a discretion though would not be exercised, where the effect might be to defeat the substantial justice of the case.

It must be borne in mind, however, that, while the reading of collateral passages can only be compelled for explanation, a statement composed of two branches, and capable accordingly of logical severance, may nevertheless so represent one entire transaction, that the Court will not allow its use as establishing one part of the transaction, without receiving it at the same time as showing the other. Accordingly, were the suit one against an executor, and he were to admit a receipt on account of the estate, alleging in the same breath, as it were, its payment away,—as for example were he to say, in one continuous passage, “that he had received certain sums, which sums he had paid, &c.”—the discharge thus following immediately in the same sentence, the admission of the receipt would not be entertained, without, at the same time, carrying with it its own discharge.

* Bartlett vs. Gillard, 3, Russell, 149.
† Freeman vs. Tatham, 5, Hare, 329.
The transaction, however, must be one only, and a cotemporaneous one; as was laid down by Lord Eldon in Thompson vs. Lambe,* an early case on the subject, where he says:—

"Upon the other point, I am clearly of opinion, a person charged by his answer, cannot, by his answer, discharge himself; nor even by his examination; unless it is in this way: if the answer or examination states, that upon a particular day he received a sum of money, and paid it over, that may discharge him; but if he says, that upon a particular day he received a sum of money, and upon a subsequent day he paid it over, that cannot be used in his discharge; for it is a different transaction."

But this principle, though strictly applicable to the sort of case which elicited its enunciation by Lord Eldon, would not be carried beyond its legitimate exigency; and it will be observed that the point of that case was the one-ness of the transaction.

In a more modern case before Vice Chancellor Wigram, that of Freeman vs Tatham,† where the question in the cause was, whether the defendant was the trustee or absolute owner of certain stock, the subject of the suit, which had been transferred into her name, the defendant stated by her answer;—"that she did not know of the transfer until the deceased informed her of it, and told her she had transferred the stock into their joint names, in the confidence that the defendant would fulfil every wish and direction which she might give respecting the same;"—and in a subsequent portion of her answer she stated directions, from time to time afterwards, given to her by the testatrix for the appropriation of the stock, shutting out the claims of the plaintiff. It was insisted, under this frame of the answer, that the explanation as to the directions was both independent and subsequent matter, from that of the transfer itself; and that the admissions of the transfer might accordingly be received against the defendant, without opening the door to the reading of the directions, and Thompson vs. Lambe was pressed upon the

* 7, Vesey, 587.
† 5, Hare, 885.
Court. The Vice-Chancellor, however, held otherwise, observing:—
"The subsequent declarations are in fact part of the original transaction. The acceptance was of a trust to be from time to time declared; and the authorities cited, with reference to the doctrine of charge and discharge, do not appear to me to be analogous. It appears to me, that, having accepted the trusts of the transfer, the subsequent declarations were part of the trusts which she accepted; and the author of the trust could not fix her by her own admission, without allowing her to explain what those trusts were."

Were that which was given in evidence as the admission, in the nature of an independent piece of evidence, the party propounding it must take it with all its risks of being converted, in any other of its parts, into evidence against himself; for, having once made evidence of it, he would have done so for all purposes; and that notwithstanding its original production as evidence was for a different purpose, and it had originally been received in one stage of a cause, and was sought to be afterwards used in another. Thus, in a question whether a bond was to be taken as having been given as a general security for pending transactions between the parties, or for the sum it specified, as a liquidated demand, an account having been put in at the hearing by the side asserting the former, to show the bond to have been given as a general security, it was afterwards, in a subsequent stage of the proceedings, namely, the taking the accounts under the decree, allowed to be made use of by the other, to charge his opponent with specific items of the account.*

Ordinarily, the mere proof of one of a series of distinct entries in accounts,—one of a list of unconnected letters in a correspondence copied in a book,—or any like train of unconnected documents, would not let in proof of the disconnected entries, letters, or documents, of the series. Express reference to the others, however, would make them liable to be read too.

* A case of Dicken v. Ward before the then V. C. Knight Bruce in which the author was counsel, though he does not find any report of the case on this point.
In the case of letters, the portion of the correspondence in the hands of one of the litigants may be read, without putting in those on the other side; since it is in the power of the latter to produce them himself.

Though a statement obtained under duress would be rejected, it would be no objection to the reception of any admission, that it was procured through the operation of a compulsory process; provided only that the process were legal; for example, an Answer extracted by a bill in Equity or an Examination under a bankruptcy, or upon a trial, would be entertained as an admission; and that though the question which extorted the admission were even irrelevant or might otherwise have been demurred to.

In a case of Regina vs. Scott, which occurred in the year 1856,* the examination of a bankrupt in the Court of Bankruptcy, touching his trade dealings and estate, was held admissible in evidence against him on a subsequent criminal charge, notwithstanding the self-criminating character of the examination, and the circumstance that it was extracted under a threat of committal. Mr. Justice Coleridge, indeed, (a high authority) dissented on the ground of the great maxim of the Common Law,—"that no person can be compelled to criminate himself." However, the rest of the Court, with Lord Campbell, Chief Justice, at their head, took an opposite view of the case; and the conviction founded on that examination was sustained.

The natural reluctance with which, under the circumstances, the admission thus extracted might be presumed to be made, would rather be an element in favor of its truthfulness; and, in civil cases, at all events, the rules of evidence are framed to elicit truth, and not on a consideration of chivalry.

The principle of admitting statements, though made under legal compulsion, has been carried so far as, at first sight, almost apparently to trench upon the integrity of the

* Weekly Reporter, 1856, p. 771.
admission itself as the fair representation of any given fact. Thus, where a party having admitted a given act, was proceeding to vindicate it, but the vindication was stopped by the Court as unnecessary, the admission was nevertheless received in a subsequent case, the statement having a direct bearing on the issue, and the mode of obtaining it being treated by the Court as only matter of observation.* So in another, where, a bankrupt having been examined under his bankruptcy, part only of the examination appeared to have been taken down in writing, but that having been read over to and signed by him, was allowed to be received as an admission of the facts made by himself, notwithstanding its alleged incompleteness.†—In both cases, though, it will be observed the admission was complete in itself; and that without the explanation of the cotemporary matter.

It has been questioned whether documents, say, for example, letters or accounts, the discovery of which has been forced under some process of the Court, as for instance that which came out in an answer in chancery or on an examination in bankruptcy, could be read as admissions, without production of that in which their existence is admitted, say the answer or examination;—and some question may still exist as to the case in which the document is, by annexation and reference, made part of the answer or examination itself. However, there is no doubt that, whenever at all events it can be treated as an independent document, it may be read as an admission. It was stated by Lord Denman, C. J., in a somewhat modern case on the subject;—"It was surmised that an unfair advantage had been taken of the defendant in obtaining a knowledge of these letters through a suit in chancery, and then producing them without the answer, which may have greatly qualified and altered their effect. But I cannot think that a Judge at nisi prius has any thing to do with these considerations: he is to enquire only whether due notice has been given; whether the documents have been proved to exist; whether copies are well proved."‡

* Collett vs. Lord Keith, 4, Espinasce, 212.
† Milward vs. Forbes, 4, Espinasce, 171.
‡ Sturge vs. Buchanan, 10, Adolphus and Ellis, 598.
Admissions, as we have seen, are not confined to the actual statements of parties. A particular course of conduct may equally amount to an admission.

The question of conduct arises, perhaps, for the most part, more prominently in criminal than in civil cases.

Thus the flight of the accused,—his concealment or disguise,—attempted riddance of the means of discovery, (destruction, for instance, of the weapons or other instruments of offence, or washing of clothes to efface their traces of blood)—diversion of enquiry,—putting, as it is termed, on a wrong scent,—and the like, would all be conduct leading to the presumption, and, so far accordingly, admission of the guilt.

If less prominent, however, the admission arising out of conduct would be equally applicable in civil cases.

Thus the mode of treatment by any particular party of a subject, might be an admission of the fact against himself. This may be illustrated by the familiar case of the charge by a Tradesman in his books, where the debit to one, would be an admission that the party debited, and not a different individual was the party to whom the credit was given, in other words the debtor.—So the putting in by a Landlord of a distress for subsequent rent, after a forfeiture under the lease, would be an acknowledgment of the then subsistence of the tenancy, and involving accordingly a waiver of the forfeiture.—Again the payment by an Executor of one of the legacies under the Will, would, prima facie, be an admission that he had assets sufficient to discharge the whole; since, as between legatees, an executor has no right to prefer one to another. It would be different, however, were the payment that of a debt, so far as regards debts in the same degree, since of these he is entitled to select one debt for payment in priority to another. Still as between debts of different degrees the right of preference does not exist.—Consequently payment of a debt of lower degree, would be an admission of assets.
sufficient to pay all of a higher; that is, at least, an admission *prima facie*; though like other admissions of this nature, liable to be explained, and displaced by the circumstances.

So, when the circumstances of any particular case would, in an ordinary course of conduct, require the taking of some step, or the giving vent to some expression, to contradict the natural inference of passiveness or silence, a failing to do this would amount to an admission of the inference.

The receipt of accounts, for instance, by one merchant from another, without objection within some reasonable period to its items, would *prima facie* be an acknowledgment of the *propriety* of the account; as, between ordinary individuals, would be the raising the objection to one or more only of the items be an admission of the correctness of the rest. So, receipt by a tenant, without objection, of a notice to quit on a particular day, would, from his silence, be a *prima facie* admission that his tenancy in fact expired on that day.

A man might be naturally expected to contradict, possibly to resent, any statement coming to his knowledge, prejudicial to his interest or his character; and especially if made in his presence, and addressed to himself. Under ordinary circumstances, accordingly, his failure to do this, would, *prima facie*, be held to amount to an admission of the truth of the statement.

This, however, would not apply to judicial proceedings; and the deposition of a witness taken in a judicial proceeding against a party, is not evidence in another proceeding against him. It would be no ground for the admission of the evidence, that he was present, and did not cross-examine the witness; for the nature of a judicial proceeding prevents a party from interposing to contradict or comment on the statement of a witness, as he would, in common conversation.
Where, however, the deposition or statement of third parties has, on some former occasion, been used by a party for his own purposes as true, this might be resorted to on another occasion, as evidence in the character of admission against himself.

Letters addressed to a party do not appear ordinarily to require specific contradiction as to their statements; and the want of contradiction accordingly, when this is so, would not, on the score of conduct, amount to an admission.

"What," said Lord Tenterden, Chief Justice, "is said to a man before his face, he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering a letter is quite different; and it is too much to say, that a man, by omitting to answer a letter at all events, admits the truth of the statements that letter contains."*

The point is thus well put by Mr. Roscoe;—

"It should be observed that although silence has been considered to be evidence of assent to a statement made orally in the presence of the party, no such inference can be fairly drawn from the mere omission of a party to reply to a letter, unless sent under circumstances which entitle the writer to an answer. A statement, which may be immediately contradicted without any further trouble than an oral denial, may be presumed to be true; but no one is, or ought to be, expected to answer every letter that is written to him. But it has been held that such a letter may be used as evidence of a demand, and of so much as may explain the demand though not of any fact stated in it. Gaskill vs. Skene, Q. B., 19, L. J., 275".†

Letters and other papers, however, found in the possession of a party might still, under circumstances, be made use of as evidence against him, on the ground of acting upon them under a knowledge of their contents, which those circumstances might ascribe to him. This species of evidence occurs more often in criminal than in

† Roscoe on Evidence, 46.
civil proceedings, especially those in conspiracy or treason, and it must always be received with caution.

A distinction in the case of statements, has been made between those by strangers and those interested; as, what a stranger says may not require notice. As it was said by Best, Chief Justice;—* “It may be impertinent, but may best be rebutted by silence.” This would be the stronger, if the statement were not addressed to the party, or did not in itself call forth a reply.

In all cases in which conduct, as manifested by silence, is insisted on as an admission, it is of course of the essence of the case that the party is capable of being shown to have had knowledge of the truth or falsehood of the statement. If he did not possess that knowledge, his keeping silence could be no evidence against him. It was observed by Lord Wensleydale in Hayslep vs. Gymer;—†

“A declaration made in the presence of a party to a cause, becomes evidence, as showing that the party, on hearing such a statement, did not deny its truth. Such an acquiescence, indeed, is worth very little, where the party hearing has no means of personally knowing the truth or falsehood of the statement.”

Any thing done by a party in a particular Office, or an assumption by him of a particular Character, would be an admission as against himself of his holding the Office, and sustaining the Character. Thus, the execution by the Sheriff of a writ addressed to him would be an admission that the party putting it in execution was himself the Sheriff; as would process issued against another, ostensibly as the attorney of some third person, be proof as against the party professing to be the attorney, that he was such in fact.

* Child ex. Grace, 2, Carrington and Payne, 193.
† 1, Adolphus and Ellis, 165.
Upon like principle, the Recognition by a third party of the office or character of another would be a prima facie admission of title as against the party making it. Thus, in a case in which B had accounted with A, as farmer of the post-horse duties, in an action by A against B for the recovery of penalties for which A, as such farmer, had a right of action against B, B's previous accounting with A was held sufficient to dispense with the proof of A's appointment. And in an action for slandering the plaintiff in his profession of an attorney, the words themselves importing that the defendant would have the plaintiff struck off the roll of attorneys, the threat was held to be an admission of the plaintiff's character as attorney.†

"I take it to be quite clear," said Lord Ellenborough, 'that any recognition of a person standing in a given relation to others, is prima facie Evidence against the person making the recognition, that such relation exists."—‡ A proposition adopted by Lord Lyndhurst in a much later case.§

The case in which the admission arising out of conduct is usually the most conclusive, is that on which it has led to the influence of the conduct of another, and the position of that other been altered by it.—Such, for instance, would be one in which a tenant making alterations, the landlord were to stand by, looking on without objection. His conduct would be an implied admission of acquiescence in the alteration, with all the consequence which might flow out of it, even though he in fact merely said nothing.

However, all cases of admission must depend very much on their own individual facts; and the application to these of the general principles pointed out, must be always more or less matter of discrimination, and

* Rawford v. Mackintosh, 3, Term Reports, 632.
† Berryman v. Wise, 4, Term Reports, 366.
‡ Dickenson v. Coward, 1, Barnewall and Alderson, 679.
§ Inglis v. Spence, 1, Crompton, Meeson and Roscoe, 436.
often a very nice one. Wherever what is relied on is mere matter of admission, it is open to explanation; and, where no one was misled by it, to rebuttal.

In a subsequent Chapter* we shall treat of a distinction between an ordinary admission preferred only as a matter of evidence, and that peculiar species of admission technically termed an estoppel, which precludes or estops a party from gainsaying it. For the present, however, we only deal with the class of admissions, subject, as any other evidence, to qualification and explanation; and to this all are open not ranging under the technical head of estoppel.

The general law as to the power of explaining away admissions when another has not been induced to alter his position by them, is thus laid down by Mr. Justice Bayley, in a case of Heane vs. Rogers,† a leading one on the subject:—

"There is no doubt but that the express admissions of a party to the suit or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken, or were untrue, and is not estopped, or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him), in that transaction; but as to third persons, he is not bound. It is a well-established rule of law, that estoppels bind only parties and privies, not strangers."

In a later case of Newton vs. Liddiard,‡ the application of the rule thus laid down was attempted to be denied to a case in which the admission arose from a mistake in law; in reliance on an analogy to the rule preventing the recovery back of money paid under a mistake in law; but this absurdity was rejected by the Court; Lord Denman, C. J., observing in his judgment:— "The general doctrine laid down in Heane

* Chapter on Estoppels.
† 9, Barnewall and Cresswell, 587.
‡ 12, Queen's Bench, 925.
vs. Rogers, that the party is at liberty to prove that his admissions were mistaken or untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition, is applicable to mistakes in legal liability, as well as in respect of fact."

The same principle would apply, however solemn in point of form and to admission on the admission, and even if made on oath; as for instance, when found in an answer to a bill in Equity.

Thus in Lord Londesborough's case,* the Directors of a Joint Stock Company having, in a former suit against them, made certain admissions in their answer; these, on the ultimate winding up of the Company under an order of the Court, were sought to be set up as evidence against them, concluding the question arising on the proceedings under the winding up, though alleged to have been made per incuriam, that is, incautiously, and under a misapprehension. The Court, however, refused to allow this use to be made of the admission; Lord Justice Knight Bruce, after pointing out that the admissions were made in a different litigation, and between different parties, thus observing:—

"They are, therefore, as Mr. Cairns very properly observed, not in the nature of estoppels; they are not here to be considered as within those rules of pleading which apply to proceedings between the parties to the particular litigation. They are used for another purpose, and are merely admissions in the technical sense of that phrase, when we are speaking of the law of Evidence; and as to those probably the rule cannot be better expressed than it was by Mr. Justice Bayley in the case of Heane vs. Rogers where he says," &c. [Quoting the passage cited above.] And His Lordship then adds:—"I am of opinion, that this case is not brought within any of the exceptions that Mr. Justice Bayley mentions; that, accordingly, it is competent to each of the persons whose answers have been read against them to show, that the answers were, through mistake or otherwise, inaccurate; and we have to consider the matter here as merely in a civil point of view, and not for any purpose directly or indirectly criminal."

* IV. De Gex MacNaghten and Gordon, 423.
Though the circumstance, that the statement relied on as an admission, was made upon oath, would not prevent the reception of evidence in explanation, of course, under ordinary circumstances, the contradiction of any statement made under such a solemnity, would require to be cautiously entertained. Indeed, any thing in the way of admission existing in a written or any other solemn form, would carry with it a certain natural weight; and this would obviously be greater, in proportion to the solemnity of the writing, or the occasion to which it owed its existence.

On the other hand, it is well observed by Professor Greenleaf:

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

The witness might even wilfully misrepresent the actual terms of expression; or give a false coloring to the whole.

"Of all kinds of evidence' (says Mr. Starkie) 'that of extra-judicial and casual declarations is the weakest and most unsatisfactory; such words are often spoken without serious intention, and they are always liable to be mistaken and misremembered, and their meaning is liable to be misrepresented and exaggerated.

A hearer is apt to clothe the ideas of the speaker as he understands them in his own language, and by this translation the real meaning must often be lost. A witness, too, who is entirely indifferent between the

parties, will frequently, without being conscious that he does so, give too high a coloring to what has been said.

The necessity for caution cannot be too strongly and emphatically expressed, where particular expressions are detailed in evidence which were used at a remote distance of time, or to which the attention of the witness was not particularly called, or where misconception was likely to arise from their situation, and the circumstances under which they were placed, or from the prejudice of the witness, especially if his object was to extract an admission for the purposes of the cause.

Such evidence is fabricated easily, contradicted with difficulty. In cases of this kind, the conduct of the parties, and those facts and circumstances of the case which are free from suspicion, are frequently the safest and surest guides to truth.

Evidence of this nature is of the very weakest kind, when it is doubtful whether the party making the admission knew his legal rights and situation."

Admissions attributable to conduct would seem to require almost more caution than any other in their reception. In the varying constitution of the human mind, operated on as our intellectual being is liable to be, by differing influences, sometimes of a moral, sometimes of a physical, character, the conduct of one man, in the same circumstances, might be directly opposite to that of another; and, indeed, opposed to ordinary experience. And this principle would apply alike to civil and to criminal cases, though it is probably in the latter that its application would come more prominently into play, and there are some singular illustrations to be found in the books on the subject.

One early case, mentioned by Lord Hale and often referred to, is that of an uncle charged with the supposed murder of his niece. She had been heard to utter a cry of "Good uncle, do not kill me," and shortly after disappeared. Suspcion of her murder lighting upon the uncle, he was called on to

* Starkie on Evidence, p. 825.
produce her. This he could not do; and, in his alarm, found another
girl resembling the niece, and passed her off as such. The fabrication
was detected, and the unfortunate man was convicted of the murder, and
executed. It afterwards turned out that the girl was alive all the time;
in fact, after the execution, re-appeared; having temporarily only ab-
scended. The man, in his fear, had blundered himself on to a scaffold.

The case has become a sort of land-mark in the Law of Inferential Evidence as deducible from Conduct. In a case tried in the Supreme
Court of Calcutta, at the 5th Criminal Sessions, 1861, it was cited by
Sir Barnes Peacock, the able Chief Justice who presides over that
Court, as illustrative of the extent to which some motive opposite to
the apparent one, may in fact be the secret spring of conduct.*

A well-known tale in the Arabian Nights, though one of fiction,
furishes another good illustration. It is the one of the Dwarf Haunch-
back, who having met with his death by accident in the house of a par-
ty, the latter, under apprehension of being charged with a murder, passed
the body on by stealth to his neighbour. The neighbour took the like
alarm at finding it in his own house, and in his turn passed it on to his,
and he to a fourth. The clandestine removal of the body might well
have assigned to each in his turn the presumption of murder.

To these illustrations we may add the sensible observations of
Mr. Best, which, though addressed more particularly to a case of flight,
have in their principle, a bearing on the whole question:—

"But even the clearest proof that the accused absented himself to
avoid the actual charge against him, although a strong circumstance, is
by no means conclusive of guilt. Many men are naturally of weak nerve;
and, under certain circumstances, the most innocent person might deem
a trial too great a risk to encounter. He may be aware that a number
of suspicious, though inconclusive facts will be addressed in evidence
against him; he may feel his incapacity to procure legal advice to con-
duct his defence, or bring witnesses from a distance to establish it; he
may be fully assured that powerful or wealthy individuals have resolved

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* Regina vs. Ramcoomar Mitter, Englishman, 2nd September 1861.
on his ruin, or that witnesses have been suborned to bear false testimony against him. Besides even, under the best regulated judicial system, more or less vexation must necessarily be experienced by all persons who are made the subjects of criminal charges, which vexation it may have been the object of the party to elude by concealment, with the intention of surrendering himself into the hands of justice when the time for trial should arrive. Considerations like these are entitled to weight at all times, and in all places; but in dealing with the general question, the nature and character of the tribunal before whom, and of the administration of justice in the country where the trial is to take place, must never be lost sight of.

Mr. Norton in addressing himself to the same subject says:—"At the very moment at which I write, I am engaged in defending a man in the Mofussil Court against a charge of instigation of murder. The charge is of the most trumpety description, got up by the malevolence of the man's own near relation; yet no sooner was the accusation brought forward, than he fled first to Bangalore and then to Madras. This is not the only case of a similar nature within my own personal experience." And he adds in a note:—"The man has been since acquitted."

The admissions by which a party may be bound are not confined to those made by himself. It is sufficient if they are made either by those through whom he claims, being in privity with him, or by those identified in interest with him.

The admission, however, must be made during a subsistence of interest in the property in the party making it; and it must be through that party that the title was derived.

By the term 'privity' is meant successive relationship to the same right of property; as for instance, donor and donee, grantor and grantee, lessor and lessee.

* Best on Presumption, p. 821.
† Norton on Evidence, 878.
cestor and heir, testator and executor, intestate and administrator, or, in the case of chattels, assignor and assignee. All falling within the second class of the enumerated series, would be bound by the admission of the first, from whom they claimed, that is donee by those of his donor, and so on.

By the expression interest is meant an interest either joint or derivative. A mere interest of similarity, even though in a sense one of community, would not suffice, unless it amounted to an actual unity.

Accordingly, the admission of one tenant in common, would be no evidence against his co-sharer; nor would the admission of one of a body of trustees be evidence against the others, or that of one member of a corporation be evidence against the body. So far has the principle been carried, that in a case where two persons were in partnership, and an action was brought against them as part owners of a vessel, an admission made by the one, as to a matter not being a subject of the partnership, but of the co-part-ownership was held inadmissible against the other.*

The question of identity of interest often arises in the case in which, proceedings being prosecuted in the name of one person, the real interest in the subject of dispute is vested in another; and upon admissions made by either the former or the latter: Here, as a general rule, the identity of the interest would constitute the admissions of either, evidence against the other, and in support of the defence.

Thus, as an illustration of the former,—that in which the admission was that of the party in whose name the suit was brought,—it may happen that a party might be putting in suit a right of action which, though beneficially vesting in himself, may have been acquired and be subsisting in the name of another, while the restrictive state of the law, with reference to the assignability of such a right, would require it to be prosecuted, not in

* Jaggers vs. Binnings, 1, Starkie's Reports, 64.
his own name, but that of the third person accordingly. For instance, the subject of the action might be a chose in action, say a bond assigned to another, in respect to which the legal right of suit would be not in the assignee, but in the assignor, the obligee;—or it might be a note taken in the name of a trustee, where the legal right would be in him;—or it might be damages sought by a consignee to be recovered from a shipper, but where the right of action would be in form with the consignor. In all these cases the action would have to be brought in the name of him in whom the legal right vested. Yet the Court not looking beyond the record, it would hold the party really interested bound by the admissions of the nominal plaintiff. In fact, it would regard him as the real plaintiff, and every one, accordingly, suing in the name of another, would have to do so with all the risks to which the case would have been exposed, had that other been the substantial as well as the nominal plaintiff. At least, such would be the state of the case in the proceedings in the action itself; though the embarrassment might be avoided by a timely application for the interference of a Court of Equity.

So in the converse case, that in which the admission in question was that of the party actually interested, the admission might be set up against the nominal plaintiff on the record, the identity of interest having been first established.

Thus, in an action on a bond, the obligee being, in fact, a trustee only for others; the admission of the parties beneficially interested might be set up in defence to the action. So, in an action on a policy effected in the name of another, the admissions of the parties for whose benefit the policy was effected, would be receivable as against the party in whose name the suit was brought.

The admissions, which, in the case of strangers to the record, are thus receivable, are not confined to the instances in which they are set up in bar to the action as against a plaintiff. The same principle would apply, were the admission that of a party in interest with the defendant, and brought forward as against the defendant; just in the same way as were the admission that of the defendant himself.
"The cases," says Mr. Justice Maule, in May vs. Taylor, 

— "show that the rule with respect to the declarations of a plaintiff, is to be considered as applying to a declaration made by a person not named as party to the record, but who is really and substantially interested as plaintiff; and in the same way, one who, though not named as defendant, is really and substantially defendant."

Accordingly, in an action of trover brought for the recovery of a deed, which the defendant retained at the request of one W. R., and in the detainer of which W. R. was substantially interested, the admission of W. R., in favor of the plaintiff's claim, were admitted as evidence for the plaintiff.

In all cases, however, in which the admission of an individual, not party to the record, is sought to be set up, on the ground of a substantial interest, it could be only to the extent of his own interest, that the admission would be receivable. Thus, in a case in which a Trustee represented an interest for life, as well as one in remainder, it was held that no admission of the tenant for life could be received so as to prejudice the party in remainder. Indeed, before the admission of any beneficiary could be received as against a plaintiff trustee, the nature of the interest of the party making the admission must be shown, so that it may clearly appear that he alone is the person entitled to the benefit resulting from the action.

Beside the classes of declarants to which we have referred, there is yet a third or middle class, in which the admissions of even entire strangers to the proceeding itself are received, on the ground of the community of the question involved in it. Thus, for instance, in an action against a Sheriff for an escape of the debtor, any admission which, in an action against the debtor for the recovery of the debt, would have been receivable in proof of the debt, would be receivable in the action against the Sheriff for letting the

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* 6, Manning and Granger, 266.
† Harrison vs. Vallance, 1, Bingham, 45.
‡ Doe vs. Warnwright, 8, Adolphus and Ellis, 691.
debtor escape. The Sheriff is treated as standing in the shoes of the
debtor, the practice being to let in such evidence in general as would be
legally admissible in an action between the parties themselves. So, in
any ordinary case of an action against the Sheriff, the declarations of the
party who has indemnified the Sheriff, are evidence against the defendant.

It has been questioned whether admissions made by a party in one
character could be set up against him in a suit
instituted by himself in another;—for example,
whether statements made by an executor or assign-
ee, before he had become such, would be receivable as evidence against
himself in a subsequent suit by him in that character. The better
opinion appears to be that they would not. His suit, it will be observed,
would be in a different form, while it would be, not personal, but fiduciary;
and it would not appear just that those on whose behalf he was suing
as a trustee, should be damaged by statements, even of his own, made
before he became such.

In the case of an Infant suing by Guardian or Next Friend, it is the
Infant who is regarded as the real plaintiff, the
Guardian or Next Friend being merely, as it were,
the promoter of his suit, or the officer to conduct
it. Consequently, the admissions of the Guardian or Next Friend could
not be set up in the way of evidence as against the Infant.

Admissions, however, made in the course of the proceeding, and in
facilitation of it; such, for example, as might be
made by the Attorney in the cause, would be
binding on the infant. This is an exception made in favor of a general
convenience; and, in fact, in the long run the interests of infants are
promoted (particularly as respects a saving of expense) by a permission
to those having the management of their suits to make formal admis-
sions in them.

In any case of Agency, a party would be bound by the admissions
of his agent, had in the course of his employment,
and in relation to the business intrusted to him,
though no further. Thus, the declaration of a
A servant employed to sell a horse, is evidence to charge the master with a warrant, if made at the time of sale. If made at any other time, the facts must be proved by the servant himself. So, an admission by the servant, not relating to the business in which he was employed, is no evidence against the master.

The rule would extend to a Wife in those cases, though in those cases only, in which she could be treated as acting as her husband's agent.

So, it would apply to the Attorney or Counsel of a party in a suit, as respects the ordinary routine of the cause, though not to collateral matters or statements.

The general Law on the subject of admissions by an agent was thus laid down by Sir William Grant, Master of the Rolls, in a case of Fairlie vs. Hastings, which is always treated as a leading one on the subject;—

"As a general proposition, what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may, undoubtedly, within the scope of his authority, bind his principal by his agreement; and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made, may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove that the agent did make the statement or representation. So with regard to acts done, the words with which those acts are accompanied, frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But except in one or the other of those ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it; though it may have some relation to the business, in which the person making that assertion was employed as

* 10, Vesey, 123.
agent. The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission; and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting any thing any person has asserted as to him, respecting his conduct or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion."

The same general principle is tersely put by Mr. Justice Gibbs, in Langhorn v. Allnutt,* where he says;—"When it is proved that A is agent to B, whatever A does, or says, or writes, in the making of a contract as agent of B, is admissible in evidence against B, because it is part of the contract which he makes for B, and which therefore binds B; but it is not admissible as the agent's account of what has passed."

The letters of the agent to the principal, merely containing a narrative of the transaction in which he had been employed, would not be admissible as evidence against the principal.

Somewhat akin to the case of agency, is that in which one party referring another to a third for information, the statements of the referee are treated as the admission of the party referring. Thus is a case in which executors had referred a party to a merchant for information as to the assets of their testator, they were held bound by his replies to the inquiries.† In an action in which the delivery of goods by the car-man was disputed, and the defendant had said, speaking of the car-man;—"If he will say that he delivered the goods I will pay for them,"—and the carman had stated that the goods had been delivered, he was held bound by the reply.‡

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* 4, Taunton, 519.
† William vs. Innes, 1, Campbell's Reports, 164.
‡ Daniel vs. Pett, 1, Campbell's Reports, 364.
The principle is thus well put by Mr. Roscoe;—

"Where a party to the suit constitutes a third person, his agent for the purpose of an admission, the admission so made is evidence. Thus, if a person agrees to admit a claim provided I. S. will make an affidavit in support of it, such affidavit is proof against him."*

A Principal would not be an agent for the Surety within the rule; so that in any proceedings against the surety, he would not be bound by the admissions of his principal.

The existence of a joint interest would make the admission of any one of the parties concerned admissible against the others, in all matters having relation to it. The admission, however, must relate to the subject-matter in dispute, and be made by the declarant in his character of a person jointly interested with the party against whom it is tendered, and while that interest continued in existence.

The reception, however, of the evidence is founded on the existence of the joint interest, as either admitted or previously proved. It would be inadmissible on the question of the interest itself, were that interest in controversy; nor could it be received after the interest had terminated.

The case of partnership would be an obvious illustration of the rule. Any statement of a fact in reference to a partnership transaction, and that whether representation, or misrepresentation, would bind each member of the firm individually.

Indeed, this has been carried so far as to fix a party by an admission, made by his partner, even after a dissolution of the partnership, the admission relating to the subject-matter of the partnership.† Of course the partnership interest would continue, notwithstanding the dissolution, until the whole affairs were wound up.

* Roscoe on Evidence, p. 49.
† Draper vs. Pritchard, 1, Russell and Mylnie, 191.
In the case of mere co-defendants in a suit, the answer, however, of one defendant could not be read as such as any admission against the other. In a case of Parker vs. Morrell,* which was a suit having reference to the concerns of a former partnership, of which one Cox had been a member, but which partnership had been dissolved, and subsequently to its dissolution Cox had become bankrupt, and had obtained his certificate, and he being made party to the suit had put in an answer admitting the whole case made by the bill, it was attempted to read his answer against the other partners and defendants, as an admission by a partner touching the partnership affairs; and in fact it had been ordered to be read at the original hearing de bene esse, that is, conditionally, without prejudice to the question of its ultimate admissibility. This, however, was reversed on appeal by Lord Cottenham, Lord Chancellor. His Lordship, advert- ing to the distinction that in the case of partnership the admissions of a partner had been received, observed;—"The party making the admission was at the time subject to a joint obligation with the party against whom it was to be used, while in the case before the Court the interest had wholly ceased by the bankruptcy of the party."

In the instance of an ordinary joint contract not being one of partnership, and the severance of the joint interest by the death of one of the contractors, his representa- tives could not be bound by any admission made after his death by the survivors.

The admissibility of this species of evidence is not confined to the case of actual interest, that is interest in property or contract. It applies to the cases in which parties are engaged in one common enterprise or design. Thus, in a case of conspiracy or trespass, the acts and declarations of co-conspirators or co-trespassers would be receivable against the other.

The community, however, must be first established to the satisfaction of the Judge before the evidence could be received; and the act or

* 2, Phillipps' Reports, p. 453.
declaration in question must have reference to the common object, and
be in pursuance or explanation of it; though it would be immaterial
whether, in point of time, it occurred before or after the party against
whom the evidence was given had joined in the common scheme.

Mere narratives of past events, and not forming part of the res
*gest*ae of the design, would not be admissible as against any one but the
party giving them.

Confidential overtures of pacification are on grounds of public
policy treated as not amounting to admissions. Nor is it necessary to secure their protection, that
they should be stated in terms to be "without prejudice." It is sufficient if they are so impliedly. Were it otherwise,
great difficulty might often be thrown in the way of an amicable
adjustment.*

To afford protection, however, the offer must be to some extent at
Overtures not being all events of a confidential character. Were it
confidential.
wholly divested of this, it would be an admission
of some liability; though what would be dependant on the circumstances;
and being an offer the basis of which was to purchase peace, as a matter
of evidence, the admission would, under ordinary circumstances, carry
with it but little comparative weight.

* And see Ante, p. 163.
CHAPTER XVIII.

On Estoppels.

The branch of the Law of Evidence of which that of Estoppel forms part is referred to by text writers, sometimes under the head of Presumption, and sometimes under that of Admission. It might, perhaps, be ranged under either, with almost equal propriety; but on the whole we prefer to place it under that of Admission. Though in the preceding Chapter, proposing to treat it separately from the general subject of Admissions, we have alluded to it as a branch of that head of the Law.

The distinction between an Estoppel and the more ordinary class of Admission, is the higher amount of conclusiveness, which the law assigns to the former. In fact, we shall see that it imports something even beyond evidence: it amounts to a legal bar to question.

To borrow the definition of the author of the Leading Cases:

An estoppel is an admission, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature,—so high and so conclusive, that the party whom it affects is not permitted to aver against it, or offer evidence to controvert it;—though he may show, that the person relying on it is estopped from setting it up; since that is not to deny its conclusive effect as to himself, but to incapacitate the other from taking advantage of it.

Such being the general nature of an estoppel, it matters not what is the fact thereby admitted, nor what would be the ordinary and primary evidence of the fact, whether matter of record, or specialty, or writing unsealed, or mere parol: the fact may in each case be proved, the ordinary evidence rendered unnecessary by an estoppel; and this is no infringement
on the rule of law requiring the best evidence, and forbidding secondary evidence to be produced till the sources of primary evidence have been exhausted, for the estoppel professes, not to supply the absence of the ordinary instruments of evidence, but to supersede the necessity of any evidence by showing that the fact is already admitted; and so, too, has it been held that an admission, which is of the same nature as an estoppel, though not so high in degree, may be allowed to establish facts, which, were it not for the admission, must have been proved by certain steps appropriated by law to that purpose.*

To this we add the definition furnished by Mr. Best, who says:—

"On the whole, an estoppel seems to be, when, in consequence of some act, generally speaking, some act to which he is either party or privy, a person is concluded from showing the existence of a particular state of facts. It is based on the maxim, "Allegans contraria non est audiendus,"† and is that species of presumptio juris et de jure‡ where the fact presumed is taken to be true, not as against all the world, but as against a particular party, and that only by reason of some act done. Hence also it appears that estoppels must not be confounded with conclusive evidence; they being conclusions against parties imperatively drawn by law from particular facts proved, while by conclusive evidence is meant some piece or mass of evidence sufficiently strong to generate conviction in the mind of a tribunal."§

An estoppel may accordingly be taken to be that which concludes the party against whom it is set up, from disputing its own averment; whether that averment be direct, as for example the statement of any given fact, or constructive as legally deducible from the circumstances; and the difference between a mere admission and an estoppel is that the former can be set up as Evidence only, while the latter amounts to a legal Conclusion.

† A party is not to be heard to allege the contrary.
‡ See Ante, Chapter I., p. 58.
§ Best on Evidence, p. 404.
Some misconception has been introduced into the subject by an unhappy description of Lord Coke, in which he says,—"An estoppel is where a man is concluded by his own act or acceptance to say the truth;"* as though the doctrine were based on the principle of shutting out truth by a technicality. It is founded, however, in fact, on no such absurdity. The whole principle of estoppel is, that what has once been affirmed, or represented to be truth, or established to be so in a judicial controversy, shall not be contradicted by either the affirmant, the party against whom it has been established, or those claiming through him, to the disparagement of those who, being in a position to avail themselves of it, have acted on it.

It is, indeed, as regards the binding of a party to his own affirmation, a principle alike of truth and of honesty; while, as respects the obligatory effect it imports into the judicial decision, it is founded on what is expressed by the maxim;—"Interesse republicae ut sit finis litium;"†—or in other words, upon an appreciation of the endless confusion which would arise, were matters once solemnly determined by a competent Court, to be subject to be again dragged into controversy in some renewed litigation.

Estoppels have been divided into three classes.

1. By matter of record.
2. By deed.
3. In pais.

A matter of record, as its name would import, is something forming part of the records of a Court. It is at once the narrative and the proof of its proceedings.

In modern times, the more usual form in which the question of estoppel by record becomes matter of discussion in our Courts, is when it occurs in the shape of a judgment, on some matter of disputed right. In this form we have

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* Co. Litt., 352.
† "It concerns the public interest that suits should have a termination."
already in a former Chapter* anticipated the subject; showing for what and against whom a judgment is capable of being insisted on as an estoppel; and there we leave this part of the case.

It is not, however, the actual Judgment only of the Court which concludes as an estoppel. Its general Records have the same effect. It is laid down by Lord Coke:†—

"The rolls being the records or memorials of the Judges of the Courts of record, import in them such incontrollable credit and verity, as they admit of no averment, plea, or proof to the contrary. And, if such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself; and the reason hereof is apparent, for otherwise (as our old authors say, and that truly,) there should never be any end of controversies, which should be inconvenient."

Accordingly, in a case in which a party, tried under a Commission addressed to certain Justices, or any two of them, was convicted, and afterwards assigned as a cause of error, for setting aside the conviction, that in point of fact there was but one Justice present at the trial, it appearing on the face of the record that there were a sufficient number there, the accused was held estopped from questioning the fact stated in the record. "The authorities," said Lord Tenterden, Chief Justice, in delivering the judgment of the Court, "are clear that a party cannot be received to aver as error in fact a matter contrary to the record." And he proceeded to cite the passage we have quoted from Lord Coke; and referred among others to an instance put by Lord Hale where the Court was not, in fact, sitting at all, though otherwise appearing on the record; and yet the record was not allowed to be questioned.‡

Even in the case of Records, however, there are exceptions to the rule establishing their conclusiveness; and they are as follows:—

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* Chapter X., p. 279, passim.
† 1, Institute, 260.
‡ The King v. Carlisle, 2, Barnewall and Adolphus, 362.
1. Where the record is *coram non judice,* that is where the Court had not jurisdiction to entertain the question,—as for instance, in India, were a Mofussil Court to take on itself the trial of an offence on the high seas, which would belong only to one of the Supreme Courts of the Presidencies administering a jurisdiction in Admiralty; or a Police Magistrate to assume the decision of a civil right.

2. Where the matter appears in the same record; as, for instance, the record itself shows the reversal of the judgment relied on.

3. Where the allegation on the record is uncertain; that is, not alleged with sufficient exactitude to escape doubt as to its construction,—certainty, to every intent, being the essence of an estoppel. Says Lord Coke:—"Every estoppel must be certain to every intent, and not to be taken by argument or inference."

4. It is alleged by way of supposition.

5. Or is not traversable or material—as, for instance, the day in an indictment.

It should be observed that the doctrine of estoppel is not restricted to the records of Courts. It would extend to such things as Charters or Letters Patent, and the statements contained in them.

*Estoppel extends to Charters and Letters Patent.*

*An estoppel by deed* is that which binds the parties to the instrument, and those claiming through them, to its statements and operation, as an admission of the truth, that is, at least, as to the matter intended to be effected by the instrument, and the facts recited in it. The solemnity of the seal prohibits all subsequent dispute of the acknowledgment.

A good illustration of the doctrine is to be found in a case of Bowman vs. Taylor,† where the plaintiff, a patentee, had granted to the defendant, a license to use his (the plaintiff's) invention, at a stipulated

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* Not before a Judge having authority.
† Co. Litt., 352b.
‡ 2, Adolphus and Ellis, 278.
payment, covenanted for by the deed; and the deed contained a recital of the plaintiff having invented the improvements in question, invention being of course of the essence of the validity of the Patent. The defendant pleaded that the invention was not, in fact, a new one; setting up the defence as a ground why he should be relieved from the liability to payment, contracted on the faith of the patent's validity. The Court, however, held him concluded, that is to say estopped, by the recital. It was observed by Mr. Justice Taunton;—"The law of estoppel is not so unjust or absurd as it has been too much the custom to represent. The principle is, that where a man has entered into a solemn engagement by deed under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted. The question here is, whether there is a matter so asserted by the defendant under his hand and seal, that he shall not be permitted to deny it in pleading."

The doctrine of estoppel, however, assumes the legal validity of the deed. Where the instrument itself is open to impeachment on the ground of fraud, illegality, or immoral purpose, it would not apply; and any of these grounds could be set up to displace the estoppel.

"The meaning of estoppel," says Baron Martin, "is this,—that the parties agree for the purpose of a particular transaction, to state certain facts as true; and that, so far as regards that transaction, there shall be no question about them. But the whole matter is opened where the statement is made for the purpose of concealing an illegal contract; for persons cannot be allowed to escape from the law by making a false statement."**

Indeed it is not necessary that there should be any actual statement at all. Suppression or omission of the real transaction would suffice. Thus, a bond given to a woman securing to her a pecuniary payment in return for future cohabitation, would naturally be silent as to the consideration; but being in fact for an immoral purpose, it would be bad, and the obligor would not be estopped from showing the nature of the consideration.

* Horton v. Westminster Commissioners, 7, Exchequer Reports, 791.
In the case of a deed obtained from any one while under duress or in a state of drunkenness, there would, of course, be no estoppel.

A notion had at one time got abroad, that the doctrine did not apply to the case of Trustees acting on behalf of the Public, and their deeds; since its application, in such a case, might cause wrong to innocent parties; and this was formally insisted on in a case of Doe dem Levy vs. Horne.* But it was observed by Lord Denman, Chief Justice, in delivering judgment in the case:—“There is no authority for holding that Trustees for a public purpose are in any peculiar state of protection on such a point.” Doe dem Levy vs. Horne, was the case of a mortgage of the tolls of a bridge by Commissioners under a local act, empowering them to mortgage. There was a mortgage prior to that of the plaintiff which, if capable of being set up in defence, would, by reason of its priority and the legal estate it carried with it, have defeated the title of the plaintiff; and it was set up as a defence with that object. The Court, however, held that the defendants were estopped, by their own deed of mortgage to the plaintiff, from setting up the prior one to defeat it. All question as to an exception in the instance of Trustees on the mere ground of their acting on behalf of the Public is now, accordingly, considered as at an end.

An exception would still be recognized, however, in the case in which the deed in question was the violation of some public Statute, the contents of which, it would be presumed, would be alike known to both the contracting parties.

There is one class of transactions peculiar to India, from which the application of the doctrine has been withdrawn. As a general principle of English Law, subject to qualification in a case of fraud or illegal consideration, in a suit founded on a bond or other instrument under seal, the solemnity of the seal supersedes the occasion for proof of consideration,

* 3, Queen's Bench, 757.
the law implying it. In India, however, at least in the Mofussil Courts, Regulation Law (Regulation III. of 1793, Section 15,) prohibits the Courts from decreeing the payment of any sum due on a tumussook or bond, unless upon proof either of its execution in the presence of two credible witnesses, or of the consideration. This, it will be observed, in terms puts the matter in the alternative, but the Calcutta Sudder Dewany Adawlut requires proof of consideration in all cases. "It has been the established practice of our Courts," says one of its Judges,* "in cases of contract, to require satisfactory proof that consideration has actually been received, according to the terms of the contract. It has never been held in our Courts that a contract made under seal, of itself imports that there was a sufficient consideration for the agreement."

The Agra Court seems less strict, or, at all events, less regular in its practice. "On the other hand," says Mr. Arthur Macpherson, in his useful book on Mofussil mortgages, the Agra Court recognizes a distinction between those contracts which are evidenced by deeds duly executed, and those which are not, although it has not defined with any precision the length to which this distinction is to be carried. A strong inclination is, on the whole, perceptible in that Court, in favor of duly executed deeds, considerable weight being attached to them, and statements contained in them not being generally discredited, except on convincing evidence. The regulation VIII. of 1805, Section VI, is construed as making proof of consideration unnecessary as a general rule, where there is a duly executed deed. The decisions of the Court on the subject are, however, not quite consistent with each other."†

The doctrine of Estoppel applies only to essential averments. The actual fact as to dates, quantities, descriptions, and so forth, when not of the essence of the instrument or its transaction, would not be concluded by any statement of them a deed might contain.

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* Sudder Dewany Adawlut, 1853, p. 25.
† Macpherson on Mortgages, 56.
It was at one time questioned how far, in the case of a Recital contained in a deed, its statements would be matter of estoppel, and this was said, by Lord Coke, not to conclude, because it was no direct affirmation. The Law, however, has, in more modern times, been placed on a sounder footing.

It was thus laid down by Lord Wensleydale, (then Baron Parke) in a case of Carpenter vs. Buller,† which has been recognized as an authoritative one on the subject:—

"If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital, notwithstanding what Lord Coke says on the matter of recital in Coke Littleton, 332; and a recital in instruments not under seal may be such as to be conclusive to the same extent."

* * "By his contract in the instrument itself, a party is assuredly bound, and must fulfil it. But there is no authority to show that a party to the instrument would be estopped, in an action by the other party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence; for instance, in another suit, though between the same parties, where a question should arise whether the plaintiff held at a rent of £170 in the one case, or was married in the other case, it could not be held that the recitals in the bond were conclusive evidence of these facts. Still less would matter alleged in the instrument, wholly immaterial to the contract therein contained; as, for instance, suppose an indenture or bond to contain an unnecessary description of one of the parties, as assignee of a bankrupt, overseer of the poor, or as filling any other character, it could not be contended that such statement would be conclusive on the other party, in any proceeding between them."

In a very recent case of Carter vs. Carter, before the Vice-Chancellor Wood, his Honor thus recognizes the law as laid down by Lord Wensleydale:—

† Carpenter vs. Buller, 8, Meeson and Welsby, 212.
"As to the doctrine of estoppel, the second point Mr. James relied upon, that is clearly disposed of by the case of Carpenter vs. Buller, which lays down distinctly the effect of estoppel, and shows that the mistake has long since been corrected at law, which was fallen into here, of supposing that the deed itself could operate as an estoppel in all actions. An estoppel is always in some action or proceeding based on the deed in which the fact in question is recited. In a collateral action, there can be no estoppel, as Baron Parke puts it in Carpenter vs. Buller." And the Vice-Chancellor then goes to cite the passage quoted above.*

The estoppel would be limited to the portion of the deed actually embodied in the recital; in other words, to the recital itself.

The proposition as put by Lord Wensleydale, it will be noticed, requires,—a distinct statement,—some particular fact,—and an action between the parties,—founded on the deed; and it was laid down by the Vice-Chancellor Wood:—"As pointed out above, in a collateral action there can be no estoppel." Indeed, there it would be only an admission; and the parties might show circumstances displacing its weight."

By the distinct statement, and particular facts to which this requisition addresses itself, is meant a clear and specific averment, in opposition to one of mere vague generality.

The doctrine of Estoppel applies as well to Conditions and Covenants as to recitals. They all alike partake of the same distinction in reference to particular statements and generalities; and the authorities in relation to each will tend to the illustration of the other. Indeed, the whole doctrine is only a branch of the general principle that an estoppel to conclude must, in deeds as well as in wills, be certain.

It is laid down in Rolle's abridgment in reference to a case of Condition;—

"If the condition contain a generality to be done, the party shall not be estopped to say there was not any such thing. But in all

* 3, Kay and Johnson, 617.
cases where the condition of a bond has reference to a particular thing, the obligor shall be estopped to say that there is no such thing."

Accordingly, in the case of a bond conditioned to perform all the agreements already set by I. S., it was held, that the defendant was not estopped from pleading that no agreement was made, because it was in the generality.† The expression 'all the agreements' was considered as defining no one in particular, and consequently as too vague to be acted on.

So, in a case in which a mortgagor having at that time only an equitable interest, had covenanted with his mortgagee that he was "legally or equitably entitled," a subsequent mortgagee from him was held not to be estopped from setting up the legal estate, which the mortgagor had acquired after the first mortgage, and which had passed to the second, under the mortgage to him. It was contended that, deriving his title through the mortgagor, the second mortgagee was concluded by the prior covenant of the mortgagor averring a scisin;—to which it was answered that an averment of an alternative seisin, that is one either legal or equitable, was no distinct or certain assertion of a legal one; and so it was held. "There is," said Lord Tenterden, delivering the judgment of the Court, 'a want of that certainty of allegation which is necessary to make it an estoppel."‡

Primâ facie, the statements of a deed would ordinarily be taken as concluding all the parties to it; and the law was thus laid down by Mr. Justice Coltman in a leading case on the subject of Young vs. Raincock.§ "It seems clear, that, where it can be collected from the deed, that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, the statement of those facts, though but in the way of recital, shall estop the parties to aver the contrary."

It may be, however, that the statement in question is, rather in the nature of the assertion of one of the parties to the deed, and in reference to his own position

* Estoppel P. pl. 1 and 7.
† King vs. Perseval, 1, Rolle's Reports, 340.
‡ Dee vs. Bucknell, 2, Barnewall and Adolphus, 278.
§ 7, Common Bench Reports, 310.
than the statement of both; as in the common instance (pointed out by the late Mr. Jarman in his work on Conveyancing*) of a vendor asserting his title, and backing up the assertion with covenants (that is the usual covenants for title) in support of it. There, if the statement of title were to be taken as the assertion of the purchaser equally with that of the vendor, it might be destructive of the remedies of the latter, under the covenants, inasmuch as it would operate, by way of estoppel, in bar to any action for breach of the covenants, which, of course, could only be founded on the untruthfulness of the statement.

"The doctrine of estoppel," says Mr. Jarman, 'if carried strictly out, would seem to require, that the grantee should not, in an action on the indenture, be permitted to allege that it did not operate according to its purport. But, if this were so, an action could scarcely be brought in any case upon the covenants for the title in a conveyance: for, if the deed purported to confer a good title, and therefore did not disclose any defect, the grantee would be estopped from alleging a defect, and, though evicted, must necessarily admit that the eviction was unlawful, and therefore not within the covenants; and the case of Nokie vs. Awder, seems to have been founded too much on this notion. The proper way of regarding the matter appears to be, that statements by deed are estoppels only quoad the purpose for which they are made, and so may estop for one purpose, and not for another,—Gaunt vs. Wainman.† Therefore, the recital of the grantor's title shall not estop him and his assigns from denying that he then could convey, because it is made with a view to conveyance; and, for the same reason, it shall estop the grantee, so long as he is not ousted, from asserting a want of title in his grantor as an excuse for not performing his part of the compact. But, quoad the covenants for title, the recital of title is obviously immaterial, or rather may be said to be contingently inconsistent with them, and, so far only as may be necessary for their operating, to be set loose by them."

This passage from Mr. Jarman was cited in Young vs. Raincock, but the turn the case ultimately took did not require a decision on the

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* Jarman on Conveyancing, p. 366.
† 3, Bingham's N. C., 413.
particular point. Its principle, however, was adopted in the later case of Stronghill vs. Buck,* and the law was there thus propounded by the Court in the judgment delivered by Mr. Justice Patteson:

"Where a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument. All the cases were brought forward and considered in Young vs. Raincock; and we have no doubt that the result of them is as above stated."

To work an estoppel, there must be Reciprocity in the obligation, or, as it is said in the books, "the estoppel must be mutual." Accordingly, as against a stranger, not coming in under the deed as a privy under either of the three heads mentioned below, the admission could not be set up. Thus, where a party possessed of Chambers in Lincoln's Inn† which he held as tenant at will under the Benchers‡ recited in a deed, by which he conveyed his interest to A, that he was seised of these Chambers for life, and subsequently surrendered them to the Benchers, who admitted B as tenant, the Court held that B, in defending an action of ejectment brought against him by A, was not estopped from denying that the surrenderor was seised for life.§

A deed poll, that is an instrument not inter partes but the deed of one party only, would not estop any one taking under it; and this by reason of the non-mutuality. Still it would be operative, even by way of estoppel, on the grantor.

Indeed, it is pointed out by Mr. Smith || "that the rule—that an estoppel must be mutual, otherwise neither party is bound,—must be taken with

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* 14, Queen's Bench Reports, 781.
† One of the Institutions for the study of the Law in England.
‡ The Governors of the Society.
§ Doe vs. Errington, 6, Bingham, N. C. 79.
|| 2, Leading Cases, 611.
some limitation, and probably on accurate investigation would be found to apply to those cases only where both parties are intended to be bound, since otherwise there could be no estoppel by deed poll. Indeed, in Bac. Abr. tit. Leases, it is remarked that where a lease is by deed poll, the lessee is not estopped to say that the lessor had nothing in the land; but, it is added it should seem, that such lease by deed poll binds the lessor himself, as much as if it were by indenture, because it is executed on his part with the very same solemnity, and therefore it should seem that he is bound by such lease by way of estoppel."

An estoppel may be even created without actual Averment at all; as, for example, were an heir to convey during the life of his ancestor, with nothing in the way of assertion of a title beyond the fact of Conveyance, and did the estate afterwards by his ancestor’s death devolve on him, he would be estopped from disputing his intended conveyance, and the party would have acquired an estate under it.

It was laid down by Sir John Leach, Vice-Chancellor, in Bensley vs. Burdon:*—

"Where by deed indented a man represents himself as the owner of an estate, and affects to convey it for valuable consideration, having at the same time no possession or interest in the estate, and where nothing, therefore, can pass, whatever be the nature of the conveyance, there, if by any means he afterwards acquire an interest in the estate, he is estopped, in respect of the solemnity of the instrument, from saying, as against the other party to the Indenture, contrary to his averment in that Indenture, that he had not such interest at the time of its execution."

Sir John Leach uses the expression ‘by deed indented.’ A deed poll would be equally within the principle he enunciated, where it was intended to operate in favor of another, and that other or any representative of his were the party setting up the estoppel; and he only

* 2, Simons and Stuart, 526.
adopted the word 'indented' as descriptive of an ordinary deed of conveyance.

It is a rule that, where there is any interest at all passed by a conveyance, albeit the interest is less than that purported to be conveyed, no estoppel arises; or, as the rule is shortly put, there is no estoppel where an interest passes. A party accepting a grant may dispute the extent of the operation of the deed, that is, of the interest passing; but he is estopped from saying it passes no estate at all.

A party, however, estopped from denying the original existence of an interest, may show its determination. Thus, though a tenant cannot dispute that his landlord had title on the creation of the tenancy, he may show that that title has determined; as, for example, in the instance of a lease granted by a tenant for life, that his estate had ceased by his death.

In technical language,—(and the rule applies as well to estoppels by record as those by deed)—the obligation is binding on Parties, and Privies.

The term 'Parties' bespeaks itself. The person meant would be obviously the individual party to the litigation, or party to the deed.

There is one distinction, however, to be pointed out in the case of parties; and that is, that to constitute the estoppel there must be an identity and continuity of the character in which the individual originally became party. Thus, one who afterwards took out administration to the estate of a deceased, would not be estopped by a deed to which he was made party in the character of an executor de son tort only, which he sustained at the date of the deed, and in respect of which he was made party to it;* and the same principle would apply to a case of suit.

* See post, p. 561.
PRIVIES.

"Privies," upon the ancient authority of Lord Coke, have been divided into three classes;—

1. Privies in Blood.
2. Privies in Law.
3. Privies by Estate.

An heir would naturally be the only person capable of being a privy in blood. Nor in the case of an estoppel by deed would he be bound, were the deed itself obnoxious to the taint of illegality; as, for instance, in the case of a conveyance executed by the ancestor to defeat the statutes of mortmain, and thus intercept the title of the heir by descent.

We are not aware that the point has ever undergone judicial discussion; but we presume that, regard being had to the light in which, in Hindu Law, an adopted son is regarded, and the completeness of his capability of succession to the estate of his adoptive father, in India an adopted son would be regarded, in relation to this doctrine, as tantamount to a privy in blood.

Privies in Law would be all persons succeeding to a right by legal devolution;—for example, executors or administrators succeeding to the estate of a testator or intestate,—assignees to that of a bankrupt or insolvent,—a husband suing in right of his wife, or succeeding to her estate as tenant by the curtesy,—or a wife to that of her husband as tenant dower,—or a lord by escheat.

Privies by estate would be grantees, assigns, or lessees of it.

In the case of an estoppel either by deed or by record, there are two ways in which the estoppel may be insisted on. It may be set up in bar to the demand by way of plea on the record, or if the matter be apparent on the pleadings of the plaintiff, by demurrer; and if so set up, unless capable of being got rid of, on some v 2
special ground applicable to all deeds alike; for example, fraud or illegality, the estoppel would be conclusive. If not thus specially insisted on, that is, raised either by plea or demurrer, it would, like any ordinary admission, resolve itself only into a matter of evidence; and notwithstanding the inherent weight so solemn an admission would carry, it would be open to be contradicted and impeached. The failure thus to insist on the estoppel would be held, so far a waiver of it, as to leave the whole matter open on the evidence;—in the technical language of the Court, "to set the matter at large."

The waiver, indeed, assumes that the proceeding is of a nature to admit of a course of pleading, and that opportunity, accordingly, existed to put in a plea of the estoppel. If there existed, in fact, no opportunity, as, for example, in an action of ejectment, though the point has not yet been decided, the better opinion would appear to be that it might still be insisted on as conclusive.

The general law on the subject is thus stated by Mr. Starkie:—

"In general, however, in order to conclude the party by his deed by way of estoppel, it should be pleaded, for if his adversary does not rely upon the estoppel, the Court and jury are not bound by it; but the jury may find the matter at large according to the fact, and the Court will give judgment accordingly. He asks them their opinion, and they are bound to give it. Where, however, the title of the party is by estoppel, and he has no opportunity of pleading it, the jury cannot find against the estoppel."*

An estoppel in pais is that which, though not existing as matter of record, or under the solemnity of a deed, may nevertheless, under the circumstances, conclude equally with the higher species of averment. It may exist in writing not being under seal, in oral statement, or even in conduct.

In ancient times, the recognized estoppels in pais were but few, and these existed only in connection with landed property and its ownership. It was said by Lord Wensleydale in a case of Lyon vs.

* Starkie on Evidence, p. 461.
Reed*—(a case in which the law on this subject underwent a good deal of discussion)—and speaking of the ancient estoppel:—

"The acts in pais which bind parties by way of estoppel are but few; and are pointed out by Lord Coke, Co. Litt. 352, a. They are all acts which, anciently, really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as livery,† entry‡, acceptance of an estate,§ and the like. Whether a party had or had not concurring in an act of this sort, was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed."

Of that which has attracted the application of the doctrine, there is perhaps nothing which has done so to a larger extent than matters involved in the relationship of landlord and tenant.

It is on this doctrine that the maxim,—(one applied under circumstances of great variety,)—has grown up, that a Tenant or those claiming under him, cannot dispute the title of the Landlord under whom they came into possession. This has been applied to the case where the letting was by an agent, and the landlord un-named; and the principle would extend to that of any party coming in under the permission of the owner, as in the instance of a lodger, a servant, or any other licensee. Indeed, so far has the doctrine been carried in practice, that where the object is to try the title by one in the position of a tenant, the only course to be pursued is, first to give up possession, and then bring ejectment.

The tenant, however, may dispute the validity of the title antecedent to his own possession, so as to avoid an intermediate assurance; or he may show the title under which he came into possession to have expired.

* 13, Meeson and Welshy, 285.
† The process by which, on a transfer of ownership of land, its formal delivery was, according to the principles of the feudal system, accomplished.
‡ Entry on the possession.
§ An acceding to the grant.
Another exception to the rule, or at least what has practically become so, is that of a tenant coming in under a mortgagee, to dispute his immediate landlord’s title; and this on the principle that a mortgagee in possession may at any time be treated by his mortgagee as a trespasser, and his title then be shown to be determined. — "The tenant, therefore," said Lord Denman, Chief Justice, in Doe d. Higginbotham vs. Barton, * "may be said to satisfy the rule, when he admits that, at the time when he was let into possession, the person who so let him in was mortgagee in possession, not treated as a trespasser, and so had title to confer on him, the tenant, the legal possession; and yet may go on to show that subsequently he has been treated as a trespasser, whereby his (the mortgagee’s) title, and the tenant’s rightful possession under him, have been determined."

Tenancy is a conclusive estoppel; but mere payment of rent may not be explained; and it may be shown to have been made under mistake. It was said by Mr. Justice Patteson in Doe d. Harvey vs. Francis, † "Where a tenancy is attempted to be established by mere payment of rent, without any proof of an actual demise, or of the tenant having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent, and to show on whose behalf such rent was received."

Attornment, too, would stand upon the same footing; particularly in a case of misrepresentation; and as put by Lord Denman, Chief Justice, in the case of Doe d. Pleivir. vs. Brown, ‡ "upon the broad principle, that it is always open to a party, not guilty of laches, to explain and render inconclusive acts done under mistake or through misrepresentation."

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* 11, Adolphus and Ellis, 307.
† 2, Moody and Robinson, 57.
‡ 7, Adolphus and Ellis, 417.
SURRENDER—MODERN EXTENSION OF DOCTRINE OF ESTOPPEL. 549

Upon the ground of estoppel by entry and acceptance, may be put the doctrine which even in the absence of a surrender in fact, that is by deed, treats the acceptance of a new tenancy as a surrender of the old one in law; and this would be the operation of such a transaction, and that although the new term were less than the old. The new estate, however, must appear to have been in contemplation of the parties at the time; that being an implied condition of the surrender.

The same principle would apply to the case of a grant to a stranger of a new lease, with the consent of the tenant under the original one, were there an actual surrender of the possession,—at least, such would be the case were the interest of the lessee a chattel one only; and, though question has been raised whether the same would be the result were it freehold, the better opinion appears to be that it would; and in all those cases, at all events, in which the subject of the letting was one capable of corporeal and tangible possession.

Mr. Taylor, addressing himself to the point, observes:—

"On the whole it is submitted that this rule [the rule which upholds the surrender] is good law; and that, confined as it is to cases where an actual, and, consequently, a notorious shifting of possession has occurred, no real danger need be apprehended from its continuance. Its adoption, where reversion or incorporeal hereditaments are disposed of, which pass only by deed, or its extension to cases when corporeal hereditaments are dealt with by the consent of the tenant, but when no actual change of possession has taken place, would certainly let in all the dangers for avoiding which the Statute was passed."

In modern times, and in the more complicated relationships of society which have been growing up, the doctrine of estoppel has been considerably extended in application beyond its more ancient limit; and especially in reference to the mercantile and more general transactions of mankind. It has been rested too, less upon

technical grounds, than upon the broad basis of good faith and personal honesty;—and the principle is to hold men to those representations whether written or unwritten,—whether by word of mouth or of conduct—whether intentional or unintentional,—upon the faith of which others have been induced to act to the change of any previous position.

Exposition of the principle. Includes all intentional representation acted on in change of position.

In a case which has always been regarded as a leading one on this subject, that of Pickard vs. Sears,* the law is thus laid down by Lord Denman, Chief Justice:

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

In a somewhat later case of Gregg vs. Wells† which may be cited as an appendix to Pickard vs. Sears, Lord Denman again takes up the subject thus:

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

The former case, it will be observed, might possibly seem by the expression 'wilfully causes' almost to imply a fraudulent representation only; and to limit the application of the doctrine to that state of things;—while the latter extends it to a case of mere omissive silence or passive acquiescence; and that not culpable merely, in the more obnoxious sense of the term, but even negligent;—and a good deal of discussion has

* 6, Adolphus and Ellis, 469.
† 10, Adolphus and Ellis, 90.
arisen as to the precise limit of the rule. It is now, however, established, that the word 'wilful' is to be understood, not in the sense of intentionally, but practically, deceptive.

The discussion of the proposition as laid down by Lord Denman came before the Court in a case of Freeman vs. Cooke,* where Lord Wensleydale, in delivering the judgment, after adverting to the rule as laid down by Lord Denman, thus commented on it;—

"Whether that rule has been correctly acted upon by the Jury in all the reported cases in which it has been applied, is not now the question, but the proposition contained in the rule itself as above laid down in the case of Pickard vs. Sears, must be considered as established. By the term "wilfully," however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorised."

Lord Wensleydale's statement of the law was reviewed in the later case of Howard vs. Hudson,† in the year 1853, where Lord Campbell, Chief Justice, says:—

"Now I accede to the rule laid down in Pickard vs. Sears, and in Freeman vs. Cooke. If a party wilfully makes a representation to another, meaning it to be acted upon, and it is so acted upon, that gives rise to

* 2, Exchequer Reports, 654.
† 2, Ellis and Blackburn, 1.
what is called an estoppel. It is not quite properly so called: but it operates as a bar to receiving evidence contrary to that representation as between those parties. Like the ancient estoppel, this conclusion shuts out the truth, and is odious, and must be strictly made out. The party setting up such a bar to the reception of the truth must show, both that there was a wilful intent to make him act on the faith of the representation, and that he did so act."

Though Lord Campbell, in enunciating the proposition he was laying down, makes use of the expression ‘wilfully,’ it will be noticed that he adopts the exposition of the law given in the later case of Freeman vs. Cooke, which in effect expounds the word wilful to mean simply intentional,—and this probably, accordingly, was what Lord Campbell intended to convey. In the same case of Howard vs. Hudson too, Mr. Justice Crompton, in addressing himself to this particular expression, observes;—

"The word ‘wilfully’ which is used in the judgment in Pickard vs. Sears, has been well commented upon in the judgment in Freeman vs. Cooke. As the rule is there explained, it takes in all the important commercial cases, in which a representation is made, not wilfully in any bad sense of the word, not malo animo, or with the intent to defraud or deceive, but so far wilfully, that the party making the representation on which the other acts, means it to be acted upon in that way. That is the true criterion."

Of course, the principle would be equally applicable whether in a Court of Law or one of Equity, and in a modern case of Money vs. Jorden, which ultimately came to the House of Lords, Lord Cranworth, Lord Chancellor, referred to the principle as one;—

"Well known in the law, founded upon good faith and equity, a principle equally of Law and of Equity, if a person makes any false representation to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set

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* 5, House of Lords' Cases, 185.
up that what he said was false, and to assert the real truth in place of falsehood which has so misled the other. That is a principle of universal application, and has been particularly applied to cases where representations have been made as to the state of the property of persons about to contract marriage, and where, upon the faith of such representations, marriage has been contracted. There, the person who has made the false representations has, in a great many cases, been held bound to make his representation good. And in a later part of his judgment, he thus adds;—"These principles are plainly and perfectly intelligible, and quite consistent with good sense, and I should be in the last degree sorry that any opinion or decision to which I am a party, should lead to a notion that I, in the slightest degree, question their propriety. Nay, more, I think that the principle has been carried, and may be carried, much further, because I think it is not necessary that the party making the representation should know that it was false, no fraud need have been intended at the time. But if the party has unwittingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying. It will not do if he merely said something, supposing it to be quite right, and then that some stranger, having heard and acted upon it, should afterwards come to him to make it good.

"The whole doctrine was very much considered at Law, for it is a doctrine not confined to cases in Equity, but one that prevails at Law also; and there are, in fact, more cases upon the subject at Law than in Equity."

Money vs. Jordan, originally decided in the Court of the Master of the Rolls, had been appealed thence to that of the Lords Justices, before it came to the House of Lords. But up to this point,—(the doctrine as laid down by Lord Cranworth)—both in the Courts below, and on the final appeal in the House of Lords, there was no difference of opinion among the Judges.

Lord Cranworth, however, who on the original appeal to the Lords Justices, and before his promotion to the Chancellorship, was sitting as
one of them, both on that appeal, and the one to the House of
Lords, took up the point that the doctrine under discussion did not
apply to a case where the representation was not a representation of a
fact, but a statement of something which the party intends or does not
intend to do.—And Lord Brougham on the appeal before the Lords
adopted that view of the case.—"She,"—said his Lordship (referring
to the lady the effect of whose statement was the issue in the cause),—
"simply stated what was her intention; she did not misrepresent her
intention; and I have no manner of doubt that, at the time she made
that statement, she had the intention which it is stated she professed."

This distinction did not prevail in the original appeal before the
Lords Justices, because having been dissented from by Lord Cran-
worth's then coadjutor, the Lord Justice Knight Bruce, and being
opposed to the view taken of the case by the Master of the Rolls, Sir
John Romilly, on the original hearing before him, the first appeal, that
before the Lords Justices, only terminated in the upholding of the
original decision, and the negation accordingly of this distinction.
When the case, however, got to the Lords, on its second and final appeal,
Lord Cranworth, then raised from Lord Justice to be Chancellor,
found a supporter for his view in Lord Brougham; and, though he
had at the same time an opponent to it in Lord St. Leonards, the late
Chancellor, these being the three Lords by whom the appeal was heard.
Lord St. Leonards was in the minority, and the ultimate decision was
accordingly in conformity with the opinions on the point of Lords
Cranworth and Brougham.

Had Lords Cranworth and Brougham simply meant to speak of
that which a party held out as a mere matter of intention, reserving to
himself the power to change his mind, it would be difficult to dispute
their contention. Both, however, in the terms in which they state the
proposition, would appear to carry it further; and were this their real
intention, it may be permitted, in all humility, to doubt the soundness
of the view; and certainly in doing so we are in pretty good company;
for if it be supported by Lords Cranworth and Brougham on the one side,
on the other it was opposed to that taken by the Master of the Rolls,
Sir John Romilly, the Lord Justice Knight Bruce, and Lord St. Leonards; and with reference to all three of whom, it may be said that none are more conversant with the great principles of Equity. Indeed, though the judgment of the Court of last resort, the decision presented the somewhat anomalous state of things of being carried in a conclave of three Judges by a majority of one only; while, had all the five Judges by whom it was consecutively heard, been there sitting together to decide, it would have been lost by a minority of two out of five; so that, while the dissentient Judges, as a body, were certainly, on such a question, not inferior to the assenting ones, it was the numerical minority which ultimately prevailed over the majority. Moreover, on the hearing in the Lords, Lord St. Leonards entered his protest most energetically against the doctrine.

"Your Lordships," says he, "are asked to consider that a representation of an intention is not a binding act, and that you cannot misrepresent what you intend to do. But if you declare your intention with reference, for example, to a marriage, not to enforce a given right, and the marriage takes place on that declaration, I submit that, in point of law, that is a binding undertaking." And he goes on to cite various well established authorities in support of his view.

The case presented much conflict of evidence; and can hardly be said to involve the decision of the question in the particular form assigned to it by the passages we have quoted, from the judgments of Lords Cranworth and Brougham; and it may, it is submitted, be considered, accordingly, to have been left as an open one. Indeed, on a close analysis of the case, we think it will be found, that applying the judgments of these two learned Lords on the legal point, to the facts only which they (particularly Lord Cranworth) treated the evidence as establishing, the broader proposition apparently which, according to the report, was broached by them, went beyond the exigency of the decision, and might accordingly be so far fairly treated as obiter; if, indeed, it was the intention of the two learned Judges to carry that proposition quite so far as their language might ascribe to them.

The case, so far as it requires to be told to explain the discussion, was simply this.—A lady (a family friend, at that time a spinster of
some maturity of age,) had in her possession, and belonging to her, a bond, to which a young gentleman about to be married was a party as on obligor with others; but she had already often avowed, that under certain peculiar circumstances in which the bond was given, and her regard for the youth, it was her intention never to enforce it against him. In this state of things, she was applied to by the gentleman and his friends, on the occasion of the marriage, and with reference to the marriage arrangements, more formally to release the obligation, and give up the bond. This, however, she declined to do, saying that the document itself might be required should she wish to enforce it against the other parties, but that she had no intention of ever doing this as against the gentleman in question. This was treated by the family as a practical release, and the marriage took place accordingly. The lady, subsequently, herself married, and an action was afterwards brought, in the name of her husband and herself, to enforce the bond against the party who had, under the circumstances detailed above, treated himself as released, and married on its faith; and a suit was thereupon preferred in Equity to restrain the action at Law; being the suit to the proceedings in which we have been addressing ourselves.

The judgments of Lord Cranworth and Brougham were necessarily founded on their own view of the evidence, and it was this, as stated by Lord Cranworth himself, and adopted by Lord Brougham;—

"I repeat that I do believe that she often and often told this young man that she would leave him all her property, and that she would never enforce this bond; that I believe she said this over and over again, knowing that it would come to his ears, but that that was all that was said either expressly or impliedly, and said with the qualification, I will not give up my right to the bond; you must trust to my honor."*

Now this would almost appear to have reserved to the lady the power of changing her mind; and whether it were the correct view of the evidence or not, might possibly in itself be sufficient to warrant the judgment ultimately passed by Lords Cranworth and Brougham. At all

* Page 223.
events it falls, it is submitted, somewhat short of invoking the broader proposition ascribed to them as the basis of their conclusion,—while, if so, it would fail to disturb the general course of decision which has been pointed out. According to Lord Cranworth, what the lady intended to be acted on was not her intention, but the once that she might never change it.—If there were to be any thing to trust on, it was her honor simply that she would not change, with the reservation that she might, if she chose, for she expressly reserved to herself her right to the bond. —It was a reed to lean on, which might be broken, not a staff which could not.

The more general doctrine under discussion has recently been applied to a state of circumstances in which a third party was held responsible for representations made by another, though himself ignorant of the falsehood, having left it to that other to conduct the negotiation.

Thus, in a very late case before the Vice-Chancellor Stuart, (that of Rawlins vs. Wickham*) where the plaintiff Rawlins sought to set aside a partnership entered into between himself, one Wickham deceased, and the defendant Bailey, on the ground that he, the plaintiff, had been induced to enter into it upon gross misrepresentations as to its condition, and the defence taken on the part of the representatives of Wickham was that the representations were not his but Bailey's, and that he, Wickham, had been himself deceived in the matter; this was not allowed to prevail. It was said by the Vice-Chancellor;—"The second topic of defence to the prayer of the bill, which seeks an entire dissolution of partnership as to the three partners, is, that Mr. James Wickham was himself deceived in the matter. Then, who made the false representation? The defendant Bailey? But when Mr. Wickham and Mr. Bailey were about to enter into partnership with the plaintiff Rawlins, if Mr. Wickham thought fit to entrust Mr. Bailey to represent to the in-coming partner the actual state of affairs, and if, in consequence of the representations so made, the partnership formed upon the strength of those representations

* Weekly Reporter, 1858, p. 509.
is to be dissolved, so far as regards Mr. Bailey, the whole contract is at an end. However, it is of no consequence whether the guilty foundation of this contract lay with Mr. Bailey or Mr. Wickham, or, as has been alleged, with a person who was the clerk of both. The principles of equity make it necessary that I should declare that both Mr. Bailey and Mr. Wickham are answerable for the effects of the falsehood, and that the contract in question cannot stand. All that has been urged, therefore, with reference to the honesty and bona fides of the late Mr. Wickham, is clearly beside the question."

A further principle was also recognized by that case, that is that the existence of the means of disproof of a representation by the party to whom it is made, in no way relieves the party making it from his own liability, or precludes the application to such a case of the doctrine of estoppel.

"It has been urged," says the Vice-Chancellor, 'that the means of verifying the representations which were unquestionably made to him, were open to the plaintiff. But that is no defence against a charge of misrepresentation. It frequently happens that the means of ascertaining the truth, in cases of this nature, are within the power of the complainant, but it has never been held, that in order to entitle him to rescind his contract, he is bound to show that he has resorted to all the means of information within his power. The very motive of the misrepresentation is to check inquiries of this nature. The contest upon this point is one which scarcely requires the assistance of authority; but I may refer to a case before Sir John Leach, Maddeford vs. Austwick (1, Sim. 89), in which one partner agreed to purchase his co-partner's share in their joint business for a sum which he knew, from the accounts in his possession, was an inadequate consideration. There the contract was set aside; although the misrepresentation might readily have been detected by the partner to whom it was made."

It is scarcely necessary to find much of illustration for the general doctrine under discussion; and the authorities which have established it are as varying in their
circumstances, as they are simple in their principle. We subjoin, however, some little taken from decided cases.

A very ordinary one would be that of a party allowing a tradesman to supply goods to a woman, on the representation that she was his wife, and which would prevent him from afterwards showing that she was not; as, in like manner, would a woman, who on some former occasion had solemnly declared herself married to a particular man, be estopped, on his bankruptcy, from denying the marriage, and laying claim to the goods as her own.

Another would be that of an agent who is precluded from disputing the title of his principal to the subject-matter of the agency.

The application of the rule to a case of agency would ordinarily be a very simple thing. There is an instance, however, in which it might not be so apparent, which we notice accordingly, namely, that of a depositary of goods or monies having acknowledged the title of a principal; and here, as an ordinary rule, the depositary would not be allowed to set up the title of a third party, so as to defeat that of the party he had acknowledged as his principal. The case, however, would be otherwise, had the goods been wrongfully obtained by the previously admitted principal from the third party; were the agent unacquainted with the circumstances under which he made the admission.

An acceptor of a bill of exchange is precluded, in an action against himself, from disputing the ability to draw of its drawer, or after sight of the bill, his hand-writing; or, if payable to the order of the drawer, his capacity to endorse,—nor can the endorsee dispute the hand-writing of any antecedent party. Indeed, the acceptor of the bill could not even set up that his signature had been forged; had he accredited the bill, and induced the plaintiff to take it by an admission of his acceptance.

It should be added, however, that the mere acceptance of a bill, recognizes no admission on the part of the acceptor of the signature of either the payee, or an endorsee.

On the same principle of estoppel, a person holding himself out to the world as a partner, would be prohibited from gainsaying his liability to the partnership debt.
And, not further to multiply instances, a person having title to an estate while its possession was in another, and standing by permitting the apparent owner to deal with it as his own,—as for example, a purchaser to buy it from him,—would be estopped from afterwards asserting his own title, against that thus acquired by the purchaser. A leading authority on the illustration last cited, indeed on the general principle, is that of the Duke of Beaufort vs. Neald, where the Duke had signed, and put into the hands of his agent, an authority to consent to any exchanges under an enclosure act; but at the same time had directed him not to act upon the authority except under certain circumstances. The agent, in breach of the instructions, agreed to an exchange not warranted by them; and produced the authority, and the Duke refused the agreement. But the House of Lords held him bound by it.

Summary by Mr. Taylor.

The whole law on the subject is thus well summed up by Mr. Taylor:—

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

* 12, Clark and Finelly, 3.
on grounds of public policy and good faith, from repudiating his own representation. *

"On the other hand," Mr. Taylor elsewhere observes, 'admissions, which either have been made without any intention of being acted upon or which have not been acted upon, or by which the situation of the opposite party has not been prejudiced or altered, though receivable in evidence against the parties making them, are not conclusive." †

Whatever might take place in a Court of Equity in cases where, by reason of her possession of a separate estate, she might be regarded as a femo sole, still, as an ordinary principle, the doctrine of estoppel would not apply to the representations of a married woman, nor would it apply to those of an infant. This was established as respects the former in a case of Cunnam vs. Farmer, ‡ where a promissory note having been signed by the defendant—'widow,'—that is with a description of herself as a 'widow' attached to it, in a plea of coverture put in by her to an action on the note, it was held that the representation of widowhood appearing on the note, did not bind her by estoppel.—Baron Parke observing:—

"The defendant's incapacity to contract, by reason of her coverture, was not removed by her representation. It is not an estoppel in any way."

The same principle would apply to an infant.

As in the instance of estoppels either by record or by deed, so in those by pais, in order to create a case of estoppel there must be continuing identity of character throughout.—Thus, where an executor de son tort verbally agreed with the landlord of the intestate to deliver up the premises demised, and afterwards took out letters of administration, he was held not concluded from bringing an action of ejectment against the landlord, who had actually obtained possession under the agreement.§

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† Ibid, p. 682.
‡ 3, Eschequer, 699.
§ Doe d Glenn, 1, Adolphus and Ellis, 49.
The doctrine of estoppel has been long recognized in the Mofussil Courts.

In a case reported, S. D. A. 1827, p. 10, a Mussulman dying, the son, under the authority and direction of the widow, sued for and obtained judgment as heir. The widow subsequently preferred her claim, under a deed of gift from her husband, in lieu of dower.—But the Court held her estopped;—and there are other authorities to the like effect.

The case cited appears to proceed on the principle of estoppel; but the Mahomedan Law has an especial recognition of the principle, under a head which terms Repugnancy or Tenakus. Accordingly, in a case reported I. S. D. A. 1827, p. 68, a party pleaded a will, which being rejected as a forgery, she afterwards relied on a gift she had formerly denied. It was held, however, that the plea was estopped in Mahomedan law by repugnancy; and the like was held in two cases reported in the same volume, ps. 68 and 73, and in a case of 7 S. D. A., p. 20.

As a general rule, the laws of pleading forbid the insisting, by way of plea, on that which in truth only amounts to evidence; and an estoppel by matter in pais partaking to a certain extent of the character of evidence, it was at one time questioned, whether it could be set up as a summary defence by plea.

The question, however, was formally raised in a case of Sanderson vs. Coltman,* on the point whether it was open to the acceptor of a bill of exchange to set up, as against an endorsee, the defence of the forgery and consequent invalidity of the bill; and whether the estoppel might be insisted on by way of plea, and it was decided that the acceptor was estopped, and that the estoppel might be urged by plea.

After disposing of the more general question, namely, the power of the acceptor to repudiate the bill, the validity of which his signature had attested, Tindal, Chief Justice, in delivering judgment, thus proceeds:

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* 4, Manning and Granger, 203.
PLEADING ESTOPPEL.

"The question then arises, whether the plaintiffs can set this up by way of estoppel. It is said that this may be evidence, and even conclusive evidence, against the defendant, but that the plaintiffs cannot avail themselves of it as an estoppel. If, however, we find, upon the record, a fact which would have entitled the plaintiff to a verdict, I do not see why they may not rely upon that fact by way of estoppel. Estoppel may be by matter of record, by deed, and by matter in pais. If, by the last branch, it is meant only that the matter may be given in evidence, it would certainly not be pleadingable, and ought not to be put on the record. But there seems to be no reason why the meaning should be so confined."

Coltman, Justice, thus adds:—"My brother Channell has argued that this is not a matter of plea, but matter of evidence, and that matter of evidence cannot be pleaded. But the meaning of that rule, I apprehend, is, that a party shall not plead facts from which another fact, material to the issue, is to be inferred. But here the defence itself is pleaded. Then it is said that matter in pais cannot be pleaded by way of estoppel. Veale vs. Warner is certainly no authority for such a mode of pleading. I think, however, that if a party has a legal defence to that which is set up against him, he cannot be precluded from pleading such defence.

The distinction of Mr. Justice Coltman will be noticed that the plea must be not matter of fact, but of defence.

Another distinction as regards pleading remains to be noticed:—that between estoppels by record or deed, and estoppels in pais. The former, to make them conclusively binding, must be pleaded, if the opportunity of pleading arises, otherwise the party omitting to plead it is treated as waiving the estoppel, and, as it is termed, 'leaving the issue at large;' the meaning of which is, that the subject-matter of the estoppel is left, like any other fact in the case, one of evidence only, and may be found according to its proof. With respect to estoppels in pais, however, the case is different. They need not in most cases, at least, if not in all, be pleaded in order to make them obligatory. In truth, their establishment in evidence renders them as complete a defence as their formal
pleading. Indeed, it is rather in the *legal result* of the *facts*, than on the *facts* themselves; in other words, in the *law* as applied to the *facts* that the estoppel is found. Thus, were a man to represent another as his agent, in order to procure a person to contract with him as such, and such person were to contract, the contract would bind in the same manner as if he made it himself. It would be *his* contract in point of law; and no form of pleading could leave such a matter at large, and enable the Jury to treat it as no contract.*

We conclude the whole subject of estoppel, with the pertinent observations with which the late Author of the Leading Cases concludes his own *valuable* note on the subject, where he says;—

"The truth is, that the Courts have been, for some time, *favorable* to the *utility* of the *doctrine* of estoppel, *hostile* to its *technicality*. Perceiving how essential it is to the quick and easy transaction of business, that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time, they have been unwilling to allow men to be entrapped by formal statements and admissions which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or induced to alter his position. Such estoppels are still, as formerly, considered odious."†

* Best on Evidence, 411.
† Smith's Leading Cases, Vol. II., p. 665.
CHAPTER XIX.

On Confessions.

Mr. Archbold's classification of.

AN experienced writer on Criminal Law, Mr. Archbold, has thus classified Confessions:—

"Admissions and Confessions are of four kinds.

1. Where the defendant, in open Court, confesses that he is guilty of the offence of which he is charged in the indictment.

2. Where the defendant, upon an indictment for a misdemeanor, yields himself to the Queen's mercy, and desires to submit to a small fine; which submission the Court may accept, if they think fit, without putting the defendant to a direct confession.

3. Where the defendant, upon his examination before Justices of the Peace on a charge of felony or misdemeanor under Statute 11 and 12, Vic., c. 42, ss. 17, 18, admits either his guilt or any fact which may tend to prove it at the trial.

4. Where the defendant makes an admission or confession of his guilt, or of any fact which may tend to the proof of it, to any other person; or assents to what is said in his presence and hearing, relative to a fact within his knowledge.

All these several species of confession, in order to be admissible, must be free and voluntary."

It is with the last only of Mr. Archbold's classification that this treatise has to deal.

The two first are not of the nature of evidence, but of pleas to the procedure. The third has no application to India;—or none at least beyond the indication of the spirit of English law afforded in the

* Archbold's Criminal Law, 190.
section of the Statute referred to by Mr. Archbold, which enjoins as a condition to the reception of the Confession, that it should be prefaced with a magisterial monition to the accused, cautioning him against self-crimination; and pointing out the use which will be made on the trial of any statement he may volunteer.

Under his fourth head, Mr. Archbold would appear in terms to be dealing only with a Confession or assent merely oral. It should be stated therefore that, as in civil cases, so in criminal, there may be a Confession as well by conduct as by word of mouth; and as regards the matter of assent this may be passive and constructive, as well as active and avowed.

Confessions have been divided into the two classes of Judicial and Extra-Judicial. The former indicates those which are made on a magisterial investigation,—the latter designates confessions not made under this sanction.

Confessions too of both descriptions have been still further classified under the denominations of Plenary and not Plenary. With reference to this distinction, Mr. Best observes;—

"A Plenary Confession or Admission is where the statement is such as if true, is absolutely conclusive against the person making it, at least on the physical facts of the matter to which it relates: as where a party accused of murder says, 'I murdered, or, I killed, the deceased.' In all such cases the proof is in the nature of direct evidence, and the maxim is;—'Habemus optimum testem, confitentem reum.'* Not plenary is where the truth of the self-dis-serving statement is not absolutely inconsistent with the innocence, &c., of the party, and only gives rise to a presumptive inference unfavorable to him, and is therefore in the nature of circumstantial evidence: as where a person accused of murder admits that he threatened or even intended to commit the crime; that he fled to avoid being tried for it," &c.†

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* "We have the best witness,—the accused confessing."
† Best on Evidence, p. 395.
Confessions are in criminal cases what admissions are in civil; and like an admission, a Confession is permitted to be entertained as evidence against the party making it, on the faith of a probability of truthfulness inherent in itself.

"A full confession of guilt," (it is observed by Mr. Starkie,) "although it be but presumptive evidence, is one of the surest proofs of guilt, because it rests upon the strong presumption that no innocent man would sacrifice his life, liberty, or even his reputation by a declaration of that which was untrue." Though he adds,—"The presumption ceases as soon as it appears that the supposed confession was made under the influence of threats, or of promises, which render it uncertain whether the admissions of the accused resulted from a consciousness of guilt, or were wrung from a timid and apprehensive mind, deluded by promises of safety, or subdued by threats of violence or of punishment."*

Under ordinary circumstances innocence is not likely, by a self-accusation, to bring upon itself either the obloquy or the punishment of guilt. It would be more inclined to resent the charge, and proclaim integrity.

The value of admissions in a civil case has been pointed out in the preceding Chapter. It is obvious that in criminal cases a Confession would ordinarily carry with it even a greater weight than an Admission in a civil one, from the deeper stake involved.

"In criminal cases," says Mr. Phillipps, "a deliberate confession carries with it a greater probability of truth than an admission in civil cases, the consequence being more serious and penal;—'Habemus optimum testem, confitentem reum.'† But it is to be observed, there may not unfrequently be motives of hope and fear inducing a person to make an untrue confession, which seldom operate in the case of ordinary admissions."

In England popular feeling very fully appreciates the weight ascribable to a Confession. Indeed in cases attractive of the public attention, such for instance

* Starkie on Evidence, 78.
† "We have the best witness;—the party confessing the act."
as crimes of the more atrocious character,—(the commission of which in secrecy has left nothing but circumstantial evidence for its proof, while conviction and the extreme penalty of the law have followed trial,)—it not unusually happens that the public mind becomes satisfied only with final confession, however strong the chain of circumstantial proof may be. On the other hand, a consistent denial of guilt to the last,—(carrying with it, as it naturally would, the weight of being maintained to the very entrance into eternity),—has been known to produce an uneasy mistrust as to the propriety of a conviction; and it certainly has occurred, that men have suffered even death, for crimes they never committed.

It is indeed within the compass of possibility that both confession in the one case, and denial in the other, might have originated in some of those varying motives of the mind impenetrable to the eye of human scrutiny, which might have led to untruth under circumstances even so extreme; and the confession and the denial might alike be false. But we form our judgments on the ordinary course which Nature takes; and not her freakish departures from it.

Of course, in referring to a case of denial, we speak of denial after conviction.—Denial up to trial is mere ordinary challenge of proof, and part of the chances of escape; while, on the score of actual evidence, though confession may be proof against the accused, denial can be none in his favor.

False denial, even after conviction, is more easily to be understood than false confession.—It is the result of the predominance of the worldly influence over the spiritual. Its motive may be traced in the desire,—to escape from punishment;—to rescue character from infamy;—to shield the reputation of the denier, perhaps for the sake of his family, possibly even more than himself;—to enlist a feeling of sympathy, by the impression that the sufferer was a victim, not a culprit;—or it may originate in the hope of aiding the escape of an accomplice;—and, even to the very foot of the scaffold, there may be reliance on a sustained course of imposition, which confession would necessarily destroy.
Temporal interests accordingly may well point to denial; and hence it is, that even in a moral point of view, denial in any stage of a proceeding would naturally carry with it an infinitely smaller degree of weight against the fact, than confession would bring with it in its favor; and in a legal one it has none.

In the case of confession, and especially before conviction, it is in the opposite direction, for the most part, that motives would point; and hence in fact the value of the confession itself.

Still even Confessions have been simulated; and crimes have been acknowledged which were never committed.

"The prisoner," says Mr. Taylor, 'oppressed by the calamity of his situation, may have been induced, by motives of hope or fear, to make an untrue confession; and the same result may have arisen from a morbid ambition to obtain an infamous notoriety;—from an insane or criminal desire to be rid of life;—from a reasonable wish to commence a new career in another hemisphere;—from an almost pardonable anxiety to screen a relative or a comrade;—or even from the delusion of an overwrought and fantastic imagination.'

Illustration.

Various illustrations of such Confessions are to be found in the books.

One is quoted as having occurred in ancient Rome; in which a Slave confessed to a murder he had never committed, to avoid the worse fate of falling into the hands of a cruel Master.

Another, and a very circumstantial one, is cited in early English history; that of one Hubert, who confessed to having occasioned the fire of London, and was not only found guilty, but executed on this confession;—" though," says the historian of the fact, 'neither the Judges nor any present at the trial did believe him guilty; but that he was a poor wretch weary of life, and chose to part with it in that way.'

A case is said to have occurred in Germany, where two women, being too poor to procure bread for their children, confessed to a crime they had never committed; to obtain for the children the benefit of a provision made by law for orphans; and one of them was executed on the confession.

A case is stated to have happened in America, usually cited as that of the two Boorns, where two brothers, charged with the murder of a third who had suddenly disappeared—(in fact, through fear of his life being taken by his brothers)—confessed to the crime, under circumstances of presumptive guilt, and were found guilty, partly on the strength of the confession, and sentenced to death. On the same day, however, they appealed to the legislature for a commutation of the sentence to that of perpetual imprisonment, which as to one of them only was granted.—The confession being withdrawn, and contradicted, a reward was offered for the missing brother; by whose appearance the survivor was saved, almost as it were at the foot of the scaffold. The brothers had been advised by some misjudging 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.

Another case is reported where an innocent person made a false confession, in order to fix suspicion on himself alone, so that his guilty brothers might have time to escape; a stratagem which was completely successful. On his trial he proved an a libi and was acquitted.

It is stated in a note to Mr. Phillipps' work on Evidence;—“Instances have occurred, in cases where a crime has caused great public excitement and notoriety, that persons have actually delivered themselves up to the officers of justice upon a self-accusation of having perpetrated the crime, though their innocence has afterwards been proved beyond all question.”*  

To cite a very romantic case from the Nizamut Adawlut Reports of the Presidency of Bengal; and one somewhat illustrative of Indian life in the class to which it refers,—that of Medavee vs. Musst. Nubia;—

The girl Nubia, with whom it was suspected that one Kulian entertained a criminal connection, disappeared from her father's house; and it was at the same time discovered that her clothes, ornaments, and money to a considerable amount, had been carried off. Dhur, her father, immediately went in search of her; and having been informed that Kulian (who was already the object of his suspicion) had been seen along with his daughter, had him apprehended. Being taken to the Thanna, and questioned, he confessed that he had killed her, and thrown her body into a nullah, but the remains not being found at the place to which he led them, he then recanted the confession, saying, "I was afraid of being ill-used at the Thanna, and therefore confessed having killed Nubia, but in truth I did not do so. I left her alive in the neighbourhood of the camp of Cawnpore."

Being brought to trial, he persisted in the second story; saying that he had been beaten and threatened by the Police Officers, and he had therefore confessed. He then declared his ignorance of Nubia's fate; alleging that the opposition shown by her parents to her union with him had induced her to form the resolution of eloping and proceeding with him to Cawnpore;—that early in the morning having arrived in the neighbourhood of the cantonment, they were afraid of being seen together, and therefore resolved that he should go on, and obtain a house, and the girl remain where she then was, till he came back to her;—that Nubia gave him whatever articles of value she had with her, thinking they would be safe in his possession;—and that he went on to Cawnpore.

He did not however succeed in getting a house, and about mid-day returned to the well, at the side of which he had left the girl. Not finding her there he continued seeking her for some time, and then returned home; and he stated that from that time he had had no intelligence of her; but that still being in hopes of meeting her again, and
living with her unknown to her father, he had concealed the circumstances, and hid the ornaments, &c., under the ground.

Notwithstanding this explanation, the Court, from the long concealment of the circumstances, acted upon the original confession; and the Law Officer of the Court having declared that, though the evidence was insufficient to justify the more extreme sentence, the accused was liable to stripes and imprisonment; he received thirty-nine lashes and was condemned to fourteen years' imprisonment.

The girl, however, ultimately turned up—(at least though there was some question about her identity, the Court considered it established)—and the story by which she accounted for her disappearance and absence was;—that she remained a long time in the spot where Kulian had left her; and, as he did not return within the time she expected, she went on to Cawnpore to seek for him; but they missed. She added that, after a long and fruitless search, she met with a soldier belonging to one of the regiments there stationed; and was persuaded to go and live with him. His regiment being soon after ordered away from Cawnpore, she accompanied him; and it was not until the time of her re-appearance that she had returned to her own country, and was enabled to appear for Kulian's justification.

Kulian was released; but not until after he had suffered an imprisonment of nearly four years, and had undergone the punishment of the lash.*

Mr. Norton's experience furnishes a case which he describes (speaking more particularly we presume of the Madras Presidency) as not of unfrequent occurrence in India, in which as he says—

"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

* 1, Nizamut Adawlut, 194.
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.*

The list may be extended; and some curious additional illustrations will be found in Mr. Norton's work.

Confessions made under mistake.

The instances we have cited are examples of entire fabrication,—of self-condemnation,—merely to carry out some particular scheme.

But it may happen that a Confession might arise in some mistake of fact; and in the belief that a crime had actually been committed by the party confessing.—A person, for example, may have imagined a death arising from natural causes to have been the result of a treatment inflicted by himself.—In Beck's Medical Jurisprudence is mentioned a case in which a child, supposed by its father to have sunk under chastisement administered by himself for an act of theft, was proved, on a post mortem examination, to have died, in fact, under the paroxysm of a poison it had previously taken. Had the father been put on his trial, and had there been no post mortem examination, he might not impossibly have confessed to a murder.—In the case of the Hunchback in the Arabian Tales, every person into whose house the body came believed himself a murderer.

Still, on the whole, Confessions either assumed or mistaken are comparatively rare; especially where the voluntary action of the mind itself, uncoerced by external influences; and the chance of simulation

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* Norton on Evidence, 115.
or mistake would detract but little from the general credibility attached to a Confession.

In the instance of a Confession after conviction, Confession is more frequently the result either of an awakened conscience, and of religious impulse, or else of a desire to escape the irritation, and the pain of interrogation; by "making a clean breast" of the matter; and, in either case, truthfulness may naturally be looked for. In those confessions which precede trial (and sometimes also as respects punishment in those after it) it would probably be found in the majority of cases, that the great motive for confession is the hope either of a withdrawal of the prosecution, or a mitigation of the punishment—and this on the faith of the supposed contrition involved in the act of confession. Here, however, the security for the fullness of the truth is not quite so great as when the motives are traced to a less suspicious source. The confession may not be more truthful than is required to secure the accomplishment of its own object; while there would be a natural tendency on the part of the confessing party to extenuate in his own favor all such circumstances as might admit of toning down; and to exaggerate as against others all those which might have a tendency to shift the burden to them, and thus withdraw it from himself.

Of course the direction of danger would be not in a confession of too much, but of too little,—of an attempt on the part of the real culprit to implicate others in order to screen himself,—in short, of any thing rather than the assumption of a crime not committed.

In the whole History of Confession,—(and one strikingly illustrative of the action of the motive of propitiation),—whether we regard the peculiarity of the offence, the individual by whom the Confession was made, or the Forum to which it was addressed, perhaps the most remarkable on record is that of,—

"The wisest, brightest, meanest of mankind,"—

the great Lord Bacon, when arraigned by the Commons before the Upper House of Parliament, of which he was himself a member, on the
charge of having taken bribes in the exercise of his judicial office of Chancellor.

It was addressed to,—

"The Right Honorable the Lords of Parliament in the Upper House assembled."

And was,—

"The humble submission and supplication of the Lord Chancellor."

And thus concluded:—

"And therefore, my humble suit to your Lordships is, that my penitent submission may be my Sentence, and the loss of my Seal [meaning the Great Seal of State entrusted to him as Chancellor] my Punishment, and that your Lordships will spare any further Sentence, but recommend me to her Majesty's grace and pardon for all that is past.—God's holy spirit be amongst you—Your Lordships' humble servant and supplicant.

Fr. St. Albans Canc."

This, however, was thought to be too vague; and the Lord Chief Justice subsequently reported that he had received from the Lord Chancellor a sealed roll, which, when opened, was found entitled;—

"The humble Confession, and humble submission of me the Lord Chancellor."

And it ran thus;—

"Upon advised consideration of the charge descending into my conscience, and calling my memory to account so far as I am able, I do plainly and ingenuously confess that I am guilty of corruption, and do renounce all defence, and put myself on the grace and mercy of your Lordships."

That no question might arise as to the formality of the procedure, the Lords despatched certain members of their body to the house of the Lord Chancellor to inquire if the signature were his?—when his impassioned reply was;—"My Lords, it is my act, my hand, my heart. I beseech your Lordships to be merciful to a broken reed."
The sentence pronounced on the self-confessing offender was—

1st. That the Lord Viscount St. Albans should pay a penalty of £40,000—(equal to four lakhs of Indian money.)

2nd. That he should be imprisoned in the Tower (the then State Prison) during the King's pleasure.

3rd. That he should be for ever incapable of holding any public office or employment; and

4th. That he should never sit in Parliament or come within the verge of the Court.”

This celebrated Confession, in fact the justice of the charge itself, has been the subject of much keen discussion among biographers of Lord Bacon; and the Confession is suggested as having been wrung from him under circumstances to impeach the fullness of its effect. Whether this be so or not, it may be permitted to observe, that, strongly as all proper feeling would naturally be enlisted against any case of judicial corruption, the bitterest enemy of the Chancellor cannot but admit, that in the dignified pursuit of intellectual culture to which his later life was devoted, and the rich legacy which in its fruits he has left to mankind, some atonement, at all events, was made by him for whatever may have been the acts of his previous life.

To return however to Confessions of a more ordinary character;— and there is nothing in which the humanity of British Law is more conspicuous than in the caution which it prescribes as a condition for the reception of all confession—evidence; and the care with which it aims at guarding Confessions themselves from resort to undue influence in procuring them.

If, as has been already pointed out, Admissions in civil cases demand careful watching, a fortiori should Confessions in criminal ones be received with caution, from the higher and penal consequences involved.

* Campbell's Lives of the Chancellors.—Lord Bacon.
Caution too is the more necessary when it is considered that (with some occasional exceptions) it is among the lower and the uneducated classes of society that the agent of crime is usually sought; and it is from the mouth of the illiterate that the confession itself more ordinarily proceeds, with its original liability to inadequacy and inaccuracy of expression;—that it is in most instances made to another of no higher social position, with a corresponding chance of misapprehension and perversion, and, when not in writing, misrecollection and mis-statement;—that the agency through which confessions most often comes is the Police, frequently its lower functionaries, whose very esprit de corps renders them as a body zealous to achieve conviction,—a motive inflamed, if not by direct reward, as it sometimes is, by the indirect one of promotion;—and all tending to exaggeration in the confessions their instrumentality may have procured;—and lastly, in any case, even malice may be active to misrepresent, or carelessness passive to mistake.

Mr. Justice Foster in his Discourse on Criminal Law, published a century ago, thus gives his estimate of the value of confessions not taken under the sanction of a magisterial scrutiny;—

"For hasty confessions, made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured; words are often misreported, whether through ignorance, inattention, or malice, it mattereth not to the defendant, he is equally affected in either case; and they are extremely liable to misconstruction: and withal, this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be and often is confronted."*

Illustration.
Imperfect expression.
Mis-apprehension.

One case mentioned by Mr. Bentham is curiously illustrative of the chances of misrepresentation from imperfect expression.

"In the history of French Jurisprudence," says he, "may be found one in which inaccuracy of expression cost a man his life. A witness, having been examined in the presence of the defendant, and having been

* Foster's Crown Law, 248.
asked whether he was the person by whom the act was done, which he had seen done, answered in the negative. "Blessed be God," exclaimed 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'étoit pas moi" — "who has recognized, declared, that it was not I."*

... Another, selected from the criminal trials of England, the case of R. vs. Simons,† may be taken as an example of the hazard of misapprehension. The prisoner was indicted for an offence of which, if convicted, death according to the then state of the law would have been the punishment, and his wife accordingly left a widow. — In support of the charge, evidence was given of a statement in the nature of a confession, said to have been overheard as made by him to his wife on leaving the Magistrate's room after his committal, which as reported by the first witness, was — "Keep yourself to yourself and don't marry again;" implying of course his feeling of the sentence of death which awaited his guilt. — A second witness, however, being called to corroborate the evidence of the first, gave his version of the statement as follows; — "Keep to yourself and keep your own counsel." — Of course the supposed confession was rejected, and the prisoner was acquitted.

The ordinary considerations for caution, powerful any where, are doubly so in India; where the daily experience of its Courts but too painfully shows the general untrustworthiness of the channels through which confessions more usually come, and where the chances of miscarriage which exist both in the original confession, and its subsequent narration, are often augmented by the process of transposition from one language into another.

Addressing himself more particularly to India, Mr. Norton thus pertinently observes; —

* Judicial Evidence.
† 6, Carrington and Payne, 540.
CAUTION IN RECEPTION.

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

In those instances in which Conduct constitutes the Confession, caution is the more necessary in acting upon it, from the differing motives to which Conduct itself may be capable of being referred; and it is unquestionable that, even under the same apparent circumstances, the charge or suspicion of a crime might produce on the mind or conduct of one individual, an action entirely at variance with that which it might produce on another.

For example in the case of flight this might be an apparent, and is ordinarily recognized as a probable admission of guilt;—yet while the temperament of one man would dictate his remaining to assert his innocence, that of another equally innocent might lead him to escape the pain of an inquisition, by a withdrawal even at the sacrifice of his character.† So the agitation consequential on the accusation, which in the instance of one of accus-

* Norton on Evidence, 108.
† See Chapter on Admissions.
tomed composure might indicate that the charge was not without foundation, might in another of more excitable temper be the result of alarm at the having to encounter it. Indeed as has been pointed out in the Chapter on Admissions, particular conduct may have arisen in any other instance than that ascribed to it, and in addition to the illustrations there furnished we will add a case mentioned by Mr. Bentham, in which, a spoon being missed at an entertainment, one only guest refused to be searched, and suspicion naturally fell upon him.—His refusal, however, so far from originating in guilt was only the result of a spirit of pride acting upon a condition of poverty. He was a Military Officer; had the rank of his position to keep up; but while he went abroad to feast, had left a family starving at home. He had pocketed a portion of a fowl, part of the viands at the entertainment to take to his family, and it was in his desire to screen his poverty that he refused to permit the search of his pockets.*

But the law does not content itself with the mere enjoining of caution in the reception of a Confession. It protects first, in the case of a confession either judicial or obtained by the Police, by legislative provisions securing the confession from all undue influence in obtaining it; and, secondly, by rendering inadmissible as evidence all those confessions obnoxious to the charge of extortion.

Allusion has been made in the earlier part of the Chapter to the English Statute on the subject of monition (the one mentioned in Mr. Archbold's third classification of confessions), and Indian Law is based upon the same principle.

Regulation IX of 1793, which provides for the preliminary examination before the Magistrate of any party charged with an offence, requires the Magistrate to satisfy himself that all confessions made by prisoners are free and voluntary; while it abolished all corporal punishment or other ill-treatment, under pretence of compelling the accused to answer.

* Judicial Evidence.
Regulation XX of 1817 in reference to the proceedings of the Police, restrains Police Officers from encouraging confession; and particularly forbids to excite either the hopes or fears of a prisoner, by holding forth prospect of pardon, or using threats or other intimidation with a view to induce a confession.

The length to which the Mofussil Courts carry their mistrust of confessions has been already pointed out in their refusal to act on even a plea of guilty. But Indian criminal Jurisprudence tells but too truly that even,—

"Strict Statutes and most biting Laws"

may prove powerless against the habits of a people; and it is scarcely to be denied that the antagonism of the practice of the Indian Police to this wholesome theory of Indian Law only illustrates the saying of Horace,—

"What are Laws without Morals? They profit nothing;"

or as somewhat amplified by Machiavel, who tells us,—

"As good Morals to maintain themselves need the aid of Laws; so Laws to make them observed require the support of good Morals."

Dr. Chevers in his work on Medical Jurisprudence, published so late as 1856, states;—

"The extortion of confession by intimidation and even by torture, is a practice often attributed to the Police of this Presidency (Bengal), and occasionally brought home to them in extreme cases; and in certain instances, Darogahs and their subordinates have been under strong suspicion of fabricating cases, and of suborning witnesses."

* "Quid leges sine moribus
  Vanae proficiunt."
  Carm. L. III., 24.

† "Perché, così come gli buoni costumi, per mantenersi hanno bisogno delle leggi;
  così le leggi per osservarsi hanno bisogno dei buoni costumi."
  Dei Discorsi, L. i. c. 18, p. 150.

† Chevers on Medical Jurisprudence, 26.
A very recent trial in the Presidency of Bengal (1861) in which a Darogah was convicted of having practised torture under very aggravated circumstances, and was sentenced to a penal servitude of seven years for his offence, is a too truthful corroboration of the charge.*

* So jealous is the law of all undue influence in the obtaining a Confession, that in every case on which one is tendered in evidence against an accused it requires proof of its voluntary character to precede its reception; and where the trial is by Jury this is a preliminary question for the determination of the Judge. Ordinarily, however, and in the absence of suspicion, it is not required to do more than simply to give some general evidence negativing the fact of inducement; as for instance by asking the witness,—Whether it was procured by any promise or threat? Should there be circumstances on which to ground a suspicion even of improper procurement, this must be removed before the confession could be received. Thus where a constable, having a prisoner in custody, left the room in which the prisoner was detained, when another constable entered the room, on which the prisoner at once made a confession to him, it was held necessary for the prosecutor to call the first constable, for the purpose of proving that he had not held out any inducement.†

Should it happen in a later stage of a trial that a confession, admitted at an earlier one, ought not originally to have been received, the course is for the Judge to strike the confession out of his notes; and the trial proceeds as if the evidence of it had never been given.

In order to bring a Confession within the condition of voluntary, there must be an absence of those influences which the law defines as vitriatory; and the question of voluntariness assumes two distinct phases or classifications;—

* Sentence confirmed by Nizamut Adawlat on Appeal.
1st.—As regards the persons under whose influence the confession may have been made,

And, 2ndly—The influence itself.

Any confession made to one of the prescribed class, and under the prescribed influence would be rejected; but the combination of the two, the class and the influence, must exist, or the confession would not be inadmissible.

"The general rule on the subject," says Mr. Phillipps, 'may be thus stated;—A promise of benefit or favor, or threat or intimation of dis-favor, connected with the subject of the charge, held out by a person having authority in the matter, will be sufficient to exclude a confession made in consequence of such inducement either of hope or fear."*

In the language of Chief Baron Eyre—"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."†

The class proscribed embraces all those who from their position are treated as having an authority over the accused, in connection with the prosecution, and from the existence of which influence is assumed.

These are the prosecutor, his wife or attorney, the master or mistress of the accused (where the offence concerns them) the constable or other officer acting in the apprehension of the party or having him in custody, a magistrate, and the like. They would all be regarded as possessing the authority in question; and inducements accordingly to confess of the prescribed character, held out by persons in any of these positions, would vitiate any confession which was based upon them.

In the case of a servant, the wife as well as the relations or neighbours of the prosecutor have been included in the class, where the charge applied to the person or property of the master; and the wife has been

* Phillipps and Arnold, 10th Ed., p. 408.
† In Warickshall's Case, l, Leech's Crown Cases, 263
held to be a person within the class, where the offence was committed against several persons in partnership, her husband being one of them. The case would be otherwise did the charge not affect the person or property of the master or mistress, as for instance a case of child-murder, or concealment of birth.

A person having only a temporary custody would be treated as having authority within the meaning of the rule. Thus in the instance of a girl apprehended for the murder of her child, and left temporarily by the constable in the custody of a woman who persuaded her to confess, the confession was rejected.*

It might happen, that while the inducement originally proceeded from a party having authority, the person to whom the confession was actually made was a different individual. The identity and continuance of the influence being shown, the difference of the individual would be no ground of distinction. Thus were the party originally holding out the inducement a Magistrate, but the person to whom the confession was ultimately made a Turnkey, it has been considered that the confession would not be receivable; and a fortiori would it be so, when the inferior officer had not cautioned the prisoner previously to the confession.†

It is not necessary that the authority should be actively exercised; it is sufficient to vitiate the confession if it be so constructively. Thus in the instance of a confession made in the presence, simply, of the person having the authority, without any interference on his part,—if sanction, either expressed or implied, could be imputed to him, the confession would not be receivable, and the failure to express dissent would be equivalent to assent.

Whether the vitiating effect would be confined to influences of persons of the proscribed class, or, in the case of others obtaining confessions on inducements they had no authority to hold out, be extended to them;

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* R ex. Enock, 5, Carrington and Payne, 539.
† R. ex. Cooper, 5, Carrington and Payne, 585.
was formerly an undecided question. It has been considered to have been established, however, by a case of Regina vs. Taylor* that it would be confined to the proscribed class.—Mr. Justice Patteson there stated:—

"It is the opinion of the Judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority, and in this case I should have received the evidence of the statement made to Mr. Winders, if the inducement had been held out by him alone. But here the inducement does not rest with him alone, because Mrs. Lyford, who was the Wife of the prosecutor, and also the Mistress of the prisoner, was present with Mr. Winders, and must, as she expressed no dissent, be taken to have sanctioned the inducement. I think, therefore, that the inducement must be taken, as if it had been held out by Mrs. Lyford, who was a person in authority over the prisoner, and that, therefore, the evidence is inadmissible."

Mr. Taylor indeed appears to treat the question as, notwithstanding that case, still an open one; and he adds, certainly with considerable force,—"An inducement held out by a private individual may be, and, indeed, frequently, is, quite as much calculated to cause the prisoner to utter an untrue statement, as any promise made to him by a person in authority; in these cases, the confession made to such private person should be excluded. It is therefore submitted, that without laying down any positive rule, whether of admission or rejection, the Judge should determine each case on its own merits; only bearing in mind, that his duty is to reject such confessions only, as would seem to have been wrung from the prisoner, under the supposition that it would be best for him to admit that he was guilty of an offence which he really never committed."†

It will be observed, however, that in Regina vs. Taylor, which is, we believe, the last case on the subject, and in which the previous opposite authorities were cited, Mr. Justice Patteson represented himself as acting

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* 8, Carrington and Payne, 733.
in conformity with an established opinion on the part of the Bench; and certainly Mr. Phillipps adopts the decision in Regina vs. Taylor as now furnishing the rule; for after a reference to that case, he adds;—"It seems settled, therefore, for the present, that under ordinary circumstances a confession is not to be excluded on account of its having been made under an inducement held out by some person who had no authority of any kind in the matter."

Mr. Archbold too, with Mr. Phillipps, treats the law on the subject as settled by Regina vs. Taylor; and we apprehend it must be so considered.

One thing at all events is beyond question; and that is, that in the case of a confession made at the instance of a party interfering officiously, and made to another who has not sanctioned the undertaking to confess, the inducement would not invalidate the confession. It is assumed that the influence would be of too indirect a character to be operative on the mind; while, to admit the suggestion of such an influence to vitiate, would be to open a door to the chances of the production on the day of trial of associates or others falsely to state the confession to have been made under their influences, and then to avoid it; or honest confessions might get shut out by the embarrassing intervention of meddling persons.

"To exclude a confession," observes Mr. Archbold, 'made under the influence of a promise or threat, the promise and threat must be of a description which may be presumed to have such an effect on the mind of the defendant as to induce him to confess: and therefore an exhortation, admonition, promise, or threat, proceeding at a prior time from some one who has no concern in the apprehension, prosecution, or examination of the prisoner, but interferes without any authority, will not be sufficient to render a confession inadmissible."

* Phillipps and Arnold, 10th Ed., 410.
† Archbold's Criminal Law, 191.
‡ Archbold's Criminal Law, 191.
So Mr. Phillipps:

"A confession made in consequence of an inducement held out by a person who has no authority, and cannot reasonably be supposed to have any, is not liable to the suspicion or presumption of being untrue. It is not likely that an inducement held out by a person having no authority, would have the effect of prevailing on a prisoner to make an untrue confession to him; on the contrary, he would, probably, be particularly cautious as to what he stated to such person to his own disadvantage. It has been decided, therefore, that a confession made to a person who held out an inducement, but who had no authority whatever in the matter, is not to be excluded by reason of such inducement."

In the case of a confession established to be voluntary, it would be wholly immaterial to whom made, and whether warning had been given or not.

Let us now turn to the Influence which would vitiate a Confession; and this may assume the form either of promise, of threat, or of advice.

The essential element is that the influence should address itself to the charge in question; and, either to the escape of the accused from it, or to some diminution of its punishment;—while it must be on the hopes or fears of the party, in connection with the result, that the influence must be operative.

In a modern case of Regina vs. Baldry† the whole subject of confession underwent a very elaborate investigation and in a full Court; and the following statement of the law by the able Counsel for the prisoner, and rejoinder of the Chief Justice, are taken from the report;—

H. Mills, for the Prisoner:—"It is proposed, on behalf of the prisoner, to substantiate the objection raised at the trial; and the question is, whether the words addressed by the constable to the

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† 2, Denison's Crown Case, 430.
prisoner held out to him the promise or assurance of any worldly advantage to himself, in regard to the charge, as the consequence of making a statement, or a threat of harm to himself as the consequence of refraining from doing so; if so, a confession made on the strength of these words, would be inadmissible in evidence."

Lord Campbell, Chief Justice,—"That is the question."

Accordingly an inducement held out, with reference to one charge, would not exclude a confession in relation to another; unless indeed the offences were so blended together as, in reality to constitute but one.

Neither would it be any objection that the confession was made before the charge was actually preferred, that is, previously to the information before the Magistrate, or the apprehension of the accused upon it. It may be made at any time pending the investigation.

An influence of a religious character, had on a spiritual exhortation, would not affect the validity of the confession.

Nor would one of a personal and collateral benefit, as for example a promise to strike off the hand-cuffs,—to give the accused some spirits,—or let him see his wife;—all which have been held not to vitiate the confession.

It is not necessary that the communication under which the confession was obtained, should be made direct to the accused. If in fact presumably capable of being acted on by him, it would be sufficient, were it made originally to a third party, as for instance to his wife.

Thus where a Post-man, or, as it would be termed in India, a Post Office or Dawk Peon, was in custody on a charge of opening and detaining a letter, and a superior clerk in the department said to the wife,—"Do not be frightened, I hope nothing will happen to your husband beyond the loss of his situation,"—the husband’s subsequent confession
was rejected; it appearing that the statement might have been communicated to him by the wife.

The precise inducement will of course vary with each particular case.—The more ordinary form is that which would hold out either a promise or a threat, making the position of the accused either better or worse according as he confessed or not.

The following are examples taken from cases where the very expressions themselves have undergone the judicial ordeal, and have been held to vitiate. If it be said to the defendant "that it will be better or worse for him if he do or do not confess"—or if a confession be procured by a threat to "take the defendant before a Magistrate, if he do not give a more satisfactory account,"—or "to send for a constable,"—or by saying, "If you do not tell me who your partners were, I will commit you to prison:"—"Tell me where the things are, and I will be favorable to you:"—"I only want my money, and if you give me that you may go to the devil:"—"You had better tell where you got the property:"—"You had better tell all you know:"—or, "You had better split, and not suffer for all of them:"—or, "It would have been better if you had told at first:"—"If you will not tell all you know about it, of course we can do nothing," meaning nothing for the benefit of the accused.

The gist of all these cases is that they held out an inducement. To this extent, accordingly, it may be considered that other analogous expressions would avoid the confession.

There is no doubt, however, that cases have occurred in which the doctrine has been applied beyond its legitimate limit; and, where the element of inducement could hardly be detected even by the most microscopic examination.

"There is a general feeling," says Mr. Phillipps, "not unfounded, that the rule has been extended much too far, and been applied in some cases where there could be no reasonable ground for supposing that the
inducement offered to the prisoner was sufficient to overcome the strong
and universal motive of self-preservation. The doctrine has also been
attended with much inconvenience, in consequence of the nice distinc-
tions, and numerous and sometimes contradictory decisions, to which it
has given rise."

Suggestions, even, merely directed to encourage a statement of the
 truth, to apprise the prisoner of his position, to in-
form him that use will be made for or against him, on
his trial, of his statement, have all been held to invalidate the confession.
For example:—"It will be better for you to speak the truth. It is
of no use for you to deny it, for there are the man and boy who will
swear they saw you do it." "Do not say any thing to prejudice your-
self, as what you say I shall take down, and it will be used for you or
against you at your trial." "What you are charged with is a very
heavy offence, and you must be very careful in making any statement to
me, or any body else, that may tend to injure you; but any thing you
can say in your defence, we shall be ready to hear, or send to assist you."

In one case it was even attempted to avoid the confession upon a
simple caution to the accused "to tell the truth;"
but this not being accompanied by any inducement to
do so, as in the instance cited above where it was said,—"It will be
better for you to tell the truth,"—was rejected by Mr. Justice Littledale.
The learned Judge observed:—"It can hardly be said that telling a
man to be sure to tell the truth, is advising him to confess what he is
not really guilty of."†

The unwarrantable length to which the doctrine had been carried
was very forcibly pointed out by Mr. Taylor in the
original edition of his work on Evidence; and,
when the matter came before the Court in Baldry's
case, referred to above, his view received the unanimous support of the
Judges; Lord Wensleydale, then Baron Parke, thus observing;—

* 1, Phillipps and Arnold, 10th Edition, 408.
† R. v. Court, 7, Carrington and Payne, 486.
"By the Law of England, in order to render a confession admissible in evidence it must be perfectly voluntary; and there is no doubt that any inducement in the nature of a compromise or of a threat held out by a person in authority, vitiates a confession. The decisions to that effect have gone a long way; whether it would not have been better to have allowed the whole to go to the jury, it is now too late to inquire, but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree with the observation of Mr. Pitt Taylor, that the rule has been extended quite too far, and that justice and common sense have, too frequently, been sacrificed at the shrine of mercy. We all know how it occurred. Every Judge decided by himself upon the admissibility of the confession, and he did not like to press against the prisoner, and took the merciful view of it. If the question were res nova I cannot see how it could be argued that any advantage is offered to a prisoner by his being told what he says will be used in evidence against him."

The statement in Baldry's case was that of the Police constable, and which, as taken from his own evidence, was as follows:—"I went to the prisoner's house on the 17th December. I saw the prisoner. Dr. Vincent, and Page, another constable, were with me. I told him what he was charged with; he made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said he need not say any thing to criminate himself. What he did say would be taken down and used as evidence against him."

Objection was made on behalf of the prisoner that what he then said was not admissible. The point was reserved for the opinion of the Judges; and the Confession was ultimately received. It was argued that statements generally of this nature amounted to inducements to confess; and consequently were not voluntary; and appeal was made to those cases in which a holding out to the individual that "it would be

* 2, Denison's Crown Cases, 444.
† 2, Denison's Crown Cases, 444.
better for him to confess," had been held to vitiate. But Lord Campbell, Chief Justice, applied the true test when, quoting the words cited above, he said;—"Do these words import a promise or a threat?" And in reference to the assumed analogy of the exhortation to tell the truth, Pollock, Chief Baron, in delivering his judgment, thus observed:—

"A simple caution to the accused to tell the truth, if he says any thing, has been decided not to be sufficient to prevent the statement made being given in evidence; and although it may be put that when a person is told to tell the truth, he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say any thing, but if he says any thing let it be true. It has been decided that that would not prevent the statement being received in evidence by Littledale, J., in the case of Rex vs. Court, 7 Car. and P. 486, and by Rolfe B, in a case at Gloucester, R. vs. Holmes, 1 Car. and K. 248; but where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession was not receivable—the objectionable words being that it would be better to speak the truth, because they import that it would be better for him to say something. This was decided in the case of Reg. vs. Garner, 1, Den. C. C. 329. The true distinction between the present case and a case of that kind is, that it is left to the prisoner a matter of perfect indifference whether he should open his mouth or not."

Baldry's case has placed the law upon a much more satisfactory footing; and its principles may be taken to be governing ones on the subject.

Any form of expression, even though ambiguous, which left it open to the construction of amounting to either threat or promise, or left that construction open to reasonable doubt, would render the confession inadmissible.

* 2, Denison's Crown Cases, 442.
The inducement, to be a vitiating one, must be operative at the time of confession—not some former, unless shown to be a continuing inducement. The former inducement the law would consider might have been effaced; and à fortiori would it be so if, notwithstanding the original inducement, there had been a subsequent warning; and the result would be the same though the confession were finally made to the party holding out the original inducement. Of course, there would be less ground of objection were it made to another. In one case a prisoner, on being taken into custody, was told by a person assisting in the apprehension, “that it would be better for him to confess,”—but being subsequently cautioned by the committing Magistrate to say nothing against himself, and afterwards confessing, the confession was received.

On this point it is observed by Mr. Taylor:

“Where promises or threats have been once used of such a nature as to render a confession inadmissible, all subsequent admissions of the same or the like facts will be rejected, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there be good reason to presume, that the delusive hope or fear which influenced the first confession has been effectually dispelled. Where, however, it appears to the satisfaction of the Judge, that the improper influence was totally done away before the confession was made, the evidence will be received.”*

Where the element of influence did not exist, it would be immaterial in what way the confession was obtained. It might even be got by means which a person of nice sense would pronounce dishonorable,—as for instance under a promise of secrecy,—by deception, false representation or other artifice;—nay, even by making the accused drunk, however much and properly so the Court would reprobate the course pursued. Thus, for instance, where one in prison having written a letter containing an admission of his crime, and delivered it to the turnkey to post, without communicating its

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contents, and the letter was stopped by the Gaoler. So, where a person
to whom the accused was about to divulge his crime took a previous
oath to secrecy and broke it. So, where the confession was made upon
a representation that the accomplices had been apprehended, from which
it might have been inferred that the crime would be divulged, and the
guilt of the accused become manifest. And again, where a constable
assumed the guilt in order to entrap the prisoner into its confession,
asking her "how she came to poison her uncle," and the stratagem
elicited a confession.—In all these cases the confession was admitted,
notwithstanding the artifice.

The ground was that, however unworthy the device resorted to,
there was nothing in the way of inducement to extract the confession,
nothing to operate on either the hopes or the fears of the accused.

It has been held that drunkenness would not, per se, avoid a confes-

_Drunkenness would not avoid.

_on, though it would naturally detract vastly from its weight.

On the score of weight, though, it may be observed there is an old
Latin apothegm,—

"In vino veritas,"

which means to enunciate that in a state of inebriety the truth will
drop out; and to a certain extent no doubt this is true. Thus, the
tongue might be prone to babble of that which, under the existence of
crime, might be uppermost in the mind; while the diminished power of
self-control and of caution, engendered by a state of intoxication, would
leave the mind itself in a condition of unguardedness. Still, the very
notion of a Confession would seem to involve some deliberative action of
the mind, and it is not ordinarily in a state of drunkenness that this
action is to be sought.

There is one recorded case in which a statement made by a prisoner
while talking in his sleep was tendered in evidence as a Confession; but Tindal, Chief Justice,

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* "There is truth in wine."
doubting its admissibility, it was withdrawn. One cannot, however, but observe that the wandering of the dream is but a step, if at all, removed from the raving of drunkenness; and that which oppresses the mind by day often finds utterance in the vision of the night. In the scene in which Lady Macbeth is depicted by Shakespeare as walking the chamber in her sleep, and in her talk betraying the murder of the King, the Doctor, who was called in to cure her of her sleep-walking, but gave utterance to a well-known fact when he said—

———“Inflicted minds
To their own pillows will discharge their secrets.”†

If the confession of the drunkard is to be admitted, one would be almost disposed to admit that of the dreamer; and possibly as regards both, the proper way to deal with them would be to make each admissible, ascribing on the score of effect but little weight to either; and leaving the whole a question of circumstances. Conduct, however, would appear the more appropriate head to which to refer either.

It would be no objection that the confession came out as the result only of questioning, whether question put by a stranger, by a constable, or others; though English Judges very much reprobate the practice.

Still less would it be an objection that the knowledge was got by listening, as for instance a statement overheard on the muttering of the accused to himself, or in a conversation with his wife.

Summary by Mr. Archbold.

Mr. Archbold, speaking generally on the whole subject, thus sums up the result of the authorities:—

“*The only questions in these cases really are—was any promise of favor, or any menace or undue terror made use of, to induce the prisoner to confess? and if so, was the prisoner induced by such promise or menace, &c., to make the confession attempted to be given in evidence?*

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† Macbeth, Act V. Scene I.
If the Judge be of opinion in the affirmative upon both these questions, he will reject the evidence. If, on the contrary, it appear to him, from the circumstances that, although such promises or menaces were held out, they did not operate upon the mind of the prisoner, but that his confession was voluntary notwithstanding, and he was not biased by such impression in making it, the Judge will admit the evidence.*

Were the inducement held out, conditional on some act to be done by the accused himself, and he to break the condition, this would be tantamount to a forfeiture of the protection implied in the inducement, and leave the confession admissible. Thus, in the instance of a confession made under the inducement of being allowed to turn King's evidence, were the party on the day of trial to fail to make the promised disclosure, the inducement would be treated as cancelled, and the confession would be received.

In the case of a statement upon oath of a party charged with a crime, and made on any preliminary investigation, whether before a Magistrate or on the Inquisition of the Coroner, the statement would not be receivable as a confession on the subsequent trial, for the same offence, of the party making; it the principle being that the oath itself places him under a species of constraint.

There are authorities in which this principle has been applied to a case where the statement was made by the individual rather in the character of a witness than an accused; as, where there not being at the time any person specifically charged, but the party having been examined in common with others, he was ultimately committed on their depositions. This, however, has been much shaken by later decisions; and the doctrine could not now be relied on. Mr. Taylor, commenting on them, says;—

"On the whole it seems clear, that if a prisoner, on being examined as a

* Archbold's Criminal Law, 193.
witness, has consented to answer questions, to which he might have demurred as tending to criminate himself, and which, therefore, he was bound to answer, his statement will be deemed voluntary, and, as such, may be subsequently used against himself for all purposes, unless he be protected by the special language of some statute.”

It has been questioned, indeed, whether in any case in which an examination had been taken on oath, it would be admissible; and this on the ground that the oath would destroy the voluntary character of the admission.

The better opinion, however, is that there is no weight in the objection; and undoubtedly there are many cases in which it has not been adhered to.

Thus, it has been held that statements made under an examination in bankruptcy, and that even after a charge on the offence before a different tribunal, answers in Chancery, depositions made on charges against other persons, and testimony given before a committee of the House of Commons,—and all of them being upon oath,—would be admissible in the nature of confessions, on the subsequent criminal trial of the party making them, on the matter to which they related.

According to English law, it is clear too, that where at all events the investigation had reference to another offence, the statement would be admissible, notwithstanding the oath; as it would have been competent to the party in his character of witness to refuse to submit to a self-crimination. “And it may be laid down generally” says Mr. Phillipps, “that a statement upon oath by a person, not being a prisoner, and when no suspicion attached to him, the statement not being compulsory, nor made in consequence of any promise of favor,—is admissible in evidence against him on a criminal charge. Thus, where a prisoner had been examined upon oath respecting a distinct charge

against another person, Parke, B., received the evidence of the examination."

Were a party, however, examined as a witness, improperly constrained to a course of examination, in which he had criminated himself, the examination, if tendered as a confession, would be rejected.

In the instance of a statement made before a Magistrate, objectionable as having been taken on oath, were the deposition afterwards destroyed, and the statement subsequently renewed upon caution, the second statement would be admissible.

In India, the Evidence Act in making self-crimination no excuse for not answering, whether in a civil suit, or on a criminal proceeding, (Section 32) expressly prohibits the answer being used against the party on any other criminal prosecution than one for perjury in the answer itself.

This would obviously be a protection to any Confession extorted under the compulsory process of an examination. It would seem, however, to leave all statements made otherwise than under such a process to be dealt with according to what might be the English law applicable to the subject.

Inadmissibility is confined to the Confession itself. However open to objection accordingly this might be in the mode of eliciting it, extraneous facts coming out as its result would not be excluded. Thus, for example, did the Confession extend to the assigning a place in which stolen property was to be found, and it was there discovered, the proof of the fact would not be shut out by any original taint as to the source of information.

In Warickshall's case,† which is an early and leading authority on this subject, the law was thus laid down by the Chief Baron Eyre:—

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* 1, Phillipps and Arnold, 425.
† 5, Leach's Crown Cases, 263.
"This principle respecting confession [the principle that a forced confession was not receivable as an evidence of guilt] 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 would appear that even in the case of a delivery up of goods by the accused, his accompanying statements in the way of confession would be receivable as explanatory of the delivery, notwithstanding the objection that, the confession itself had been improperly obtained. "If the prisoner," says Mr. Taylor, "himself produces the goods stolen, and delivers them up to the prosecutor, notwithstanding it may appear that this was done upon inducements to confess held out by the latter, no reason seems to be assignable for rejecting the declarations of the prisoner, cotemporaneous with the act of delivery, and explanatory of its character and design, though they may amount to a confession of guilt. But whatever he may have said at the same time, not qualifying or explaining the act of delivery, is to be rejected. And, if in consequence of the confession of the prisoner thus
improperly induced, and of the information given by him, the search for
the property or person in question proves wholly ineffectual, no proof of
either will be received. The confession is excluded because, being
made under the influence of a promise, it cannot be relied upon; and
the acts and information of the prisoner, under the same influence, not
being confirmed by the finding of the property or person, are open to the
same objection. The influence which may produce a groundless con-
fession, may also produce groundless conduct."

No confession of either Accomplices or Agents would be receivable
against another; and, in the case of Principal
and Receiver, the confession of either would be
within the protection, and that though, on their
joint trial, the confession were that of the Principal on a plea of guilty.

As respects the case of Agents, it is an ordinary principle that
there is no agency in crime.

In reference to charges against Co-conspirators, we have seen in
the case of admissions, that, the community of
the offence being established, the statements of
all may be received in illustration of the general acts of the conspiracy.
It is necessary, however, to distinguish between statements illustrative
of the acts, and confessions of the crime itself. The confession of one
would not be receivable on the trial of the other.

As in the case of Admissions, so in that of Confessions, the whole
statement must be received; and upon the prin-
ciples already explained in relation to the for-
mer.

Indeed, in the case of Confession, the practice, if not the law, and
in favorem vitae, carries the obligation to receive
the entire statement even further than in Ad-
missions, since not only is it required that all that is explanatory of
any particular statement previously given in evidence should be received.

† "In favor of life."
but all relative to the charge whether explanatory of the previous statement or not.

The whole must be read, even where part of it may implicate other parties, and to the extent of the names of the parties inculpated; though by itself no evidence of course against them; of which, in a case of a trial by Jury, it is the duty of the Judge to apprise the Jury.

Of course each particular portion of a confession is subject to contradiction by other evidence; and, though the whole confession is received as matter of evidence, varying weight may be ascribed to its different parts, and even to the extent of an entire disbelief of any particular statement.

As an ordinary principle of English law a party might be convicted on his own Confession, without any corroborative proof; save in a case either of High Treason, or where proof was wanted of the corpus delicti adverted to in the Chapter on Preconstituted Evidence. In the Courts, however, of the Mofussil, as noticed above, even a plea of guilty does not supersede the necessity for trial; and à fortiori would an ordinary confession require corroboration.

There is no doubt that, in the principle which seeks security for the fidelity of every Confession to be brought up in evidence against an accused on his trial, and especially in rejecting whatever is liable to the suspicion of coercion or even influence, our Jurisprudence is based, no less on a spirit of humanity, than of sound and enlightened judgment. In the extreme, however, to which the application of the principle has been carried, and in the reluctance the administration of Criminal Justice has exhibited to borrow any aid in the detection and the punishment of crime from the party suspected of its commission, it has been thought to have displayed rather a leaning to the cause of Compassion, than an adherence to that of Justice.
This is certainly in marked contrast to the practice of Continental Nations; which avails itself largely of the self-crimination of the accused to achieve his own condemnation.

This is accomplished, however, by a course of interrogation, both on the original accusation and on the trial, which, especially as instanced in the latter, often partakes more of the character of a system of torture, than the calm dispassionate investigation of a fact, the impartiality of trial, to be looked for in the Judicial Tribunal. 

There is a case frequently cited as illustrative of this,—that of the trial at Paris in the year 1847 of Le Duc de Praslin for the murder of his wife;—and our readers will appreciate the scene if they will picture to themselves the Duke placed at the bar on his trial, the President of the Court, his Examinant, and the following course of examination occurring.—The italics are of course ours, and only mark the more salient parts of the illustration.

Question.—"Was she (the deceased) not stretched upon the floor where you had struck her for the last time?"

Answer.—Why do you ask me such a question?

Q.—You must have experienced a most distressing moment when you saw, upon entering your chamber, that you were covered with the blood which you had just shed, and which you were obliged to wash off?

A.—Those marks of blood have been altogether misinterpreted. I did not wish to appear before my children with the blood of their mother upon me.

Q.—You are very wretched to have committed this crime?—(The accused makes no answer, but appears absorbed.) Have you not received bad advice, which impelled you to this crime?

A.—I have received no advice. People do not give advice on such a subject.
Q.—Are you not _devoured with remorse_, and would it not be a sort of _solace to you to have told the truth_?

A.—Strength completely fails me to-day.

Q.—You are constantly talking of your weakness. I have just now asked you to answer me simply yes, or no?

A.—If any body would feel my pulse, he might judge of my weakness.

Q.—Yet you have had just now sufficient strength to answer a great many questions in detail. You have not wanted strength for that?—(The accused makes no reply). _Your silence answers for you that you are guilty._

A.—You have come here with a conviction that I am guilty, and I cannot change it.

Q.—You can change it if you give us any reason to believe the contrary; if you will give any explanation of _appearances that are inexplicable upon any other supposition than that of your guilt._

A.—I do not believe I can change that conviction on your mind.

Q.—Why do you believe that you cannot change that conviction?—(The accused, after a short silence, said that he had not strength to continue).

Q.—_When you committed this frightful crime_ did you think of your children?

A.—As to the crime, I have not committed it; as to my children, they are the subject of my constant thought.

Q.—Do you venture to affirm that you have not committed this crime?—(The accused, putting his head between his hands, remained silent for some moments and then said,)

A.—I cannot answer such a question.”*

To this we will add a very recent trial,—one which took place at Tours in December 1859, and which was of a Madame Lemoine and

* See particularly Best on Confession, 535.
her daughter charged with the murder of the illegitimate child of the latter, the paternity of the child being ascribed to the family coachman. The mother was charged with having prepared a fire for the destruction of the child immediately on its birth. Both the design and execution were denied. Yet the Judge thought it not unbecoming the dignity of his office, and a sense of consideration to the accused, thus to assume her guilt in the interrogation which we quote.

Q.—“What preparation did you make for her confinement?
A.—Excuse me, the details would be painful.
Q.—I insist on your answering?
A.—I did what every mother would have done, and among other things I put a bed in the room.
Q.—And what happened?
A.—A dead child was born.
Q.—And what did you do with it when you had condemned it in advance not to live?
A.—Oh! Sir, what you now say deprives me of the courage of stating what passed.
Q.—When a woman has the courage to throw into the fire the child of her daughter, she ought to have the courage to state what she did.
A.—I had the courage to do what was necessary to save the honor of my daughter.”

It will be noticed that the form of the question attributed to the party under examination a previous admission of those very facts which had throughout been denied by her; and the whole interrogation was pointed to entrap. The daughter was acquitted; but the mother was found guilty, and sentenced to twenty years' hard labor—which sentence however she appealed.

This is not the occasion to enter into any elaborate discussion on the relative value of the two systems, the British and the Foreign. Any one desirous of pursuing the subject will find some very
pertinent observations on the subject in Mr. Best's work on Confession, and the Indian Student will find them transferred by Mr. Norton to his pages.

We will just however add that, if we may err at all in one extreme, with such scenes as these brought to the mind, one could scarcely desire the correction of the error at the chance of running into the opposite one displayed in the trials of Madame de Lemoine and Le Duc de Praslin, and which would seem to re-enact to the mind, if not to the body, the rack of the barbarous ages.

Occasional instances may possibly occur under our system in which guilt may escape its punishment from the absence of proof from without. But on the whole it is submitted, even the cause of Criminal Justice itself is best saved by the refusal to extort a Confession from within, if that Confession is only to be had at a sacrifice of the dignified and humanising impartiality which may well entitle a British Criminal trial to the admiration of the world.
CHAPTER XX.

On Presumptions.

In the Introductory Chapter of the work, we have entered upon the more general doctrine and principles of that portion of the law which treats of Presumptions; and these have been there classified under the three heads of—Presumptions of Fact,—Presumptions of Law,—and Mixed Presumptions.

Presumptions of Fact, as already pointed out, are, from their very nature, of too varied and subtle a character to admit of reduction to the standard of an artificial rule. Mixed Presumptions are partly open to the same observation; while they exist more particularly in relation to the English Law of real property, and the niceties of that system, and find their way but sparingly into Indian Jurisprudence.

It is deemed unnecessary accordingly to enlarge further than has already been done on either of these two classes of Presumption; and, in what remains to be added, attention is confined to Presumptions of Law;—and we add such detail with respect to these as it is conceived may be found practically useful.

To the head 'Presumption' have been sometimes referred matters, the appropriate falling under which, at all events in the more accustomed apprehension of the term, it may be permitted to doubt.

Thus, certain Statutes have, in particular cases, substituted the assumption of certain specific things for their reality. The ordinary English conveyance of land, for example, having formerly been an assurance founded on the theory of the existence of a lease of the land in the party to whom it was conveyed, granted to him by the owner for a nominal term, and a release to that party in perpetuity by the owner of his interest in the reversion, an Act of the present reign provided,
STATUTORY PRESUMPTIONS.

that a recital of the lease in the deed of release was to be taken as conclusive of the existence of the lease; and the like principle has been adopted in relation to other matters the subject of other statutes. These statutes have been said to create Statutory Presumptions of the matter of proof dispensed with. So again, other statutes, familiarly termed Statutes of Limitation, have prescribed limits to the periods within which rights could be prosecuted. These have been sometimes referred to the supposition that the want of an earlier prosecution of the right carried with it a presumption of its satisfaction.

It is submitted that the reference of these statutory enactments to the doctrine of presumption is somewhat out of place. The simpler mode of dealing with the matter would seem to be to refer the results accomplished by the statutes to the specific provision of the statutes themselves; and it is desirable not to introduce complication; and especially by considerations which have no foundation in fact.

Thus in the case adverted to of the statutory dispensation with the proof of the lease,—it is conceived that when a statute enacts a dispensation of proof, as a specific remedy for a particular and isolated emergence, there is no occasion, either in pursuit of a legal analogy or otherwise, to fall back on a presumption; and especially would this seem objectionable when the presumption is in fact untrue. So, with respect to the Statutes of Limitation, and their foundation on an assumed satisfaction of a right, whatever may be the policy in which they originated, whether the presumption of satisfaction, or the desire to conclude a course of litigation, it is sufficient to appeal to the particular statute itself to determine the question of the continuance of the right or its extinction; and that without any reference to the question whether the bar which the statute creates, approach to the character of a Presumption or not. Indeed as regards these very Statutes of Limitation themselves, we should be rather disposed to refer their policy to the maxim,—"Interest Reipublicæ ut sit finis litium"; in other words, to the policy of quiescence by time, than to any presumption

* "It behoves the State that disputes should have an end."
of satisfaction;—a policy eloquently described by Lord Plunkett in the celebrated passage in one of his speeches, in which he says;—"If Time destroys the evidence of title, the Laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights; but in his other hand the lawgiver has placed an hour-glass, by which he metes out incessantly those portions of duration which render needless the evidence that he has swept away."

We abstain, accordingly, from dwelling further on this species of Presumption, considering it hardly appropriate to a work simply on Evidence; and we pass on to the notice of those more practical ones which have acquired a prominent position in our Jurisprudence.

Foremost among these is the presumption which, on the principle that the act must be the index of the mind, assigns to every member of the State of adequate age and understanding, the intention indicated by his acts, and holds him to their consequences, that is, acts of a deliberate character, and consequences which are the immediate and natural ones of the acts; and so holds him, whether in relation to proceedings, criminal or civil.

Thus the malicious intent, that is, the intent to kill or perpetrate homicide, is inferred from the use of the deadly weapon, the laying of poison, and so forth; and that even though the intention ultimately manifested itself in a form different from its original conception; as for instance the killing one man with a gun, supposed or intended to be fired at another, which, in the eye of the law, would as much amount to murder as had the gun been in fact levelled at the party originally designed. So, the setting fire to a building, even though no motive were shown, would be evidence of malice, and an intent to injure the owner. An exception though to this inference, of a malicious intent, has been made in the case of suicide, where the character of the act itself is obviously dependent

* Lord Brougham’s Life of C. J. Bushe, in his Historical Sketches.
on the state of mind of the party;—and this on a Coroner's inquest is always a prominent subject of enquiry. Again, an act of a trader which has the effect of defeating or delaying his creditors might, on a question of his bankruptcy, fix him with that intent. And in an action for libel, the publication of the calumny which the publisher either knows to be false, or has no reason to believe to be true, would be presumptive of malice; as in an action for false representation, would be that of the representation itself if known to be false, whatever might be the motive. So the tearing in pieces by a testator of his will, would constitute a presumption of an intention to revoke it; as would the taking up a residence in a foreign country create one to change the domicil from the original one of the party to that to which he had removed.

Whenever the application of this presumption, however, arises on a question of malicious intent, it is necessary to distinguish between malice in fact, and legal malice; and it must be borne in mind that the presumption would arise as much in respect of the latter as the former.

"Malice," says Mr. Justice Bayley, "in the common acceptation, means ill-will against a person; but in its legal sense, it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle without knowing whose they are: if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. If I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I mean to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces."

* Bromage vs. Prosser, 4, Barnewall and Cresswell, 247.
With reference to the presumption in question it should be stated that the responsibility of an individual is not always limited even to his own acts.—In civil cases, at all events it is a maxim "Qui facit per alium facit per se,"—in other words, an act done by another in any of those relationships in which the law would imply agency, is an act done by the individual himself. Thus, a contract entered into by an authorized agent,—an act done by a servant within the scope of his authority,—would be presumed an act of the principal or master. Whatever, therefore, in such cases, would be properly presumable against the Agent, would equally amount to a Presumption against the Principal.

In criminal cases, however, as a general rule, no presumption would be made; the broader principle being that there is no agency in crime.

But there are exceptions even to this in the class of cases, in which, without having actually stood behind the scenes and pulled the strings, (when an original responsibility would be incurred) parties have been made liable for the acts of others; the Court affixing, if not an actual connivance, still an implied sanction to them.

Thus, on an indictment against a contract baker for selling unwholesome bread, where it appeared that the defendant allowed his foreman to use alum,† though he had not actively sanctioned its use in such quantities as to render the bread unwholesome;—yet it was held that the master might legally be convicted, on the mere proof that the servant had introduced alum into the bread to a deleterious extent.‡ And Bayley, J., observed:—"If a person employed a servant to use alum, or any other ingredient, the unrestrained use of which was noxious, and did not restrain him in the use of it, such person would be answerable if the servant used it to excess, because he did not apply the proper precaution against its misuse."

* He who does an act by another does it by himself.
† A deleterious ingredient.
‡ R. vs. Dixon, 3, Maule and Selwyn, 11, 4, Campbell, 12.
So, the Directors of a Gas Company have been held criminally answerable, on an indictment for nuisance, for an act done by their Superintendent and Engineer, under a general authority to manage the works; though they were personally ignorant of the particular plan adopted, and though such plan was a departure from the original and understood method, which the Directors had no reason to suppose was discontinued.*

In summing up in this case Lord Denman, C. J., is reported thus to have laid down the Law on the subject;—"It is said the Directors were ignorant of what had been done. In my judgment that makes no difference; provided that you think they gave authority to the Superintendent to conduct the works they will be answerable. It seems to me both common sense and law, that if persons, for their own advantage, employ servants to conduct works, they must be answerable for what is done by those servants."

This case indeed is suggested by Mr. Taylor as "carrying the doctrine to its furthest extent;"† and when it is taken into account that the act in question was a departure from the original plan which the Directors had prescribed for the management, one may be permitted to doubt even the soundness of the decision; and it will be observed that in the case of R. vs Dixon, previously noticed, Mr. Justice Bayley appears to rest the liability on the fact of the servant not having been restrained. If a master is to be liable for a departure from his own instructions by the servant, one hardly sees how, in an ordinary case, there can be an employment of a servant at all without involving exposure to a criminal liability. Lord Denman, it will be observed, does not advert to the departure from the plan prescribed; which may possibly accordingly have escaped its due consideration. Making allowance, however, for this, whatever may be the correctness of the decision, the Law as laid down in the summing up would appear generally correct.

Where a libel is sold in a book-seller's shop by his servant, in the ordinary course of his employment, the selling is evidence of a guilty

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* R. vs. Medley, 6, Carrington and Payne, 292.
publication by the master; though, in general, an authority to commit a breach of the law is not to be presumed. The exception in the case of the libel is founded upon public policy, lest irresponsible persons should be put forward, and the principal and real offender should escape. But such evidence is not conclusive against the master, who may still prove, under the plea of not guilty, that the publication was in fact made without his authority, consent, or knowledge, and that there was no want of care or caution on his part. The same law is applied to the publishers of newspapers.

Though the Presumption in discussion, however, assigns prima facie to every one cognizance of the consequences of his acts, it is so far rebuttable as to leave the acts themselves open to explanation, and the application of the Presumption would thus become a question of circumstances. For example, in the case of the use of the deadly weapon, were it shown that though the death of a human being followed the discharge of the gun, this was accidental, and the gun in fact aimed at a tiger and not a man, the intention to commit murder would cease to be presumed.—So, the leaving by the trader of his house might be explained by the special facts of the case.

In cases where the question was one of malicious intent, the presumption would always turn upon the original legality or illegality of the act. Thus, it was laid down by Lord Mansfield;—

"Where an act, in itself indifferent, if done with a particular intent, becomes criminal, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent."†

Where the acts of a party are susceptible of two interpretations, the one constituting the act lawful, and the other unlawful, the law presumes the former.

† R. vs. Woodfall, 5, Burrough's Reports, 2667.
As regards acts, too, working oppression or wrong to another, a wrongful intention is not to be presumed against any one;—as for example that a party intended, as the result of his acts, an ouster, disseisin, or any thing else tortious or injurious to another. The maxim of the law is;—"Injuria non presumitur;" "Nullum iniquum est in Jure presumendum;"—that is to say, the law never, as a matter of legal presumption, ascribes to any one an injurious or unlawful intention.

The next Presumption to which we address ourselves is that represented by the Latin maxim:—"Omnia presumuntur contra spoliatorem,"†—in other words, that everything is presumed against one who has placed himself in the position of what is termed a spoliator or destroyer; and the effect of this presumption is to redress the wrong by raising, as against the offender, every presumption of which, had the spoliation not taken place, the facts might have supplied the proof:—in the language of the Master of the Rolls; in a late case on this subject, Gray vs. Haig;‡—"Every thing most unfavourable to him [that is the spoliator] consistent with the rest of the facts which are either admitted or proved."

An early, and a governing case on this subject, is that of Armory vs. Delamirie,§ where a poor boy having found a jewel, took it to a goldsmith's shop to enquire its value, and the goldsmith having got the jewel into his possession under pretence of weighing it, took out the stone, and on the finder refusing to accept a small sum for it, returned to him the empty socket. An action having been brought to recover damages for the detention of the stone, Pratt, Chief Justice, directed the jury, that unless the defendant produced the jewel, and showed it not to be of the finest water, they should presume the strongest against him, and make the

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* An injury is not to be presumed,—nothing unjust is to be presumed in law.
† Every thing is presumed against the Spoliator.
‡ 20, Beavan, 219.
§ 1, Strange, 505.
value of the best jewels the measure of their damages. So, in the
more recent case of Mortimer vs. Craddock,* which was an action
of trover for a necklace, consisting of several diamonds, which had
been unlawfully taken out of the owner's possession; and some of the
diamonds were seen shortly afterwards in the possession of the defen-
dant, who could give no satisfactory account how he came by them,
it was held that the Jury might fairly be directed to presume that the
whole set of diamonds had come to the defendant's hands, and that the
full value of the whole was the proper measure of damages.

"What," said Lord Eldon, (in Lupton vs. White,† in which the law on
this subject was a good deal discussed)—"What are the cases in the old
law of a mixture of corn or flour? If one man mixes his corn or flour
with that of another, and they were of equal value, the latter must have
the given quantity: but, if articles of different value are mixed, producing
a third value, the aggregate of both, and through the fault of the person
mixing them, the other party cannot tell what was the original value
of his property, he must have the whole."

In a case of Panton vs. Panton, referred to in the same authority,
a clerk in a banking-house at Chester remitted his own money, with
that of his employer, to an agent in London, to be laid out upon secu-
ritv; and by management the securities were so changed, that the pro-
erty could not be distinguished. The Court of Exchequer held, that,
the confusion being occasioned by him, who so dealt with the property, the
distinction lay upon him; and, if he could not distinguish what was his
own, the whole must be considered as belonging to the other.

Lupton vs. White itself was a case in which, there being two mines,
one called The Prosperous mine, belonging to the defendants, and an ad-
joining one called The Little Ing, claimed by the plaintiff to belong to
him, but also claimed by the defendants as included in their mine,
the two had been worked together‡ by the latter, without distinction as one

* 12, Law Journal, N. S., 166.
† 15, Vesey, 432.
‡ That is, the ore had been extracted from each without distinction as to their
respective produce.
mine. A bill in Equity having been filed by the plaintiff to establish his title to *The Little Ing*, and an injunction obtained to prevent the working by the defendants of that portion of the mine, this was dissolved, upon the undertaking of the defendants to keep separate accounts of the ore produced by the Little Ing, *pending the trial* in an action at law of the plaintiff's title to it. The trial was afterwards had, and it established the right of the plaintiff, when he came back to the Court of Equity for an account of the defendant's working. It then transpired that no separate accounts had in fact been kept; but that the two mines had been worked together, and the accounts kept in such a manner as that the whole returns of the mine appeared as the produce not of the two, but of the one called *Prosperous*. A decree was thereupon pronounced on the principle of charging the defendants on a footing of liability to the plaintiff with the whole net produce of both mines, except what they should prove to have been taken from the Prosperous,—thus throwing the onus on the spoliators,—and this decree was given, notwithstanding the Little Ing formed in fact proportionately but an insignificant part of the whole. Lord Eldon remarked in giving his judgment:—"What then is the conclusion? If a man by his own tortious act makes it impossible for another to ascertain the value of his property, and that in a transaction, in which the former was, not merely under an implied moral obligation, but pledged by a solemn undertaking in a Court of Justice, that such should not be the state of things between them,* by those means preventing the guard, which the Court would have effectually interposed, is the argument to be endured, that, as the party, so injured, cannot distinguish his property, therefore he shall have nothing? That is not the law of this country; as administered in Courts either of Law or Equity." And he goes on to refer to the case of the diamond ring found by the poor boy, and the other cases of the like description cited above. The judgment of Lord Eldon, it may be noticed, adverted to the pledge given by the parties, referring to the undertaking to keep separate accounts on which the injunction originally

* Referring to the understanding to keep separate accounts, on which the injunction originally obtained in the Equity suit had been dissolved.
obtained had been dissolved. This, however, was put as an aggravation only of the offence, and not as of its essence. The result would have been exactly the same had that feature of the case been wanting. Indeed, this is obvious from the authorities cited by Lord Eldon himself, as affording the principle for his own decision.

**Spoliation,** however, is the basis of this presumption. Accordingly, if in the absence of all proof of fraud or other improper conduct, goods of an unknown quality were shown to have been delivered to a party, the only presumption would be that of the delivery of goods of the class, not of the highest, but of the cheapest quality.

The presumption against the spoliator is not confined to things having a material substance or existence; it applies alike to what partakes only of the nature of destruction or suppression of evidence.

A familiar illustration often cited of this is that of a Ship affecting to be neutral, but those in command of her destroying her papers, which would in itself raise the presumption against her neutrality. Another would be that of a Trustee, Agent, or other party liable to account, destroying the books of account or failing to keep proper accounts of his transactions. In either case the strongest presumption would be made against him which the nature of the case admitted. So again, in the case of a party obtaining papers from a witness subpoenaed to produce them, and afterwards at the trial withholding them, the broadest presumption the case admitted of would be raised as to their contents, and adversely, of course, to the party suppressing them.

The more ordinary application of the principle is that of redress to the party injured, of the mischief done by the spoliator. But in Gray v. Haig, referred to above, where books had been destroyed by an accounting party, it was, in the result, by the application of the principle, that the spoliator was the sufferer by the spoliation. His destruction of the books had seriously interfered with the proof of even claims.
of his own; and the Court had been pressed to put the case on a train of further enquiry by the trial of an issue at law; but said the Master of the Rolls, Sir John Romilly:—

"The Master heard *vivd voce* evidence before him on this subject, he entertained no doubt on the question, and I entertain none; and if I did, I should consider that the doubt had been occasioned by the loss of that very evidence that would have cleared up the whole matter, and which loss had been *intentionally occasioned by the party who now asks for the issue.* And after a reiteration of the same doctrine in addressing himself to the different varieties of the case, he concludes his judgment: "I cannot conclude this case without expressing my regret, that I have felt it my duty to make a decision on these points which will lead to so stringent a decree against Mr. Gray. It cannot, however, be too generally known or understood, amongst all persons dealing with each other, in the character of principal and agent, how severely this Court deals with any irregularities on the part of the agent; how strictly it requires that he who is the person trusted shall act, in all matters relating to such agency, for the benefit of his principal, and how imperative it is upon him to *preserve correct accounts* of all his dealings and transactions in that respect, and that the loss, and still more the destruction of such evidence, by the agent, falls most heavily on himself."

But though such is the penalty of an act of spoliation, *spoliation* must not be confounded with *fabrication*; and the *mere fabrication* of documents raises *no legal presumption* against the fabricator, however strong on the matter of conduct the observation to go to the jury upon it.

Somewhat analogous to the presumption which fixes a man with the consequences of his acts, is the one glanced at in our Introductory Chapter,† which ascribes to every one a knowledge of the whole legal institutions of the Country,

* Page 239.
† P. 57.
and of which the result is to constitute ignorance of a law no excuse for breaking it.

This Presumption is expressed by the Latin maxim, "Ignorantia Juris, quod quique teneretur scire, neminem excusat;"* and it assumes that every sane person above the age of fourteen, and whether a resident in the Country or a temporary sojourner there, is acquainted with the whole body of the law, written or unwritten, civil or criminal.

On a superficial view it might seem somewhat harsh to visit a party with the penalties of a law of the existence of which he was ignorant; and certainly there is no legal fiction greater than that which, as a matter of fact, ascribes this general and universal knowledge to the individual members of the community. It has been pronounced indeed the labour of a life to attain. A little further reflection, however, will show, that were such a plea as that of ignorance once allowed, there would rarely be a case in which knowledge could be proved; and rarely, consequently, any in which crime could be punished, or wrong redressed; and the law is, in the main, so constructed on the foundation of principles of morality and sound policy, that, with the exception of laws involving some peculiarity of custom, or addressed to some specific emergencies, it seldom happens that, although there may be an ignorance of the exact letter of the law which is broken, its spirit did not already exist in the conscience of the party breaking it. It does not require a legislative enactment to proclaim murder, theft, or forgery, a crime; or to subject one who inflicts a wrong on another to a liability to compensate him in damages. From the very nature of the case, presumptions of this class are conclusive.

As a branch of, or in connection with, this presumption, it may be noticed that Courts would naturally be presumed to know the law which they administer. Hence, as a general rule, in all the pleadings which take place in the progress of a cause, (subject to exception as to pleading particular statutes or other

* Ignorance of the Law, which every one is held to know, excuses no one.
VIOLATION OF THE LAW, &C. 619

matters specially) it is sufficient to state matters of fact, and not go on to aver those of law.

At the same time that the law admits no excuse in ignorance, in the absence of criminative proof, it presumes that neither will one be guilty of any act in violation of its provisions, nor commit any involving a civil penalty.—Nor is this presumption confined to the case in which the innocence of a party is sought to be displaced on a criminal proceeding, by proof of his guilt. It applies alike to civil proceedings, and where their issue is the consequence of some act in question.

Thus, to take an illustration in an established case on the subject, that of Williams vs. the East India Company,† which was an action brought against the defendants for having put on board the plaintiff's ship (which the defendants had hired to convey merchandize) a quantity of combustible matter, without giving him notice of its dangerous nature, in consequence of which negligence his ship was burnt, and the question was on whom the onus of proving want of notice lie, Lord Ellenborough, in delivering judgment, said:—

"There is a rule of law, that where any act is required to be done on the one part, so that the parties neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, * and throws the burden of proving the contrary on the other side. If the defendants, being conusant of the dangerous nature of the article put on board, gave no notice of it, considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency, for which they are criminally liable, and punishable as for a misdemeanor at least." It was accordingly held, that the onus lay on the plaintiff to prove that no notice had been given of the dangerous nature of the article put on board.

† S. East, 192.

* That is presumes that the act was done; and in negation of the neglect of the act.
Nor would the presumption against unlawful acts be confined to the actual litigants in the cause. It would extend to third parties, and so far to a collateral issue. Thus, in an action against underwriters, on a policy of insurance on goods shipped on board a ship, for a loss occasioned by an alleged act of barratry of the master—(that is, a fraudulent deviation for purposes of his own from the course prescribed to him by the owners)—it was insisted that the deviation of the master, the subject of complaint, might have been under the direction of the owners, in which case the act would not have been barratrous; and that it should be presumed to have been so: but this the Court overruled.—"It is asked," said Mr. Justice Buller, 'why it should not be presumed that the Captain went out of his course by the direction of his owner if he had any. The reason is plain because the Court cannot presume fraud in another person."*

The presumption against a violation of law would embrace any act of fraud or covin;—a rule expressed by the Latin maxim—"Odiosa et inhonesta non sunt in lege presumenda."†

Indeed, this presumption has been applied to breaches even of public decency or morality.

For instance, prima facie, co-habitation under the reputation of marriage, would be in itself a presumption of marriage; since not to ascribe to the co-habitation this presumption would be to attribute to the parties a breach of public decency or morality. Indeed, the reputation of marriage would be in itself evidence of the fact of marriage, which the presumption would both suggest, and help to sustain.

An exception, however, against the adoption of the presumption exists in the instances of indictments for bigamy, and proceedings founded on adultery; where, from the gravity of the consequences, strict

* Ross vs. Hunter, 4, Term Reports, p. 33.
† Things odious or dishonest are not to be presumed in law.
BREACH OF MORALS, &C. DISCHARGE OF DUTY.

proof is always required; and the Court would not act on presumptive evidence only.

Co-habitation might even assume a different basis from that of marriage, and not even purport to have this as its foundation, under which state of circumstances no presumption could arise. For example, it might be even of a known adulterous character.

It is upon the latter principle that Mahomedan Law, recognizing intercourse with a female slave as lawful, it is stated by Mr. Bailie, speaking of the Presumption arising out of such relationships:—"There is nothing in the fact of co-habitation from which it can be inferred that a contract of marriage has been entered into."*

The Presumption against breach either of law or morals applies only in the instance of the former to that of some positive law; in that of the latter to some article of public morality as distinguished from a mere private or personal vice.

Thus, in an action on a life policy founded on an antecedent declaration that the assured led a temperate life, and it was contended that temperance would be presum ed, so as to throw on the opposite side the proof of intemperance, the Court, treating intemperance as a mere private vice, refused to entertain the contention, and put the party to proof of the plea.†

But not only will the law raise a presumption against a violation of itself; it creates a presumption in favor of the discharge of the duties it itself imposes.

Thus, the Records of Courts are presumed to be correctly made;—Judges and Jurors are presumed in their conduct to act honestly and not maliciously;—and Public Officers to do their duty.

* Bailie's Mahomedan Law of Inheritance, p. 49.
† Hickman vs. Fernie, 3, Meeson and Welaby, 505.
Allied to this Presumption (indeed the two are perhaps much the same),—is a very leading Presumption in favor of the regularity of proceedings generally; embodied in the maxim "Omnia praesumuntur rite esse acta"—to which, however, has for the most part to be added the qualification "dona probetur in contrarium."* In other words, until the contrary is proved, every thing is presumed to have been rightly done.

This is a presumption of somewhat extreme application; and it has been applied to acts both of a Judicial and Official character. Thus, as an example of the former, where successive decisions have been found inconsistent with some general Order of the Court, the reversal of that Order has been presumed, though the reversing Order itself could not be traced.† As an example of the latter,—on an indictment for perjury in answer to a bill in chancery, the act of swearing has been presumed, on proof of the signature of the party and that of the master before whom the answer purported to have been sworn; though the master's clerk, who proved the signature, had no recollection of administering the oath, and the jurat was not written by himself.‡ So, a return to a mandamus would be presumed to be regular;§ and where a Parish certificate had been signed by one only of the two ordinary officers whose duty it was to sign such matters, the Court has even presumed a custom in that particular Parish to have one officer only.¶

Still, where the question is one of the Jurisdiction of a Court itself, as for instance that of an inferior Court or functionary, the jurisdiction will not be presumed from its exercise. It must appear on the proceeding itself, or by reasonable intendment from it.

* All things are to be presumed to be rightly done until the contrary is shown.
† Bohun vs. Delessert, C. P. Cooper's Reports, 21.
‡ R. vs. Benson, 2, Campbell's Reports, 508.
§ Per Buller Justice in R. vs Lyster Regis 1 Douglas, 159.
¶ R. vs. Catesby, 2, Barnwell and Crosswell, 814.
Under this presumption, deeds or other documents of adequate antiquity, that is to say of thirty years of age, coming out of the proper custody, and in a condition to raise no suspicion of having been tampered with, have been admitted as valid without proof of their execution.

So, though sealing and delivery are of the essence of the particular instrument, in English law technically termed a deed, did a deed on production appear to have been regularly executed, these would be presumed, though the attesting witnesses could only speak to the fact of signing.

Ditto of collateral facts required to give validity to instruments.

So, collateral facts requisite to give validity to instruments, will be presumed.

Thus, partly from the deliberative nature of the instrument, and partly to secure their better negotiability, in the case of notes or bills of exchange which require consideration to give them validity, the Court assumes them to have been founded on consideration. So, a lost instrument, or one after notice, refused to be produced by an opponent, will be taken to have been duly stamped, until the contrary appears by proof or adequate circumstances of suspicion;—interlineations in a deed will be assumed to have been made previous to its execution;—documents will be taken to have been executed on the day of their date;—in the case of deeds of even date, the prior execution of any to the others will be presumed according as it may be necessary to give effect to the general intention;—and particular statutes requiring, in testamentary disposition, that the witnesses should attest the will in the presence of a testator, their signature in such a position as that they might have seen them has been held sufficient, as for instance signing in an adjoining room.

Contrasted presumption of interlineations in case of Wills and Deeds.

In the case of a will, however, the presumption as to interlineation is the reverse of that which takes place in the case of deeds, interlineations in the case of a will being, primum facie, taken to have been made after the execution, except in the case of the filling up of blanks, and
these are presumed to have been left previously, otherwise the execution of the will itself would, as respects them, have been an idle ceremony.

Pencil alterations are, according to the circumstances, presumed to be deliberative only, and not testamentary, from the character of the material resorted to.

To revert to the illustration of the presumption of stamping. In a modern case of Closmâleuc vs. Carrel,* a charter party (which like other documents required a stamp,) was admitted to have been executed without being stamped at the time of its execution, and there was no sufficient proof of the subsequent stamping; though there was evidence which left it uncertain, whether it had in fact been stamped or not. It was held that, in this uncertainty, the stamping might be presumed. It had been contended that, not having been stamped at the time of execution, to raise the presumption it would have to be assumed affirmatively that something more had been done after the execution; and why should this be presumed? and it was said it could not be presumed on the ground “that omnia rite acta esse præsumuntur,” for it was not the plaintiff’s duty to do it or have it done. The matter was indifferent; he might do it or leave it undone with equal propriety. There was, therefore, no ground for presuming that the charter party was stamped in the absence of evidence on the subject.” But on this it was observed by Mr. Justice Cresswell in delivering the judgment of the Court;—“But, did the defendant prove that it was unstamped? for the onus probandi lay on him. He showed that at one time it was unstamped; and, in the absence of any evidence to displace the presumption arising from that circumstance, it might have been presumed that it remained in the same state. But the evidence of the payment of stamp duty, and the sending of the instrument to London, and so forth, made it altogether uncertain whether it was afterwards stamped or not, and sufficed to get rid of the presumption, and to cast again upon the objector the burthen of proving the want of a stamp.”

* 10, Common Bench, 36.
To the presumption, in favor of regularity, it has been sometimes referred that the acting of parties in public or official employments is sufficient proof of their original appointment to the office, as it is admitted to be. Indeed, this presumption has been carried so far, that in the case of an indictment for the murder of a constable in the execution of his office, evidence of his having acted, and been known as the constable, was held sufficient presumption of the fact of his being constable, to sustain the conviction; and execution followed upon it. *

The presumption has been extended to offices even though not of a strictly public nature; as, for instance, constables, and watchmen appointed by commissioners under a local Act of Parliament, or trustees empowered to raise money to build a Church. It would not, however, apply to the case of private individuals; for instance, agents, assignees under a bankruptcy, or executors.

* R. vs. Winifred and Gordon, Leach's Crown Cases, 412.
postmarks being *prima facie* evidence of posting at the time and place there specified;—that a party dealing in a particular market, or entering into a contract at a particular place, was dealing or contracting in conformity with the local usage.

If not precisely that which ascribes regularity to transactions, at all events to a principle somewhat analogous to it, may be ascribed a *presumption which, prima facie, assigns ownership to possession*;—a presumption applicable alike to both real and personal property; and which, in the instance of the former, extends to the presumption of a title in fee simple.

To this head it may be referred that in the instance of a letter produced with the direction torn off, it would be presumed to be addressed to the party by whom it was produced.

The presumption arising out of possession is conclusive or otherwise, according to the circumstances.—But in such cases as those of *trespass on real property*, the mere possession as against the wrong-doer would constitute an *absolute* presumption; as in a case of *injury to personal chattels* would the presumption, coupled with proof of some special property in the chattel, constitute a *complete title* for the purpose of the action.

Of course were the *rightfulness of the possession* itself the subject of the litigation, as in the case of an action of ejectment brought for recovery of land, the mere *fact* of possession could not defeat the action.

Where the question is one, not of the mere *existence* of a presumption, but of the *strength* attachable to it, this of course would be very much increased by the *length of the possession*; since, if things are ordinarily presumed to have been rightly transacted, à *fortiori* would they be so after a lapse of time; and which is expressed by the maxim;—"*Ex diuturnitate omnia praesumuntur rite et solemniter esse acta.*"* The greater the lapse

* From *lapse of time*, all things are presumed to have been rightly and solemnly transacted.
of time, the greater the probability of regularity the law assumes; and the absence of disturbance of the possession would obviously add strength to the presumption.

But not only is possession a presumption in favor of a rightful ownership, but we have seen that in all cases of a sustained possession under a beneficial ownership, wanting only some collateral matter to make it legal in point of form, all sorts of presumption will be made to supply the formal defect and complete the title; and particularly in the instance of matters constituting an original creation of title, whether public or private. Thus, in the absence of their production, there have been presumed Acts of Parliament,—Grants or Letters Patent from the Crown,—Endowments,—Conveyances of legal estates,—Inquisitions,—Fines,—Recoveries,—Bye Laws of Corporations;—and, in fact, almost every foundation of title.

Possession thus carrying with it its inferences on the one hand, on the other the absence of possession, has its own inferences too.—Thus in the case of a will traced to the possession of a testator, but not forthcoming at his death, the law would presume its destruction by himself, "animo revocandi," that is, with the intention to revoke.

Nature has its law which assigns to every thing a state of rest until its condition is changed by some disturbing cause.—Upon a principle not very dissimilar, and on an experience of the continuance for some longer or shorter period of any existing condition of human affairs, the Court ascribes to a state of things, duration in that condition, until the presumption is displaced by proof, or met by some counter-presumption.

"It is a very general presumption," says Mr. Best, "that things once proved to have existed in a particular state are to be understood as continuing in that state, until the contrary is established by evidence, either direct or presumptive."†

* See on this subject Chapter I., p. 61.
† Best on 'Presumption, 186
So, as put by Mr. Taylor:—"When, therefore, the existence of a person, or personal relation, or a state of things, is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, till the contrary is shown, or till a different presumption is raised, from the nature of the subject in question."

Presumptions of this class are referred to as existing in favor of Stability or Immutability.

Upon this principle a person once shown to be alive is, in the absence of proof to the contrary, presumed living, or at all events for a period corresponding with the duration of human life, or until shown not to have been heard of for seven years; while, at the expiration of that period, the presumption would be reversed; and death would be presumed.

What is the period which the law would recognize as that of the duration of life has never been arbitrarily fixed; and the application of the presumption might be affected by the particular circumstances in the individual case, such as state of health, and so forth.

Three score years and ten have certainly been prescribed by high authority, as an average limit to human life. Still even the attainment of a hundred is of occasional, and not over-rare occurrence, while instances have been stated extending life to almost half a century further. All ordinary experience, however, certainly pointing to a period so rarely exceeding an age of a hundred, it would seem that this might be fairly taken as a basis, for what after all would be only a presumption; though it has not been ever so fixed by judicial decision. Indeed, the period appears never to have been actually fixed at all. A presumption of death at the expiration of a hundred years is recognized, however, in both the Civil and Scotch Law; and in a case so long ago as the time of Lord Hale, there is a dictum of his, that if feoffment be made to the use of one for ninety-nine years if he shall so long live, and after his death to the use of another, this shall not be contingent, for it would be presumed that his life would not exceed ninety-nine years.† Lord Coke had

† Weall v. Lower, Pollux fen, 67.
got no further than laying it down that "it was a common intention that a man should die within five thousand years!"*

According to Mahomedan Law the absence of a missing person for a given period renders his property divisible among his heirs; and it has been said that death was to be presumed at the end of ninety years from the time of birth; and that, although the party may have been seen within five or ten years previous.† In the edition of the Serajeeva;‡ however, a Treatise on the Mahomedan Law of Inheritance, originally translated by Sir William Jones, and again lately edited by Samachurn Sirca, one of the Interpreters of the Supreme Court of Calcutta, there is a note of the learned Editor, in which it is said—(speaking of the Mahomedan Law on the question);—"The time at which an absent person is presumed in Law to be dead has varied, we see, in different ages; but the modern practice I understand to be this.—If Zaed has been so long absent, that no man can tell whether he be dead or alive, and if seventy years have elapsed from the day of his birth, he is presumed to be dead as to his own property, from the end of that term; but as to his hereditary claims on the property of another, from the day of his absence; so that in the first case, no person dying within the seventy years could have inherited any part of his estate; nor, in the second, would he have inherited from any one, who died after the day when he was first missed."‡

In English law the period of seven years has, in the case of absence without tidings, been taken as creating the presumption of death, and this period was adopted partly from the analogy of the Statute of Bigamy, which relieves from its penalties either husband or wife who might, in the absence of tidings of each other, contract, at the expiration of that period, a second marriage; and partly from that of the Statute relating to Leases held on Lives, and which, in the absence of the like tidings, takes the life to have dropped.

* 10 Report, 50.
‡ Al Sirajeeya, p. 57.
This presumption too is also one of circumstances; and may be rebutted by others sufficiently accounting for the silence. Thus, in Bowden vs. Henderson, where there existed the circumstances stated in the judgment, the Vice-Chancellor Stuart thus stated the law on the subject;—

"The principle on which the Court presumes the death of a person of whom no tidings have been received for a long period of time, is this:—that, if he were living, he would probably have communicated with some of his friends and relatives. It is a conclusion which the Court draws from the probabilities of the case. It is quite clear, therefore, that, when no such probability exists, the presumption cannot arise.

"In this case, all the circumstances tend to show, that, after what had taken place between Letitia Langton and her friends, it was extremely improbable she would have entered into further communication with them. She had abandoned her religion, and her friends wrote to her a letter of remonstrance and reproach for so doing. These reproaches were not calculated to encourage further communications. I think this circumstance, taken in connection with the rather eccentric course of life, which, it appears from her letters, she pursued, render it improbable that she would have further communicated with her friends. If I am right in this view, it follows that the presumption of her death does not arise from the absence of information or of communication, when that absence is natural, even if the lady were still alive. There must, therefore, be further inquiry."

Absence means absence from some particular place; as for instance, the residence or place of resort of the party when last at home, in short, the place at which he would be likely to be known. Tidings must be with reference to some person or persons, members, for instance, of the family, or friends, with whom communication might be expected to have taken place had the party been in fact living.†

* 2, Smale and Giffard, 366.
† See Hubback on Succession, p. 172.
The legal presumption arises only at the expiration of the seven years; but the fixing this as the period to which the presumption attaches, would in no way preclude the application in any individual case, of such a presumption of fact as the circumstances might furnish, at any period even short of the seven years.

"It appears to me," says Lord Denman,* 'that nothing could be more absurd than that there should be a presumption of life or death without reference to the age, circumstances, situation of life, and common habits of the party. Can there be the same presumption as to a party who is one hundred, and one who is thirty-five? as to a party who was in good health when last heard of, and one who was proved to have then had a disorder upon him, which was likely speedily to terminate in his death?' To which Mr. Habback, in commenting on the subject, adds;—"And the circumstances of the country whither the party had gone, having been visited with a fatal disease, war, or other similar calamity; or again, the sudden unexplained cessation of his habitual correspondence with several persons, would materially assist the presumption of his death. On the other hand, the cause of the absentee's departure, the terms of intercourse on which he had lived with his relatives, or the state of the communication between this and the country where he resided, may be such as to make the want of intelligence concerning him, easily consist with the supposition of his continuing existence."†

The presumption, however, in question—that is, the legal one merely,—fixes no specific time as the period of death, beyond the assertion generally, that at the expiration of the seven years the party shall be presumed dead.

Thus, in a governing case on this subject of Doe d. Knight vs. Nepean,‡ where a party who had gone abroad had not been heard of

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* Neville vs. Manning, 344.
† Page 174.
‡ 5, Barnewall and Adolphus, p. 86; afterwards affirmed, 2, Meeson and Welsby, p. 894.
for above seven years, it was contended that, as the presumption of death did not arise until the seven years had elapsed, the party must be presumed living throughout the whole of that period, otherwise, it was urged, that he ought to have been presumed dead from the moment the seven years commenced. But the contention was overruled, and Lord Denman, Chief Justice, in delivering the judgment of the Court, thus stated:—

"The absence of Mathew Knight abroad for seven years, without having been heard of, is evidence from which a Jury might reasonably presume, and in this case have properly presumed, his death. This period has been adopted as the ground for such presumption in analogy, to the statutes of 1 Jac. I. c 11., relating to bigamy, and 19 Car. 2 c. 6, as to the continuance of lives on which leases were held; and the lesser of the plaintiff clearly proved the first of the points necessary to maintain his case.

But such absence abroad for seven years, though it naturally leads the mind to believe that the party is dead, and therefore is sufficient evidence to warrant a presumption of fact that the party was dead at the end of seven years, certainly raises no inference as to the exact time of the death; and still less that such death took place at the end of seven years. Absence for that period has no tendency to induce the belief that life has ceased at that precise time; and no case has been cited, nor do we know of any, in which it has been laid down as a rule of law, that such a presumption ought to be made, or in which, in point of fact, any such effect has been given to evidence of absence abroad; and, on the other hand, one case was referred to, in which Lord Ellenborough held, that though the loss of a vessel in which a person sailed might be presumed, after having sailed on a foreign voyage for two or three years without having been heard of, and so it might be taken that the person who sailed on board was then dead, the time of death was to be decided upon by the Jury according to the special circumstances."* And, again, in the same case on appeal in the

* 5, Barnewall and Adolphus, 94.
Exchequer Chamber:—"Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time, the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of; because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day: and the previous extraordinary lapse of time, during which he was not heard of, has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time before the expiration of the seven years."

According to Hindu Law the presumption of death, arising from absence, would appear to take place after an absence of tidings for twelve years. At least it is laid down in a case cited in Colebrooke’s Digest that;—"If no intelligence be received during twelve years concerning a man who has travelled to a foreign country, the law requires his son to perform obsequies for him, presuming his death."

When the life of a plurality of individuals, relatives for example, has been terminated by the same common cause,—loss at sea, conflagration, battle, earthquake, or the like,—with no actual proof of individual Survivorship, it has become a question, according to the laws of different countries, by what principle that survivorship was to be decided.†

* 2, Meeson and Welsby, p. 913.
† Digest, Vol. I., p. 188; and see Strange’s Hindu Law, p. 188.
‡ See an Examination of the writings of the Civilians and old French Lawyers on the subject.—Burge’s Colonial Law, Vol. IV., p. 11.
By Mahomedan Law the presumption was, that in such an emergency all died at the same moment; and the property of each passed accordingly to his living heirs, without any portion of it vesting in his companions in misfortune.*

In a curious metrical exposition of the Mahomedan Law of Descent, translated from the original Arabic, by Sir William Jones,† occurs the following recognition of the doctrine,—

"And if many kinsmen die by ruin or drowning,
Or a calamity overtakes all, as fire,
And the case of the survivor be not known,
And one deceased cannot be heir to another deceased
Reckon them all, as if they were strangers;
And this is the sound and true determination."

In the Roman Law the question was determined by probabilities depending on the age, sex, or strength of the parties; so that in a case of the joint shipwreck of father and son, the law presumed that the son died first, if he was under the age of puberty; but if he was above that age, that he was the survivor; upon the principle that in the former case the elder is generally the more robust, and in the latter, the younger.‡

The Code Napoleon, which prescribes the law for France and is adopted by other Continental nations, takes the ages of fifteen and sixty, as the two extreme terms with reference to which it provides. It presumes that of those under the former age, the eldest survived, while of those above the latter age, that the youngest survived. If some of the parties were under fifteen, and others above sixty, the former are presumed to have survived. If all were between those ages, but of different sexes, the males are presumed to have survived, unless they were more than a year younger than the female; but if they were of the same sex, the

† Bigyalo 'l babith, Section 11.
‡ Dig. Lib. 34, Tit. 5.
presumption is in favor of the survivorship of the younger, as opening the succession in the order of nature. These presumptions, however, only hold good until disproved.*

The same rules were in force in the territory of Orleans, at the time of its cession to the United States, and have since been incorporated into the Code of Louisiana. They have also, with some modifications, been adopted in the State of New York.†

The law of England, however, raises no legal presumption either way, save that in the absence of proof adequate to determine the fact, it assumes all parties to have died at the same instant of time, and so as to preclude the transmission of rights by the one to the other. This seems nearest to conform with the Mahomedan Law cited above.

In a great case on the subject, known as that of General Stanwix,‡ which occurred in the year 1766, the General, his wife, and daughter were all supposed to have perished in a shipwreck at sea. The ship set sail from Dublin for England with them on board, and was never afterwards heard of; and the succession to the property of the General involved the question of the survivorship of the three several parties, which, after a good deal of litigation, was ultimately compromised on the recommendation of Lord Mansfield, Chief Justice, who stated,—“that he knew no legal presumption on which to decide it.”

The case itself thus resulting in compromise, was no actual decision on the question; but in later cases, Lord Mansfield’s proposition has been generally considered as affording the correct rule on the subject, and we apprehend the law to be rightly stated by Mr. Best, when he says;—

“The true conclusion seems to be, that the law of England recognizes no artificial presumption in cases of this nature, but leaves the real or supposed superior strength of one of the parties perishing by a common calamity to its natural weight, as a circumstance proper

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* Code, Civil, Lib. 3, Tit. 1 Chap. 1, des Successions.
‡ 1, William Blackstone, 640.
to be taken into consideration by a Jury or Ecclesiastical Judge, called on to determine the question of survivorship, but which circumstance, standing alone, is insufficient to shift the burden of proof."

There is an old case of Broughton vs. Randall, one which occurred in the time of Queen Elizabeth, where a father and son being seized of land as joint tenants, with remainder to the heirs of the son, they had the misfortune to be hanged; and both were hung at the same time in one cart. The son’s wife could only have claimed her dower on the supposition that her husband had survived his father; since, had the father survived, there would not have been that legal seisin in possession in the son, upon which alone the dower would have attached. The Court awarded her dower to the wife, and it would seem that the survivorship was inferred mainly from proof given in the cause of the shaking of the son’s legs.†

The presumption which, in the case of human life, assumes its determination from absence of tidings, has also, in cases of maritime assurance, been applied to ships; and it is a presumption that a vessel not heard of within a reasonable time, shall be presumed to have foundered at sea. So, in the case of a ship proving unseaworthy shortly after the commencement of the voyage, the ship is presumed to have been so from the first.

A general consistency with the Ordinary Course of Nature would naturally give rise to legal inference, and whatever accordingly this consistency dictates, whether in the physical or the moral world, affords ground of presumption in itself.

Thus, the Court recognizes the course of the seasons, with all such inferences as would be naturally deducible from them. To quote the ancient authority of Littleton:—

"If a tenant holds of his lord by a rose, or by a bushel of roses, to pay at the feast of St. John the Baptist, [Midsummer day] if such

* Best on Presumption, p. 201.
† Coke's Reports, time of Elizabeth, 508.
tenant died in winter, then the lord cannot distress for his relief until the time that roses by the course of the year may have their growth."†

So the law ascribes \textit{prima facie} to all human beings the usual faculties of the race; as for instance, understanding, perception, appetite, procreative power, and so forth; while it would alike assign to the brute creation what would appertain to them. It is on this principle that \textit{none are taken to be lunatic or idiot until proved so}. In treating on the respective subjects of marriage and infancy, we shall presently also see other presumptions, which, perhaps, might, with equal propriety, be referred to this head.

Hitherto we have been addressing ourselves to presumptions of a general character, and their application to particular instances. But there is a class remaining to be pointed out where, some particular relationship, status, or position being established, the law derives certain presumptions from them, as mathematicians deduce corollaries from a foregone proposition.

A prominent one among these is the presumption which assigns legitimacy of offspring to the fact of marriage; and the opportunity on the part of the husband of access to the wife; and that notwithstanding cotemporaneous probabilities to the contrary; as for example that the husband and wife were living separate, or the wife in the habit of committing adultery at the time.

A marriage once shown, the presumption of legitimacy—(that is as the issue of the husband and wife)—extends to every child born of the wife, either during its continuance, or, regard being had to the law of nature, in due time after its termination; as for instance by death; a presumption, on the natural probability of the paternity, extended by English law, even to a child who might be born only on the day after, or the very day of the marriage. In the case of a child born in due course from

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* S. 129.

† In England, Midsummer is the season at which roses flourish most.
the date of the marriage, the foundation of the Presumption is sufficiently obvious. In that of a child born before the natural date had been arrived at, the probability of the legitimacy might be somewhat less conclusive in point of degree; yet it is still sufficient to have acquired the legal sanction.

Of course, in the instance of a widow contracting a second marriage, and being at the time in a state of pregnancy capable of being referred to the former husband, it would be by the previous marriage, and the circumstances attending it, that the legitimacy would be tried.

It has been said, indeed, that when a widow having married again so shortly after the death of her husband, and had a child within a period in which, according to the laws of nature, it might have been that of either husband, the child might choose its father. But this somewhat whimsical mode of cutting the knot has not in modern times been considered a very sound solution of the difficulty; and in one case in which a widow married immediately after the death of her former husband, and forty weeks and eleven days after such death had a child, it was held to be that of the second husband. "The better opinion," says Mr. Hubback, "seems to be, that the presumption of paternity must be guided by the circumstances of the case; but it is conceived that evidence would be admissible, as in other cases of disputed legitimacy."*

In the earlier history of the Law of England, unless in the instance of an established impotency, marriage was a conclusive and irrebuttable presumption, provided only there was that possibility of access represented by both parties being within what may be termed the Kingdom, conveyed by the expression "inter quatuor maria," that is within the four seas which girded it; and that there was no separation under the decree of the Ecclesiastical Court. In the language, however, of Lord Eldon;—"The law was scrupulous about legitimacy to the extent of disturbing the rules of reason;"—and the doctrine has given way in modern times to the more sensible rule which restricts the inference of legitimacy arising from the fact of marriage to

* Hubback on Succession, 414.
a mere presumption of the rebuttable class; and, though always a presumption of great gravity, and, where means of access exist, to be displaced only on the most cogent and unequivocal proof, still open to be displaced on proof sufficiently manifest.

In the Banbury Peerage case, the governing authority on the subject, in which the opinion of the Judges was taken by the House of Lords, the law was thus laid down by the Lord Chief Justice in delivering the Judges' opinion:

"That in every case where a child is born in lawful wedlock, (the husband not being separated from his wife by a sentence of divorce) sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time when, by such intercourse, the husband could, according to the laws of nature, be the father of such child. That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife, at any time, when, by such intercourse, the husband could, by the laws of nature, be the father of such child."

The proposition of the Judges, however, though affording a general principle of decision, stopped short of any attempt at definition of the proportionate inflexibility of the presumption on the one hand, and that of the amount of evidence in contradiction to be adduced on the other; and this has been supplied by the later authorities.

In the case of Head vs. Head, the result of the decision in the Banbury Peerage case was thus expounded by Sir John Leach, Vice-Chancellor:

* Nicolas' Adulterine Bastardy, 291.
† I, Simons and Stuart, 151.
"The ancient policy of the Law of England remains unaltered. A child born of a married woman, is to be presumed to be the child of the husband, unless there is evidence, which excludes all doubt, that the husband could not be the father. But, in modern times, the rule of evidence has varied. Formerly, it was considered, that all doubt could not be excluded, unless the husband were *extra quattuor maria.* But, as it is obvious that all doubt may be excluded from other circumstances, although the husband be within the four seas, the modern practice permits the introduction of every species of legal evidence tending to the same conclusion. But still the evidence must be of a character to exclude all doubt, and when the Judges, in the Banbury case, spoke of 'satisfactory' evidence upon this subject, they must be understood to have meant such evidence as would be satisfactory, having regard to the special nature of the subject."

So, in the still later case of Morris vs. Davies,† which ran the gauntlet of all the Courts, and finally arrived at the House of Lords; on the hearing there Lord Lyndhurst stated:—

"My Lords, this then is the view I have always taken of the law connected with this subject; at the same time, as I before expressed, and I now feel, that presumption of law is not lightly to be repelled. It is not to be broken in upon, or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive."‡

Of course adequate proof of impotency would always be conclusive; but apart from this, the weight of evidence necessary to counteract the presumption would vary much according to the question whether the fact of personal access to the wife on the part of the husband, (we mean personal as contradistinguished from sexual) or only opportunity of access were shown. The requisite amount of counteracting evidence would naturally be less strong in the latter case, than in the former.

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* Beyond the Four Seas.
† 5, Clark and Finnely, 163.
‡ P. 265.
Sir John Leach, in addressing himself in Head vs. Head, to the former, thus adds in continuation of the passage cited above:—

"It is to be deduced as a corollary from the opinions of the learned Judges in that case, that, whenever a husband and wife are proved to have been together, at a time when, in the order of nature, the husband might have been the father of an after-born child, if sexual intercourse did then take place between them, such sexual intercourse was, prima facie, to be presumed; and that it was incumbent upon those who disputed the legitimacy of the after-born child, to disprove the fact of sexual intercourse having taken place, by evidence of circumstances which afford irresistible presumption that it could not have taken place; and not, by mere evidence of circumstances which might afford a balance of probabilities against the fact that sexual intercourse did take place:”—a view adopted by Lord Eldon, Lord Chancellor, when the case was on appeal before him,† when he says:—

"Upon my recollection of the Banbury Peerage case, it was the opinion of the Judges, that where personal access is established, sexual intercourse is to be presumed, and that that presumption must stand till done away with by clear and satisfactory evidence, whether that evidence apply directly to the period at which personal access was proved, or whether it may be called satisfactory, if it apply not to that period, but to antecedent and subsequent periods; in one way or other the rule must be established."

Opportunity of intercourse would be in itself presumptive of the fact of sexual intercourse; and said Lord Cottenham, Lord Chancellor, in Morris vs. Davies;—

"Proof that the husband and wife were living in the same town, and so had opportunities of meeting, and therefore of sexual intercourse, would, in the absence of any proof raising a presumption to the contrary, be sufficient to establish the legitimacy of a child born of the wife. Proof that they had been in the same room or in the same house together, would be much stronger evidence of the fact; the strength of

* The Banbury Peerage Case.
† 1, Turner and Russell, 189.
which, however, would vary with the circumstances; and as neither would be direct proof of sexual intercourse, but of facts from which, taken by themselves, sexual intercourse would be inferred, such inference must, as in all other cases, be capable of being repelled by the proof of facts tending to raise a contrary inference.*

The presumption of sexual intercourse being otherwise uncontradicted, even the proved Adultery of the wife would not misplace it; and still less could the Court enter upon the question of actual paternity at all. It was laid down by Mr. Baron Vaughan, in charging the Jury in one of the stages of Morris vs. Davies;†

"If there was any sexual intercourse between the husband and the wife, at a time when, by the course of nature, the husband might be the father of the child, any infidelity that she might be guilty of would not vary the case; and it matters not that—the general camp, Pioneers and all, had tasted her sweet body,‡ (if I may be allowed that expression); because the law fixes the child to be the child of the husband."

It was said by the Vice-Chancellor Wood, in a later case of Legge vs. Edmonds:—

"Adultery was allowed to be immaterial if impotency was not proved, and there was no satisfactory evidence to repel the irresistible presumption arising from the parties cohabiting. ⋅ ⋅ ⋅ ⋅ ⋅ "The law having clearly established that minute speculations as to paternity were not to be admitted when the fact of no physical incapacity was once made out."§

General summary by Lord Langdale.

The general law on the subject is well summed up by Lord Langdale, Master of the Rolls, in a case of Hargrave vs. Hargrave,¶ when he says,—

* 5, Clark and Finnelly, 243.
† 3, Carrington and Payne, 217.
‡ Othello, Act III., Scene 3.
§ Weekly Reporter, 1855-56, page 75.
¶ 9, Bevan, 555.
"A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by proper and sufficient evidence, showing that the husband was, 1, Incompetent; 2, Entirely absent, so as to have no intercourse or communication of any kind with the mother; 3, Entirely absent, at the period during which the child must, in the course of nature, have been begotten; or, 4, Only present, under such circumstances, as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question, and establishes the illegitimacy of the child of a married woman.

It is, however, very difficult to conclude against the legitimacy, in cases where there is no disability, and where some society or communication is continued between husband and wife during the time in question, so as to have afforded opportunities of sexual intercourse; and in cases where such opportunities have occurred, and in which any one of two or more men may have been the father, whatever probabilities may exist, no evidence can be admitted to show, that any man other than the husband may have been, or probably was, the father of the wife's child. Throughout the investigation the presumption in favor of the legitimacy is to have its weight and influence, and the evidence against, it ought, as it has been justly said, to be strong, distinct, satisfactory, and conclusive."

Though the fact of adultery, however, would not in an ordinary case preclude the presumption of legitimacy arising from the assumed existence of sexual intercourse on the part of the husband, when the question was one of impotency, it would have an important bearing on that issue; as would, on the other hand, that of the irreproachability of the wife's character on the score of chastity. It was said by the Vice-Chancellor Wood, in Legge vs. Edmonds;—

"Adultery was an important ingredient in the case; for, if the wife were found irreproachable in character, and a child had been
born, there would be considerable hesitation in coming to the conclusion that the husband was impotent."

On the other hand, were there a possibility of other paternity, the necessity of referring it to the husband of course ceases.

It has been long established in these cases that the evidence of the wife, whether direct or indirect, would be inadmissible to prove the fact of non-access; and in Legge vs. Edmonds, letters affecting to have been written by the wife to her assumed paramour, and ascribing to him the paternity of the child, were on the general principle rejected.

In the reclusiveness of the habits of their females, the question of legitimacy in the form we have been discussing, could hardly arise among, what is termed, the Natives of India.

A case, however, believed to be the first of its class, recently came into the Supreme Court of Calcutta, arising out of a marriage between Armenians; and this would have opened up the whole law on the subject, but it was compromised in its progress.

As a branch of the presumption connected with marriage and the question of legitimacy, it will be proper here to refer to two subjects which have given rise to a good deal of discussion;—1st,—the age at which the power of child-bearing in the woman is to be taken to have ceased;—and, 2ndly,—the length of the period of gestation; and on neither of which, at all events within a given range, does the law appear to have fixed any definite period of Presumption.

The comparative variety of the occurrence of either phenomenon, relieves us from any minute pursuit of enquiry; and in the case of the Native females of India, from the impossibility of arriving at other reliable data, the presumption would probably be regulated by the experience derived from the ordinary course in which nature exhibits itself with them, or at all

* Supra, p. 642.
events with but little allowance for excess; though we are aware of no actual legal authority on the question.

So far, however, the laws of England would afford a criterion, or would be applicable to Europeans in India, it may be stated in relation to both questions, that the known existence of various cases in which the limit of more ordinary experience has been exceeded, would prevent that precise limit from being taken as fixing a legal presumption. Thus, females having been known to bear children above the ages of fifty and even sixty years, or at all events as to sixty about that age, no legal presumption would arise against the capacity; and the ordinary period of gestation being fixed by some eminent authorities at nine calendar months, and by others with an addition of about a week over; and it being admitted by all that a delay of some days or even weeks beyond this is capable of taking place, it is obvious that no presumption could be properly adopted which did not fall within the extreme point of that range; nor has any in fact been so.*

Certainly, the period of nine months would appear with the nations of the East as well as those of the West to be about the average period of gestation, and that from the ages of antiquity. The Book of Esdras may be apochryphal in itself, but when Esdras puts into the mouth of the Angel, as the answer to the enquiry of the former, the reply;—“Go thy way to a woman with child, and ask of her when she hath fulfilled her nine months, if her womb may keep the birth any longer within her;” and he rejoined: “Then said I, no Lord, that can she not”†;—there was but recorded a physical fact of universal admission; to which, Esdras was aware, he might well appeal.

If Mahomedan Law, and the Treatises of learned Mahomedans upon it, are, however, to be taken as illustrative of the period of Mahomedan gestation, there must be something very peculiar on this

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* See Best on Presumption, p. 171.
† II. Esdras, c. IV. V., 40, 41. Noticed, Best on Presumption, p. 172.
point in the constitution of Mussulman women. In the Edition by
Samachurn Sircar of the Al Sirajiyyah, referred to above, the Edi-
tor tells us, speaking of Mahomedan Law, that the longest possible
time of gestation is now limited, on the authority of Adisha, one
of Mohammed's wives, to two years. "But even this falls far short
of the period assigned by the Text of the Treatise on which it is a
Commentary; for under the head 'Pregnancy,' the text declares:—

"The longest time of pregnancy is two years, according to Aba
Hanifah (may God be merciful to him!) and his companions; and
according to Laith, the son of Sad Alshahma (may God be merciful
to him!) three years; and according to Alshafti (may God be merciful
to him!) four years; but according to Alzuhri (may God be merciful
to him!) seven years; and the shortest time for it is six months."*

Some might think that the mercy asked for the Sage might be
solicited for the Woman.

As to the minimum time within which a child can be born after its
procreation, there exists no legal presumption, short, perhaps, of the one which, from the known
consistence of the fact with the possibilities of
nature, would recognize the legitimacy of a seven months' child. It has
been stated, however, as a matter of fact, by medical authority, that a
child what is termed "viable," that is, capable of living, might be born
even five months after conception.†

In the case of a male the law affixes no presumptive limit to the
power of generative capacity; and in the Banbury
Peerage case several instances were cited of men
above eighty being known to have had children.

Out of the status of marriage springs the presumption that, in cases
of crime committed in the presence of the hus-
band, the wife acts under his coercion, so as to
relieve her from its penalties. Such at least is

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* The Serajiyyah, p. 52 to 55.
† Becke's Medical Jurisprudence, 210, 7th Ed.
HUSBAND AND WIFE.

the admitted law in the graver class of offences coming under the general head of felony; and it has been treated as applying even to misdemeanors, especially if of the more serious character; as for instance, uttering base coin. Practically at all events, and certainly in the heavier charges, the presumption is treated as conclusive; but the more prevailing opinion is that it may be rebutted by proof that the wife was not in fact under coercion, though the proof must be positive.*

This presumption appears to have been as old as the Laws of the Saxons. Speaking in his History of the English Law of this earlier period, Mr. Reeves informs us;—"Such regard was paid to the character of a wife, and the subjection she was supposed to be under to her husband, that when any thing stolen was found in their house, the law considered her as no party in the stealing, unless it were manifestly in her separate custody."†

The exception will be noticed when the property was in the separate custody of the wife; and on a like principle it is that when the offence is more particularly that which would be personally attributable to the wife, the presumption which would relieve her from liability would not apply; as in the instance of the keeping a brothel, or the personal assault or battery of another by the wife.

In civil cases, the Husband and Wife living together, goods ordered by the wife are presumed to be ordered by the authority of the husband, and the wife to act as his agent; though the presumption would not arise were the articles, regard being had to the station of life of the parties, excessive in quantity, improvident in quality, or extravagant in price.

Even were the wife living separate from the husband, the presumption would still arise to the extent of supplies necessary to the wife's subsistence, unless an adequate allowance were shown to have been made for

* And see Taylor on Evidence, Vol. I., p. 163.
† Reeves's History of English Law, p. 18.
her maintenance, or the wife to have eloped from her husband's house, or been turned out of it for adultery. In the case of separation, however, the onus of showing the circumstances to be such as to raise the legal presumption, lies on the creditor.

In the case of an Infant, the Father is liable for necessaries supplied the infant, in accordance with his condition of life; but this is rather matter of legal obligation than of presumptive evidence; and we do not enlarge upon it.

In any instrument, deed, will, or otherwise, in which a Father and Son appear both bearing the same name, Christian as well as surname, and the name appears without designation by context or otherwise to indicate which of the two was meant, the law, out of deference to seniority, presumes the father, until the establishment of the contrary by proof.

Thus, an Infant is so far presumed incapable of managing his own affairs, that he can neither alienate his property by deed, dispose of it by will, or contract obligations other than for necessaries. Under the age of seven the law ascribes to him such an absence of discretion that he is absolutely presumed incapable of committing felony; while between that age, and under fourteen, he is presumed incapable, unless a malicious discretion be proved against him; when the maxim prevails "malitia supplet ætatem,"—that is to say, malice supplies age. So, under fourteen, a male infant is presumed incapable of sexual intercourse, and consequently of committing a rape, as a principal in the first degree, or an assault with attempt to perpetrate one. So, a female infant under ten is presumed incapable of consenting to sexual intercourse. Such at least are the presumptions of English Law.

A singular instance of the extent to which the legal presumption in reference to rape would prevail, even in the teeth of the most conclusive evidence of its being opposed to the fact, occurred in a case of
R. v. Groombridge,* tried in England in the year 1836. The prisoner, described in the calendar as of the age of sixteen, was indicted for the then capital offence of carnally knowing a female child under the age of ten years. Whatever doubt might have existed as to the commission of the capital crime, there could have been none of its having been attempted, and perhaps as little of the prisoner's capacity to commit it; for he had communicated to the child a venereal disease, under which he was himself laboring when placed in the dock. On the case being called on, it was unexpectedly discovered that the prisoner's age was mis-stated, and that he had not completed his fourteenth year; whereupon the counsel for the prosecution, after a conference with the Judge, consented to an acquittal, telling the Jury that it was useless to shock them with an indecent story, as, sooner or later, he must be met with the fatal objection, that the law conclusively presumed the prisoner to be incapable of sexual intercourse; and he was accordingly discharged with an admonition from the Judge.

Some presumptions are raised in respect of **Contiguous Ownership.**

Thus, in the case of **Lands lying on the Sea-shore,** though up to high water mark, that is, the medium high tide between the spring and the neap, the soil belongs to the Crown under the title of the monarch as lord paramount, any part of the shore overflown at spring tide would be presumed vested in the proprietor of the adjoining lands.

So, in the case of **Navigable Rivers** and **Arms of the Sea,** the legal presumption assigns the right of the soil to the Crown, and of fishery to the Public; while in un-navigable rivers, it awards the soil up to the middle of the stream, termed "usque ad medium filum aquae," to the owner of the adjacent land.

**Waste Lands** on the sides, and the soil to the middle of the highway, are presumed to belong to the proprietor of the adjoining enclosed land, on the theory of some

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* Best on Presumption, p. 22.
former assumed surrender of his; although the presumption may be rebutted or removed by proof that the slip of adjoining land originally communicated with an open common, or other large portion of lands.

In the instance of Fields belonging to different owners, separated by a hedge or ditch, but by either alone, the soil up to the middle of the hedge or ditch would be presumed \textit{prima facie} to belong in equal moieties to each owner.

In the case of a separation by hedge and ditch, the ownership in the hedge would be ascribed to the owner of the field in which the ditch was not, and \textit{vice versa}. But were there two ditches or two hedges, one on each side, there would be no legal presumption; but the proprietorship would be determined by the acts of ownership proved.

In the instance of Party Walls, where the precise ownership of the land constituting their site was otherwise incapable of being assigned to either party, proof of the \textit{common use} of the wall would raise the presumption that the wall and the land on which it was built were the undivided and equal property of both. In such a case, however, the user would be a matter rather passive than active.

Were it a case of a Bank of Earth, as distinguished from a Wall of brick, stone, or other materials brought from a distance, presumption would assign the ownership of the former to the proprietor of the adjacent lands, on the principle that it was from the soil of those lands the bank, or the materials for its construction, would have been taken; while in the instance of the Wall, which would be made from materials brought from a distance, the proprietorship would be assigned to him on whom lie the obligation of the repairs.

When a Tree grows on the boundary of two fields, so that the roots extend to the soil of each, the tree is presumed to belong to the owner of the land in which it was first planted.
Presumptive right of support.

Presumptions have been admitted in the class of cases in which property of given descriptions requires for its safe enjoyment, the support or prop of some other on which it may require to lean, or by which it may be upheld.

Thus, in the case of the ownership of the surface of lands in one, and that of the subjacent minerals in another, but with no documentary or other evidence to define the rights of the two parties, the law presumes a right in the surface owner to the requisite support of the minerals, and so as to preclude these from being removed or otherwise so dealt with as to endanger the falling in of the surface.—A provision for this would be assumed to have taken place on the original severance.

So, when the ownership of a house is divided into separate flats, the proprietor of the upper story has a presumptive legal right to the support of the lower; as has that of the lower to the covering and protection of the upper.

Lateral support.

The presumptive right of common support also extends laterally.

Thus the owner of one close has a right to the lateral support of the others, though with an exception of the case in which additional weight has been put on the land by the erection of new buildings. Yet even there a twenty years' enjoyment would sustain the presumption of a previous grant of the right to the support.

So, where two houses, originally constructed by the owner of the land on which they were built in such a manner as to require mutual support, ultimately became severed in their ownership, the law would presume the severance to have taken place under circumstances providing for this support, as either by grant or reservation;—and it would assign to each house accordingly the right to support from the other.

In the instance, however, of adjoining houses in which no particular specialty exists, and the ownership is different, the right to support of
one house by another is one of some question, and it formed the subject of a good deal of discussion in a case of Solomon v. Vintner's Company, which came before the Court of Exchequer so late as the year 1859.*

In the case of houses immediately adjoining, that is, abutting one upon the other, the right of support had in certain antecedent cases been stated to have been gained, had the houses stood for twenty years. In Solomon v. Vintner's Company there were four houses constituting one block, which had stood out of the perpendicular for a period even exceeding that time. Two of the four belonged to the plaintiff; there was an intermediate one belonging to a stranger, and the fourth, which was a corner house, belonged to the defendants. The defendants having pulled down their house, the two belonging to the plaintiff cracked and gave way from the want of the mutual support; and an action to recover damages was brought, founded on the theory of the plaintiff's right to the support. The action, however, failed; the Court holding that whatever might be the law with respect to houses actually adjoining, its application could not be extended beyond that point; and in the case before the Court, there had existed an intermediate house.

Some doubt, moreover, was thrown by the Judgment of the Court as to the existence of the right, even in the case of houses actually adjoining; and the soundness of the view taken in the prior cases in which a twenty years' lapse of time, at all events, had been treated as conferring it; though the Court intimated ultimately that they might possibly have acted on those cases had the circumstances been the same.

Encroachments by a tenant on adjoining waste land will, primâ facie, be presumed to be not for his own benefit, but that of his landlord.

There are presumptions arising out of certain Ordinary Relationships.

* IV., Exchequer Reports, 586.
Thus, from the employment of an Agent, the Court would assume
the delegation to him by the Principal of the power,
within the scope of his authority, to bind the prin-
cipal by his acts; and, the agency established, the Court would assume
authority for all which fell within the ordinary scope of his commission.

So, from the relationship of Partnership, in the absence of proof
derivable from the books, or other sources of
definition, the law would assume an equality of
interest among the partners; and both in the profits and the stock; as
it would attribute to each the delegated authority from all to bind the
partnership, whether by contract, pledge of its credit, or otherwise, in
the course of the whole current business of the partnership, though not
ultra this limit.

So in the case of a Hindu Family succeeding to ancestral property,
its members will be presumed to have remained
joint until a separation has been shown; and until
separate acquisition is shown, all the property will be presumed to be held
in coparcenary.

Presumptions from certain trades.

Thus, prima facie, goods entrusted for transmission to a Common
Carrier, and lost or damaged while under his
charge, are presumed to have been so through
negligence, and the carrier would be liable accordingly.

The term 'carrier' would embrace the calling of a carrier generally,
whether exercised by sea or land; and as to the latter, whether by stage
coach, dawk carriage, bullock train, railway, or otherwise.

The presumption is, however, liable to be rebutted by circumstances,
—as for example, could it be established that the loss was occasioned by
the act of God or the Queen's enemies; and questions often arise
as to the effect of personal interference on the part of the owner,
or notice limiting the liability, as relieving the carrier from his original
responsibility.
The liability is to some extent controlled by legislative provision; and particularly on the subject of notice; but when not thus governed,—(to take the law from Mr. Smith’s statement of it)—“these notices as generally worded and interpreted by Courts of law only exonerate the carrier from liability for loss or damage occurring to uninsured goods, without fault on his part; for if guilty of wilful misconduct or gross negligence, he is chargeable with the damage occasioned thereby, and his notice is not permitted to limit his responsibility, unless the employer had been guilty of a concealment of the nature and value of the property, for that would have discharged the carrier, even though he had given no notice.”*

In the case of goods intrusted by a guest to an Inn-keeper for safe custody, the like presumption prevails as in the case of carriers; that is loss or damage is *prima facie* attributed to the negligence of the Inn-keeper; though the presumption is liable also to be rebutted by circumstances, and among which may be particularly noticed the personal interference of the guest.

The above, if not exhausting the presumptions of Law, are, it is believed, among the more prominent which are likely to come into discussion in the field of Indian Jurisprudence, and in fact of Judicature generally. Many others no doubt might be added, and of each class the illustration might be a good deal extended. This work, however, professes to be a treatise only on Evidence, and not upon Law generally, and we must be content to restrict our limits accordingly.

One feature of Presumptions of the *legal* class remains to be noticed; and that is that they are occasionally found in an antagonistic position, counter to, and balancing, or rather controlling each other.

Thus in a case of Regina *v.s.* The Inhabitants of Twynning,† where a woman not having heard of her husband, a soldier on foreign service,

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* Smith’s Mercantile Law, 5th Ed., p. 286.
† 2, Barnewall and Alderson, 386.
for above a twelvemonth, married again, a question arose as to the legitimacy of the children by the second marriage. There was no evidence to decide it, and it turned accordingly on the presumption of continuing life of the first husband, on the one hand, and that of innocence on the part of the woman on the other—(a second marriage, the first husband being alive, would of course have been a criminal act)—and the presumption of innocence outweighed that of continuance of life, and prevailed against it.

In this class of cases the difficulty always is to decide to which of the two counter-presumptions to award the preponderance, and we know no general rule for determining this, other than that which would assign the palm to that one which, under the circumstances, would appear as most weighty.

Admitting the soundness of the decision in R. vs. Twynning (and the decision itself has not been questioned) the language of the Judges in that case is considered not only to have gone beyond the exigence of the decision, but to have assigned to the presumption of innocence a relative force greater than properly ascribable to it.

"This is a case," said Mr. Justice Bayley in R. vs. Twynning, "of conflicting Presumptions, and the question is, which is to prevail? The law presumes the continuation of life; but it also presumes against the commission of crime, and that even in civil cases, until the contrary be proved. Are we to presume that the first husband was alive? If the female had been indicted for bigamy, the evidence would clearly not be sufficient. In that case the first husband must have been proved to have been alive at the time of the second marriage. It is contended that his death ought to have been proved; but the answer is, that the presumption of law is, that he was not alive when the consequence of his being so is that another person has committed a criminal act. I think, therefore, that the Sessions decided right in holding the second marriage to have been valid, unless proof had been given that the first husband was alive at the time."

It will be observed that although all which in fact was sustained by the decision was, that proof of life down to above a twelvemonth only of
the marriage was not sufficient to counteract the legal presumption of innocence, the judgment of the Court rather assumes that nothing short of actual proof of the husband being living would have done for the purpose.

This view came before the Court in the subsequent case of R. vs. The Inhabitants of Harborne,* where a woman contracted a second marriage, having twenty-seven days only previously received from her first husband letters dated from abroad, and there was nothing to prove his subsequent death; and R. vs. Twynning being cited as an authority for the proposition that the presumption of innocence was ex proprio vigore,† to prevail, the Court refused to act upon it; and Lord Denman, Chief Justice, addressing himself to the doctrine propounded in R. vs. Twynning, thus observed;—

"The only circumstance raising any doubt in my mind, is the doctrine laid down by Bayley, J., in Rex vs. Twynning. But in that case, the Sessions found that the party was dead; and this Court merely decided that the case raised no presumption upon which the finding of the Sessions could be disturbed. The two learned Judges, Bayley, J., and Best, J., certainly appear to have decided the case upon more general grounds. The principle, however, upon which they seem to have proceeded, was not necessary to that decision: and I must take this opportunity of saying, that nothing can be more absurd than the notion, that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances; such, for instance, as the age or health of the party. There can be such strict presumption of law."

To this Mr. Justice Littledale adds;—

"The case put by my Lord, of a party being alive a few hours before the time, illustrates the question very well. Or suppose a letter were to announce that the party writing was seized with a disease

* 2, Adolphus and Ellis, 540.
† From its own vigour.
likely to prove fatal in a very short time. Could it be said that such a letter raised exactly the same presumption as a letter written under ordinary circumstances?"

As between two presumptions of fact it is obvious that the degree of relative weight must ever be one of circumstances, and a conflict might equally arise when one of the presumptions was one of Law, that is of the rebuttable class, and the other one of Fact. Still even in the latter instance there could be no practical difficulty in the determination, since though the legal presumption, even when of the rebuttable class, would, from its nature, always prevail until displaced by proof generally, an inference of fact would be as much a material of proof as any other evidentiary matter.

The great difficulty would be where the conflicting presumptions were both Legal;—for being both legal, what, it may be said, is to be the gauge of either? The practical solution, however, seems to be that given by Lord Denman in R. vs. Harborne, when he says;—"Nothing can be more absurd than the notion that there can be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances."

Mr. Best suggests, on the authority of the Civilians, four rules for determining the value of Counter-Presumptions.

"1st,—That special presumptions take precedence of general ones;—2ndly,—That presumptions derived from the ordinary course of nature are stronger than casual presumptions;—3rdly,—That the presumptions are favored which tend to give validity to acts;—and, 4th,—That the presumption of innocence is favored in law."

With all deference to such high authority, the value of the two last rules does not strike us as being particularly apparent.—As respects the two first, however, we agree with Mr. Best:—"they appear sound in principle and likely to be serviceable in practice."—Thus to take

* Best on Presumption, 54.
his illustration of the first.—“Although the owner in fee of land is presumed to be entitled to the minerals found under it, the presumption may be rebutted by that arising from non-enjoyment, and the use of those minerals by others.” And again.—“The flowing of the tide is presumptive evidence of a navigable river; but the presumption may be removed by proof of the narrowness of the stream, or shallowness of its channel, or of acts of ownership in private individuals inconsistent with a right of public navigation. The presumption of innocence is a very general, and rather a favored presumption, but guilt, as we see every day, may be proved by presumptive evidence.” And to take his illustration of the second.—“On an indictment for stealing a piece of timber, it would probably be considered a sufficient answer to the longest and strongest chain of presumptive evidence, or even to the positive testimony of an alleged eye-witness, to show that the log stolen was so large and heavy that twenty men could not move it. Charges of robbery brought by a strong person against a girl or child, or of rape by an athletic female against an old or sickly man, are reputed in this way.”*

In truth, however, when closely analysed, the presumptions cited appear not so much Counter-Preusumptions of Law, as either altogether Presumptions of Fact, or, when Legal presumptions, still of the rebuttable class only; and in that view of the case the whole matter would appear to stand very much on the footing of the law as propounded by Lord Denman in the passage pointed out above, namely, that which in any case of Counter-Presumption would leave the preponderance to the weight of the relative circumstances.

* Page 56. And see the judgment of Sancho Panza quoted ante, p. 55.
APPENDIX.

ACT NO. II. OF 1855.

AN ACT FOR THE FURTHER IMPROVEMENT OF THE LAW OF EVIDENCE.

Preamble.

WHEREAS it is expedient further to improve the Law of Evidence; It is enacted as follows:—

I. Act No. X of 1835 is hereby repealed.

II. Within the territories in the possession and under the Government of the East India Company, all Courts of Justice, and all persons having by law or consent of parties authority to take evidence, shall take judicial notice of all Regulations and Ordinances made before or on the 22nd day of April 1834 by the Governor General in Council of the Presidency of Fort William in Bengal, by the Governor in Council of the Presidency of Fort St. George, or by the Governor in Council of the Presidency of Bombay, and having the force of Law in any part of the said territories, and of all Laws and Regulations heretofore made by the Governor General of India in Council, and of this Act, and of all Acts and Regulations hereafter to be made by the Governor General of India in Council, constituted for the purpose of making Laws and Regulations, whether the same be of a public or of a private nature.

III. All Courts and persons aforesaid shall take judicial notice of all public Acts of Parliament and of all local and personal Acts declared by Parliament to be public and to be judicially noticed; and shall admit as prima facie evidence of any private Act of Parliament, any copy thereof purporting to be printed by the King's Printer.
IV. Every Court shall take judicial notice of its own Members and Officers respectively, and of their deputies and subordinate Officers or Assistants, and also of all Officers acting in execution of its process, and of all Advocates, Attornies, Proctors, Vakeels, Pleadars, and other persons authorized by Law to act before it.

V. All Courts and persons aforesaid shall take judicial notice of the names, titles, and authorities of the persons filling for the time being any one of the following offices in any part of the said territories:—Governor General, Governor, Lieutenant-Governor or Deputy Governor, Secretary or Under-Secretary to Government, Commander-in-Chief, Bishop, Member of Council, Legislative Councillor, Judge of any of Her Majesty’s Courts or of any Sudder Court, or of any Court of Judicature hereafter to be constituted in the said territories to or in which the powers of any of Her Majesty’s Supreme Courts may be transferred or vested.

VI. All such Courts and persons aforesaid shall take judicial notice of all divisions of time, of the geographical divisions of the world, of the territories under the dominion of the British Crown, of the commencement, continuation, and termination of hostilities between the British Crown and any other State, and also of the existence, title, and national flag of every Sovereign or State recognized by the British Crown. In all the above cases, such Court or person may resort for its aid to appropriate books or documents of reference.

VII. Any Government Gazette of any Country, Colony, or Dependency under the dominion of the British Crown, may be proved by the bare production thereof before any of the Courts or persons aforesaid.

VIII. All Proclamations, Acts of State, whether Legislative or Executive, nominations, appointments, and other official communications of the Government appearing in any such Gazette, may be proved by the production of such
Proclamations, &c., when to be *prima facie* proof of fact.

Gazette, and shall be *prima facie* proof of any fact of a public nature which they were intended to notify.

IX. Any recital contained in any Act of the Governor General of India in Council, constituted for the purpose of making Laws and Regulations, hereafter to be passed, of any fact of a public nature, shall be deemed, before all such Courts and persons, to be *prima facie* evidence of the truth of the fact recited.

X. The *Gazette* or Newspaper containing any advertisement purporting to be published by virtue of any public Statute, Act, Regulation, or Ordinance, or of any Rule or Order of a Court of Justice, or of any Board or Officer of Revenue, may be received by any such Courts or persons as aforesaid as *prima facie* evidence that such advertisement was published duly under the authority from which it purports to proceed.

XI. All Courts and persons aforesaid may, on matters of public History, Literature, Science, or Art, refer, for the purposes of evidence, to such published Books, Maps, or Charts, as such Courts or person shall consider to be of authority on the subject to which they relate.

XII. Books printed or published under the authority of the Government of a Foreign Country, and purporting to contain the Statutes, Code, or other written Law of such Country, and also printed and published Books of reports of decisions of the Courts of such Country, and Books proved to be commonly admitted in such Courts as evidence of the Law of such Country, shall be admissible before any such Courts or persons as aforesaid as evidence of the Law of such Foreign Country.

XIII. All Maps made under the authority of Government or of any public municipal body, and not made for the purpose of any litigated question, shall *prima facie* be deemed to be correct, and shall be admitted in evidence without further proof.
ACT No. II. of 1855.

XIV. The following persons only shall be incompetent to testify:—

1. Children under seven years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

2. Persons of unsound mind, who, at the time of their examination, appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; and no person who is known to be of unsound mind, shall be liable to be summoned as a witness, without the consent, previously obtained, of the Court or person before whom his attendance is required.

XV. Any person who, by reason of immature age or want of religious belief, or who by reason of defect of religious belief, ought not, in the opinion of such Court or person, to be admitted to give evidence on oath or solemn affirmation, shall be admitted to give evidence on a simple affirmation, declaring that he will speak the truth, the whole truth, and nothing but the truth.

XVI. The provisions in the last preceding Section as to witnesses shall apply to testimony given by affidavit or otherwise in writing, as well as to testimony orally delivered.

XVII. Any such witness wilfully giving false evidence shall be subject to be proceeded against in like manner, and to suffer, if convicted, the same punishment as if he had been sworn and had committed wilful and corrupt perjury. The indictment or charge shall be varied so as to meet the case.

XVIII. No person shall, by reason of any interest in the result of any suit or of any interest connected therewith, or by reason of relationship to any of the parties thereto, be incompetent to give evidence in such suit.
XIX. Any party to a civil suit or other proceeding of a civil nature shall be competent, and may be compelled, to give evidence as a witness therein, either on his own behalf or on behalf of any other party to the suit or proceeding, and also to produce any document in his possession or power, in the same manner as if he were not a party to the suit or proceeding. Provided that no Court or person as aforesaid, other than Her Majesty's Supreme Courts of Judicature, shall compel the attendance of any party to such suit or proceeding, for the purpose of giving evidence therein, except under and subject to the rules prescribed in that behalf in Act XIX of 1858.

XX. A husband or wife shall in every civil proceeding be competent to give evidence for or against each other. Provided that any communication made by husband or wife to the other during their marriage shall be deemed a privileged communication, and shall not be disclosed without the consent of the person making the same, unless such communication shall relate to a matter in dispute in a suit pending between such husband and wife.

XXI. A witness, whether a party or not, shall not be bound to produce any document relating to affairs of State, the production of which would be contrary to good policy, nor any document held by him for any other person who would not be bound to produce it if in his own possession.

XXII. A witness being a party to the suit shall not be bound to produce any document in his possession or power which is not relevant or material to the case of the party requiring its production, nor any confidential writing or correspondence which may have passed between him and any legal professional adviser. If any party, however, offer himself as a witness, he shall be bound to produce any such writing or correspondence in his custody, possession, or power, if relevant or material to the case of the party requiring its production.
XXIII. Every witness summoned to produce a document shall, if the same be in his custody, possession, or power, be bound to bring it, or cause it to be brought into Court, although there be a valid objection to the right of the party calling for it to compel its production, or to the reading or putting it in as evidence, or to the disclosure of the contents thereof. The validity of any such objection made by the person producing the document shall be determined by the Court; and for the better determination thereof, it shall be lawful for the Court to receive any admissible evidence which the person producing the document may give respecting it, and it shall also be lawful for the Court, except in the case of any document relating to affairs of State, to inspect the document, and, if necessary, to call to its assistance any person whom it may appoint to interpret the same. Such person, however, shall be previously sworn truly to interpret the same to the Court alone, and not to disclose the contents thereof except to the Court, unless the Court shall order the document to be given in evidence.

XXIV. A Barrister, Attorney, or Vakeel shall not, without the consent of his client, disclose any communication made by the client to him in the course of his professional employment, nor any advice given by him professionally to his client, nor the contents of any document of his client, the knowledge of which he shall have acquired in the course of his professional employment. The privilege, however, is that of the client, and if any party to a suit shall give evidence therein, at his own instance, he shall be deemed thereby to have waived his privilege, and to have consented to the disclosure by such Barrister, Attorney, or Vakeel, of any matter as aforesaid, which may be relevant, and which the Barrister, Attorney, or Vakeel would have been bound to disclose, but for the privilege of his client; and the Barrister, Attorney, or Vakeel shall be bound upon examination to disclose any such matter.

XXV. Any person present in Court, whether a party or not, may be called upon and compelled by the Court to give evidence, and produce any document then and there in his actual possession, or in his power,
in the same manner and subject to the same rules as if he had been summoned to attend and give evidence, or to produce such document, and may be punished in like manner for any refusal to obey the order of the Court.

XXVI. Any person, whether a party to the suit or not, may be summoned to produce a document without being summoned to give evidence, and any person summoned merely to produce a document, shall be deemed to have complied with the summons, if he cause such document to be produced instead of attending personally to produce the same.

XXVII. The Rules of the evidence in Her Majesty’s Supreme Courts, as to matters of Ecclesiastical or Admiralty Civil Jurisdiction, shall be the same as they are on the Plea side of the said Courts.

XXVIII. Except in cases of treason, the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact in any such Court or before any such person. But this provision shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury.

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

XXX. The party at whose instance a witness is examined may, with the permission of such Court or person, cross-examine such witness to test his veracity, in the same manner as if he had not been called at his instance, and may be allowed to show that the witness has varied from a previous statement made by him.
XXXI. In order to corroborate the testimony of a witness, any
former statement made by such witness, relating
to the same fact, at or about the time when the
fact took place, or before any authority legally
competent to investigate the fact, shall be admissible, and for that pur-
pose a copy of any deposition or statement taken before any Court,
Judge, Justice of the Peace, Magistrate, or person lawfully exercising
the powers of a Magistrate, or before a Commissioner or Superintend
for the suppression of Thuggee or Dacoity, in the discharge of his
duty, shall, if certified by such Court, Judge, or other Officer above-
mentioned, under his hand or the Official Seal of the Court, or under
the hand or Official Seal of such Judge, to be a true copy of such de-
position or statement, without further proof, be received as prim\facis
evidence that such deposition or statement was made, and that it was
made at the time and place, and under the circumstances, if any, which
shall be stated in the certificate or on the face of the deposition or
statement.

XXXII. A witness shall not be excused from answering any
question relevant to the matter at issue in any suit
or in any Civil or Criminal proceeding, upon the
ground that the answer to such question will cri-
minate, 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.

XXXIII. A witness in any cause may be questioned as to whether
he has been convicted of any felony or misde-
meanor, 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.
XXXIV. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him. Provided always, that it shall be competent for the Judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit.

Copy of a document made by a copying machine to be deemed correct.

Proviso.

XXXV. An impression of a document made by a copying machine shall be taken without further proof to be a correct copy.

XXXVI. When an original document is out of the reach of the process of the Court, it shall be lawful for the Court, on application to it, in any Civil suit or proceeding, and on notice to the opposite party at a reasonable time before the hearing, to make an order for the reception of secondary evidence of its execution and contents.

When attested document may be proved as if unattested.

XXXVII. An attested document may be proved as if unattested, unless it be a document to the validity of which attestation is requisite.

The admission of a party to an attested instrument of its execution by himself shall be as against him sufficient *prima facie* proof of such execution of it, though it be an instrument which is required by law to be attested.

XXXVIII. The admission *prima facie* proof of an attested document.

XXXIX. An entry or statement, which would be admissible in evidence after the death of the person who made it, on the ground of its having been made against the interest of the person making it, or on the ground of its having been made in the ordinary course of business, shall be admissible, though the person who made it be not dead, if he is incapable of giving evidence by reason of his
subsequent loss of understanding, or is at the time of the trial or hearing *bona fide* and permanently beyond the reach of the process of the Court, or cannot after diligent search be found.

**XL.** Any entry in any books proved to have been regularly kept in the course of business or in any public office, so far as such entry merely refers to and tends to identify by name, description, number, or otherwise, any Bank Notes or other Securities for the payment of money, or other property, and the payer-in or receiver of them, shall, in any case where such identification is necessary to be proved, be admissible in evidence for that limited purpose if it shall appear to have been made at or about the time of the transaction to which it relates, though the person who made it, or he on whose information it was made, is alive and capable of being produced as a witness.

**XLI.** Any receipt in writing, acknowledging the receipt of any money, valuable securities of goods, shall, on proof of the execution thereof, be admissible in evidence before such Court or person aforesaid, not only against the party giving it, but also against any person in whose favor such receipt would operate as a discharge, or to whom it would render the person giving it liable for the money, security, or goods acknowledged to have been received.

**XLII.** Whenever a receipt would be admissible under the preceding Section, if given by a principal, a receipt given by an agent or servant of such principal shall, in like manner, be evidence upon proof of the authority to give such receipt.

**XLIII.** Books proved to have been regularly kept in the course of business or in any public office, shall be admissible as corroborative, but not as independent proof of the facts stated therein.

**XLIV.** The following documents may be admitted as corroborative evidence:—Certificates of shares, and of registration thereof, bills of lading, invoices, account sales, receipts usually given on the payment, deposit or
delivery of money, goods, securities or other things, provided they be proved to have been given in the ordinary course of business.

XLV. A witness shall be allowed before any such Court or person aforesaid to refresh his memory by any writing made by himself or by any other person at the time when the fact occurred, or immediately afterwards, or at any time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. In such case the writing shall be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it.

XLVI. Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document, provided the Court or person, under the circumstances, be satisfied that there is sufficient reason for the non-production of the original.

XLVII. In cases of pedigree, the declarations of illegitimate members of the family, and also of persons who, though not related by blood or marriage to the family, where intimately acquainted with its members and state, shall be admissible in evidence after the death of the declarant, in the same manner and to the same extent as those of deceased members of the family.

XLVIII. On an enquiry whether a signature, writing, or seal is genuine, any undisputed signature, writing, or seal of the party, whose signature, writing, or seal is under dispute, may be compared with the disputed one, though such signature, writing, or seal be on an instrument which is not evidence in the cause.

XLIX. Any Power of Attorney, which has been executed at a place distant more than one hundred miles from the place wherein the action, suit, or proceeding is depending, may be proved by the production of it, without further proof, where it purports, on the face of it, to have been executed before
and authenticated by a Notary Public, or any Court, Judge, Consul or Magistrate.

L. Whenever it is proved that a Letter Book is kept, and that, according to the usual course of business, letters are copied into such book and despatched, and the Letter Book is produced, and it is proved that the letter was despatched according to the usual practice, to the best of the knowledge and belief of the witness, having reasonable ground for forming that belief, the Court may presume the despatch of that letter according to the usual course of business.

LI. Any book proved to have been kept for marking the despatch and receipt of letters, containing an entry of the despatch of a letter, and an acknowledgment of the receipt of such letter, shall, on proof that such entry was made in the usual course of business, be prima facie evidence of the receipt of such letter.

LII. So much of Section VI of Act XV of 1852 as provides that every such application as therein mentioned shall be made before issue joined in any such action, or twenty-one days before the trial or hearing of any other legal proceeding as therein mentioned, is hereby repealed.

LIII. The provision contained in the 16th Section of Act VI of 1854, that affidavits of particular witnesses, or affidavits as to particular facts or circumstances, may, by consent of the parties, or by leave of the Court obtained upon notice, be used in the hearing of any cause on the Equity side of the Supreme Courts, shall extend to all civil actions, suits, and proceedings on all sides of the Courts.

LIV. So much of the 17th Section of the same Act as provides that, upon the hearing of any motion, petition or other proceeding in any of the said Supreme Courts, the Court may, upon the application of any of the parties thereto, or of its own accord, require and enforce the attendance and oral examination before itself of any witness or of any party to the suit, and may also require and enforce the production of any document or
documents, and may direct the costs of the attendance and examination of such witness or party to be paid by such of the parties to the suit, or in such manner as it may think fit, shall extend to all civil actions, suits, and proceedings on all sides of the said Court.

LV. The 33rd Section of the Act No. VI of 1854, which applies only to proof of accounts on the Equity side of the said Supreme Courts, shall extend to and embrace all accounts directed to be taken on any side of the said Courts.

LVI. Whenever, by any Statute or Act, Regulation or Ordinance now in force, or any Statute or Act to be hereafter in force, any certificate, certified copy, or other document, shall be receivable in evidence of any particular in any Court of Justice, the same, if it is substantially in the form, and purports to be executed in the manner directed by the Statute, Act, Regulation, or Ordinance which makes it evidence, shall be *prima facie* evidence, where it is rendered admissible without proof of any seal, stamp, signature, character, or authority, which it is directed to have, or from which it is directed to proceed.

LVII. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

LVIII. Nothing in this Act contained shall be so construed as to render inadmissible in any Court any evidence which, but for the passing of this Act, would have been admissible in such Court.
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